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Court of Appeals
Division I
State of Washington

SUPREME COURT NO. _____
COA NO. 69968-7-I

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JASON MARKLEY,

Petitioner.

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

The Honorable Cheryl Carey, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Jason Markley asks this Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Markley requests review of the decision in State v. Jason Markley, Court of Appeals No. 69968-7-I (slip op. filed Nov. 3, 2014), attached as appendix A. The order denying reconsideration, entered Dec. 8, 2014, is attached as appendix B.

C. ISSUE PRESENTED FOR REVIEW

Whether insufficient evidence supports the conviction for first degree animal cruelty because the State failed to prove criminal negligence in starving an animal?

D. STATEMENT OF THE CASE

The State charged Jason Markley and his wife, Cherish Thomas, with first degree animal cruelty, alleging they were criminally negligent in starving a horse. CP 1; 3RP¹ 35-36. The following is a summary of the evidence produced at trial.

Markley lived with his wife and their four children on a five acre parcel of rural property in the Auburn area. 4RP 97; 5RP 135-36.

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.

Markley decided to get a horse for his kids. 5RP 136, 164. He noticed a horse listed on Craigslist that appeared suitable for children. 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 need to also take Alex (another horse). 4RP 24, 79; 5RP 138-39. Hebow was fat and healthy. 5RP 141. Alex was old and thin. 5RP 138-39, 155-56, 168. 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. 4RP 102; 5RP 139. They had no previous horse knowledge. 4RP 103.

On April 8, 2011, Animal Control officer Westberg went to Markley's property after receiving two calls about one of the horses. 4RP 95-97, 135. Westberg had been an animal control officer for 11 years and had owned horses all of her life. 4RP 96. She described the horse, Alex, as emaciated. 4RP 99-100, 120-23. The other horse, Hebow, was healthy. 4RP 109, 121. 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 to feed the horses. 4RP 106, 108, 140. Markley told Westberg he was feeding three bales per week between the two horses. 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, such as beet pulp. 4RP 108. Markley tried beet pulp as recommended by the farrier who shod Alex, but the beet pulp caused diarrhea so Markley 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. Stewart, the veterinarian, 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.

Dr. Stewart went to Markley's property on April 9. 4RP 19-20. She had both personal and professional experience working with horses. 4RP 17-18. Stewart saw Alex was emaciated. 4RP 20, 47, 67. She did a physical exam of Alex, but did not examine Hebow, the much younger

horse, because it did not look underweight. 4RP 20-21, 24-25, 78-79. Stewart estimated Alex to be in his late twenties judging from the condition of his teeth. 4RP 22. Alex was not examined by a vet before Stewart's arrival. 4RP 25-26.

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. 4RP 27-28. 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.

Alex had access to five acres of pasture. 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.

Markley had been told to feed local hay. 4RP 42. Stewart recommended that Markley feed Alex a better quality hay that had more calories per pound. 4RP 25. Markley told Stewart that he had tried alfalfa pellets and beet pulp supplements, which are often used to add calories to a horse's diet. 4RP 42-43, 72. Stewart did not recommend to Animal Control that Alex be seized, but rather that Alex receive a higher calorie food. 4RP 39-40, 52-53.

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. 4RP 117-18, 128.

Sergeant Eykel of the Animal Control Shelter took custody of Alex and created a specialized feeding plan based on her experience with older, emaciated horses. 5RP 22-24, 34, 40. She explained 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 was placed in the care of Dr. Mueller a few days later. 5RP 69. Mueller is a veterinarian that specializes in horses and horse rehabilitation in particular. 5RP 62-64. She has clients for whom she does regular horse checkups. 5RP 97. She advises first time horse owners about food and other medical needs. 5RP 97-98.

