

66417-4

66417-4

COA NO. 66417-4-I

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

---

---

STATE OF WASHINGTON,

Respondent,

v.

RICHARD BERGEM,

Appellant.

---

---

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

The Honorable Dave Needy, Judge

---

---

REPLY BRIEF OF APPELLANT

---

---

CASEY GRANNIS  
Attorney for Appellant

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

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2011 DEC 16 PM 4:41

**TABLE OF CONTENTS**

	Page
A. <u>ARGUMENT IN REPLY</u> .....	1
1. THE EVIDENCE IS INSUFFICIENT TO CONVICT FOR SECOND DEGREE ANIMAL CRUELTY UNDER COUNT III BECAUSE THE STATE DID NOT PROVE LACK OF SHELTER CAUSED THE HORSE TO SUFFER. ....	1
2. VIOLATION OF THE RIGHT TO AN EXPRESSLY UNANIMOUS VERDICT REQUIRES REVERSAL OF THE CONVICTIONS.....	3
a. <u>This Is An Alternative Means Case, Not A "Means Within A Means" Case.</u> ....	3
b. <u>The Unanimity Error Related To The First Degree Animal Cruelty Conviction Is Not Harmless.</u> .....	14
c. <u>The Unanimity Error Related To The Second Degree Animal Cruelty Convictions Is Not Harmless.</u> .....	17
3. THESE CONSTITUTIONAL ERRORS MAY BE RAISED FOR THE FIRST TIME ON APPEAL. ....	18
B. <u>CONCLUSION</u> .....	20

## TABLE OF AUTHORITIES

Page

### WASHINGTON CASES

<u>In re Detention of Cross,</u> 99 Wn.2d 373, 662 P.2d 828 (1983).....	17
<u>In re Detention of Halgren,</u> 156 Wn.2d 795, 132 P.3d 714 (2006).....	13
<u>State v. Al-Hamdani,</u> 109 Wn. App. 599, 36 P.3d 1103 (2001), <u>review denied</u> , 148 Wn.2d 1004, 60 P.3d 1211 (2003) .....	11, 12
<u>State v. Allen,</u> 127 Wn. App. 125, 110 P.3d 849 (2005).....	16
<u>State v. Alvarez,</u> 128 Wn.2d 1, 904 P.2d 754 (1995).....	18
<u>State v. Arndt,</u> 87 Wn.2d 374, 553 P.2d 1328 (1976).....	4
<u>State v. Carothers,</u> 84 Wn.2d 256, 525 P.2d 731 (1974).....	19
<u>State v. Crane,</u> 116 Wn.2d 315, 804 P.2d 10, <u>cert. denied</u> , 501 U.S. 1237, 111 S. Ct. 2867, 115 L. Ed. 2d 1033 (1991).....	19
<u>State v. Fernandez,</u> 89 Wn. App. 292, 948 P.2d 872 (1997).....	13
<u>State v. Green,</u> 94 Wn.2d 216, 616 P.2d 628 (1980).....	18

**TABLE OF AUTHORITIES (CONT'D)**

Page

WASHINGTON CASES (CONT'D)

<u>State v. Hursh</u> , 77 Wn. App. 242, 890 P.2d 1066 (1995), <u>abrogated on other grounds</u> , <u>State v. Roggenkamp</u> , 153 Wn.2d 614, 106 P.3d 196 (2005).....	19
<u>State v. Kintz</u> , 169 Wn.2d 537, 238 P.3d 470 (2010).....	13-15, 17
<u>State v. Klimes</u> , 117 Wn. App. 758, 73 P.3d 416 (2003).....	12
<u>State v. Laico</u> , 97 Wn. App. 759, 987 P.2d 638 (1999).....	4, 5
<u>State v. Linehan</u> , 147 Wn.2d 638, 56 P.3d 542 (2002) .....	4, 5, 11
<u>State v. Maupin</u> , 63 Wn. App. 887, 822 P.2d 355, <u>review denied</u> , 119 Wn.2d 1003, 832 P.2d 487 (1992) .....	15, 17
<u>State v. Nam</u> , 136 Wn. App. 698, 150 P.3d 617 (2007).....	11
<u>State v. Nicholas</u> , 55 Wn. App. 261, 776 P.2d 1385, <u>review denied</u> , 113 Wn.2d 1030, 784 P.2d 530 (1989) .....	10
<u>State v. Nonog</u> , 145 Wn. App. 802, 187 P.3d 335 (2008), <u>aff'd</u> , 169 Wn.2d 220, 237 P.3d 250 (2010).....	8, 9, 13
<u>State v. O'Donnell</u> , 142 Wn. App. 314, 174 P.3d 1205 (2007).....	11

