

64526-9

64526-9

NO. 64526-9-I

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

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STATE OF WASHINGTON,

Respondent,

v.

LANETTE SMITH,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR WHATCOM COUNTY

The Honorable Charles R. Snyder, Judge

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OPENING BRIEF OF APPELLANT

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DAVID B. KOCH  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

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DIVISION ONE

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A. ASSIGNMENTS OF ERROR

1. Appellant was denied her right to effective representation and a fair trial when her attorney failed to argue for conviction on lesser-degree offenses.

2. The trial court erred when it failed to enter written findings of fact and conclusions of law following appellant's bench trial.

3. The trial court erred at sentencing when it found it was required to prohibit Smith from ever owning, working with, or caring for herd animals.

Issues Pertaining to Assignments of Error

1. Appellant was charged with animal cruelty in the first degree, a class C felony. The defense disputed that charge, and there was evidence that appellant had committed, at most, animal cruelty in the second degree, a misdemeanor. Yet, defense counsel failed to argue for conviction on the lesser charge. Was appellant denied her right to effective representation and a fair trial?

2. When a case is tried to the court, CrR 6.1(d) requires the trial judge to enter written findings of fact and conclusions of law. Did the trial judge violate this rule in appellant's case?

3. The trial court believed it was required by statute to impose a lifetime ban on appellant's ownership or care of herd animals. Did the trial court err where (a) the statute does not apply because a condition precedent has not been satisfied, (b) even if the statute applies, the prohibition on all "herd animals" is too broad, and (c) the statute previously authorized only a two-year ban and appellant's offenses precede the effective date of the amendment authorizing a lifetime ban?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Whatcom County Prosecutor's Office charged Lanette Smith with eight counts of animal cruelty in the first degree and one count of bail jumping. CP 29-32. Smith waived jury trial. CP 25. The Honorable Charles R. Snyder found her guilty as charged and imposed a standard range sentence of 90 days, some of which was converted to community service. CP 13-18. Smith timely filed her notice of appeal. CP 2-12.

2. Substantive Facts

On March 6, 2007, animal control officer Jennifer Andrus responded to a call regarding a dead llama in the 6000 block of Olson Road in rural Whatcom County. RP 225-227. This was a

large property, estimated at 40 acres. RP 119. From the road, Andrus could see the llama. She taped a notice on the property's front gate requesting a call from the owner. RP 226.

The following day, Andrus returned to the property, where she met and spoke briefly with Lanette Smith. RP 227. Andrus saw many llamas walking around, and Smith told her there were 45 animals on the property, including two horses. RP 228, 240. She asked Smith if her animals were under the care of a veterinarian and Smith indicated she preferred not to provide the names of her veterinarians at that time. RP 229. Andrus also asked whether there were any food issues with the animals and Smith said there were not, although some of the animals might be slightly underweight because she had a problem with local dogs chasing them around the property. RP 229. Because a reporter from the local paper was hovering nearby, which made Smith uncomfortable, Smith and Andrus agreed to meet again at a later time. RP 227. Smith moved the llama carcass so that it was no longer visible from the road. RP 230.

The next day, March 8, Smith allowed Andrus and two veterinarians to examine animals on the property. RP 231. Initially, Andrus noted the animals were thin, "but none were in bad shape."

RP 553. However, based on their condition, the dead llama, and observations regarding general conditions on the property, a decision was made to contact the sheriff's office and obtain a warrant authorizing the seizure of any "deceased, diseased, underfed, or otherwise distressed animals . . . ." RP 118-145, 237-238, 524, 583.

Smith agreed to an interview with Whatcom County Sheriff's Detective Thomas McCarthy. RP 525-526. She explained that she did not own the property, but was responsible for the animals. She ran a llama packing business, bred them, and sold them. RP 526-528. She provided the animals with four large bags of hay daily and although there was no water faucet on the property, the llamas had access to a creek running through the property, which Smith supplemented with additional drinking water she delivered. RP 528-529. She often tended to the animals at night and either did not notice the dead llama or saw it and thought it was sleeping. RP 530-531.