According to Dr. Mueller, 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 mash supplement as an additional fat source, such as beet pulp, grass hay or alfalfa pellet. 5RP 86. 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 Dr. Mueller's care for three months and started gaining weight during the first few weeks. 5RP 78, 83, 96. Alex was a 4 or 4.5 on the Henneke scale when he left Mueller's care after three months. 5RP 79,

96. Mueller opined Alex did not receive proper nutrition during the previous months. 5RP 86-88. Her opinion was that Alex was starved and experienced pain as a result of starvation for a long period of time. 5RP 99, 117.

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. The farrier who put shoes on Alex told them in January 2011 that Alex was emaciated. 5RP 157. Alex's condition remained "pretty much constant" during the three months they had him. 5RP 143. Hebow was fat and healthy when they acquired him and his condition remained unchanged. 5RP 141.

According to Thomas, Markley fed the horses every day. 5RP 141. Alex was given beet pulp, which caused diarrhea. 5RP 167. Thomas said "Everything that I saw was my husband was trying so hard to take care of Alex." 5RP 152.

The judge returned a verdict of guilty as charged.² CP 70, 72, 78-81. On appeal, Markley argued the evidence was insufficient to prove first degree animal cruelty. Brief of Appellant at 14-23; Reply Brief at 1-8. The Court of Appeals disagreed. Slip op. at 1. Markley seeks review.

² The jury was unable to reach a verdict on Thomas. CP 111-12.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THE QUESTION OF WHETHER THE EVIDENCE IS SUFFICIENT TO CONVICT FOR FIRST DEGREE ANIMAL CRUELTY UNDER THE CRIMINAL NEGLIGENCE STANDARD PRESENTS ISSUES OF SUBSTANTIAL PUBLIC IMPORTANCE.

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. Markley was convicted in violation of due process.

An ordinary reasonable person with no previous horse experience does not commit the crime of first degree animal cruelty in failing to rehabilitate an old horse that was already starved before it came into that person's care. Proper rehabilitation requires expert knowledge and is beyond the ken of the ordinary reasonable person. The criminal negligence standard does not presume omniscience. And there is no authority that lay persons like Markley are held to an expert standard of care in determining whether a reasonable person would have avoided the wrongful act.

There is no case where a person has been found guilty of animal cruelty for starving an animal where that person inherited an already-starved animal. The cases that do exist involve situations where a person

has a healthy animal in his or her control and then causes the animal to become starved or dehydrated. State v. Zawistowski, 119 Wn. App. 730, 732, 737, 82 P.3d 698 (2004) (starvation), review denied, 152 Wn.2d 1010, 99 P.3d 896 (2004); State v. Peterson, 174 Wn. App. 828, 853-55, 301 P.3d 1060 (dehydration), review denied, 178 Wn.2d 1021, 312 P.3d 650 (2013). In such cases, the animal's caretaker creates the wrongful act by causing the animal to deteriorate from a healthy condition to an unhealthy one. Markley's case, in contrast, involves a situation where a person acquires a malnourished animal and is unable to rehabilitate the animal from an unhealthy condition into a healthy one. The question of whether the legislature intended ordinary folks to be convicted for first degree animal cruelty under this circumstance is an issue of substantial public importance under RAP 13.4(b)(4) because of the sweeping expansion of criminal liability involved.

Review is further warranted under RAP 13.4(b)(4) to clarify what is taken into account under the criminal negligence standard. There is no Washington case law on whether that standard differentiates between an expert standard of care and a lay person standard of care in determining whether a reasonable person would have avoided the wrongful act in question. Nor is there case law that directly addresses whether the circumstances known to the defendant are relevant in assessing what an

objectively reasonable person would have done. Given the number of criminal offenses that incorporate a negligence standard, review is appropriate to provide guidance on these unresolved matters.

