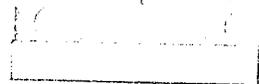


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WA State Court of Appeals, Division III

By  _____



No. 226093-III
COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON

Plaintiff/Respondent

v.

JERRIE L. VANDER HOUWEN, SR.,

Defendant/Petitioner

RESPONDENT'S ANSWER AND REPLY
TO MOTION FOR DISCRETIONARY REVIEW

Kenneth L. Ramm WSBA 16500
Deputy Prosecuting Attorney
Room 211 County Courthouse
Yakima WA 98901
509-574-1200
Attorney for Plaintiff/Respondent

A. IDENTITY OF RESPONDENT

State of Washington, by and through Kenneth L. Ramm, deputy prosecuting attorney for Yakima County.

B. DECISION

On November 7, 2003, the Honorable Michael Schwab, in Yakima County Superior Court Cause Number 01-1-00649-1, affirmed the petitioner's convictions entered in Yakima County District Court. (Appendix A).

C. ISSUES PRESENTED FOR REVIEW

- (1) Can the Petitioner rely on RCW 77.36 for immunity from criminal liability?
- (2) Did the trial court err in not submitting to the jury the Petitioner's instructions regarding the necessity defense re: State v. Burk, 114 Wash. 370, 195 Pac. 16 (1921)?
- (3) Did the trial court's instructions to the jury impermissibly shift the burden of proof to the defense?
- (4) Were their multiple acts presented to the jury requiring a separate unanimity instruction?
- (5) Was there sufficient evidence presented to support the verdicts

of the jury?

- (6) Were the verdicts inconsistent, and if so, what effect would that have on their validity?

C. ANSWERS TO ISSUES PRESENTED FOR REVIEW

- (1) The Petitioner cannot rely on RCW 77.36 for immunity from criminal liability because he did not comply with that statute.
- (2) The instructions given to the jury allowed the defense to present their theory of the case.
- (3) The trial court's instructions did not impermissibly shift the burden of proof to the defense.
- (4) The State did not present multiple acts that were not alleged in the complaints.
- (5) There was sufficient evidence to support the verdicts.
- (6) The verdicts were not inconsistent when one considers the evidence presented regarding the recovery of the two spent rifle slugs in two of the elk.

E. STATEMENT OF FACTS.

The facts presented to the jury, as agreed to by Appendixes B and C are as follows: During the month of January, 2000, the Petitioner contacted

the Department of Wildlife several times to complain that elk were entering his orchard and eating his young trees. On one telephone call to Officer Beireis, the Petitioner stated that shooting over the heads of the elk was not scaring them or preventing them from eating his trees. Officer Beireis said that he would attempt to organize a drive to move the elk behind the elk fence, but that he could not do that until the following week due to the upcoming Martin Luther King holiday on Monday. Petitioner told Officer Beireis that he could not wait that long and that he would have to lower his sites and shoot them.

On January 27, 2000, a report was made to the Department of Wildlife that dead elk were seen in the Petitioner's orchard. Sergeant Kohls and Officer Beireis went to Petitioner's orchard and located ten elk that were dead. The officers, through the use of a metal detector, located bullet slugs in two of the ten dead elk. The two slugs found by the officers were determined to be from a .270 caliber rifle.

Elk carcasses were scatted throughout the area of the orchard, both inside and outside the orchard. The officers contacted Petitioner at the orchard. Petitioner admitted to shooting at the elk. Petitioner also admitted owning a .270 caliber rifle.

The jury returned verdicts of guilty to two counts of Killing Game Out of Season. The Petitioner filed an appeal to Yakima County Superior Court. Judge Michael Schwab denied Petitioner's appeal, setting forth the reasons in the Order for Remand, Appendix A. This motion for discretionary review follows.

F. ARGUMENT

- (1) THE PETITIONER CANNOT RELY ON RCW 77.36.030 FOR IMMUNITY FROM CRIMINAL LIABILITY BECAUSE HE DID NOT COMPLY WITH THAT CHAPTER.