On the morning of March 10, Detective McCarthy, animal control officers, three veterinarians, and a dozen or more volunteers entered the property to evaluate all of the animals on the premises. RP 330-335, 532-534. Each llama was assigned a number and

scored on weight from 1 to 5. RP 131, 149, 169. Using that scale, generally any llama above 3 is too fat, a score of 2 to 3 is fine, and anything below 2 is too thin. RP 149, 169-170, 295, 771. To determine the score, veterinarians feel various parts of the animal, including the ribs, back, loin, and thighs. RP 295. As discussed below, the impressions of those who examined the animals varied, although they can generally be categorized by whether they were prosecution witnesses (painting a bleak picture) or defense witnesses (conditions not as bad).

Of the three veterinarians that examined the animals on March 10, the State only called one as a witness: Dr. Nancy Williams. RP 104. Williams does not treat large animals as part of her practice, but she did treat them 15 years ago, testified she is knowledgeable about llamas (although not an expert), and once dissected a llama 30 years ago. RP 105-108, 184. According to Williams, when an entire herd suffers from malnutrition, the likely causes are starvation and/or parasitism, external and internal parasites that depend on the animals for their own nutrition. RP 112-113.

Dr. Williams was highly critical of the conditions on the property. She testified that the water storage tanks on the property

did not contain drinkable water (only green sludge), all of the edible grass was gone, and the pasture was covered with feces, which would have contaminated the creek. RP 120-121, 184. There was no separate area for crias (baby llamas) and no separate feeding spaces, which meant only the more aggressive llamas tended to get food. RP 136-138. The llamas were eating the bark off of the trees to quell their hunger despite the fact it offered no nutritional value. RP 115-116, 176-177.

Dr. Williams examined the dead animal and noted it was missing some teeth and others were abscessed. RP 125. She testified that without proper and regular dental care, llamas develop problems that can affect their ability to chew food. RP 125-128. According to Williams, Smith seemed unaware that llamas need regular dental care. RP 129-130. Williams gave the dead animal a body score of 1 and found evidence of severe malnutrition. The llama was very old.<sup>1</sup> RP 124, 146.

As for the rest of the herd, some had physical injuries – one

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<sup>1</sup> Dr. Williams also was asked to perform a necropsy on the partial remains of an animal found in a ditch located outside the property line. RP 262-265. Dr. Williams determined that it was either a baby llama or alpaca and that it had been born alive and likely starved to death. RP 192-194, 220-223.

had bailing wire wrapped around a foot and two others had orthopedic issues. RP 153-154. Eight or nine had bad teeth. RP 164. Dr. Williams testified that over 85% were “emaciated” and 100% had parasites (biting and sucking lice) and overgrown nails, which is painful. RP 155-156. Many had dermatological issues. RP 164. Smith had not taken fecal samples recently. RP 142. Williams took a sample, which revealed the animals had every known type of internal parasite save one. RP 143-144, 174. Smith indicated she wormed the herd twice a year with Fenbendazole, but Dr. Williams testified that substance was ineffective on llamas. RP 142. All llamas were seized – 41 animals total – and, after consultation with others, Williams decided that seven were beyond rehabilitation and should be euthanized. RP 158-161, 204-205. She testified that they did not struggle and died “gentle deaths.” RP 211.

Jennifer Andrus – the animal control officer – testified that there had been prior complaints concerning food and water for the animals on the property, but all were investigated and determined to be “unfounded.” RP 248-249. In fact, as recently as August 2006 (just seven months earlier), all of the llamas had actually been overweight. RP 553-554. And contrary to Dr. Williams’ testimony, Andrus found 20-25 gallons of drinkable water in each water tank

located on the property. RP 252-253. Moreover, the two horses on the property were in good condition. RP 261.

The State also called Nicole Kuklenski, one of a group of volunteers that a veterinarian labeled the “rabid llama people.”<sup>2</sup> RP 817. Animal control asked for help in removing the llamas from the property and Kuklenski – who has been involved in the breeding and showing of llamas since 1984 – contacted the “Llama Rescue Net,” an organization involved in education and rescue efforts. RP 314-321. 329-330.

Kuklenski testified there was not sufficient grass in the fall and winter to feed the animals and the property lacked sufficient shelter, which – at a minimum – required a three-sided structure with a roof. RP 324-326. She also testified to what appeared to be the absence of sufficient practices for the care, feeding, and breeding of the llamas and, like Dr. Williams, stressed the importance of identifying and treating parasites. RP 327-328, 340. As many as 10 female llamas were pregnant. RP 397. Kuklenski said the overall conditions made her “sick.” RP 337.