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 first degree animal cruelty statute requires proof that the defendant caused the pain and suffering resulting from the wrongful act, i.e., the starvation. RCW 16.52.205(2). The Supreme Court has held "[b]efore criminal liability is imposed, the conduct of the defendant must be both (1) the actual cause, and (2) the 'legal' or 'proximate' cause of the result." State v. Bauer, 180 Wn.2d 929, 935-36, 329 P.3d 67 (2014) (quoting State v. Rivas, 126 Wn.2d 443, 453, 896 P.2d 57 (1995) (quoting 1 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* §

3.12, at 392 (1986)). "Cause in fact refers to the "but for" consequences of an act-the physical connection between an act and an injury." State v. Dennison, 115 Wn.2d 609, 624, 801 P.2d 193 (1990) (quoting Hartley v. State, 103 Wn.2d 768, 778, 698 P.2d 77 (1985)).

The horse was starved before it entered into Markley's care. Markley's conduct was not the actual or legal cause of the horse's incipient starvation. If any criminal liability to attach, it can only attach to what happened while the horse was in Markley's care.

The trial prosecutor argued there was criminal negligence because a reasonable person would have gone to the vet to find out how to properly care for and feed a horse of Alex's age and condition. 6RP 34-35, 73-74. Along the same lines, the Court of Appeals held sufficient evidence supported the conviction because "[a] rational trier of fact could find that given Alex's extremely emaciated condition and the lack of improvement in his condition, *a reasonable person would have consulted someone with animal care expertise.*" Slip op. at 5-6 (emphasis added). In other words, Markley should have gone to a horse veterinarian to determine the cause of the starvation and how to safely rehabilitate the horse to a healthy condition.

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). The evidence, when viewed in the light most favorable to the State, shows Markley did not seek out medical advice from a veterinarian on how to properly rehabilitate Alex. But that is not first degree animal cruelty.

An owner's failure to consult a veterinarian on how to put weight on a malnourished animal only supports a second degree animal cruelty conviction for failure to seek necessary medical attention.³ State v. Smith, 154 Wn. App. 272, 274, 278, 223 P.3d 1262 (2009). It does not support a first degree animal cruelty conviction. The Court of Appeals dismissed Markley's reliance on Smith as "unpersuasive," stating "there is sufficient evidence to support a rational inference that Markley failed to obtain any advice while he starved Alex. Unlike Smith, the evidence that Alex was starved does not support only the lesser included offense of merely failing to provide medical attention." Slip op. at 7. That attempt to distinguish Smith is a failure because the defendant in Smith, like Markley, did not

³ 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."

obtain any advice from a vet on how to put weight back on an emaciated animal and that only supported a second degree animal cruelty conviction. Smith, 154 Wn. App. at 274, 278.

Further, the Court of Appeals misinterpreted what criminal negligence takes into account and improperly incorporated an expert standard of care in determining what constitutes a gross deviation from what a reasonable person would have done. The mental state of negligence is based on a reasonable person standard. State v. Coates, 107 Wn.2d 882, 892, 735 P.2d 64 (1987). Criminal negligence is an objective test described as a "catchall category for persons whose conduct constitutes a gross deviation from reasonable care, yet who cannot be said to be subjectively aware of the risks they create." Coates, 107 Wn.2d at 895 (Goodloe, J., concurring).

The Court of Appeals opined "[b]ecause criminal negligence involves an objective standard, Markley's argument that he lacked experience with and knowledge of an older, emaciated horse's dietary needs is not persuasive. Instead, we focus on what a reasonable person would do under similar circumstances." Slip op. at 5. But what "similar circumstances" are properly taken into account? The reasonable person standard is tied to the "same situation" that the defendant found himself in. RCW 9A.08.010(1)(d). Criminal culpability, or lack thereof, must be

measured by that yardstick. What a reasonable person would have done does not occur in a factual vacuum. There must be context for that decision. What an ordinarily reasonable person would do in the same situation depends on the facts and circumstances known to that person.

The criminal negligence standard does not take into account mental peculiarities. See State v. Warden, 80 Wn. App. 448, 456, 909 P.2d 941 (1996) (a person may be criminally negligent despite impairment in mental capacity), aff'd, 133 Wn.2d 559 (1997). But by necessity it takes into account the surrounding circumstances known to the actor because the standard of care, and whether a person is negligent in failing to be aware of the risk of harm, is judged with reference to those circumstances. To hold otherwise would allow the criminal negligence standard to become untethered from the factual context in which the defendant finds himself.

