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No. 72667-6-I

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

CITY OF SEATTLE,
Respondent,

vs.

JANET NORMAN,
Petitioner.

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BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENTS OF ERROR

1. Neither Seattle's animal control ordinances nor due process require that an animal's dangerousness be determined in an administrative hearing before the animal's owner can be charged with the crime of Owing a Dangerous Animal.

2. Seattle's animal control ordinances, under which an animal declared dangerous in an administrative hearing can be killed and an animal whose owner is convicted of Owing a Dangerous Animal must be killed, do not violate the privilege and immunities provision of the Washington constitution.

3. The trial court's admission of evidence for the purpose of showing its effect on the defendant did not violate her rights under the confrontation clause.

4. The trial court did not abuse its discretion by admitting testimony from an animal control officer that, after speaking with both the victim of a dog bite and the owner of the dog regarding the incident, he believed the bite was unprovoked.

B. ISSUES PRESENTED FOR REVIEW

1. Has defendant established that Seattle's animal control ordinances require that an animal's dangerousness be determined in an administrative hearing before the animal's owner can be charged with the crime of Owing a Dangerous Animal? (Assignment of Error 1)

2. Has defendant established that due process requires that an animal's dangerousness be determined in an administrative hearing before the animal's owner can be charged with the crime of Owing a Dangerous Animal? (Assignment of Error 1)

3. Has defendant established that Seattle's animal control ordinances, under which an animal declared dangerous in an administrative hearing can be killed and an animal whose owner is convicted of Owing a Dangerous Animal must be killed, violate the privilege and immunities provision of the Washington constitution? (Assignment of Error 2)

4. Has defendant shown that admission of evidence for the purpose of showing its effect on her violated her right of confrontation? (Assignment of Error 3)

5. Has defendant shown that the trial court abused its discretion by admitting testimony from an animal control officer that, after speaking with both the victim of a dog bite and the owner of the dog regarding the incident, he believed the bite was unprovoked?

(Assignment of Error 4)

C. STATEMENT OF THE CASE

Defendant was convicted of Owing a Dangerous Animal. She appealed, contending that the trial court erroneously admitted and excluded evidence, that her attorney was ineffective, that the evidence was not sufficient to support the conviction and that the ordinance is unconstitutional. The superior court rejected these arguments and affirmed defendant's conviction, CP 515-16, and this court accepted review of her claim that the statutory structure is unconstitutional.

Julia Coleman lives with her daughter Melaina Grant across the street from defendant. CP 290-91. After defendant obtained her dog Duncan, Coleman noticed that the dog seemed difficult to control. CP 291-92. This large dog was aggressive and always running after vehicles and pedestrians, and defendant and her family

were constantly yelling at it in an effort to control it and had to tie it up and put a muzzle on it. CP 291-93 & 303. Coleman never saw defendant walk the dog or play with it. CP 293 & 303.

On September 22, 2012, Melaina called Coleman to say she had just been bitten by defendant's dog. CP 293-94. Coleman went outside to meet Melaina, who was walking back from across the street. CP 294. Defendant also was present and said "Oh my God, he had never done anything like that." CP 294. Defendant was visibly upset and apologetic. CP 294-95 & 304. Melaina's arm was bitten so deeply that the flesh was exposed. CP 295. Coleman took Melaina to the hospital, where doctors repeatedly flushed the wound and repeatedly administered pain medication. CP 295-96. Melaina was in considerable pain and ultimately had 50 stiches in her arm to close the wound. CP 296. Her arm is terribly scarred and mutilated. CP 300. After the incident, defendant frequently came over to check on the condition of Melaina's arm and advised her not to file a lawsuit and not to appear if the City pursued charges. CP 299-300.

Three days later, Seattle Animal Control Officer James Jackson investigated this incident. CP 306. He first spoke with

Melaina, who showed him the wound caused by the dog bite and told him where the dog lived. CP 298-99 & 307-08. Officer Jackson then went across the street to talk with defendant, who admitted that her dog had bitten Melaina. CP 298-99 & 308-09. Defendant explained that usually when a person comes to her door, she will put the dog away, CP 309, but did not do so when Melaina came to her door as the dog did not show any type of aggressive behavior. CP 311. When defendant opened the door, the dog shot past her and bit Melaina. CP 311. Officer Jackson explained to defendant the difference between a provoked bite and an unprovoked bite and told her that this incident involved an unprovoked bite. CP 312-13.

