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NO. 87929-0

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY DYE,

Petitioner.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JOAN DUBUQUE

**RESPONDENT'S ANSWER TO AMICUS CURIAE BRIEF OF
WDA AND WACDL**

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A. SUMMARY OF ARGUMENT

Washington trial courts are vested with broad discretion to control the manner in which trials are conducted in their courtrooms. This discretion should include the ability to allow the use of a facility dog in appropriate circumstances. Moreover, there is no evidence in the record in this case to establish either that the defendant was prejudiced or that the jury's verdict was affected by a facility dog's presence in the courtroom with a developmentally disabled witness.

Amicus Curiae Washington Defender Association (WDA) and Washington Association of Criminal Defense Lawyers (WACDL) argue that this Court should categorically ban facility dogs from the courtroom, thus eliminating any discretion on the part of trial judges to allow these dogs to be used in cases where their presence will help to further the truth-seeking function of the trial. WDA and WACDL's arguments are not based on the record in this case; rather, their arguments are based on generalizations and speculation from sources outside the record, many of which are irrelevant. WDA and WACDL's arguments should be rejected.

B. STATEMENT OF THE CASE

The State has provided a relatively detailed account of the facts of this case in both the Brief of Respondent and the Supplemental Brief of Respondent. See Brief of Respondent (COA No. 66549-9-I), at 1-7, and Supplemental Brief of Respondent, at 1-7. In light of the assertions made by WDA and WACDL, however, a brief augmentation of a few factual points is necessary to correct inaccuracies and potential misconceptions.

WDA and WACDL state that “therapy dogs are trained to specifically interact with witness [sic] when they feel stressed,” and that “[a] therapy dog’s duties include ‘cuddling, doing tricks . . . and lovingly placing her head on the laps’ of witnesses.” WDA/WACDL Amicus Brief, at 10-11 (quoting Dellinger, Marianne, Using Dogs for Emotional Support of Testifying Victims of Crime, 15 Animal Law 171, 176 (2008-2009)). First, as noted in the State’s supplemental brief, Ellie is not a “therapy dog.” Therapy dogs are pet dogs that have undergone relatively minimal training and have passed a basic behavior test in order to visit hospitals and other facilities under the direct control of their owners. See Supplemental Brief of Respondent, at 16 n.13. Ellie has been far more extensively trained by Canine Companions for Independence (CCI), an

organization whose primary mission is to breed, train, and provide certified assistance dogs for persons with disabilities.¹ Moreover, although Ellie certainly knows how to cuddle, perform tricks, and place her head in someone's lap on command, there is absolutely no evidence in the record that anything of that sort occurred when she was in the courtroom with Douglas Lare.² Rather, as the trial court observed, Ellie is "unobtrusive"³ when she is in a courtroom in accordance with her training.

WDA and WACDL also state that the facility dogs that have been used in King County are "owned" by deputy prosecutors. WDA/WACDL Amicus Brief, at 11-12. From this statement, WDA and WACDL suggest that allowing a facility dog to accompany a witness like Douglas Lare is misconduct akin to giving a witness a gift. *Id.* (citing State v. Aponte, 249 Conn. 735, 738 A.2d 117 (1999)). But CCI (the organization that bred, trained, and provided Ellie to King County) maintains ownership of all of the dogs it

¹ For more information about CCI's training program, see http://www.cci.org/site/c.cdKGIRNgEmG/b.4011115/k.65BA/Training_assistance_dogs.htm (last accessed 4/30/13).

² Indeed, if any such behavior had occurred, Dye's defense counsel certainly could have objected and the trial court could have intervened.

³ RP (11/18/10) 29.

places.⁴ A facility dog like Ellie is not a deputy prosecutor's personal pet. Rather, facility dogs are working dogs that have been trained for specific purposes. The fact that some of these dogs live with deputy prosecutors who are responsible for their care does not transform them into gifts from prosecutors.

WDA and WACDL also assert that undersigned counsel for the State was "emphatic" during oral argument in the Court of Appeals that a facility dog like Ellie would not be made available to criminal defendants. WDA/WACDL Amicus Brief, at 16 (citing footnote 9 of Dye's supplemental brief). This assertion misstates the record at oral argument. Undersigned counsel for the State, responding to a question from Judge Becker as to whether the court could anticipate a "courtroom full of dogs" in the future, stated that that scenario was a "slippery slope" that was not presented by this case. Undersigned counsel for the State then went on to explain that facility dogs *have* been used in King County to provide

⁴ See "Follow Up" at http://www.cci.org/site/c.cdKGIRNqEmG/b.4011035/k.8E5F/The_Experience.htm (last accessed 4/30/13).

support to criminal defendants in juvenile drug court.⁵ Accordingly, WDA and WACDL's assertion that the King County Prosecutor's Office would never allow a dog like Ellie to provide support for criminal defendants is unfounded.

But in any event, these matters are both outside the record and largely beside the point. Based on the record presented in this case, there is no support for a categorical prohibition on the use of facility dogs during criminal trials. Rather, this Court should hold that trial courts have the discretion to allow the use of a facility dog in cases like this one, where the dog's presence will help to further the truth-seeking function of the trial.