The Court of Appeals, in holding a reasonable person in Markley's situation would have consulted someone with animal care expertise, obliquely acknowledged that a reasonable person in that same situation lacks the expertise to properly rehabilitate an old, emaciated horse. Yet the Court of Appeals, in emphasizing the objective aspect of the reasonable person standard, failed to appreciate its ramifications for a case like this, where the question of whether a reasonable person grossly deviated from the standard

of care turns on whether the person giving the care is an expert or a lay person.

Would a lay jury know how to evaluate the evidence in determining whether Markley's conduct fell below a reasonable standard of care without the assistance of expert testimony? And if a lay jury would not be in a position to understand the significance of the facts before it without the aid of experts, how can an ordinary, reasonable person fairly be expected to do so?

The State presented no less than four experts in support of its argument that Markley was criminally negligent (Dr. Stewart, Dr. Mueller, Sgt. Eykel, Officer Westberg). The State's presentation of expert testimony is understandable: "a reasoned evaluation of the facts is often impossible without the proper application of scientific, technical, or specialized knowledge" provided by experts. Johnston-Forbes v. Matsunaga, 181 Wn.2d 346, 393, 333 P.3d 388 (2014).

Dr. Mueller cared for Alex for three months after Markley voluntarily surrendered the horse. 5RP 83, 96. But it took three months for Alex to reach a 4.5 on the Henneke scale. 5RP 79, 96. What is the difference between Markley and Dr. Mueller? Dr. Mueller, with her expert knowledge on how to rehabilitate an emaciated old horse, was able to formulate a specialized feeding plan to safely put weight back on the

horse. 5RP 62-64, 68, 82-84. Markley, not being an equine veterinarian and otherwise lacking such expert knowledge on how to properly rehabilitate an emaciated old horse, regularly fed hay to Alex but failed to achieve sustained weight gain.

Indeed, if Markley had attempted to feed nutrient rich Eastern Washington hay and supplements to Alex without following a specialized feeding plan, the result would likely have been a disaster because it would have been too much too soon. Sergeant Eykel, who initially created a specialized feeding plan for Alex based on her experience with older, emaciated horses, explained a malnourished horse can die if it is overloaded with nutrients too quickly. 5RP 22-28, 30, 34, 40. Dr. Mueller likewise knew such a horse can crash, get colic, and die if it is fed too much too quickly. 5RP 68. In this respect, Sergeant Eykel knew a horse could have an adverse reaction if suddenly given beet pulp. 5RP 29-30. And sure enough, Markley tried beet pulp but discontinued it because Alex suffered diarrhea as a result. 4RP 108, 110-11, 141-42.

Again, negligence requires "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). Markley's situation included a lack of expert knowledge on how to safely put weight on an old emaciated horse. He chose local hay not only because it was less expensive but because he

could get *more of it* to feed Alex. 4RP 106, 108, 140. From an ordinary lay person's perspective, feeding a horse *more* hay in an effort to help the animal gain weight would seem to make sense. Indeed, Reber Ranch and other feed stores carried local hay in addition to Eastern Washington hay, which would signal to a reasonable person in Markley's situation that local hay was an acceptable food item for horses. 4RP 73-74. This is not a case where a person simply fails to feed an animal. Markley regularly fed Alex. The situation, however, called for an expert on how to properly put weight on the malnourished horse.

A person may qualify as an expert with special knowledge based on practical experience. State v. Ortiz, 119 Wn.2d 294, 310, 831 P.2d 1060 (1992) (citing State v. Smith, 88 Wn.2d 639, 647, 564 P.2d 1154 (1977)). Markley was not an expert by practical experience. He had never owned a horse before, let alone an old, emaciated horse. 4RP 102-03; 5RP 139. A reasonable person with previous experience caring for horses in Western Washington would likely know hay from the west side of the state is insufficient nourishment for an old horse. But that is not Markley's situation.