The State identified eight llamas it would focus on for the

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<sup>2</sup> The trial court would later find Kuklenski “clearly emotionally involved” in the case and “not . . . particularly objective.” RP 892.

eight charged counts of animal cruelty: animals 1, 7, 8, 8-B, 21, 25, 27, and 33. RP 100. Kuklenski offered her opinion on the condition of each:

- #1 young male, physical signs of poor nutrition and poor breeding, lethargic [RP 345-347]
- #7 pregnant female, "very underweight," trouble standing, lice, needed shearing, evidence of internal parasites [RP 347-356]
- #8 nursing female, "severely underweight" [RP 354-358]
- #8-B nursing cria (offspring of #8), standing as if cold or sick and possible parasites [RP 357-358]
- #21 gelding, "very poor shape," severely malnourished, hair loss from lack of nutrition and parasites [RP 359-360]
- #25 gelding, "emaciated," genetic condition made it difficult to chew, terrible bite, standing position indicative that animal not feeling well, full of parasites [RP 361-364]
- #27 worst animal, difficulty walking, possible hip injury, "severely malnourished" and "barely alive" [RP 364-369]
- #33 young gelding, rear leg problems, underweight [CP 367-370]

Llamas 1, 25, 27, and 33 were among the seven animals Dr. Williams euthanized. The others were llamas 3, 11, and 36. RP 581. The remaining 34 llamas were placed in foster homes. RP 399-403.

Detective McCarthy, who was responsible for executing the warrant and seizing the animals, made certain that he only

considered the opinions of the three veterinarians and not the others, including Kuklenski. RP 555-556. Regarding the eight animals the prosecutor focused on, McCarthy's notes revealed the following problems:

- # 1 starved and severe diarrhea [RP 540]
- #7 starved and infested with parasites [RP 541]
- #8 starved [RP 541-542]
- #8-B underfed and dwarf-like [RP 542]
- #21 starved, near death, very bad feet and nails [RP 544]
- #25 starved and near death [RP 544-545]
- #27 starved and near death [RP 545]
- #33 starved [RP 545]

An animal was seized if in "distress," which could mean parasites, a low body score, or any other health issue causing the animal discomfort. RP 557. McCarthy ended up seizing all 41 animals. RP 545-546.

Two individuals who offered foster care to some of the llamas testified that the animals were very thin, had parasites, and were not in good shape when they first arrived. RP 466-468, 494-497. Llama #21, an old animal, died two weeks after the seizure. A necropsy revealed the cause of death to be heart failure caused by the

systemic spread of bacteremia from an infected tooth, which also would have impacted his ability to eat. RP 287-288, 292-297, 471. He might have survived had his tooth been treated in a timely fashion. RP 298-299. A second animal in foster placement died the following month. This animal also had an infection in its mouth. RP 473.

Following the State's case, the defense called four witnesses – Smith and three veterinarians. Smith testified that she has 16 years' experience working with and caring for llamas. RP 622. She did not own the property and owned only some of the animals, many of which were old. RP 596, 603-606. Smith disputed the State's witnesses' descriptions of the llamas under her care, testifying that prior to the seizures, the llamas were alert, not sick, and seemed fine. RP 674-675.

Smith testified that llama #1, named "Scooter," was born in 2005 and seemed to be happy. RP 616-617. He had a lot of wool, but there was nothing wrong with him based on how he stood. RP 618-619. Llama # 8, "Lupine," looked like her normal self on the day of the seizure, simply watching what was going on and appearing somewhat perplexed by what was happening. RP 631-632. Her offspring, "Glacier," was llama #8-B. RP 631, 647. Smith described

him as "very sturdy." RP 648. Llama # 21 – the animal that died from an infection – was named "Meteor" (later "Rusty") and was very old. He was thin and Smith had been feeding him separately and keeping an eye on him. RP 606, 697-698. He would get thin every winter, but gain weight again in the spring. He did not seem unhappy or sick, however. RP 608, 648-650. Similarly, llama #27, "Sam," was quite old and suffered from arthritis. RP 652-653, 656. Llama # 33 was "Blackie." RP 653-654. Smith testified that although he has a slight build, he was a healthy animal. RP 654-655, 702.