**TABLE OF AUTHORITIES (CONT'D)**

Page

WASHINGTON CASES (CONT'D)

State v. O'Hara,  
167 Wn.2d 91, 217 P.3d 756 (2009)..... 19

State v. Ortega-Martinez,  
124 Wn.2d 702, 881 P.2d 231 (1994)..... 14, 15, 17, 19

State v. Peterson,  
168 Wn.2d 763, 230 P.3d 588 (2010)..... 12

State v. Rivas,  
97 Wn. App. 349, 984 P.2d 432 (1999),  
overruled on other grounds by  
State v. Smith, 159 Wn.2d 778, 154 P.3d 873 (2007). .... 15, 16

State v. Roche,  
75 Wn. App. 500, 878 P.2d 497 (1994)..... 10

State v. Smith,  
159 Wn.2d 778, 154 P.3d 873 (2007)..... 4

State v. Strohm,  
75 Wn. App. 301, 879 P.2d 962 (1994),  
review denied, 126 Wn.2d 1002 (1995) ..... 4, 6, 7, 13

State v. Young,  
89 Wn.2d 613, 574 P.2d 1171 (1978)..... 19

FEDERAL CASES

In re Winship,  
397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)..... 18

**TABLE OF AUTHORITIES (CONT'D)**

Page

**RULES, STATUTES AND OTHER AUTHORITIES**

Former RCW 9A.56.010(7).....	5
Former RCW 9A.82.010(10).....	7, 8
Former RCW 9A.82.050(2).....	6-8, 13
Former RCW 69.50.402(a)(6).....	13
Former RCW 71.09.020(16).....	13
RAP 2.5(a)(3).....	19
RCW 9A.36.150(1).....	8, 9
RCW 9A.36.150(1)(b).....	13
RCW 9A.44.050.....	11
RCW 9A.46.110(1)(a).....	13
RCW 9A.56.010.....	5
RCW 9A.56.020.....	5, 11
RCW 9A.56.020(1).....	5
RCW 9A.56.020(1)(a).....	11
RCW 9A.56.020(1)(b).....	11
RCW 9A.56.030-.050.....	11
RCW 9A.56.190.....	10
RCW 9A.56.200.....	10

**TABLE OF AUTHORITIES (CONT'D)**

Page

RULES, STATUTES AND OTHER AUTHORITIES (CONT'D)

RCW 9A.56.200(1).....	10
RCW 9A.82.050(1).....	6
RCW 16.52.011 .....	5
RCW 16.52.205 .....	10
RCW 16.52.205(2).....	3-6, 8-10,-12, 14
RCW 16.52.207 .....	10
RCW 16.52.207(2)(a) .....	3-6, 8-10, 13
U.S. Const. Amend. VI.....	19
U.S. Const. Amend. XIV .....	18
Wash. Const. Art. I, § 22 .....	19

A. ARGUMENT IN REPLY

1. THE EVIDENCE IS INSUFFICIENT TO CONVICT FOR SECOND DEGREE ANIMAL CRUELTY UNDER COUNT III BECAUSE THE STATE DID NOT PROVE LACK OF SHELTER CAUSED THE HORSE TO SUFFER.

The State acknowledges there is no "direct testimony" indicating the sorrel mare suffered unnecessary or unjustifiable pain from lack of shelter under count III. Brief of Respondent (BOR) at 33. In point of fact, there is no substantial evidence, direct or indirect, that establishes lack of shelter caused the mare any such pain.