On October 5, Seattle Animal Control Officer Rachel Leahy went to defendant's home and told her that if she did not remove the dog from the City limits, the City might file a criminal charge against her. CP 319-21 & 324-25. Defendant appeared to understand and said that she intended to keep her dog. CP 324-25. Officer Leahy returned to defendant's home on October 16, defendant said she still had the dog and the officer again advised defendant that the City might file a criminal charge against her. CP 325.

The jury was instructed, in pertinent part, as follows:

To convict the defendant of the crime of Owning a Dangerous Animal, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about October 16, 2012, the defendant owned a dangerous animal;
- (2) That the defendant knew that the animal was dangerous or acted with reckless disregard of the fact that the animal was dangerous; and
- (3) That the ownership occurred in the City of Seattle.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 101 & 376-77.

“Dangerous animal” means any animal:

- (1) that, when unprovoked, inflicts severe injury on or kills a human being or domestic animal on public or private property.

CP 102 & 377.

A severe injury is a physical injury that results in broken bones, or disfiguring lacerations requiring multiple sutures or cosmetic surgery, or transmittal of infectious or contagious disease by an animal.

CP 103 & 377.

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result which is described in law as being a crime, whether or not he or she is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.

CP 97 & 375.

D. ARGUMENT

1. Defendant has not established that an administrative determination that her dog was dangerous is a prerequisite to a prosecution for Owning a Dangerous Animal.

Defendant contends that the criminal charge should have been dismissed because the City did not utilize the administrative process under Seattle Municipal Code 9.25.035 for declaring her dog to be dangerous. The trial court determined that this ordinance gave the Director discretion to investigate a dog's behavior and declare it to be dangerous, but that this administrative process was not the sole

means of determining that a dog is dangerous and was not mandatory.¹ The superior court affirmed this decision.

- a. The ordinances do not require that an administrative determination that a dog is dangerous is a prerequisite to a prosecution for Owning a Dangerous Animal.

Defendant first argues that Seattle's animal control ordinances require that a dog's dangerousness be determined administratively before the dog's owner can be prosecuted for the crime of Owning a Dangerous Animal. A court's paramount duty in construing an ordinance is to ascertain and give effect to the intent of the Council.² A court should construe each part of an ordinance in connection with every other part to harmonize the ordinance as a whole.³ Seattle's animal control ordinances show that the administrative process for declaring that an animal is dangerous is not a prerequisite to a criminal charge alleging that a person owned a dangerous animal. Neither the ordinance authorizing the Director to declare an animal

¹ CP 161.

² *Higgins v. King County*, 89 Wn. App. 335, 339, 948 P.2d 879 (1997).

³ *Belleau Woods, II, LLC v. Bellingham*, 150 Wn. App. 228, 242-43, 208 P.3d 5, *review denied*, 167 Wn.2d 1014 (2009); *Higgins*, 89 Wn. App. at 339.

to be dangerous,⁴ defining a “dangerous animal”⁵ nor defining the crime of Owing a Dangerous Animal⁶ indicate that the only means

⁴ Seattle Municipal Code (SMC) 9.25.035A provides, in pertinent part:

The Director, upon the petition of any person, or at his or her own discretion, may conduct an investigation, and if the findings of the investigation so indicate, he or she may declare an animal to be dangerous. If a domestic animal is found to be dangerous, the Director shall enter an order so stating and shall direct either: (1) humane disposal of the animal; (2) that the animal be sent at the owner’s expense to a secure animal shelter; or (3) removed from the City and maintained at all times in compliance with RCW Chapter 16.08.