According to Smith, the llamas did not need a structure built for them on the property. Their thick coats, and a dense wooded area on the property, provided sufficient protection from the elements. RP 634-635, 687-691. The pond provided water for the llamas and when it did not, Smith supplemented with water she hauled to the property. RP 642-644. One of Smith's neighbors testified that there were periods where he saw no evidence that anyone was visiting the property to tend to the animals. RP 443-447.

But Smith explained that she sometimes used a back entrance to the property. RP 639-640, 645-646. There was never a lack of food or water and Smith did not detect that any of the llamas were suffering or in pain. RP 675-676. The property was covered with

molehills, not feces as Dr. Williams had claimed. RP 672.

Smith knew that she needed to take fecal samples from the llamas to check for parasites and that their nails needed attention. But she accomplished these tasks every spring. In fact, she had planned on doing this the very next weekend, but the animals were confiscated. RP 676-677. Regarding dental care, Smith testified that not all llamas need regular care and she examined their teeth herself. RP 683. Despite Dr. Williams' findings regarding the health of the llamas, Smith had believed the llamas under her care were healthy. RP 681.

Smith called the two veterinarians who, along with Dr. Williams, assessed the llamas the day they were seized. The first, Dr. Michael Anderson, primarily treats large animals, including llamas. RP 732. When he arrived, he saw that non-veterinarians were rating the animals as far as weight and general health, which seemed inappropriate. RP 733. He testified that "their passion was such" it seemed "that minds had been made up already"; it did not appear to be "an arms length evaluation of what was going on." RP 760. Dr. Anderson attempted to ensure fairness in the evaluation process. RP 767.

Dr. Anderson helped evaluate as many as 18 of the animals.

RP 734-735. Some of the animals were in very good condition and others were in "okay condition." RP 796. A number were low to average body weight, but none struck him as emaciated or near death, and all of the llamas he worked on were "pretty active animals." RP 735-736, 777. He did not find that any of these animals needed to be put down. RP 741. Geriatric llamas tend to have more issues with weight. RP 748. He agreed that one such llama -- #21 ("Meteor") -- was significantly underweight. RP 750-751. He may have rated another llama at issue -- #7 -- as a 1 or 2. But he testified that animal was not "critical" and, based on a photo of the animal, it was "looking strong." RP 773-776. It was just "a little thin." RP 796-797. As to the pregnant females, he testified it is very difficult for a starving llama to get pregnant. RP 743.

According to Dr. Anderson, living conditions on the property were "okay." RP 798. The trees on the property may have provided sufficient shelter for the llamas. RP 797-798. He was not sure whether the stream and pond provided sufficient water, but he noted that llamas, like all camelids, are very efficient users of water. RP 796, 801. Moreover, grass on the property would have provided some nutrition even in the fall and winter months. RP 800-801.

The third veterinarian to evaluate the llamas was Dr. Peter

Rule, who examined as many as nine animals. RP 809, 822. Dr. Rule owns a Ferndale animal hospital and has treated large animals, including llamas. RP 807-808. Just months before the seizure, he had treated one of Smith's crias. RP 808. When he heard that the media and animal control, which had a somewhat poor reputation in the community, were involved at Smith's farm, he decided to offer his services and see "what was really going on." RP 808-809.

Dr. Rule believed that a lot of things had been said about the situation "that probably weren't true." RP 810. He noted that when he tried to take a sample of what everyone was calling lice, it created a "hullabaloo" from the "llama enthusiasts." RP 811-812. He found it "disgusting" that they were not interested in seeking the truth about the llamas' condition. RP 813. He felt they were "rabid," "emotionally excited," and wanted to make themselves look good by destroying Smith. RP 817-818. They also tried to dictate to the veterinarians what findings they should make regarding the animals. RP 835.

That said, Dr. Rule agreed that generally speaking the llamas were not healthy and far too thin, although he disputed that any of the animals he examined actually had lice. RP 809, 812, 816. He believed conditions were the product of "very bad husbandry" and

insufficient care. Some llamas were starving because there were too many animals for the food supply. Small and old llamas could not compete for food. RP 810-811.