C. **ARGUMENT**

WDA AND WACDL'S PROPOSED BAN ON THE USE OF FACILITY DOGS IS NOT CALLED FOR BASED ON THE RECORD IN THIS CASE.

WDA and WACDL contend that nothing short of a total prohibition on the use of facility dogs can ensure that criminal

⁵ A recording of the oral argument in the Court of Appeals (May 24, 2012) is available on the Court's website via the following link: http://www.courts.wa.gov/appellate_trial_courts/appellateDockets/index.cfm?fa=appellateDockets.showOralArgAudioList&courtId=a01&docketDate=20120524 (last accessed 4/30/13). For verification that Ellie supports defendants in drug court, see [King Co. Court Dogs Offer Love](http://seattletimes.com/html/localnews/2009442820_apwacourtdogs.html), Seattle Times, July 9, 2009, available at http://seattletimes.com/html/localnews/2009442820_apwacourtdogs.html (last accessed 4/30/13).

defendants will receive fair trials. WDA/WACDL Amicus Brief, at 14. This proposed categorical prohibition is not justified by the record in this case. Rather, WDA and WACDL's arguments consist of little more than generalizations and speculation about matters wholly outside the record. Moreover, a complete ban on the use of facility dogs would do a disservice to the criminal justice system by discouraging or even thwarting full participation by victims and witnesses like Douglas Lare, who benefit from the support of a well-trained dog in order to testify at trial.

WDA and WACDL's argument, at its core, is that the mere presence of a dog is so inherently prejudicial to the defendant and makes the witness appear so inherently sympathetic to the jury that nothing short of a complete ban on facility dogs can ensure that a defendant will receive a fair trial. See, e.g., WDA/WACDL Amicus Brief, at 1 ("the presence of the dog is guaranteed to distract the jury" and "cannot be cured by a jury instruction"); at 4 (the dog's presence "compromises a jury's ability to determine the honesty and accuracy of that witness"); at 4-5 (the dog "undermines the presumption of innocence by bolstering a witness's image as a vulnerable victim in need of protection and sympathy"); at 5 (the dog "imparts a sense of vulnerability that may evoke sympathy from

a jury and can lead them to make impermissible assumptions as to the defendant's guilt"). In support of these pronouncements, WDA and WACDL cite various sources outside the record⁶ standing for the generalized proposition that people and dogs have a mutually beneficial relationship in a variety of contexts, and that people are unable to put their positive feelings about dogs aside in the context of a criminal trial.⁷

But one crucial source of information that receives almost no attention in WDA and WACDL's brief is the trial court record in this case. That the record receives scant attention is perhaps not surprising, because it provides no support for the position that WDA and WACDL espouse.

⁶ In addition, many of these sources are irrelevant. For example, WDA and WACDL argue that "[d]ogs are used to sell fast food, beer, cars, and to promote chain stores such as Target." WDA/WACDL Amicus Brief, at 12. The suggestion that jurors are unable to distinguish between a criminal trial and an advertisement for beer, and that they are unable to follow a trial court's instructions to decide a criminal case based solely on the evidence, is, quite frankly, insulting. In any event, this argument is plainly disproved by what occurred in this case.

⁷ One of the sources cited by WDA and WACDL is a law review article that quotes two Superior Court judges who expressed concerns about using dogs in the courtroom. WDA/WACDL Amicus Brief, at 6-7 (citing Dellinger, Marianne, Using Dogs for Emotional Support of Testifying Victims of Crime, 15 Animal Law 171, 187-88 (2008-2009)). Again, because the appropriate use of these dogs should continue to be a matter addressed to the sound discretion of the trial court, trial judges who have these concerns should remain free to disallow their use. Such concerns do not justify a categorical prohibition for every trial court in every case. In addition, both judges quoted in the law review article also expressed very positive views about facility dogs in the same article. *Id.* at 176, 179, 187. These positive comments were not included in the amicus brief.

In this case, the record establishes that Douglas Lare requested Ellie's presence during his testimony to help alleviate his significant anxiety about testifying. This request was based in part on the fact that Ellie was present for Lare's three-hour pretrial defense interview, and he found her presence during that interview "to be very comforting." CP 104. There was no dispute that Lare has significant developmental disabilities, and that he functions on the level of a child. See, e.g., CP 15, 17-18, 92. Dye objected on grounds of prejudice and a dog allergy. RP (11/18/10) 29-30. The trial court offered to make accommodations for Dye's allergy, but none were requested. RP (11/18/10) 30-33. The trial court observed that Ellie "is very unobtrusive" and would "not be laying in [Lare's] lap," and ruled that it was "appropriate" to "accommodate somebody who has a developmental disability when they're testifying in the courtroom." RP (11/18/10) 29.

Throughout Douglas Lare's testimony, which included a lengthy and thorough cross-examination, there is no indication that Ellie engaged in any inappropriate or sympathy-inducing behavior, or that defense counsel's ability to cross-examine Lare was affected or hampered in any way. See RP (12/1/10) 9-127. If defense counsel had seen any behavior from the dog that counsel

deemed inappropriate or prejudicial, she could have objected and asked the trial court to have the dog removed; she did not. If defense counsel had wished to cross-examine Lare about the presence of the dog, she could have done so; she did not.