⁵ SMC 9.25.020G provides:

“Dangerous animal” means any animal:

- (1) That, when unprovoked, inflicts severe injury on or kills a human being or domestic animal on public or private property;
- (2) Whose owner has been previously found to have committed a civil violation of 9.25.084G [permitting an unprovoked animal to bite a domestic animal or bite or menace a human] or has been convicted of a crime under 12A.06.060 [negligent control of an animal] of the Seattle Municipal Code and whose owner is found to have committed a violation of either 9.25.084G or 12A.06.060 of the Seattle Municipal Code with respect to the behavior of that same animal;
- (3) That, under circumstances other than as described in subsection G(2) above, has been the subject of one or more findings that its owner has committed a civil violation of 9.25.084G or has been convicted of a crime under 12A.06.060 of the Seattle Municipal Code, whether involving the same or a different owner, whose owner is found to have committed a violation of either 9.25.084G or 12A.06.060 of the Seattle Municipal Code; or
- (4) Whose owner has received a written notification alleging behavior that would be in violation of either 9.25.084G or 12A.06.060 of the Seattle Municipal Code issued under the laws of any other city, county or state agency within or outside of the State of Washington, which animal again engages in behavior that is in violation of either 9.25.084G or 12A.06.060 of the Seattle Municipal Code.

⁶ SMC 9.25.083 provides:

of determining that an animal is dangerous is through the administrative process. The City Council could have defined the crime of Owning a Dangerous Animal as owning an animal that had been declared to be dangerous under Section 9.25.035, but obviously chose not to do so.

The court in *Rabon v. Seattle*⁷ recognized that a determination that a dog is “vicious” could be made by the director or “necessarily made by the jury in finding him guilty of owning a vicious animal.” Construing the ordinances to require an administrative determination that a dog is dangerous before a criminal charge could be brought would lead to the bizarre result⁸ of the City having to prove twice the dangerousness of the same dog – first in an administrative hearing and then in a criminal trial. As a matter of statutory construction, a

A. It is unlawful to own a dangerous animal (other than a licensed guard or attack dog) with knowledge that the animal is dangerous, or with reckless disregard of the fact that the animal is dangerous.

B. It is unlawful to possess within the City of Seattle any animal that has been ordered removed from the City of Seattle pursuant to SMC 9.25.035.

C. An animal whose owner is convicted of or pleads guilty to violating this section shall be humanely destroyed.

⁷ 135 Wn.2d 278, 295, 957 P.2d 621 (1998).

previous administrative determination that an animal is dangerous is not a prerequisite for a criminal charge of Owning a Dangerous Animal.

- b. Due process does not require that an administrative determination that a dog is dangerous is a prerequisite to a prosecution for Owning a Dangerous Animal.

Defendant also contends that procedural due process requires that an administrative determination that her dog is dangerous precede a criminal prosecution. This challenge, as well as defendant's privileges and immunities contention, asserts that the ordinance is unconstitutional. A legislative enactment, including a municipal ordinance, is presumed to be constitutional, and the party challenging it has the burden of proving its unconstitutionality beyond a reasonable doubt.⁹

[T]he "beyond a reasonable doubt" standard used when a statute is challenged as unconstitutional refers to the fact that one challenging a statute must, by argument and research, convince the court that there is

⁸ A criminal statute should be construed to avoid unlikely, absurd or strained consequences. *State v. Acevedo*, 159 Wn. App. 221, 229, 248 P.3d 526 (2010).

⁹ *Seattle v. Montana*, 129 Wn.2d 583, 589, 919 P.2d 1218 (1996); *State v. Spencer*, 75 Wn. App. 118, 121, 876 P.2d 939 (1994), review denied, 125 Wn.2d 1015 (1995).

no reasonable doubt that the statute violates the constitution. The reason for this high standard is based on our respect for the legislative branch of government as a co-equal branch of government, which, like the court, is sworn to uphold the constitution. We assume the Legislature considered the constitutionality of its enactments and afford some deference to that judgment. Additionally, the Legislature speaks for the people and we are hesitant to strike a duly enacted statute unless fully convinced, after a searching legal analysis, that the statute violates the constitution.¹⁰

In a criminal case, a due process challenge is governed by the analytical framework set forth in *Medina v. California*,¹¹ under which a state law governing criminal procedures does not violate due process unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.¹² Due process does not require adoption of a

¹⁰ *Island County v. State*, 135 Wn.2d 141, 147, 955 P.2d 377 (1998).