A person may also qualify as an expert through training and experience. State v. Cheatam, 150 Wn.2d 626, 645, 81 P.3d 830 (2003). Veterinarians are an example. See Baechler v. Beaunaux, 167 Wn. App.

128, 134, 272 P.3d 277 (2012) ("veterinarians practice a profession that requires extensive scientific training, clinical experience, and a license from the state before they can practice" and their opinions on the diagnosis of disease and its proper management are expert opinions only subject to criticism by other veterinarians). But Markley is not an expert in horse care, nor could an ordinary, reasonable person in Markley's situation be deemed as such. A reasonable lay person does not grossly deviate from the standard of care in failing to rehabilitate an old, starved horse because the standard of care necessary to rehabilitate is an expert standard of care.

Under the criminal negligence standard, the defendant's conduct must grossly deviate "from that of the ordinary reasonably prudent person." State v. Reece, 110 Wn.2d 766, 783, 757 P.2d 947 (1988). The law does not treat an ordinary person as an expert with specialized knowledge. Markley's conduct did not fall below the standard of care expected of an ordinary reasonable person. At worst, he failed to seek necessary medical assistance, which is only second degree animal cruelty.⁴

⁴ Significantly, it is an affirmative defense to the crime of second degree animal cruelty "that the defendant's failure was due to economic distress beyond the defendant's control." RCW 16.52.207(4). Markley had financial difficulties, opting to purchase local hay because of the expense associated with purchasing Eastern Washington hay. 4RP 106, 108, 140.

The first degree animal cruelty conviction should be reversed and the charge dismissed with prejudice due to insufficient evidence.


F. CONCLUSION

For the reasons stated, Markley requests that this Court grant review.

DATED this 7th day of January 2015.

Respectfully submitted,

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APPENDIX A

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

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 JASON EDWARD MARKLEY,)
)
 Appellant.)
 _____)

No. 69968-7-1

UNPUBLISHED OPINION

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COURT OF APPEALS DIV. 1
STATE OF WASHINGTON

VERELLEN, J. — Jason Markley challenges the sufficiency of the evidence supporting his conviction for first degree animal cruelty. He focuses principally on his lack of knowledge of an old, emaciated horse's dietary needs and on his lack of experience with horses. But the reasonable person standard required for criminal negligence is an objective standard that does not vary from person to person based on their individual level of knowledge or experience. Instead, the objective standard asks what a reasonable person would do under similar circumstances. Viewing the evidence and all reasonable inferences in the light most favorable to the State, there is sufficient evidence for a rational trier of fact to conclude that a reasonable person would have realized that the horse was starving and suffering pain for several months. Markley's other arguments are unpersuasive. We affirm the conviction.

FACTS

Markley purchased two horses after Christmas in 2010. Markley had no experience with horses. When Markley paid a farrier to have Alex, the older horse, shod in January 2011, the farrier told Markley that Alex was emaciated.

Markley initially fed Alex high-quality hay from Eastern Washington. But he soon switched to low-quality local hay, which was less expensive. It is undisputed that older horses cannot survive on local hay alone because it does not contain adequate nutrients and calories. Dietary supplements, useful for increasing weight, are available for horses, such as beet pulp, alfalfa pellets, and timothy pellets. Markley gave Alex beet pulp one time in an attempt to increase his weight, but Alex suffered an adverse reaction.¹

On April 8, 2011, King County Animal Control Officer Jenee Westberg performed a welfare check after receiving two anonymous phone calls about an emaciated horse. Officer Westberg testified that Alex was "clearly emaciated"; his vertebrae were visible, his ribs looked concave, his hip bones protruded out, and his overall physical condition "was quite disturbing."² The Henneke scale measures a horse's body condition, ranging from 1 (severely emaciated) to 9 (obese). Officer Westberg scored Alex a 1.2. At Officer Westberg's request, veterinarian Dr. Heather Stewart examined Alex on April 9, 2011. She scored Alex a 1.5 on the Henneke scale. Dr. Stewart testified that Alex needed higher-quality food to supplement his diet. Dr. Stewart estimated Alex's weight at below 750 pounds, whereas similar horses normally weigh 900 to 1100 pounds.