The Petitioner's reliance upon RCW 77.36.030 is misplaced. Those statutory defenses are inapplicable, because RCW 77.36.030(1) only allows a landowner to kill wildlife if permission is given (written permission, if no emergency, verbal followed by written permission if there is an emergency). In this case, no permission was given whatsoever by any agent of the State.

RCW 77.36.030 provides as follows:

- (1) *Subject to the following limitations and conditions*, the owner, the owner's immediate family member, the owner's documented employee, or a tenant of real property may trap or kill on that property, without the licenses required under RCW 77.32.010 or authorization from the director under RCW 77.12.240, wild animals or wild birds that are damaging crops, domestic animals, or fowl:

(a) Threatened or endangered species shall not be hunted, trapped, or killed;

(b) *Except in an emergency situation*, deer, elk, and protected wildlife shall not be killed without a permit issued and conditioned by the director or the director's designee. *In an emergency, the department may give verbal permission followed by written permission to trap or kill any deer, elk, or protected wildlife that is damaging crops, domestic animals, or fowl; and*

(c) On privately owned cattle ranching lands, the land owner or lessee may declare an emergency only when the department has not responded within forty-eight hours after having been contacted by the land owner or lessee regarding damage caused by wild animals or wild birds. In such an emergency, the owner or lessee may trap or kill any deer, elk, or other protected wildlife that is causing the damage but deer and elk may only be killed if such lands were open to public hunting during the previous hunting season, or the closure to public hunting was coordinated with the department to protect property and livestock.

(2) Except for coyotes and Columbian ground squirrels, wildlife trapped or killed under this section remain the property of the state, and the person trapping or killing the wildlife shall notify the department immediately. The department shall dispose of wildlife so taken within three days of receiving such a notification and in a manner determined by the director to be in the best interest of the state.

RCW 77.36.030, (emphasis added).

There was insufficient evidence that the Petitioner complied with the requirements of RCW 77.36.030(1)(a), (b), or (2) for the court to give the proposed instructions. There was insufficient evidence to support the Petitioner's contention that permission was given by the Department of Fish and Wildlife for the Petitioner to kill elk. Regardless of whether the Petitioner thought an emergency existed, without that verbal or written permission, he could not kill wildlife. Contrary to the Petitioner's assertion, the lack of verbal permission is particularly evident since no written permission followed the claimed verbal permission.

Furthermore, even if he thought that he had permission, RCW 77.36.030(2) requires that the person killing wildlife "immediately" notify the department so that the wildlife can be disposed of "in the best interest of the state." Since he did not comply with this provision, the trial court was correct in not submitting the requested instructions to the jury.

(2) THE INSTRUCTIONS GIVEN TO THE JURY ALLOWED THE DEFENSE TO PRESENT THEIR THEORY OF THE CASE.

The trial court instructed the jury regarding the necessity defense. (Appendix D). That instruction advised the jury that it is a defense to a

charge of unlawful big game hunting if the Petitioner reasonably believed the commission of the crime was necessary to avoid or minimize a harm, the harm was greater than the harm resulting from the violation, the threatened harm was not brought about by the Petitioner, and no reasonable legal alternative existed. The instruction required that the defense be established by a preponderance of the evidence by the defendant. This instruction is came from WPIC 18.02.

This instruction allowed the Petitioner to argue his theory of his case. In State v. Souther, 100 Wn. App. 701, 998 P.2d 350 (2000), the court stated:

“Instructions satisfy the requirement of a fair trial when, taken as a whole, they properly inform the jury of the applicable law, are not misleading and permit the defendant to argue his theory of the case.” State v. Tili, 139 107, 126, 985 P.2d 365 (1999). A trial court’s decision regarding a jury instruction is reviewed for abuse of discretion if the decision is based on factual issues. See State v. Walker, 136 Wn.2d 767, 772-73, 966 P.2d 883 (1998). A trial court’s decision regarding a jury instruction is reviewed de novo where the decision is based on a ruling of law. See id. at 773.

