

Div. III No. 321762

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

**FILED**

FEB 20 2015

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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STATE OF WASHINGTON

Plaintiff/Respondent,

vs.

SHARON LYNNE PROVOST

Defendant/Appellant.

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BRIEF OF APPELLANT

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Attorney for Appellant:

ROBERT E. SCHIFFNER, WSBA #20048  
PO Box 776  
Moses Lake, WA 98837  
Tel: (509) 750-2212

TABLE OF CONTENTS

	Page
ASSIGNMENTS OF ERROR .....	1
STATEMENT OF THE CASE .....	2
NATURE OF ACTION .....	2
FACTS .....	2
ARGUMENT .....	5
ASSIGNMENT OF ERROR A .....	6
CONCLUSION .....	8

TABLE OF AUTHORITIES

	Page
<u>Table of Cases</u>	
<u>Washington Cases:</u>	
<i>State v. Bowerman</i> , 115 Wash.2d 794, 802 P.2d 116 (1990) .....	6
<i>State v. McFarland</i> , 127 Wash.2d 322, 899 P.2d 1251(1995) .....	5
<i>State v. Smith</i> , 154 Wash.App. 272, 223 P.3d 1262 (2009) .....	6, 7
 <u>Other Jurisdictions:</u>	
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) .....	5
 <u>Statutes</u>	
RCW 10.61.006 .....	6
RCW 10.61.010 .....	6
RCW 16.52.205 .....	2, 6
RCW 16.52.207 .....	7

## ASSIGNMENTS OF ERROR

A. That trial counsel's failure to request a lesser included jury instruction for animal cruelty in the second degree violated Ms. Provost's right to effective assistance of counsel.

## STATEMENT OF THE CASE

### 1. Nature of Action

Appellant, Sharon Provost, appeals her felony conviction for one count animal cruelty in the first degree in violation of RCW 16.52.205 by jury verdict in the Adams County Superior Court, No. 08-1-00138-5, the Honorable David Frazier presiding.<sup>1</sup>

This is her second appeal to this court regarding the events that occurred near Lind, Washington on July 3, 2008. This court previously reversed Ms. Provost's convictions from her first trial in an unpublished opinion (hereafter *Provost I*) (Court of Appeals, Division III, 301028-III).

### 2. Facts

On July 3, 2008, the Adams County Sheriff's Office received an anonymous phone call alleging that several dogs were being mistreated on a non-residential farm just south of Lind, Washington (RP 50-51). Deputy Ben Buriak was dispatched to investigate (RP 52). Although he did not know the identity of the person who called the Adams County Sheriff's Office, and did not possess a search warrant, Deputy Buriak drove down a private dirt path off of Smart Road to reach two small wooden sheds and a larger metal shed (RP 55). This warrantless intrusion was found to be lawful by this court in *Provost I*.

Upon exiting his patrol car, Deputy Buriak was greeted by several dogs (RP 55). He immediately began searching the three sheds and taking pictures (RP 57-60). While conducting his search, Deputy Buriak found and photographed four deceased dogs (RP

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<sup>1</sup> Ms. Provost does not appeal her gross misdemeanor conviction for one count of transporting or confining animals in an unsafe manner in violation of RCW 16.52.205.

55-61). For purposes of this trial, and the trial in *Provost I*, the dogs were labeled Dog A, Dog B, Dog C, and Dog D by the court. Dog D, based upon photographic evidence, had apparently asphyxiated itself by jumping over a short wall while wearing a leash (RP 496). No evidence of the actual cause of death of Dog D, other than Deputy Buriak's photograph of Dog D's corpse, was presented at trial by the State.

While at the Smart Road property, Deputy Buriak found empty dog food bags, a small amount of dog food in bowls, and some water in various bowls (RP 498, 511, 514). Although he thought the conditions were substandard, Deputy Buriak did not attempt to feed or water the animals.

Deputy Buriak then drove to the Appellant's residence in Lind (RP 500). Ms. Provost made a brief statement to Deputy Buriak at her front door (RP 501). Before leaving, Deputy Buriak instructed the Appellant to dispose of the four dead animals (RP 501).

On July 9, 2008, Deputy Buriak drafted an application for a search warrant for the farm unit located on Smart Road and the Appellant's home in Lind (RP 78). The warrant was not executed until July 12, 2008—some nine days after the initial discovery of the conditions at Smart Road (*Id.*). When Deputy Buriak returned to execute the search warrant he found that the bodies of the four dead animals had been removed and that the conditions at Smart Road location had improved—the degree of which was contested at trial (RP 515). A combined total of 93 (ninety-three) dogs were removed from the farm on Smart Road and the house in Lind (*Provost I*).

Based upon the evidence of the search of the Smart Road farm on July 3, 2008, and July 12, 2008, Ms. Provost was charged with four counts of animal cruelty in the first

degree and two counts of transporting or confining in unsafe manner (*Provost D*). During her first trial, the State introduced a substantial amount of photographic evidence of alleged deplorable conditions at Ms. Provost's home in Lind (*Id.*). She was convicted as charged (*Id.*). On appeal, Ms. Provost argued that the search warrant application was overly broad and it should have never included her home in Lind (*Id.*). She further argued that the introduction of the evidence from her home was irrelevant and prejudicial based on the fact that she was only charged for the alleged acts at the Smart Road property (*Id.*).

This court agreed, reversed all charges, and remanded the case back to the trial court for further proceedings (*Id.*).

At Ms. Provost's second trial, the State only introduced evidence regarding the conditions at the Smart Road location (RP 484-560). After the state rested, Ms. Provost moved for a dismissal of all charges on various grounds (RP 561-565). The trial court granted her motion regarding the first three counts of animal cruelty (Dog A, B, and C) and the first count of transporting or confining animals in an unsafe manner (RP 567-571). The court declined to dismiss the remaining two charges (*Id.*).