Moreover, the trial court specifically instructed the jury not to consider the dog's presence. CP 53. Jurors are presumed to follow the trial court's instructions in the absence of evidence in the record to the contrary. State v. Kirkman, 159 Wn.2d 918, 928, 155 P.3d 125 (2007). No such evidence exists. In fact, the jury answered "no" to the special verdict regarding the alleged aggravating circumstance that Douglas Lare was a particularly vulnerable victim. CP 68-69. This verdict belies WDA and WACDL's claim that a jury instruction can never ameliorate the prejudice that they claim is inherent in the presence of a dog.⁸

In sum, WDA and WACDL's attempts to support their arguments with generalized information and speculation about dogs

⁸ Also worth noting is the fact that the jury was unable to reach a verdict in the first King County case where a dog was present in court when the child victims testified, and the defendant ultimately pled guilty to substantially reduced charges. See Christine Clarridge, Courthouse Dogs Calm Victims' Fears About Testifying, Seattle Times, Sept. 22, 2012, available at http://seattletimes.com/html/localnews/2019235703_courthousedogs23m.html (last accessed 4/30/13). This also does not support WDA and WACDL's position that a dog's presence essentially guarantees a guilty verdict.

generates far more heat than light, and should be rejected.⁹ The Court should decide this case based on the record, which establishes that the use of a facility dog in appropriate cases should continue to be a matter addressed to the trial court's sound discretion, and that Dye received a fair trial and a fair verdict in this case from jurors who followed the trial court's instructions not to consider the dog's presence and to decide the case based solely on the evidence.

As explained in the State's supplemental brief, and in the amicus curiae brief filed by the National Crime Victim Law Institute and the Courthouse Dogs Foundation, a well-trained facility dog should be used in appropriate cases with victims and witnesses who need the dog's assistance to help them testify as fully as possible at trial. In appropriate cases, such as this one, the dog's presence furthers rather than hinders the truth-seeking function of the trial. There is simply no basis to curtail trial courts' discretion based on the record in this case.

⁹ WDA and WACDL also cite case law where child victims testified while sitting in someone's lap. See WDA/WACDL Amicus Brief, at 9-10 (citing People v. Kabonic, 177 Cal. App. 3d 487, 223 Cal. Rptr. 41 (1986), and State v. Rulona, 71 Haw. 127, 785 P.2d 615 (1990), *overruled on other grounds by State v. Mueller*, 102 Haw. 391, 76 P.3d 943 (2003)). Douglas Lare did not sit on anyone's lap, nor did Ellie sit in Douglas Lare's lap; these cases are not analogous.

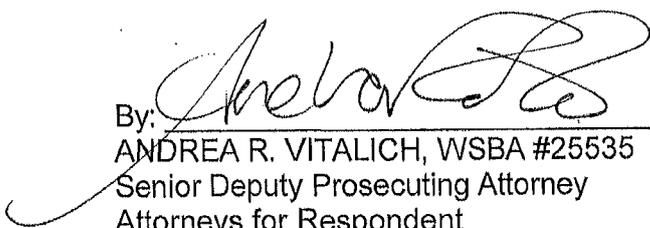
D. CONCLUSION

WDA and WACDL's arguments for a categorical prohibition on the use of facility dogs during criminal trials are contrary to the record, without merit, and should be rejected.

DATED this 2nd day of May, 2013.

Respectfully submitted,

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King County Prosecuting Attorney

By: 
ANDREA R. VITALICH, WSBA #25535
Senior Deputy Prosecuting Attorney
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jan Trasen and Nancy Collins, the attorneys for the petitioner, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Respondent's Answer to Amicus Curiae Brief of WDA and WACDL, in STATE V. TIMOTHY DYE, Cause No. 87929-0, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

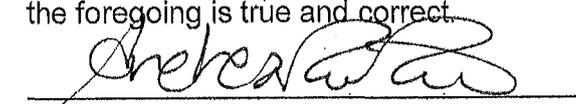
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Name
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5/2/13
Date

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for Amicus Curiae WDA and WACDL, Victoria Lyons, Travis Stearns, and Suzanne Lee Elliot, and to the attorneys for Amicus Curiae NCVLI and Courthouse Dogs Foundation, Margaret Garvin, Rebecca Khalil, Ellen O'Neill-Stephens and Seth Fine, containing a copy of the Respondent's Answer to Amicus Curiae Brief of WDA and WACDL, in STATE V. TIMOTHY DYE, Cause No. 87929-0, in the Supreme Court, for the State of Washington,

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.


Name

Done in Seattle, Washington

5-2-13
Date

OFFICE RECEPTIONIST, CLERK

To: Vitalich, Andrea
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Subject: State v. Dye, No. 87929-0, State's Answer to Amicus

Dear Supreme Court Clerk,

Please find attached for filing via email the Respondent's Answer to Amicus Curiae Brief of WDA and WACDL, with accompanying certificates of service, in State v. Timothy Dye, No. 87929-0.

Sincerely,

Andrea Vitalich, WSBA #25535
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