Souther, 100 Wn. App. at 708.

Additionally, comparing WPIC 18.02, which was used by the court, and the proposed instruction by the Petitioner, one finds that the Petitioner’s proposed instruction does not set for any requirements to establish necessity,

nor did it advise the jury that the Petitioner had the burden of proving by a preponderance of the evidence that there was a necessity. See State v. Cole, 74 Wn. App. 571, 874 P.2d 878 (1994).

Nevertheless, the Petitioner asserts that he has a constitutional right or common law right to protect his property from elk that might damage it and was entitled to instruct the jury with his specific instruction. However, the Petitioner's right to protect his property must be balanced by the State's right to protect its wildlife. "[T]he State's property right to regulate wildlife is superior to [the defendant's]: 'Wildlife is the property of the state.' State v. Long, 98 Wn. App. 669, 676, 991 P. 2d 102 (2000), citing RCW 77.12.010. "Game is not a property right appurtenant to land. Game belongs to the State.'" State v. Long, 98 Wn. App. 669, 676, 991 P. 2d 102 (2000), quoting State v. Quigley, 52 Wn. 2d 234, 236, 324 P.2d 827 (1958).

"[T]he State has the absolute right to maintain its game and wild animals upon any and all private lands, and in that act there is no element of trespass or taking." Cook v. State, 192 Wash. 602, 607, 74 P.2d 199 (1937). "This absolute power to control and regulate passed with the title to the game and wild life to the several states, subject only to the

applicable provisions of the Federal Constitution.” Cook v. State, 192 Wash. 602, 607, 74 P.2d 199 (1937), citations omitted.

Further, in Cook v. State, the court in 1937 analyzed the 1921 State v. Burk decision by saying that the Burk decision stands for the proposition that a landowner can kill an animal that is damaging his property. But, the court in Cook points out that “[w]e are not advised that the Legislature has in any way sought to abrogate or modify the rule laid down in that case, or that it has attempted to give the Game Commission, or anyone else the authority to prevent one from protecting his property under such circumstances.”

In 1947, a statutory scheme to compensate landowners for damages to private property caused by deer or elk was enacted. Laws of 1947, ch. 275, § 4, p. 904, codified in RCW 77.36. The intent of the Legislature as it relates to protection of private property and conservation of wildlife is set out in RCW 77.36.005.

The legislature finds that: (1) As the number of people in the state grows and wildlife habitat is altered, people will encounter wildlife more frequently. As a result, conflicts between humans and wildlife will also increase. Wildlife is a public resource of significant value to the people of the state and *the responsibility to minimize and resolve these conflicts is shared by all citizens of the state.* (2) In particular, the state recognizes the importance of

commercial agricultural and horticultural crop production and the value of healthy deer and elk populations, which can damage such crops. The legislature further finds that damage prevention is key to maintaining healthy deer and elk populations, wildlife-related recreational opportunities, and commercially productive agricultural and horticultural crops, and that the state, participants in wildlife recreation, *and private landowners and tenants share the responsibility for damage prevention.* Toward this end, the legislature encourages landowners and tenants to contribute through their land management practices to healthy wildlife populations and to provide access for related recreation. **It is in the best interests of the state for the department of fish and wildlife to respond quickly to wildlife damage complaints and to work with these landowners and tenants to minimize and/or prevent damages and conflicts while maintaining deer and elk populations for enjoyment by all citizens of the state.** (3) A timely and simplified process for resolving claims for damages caused by deer and elk for commercial agricultural or horticultural products is beneficial to the claimant and the state.

RCW 77.36.005, (emphasis added).

In RCW 77.36.040-080, the Legislature sets out the procedure for payment of claims from private citizens for property damage by elk. Read together, all of RCW 77.36 indicates that the intent of the Legislature was to facilitate the cooperation of the State and private citizens to prevent damage to private property and to conserve wildlife. The very reason the legislature enacted RCW 77.36 was to provide a mechanism for

compensation for loss in order to discourage property owners from destroying elk or game that are their damaging property.