¹¹ 505 U.S. 437, 445, 112 S. Ct. 2572, 120 L.Ed.2d 353 (1992); *State v. Hurst*, 173 Wn.2d 597, 601-03, 269 P.3d 1023 (2012).

¹² See also *State v. Heddrick*, 166 Wn.2d 898, 904 n. 3, 215 P.3d 201 (2009) (*Mathews* balancing test not appropriate to use in determining whether a criminal defendant received adequate due process); *Dusenbery v. United States*, 534 U.S. 161, 167, 122 S. Ct. 694, 151 L. Ed. 2d 597 (2002) (*Mathews* balancing test does not apply to due process analysis of administrative forfeiture of property seized during the execution of a search warrant).

procedure simply because it may produce more safeguards to a defendant.¹³

Of significance in defendant's case is that she was not charged with this crime for owning her dog on September 22, 2012, when it bit Melaina, but only for owning it on October 16, 2012, by which time two animal control officers had discussed the incident with her and explained her responsibilities. She was not being held accountable for circumstances beyond her control. Defendant received due process in her criminal trial where the City had to prove, beyond a reasonable doubt, that on October 16, 2012 her dog was dangerous and she knew her dog was dangerous.¹⁴ The court in *Rabon v. Seattle*¹⁵ noted that the defendant's dog was "found to be vicious in a criminal proceeding with maximum due process" and did not suggest that this finding had to be made prior to a criminal prosecution.

¹³ *State v. Hurst*, 158 Wn. App. 803, 809, 244 P.3d 954 (2010), *affirmed*, 173 Wn.2d 597, 269 P.3d 1023 (2012).

¹⁴ *See* Instruction No. 12; CP 101.

¹⁵ 107 Wn. App. 734, 744, 34 P.3d 821 (2001).

A somewhat similar situation arose in *City of Pierre v. Blackwell*,¹⁶ where the defendant's dog bit a child, an animal control officer determined that the dog was dangerous, the defendant refused to comply with the requirements for owning a dangerous dog and he then was charged with the crime of refusing to comply with the requirements for owning a dangerous dog. The ordinance did not expressly provide for an administrative hearing to determine the dog's dangerousness, although neither was such a hearing prohibited.¹⁷ The court rejected the claim that the ordinance was unconstitutional on the ground that it allowed an adjudication of the dog's dangerousness without a prior hearing.¹⁸ The court noted that if the City had given the defendant a civil hearing, it would have had to prove the dog's dangerousness by a preponderance of the evidence, but inasmuch as the City chose to bring a criminal charge,

¹⁶ 635 N.W.2d 581, 583-84 (2001).

¹⁷ *Blackwell*, 635 N.W.2d at 585 n. 1. The ordinance was amended after this decision to authorize administrative review of the animal control officer's determination.

¹⁸ *Blackwell*, 635 N.W.2d at 584-85. The court reversed the defendant's conviction, however, because at the criminal trial the judge did not determine whether the dog was dangerous, but merely reviewed the animal control officer's decision. *Blackwell*, 635 N.W.2d at 586-87.

its burden of proof was beyond a reasonable doubt.¹⁹ Again, at defendant's trial, the City proved to the jury, beyond a reasonable doubt, that her dog was dangerous.²⁰

Defendant's reliance on Justice Durham's concurring opinion in *State v. Bash*²¹ is misplaced for several reasons. First, *Bash* concerned a statute whose ambiguous language is not the same or similar to that of Seattle's ordinance.²² Second, a concurring appellate opinion has no precedential value.²³ Third, neither this concurring opinion nor either of the other opinions stated that an administrative determination that a dog is dangerous is constitutionally required in order to prove the owner's knowledge of that nature.

¹⁹ *Blackwell*, 635 N.W.2d at 585-86.

²⁰ See Instruction No. 12; CP 101.

²¹ 130 Wn.2d 594, 611-14, 925 P.2d 978 (1996).

²² See *Bash*, 130 Wn.2d at 600 (The owner of any dog that aggressively attacks and causes severe injury or death of any human, whether the dog has previously been declared potentially dangerous or dangerous, shall be guilty of a class C felony punishable in accordance with RCW 9A.20.021.)