At the trial level, the State exclusively tied conviction under count III to a lack of shelter theory, as demonstrated by the presence of rain rot. 2RP 158, 161, 166, 167. The pinto suffered from rain rot and its arguably painful effects. 2RP 25, 65, 76-77. The sorrel mare did *not* have rain rot. 2RP 25. Rain rot may cause unjustifiable suffering, but the sorrel mare did not have that condition.

Faced with that evidentiary reality, the State retools its theory of guilt on appeal by broadly arguing the combination of severe weight loss and lack of shelter caused the sorrel mare to experience unjustifiable suffering. BOR at 33-34. But its citations in support of that new theory do not establish sufficient evidence. The State cites the veterinarian's testimony at 2RP 66, but as pointed out in the opening brief, simply

stating that mud caking is "hard on their feet" does not establish the sorrel mare suffered the level of pain required by statute. Brief of Appellant (BOA) at 11. The evidence was so scant that the prosecutor did not pursue this theory of criminal culpability in closing argument. 2RP 157-67, 173-74. In fact, the prosecutor told the jury "[t]he horse's feet were fine" and "[w]e didn't charge based on their foot care." 2RP 161.

The State also cites to 2RP 17, where Officer Diaz testified lack of shelter from rain causes a horse without the "necessary body weight and body fat" to be unable to regulate body temperature "as well as a healthy horse." This portion of the officer's testimony, however, specifically referred to a horse with a body condition score of "2.5" and "this skinny horse," i.e., the pinto, not the sorrel mare. 2RP 17-18; see 2RP 7-8, 23-24 (officer scored pinto as a "2.5").

Diaz scored the sorrel mare as a "4," which she considered to be on the lean side but still a healthy weight. 2RP 7-8. The mare later dropped weight but still had more than the pinto. 2RP 16, 20-21, 48-49. Even assuming the evidence shows sorrel mare falls into the category of an unhealthy horse, there is no testimony that being unable to regulate body temperature "as well as a healthy horse" caused the sorrel mare to experience unnecessary and unjustifiable pain. Even healthy horses shake when its raining or cold. 2RP 17-18. There was no testimony that a

shivering horse suffers unnecessary and unjustifiable pain. The conviction for second degree animal cruelty under count III must be dismissed with prejudice due to insufficient evidence.

2. VIOLATION OF THE RIGHT TO AN EXPRESSLY UNANIMOUS VERDICT REQUIRES REVERSAL OF THE CONVICTIONS.

- a. This Is An Alternative Means Case, Not A "Means Within A Means" Case.

In the opening brief, Bergem argued the first degree animal cruelty statute under RCW 16.52.205(2) contained two alternative means of committing the crime applicable to this case: (1) starvation or (2) dehydration, either one of which must cause substantial or unjustifiable physical pain that extends for a period sufficient to cause considerable suffering.<sup>1</sup> Bergem further argued the second degree animal cruelty statute under RCW 16.52.207(2)(a) contained five alternative means: failing to provide necessary (1) shelter; (2) rest; (3) sanitation; (4) space or (5) medical attention.

The State claims the first degree animal cruelty statute under RCW 16.52.205(2) and the second degree animal cruelty statute under RCW 16.52.207(2)(a) do not contain alternative means of committing the

---

<sup>1</sup> The "to convict" instruction for first degree animal cruelty did not include suffocation as a means to commit the offense, and therefore that alternative means is not at issue here. CP 22.

respective offenses. BOR at 14-20, 25-27. It wholly fails to address the established test for determining alternative means crimes set forth in State v. Arndt, 87 Wn.2d 374, 553 P.2d 1328 (1976) — the test applied in the opening brief. BOA at 17-18, 23.

The State asserts 16.52.205(2) and RCW 16.52.207(2)(a) contain additional "means within a means" rather than alternative means. BOR at 19-20, 25-27. That assertion is misplaced.