Ms. Provost then testified on her own behalf regarding the conditions at the Smart Road location (RP 574-83). She further testified that she placed Dog D on a leash because he continually ran into the nearby farmland and she was afraid that he would be attacked and killed by coyotes (RP 581-82).<sup>2</sup> The Appellant also called three other witnesses testify regarding her conduct toward her animals (RP 584-613).

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<sup>2</sup> Again, the State did not present any evidence, other than photographs, of how Dog D died because Deputy Buriak never seized the animal. Instead, Deputy Buriak instructed Ms. Provost to dispose of the Dog D's remains. She complied (RP 502).

After resting, Ms. Provost's attorney failed to request a lesser included jury instruction for animal cruelty in the second degree (RP 622). During deliberations, the jury sent a note to the court asking, "Does the defendant have has [sic] to physically suffocate dog D or could it have been a result of the defendant's action?" (RP 658). The trial court instructed the jury to refer to the instructions already provided to them (RP 658-59).

Ms. Provost was convicted of the two remaining counts (RP 661-62). This timely appeal followed.

## ARGUMENT

### A. MS. PROVOST'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL WAS VIOLATED BY HER TRIAL ATTORNEY'S INEFFECTIVE ASSISTANCE OF COUNSEL

Under Washington law, a defendant must satisfy a two-prong test in order to demonstrate an ineffective assistant of counsel claim. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). First, a defendant must show that defense counsel's representation was deficient, as defined as "falling below an objective standard of reasonableness." *State v. McFarland*, 127 Wash.2d 322, 335-36, 899 P.2d 1251 (1995). Second, a defendant must show that he or she was prejudiced by the deficient representation. *Id.* Prejudice exists if:

. . . there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

*Id.* However, the defendant does not need to go as far as to show that counsel's unprofessional errors "more likely than not altered the outcome in the case." *Strickland*, 466 U.S. at 693, 104 S.Ct. at 2068.

1. TRIAL COUNSEL'S FAILURE TO ASK FOR A LESSER INCLUDED JURY INSTRUCTION WAS DEFICIENT REPRESENTATION AS A MATTER OF LAW

The right to present a lesser included offense instruction to the jury is statutory. RCW 10.61.006; RCW 10.61.010; *State v. Bowerman*, 115 Wash.2d 794, 805, 802 P.2d 116 (1990). A defendant is entitled to a lesser included offense instruction if (1) each of the elements of the lesser offense is a necessary element of the offense charged (legal prong) and (2) the evidence in the case supports an inference that only the lesser crime was committed (factual prong). *State v. Smith*, 154 Wash.App. 272, 277, 223 P.3d 1262 (2009) (trial counsel's failure to request a jury instruction of the lesser-included offense of animal cruelty in the second degree was ineffective assistance of counsel).

a. Legal Prong

Under Washington law, a person commits the crime of animal cruelty in the first degree if:

- (1) A person is guilty of animal cruelty in the first degree when . . . he or she intentionally (a) inflicts substantial pain on, (b) causes physical injury to, or (c) kills an animal by means causing undue suffering, . . .
- (2) A person is guilty of animal cruelty in the first degree when . . . 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 . . .

RCW 16.52.205. Under Washington law, a person commits the crime of animal cruelty in the second degree if:

- (1) . . . under circumstances not amounting to first degree animal cruelty, the person knowingly, recklessly, or with criminal negligence inflicts unnecessary suffering or pain upon an animal.

- (2) 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:
  - (a) 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; . . .

RCW 16.52.207.

As such, each of the elements of animal cruelty in the second degree is a necessary element of the crime of animal cruelty in the first degree. *State v. Smith*, 154 Wash.App. 272, 278, 233 P.3d 1262 (2009).

b. Factual Prong

The factual prong is satisfied when, viewing the evidence in the light most favorable to the party requesting the instruction, substantial evidence supports a rational inference that the defendant committed only the lesser included or inferior degreed offense to the exclusion of the greater one. *Id.* Given the complete lack of evidence that Ms. Provost intentionally acted to cause the death of Dog D, or that Dog D even died from asphyxiation, the jury could have found a rational inference that the Appellant only committed the inferior offense of animal cruelty in the second degree.

Defense counsel's all or nothing strategy at Ms. Provost's second trial left the jury in an arduous position: either convict Ms. Provost of animal cruelty in the first degree or find her not guilty for the death of Dog D despite evidence of some culpable behavior. *See State v. Smith*, 154 Wash.App. 272, 223 P.3d 1262. We know that the jury struggled with this very issue because it requested clarification of the jury instructions regarding the to convict instruction for animal cruelty in the first degree. As such, trial counsel was deficient and ineffective for failing to request the lesser included instruction of animal cruelty in the second degree.

CONCLUSION

Based upon the foregoing legal argument, Appellant respectfully prays this Court to reverse her conviction for animal cruelty in the first degree and remand that count back to the trial court for further proceedings.

DATED this 19th day of February, 2015.

Respectfully Submitted,



Robert Schiffner, WSBA #20048  
Attorney for Appellant

CERTIFICATE OF MAILING

I declare under penalty of perjury under the laws of the State of Washington, that on this day I deposited in the U.S. Mail, postage prepaid, a copy of the document of which this certificate is attached, directed to:

Randy J. Flyckt  
Adams County Prosecutor  
210 W. Broadway Ave  
Ritzville, WA 99169

Signed this 19<sup>th</sup> day of February, 2015 at Moses Lake, Washington.

  
Robert E. Schiffner