²³ *Brother International Corp. v. National Vacuum & Sewing Machine Stores*, 9 Wn. App. 154, 158, 510 P.2d 1162 (1973); see also *In the Matter of the Personal Restraint of Isadore*, 151 Wn.2d 294, 302, 88 P.3d 390 (2004).

Defendant may be equating the element of an owner's knowledge of a dog's dangerousness with being given notice of a determination that a dog is dangerous. In *Auburn v. Solis-Marcial*,²⁴ the court held that service of an order on a defendant is not the sole means of proving his knowledge of the contents of that order. Similarly, an administrative declaration that an animal is dangerous is not the sole means of proving the owner's knowledge of that characteristic.

Defendant's reliance on *State v. Whitney*²⁵ is misplaced as the only means by which a person's driving privilege can be revoked is through action by the Department of Licensing.²⁶ Indeed, a driver's knowledge that his driving privilege is revoked is not an element of the crime of Driving While License Revoked,²⁷ nor is a driver's

²⁴ 119 Wn. App. 398, 79 P.3d 1174 (2003).

²⁵ 78 Wn. App. 506, 897 P.2d 374, *review denied*, 128 Wn.2d 1003 (1995).

²⁶ See RCW 46.20.245(1), which provides, in pertinent part: Whenever the department proposes to withhold the driving privilege of a person or disqualify a person from operating a commercial motor vehicle and this action is made mandatory by the provisions of this chapter or other law, the department must give notice to the person in writing by posting in the United States mail, appropriately addressed, postage prepaid, or by personal service.

²⁷ See RCW 46.20.342; *Whitney*, 78 Wn. App. at 514.

knowledge that his driving privilege is revoked sufficient to prove that the privilege was revoked.²⁸

Defendant's reliance on *Ohio v. Cowan*²⁹ is misplaced because in that case the issue of the dog's dangerousness was removed from the jury's consideration. Moreover, in a subsequent case involving a charge of permitting a vicious dog to be off leash, the same court held that the owner's due process rights were satisfied by a criminal trial at which the prosecution alleged and had to prove that his dogs were vicious.³⁰ The court recognized that the statutory scheme shifted the risk of dog ownership to the dog owner in order to protect the public.³¹

Traylor argues that an owner cannot know that his dog is vicious until he is convicted under the ordinance. To hold otherwise, however, would be to permit each dog "one free bite," a result that would clearly leave society at risk. A responsibility of dog ownership is to maintain and control the animal.³²

²⁸ *State v. Dolson*, 138 Wn.2d 773, 782, 982 P.2d 100 (1999).

²⁹ 103 Ohio St.3d 144, 148, 814 N.E.2d 846 (2004).

³⁰ *Youngstown v. Traylor*, 123 Ohio St.3d 132, 137, 914 N.E.2d 1026 (2009) (Traylor's dogs were alleged to be vicious in his criminal complaint, and Traylor was given an opportunity for meaningful review in front of the trial court.)

³¹ *Traylor*, 123 Ohio St.3d at 137.

³² *Traylor*, 123 Ohio St.3d at 137-38.

Defendant has not established that due process requires an administrative determination that an animal is dangerous before an owner can be charged with Owing a Dangerous Animal.

2. Defendant has not established that the difference in the sanctions available for an administrative determination that her dog is dangerous and a criminal conviction violates the privileges and immunities clause.

If an animal is declared to be dangerous in an administrative hearing, the Director may order the animal to be killed, sent to a secure shelter or removed from the City.³³ If a defendant is convicted of the crime of Owing a Dangerous Animal, the animal must be killed.³⁴ Defendant contends that the difference in these sanctions violates the privileges and immunities clause of the Washington constitution, article 1, section 12.

The term “privileges and immunities” refers to those fundamental rights which belong to the citizens of Washington by reason of such citizenship.³⁵ For a violation of article I, section 12 to occur, the law, or its application, must confer a privilege to a class of

³³ SMC 9.25.035A.