Dr. Rule agreed some of the llamas did need new homes. RP 818. But he only saw one or two that needed to be euthanized. RP 820, 837. Specifically, he agreed that animal #27 was old and near death. RP 833-834. Moreover, #33 was badly starved, although he preferred the term "malnourished." RP 834-836. He felt their condition was less a result of what they were being fed than how the herd interacted, depriving the small and old among them. Separating the herd may have prevented the problem. RP 836. Like Dr. Anderson, based on a photo of animal #7, it did not appear to Dr. Rule that the animal was starving. RP 840-841.

Finally, the defense called Dr. Amber Itle, a veterinarian that works exclusively on larger animals and has extensive experience with llamas. RP 717-718. On March 12, 2007, Dr. Itle assisted Dr. Williams in euthanizing the selected llamas. RP 724. By the time Dr. Itle arrived, Dr. Williams had already put down two animals. RP 724. But Dr. Williams did not have the proper equipment to restrain the animals or the proper size needles. RP 719-720, 723. Dr. Itle was not involved in seizing or scoring the animals. RP 726. She

could tell, however, that several of the llamas had orthopedic issues, which may have simply been a consequence of their age. RP 726-727. The animals were not on death's door, as they struggled and fought during the process, which raised the question whether they were properly selected for death. Contrary to Dr. Williams' testimony, they did not die quickly. RP 727.

During closing arguments, the prosecutor argued that Smith was guilty of all eight counts of animal cruelty in the first degree because, with criminal negligence, she had starved the animals and caused them substantial and unjustifiable pain and suffering or death. RP 848, 855-858, 877-881. The prosecutor argued that although he had identified eight animals for the eight counts, the court was free to base the counts on any eight animals it chose. RP 872.

Instead of focusing on the eight animals the trial deputy identified, defense counsel focused on the animals that died, arguing the seven that were euthanized were killed not because it was necessary, but because it would have been difficult to place them elsewhere. RP 861-862, 868. Defense counsel argued that the State's main witnesses – Kuklenski and Dr. Williams – were “very emotionally involved” in the case, which impacted their

opinions and testimony. RP 860. Counsel conceded that many of the animals were underweight, should have been given specialized treatment, and “may have had some other physical maladies that should have been addressed.” RP 865, 868. But counsel argued the evidence did not show the animals were starving or in substantial pain for extended periods. RP 865-867.

The court found Smith criminally negligent regarding the feeding and medical care of the animals, including their dental care and treatment of internal parasites, which resulted in starving and significant suffering. RP 905-906. Like the defense, the court based the eight counts on eight animals that died – six that were euthanized<sup>3</sup> and the two that died after they were placed in a new home. RP 907-908.

### C. ARGUMENT

1. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE THAT SMITH SHOULD ONLY BE CONVICTED OF ANIMAL CRUELTY IN THE SECOND DEGREE.

Both the federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. 6; Wash. Const. art. 1,

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<sup>3</sup> The court was under the misimpression that only six llamas were euthanized. See RP 896. There were actually seven. RP 581-582.

§ 22. A defendant is denied this right when his or her attorney's conduct (1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a reasonable probability that the outcome would be different but for the attorney's conduct. State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)), cert. denied, 510 U.S. 944 (1993). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987)(quoting Strickland, 466 U. S. at 693-94).

An attorney's failure to raise and argue a potentially meritorious argument on his client's behalf falls below the minimum standard for attorney conduct. See, e.g., Thomas, 109 Wn.2d at 226-228 (failure to properly raise and argue intoxication defense); State v. Ward, 125 Wn. App. 243, 246-251, 104 P.3d 670 (2004) (failure to ask for instruction on lesser-included offense); State v. Lopez, 107 Wn. App. 270, 277, 27 P.3d 237 (2001) (failure to argue for dismissal of case based on insufficiency of the evidence), aff'd, 147 Wn.2d 515, 55 P.3d 609 (2002); State v. Klinger, 96 Wn. App. 619, 623-629, 980 P.2d 282 (1999) (failure to argue absence of

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probable cause to support warrant); State v. Carter, 56 Wn. App. 217, 223-224, 783 P.2d 589 (1989) (failure to argue mandatory joinder).