Definitional statutes create "means within means" of committing a crime rather than alternative means. State v. Laico, 97 Wn. App. 759, 763, 987 P.2d 638 (1999); State v. Strohm, 75 Wn. App. 301, 309, 879 P.2d 962 (1994), review denied, 126 Wn.2d 1002 (1995); see also State v. Smith, 159 Wn.2d 778, 788-90, 792, 154 P.3d 873 (2007) (alternative means doctrine does not extend to the common law assault definitions when submitted as a separate definitional instruction). There is no unanimity requirement with regard to "means within means" of committing a crime. See, e.g., Laico, 97 Wn. App. at 763; Strohm, 75 Wn. App. at 309.

Statutes that merely define statutory terms therefore do not create alternative means of committing the crime. State v. Linehan, 147 Wn.2d 638, 646, 648, 56 P.3d 542 (2002). But the animal cruelty statutes at issue here

are "different in kind from those definition statutes that merely elaborate upon various terms or words." Linehan, 147 Wn.2d at 648.

The statutory provisions relied on by Bergem as setting forth alternative means — RCW 16.52.205(2) and RCW 16.52.207(2)(a) — are set apart, separate and distinct, from the chapter's general definitions contained in RCW 16.52.011. See Laico, 97 Wn. App. at 763 (no means within a means for theft by embezzlement in contrast to RCW 9A.56.020, which defines the crime itself: "RCW 9A.56.020 is set apart, separate and distinct, from the chapter's general definitions contained in RCW 9A.56.010, and, in essence, actually defines the crime of 'theft.'").

The animal cruelty statutes at issue here are unlike the definitional statute for theft at issue in Linehan, where the Court held former RCW 9A.56.010(7), which defined the meaning of particular alternative elements of the crime of theft, did not itself create alternative means of committing that crime. Linehan, 147 Wn.2d at 647-49. The alternative means of committing theft were found in RCW 9A.56.020(1), which is the statute that defines *the crime* of theft. Id. at 648. The latter statute, in setting forth the alternative means of committing the crime, was "different in kind from those definition statutes that merely elaborate upon various terms or words" used in statutes that define the crime itself. Id.

Neither RCW 16.52.205(2) or RCW 16.52.207(2)(a) is a definitional statute. Those statutes set forth the elements of the crime. They do not define the meaning of an element or elaborate on the meaning of various terms or phrases. Bergem's alternative means argument in no way seeks to extract alternative means of committing the crimes of first and second degree animal cruelty based on variant meanings that may attach to the definition of an element of the crime.

Strohm is particularly instructive in distinguishing between alternative means and "means within means." That case shows why Bergem's alternative means argument carries the day.

Former RCW 9A.82.050(2), now codified at RCW 9A.82.050(1), provides "A person who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or who knowingly traffics in stolen property, is guilty of trafficking in stolen property in the first degree." Strohm recognized the "trafficking in stolen property" under former RCW 9A.82.050(2) can be committed by eight alternative means: "A person who knowingly [1] initiates, [2] organizes, [3] plans, [4] finances, [5] directs, [6] manages, or [7] supervises the theft of property for sale to others, or [8] who knowingly traffics in stolen property, is guilty of trafficking in stolen property in the first degree."

Strohm, 75 Wn. App. at 307 (quoting the statute and inserting numbers to indicate the alternative means).

Trafficking, meanwhile, is defined separately in former RCW 9A.82.010(10): "'Traffic' means to sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another person, or to buy, receive, possess, or obtain control of stolen property, with intent to sell, transfer, distribute, dispense, or otherwise dispose of the property to another person." The defendant argued the statute defining "trafficking" under RCW 9A.82.010(10) set up additional alternative means of committing the crime. Strohm, 75 Wn. App. at 308.

This Court rejected that argument, holding "definition statutes do not create additional alternative means, 'means within means,' of committing an offense." Id. at 309. This Court recognized "[b]y defining 'traffic' the Legislature was not creating additional alternative means, but merely defining the traffics alternative means of 'Trafficking in stolen property' under RCW 9A.82.050(2)." Id. The court then addressed whether the eight alternative means under former RCW 9A.82.050(2) were supported by substantial evidence. Id.