The State submits that RCW 77.36 is a clear indicator that the Legislature has sought to abrogate and modify the rule laid down in Burk by providing a system of compensation for property damaged by wildlife. The legislature's enactment of RCW 77.12.260-270 and RCW 77.36 was to establish a system to compensate landowners for property losses.

With this in mind, the trial court properly exercised its discretion by instructing the jury as to the defense of necessity pursuant to the WPIC 18.02, which properly set forth the requirements of necessity, and the burden of proving the affirmative defense, instead of the instruction requested by the Petitioner.

(3) THE TRIAL COURT'S INSTRUCTIONS DID NOT IMPERMISSIBLY SHIFT THE BURDEN OF PROOF TO THE DEFENDANT.

The Petitioner asserts that by requiring that he prove necessity by a preponderance of the evidence, the instruction impermissibly shifted the burden of proof to him. The Due Process Clause requires that a conviction must be based upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. In re

Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). However, proof of the nonexistence of all affirmative defenses has never been constitutionally required. Patterson v. New York, 432 U.S. 197, 53 L. Ed. 2d 281, 97 S. Ct. 2319 (1977).

In State v. Box, 109 Wn.2d 320, 745 P.2d 23 (1987), the court rejected a similar argument regarding whether requiring a defendant to prove the insanity by a preponderance of the evidence. The court in Box rejected the defendant's argument that it impermissibly shifted the burden to the defense. Like the affirmative defenses of insanity, the absence of the affirmative defense of necessity, is not a necessary element of the crime of Unlawful Hunting of Big Game.

(4) THE STATE DID NOT PRESENT MULTIPLE ACTS THAT WERE NOT ALLEGED IN THE COMPLAINTS.

The Petitioner asserts there was a lack of jury unanimity due to the fact that each complaint did not designate a specific elk out of the ten killed applied to each count. A separate cause number was used for each elk found killed on January 27, 2000. The jury was instructed that each count was separate, and that they must decide each count separately. (Appendix E, Jury Instruction No. 4). "Jurors are presumed to follow the

court's instructions. State v. Kroll, 87 Wn.2d 829, 835, 558 P.2d 173 (1976).” State v. Harvey, 34 Wn. App. 737, 664 P.2d 1281, (1983).

The fact that each elk was not designated by a name or number does not make the counts indefinite. The legislature has expressed its intent to punish each animal unlawfully taken, as a single unit of prosecution for each animal, by the enactment of RCW 77.15.030, which states:

Individual animal unlawfully taken—Separate offense.

Where it is unlawful to hunt, take, fish, possess, or traffic in big game or protected or endangered fish or wildlife, then each individual animal unlawfully taken or possessed is a separate offense. Where it is unlawful to hunt, take, fish, possess, or traffic in big game or protected or endangered fish or wildlife, then each individual animal unlawfully taken or possessed is a separate offense.

Since the legislature intended to punish each animal unlawful taken as a separate and distinct crime, charging the Petitioner for each count, although the conduct giving rise to the charges occurred out of one incident, was clearly appropriate. Thus multiple counts, although having occurred during one incident, does not offend due process or double jeopardy principles.

Given that it was appropriate to charge multiple counts, was it error

for the court not to give a unanimity instruction? The Petitioner cites State v. Marko, 107 Wn. App. 215, 27 P.3d 228 (2001), in support of his assertion that it was constitutional error not to do so. The court in Marko stated that “there are two ways to insure jury unanimity in multiple act cases. The State may elect the act on which it will rely for conviction or the trial court must instruct the jury that all of them must agree the same act has been proved beyond a reasonable doubt.” Marko, supra at 220. Here, the State elected the acts by charging as separate counts, each elk killed.

There was no prejudice to the Petitioner by not having each elk killed so that they were named, numbered or otherwise labeled. The evidence presented was that the Petitioner fired on the group of elk as they were in his orchard.