³⁴ SMC 9.25.083C.

citizens.³⁶ Article I, section 12 provides greater protection than the equal protection clause only where the challenged law grants a privilege or immunity to a minority class, *i.e.*, in the event of positive favoritism.³⁷

Defendant suggests that the difference in these sanctions privileges a citizen against whom the City initiates only a civil sanction. Defendant seems to ignore the option available in the civil proceeding of killing the dangerous animal. Moreover, initiation by the City of a civil proceeding against a dangerous animal certainly would not preclude a criminal prosecution against the animal's owner. The administrative and criminal remedies available to the City are not mutually exclusive. The structure of the Seattle's animal control ordinances does not create a privileged class of citizens. As a person's property interest in an animal is imperfect or qualified

³⁵ *Ockletree v. Franciscan Health System*, 179 Wn.2d 769, 778, 317 P.3d 1009 (2014).

³⁶ *Grant County Fire Protection District No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 812, 83 P.3d 419 (2004).

³⁷ *Andersen v. King County*, 158 Wn.2d 1, 18, 138 P.3d 963 (2006).

rather than absolute,³⁸ defendant does not have a right to own a dangerous dog by reason of her Washington citizenship.

Defendant's reliance on *State v. Zornes*³⁹ and *Olsen v. Delmore*⁴⁰ suggests that she is raising an equal protection challenge.

The rule in those cases, however, concerns a prosecutor's option to charge a different classification of crime for the same conduct:⁴¹

This court, in *In re Olsen v. Delmore*, 48 Wash.2d 545, 295 P.2d 324 (1956), approved and adopted the rule that an act which prescribes different punishments for the same act and thereby purports to authorize the prosecutor to charge one person with a felony and another with a misdemeanor for the same act committed under the same circumstances, denies the equal protection of the law guaranteed by the fourteenth amendment of the United States Constitution and article 1, section 12, of the constitution of this state.⁴²

³⁸ *Graham v. Notti*, 147 Wn. App. 629, 634, 196 P.3d 1070 (2008), *review denied*, 166 Wn.2d 1006 (2009).

³⁹ 78 Wn.2d 9, 475 P.2d 109 (1970).

⁴⁰ 48 Wn.2d 545, 295 P.2d 324 (1956).

⁴¹ Subsequent cases limited *Olsen* to a situation involving two different classifications of crimes. *See State v. Blanchey*, 75 Wn.2d 926, 939-40, 454 P.2d 841 (1969); *State v. Boggs*, 57 Wn.2d 484, 489-90, 358 P.2d 124 (1961).

⁴² *Zornes*, 78 Wn.2d at 21.

In *Kennewick v. Fountain*,⁴³ the court held that this rule does not apply where the prosecutor could charge a civil infraction or a crime with the same substantive elements because of the difference in the burdens of proof. As the court held in *Yakima County Clean Air Authority v. Glascam Builders, Inc.*,⁴⁴ “[i]t is constitutionally permissible to provide for civil or criminal penalties, or both, for the same act.” For example, in *State v. Ankney*,⁴⁵ the court held that an animal control ordinance authorizing either a civil or a criminal penalty for the same violation did not violate equal protection.

Under the administrative process for declaring an animal to be dangerous, the burden of proof is a preponderance of the evidence.⁴⁶ In a criminal charge of Owning a Dangerous Animal, the burden of proving the animal is dangerous is proof beyond a reasonable doubt.⁴⁷ This difference in the burden of proof eliminates any equal

⁴³ 116 Wn.2d 189, 193-94, 802 P.2d 1371 (1991).

⁴⁴ 85 Wn.2d 255, 260, 534 P.2d 33 (1975).

⁴⁵ 53 Wn. App. 393, 395-99, 766 P.2d 1131 (1989).

⁴⁶ See SMC 9.25.036C (standard of review of Director’s decision is de novo and the burden of proof is a preponderance of the evidence); *Mansour v. King County*, 131 Wn. App. 255, 266, 128 P.3d 1241 (2006) (burden of proof to prove that a dog exhibits vicious propensities is preponderance of evidence).

⁴⁷ RCW 9A.04.100.

protection objection. Defendant has not established that a prosecutor's option to pursue a civil determination that an animal is dangerous or a criminal charge of Owing a Dangerous Animal violates the privileges and immunities constitutional provision.