The animal cruelty provisions at issue here — RCW 16.52.207(2)(a)<sup>2</sup> and RCW 16.52.205(2)<sup>3</sup> — correspond to former RCW 9A.82.050(2), the statute setting forth alternative means of committing the crime of trafficking in stolen property. These provisions do not correspond to former RCW 9A.82.010(10), the statute creating means within means by defining an elemental term in various ways.

The State's citation to State v. Nonog, 145 Wn. App. 802, 187 P.3d 335 (2008), aff'd, 169 Wn.2d 220, 237 P.3d 250 (2010) actually supports Bergem's alternative means argument. BOR at 17.

Nonog addressed the crime of interfering with the reporting of domestic violence under RCW 9A.36.150(1), which provides "(1) A person commits the crime of interfering with the reporting of domestic violence if the person: (a) Commits a crime of domestic violence, as defined in RCW 10.99.020; and (b) Prevents or attempts to prevent the victim of or a witness to that domestic violence crime from calling a 911

---

<sup>2</sup> RCW 16.52.207(2)(a) provides an 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 shelter, rest, sanitation, space, or medical attention and the animal suffers unnecessary or unjustifiable physical pain as a result of the failure[.]"

<sup>3</sup> RCW 16.52.205(2) provides "A person is guilty of animal cruelty in the first degree 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; or (b) death."

emergency communication system, obtaining medical assistance, or making a report to any law enforcement official."

The State in Nonog argued the three ways in which a victim or witness might try to report a crime of domestic violence are simply definitional and that the crime itself may be committed by only one means, i.e., by preventing the victim or witness from making a report. Nonog, 145 Wn. App. at 812. This Court rejected that argument, holding the variations in RCW 9A.36.150(1) are not merely descriptive or definitional of essential terms, but "are themselves essential terms" and that the variations established alternative means of committing the crime. Id. at 812-13.

Applying that reasoning to Bergem's case shows the animal cruelty provisions of RCW 16.52.207(2)(a) and RCW 16.52.205(2) contain alternative means, not means within means. The variations under RCW 16.52.207(2)(a) — failure to provide an animal with necessary "shelter, rest, sanitation, space, or medical attention" — do not define essential terms, they are essential terms. The variations under RCW 16.52.205(2) — starves, dehydrates, or suffocates an animal — are likewise not merely descriptive of an essential term but rather comprise essential elements of the crime itself.

The State contends the first degree animal cruelty statute under RCW 16.52.205 only contains three alternative means of committing the crime, which are delineated by subsections (1), (2) and (3). BOR at 16-17. The State further asserts the second degree animal cruelty statute under RCW 16.52.207 only contains four alternative means, which are delineated in subsections (1), (2)(a), (2)(b) and (2)(c). The State proposes the variations within RCW 16.52.205(2) and RCW 16.52.207(2)(a) set forth means within means rather than alternative means of committing the crime because other subsections setting forth alternative means are present. That proposal fails.

Alternative means may be located within a particular subsection even where a separate subsection comprises yet another alternative means. See State v. Nicholas, 55 Wn. App. 261, 272-73, 776 P.2d 1385 (armed with a deadly weapon and displaying what appears to be a deadly weapon are alternative means of committing first degree robbery under RCW 9A.56.200; the statute contains other subsections); review denied, 113 Wn.2d 1030, 784 P.2d 530 (1989); State v. Roche, 75 Wn. App. 500, 511, 878 P.2d 497 (1994) (robbery is an alternative means crime under RCW 9A.56.190: taking property "from the person of another or in his presence," while RCW 9A.56.200(1) sets forth what must be proved to commit the crime of first degree robbery under various subsections);

accord State v. O'Donnell, 142 Wn. App. 314, 323-24, 174 P.3d 1205 (2007) (citing State v. Nam, 136 Wn. App. 698, 705, 150 P.3d 617 (2007)).