¹ Markley had used another supplement to improve Alex's condition after using the beet pulp, but he could not remember the specific supplement that he used.

² Report of Proceedings (RP) (Dec. 11, 2012) at 100, 103.

Markley voluntarily surrendered Alex to animal control authorities on April 9, 2011, because he was “[u]nable to care for [Alex] properly.”³ Markley never called a veterinarian regarding Alex’s condition.

Veterinarian Dr. Hannah Mueller scored Alex a 1 on the Henneke scale in mid-April, indicating that Alex’s condition was at “the point before death.”⁴ In mid-April, Animal Control Sergeant Chelsea Eykel scored Alex a 1.5 on the Henneke scale. Sergeant Eykel testified that Alex was “one of the skinniest horses [she] had seen that was still standing,” and Alex was “a candidate to be considered for euthanasia.”⁵ Dr. Mueller cared for Alex for approximately three months. Alex gained weight immediately and made a full recovery. When Alex left Dr. Mueller’s care, she scored him a 4 or 4.5 on the Henneke scale.

Following a bench trial, the trial court found Markley guilty of first degree animal cruelty.

Markley appeals.

ANALYSIS

Markley contends that insufficient evidence supports his conviction for first degree animal cruelty. We disagree.

We must determine whether substantial evidence supports the trial court’s findings of fact and whether those findings support the conclusions of law.⁶ Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it

³ Id. at 119.

⁴ RP (Dec. 12, 2012) at 70.

⁵ Id. at 31, 39.

⁶ State v. Stevenson, 128 Wn. App. 179, 193, 114 P.3d 699 (2005).

allows any rational trier of fact to find all of the crime's elements beyond a reasonable doubt.⁷ Unchallenged findings of fact are verities on appeal.⁸

To prove first degree animal cruelty, the State had the burden of proving beyond a reasonable doubt that (1) with criminal negligence, (2) Markley starved a horse, (3) causing "[s]ubstantial and unjustifiable physical pain that extend[ed] for a period sufficient to cause considerable suffering."⁹

Markley primarily contends that his conduct did not constitute criminal negligence because he had neither previous horse experience nor knowledge of an old, emaciated horse's dietary needs. "Criminal negligence" is defined as a person's "fail[ure] 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."¹⁰ Criminal negligence is based on an objective "reasonable person" standard.¹¹ The crime of first degree

⁷ State v. Townsend, 147 Wn.2d 666, 679, 57 P.3d 255 (2002).

⁸ Stevenson, 128 Wn. App. at 193. Here, the only challenged finding of fact is that "[n]o information was provided indicating where or from who[m] Alex was purchased." Clerk's Papers at 79. There was no evidence who sold the horse to Markley, but Markley's wife testified that the horse was purchased "[s]omewhere out in Roy[, Washington]." RP (Dec. 12, 2012) at 154. Although the trial court's finding is inaccurate, it does not materially affect the court's conclusions of law and therefore is harmless. State v. Caldera, 66 Wn. App. 548, 551, 832 P.2d 139 (1992) ("[A]n erroneous finding of fact not materially affecting the conclusions of law is not prejudicial and does not warrant a reversal.").

⁹ RCW 16.52.205(2). Markley was not charged with either dehydrating or suffocating the horse, alternative ways of violating RCW 16.52.205(2).

¹⁰ RCW 9A.08.010(1)(d).