The act of shooting into the herd was like dipping a net into the waters and catching numerous fish at one time. How do you distinguish one fish from the other? What difference does it make? The answer is that it is a distinction without a difference. It is one act with multiple consequences.

Most of the case law regarding multiple illegal acts comes from sexual abuse cases involving children, where there are a number of illegal

acts over the course of an extended period of time. In State v. Hayes, 81 Wn. App. 425, 914 P.2d 788 (1996), the court held:

In sexual abuse cases where multiple counts are alleged to have occurred within the same charging period, the State need not elect particular acts associated with each count so long as the evidence “clearly delineate[s] specific and distinct incidents of sexual abuse” during the charging periods. The trial court must also instruct the jury that they must be unanimous as to which act constitutes the count charged and that they are to find “separate and distinct acts” for each count when the counts are identically charged.

Hayes, supra at 431.

Unlike sex offenses, the charges that were brought forth against the Petitioner were done so using multiple counts and cause numbers, for an offense that was the result of one incident. The defense presented by the Petitioner was not alibi. The defense was necessity and insufficient evidence. Thus, the Petitioner was not prejudiced by not making a distinction as to which elk was which, by naming or numbering.

In the case at hand, the State charged each act separately, and there were no other acts that were not charged resulting from the incident on or about January 27, 2000. Two counts for each elk killed, one for unlawful hunting and one for waste. The only thing to distinguish the elk that were killed was that Sergeant Kohls and Officer Beireis located two .270 caliber

slugs in two of the dead elk. When the Petitioner was contacted later that day, he admitted shooting at the elk the night before, and admitted that he owned a .270 caliber rifle. The elk killed the night before were found both inside and outside the Petitioner's orchard. None of the elk had been gutted or skinned. Thus, this was not the usual incident of poaching, where you just find entrails.

(5) THERE WAS SUFFICIENT EVIDENCE PRESENTED TO SUPPORT THE JURY'S VERDICTS.

In reviewing a claim of insufficient evidence, the court must review the evidence presented to the jury with the following in mind:

[4] The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980).

State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

From the evidence presented, a rational trier of fact could conclude that the Petitioner shot all ten of the elk found inside and just outside his

orchard on January 27, 2000. The facts presented were that Sergeant Kohls and Officer Beireis found 10 elk that had been shot. They were located both inside and outside the Petitioner's orchard outside of Tieton, Washington, in Yakima County. The Petitioner admitted shooting at the elk the night before. Two slugs found in two of the elk killed were consistent with the type of firearm the Petitioner owned. None of the elk had been gutted or skinned, which would negate the proposition that a poacher was responsible for the elk that were killed. Thus, the evidence supports the jury's verdicts.

- (6) THE VERDICTS WERE NOT INCONSISTENT WHEN ONE CONSIDERS THE EVIDENCE. EVEN IF THEY WERE INCONSISTENT, REVERSAL IS NOT WARRANTED WHERE THERE IS SUFFICIENT EVIDENCE TO SUPPORT THE VERDICT.

The jury returned guilty verdicts on two of ten counts of Unlawful Hunting Big Game. Although there is little to distinguish one count from another, there was evidence present to differentiate the two verdicts in which there were guilty verdicts. Specifically, the facts that two spent rifle slugs from two of the killed elk were recovered by law enforcement. That the spent rifle slugs were from a .270 caliber rifle, and that the Petitioner owned a .270 caliber rifle. Those facts support the jury verdicts and differentiate

two verdicts from the others.

The Washington State Supreme Court has held that where a jury's verdict is "supported by sufficient evidence from which it could rationally find the defendant guilty beyond a reasonable doubt, we will not reverse on grounds that the guilty verdict is inconsistent with an acquittal on another count." State v. Ng, 110 Wn.2d 32, 46, 750 P.2d 632 (1988). The court relied upon the U.S. Supreme Court's holding in U.S. v. Powell, where the court rejected an argument that inconsistent verdicts justified dismissal, the court state that a variety of factors can lead to inconsistent verdicts such as "mistake, compromise or lenity that can lead to a jury's inconsistent verdict." U.S. v. Powell, 469 U.S. 57, 65, 83 L. Ed. 2d 461, 105 S. Ct. 471 (1984).