The theft statute analyzed in Linehan provides an example of this phenomenon. RCW 9A.56.020(1)(a) sets forth two alternative means of committing theft: "wrongfully obtain" and "exert unauthorized control." Linehan, 147 Wn.2d at 647-49. RCW 9A.56.020(1)(b) sets forth yet another alternative means: "obtaining the money by color and aid of deception."<sup>4</sup> Id. at 649. That situation is analogous to the animal cruelty statutes, where the delineated subsections undeniably constitute alternative means but a particular subsection also contain alternative means.

The State cites State v. Al-Hamdani, which held "mental incapacity" and "physical helplessness" are not alternative means within the second degree rape statute.<sup>5</sup> State v. Al-Hamdani, 109 Wn. App. 599, 601, 36 P.3d 1103 (2001), review denied, 148 Wn.2d 1004, 60 P.3d 1211

---

<sup>4</sup> RCW 9A.56.020 defines theft as "(a) To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him of such property or services; or (b) By color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him of such property or services[.]" RCW 9A.56.030-.050, meanwhile, sets forth what must be proved to commit the crime of theft under various other subsections.

<sup>5</sup> RCW 9A.44.050 provides "(1) A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person: (b) When the victim is incapable of consent by reason of being physically helpless or mentally incapacitated."

(2003). Al-Hamdani does not constitute a bright line rule for determining whether other statutes set forth alternative means. "[T]here simply is no bright-line rule by which the courts can determine whether the legislature intended to provide alternate means of committing a particular crime. Instead, each case must be evaluated on its own merits." State v. Peterson, 168 Wn.2d 763, 769, 230 P.3d 588 (2010). (quoting State v. Klimes, 117 Wn. App. 758, 769, 73 P.3d 416 (2003)).

Furthermore, Al-Hamdani is distinguishable because the alleged means in that rape case do not involve *a defendant's* distinct acts or various modes of conduct that may constitute the crime. Rather, there is only one act at issue: a rape. The alleged alternative means address the victim's state, not the defendant's acts.

The Supreme Court in Peterson recognized the key to determining whether a statute sets forth alternative means is whether the statute sets forth *distinct acts* that constitute the same crime. Peterson, 168 Wn.2d at 769-70. The failure to register statute at issue in Peterson does not set forth alternative means because it contemplates a *single* act that amounts to failure to register — the criminal *conduct* at issue invariably remains the same. Peterson, 168 Wn.2d at 770. In contrast, starving a horse and dehydrating a horse are distinct acts under RCW 16.52.205(2). Failing to

provide necessary (1) shelter; (2) rest; (3) sanitation; (4) space or (5) medical attention under RCW 16.52.207(2)(a) also constitute separate acts.

The State's mechanically applied "means within a means" approach cannot be reconciled with any number of cases where alternative statutory means were found. See, e.g., Strohm, 75 Wn. App. at 305, 307 (offense of leading organized crime under former RCW 9A.82.050(2) may be committed by alternative means); Nonog, 145 Wn. App. at 812-13 (RCW 9A.36.150(1)(b), the crime of interfering with the reporting of domestic violence statute, sets forth alternative means); State v. Kintz, 169 Wn.2d 537, 551, 238 P.3d 470 (2010) ("RCW 9A.46.110(1)(a) provides alternative means of committing the crime of stalking: "intentionally and repeatedly harassing or repeatedly following another person."); In re Detention of Halgren, 156 Wn.2d 795, 810, 132 P.3d 714 (2006) (presence of "mental abnormality" or "personality disorder" under former RCW 71.09.020(16) are alternative means for making SVP determination); State v. Fernandez, 89 Wn. App. 292, 299-300, 948 P.2d 872 (1997) (operating a drug house statute under former RCW 69.50.402(a)(6) contained two alternative means: "It is unlawful for any person . . . knowingly to keep or maintain any . . . dwelling . . . [1] which is resorted to by persons using controlled substances in violation of this chapter for the purpose of using

these substances, [2] or which is used for keeping or selling them in violation of this chapter.)

b. The Unanimity Error Related To The First Degree Animal Cruelty Conviction Is Not Harmless.