¹¹ State v. Coates, 107 Wn.2d 882, 892, 735 P.2d 64 (1987).

animal cruelty “requires proof of criminal negligence, not an intentional act.”¹²

Importantly, the reasonable person standard does not take account of a person’s peculiar circumstances or characteristics; the inquiry is limited to what a reasonable person would do under similar circumstances.¹³ “[I]f a reasonable person would have avoided the wrongful act, and the defendant’s failure to do so is a gross deviation from this reasonable course of conduct, the defendant has acted with criminal negligence.”¹⁴

Here, the “wrongful act” was the starvation that resulted in substantial and unjustifiable physical pain, causing Alex considerable suffering. Because criminal negligence involves an objective standard, Markley’s argument that he lacked experience with and knowledge of an older, emaciated horse’s dietary needs is not persuasive.¹⁵ Instead, we focus on what a reasonable person would do under similar circumstances.

The evidence here was that Alex appeared old and skinny when Markley purchased him and that Alex remained in a severely emaciated condition while in Markley’s care. The evidence also established that while Markley cared for Alex, the horse was underfed. Shortly after obtaining Alex, Markley switched from high-quality hay to less expensive local hay that lacked adequate nutritional value for an old horse. He used two dietary supplements in an attempt to increase the horse’s weight, but the evidence was that neither improved Alex’s body condition. A rational trier of fact could

¹² State v. Peterson, 174 Wn. App. 828, 848, 301 P.3d 1060, review denied, 178 Wn.2d 1021, 312 P.3d 650 (2013).

¹³ Coates, 107 Wn.2d at 895.

¹⁴ Id. at 892.

¹⁵ Id. at 895 (“The [person’s] state of mind is purely irrelevant to a charge of criminal negligence.”).

find that given Alex's extremely emaciated condition and the lack of improvement in his condition, a reasonable person would have consulted someone with animal care expertise. It is undisputed that Markley did not seek veterinary assistance while he owned Alex. A rational trier of fact could find that Markley's actions and inactions constituted a gross deviation from a reasonable course of conduct. Accordingly, this evidence, viewed in the light most favorable to the State, is sufficient to allow a rational trier of fact to conclude that Markley acted with criminal negligence by starving Alex.

Markley also contends that there is insufficient evidence to establish that he starved Alex because the horse was starved before he acquired it. "Starves" is not defined under the first degree animal cruelty statute, so we focus on that term's ordinary meaning.¹⁶ Common definitions include "to perish from lack of food," "to suffer extreme hunger," "to suffer or perish from deprivation," "to kill with hunger," and "to deprive of nourishment."¹⁷

Here, the testimony of several witnesses established that, more than three months after Markley acquired Alex, the horse was several hundred pounds underweight, starved, and at risk of death. Evidence also established that Markley failed to provide adequate nutrition during the months that he owned Alex. Given this evidence, a rational trier of fact could find that, while in Markley's care, Alex suffered extreme hunger and was deprived of nourishment amounting to starvation. Moreover, expert testimony established that Alex suffered unnecessary and substantial pain as a

¹⁶ State v. Edwards, 84 Wn. App. 5, 10, 924 P.2d 397 (1996).

¹⁷ WEBSTER'S THIRD NEW INT'L DICTIONARY 2228 (2002).

result of this starvation.¹⁸ Therefore, Markley's conviction for first degree animal cruelty is supported by sufficient evidence.

Markley's reliance on State v. Smith is unpersuasive.¹⁹ In Smith, the defendant's conviction for first degree animal cruelty following his llama's death was reversed after the appellate court determined that a lesser included offense instruction of second degree animal cruelty should have been given.²⁰ Such an instruction was necessary because the "evidence support[ed] a rational inference that [the defendant] committed *only* second degree animal cruelty for his failure to seek appropriate medical attention."²¹ Here, by contrast, there is sufficient evidence to support a rational inference that Markley failed to obtain any advice while he starved Alex. Unlike Smith, the evidence that Alex was starved does not support only the lesser included offense of merely failing to provide medical attention.

¹⁸ The unchallenged findings of fact include that "Alex had been starved for a prolonged period of time," and "[s]tarvation causes significant physical pain in a horse." Clerk's Papers at 79. Dr. Mueller also testified that Alex experienced considerable pain and suffering caused by starvation that lasted for a long period of time. The physical pain that Alex experienced was substantial and unjustifiable because merely providing an adequate food supply would have stopped it. See State v. Zawistowski, 119 Wn. App. 730, 737 n.3, 82 P.3d 698 (2004).

