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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
B. \_\_\_\_\_

301028-III

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Plaintiff/Respondent,

v.

SHARON LYNNE PROVOST,

Defendant/Appellant.

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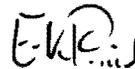
APPEAL FROM THE ADAMS COUNTY SUPERIOR COURT

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APPELLANT'S REPLY BRIEF

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Respectfully submitted:



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TABLE OF CONTENTS

Page No.

I. **ARGUMENT**.....1-10

A. Ms. Provost maintains the trial court incorrectly took witness testimony at her suppression hearing and then erred in concluding both the initial search of her property was lawful and that a nexus existed between her home and criminal activity.....1-2

B. Ms. Provost maintains the trial court erred in admitting testimony at trial from Dr. William Grant about his conversations with her concerning her dogs.....3-4

C. Ms. Provost maintains the trial court erred in admitting photographs at trial depicting living conditions inside her home.....4-6

D. Ms. Provost maintains the trial court erred in admitting testimony at trial from Deputy Verhey regarding a prior complaint made in August of 2007 about the welfare of her dogs.....6-7

E. Ms. Provost maintains the State’s evidence failed to establish each of the elements of First Degree Animal Cruelty beyond a reasonable doubt.....7-8

F. Ms. Provost maintains her trial counsel was ineffective in failing to offer an instruction to the jury on the affirmative defense to the lesser included offense of Second Degree Animal Cruelty.....8-9

G. Ms. Provost maintains cumulative errors at trial deprived her of a fair trial.....9-10

H. The State concedes that the prohibition on owning, harboring, caring for or living with dogs and cats should have been limited to five years and asks this Court to remand for resentencing......10

II. CONCLUSION.....11

TABLE OF AUTHORITIES

State Cases

	Page No.
<i>State v. Crandall</i> , 39 Wash.App. 849, 697 P.2d 250 (1985).....	1, 2
<i>State v. Greiff</i> , 141 Wn.2d 910, 10 P.3d 390 (2000).....	9
<i>State v. Hansen</i> , 42 Wash.App. 755, 714 P.2d 309 (1986).....	1, 2
<i>State v. Saunders</i> , 120 Wn.App. 800, 86 P.3d 232 (2004).....	9
<i>State v. Sullivan</i> , 60 Wn.2d 214, 373 P.2d 474 (1962).....	3, 4

U.S. Supreme Court Cases

<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	8
---	---

Statutes and Rules

ER 403.....	6
ER 404(b).....	6
RCW 9.94A.535.....	10

## I. ARGUMENT

- A. MS. PROVOST MAINTAINS THE TRIAL COURT INCORRECTLY TOOK WITNESS TESTIMONY AT HER SUPPRESSION HEARING AND THEN ERRED IN CONCLUDING BOTH THE INITIAL SEARCH OF HER PROPERTY WAS LAWFUL AND THAT A NEXUS EXISTED BETWEEN HER HOME AND CRIMINAL ACTIVITY.

The State argues the trial court needed to hear witness testimony in order to resolve the issue of whether the information contained in the search warrant affidavit was unlawfully obtained. However, at the time of the suppression hearing, Ms. Provost's counsel decided only to challenge the validity of the warrant, thereby eliminating the need for witness testimony. (10/29/2010 RP 28-30).

Should this Court decide it was proper to take witness testimony, this Court must still determine whether the search was lawful and also whether a nexus existed between Ms. Provost's home and criminal activity.

With regard to the first inquiry, the State relies upon *State v. Crandall*, 39 Wash.App. 849, 697 P.2d 250 (1985) and *State v. Hansen*, 42 Wash.App. 755, 714 P.2d 309 (1986) to support its claim that the search was lawful. However, both *Crandall* and *Hansen* are distinguishable. In *Crandall*, the officer initially used his rifle scope from a vantage of approximately 150 feet away to confirm the presence of

marijuana plants on neighboring land. *Crandall*, 39 Wash.App. at 850. In *Hansen*, the officer initially observed marijuana plants in a clearing from a lawful vantage point on the roadway. *Hansen*, 42 Wash.App. at 757. In the instant case, Deputy Buriak had to drive onto the property and physically enter each of Ms. Provost's sheds in order to observe the alleged criminal activity. It is the act of leaving a lawful vantage point and intruding into each shed which separates this case from *Crandall* and *Hansen*.

With regard to the second inquiry, which is whether or not a nexus existed between Ms. Provost's home and criminal activity, the State essentially asks this Court to make the unsubstantiated conclusion that because Ms. Provost had animals living in poor conditions on her lands then she must have also had the same inside her home. In fact, the State claims, "*it was reasonable to assume that there would be animals living in poor conditions inside the house, as well,*" which essentially acknowledges a lack of evidence. (Brief of Respondent, p. 15) (emphasis added). The State also claims, "Ms. Provost was running a puppy mill out of her house." (Brief of Respondent, p. 15). Yet there was no evidence whatsoever to support this. As such, the issuing magistrate lacked probable cause to issue the warrant for Ms. Provost's home. All evidence obtained as a result should have been suppressed.