The State contends the unanimity error is harmless for the first degree animal cruelty conviction because overwhelming evidence supports the starvation alternative, even if starvation and dehydration are alternative means under RCW 16.52.205(2) and there is insufficient evidence of dehydration. BOR at 22-25.

The Supreme Court has not accepted this rationale for avoiding reversible error for jury unanimity violations involving alternative means. It has plainly held "if the evidence is *insufficient* to present a jury question as to whether the defendant committed the crime by any one of the means submitted to the jury, the conviction will not be affirmed." State v. Ortega-Martinez, 124 Wn.2d 702, 708, 881 P.2d 231 (1994). More recently, the Supreme Court reiterated "A general verdict of guilty on a single count charging the commission of a crime by alternative means will be upheld *only if* sufficient evidence supports each alternative means." Kintz, 169 Wn.2d at 552 (emphasis added). Bergem asks this Court to follow controlling Supreme Court precedent and reverse his first degree

animal cruelty conviction because insufficient evidence supports one of the alternative means.

Even assuming a harmless error test is applicable beyond that set forth in Ortega-Martinez and Kintz, the State misapplies the test in arguing the error is harmless based on overwhelming evidence for one of the alternative means. BOR at 24-25.

"If one or more of the alternative means is not supported by substantial evidence, the verdict will stand only if we can determine that the verdict was based on only one of the alternative means and that substantial evidence supported that alternative means." State v. Rivas, 97 Wn. App. 349, 351-52, 984 P.2d 432 (1999), overruled on other grounds by State v. Smith, 159 Wn.2d 778, 154 P.3d 873 (2007).

The harmless error analysis in this unanimity context has nothing to do with whether overwhelming evidence supports the alternative means supported by sufficient evidence. Indeed, the type of harmless error argument advanced by the State here was expressly rejected in State v. Maupin, 63 Wn. App. 887, 894-95, 822 P.2d 355 (rejecting dissent's overwhelming evidence test as inapplicable), review denied, 119 Wn.2d 1003, 832 P.2d 487 (1992).

Rather, the question is whether the case was prosecuted in such a way that invited the jury to convict based on the means for which

sufficient evidence was lacking. Where, as here, the State presents evidence on a means that is unsupported by sufficient evidence and there is only a general verdict, the error cannot be deemed harmless. Compare Rivas, 97 Wn. App. at 351-52 (conviction affirmed where there was no danger that the verdict rested on unsupported alternative means because evidence was presented as to only one means, even though the jury instruction included three alternative means of assault) with State v. Allen, 127 Wn. App. 125, 132, 135-37, 110 P.3d 849 (2005) (conviction overturned where court could not be certain jury relied solely on one means because evidence regarding two alternatives was presented). The State, in arguing the jury could have lawfully convicted under the alternative means of dehydration based on the evidence presented, effectively concedes there can be no harmless error if the evidence is in fact insufficient to support that means. BOR at 22.

Finally, the State contends, "Bergem's requested relief of dismissal is inappropriate" as to the first degree animal cruelty conviction under count I. BOR at 25 n.4. Bergem does not request dismissal of count I but rather reversal and remand for a new trial. BOA at 13, 24-25. Bergem

only requests dismissal of the second degree animal cruelty conviction under count III due to insufficient evidence. BOA at 12.<sup>6</sup>

c. The Unanimity Error Related To The Second Degree Animal Cruelty Convictions Is Not Harmless.

In relation to count IV, the State concedes there is no evidence that lack of rest or space caused the pinto any harm. BOR at 31. In relation to count III, the State does not argue there is any evidence to show lack of rest, space, sanitation or medical attention caused the sorrel mare any harm, thereby conceding the point. BOR at 33-34; see In re Detention of Cross, 99 Wn.2d 373, 379, 662 P.2d 828 (1983) ("by failing to argue this point, respondents appear to concede it.").