Recently, in State v. Smith, 154 Wn. App. 272, 223 P.2d 1262 (2009), this Court found the appellant had been denied his right to effective representation under circumstances similar to those here. Michael Smith was charged with one count of animal cruelty in the first degree for starving a llama, which led to its suffering and ultimate death.<sup>4</sup> Smith, 154 Wn. App. at 273-278. The llama had an internal parasite and lice. Id. at 275. Smith testified that he fed the llama regularly but did not seek veterinary assistance to address the llama's weight loss. Id. at 274. Defense counsel did not ask that jurors consider the lesser degree offense of animal cruelty in the second degree,<sup>5</sup> a misdemeanor, and jurors convicted Smith as

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<sup>4</sup> RCW 16.52.205(2) provides:

A person is guilty of animal cruelty in the first degree when, except as authorized by law, 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.

<sup>5</sup> RCW 16.52.207(2) provides:

charged. *Id.* at 276.

On appeal, this Court concluded that several pieces of evidence supported a rational inference from which jurors could have concluded, based on Smith's failure to seek medical attention for the llama, he had committed only second-degree animal cruelty. Specifically, this Court pointed to the evidence of a previously undisclosed parasite, evidence Thomas regularly fed the llama and sought advice on how to assist the llama in gaining weight, and Smith's admission that he had failed to take the llama to a veterinarian. *Id.* at 278. As this Court recognized:

defense counsel's all or nothing strategy was not a legitimate trial tactic and constituted deficient performance because he presented evidence to call into question the State's theory on starvation, not the entire crime. This left the jury in an arduous position: to either convict Smith of first degree animal cruelty or

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(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.

"Owner" includes any person in lawful possession of an animal. RCW 16.52.011(2)(i).

let him go free despite evidence of some culpable behavior. See *State v. Pittman*, 134 Wn. App. 376, 387-89, 166 P.3d 720 (2006) (failure to request lesser included offense instruction was ineffective assistance because defendant committed a crime similar to the one charged but the jury had no option other than to convict or acquit). . . .

*Id.* at 278-279.

The same is true in Lanette Smith's case. The defense disputed that Smith was guilty of animal cruelty in the first degree, offering evidence that the llamas were not starving and did not experience substantial pain causing considerable suffering. According to Smith, there was no issue with food; she regularly fed the llamas under her care, in addition to the grass available to them on the property. RP 229, 528-529, 675. Starving llamas are unlikely to conceive. RP 743. Yet, as many as 10 females were pregnant. RP 397. Moreover, the defense challenged those State's witnesses who claimed that several of the animals had to be euthanized. Smith testified it was a healthy herd and the animals were not in pain. RP 675-676, 681. Dr. Anderson testified that none of the animals he saw were emaciated or near death and there was no need to put any of them down. RP 735-736, 741, 777. And, according to Dr. Itle, none of the animals she saw were on "death's door"; they struggled and fought against Dr. Williams'

efforts to euthanize them, raising a question whether they needed to die. RP 727.

On the other hand, there was evidence that Smith committed *some* crime: animal cruelty in the second degree, which merely required proof she negligently failed to provide proper shelter or veterinary care, which led to physical pain. RCW 16.52.207(2). There was testimony the llamas needed a structure for shelter, but did not have one. RP 324-326. Moreover, there was evidence many of them had physical conditions that caused them pain and should have been treated by a veterinarian, including problems with their teeth, lice, internal parasites, and their feet. RP 153-156, 164, 174, 243-244.

Yet, Smith disputed the need for additional shelter. RP 634-635, 687-691. And she did not seek medical attention for the animals' various medical conditions. Her use of Ferbendazole to treat parasites was deemed ineffective. RP 142. She had not taken stool samples recently, and the llamas had almost every parasite possible. RP 142-144. And Smith seemed unaware that llamas need regular dental care. RP 129-130. Indeed, both llamas that died after the seizure had infections in their mouths, and the death of one was deemed directly attributable to that infection. RP

287-288, 292-299, 471-473.

Defense counsel even conceded the State had proved that the llamas had “physical maladies that should have been addressed.” RP 865. And the court ultimately found Smith was negligent concerning the lack of shelter and medical care, including dental care and treatment for parasites. RP 905. Yet, counsel never asked the court to find Smith guilty of animal cruelty in the second degree.