B. MS. PROVOST MAINTAINS THE TRIAL COURT ERRED IN ADMITTING TESTIMONY AT TRIAL FROM DR. WILLIAM GRANT ABOUT HIS CONVERSATIONS WITH HER CONCERNING HER DOGS.

The State claims Dr. Grant's testimony was allowable at trial because the physician-patient privilege did not apply. In support of its claim, the State relies squarely upon *State v. Sullivan*, 60 Wn.2d 214, 223-24, 373 P.2d 474 (1962). However, in *Sullivan*, the Supreme Court of Washington reversed the defendant's conviction and remanded for a new trial. *Id.* at 226. There, as here, the accused made statements to a psychiatrist who was employed by the State at a State-run hospital. *Id.* at 222. There, as here, the accused was at the hospital pursuant to a court order. *Id.* The *Sullivan* Court concluded the psychiatrist's testimony fell within the ambit of the doctor-patient privilege and that the trial court erred in admitting his testimony. *Id.* at 224-26. The *Sullivan* Court noted that:

“In regard to mental patients, the policy behind such a statute is particularly clear and strong. Many physical ailments might be treated with some degree of effectiveness by a doctor whom the patient did not trust, but a psychiatrist must have his patient's confidence or he cannot help him. ‘The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame. Most patients who undergo psychotherapy know that this is what will be expected of them, and that they cannot

get help except on that condition. It would be too much to expect them to do so if they knew that all they say-and all that the psychiatrist learns from what they say-may be revealed to the whole world from a witness stand.”

*Id.* at 225.

Given the plain language and holding of the *Sullivan* case, Ms. Provost’s statements to Dr. Grant were privileged communications. It was reversible error for the trial court to allow Dr. Grant to testify.

C. MS. PROVOST MAINTAINS THE TRIAL COURT ERRED IN ADMITTING PHOTOGRAPHS AT TRIAL DEPICTING LIVING CONDITIONS INSIDE HER HOME.

The State argues the photographs at issue were highly probative of whether Ms. Provost confined animals in an unsafe manner at her property in Lind, Washington. However, this argument is unpersuasive and fails for several reasons.

First, the State’s Second Amended Information alleges in count five that Ms. Provost willfully confined dogs located *on Defendant’s property* on East Third Street. (CP 292) (emphasis added). The State claims the interior of Mr. Provost’s house is part of her property, but the plain language of the charging document reads, “on Defendant’s property.” Had the State intended to include the interior of Ms. Provost’s residence, it simply could have altered the language of the charging

document to read, “on Defendant’s property and/or inside her residence.”

The State did not do so.

Second, count five alleges Mr. Provost willfully confined dogs on her property *on or about July 12, 2008*, which is the date law enforcement executed the search warrant. (CP 292) (emphasis added). The State argues the home contained dead animal carcasses and also appeared to have recently contained live animals as evidenced by the large amounts of fecal matter. However, count five only alleges criminal activity on or about July 12, 2008. The State presented no evidence at trial that the dead decaying animals found inside the home were in fact living inside the home on or about July 12, 2008. Likewise, the State presented no evidence that the fecal matter inside the home was fresh. To the contrary, the State’s theory at trial was that the overall conditions inside the home and on Ms. Provost’s lands had been that way for quite some time.

Lastly, and most importantly, count five alleges Ms. Provost willfully confined *dogs* on her property. (CP 292) (emphasis added). Yet the State chose to introduce photographs of a goat carcass in a shower, photographs of a mummified cat near a litter box and a photograph of a dead mouse in a shoe. (06/22/2011 RP 365-370). The State claims it did not introduce these photographs to paint Ms. Provost as a disgusting human being, but instead to show that live animals had recently endured

horrific conditions inside the house. However, it is unmistakable that count five pertains only to dogs, not goats, cats or mice. By the time of trial, the State knew these photographs depicted animals other than dogs, yet it chose nevertheless to introduce these photographs.

Not only were these photographs irrelevant, they were highly prejudicial. The prosecutor relied heavily upon the photographs during closing argument and also commented on the dead animals inside the house. (06/23/2011 RP 496-497). At sentencing, the trial court also commented on the horrific nature of the photographs. (06/23/2011 RP 565-566). Any probative value in these photographs was clearly outweighed by the danger of unfair prejudice. *See* ER 403. The trial court abused its discretion in admitting them.

D. MS. PROVOST MAINTAINS THE TRIAL COURT ERRED IN ADMITTING TESTIMONY AT TRIAL FROM DEPUTY VERHEY REGARDING A PRIOR COMPLAINT MADE IN AUGUST OF 2007 ABOUT THE WELFARE OF HER DOGS.

The State claims testimony by Deputy Verhey was admissible under ER 404(b) to show both knowledge and absence of mistake.<sup>1</sup> Those claims were not raised by the State below. Ms. Provost maintains that testimony about the prior complaint was irrelevant and that any possible relevance or probative value in the testimony was outweighed by the

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<sup>1</sup> During pretrial motions, the State did not raise knowledge or absence of mistake as bases to admit the testimony, instead relying exclusively on *modus operandi*. (06/23/2011 RP 23).

danger of unfair prejudice. As argued in her opening brief, the testimony incorrectly allowed the jury to conclude that Ms. Provost had starved, neglected and abused her dogs continuously on a daily basis for the preceding 11 months leading up to July of 2008, and that she failed to take any remedial measures to clean up the properties.