Thus, although the jury's verdicts here may be considered inconsistent, those verdicts should not be overturned since the court in State v. Ng, *infra*, rejected inconsistent verdicts as a basis for challenge.

G. CONCLUSION

The Court should deny petitioner's motion for discretionary review.

Respectfully submitted this 23rd day of February, 2002.



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APPENDIX A

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KIM M. EATON
CLERK OF
SUPERIOR COURT
YAKIMA, WASHINGTON

KIM M. EATON, YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,)

Respondent,)

vs.)

JERRIE L. VANDERHOUWEN,)

Appellant.)

NO. 01-1-00949-0

ORDER OF AFFIRMATION
OF CONVICTION

THIS MATTER having come on upon the appeal of appellant, Jerrie L. Vanderhouwen, in the above-entitled action, and the court being fully advised in the premises and finding that none of appellant's allegations support a reversal of the conviction below; THE COURT'S REASONS ARE AS FOLLOWS:

- (1) The appellant's proposed jury instruction nos. 2 and 3 do not accurately set forth the law regarding a person's statutory right to kill elk pursuant to RCW 77.36.030(1).
- (2) The trial court did not err by failing to give a separate unanimity instruction since the concluding instruction required that the jurors to be unanimous. Furthermore, each one of the acts alleged to have been committed were separated into individual counts.

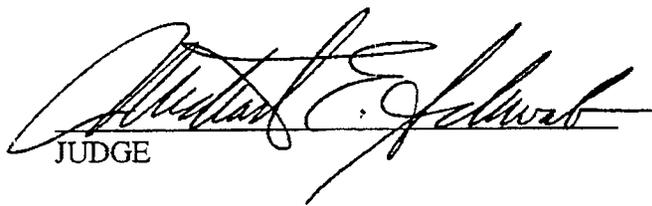
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- 1 (3) The necessity instruction given to the jury correctly set forth the law, and it did not
2 impermissibly shift the burden to the defense to disprove an element of the crime.
3
4 (4) The trial court did not err by failing to give defendant's proposed instruction #1
5 and/or defendant's amended proposed instruction no. 7.

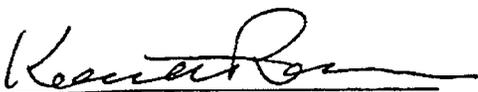
6 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of the above-
7 entitled action is denied, the conviction below is affirmed, and the case is remanded for
8 further proceedings. The Clerk of the Superior Court is hereby authorized to recover any
9 costs due on appeal.
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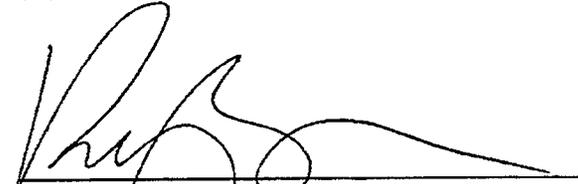
11 DATED this 7th day of NOVEMBER, 2003.

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15 JUDGE

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17 PRESENTED BY:

18 APPROVED AS TO FORM
19 NOTICE OF PRESENTATION WAIVED:

20
21 
22 KENNETH L. RAMM
23 Deputy Prosecuting Attorney
24 WSB # 16500

25
26
27 
28 RUSSELL J. MAZZOLA
29 Attorney for Appellant
WSB #5440

APPENDIX B

FILED
YAKIMA COUNTY
DISTRICT COURT

IN THE DISTRICT COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

1	STATE OF WASHINGTON,)	
2)	
3)	
4	Plaintiff,)	NO. Y00-00032 through Y00-00046
5)	
6	vs.)	AGREED FINDINGS OF FACT
7)	
8	JERRIE L. VANDERHOUWEN,)	
9	Defendant.)	
10	_____)		

THIS MATTER coming on regularly on stipulation of the parties to set forth certain Findings of Fact pursuant to RALJ 6.1 in order to present issues for the appeal filed herein.