It is ineffective to pursue an “all or nothing” strategy where the defense challenged the State’s theory of starvation (necessary for a first-degree offense) but could not challenge the fact a lesser crime had been committed (a second-degree offense). Smith, 154 Wn. App. at 278-279. Therefore, Lanette Smith is entitled to the same remedy as Michael Smith. Her convictions must be reversed and the case remanded for a new trial.

In response, the State will likely argue that because Lanette Smith had a bench trial, as opposed to the jury trial in Michael Smith’s case, she cannot establish prejudice. Specifically, unlike a jury, a trial judge likely has the authority to consider a lesser-degree offense whether asked to or not. RCW 10.61.010 (“Upon the trial of an indictment or information, the defendant may be convicted of

the crime charged therein, or of a lesser degree of the same crime. . . .”); see also State v. Atterton, 81 Wn. App. 470, 473, 915 P.2d 535 (1996) (Court of Appeals may remand to trial court for entry of conviction on lesser degree offense when conviction for greater offense reversed).

But in Smith’s case, defense counsel never asked the trial court to consider animal cruelty in the second degree and never argued why Smith’s actions only established that lesser crime. The prosecutor mentioned the lesser crime, but only to argue against it. He suggested it was only an option for one or two of the charged counts, and encouraged the court not to find Smith guilty of the misdemeanor offense. RP 872-873.

The trial court read the requirements of the lesser offense during its oral decision and indicated it had considered the degree of the charges. RP 902-904. But the only argument the court heard on the lesser offense was *not* to find it for some of the counts. Defense counsel provided no argument to the contrary despite significant evidence establishing that only that lesser crime had been committed. In short, he gave the court no reason to find Smith guilty of a lesser offense that avoided outright acquittal but prevented her conviction on eight felony counts. This is the

functional equivalent of a failure to ask for a jury instruction on a lesser offense and denied Smith her right to effective representation and a fair trial.

2. THE TRIAL COURT FAILED TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW UNDER CrR 6.1(d).

At Smith's trial, the court was the trier of fact. A trial court sitting as trier of fact must enter written findings of fact and conclusions of law. CrR 6.1(d) provides:

**Trial Without Jury.** In a case tried without a jury, the court shall enter findings of fact and conclusions of law. In giving the decision, the facts found and the conclusions of law shall be separately stated. The court shall enter such findings of fact and conclusions of law only upon 5 days' notice of presentation to the parties.

Without comprehensive, specific written findings, the appellate court cannot properly review the trial court's resolution of the disputed facts and its application of the law to those facts. State v. Greco, 57 Wn. App. 196, 204, 787 P.2d 940, review denied, 114 Wn.2d 1027 (1990). Where there is a complete failure to comply with CrR 6.1(d), the proper remedy is to vacate the judgment and sentence and remand to the trial court for entry of the required findings and conclusions. State v. Head, 136 Wn.2d 619, 624-26, 964 P.2d 1187 (1998); State v. Denison, 78 Wn. App. 566, 572, 897

P.2d 437 (citing State v. Russell, 68 Wn.2d 748, 415 P.2d 503 (1966)), review denied, 128 Wn.2d 1006 (1995).

3. THE TRIAL COURT ERRED WHEN IT IMPOSED A LIFETIME BAN ON SMITH'S OWNERSHIP OR CARE OF HERD ANIMALS.

The trial court imposed a lifetime ban on Smith owning, working with, or caring for herd animals. RP (11/10/09) at 19-20, 24-25. Specifically, Smith's judgment says, "Defendant is permanently prohibited from owning, working with, or caring for herd animals (including but not limited to llamas, alpacas, horses). . . ." CP 17. The court believed it was obligated to impose this lifetime ban under RCW 16.52.200(3). RP (11/10/09) at 24-25.

But that statute did not authorize the broad prohibition imposed on Smith. The statute provides:

(3) In addition to the penalties imposed by the court, the court shall order the forfeiture of all animals held by law enforcement or animal care and control authorities under the provisions of this chapter if any one of the animals involved dies as a result of a violation of this chapter or if the defendant has a prior conviction under this chapter. In other cases the court may enter an order requiring the owner to forfeit the animal if the court deems the animal's treatment to have been severe and likely to reoccur. If forfeiture is ordered, the owner shall be prohibited from owning or caring for any similar animals for a period of time as follows:

...