3. Admission of Officer Jackson's non-hearsay testimony did not violate defendant's right of confrontation.

In accepting review, the Commissioner authorized defendant to brief two issues that the court could decide to consider. The first is whether admission of Officer Jackson's testimony that, in speaking to defendant, he recounted to her what Melaina had told him about how the dog bite occurred⁴⁸ violated defendant's confrontation rights. Prior to trial, the trial court determined that this testimony was not being offered for its truth, but to show its effect on defendant.⁴⁹

The trial court's determination regarding the purpose of this testimony is supported by *Spokane County v. Bates*,⁵⁰ where an animal control officer's testimony regarding complaints the agency

⁴⁸ CP 310.

⁴⁹ CP at 272-81.

had received about the defendant's dog was held to be not offered to prove the truth of the complaints, but to show that the defendant had been informed about the aggressive behavior of his dog. This is exactly the reasoning relied on by the trial court regarding Officer Jackson's testimony,⁵¹ and defendant's argument that this testimony was admitted to show the background or context of the incident seems to ignore completely the trial court's stated reason for its ruling.

In *Crawford v. Washington*,⁵² the court stated that even testimonial hearsay is not barred when offered for a purpose other than establishing the truth of the matter asserted. Washington courts also have held that testimony not presented for the truth of the matter asserted does not implicate the confrontation clause,⁵³ as have courts in other states, specifically with respect to testimony offered to show

⁵⁰ 96 Wn. App. 893, 899-900, 982 P.2d 642 (1999), *review denied*, 139 Wn.2d 1023 (2000).

⁵¹ CP 273 & 278-79.

⁵² 541 U.S. 36, 59 n. 9, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

⁵³ *State v. James*, 138 Wn. App. 628, 641, 158 P.3d 102 (2007), *review denied*, 163 Wn.2d 1013 (2008); *State v. Mason*, 127 Wn. App. 554, 566 n. 26, 126 P.3d 34 (2005), *affirmed*, 160 Wn.2d 910, 162 P.3d 396 (2007), *cert. denied*, 553 U.S. 1035 (2008).

its effect on the listener.⁵⁴ As the purpose of Officer Jackson's testimony was to show the effect of Melaina's statements on defendant, their truth was immaterial and the testimony did not violate defendant's confrontation rights.

4. The trial court did not abuse its discretion by overruling defendant's objection to Officer Jackson's testimony that this incident involved an unprovoked bite.

The other issue the Commissioner authorized defendant to brief, and which the court could decide, is whether Officer Jackson's testimony that, after explaining to defendant the difference between a provoked bite and an unprovoked bite, he told her that this incident involved an unprovoked bite⁵⁵ was improper opinion testimony. Testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the jury.⁵⁶ Although a witness may not give an

⁵⁴ *United States v. Wright*, 739 F.3d 1160, 1170-71 (8th Cir. 2014); *Connecticut v. Nelson*, 144 Conn. App. 678, 688-91, 73 A.3d 811, cert. denied, 310 Conn. 935 (2013); *Ohio v. Osie*, 140 Ohio St. 3d 131, 152-54, 16 N.E.3d 588 (2014), cert. denied, 135 S. Ct. 1562 (2015).

⁵⁵ CP 313.

⁵⁶ *State v. Mason*, 160 Wn.2d 910, 932, 162 P.3d 396 (2007), cert. denied, 553 U.S. 1035 (2008); see ER 704, which provides:

opinion as to a defendant's guilt, there are, however, factual questions many of which bear upon the question of guilt for which opinions are permitted.⁵⁷ A trial court has broad discretion to determine the admissibility of ultimate issue testimony,⁵⁸ and the appellate courts have expressly declined to take an expansive view of claims that testimony constitutes an opinion on guilt.⁵⁹ A trial court's decision admitting opinion testimony is reviewed for abuse of discretion.⁶⁰

To determine whether statements are impermissible opinion testimony, a court will consider the circumstances of the case, including the type of witness involved, the specific nature of the testimony, the nature of the charges, the type of defense and the other evidence before the trier of fact.⁶¹ Officer Jackson certainly is

Testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

⁵⁷ *State v. Lewellyn*, 78 Wn. App. 788, 793-94, 895 P.2d 418 (1995), *affirmed*, 130 Wn.2d 215, 922 P.2d 811 (1996).