NOW, THEREFORE, the parties do agree to the following:

FINDING OF FACTS:

1. The Defendant, Jerrie VanderHouwen, at all times material hereto, farmed various cherry and apple orchards in the area of Tieton, Washington, referred to as Section One Road.
2. That the most western portion of the orchard above-described was an approximate 37-acre block of new cherry trees.
3. That during the years 1998 and the Fall of 1999, elk came through the Washington State Department of Fish and Wildlife, referred to as Department, fences and entered Defendant's orchard causing significant damage.
4. That in 1998/1999, Jerry VanderHouwen took steps on his own to stop and/or minimize the damage to his orchard. These steps included among other things feeding hay and repairing Department game fences.

RUSSELL J. MAZZOLA
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5. That the migration of elk continued from the Fall of 1999 into the Winter of year 2000.

1 6. That Jerry VanderHouwen testified he contacted the Department on four occasions
2 during this time frame to notify them of the migrating elk and seek their assistance to stop the
3 damage occurring to his orchard from the migrating elk.

4 7. That the migration of the elk occurred in the twilight and evening hours. That
5 Defendant became frustrated from what he felt was a lack of support by the Department in
6 controlling the elk coming into his orchard. The elk continued to cause damage to Defendant's
7 orchard trees - predominately the young cherry trees.

8 8. During the month of January 2000, the elk migrating into Defendant's orchard
9 reached populations from 40 up to 70 animals. As a result of the constant pressure and economic
10 damage to his orchard in January of 2000, the Defendant took to shooting (over the heads) of the elk
11 to drive them from the orchard.

12 9. On January 18 or 19, Jerrie VanderHouwen testified he was in his orchard when
13 Sergeant Kohls drove by him in the course of viewing dead elk that were lying in the orchard.

14 10. On January 27, 2000, a report was made to the Department that dead elk were seen in
15 the vicinity of the Defendant's orchard. As a result of that call, Sergeant Kohls and Officer Beireis
16 came to Jerrie VanderHouwen's orchard and located ten elk that were dead. The officers through the
17 use of metal detector's located two bullet slugs in two of the elk. The elk carcasses were scattered
18 throughout the area outside of Jerrie VanderHouwen's orchard with some elk inside the orchard.
19 The two slugs found by the officers were determined to be from a .270 caliber rifle.

20 11. The officers contacted Jerrie VanderHouwen who met with them and admitted to
21 shooting at the elk. Defendant was unable to tell whether he had killed any of the elk or whether the
22 rounds he fired at them went over their head. Defendant admitted to owning a .270 caliber rifle. A
23 .270 caliber rifle is a commonly owned hunting weapon.

24 12. Prior to trial, counsel for Jerrie VanderHouwen filed a Motion in Limine requesting
25 that no mention be made of the elk found in or near the vicinity of Jerrie VanderHouwen's orchard
26 unless they were elk for which the Defendant was accused of killing.

27 13. That there was no evidence presented by the State that related a specific count of a
28 specific complaint to a charged specific dead elk.
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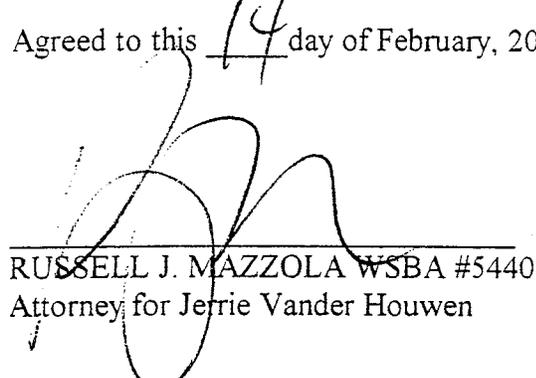
14. That upon submission of the case to the jury, the jury acquitted Defendant of 10 Counts of Waste of Wildlife and 8 Counts of Killing Game Out of Season. The jury convicted Defendant VanderHouwen of 2 Counts of Killing Game Out of Season. The specific cause numbers for which the jury convicted Jerry VanderHouwen were Yakima County Cause No. Y00-00045, Count 1 and Y00-00046, Count 1.