In the absence of a special verdict, there is no means to determine with certainty that the jury's verdict rested exclusively on the alternative means supported by sufficient evidence. See Maupin, 63 Wn. App. at 894 (absence of special verdict precluded determination that unanimity preserved). Both convictions must be reversed because sufficient evidence does not support all of the alternative means contained in the "to convict" instruction. Kintz, 169 Wn.2d at 552; Ortega-Martinez, 124 Wn.2d at 708.

---

<sup>6</sup> The opening brief, however, mistakenly requests dismissal of count IV rather than count III under the conclusion heading. BOA at 25. A notice of errata will be filed correcting this inadvertent error in the opening brief.

3. THESE CONSTITUTIONAL ERRORS MAY BE  
RAISED FOR THE FIRST TIME ON APPEAL.

Due process under the Fourteenth Amendment of the United States Constitution requires proof of 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). There is no doubt sufficiency of evidence is a question of constitutional magnitude that may be raised initially on appeal. State v. Alvarez, 128 Wn.2d 1, 13, 904 P.2d 754 (1995).

The State nonetheless claims Bergem's sufficiency of evidence argument is not one that may be raised for the first time on appeal unless it is "manifest." BOR at 34-35. That claim amounts to a dog chasing its own tail. If there is insufficient evidence to support conviction, the error is by definition manifest because such conviction cannot be affirmed as a matter of law.

The State further claims the instructional error on unanimity cannot be raised for the first time on appeal. BOR at 36. The State is fighting a battle it lost long ago.

"An appellate court will consider error raised for the first time on appeal when the giving or failure to give an instruction invades a fundamental constitutional right of the accused, such as the right to a jury trial." State v. Green, 94 Wn.2d 216, 231, 616 P.2d 628 (1980). The

constitutional right to a jury trial includes the right to a unanimous verdict. Ortega-Martinez, 124 Wn.2d at 707; U.S. Const. Amend. VI; Wash. Const., art. 1, § 22. The Supreme Court has held instructional errors constituting manifest constitutional error include failing to require a unanimous verdict. State v. O'Hara, 167 Wn.2d 91, 100, 217 P.3d 756 (2009) (citing State v. Carothers, 84 Wn.2d 256, 262, 525 P.2d 731 (1974)). It is well established unanimity errors in general verdicts amount to manifest constitutional error under RAP 2.5(a)(3) that may be raised for the first time on appeal. State v. Crane, 116 Wn.2d 315, 325, 804 P.2d 10, cert. denied, 501 U.S. 1237, 111 S. Ct. 2867, 115 L. Ed. 2d 1033 (1991); State v. Hursh, 77 Wn. App. 242, 248, 890 P.2d 1066 (1995), abrogated on other grounds, State v. Roggenkamp, 153 Wn.2d 614, 106 P.3d 196 (2005).

The State does not even acknowledge this authority. Conversely, the State is unable to cite to any case holding instructional errors related to the right to unanimous general verdicts may not be raised for the first time on appeal. That failure is telling. See State v. Young, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978) (courts may assume that where no authority is cited, counsel has found none after diligent search).

B. CONCLUSION

For the reasons stated above and in the opening brief, Bergem requests that this Court reverse the three convictions, dismissing count III with prejudice.

DATED this 16<sup>th</sup> day of December 2011

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. 66417-4-1
	)	
RICHARD BERGEM,	)	
	)	
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 16<sup>TH</sup> DAY OF DECEMBER 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **FILE REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] ERIK PEDERSEN  
SKAGIT COUNTY PROSECUTOR'S OFFICE  
COURTHOUSE ANNEX  
605 S. THIRD  
MOUNT VERNON, WA 98273
  
- [X] RICHAR BERGAM  
5198 TENNESON ROAD  
SEDRO-WOOLEY, WA 98284

**FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2011 DEC 16 PM 4:41**

**SIGNED** IN SEATTLE WASHINGTON, THIS 16<sup>TH</sup> DAY OF DECEMBER 2011.

x *Patrick Mayovsky*