⁵⁸ *Seattle v. Heatley*, 70 Wn. App. 573, 579, 854 P.2d 658 (1993), *review denied*, 123 Wn.2d 1011 (1994).

⁵⁹ *State v. Demery*, 144 Wn.2d 753, 760, 30 P.3d 1278 (2001).

⁶⁰ *Demery*, 144 Wn.2d at 758.

⁶¹ *State v. King*, 167 Wn.2d 324, 332-33, 219 P.3d 642 (2009); *Demery*, 144 Wn.2d at 759.

a government witness. The nature of his testimony concerned not an opinion as to or comment on defendant's guilt, state of mind or veracity,⁶² but an inference he drew from conversing with Melaina, observing her injury and conversing with defendant. This testimony was based on the officer's personal observations. The purpose of his testimony was to show that defendant had knowledge of the consequences of the incident and to rebut any claim that she did not know that her dog came within the definition of a dangerous animal. The defense was that the City had not proven the bite was unprovoked because neither the victim nor any of the witnesses present at the time testified and Officer Jackson's testimony was unreliable because it was given more than one year after the incident.⁶³ The other evidence was quite strong and seemingly undisputed – defendant acknowledged that her dog bit Melaina, never claimed that Melaina had done anything to incite the dog and tried to dissuade her from pursuing any remedy for the bite. During

⁶² *State v. Blake*, 172 Wn. App. 515, 525-26, 298 P.3d 769 (2012), review denied, 177 Wn.2d 1010 (2013) (testimony that did not concern an opinion on the defendant's intent or the veracity of any witness and which

closing argument, the prosecutor did not even mention Officer Jackson's testimony that he told defendant the bite was unprovoked,⁶⁴ much less argue that it proved the bite was unprovoked. Inasmuch as neither the purpose of the testimony nor its suggested use was to usurp the jury's function, it was not improper opinion evidence.

In *State v. Nelson*,⁶⁵ the trial court admitted expert testimony that the dogs on the defendants' property were possessed with the intent that they be used in dogfighting. Notwithstanding that this testimony was couched in terms of the statutory elements of the crime charged, admission of this testimony, which was not a direct statement of guilt or a comment on the defendants' credibility, was not an abuse of discretion.⁶⁶ The court characterized the testimony as "a fair summary and opinion of the significance of the other evidence offered by the State" and noted that "[i]t was then up to the

was not a statement of the witnesses' belief as to the defendant's guilt not objectionable).

⁶³ CP 392-94.

⁶⁴ See CP 381-86 & 396-402.

⁶⁵ 152 Wn. App. 755, 763-64, 219 P.3d 100 (2009), *review denied*, 168 Wn.2d 1028 (2010).

⁶⁶ *Nelson*, 152 Wn. App. at 765-69.

jury to accept either the defendants' characterization of the evidence or the State's."⁶⁷ Similarly, Officer Jackson's testimony was a fair summary and opinion as to the significance of the circumstances surrounding defendant's dog biting Melaina and it was then up to the jury to decide whether defendant's dog was dangerous. The trial court did not abuse its discretion by admitting this testimony.

Defendant also challenges the trial court's admission of Officer Jackson's testimony that he issued a citation to defendant⁶⁸ and claims that her attorney was ineffective for failing to object to this testimony. The Commissioner did not accept review on these issues. This court will not consider issues for which discretionary review was not granted.⁶⁹ Defendant's claims of error in this regard should not be considered.

⁶⁷ *Nelson*, 152 Wn. App. at 768.

⁶⁸ CP 313. Contrary to defendant's argument, Officer Leahy did not testify that she cited defendant for having a dangerous dog. *See* CP 323. This officer told defendant that if she did not remove the dog from the City, she may be charged with a crime. CP 324-25. Also, when Officer Leahy started to testify that defendant's dog was dangerous, defense counsel objected and the jury was excused. CP 321.

⁶⁹ *City of Bothell v. Barnhart*, 156 Wn. App. 531, 538 n 2, 234 P.3d 264 (2010), *affirmed*, 172 Wn.2d 223, 257 P.3d 648 (2011).

E. CONCLUSION

Based on the foregoing argument, the superior court's decision affirming defendant's conviction should be affirmed.

Respectfully submitted this 23rd day of June, 2015.

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