E. MS. PROVOST MAINTAINS THE STATE'S EVIDENCE FAILED TO ESTABLISH EACH OF THE ELEMENTS OF FIRST DEGREE ANIMAL CRUELTY BEYOND A REASONABLE DOUBT.

The State argues that, although there was no direct evidence as to cause of death, the circumstantial evidence was sufficient to support Ms. Provost's four animal cruelty convictions. The State claims Deputy Buriak was fully qualified to testify that the dogs appeared deceased. However, Deputy Buriak testified he had no training in animal control or veterinary services. (06/21/2011 RP 335). Deputy Buriak did not attempt to examine the dogs and would not have known what to look for if he had examined them. (06/21/2011 RP 335). He did not have a chance to look at them closely and the record is unclear as to how far away he was from some of the dogs.<sup>2</sup> He also did not see blood on the dogs or other signs of physical trauma. (06/21/2011 RP 317). Those dogs were gone the next

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<sup>2</sup> Deputy Buriak testified that one of the dogs was, "probably from maybe me to the chalkboard away and not even that far." Neither the trial court nor the prosecutor clarified the record to establish how far away the chalkboard was from the witness. (06/21/2011 RP 316).

time Deputy Buriak visited the property. (06/21/2011 RP 336). Based upon his testimony, some of the allegedly deceased dogs, minus maybe the one that was hanging, could have been sick, injured or sleeping as opposed to dead.

The State also claims the testimony from Nicole Montano of SCRAPs was sufficient to establish beyond a reasonable doubt that Ms. Provost's failure to care for the dogs caused their deaths. However, the general nature of Ms. Montano's testimony was that the conditions were inadequate and posed health risks to the animals. (06/22/2011 RP 378-387). Ms. Montano did not and could not testify as to the dogs' causes of death. None of the dogs were ever inspected by a veterinarian. (06/22/2011 RP 336). The State's evidence not only fails to establish that some of the dogs were in fact deceased, but it fails to establish that Ms. Provost caused the deaths.

F. MS. PROVOST MAINTAINS HER TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO OFFER AN INSTRUCTION TO THE JURY ON THE AFFIRMATIVE DEFENSE TO THE LESSER INCLUDED OFFENSE OF SECOND DEGREE ANIMAL CRUELTY.

The State argues Ms. Provost has failed to satisfy both prongs of the *Strickland* test with regard to her ineffective assistance claim. *Strickland v. Washington*, 466 U.S. 668, 684-86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A careful reading of the crux of the State's argument

appears to reveal the State's position on this issue; that defense counsel in general can never be ineffective for failing to request an affirmative defense instruction on a lesser included offense when the jury convicts of the greater offense. The State has provided no legal authority supporting this position. As such, Ms. Provost will rely on the arguments made in her opening brief with regard to this issue.

G. MS. PROVOST MAINTAINS CUMULATIVE ERRORS AT TRIAL DEPRIVED HER OF A FAIR TRIAL.

The State argues there were no errors committed in Ms. Provost's trial. The State also claims, in the alternative, that even if this Court finds error, there was no prejudicial error, as the remaining untainted evidence was sufficient to support Ms. Provost's convictions. *See State v. Saunders*, 120 Wn.App. 800, 826, 86 P.3d 232 (2004).

The cumulative error doctrine applies where several trial errors, standing alone, are insufficient to justify reversal but when combined, deny the accused of a fair trial. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Ms. Provost steadfastly maintains that each of her claimed assignments of error are sufficient to warrant a new trial. Setting aside the merits of those claims, the accumulation of errors at her trial necessitates a reversal of her conviction and a remand. The magnitude of some of those errors, especially admission of the photographs, makes

those errors highly prejudicial. Furthermore, as stated in Ms. Provost's fifth assignment of error, the State's evidence consisted almost exclusively of circumstantial evidence that was insufficient to support a finding of guilt beyond a reasonable doubt. Excluding the improperly admitted evidence leaves even less evidence for which a jury to find guilt. Ms. Provost's case should be remanded for a new trial.

H. THE STATE CONCEDES THAT THE PROHIBITION ON OWNING, HARBORING, CARING FOR, OR LIVING WITH DOGS AND CATS SHOULD HAVE BEEN LIMITED TO FIVE YEARS AND ASKS THIS COURT TO REMAND FOR RESENTENCING.

Ms. Provost contends the lower court abused its discretion in imposing an exceptional sentence and ordering her to not own, house, harbor or care for domestic animals for 20 years. The State concedes this issue in its response brief and agrees the lower court lacked a basis under RCW 9.94A.535 to impose an exceptional sentence. As the parties are in agreement, Ms. Provost's case must be remanded for resentencing.

## II. CONCLUSION

Ms. Provost respectfully asks that this Court grant her the requested relief.

DATED: April 19, 2012.

Respectfully submitted:



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