Dated this 28th day of February, 2002.

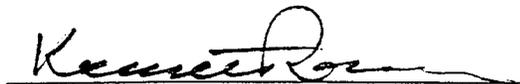

COURT COMMISSIONER/JUDGE

The foregoing Findings of Fact have been agreed to by Counsel as indicated by their signatures below. Both counsel reserve the right to supplement the record by additional Agreed Finding of Fact or pertinent portions of the trial transcript.

Agreed to this 14 day of February, 2002.


RUSSELL J. MAZZOLA WSBA #5440
Attorney for Jerrie Vander Houwen

Agreed to this 28th day of February, 2002.


KEN RAMM WSBA# 16500
Attorney for the State of Washington

APPENDIX C

1
2
3 IN THE DISTRICT COURT OF THE STATE OF WASHINGTON
4 IN AND FOR THE COUNTY OF YAKIMA

5 STATE OF WASHINGTON,)
6) NO: Y00-00045 YDP
7 Respondent,) NO: Y00-00046 YDP
8)
9) SUPPLEMENTAL AGREED
10 v) FINDINGS OF FACT
11)
12 JERRIE VANDER HOUWEN,)
13)
14 Appellant.)
_____)

15
16 This matter coming on regularly upon stipulation of the parties to set forth
17 Supplemental Findings of Fact pursuant to RALJ 6.1 in order to present issues for the
18 appeal filed herein NOW, THEREFORE, the parties do agree to the following:

19 Mr. Vander Houwen contacted the fish and Wildlife Department on Wednesday,
20 January 12, 2000. There were about fifteen (15) inches of snow on the ground by
21 January 12, 2000. Mr. Vander Houwen told Officer Beireis that there had been
22 about forty (40) elk in his orchard on January 10 and January 11. He explained
23 for the second time it was no longer working to shoot over their heads because it
24 was not scaring them or preventing them from eating his trees. Officer Beireis
25 said he would attempt to organize a drive, but he could not do anything for about
26 a week because the next Monday was Martin Luther King holiday. Mr. Vander
27 Houwen told Officer Beireis he couldn't wait that long and that he would have to
28 lower his sights and shoot them.

29 At the time of trial, Mr. Vander Houwen testified that Officer Beireis indicated
30 that if he did shoot them, he must let them lay. (The state disputes this latter
31 statement was made by Officer Beireis.)

32 Dated this 8th day of September, 2002.

33 [Signature]
34 JUDGE RUTH REUKAUF

1 The foregoing Findings of Fact have been agreed to by Counsel as indicated by their
2 signatures below. Both counsel reserve the right to supplement the record by additional
3 Agreed Finding of Fact or pertinent portions of the trial transcript.

4 Agreed to this 6th Aug 2003 day of ~~September~~, 2002.

5 
6
7 RUSSELL J. MAZZOLA WSBA #5440
8 Attorney for Jerrie Vander Houwen

9
10 Agreed to this 6th Aug 2003 day of ~~September~~, 2002.

11
12
13 
14 Kenneth Ramm, WSBA # 16500
15 Deputy Prosecuting Attorney

APPENDIX D

INSTRUCTION NO. 15

Necessity is a defense to a charge of unlawful big game hunting in the second degree and/or waste of wildlife in the first degree if

- (1) the defendant reasonably believed the commission of the crime was necessary to avoid or minimize a harm; and
- (2) the harm sought to be avoided was greater than the harm resulting from a violation of the law;
- (3) the threatened harm was not brought about by the defendant; and
- (4) no reasonable legal alternative existed.

This defense must be established by a preponderance of the evidence.

Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty.

APPENDIX E

INSTRUCTION NO. 4

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.