(b) Permanently for a first conviction of animal cruelty in the first degree under RCW 16.52.205;

RCW 16.52.200(3)(b) (emphasis added).

There are three problems with the court's application of this statute to Smith.

First, the statute does not apply because there is no indication in the record the sentencing court ever ordered forfeiture of the llamas. By the clear terms of the statute, an order of forfeiture is a condition precedent to a prohibition on owning or caring for animals. RCW 16.52.200(3) ("If forfeiture is ordered, the owner shall be prohibited . . .").

Second, even if the statute did apply, it only prohibits owning or caring for "similar animals." "Similar animals" means "an animal classified in the same genus." RCW 16.52.011(2)(k). A "genus" is "a class, kind, or group marked by common characteristics or by one common characteristic." Webster's Third New Int'l Dictionary 948 (1993). "Lama is the modern genus name for two South American camelids, the wild guanaco and the domesticated llama." [http://en.wikipedia.org/wiki/Lama\\_\(genus\)](http://en.wikipedia.org/wiki/Lama_(genus)). It also includes the alpaca and vicuña. <http://www.yourdictionary.com/llama>; <http://www.nhlama.org/NHLA/NHLA.generalinfor.asp>. Therefore,

Smith could not lawfully be prohibited from owning or caring for all “herd animals.” Rather, any prohibition could only include members of the genus Lama.

Third, the court applied the wrong version of the statute. Smith was charged with conduct occurring between September 1, 2006 and March 10, 2007. CP 29-32. The effective date of the current version of RCW 16.52.200 was July 26, 2009. See 2009 c 287 § 3. Prior to that date, the court could only prohibit the ownership or care of similar animals for a maximum of two years, even when the defendant was convicted of animal cruelty in the first degree. See former RCW 16.52.200(3); 2009 c 287 § 3. It has long been the rule in Washington that substantive amendments to criminal statutes do not apply to conduct preceding their effective date, unless the Legislature expressly declares otherwise. See RCW 10.01.040;<sup>6</sup> State v. Pillatos, 159 Wn.2d 459, 472, 150 P.3d

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<sup>6</sup> No offense committed and no penalty or forfeiture incurred previous to the time when any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, unless a contrary intention is expressly declared in the repealing act, and no prosecution for any offense, or for the recovery of any penalty or forfeiture, pending at the time any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, but the same shall proceed in all respects, as if such provision had not been repealed, unless a contrary intention is expressly declared in the

1130 (2007).

There is no such declaration regarding the 2009 amendments to RCW 16.52.200. Thus, any prohibition in Smith's case could not exceed two years.

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repealing act. Whenever any criminal or penal statute shall be amended or repealed, all offenses committed or penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared in the amendatory or repealing act, and every such amendatory or repealing statute shall be so construed as to save all criminal and penal proceedings, and proceedings to recover forfeitures, pending at the time of its enactment, unless a contrary intention is expressly declared therein.

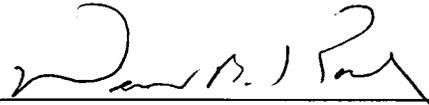
D. CONCLUSION

Smith was denied her right to effective representation when her attorney failed to ask or argue for conviction on the lesser degree offense of animal cruelty in the second degree. Moreover, the lifetime ban on Smith's ownership or care of all herd animals is not authorized and must be stricken.

DATED this 24<sup>th</sup> day of September, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



DAVID B. KOCH  
WSBA No. 23789  
Office ID No. 91051

Attorneys for Appellant

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 64526-9-1
	)	
LANETTE SMITH,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 24<sup>TH</sup> DAY OF SEPTEMBER, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] JEFFREY SAWYER  
WHATCOM COUNTY PROSECUTOR'S OFFICE  
311 GRAND AVENUE  
SUITE 201  
BELLINGHAM, WA 98225
  
- [X] LANETTE SMITH  
P.O. BOX 966  
BLAINE, WA 98231

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2010 SEP 24 PM 4:11

**SIGNED** IN SEATTLE WASHINGTON, THIS 24<sup>TH</sup> DAY OF SEPTEMBER, 2010.

x *Patrick Mayovsky*