¹⁹ 154 Wn. App. 272, 223 P.3d 1262 (2009).

²⁰ A person commits second degree animal cruelty "if, under circumstances not amounting to first degree animal cruelty, the owner knowingly, recklessly, or with criminal negligence: (a) Fails to provide the animal with necessary . . . medical attention and the animal suffers unnecessary or unjustifiable physical pain as a result of the failure." RCW 16.52.207(2).

²¹ Smith, 154 Wn. App. at 278 (emphasis added). The evidence included testimony that a previously undiscovered parasite might have been the cause of the llama's health problems. Id.

Markley also raises numerous issues in his statement of additional grounds, his addendum to his statement of additional grounds, and his response to the prosecution's oral argument. None support any relief on appeal.

Citing errors and omissions in the trial court transcripts, Markley argues that the quality of the trial court record was insufficient to permit effective appellate review. But he fails to identify how any of these alleged errors or omissions is relevant to any issue raised in his appeal. Thus, he has not shown that we have been prevented from effectively reviewing his case.²²

Markley also contends that defense counsel rendered ineffective assistance by proceeding with a bench trial without consulting Markley and by failing to give Markley the option of bifurcating his bench trial from his wife's jury trial. To establish ineffective assistance, Markley must show that counsel's performance was deficient and that he was prejudiced as a result.²³ Markley has not met this burden as the colloquy with the trial court reflects that Markley understood his rights to a jury trial and the consequences of waiving those rights.²⁴ Markley's other contentions regarding his ineffective assistance claim are outside the record on appeal.

Markley's remaining arguments, such as his claims of malicious prosecution and judicial misconduct, are entirely unsupported by the record. Markley's assertions of

²² State v. Putman, 65 Wn. App. 606, 611, 829 P.2d 787 (1992) (a record may be sufficient for review even if a verbatim report of proceeding is not available for each portion of the proceedings).

²³ Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

²⁴ Additionally, waiving the right to a jury trial can be a tactical decision. State v. Likakur, 26 Wn. App. 297, 303, 613 P.2d 156 (1980). Counsel's advice in this area is deemed "within the area of judgment and trial strategy and as such rests exclusively in trial counsel." State v. Thomas, 71 Wn.2d 470, 471, 429 P.2d 231 (1967).

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embezzlement, misuse of government funds, and his prosecutorial misconduct claims are based on alleged facts outside the record on appeal and, therefore, cannot be addressed on direct appeal.²⁵ We find no support in the record for Markley's other contentions in his response to the prosecution's oral argument.

Affirmed.

WE CONCUR:

Trickey, J

Markley, J
Spears, C.J.

²⁵ See State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

APPENDIX B

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

STATE OF WASHINGTON,)	No. 69968-7-1
)	
Respondent,)	
)	
v.)	
)	
JASON EDWARD MARKLEY,)	ORDER DENYING APPELLANT'S
)	MOTION FOR RECONSIDERATION
Appellant.)	

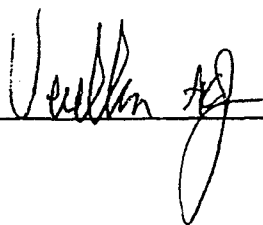
On November 24, 2014, Mr. Markley filed a motion for reconsideration of the court's opinion entered November 3, 2014. After consideration of the motion, the court has determined that it should be denied.

Now therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

Done this 8th day of December, 2014.

FOR THE PANEL:



2014 DEC -8 AM 10:57
COURT OF APPEALS
STATE OF WASHINGTON

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

v.

JASON MARKLEY,

Petitioner.

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SUPREME COURT NO. _____
COA NO. 69968-7-1

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 7TH DAY OF JANUARY 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** 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 7TH DAY OF JANUARY 2015.

x Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

FILED
Jan 07, 2015
Court of Appeals
Division I
State of Washington

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