

66417-4

66417-4

**NO. 66417-4-I**

IN THE COURT OF APPEALS – STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON  
Respondent,

v.

**RICHARD CARL BERGEM,**  
Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable David R. Needy, Judge

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**RESPONDENT'S BRIEF**

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## **I. SUMMARY OF ARGUMENT**

Richard Bergem appeals his convictions for Animal Cruelty in the First and Second Degree of a pinto gelding and a sorrel mare. Bergem had starved the horses and had not provided sufficient water or shelter.

Bergem claims that starvation and dehydration are alternative means of Animal Cruelty in the First Degree. Despite admitting sufficient evidence of starvation of the pinto gelding, Bergem claims insufficient evidence of dehydration. However, starvation and dehydration are not alternative means, there was sufficient evidence of dehydration, and even if there was not, given the overwhelming evidence of starvation, any error was harmless.

Bergem claims that Animal Cruelty in the Second Degree has alternative means of shelter, rest, sanitation, space, and medical attention and that insufficient evidence existed of these means as instructed. Since there was significant evidence of loss of weight of the two horses during one month, there was no shelter provided and one horse was not treated for a medical condition, there was sufficient evidence to support the convictions for Animal Cruelty in the Second Degree.

Additionally, Bergem's claims amount to challenges to the elements in the jury instructions and his failure to raise the issues below should preclude appellate review because the errors are not manifest.

## **II. ISSUES**

1. Since Animal Cruelty in the First Degree has separate means of intentional infliction of pain, injury or death, by criminal negligence, and by sexual contact, are starvation dehydration, and suffocation means within the means of criminal negligence?
2. Where a horse had dropped significant weight in one month despite the defendant claims of feeding and watering regularly and there was insignificant water when the horse was seized, was there sufficient evidence of dehydration to support conviction?
3. Where there was overwhelming evidence of starvation, if there was insufficient evidence of an alternative “means” as claimed by the defendant of dehydration, was the error harmless beyond a reasonable doubt?
4. Where inflicting unnecessary pain, failing to provide shelter, rest, sanitation, space or medical attention, and abandoning are three alternative means, are shelter, rest, sanitation, space or medical attention means within the means, such that each are required to have sufficient evidence to support conviction for Animal Cruelty in the Second Degree?

5. Was there sufficient evidence of lack of shelter, sanitation or medical attention, where there was no shelter, one horse had a medical condition, and a second horse had significant lack of grooming?
6. Where a defendant fails to object to the elements of the jury instructions presented below which could have addressed by the trial court if objected to, should appellate review be precluded where the claimed errors are not manifest?

### **III. STATEMENT OF THE CASE**

#### **1. Statement of Procedural History**

On January 21, 2010, Richard Bergem was charged with two counts of Animal Cruelty in the First Degree, alleged to have occurred December 4, 2009. CP 1-2. The first count was for a black and white pinto gelding. CP 1. The second count was for a sorrel mare. CP 2.

On July 22, 2010, an amended information was filed alleging two counts of Animal Cruelty in the Second Degree. CP 7-8.

On July 26, 2010, the second amended information was filed. CP 9-10. Bergem was tried on this information, which clarified that the Animal Cruelty in the Second Degree was under RCW 16.52.207(2)(a). CP 10.

On October 25, 2010, the case proceeded to trial. 10/25/10 RP 1.<sup>1</sup>

On October 27, 2010, the jury returned verdicts finding Bergem guilty of Animal Cruelty in the First Degree for the pinto gelding and two counts of Animal Cruelty in the Second Degree. CP 31-33.

On December 10, 2010, the trial court sentenced Bergem to 20 days of jail time to be served on jail alternatives. 12/10/10 RP 6, CP 45, 52. The prosecutor noted a statute provided for lifetime prohibition against owning horses, but sought a five year prohibition. 12/10/10 RP 6-7. The trial court imposed the five year prohibition. 12/10/10 RP 7, CP 48.

On December 10, 2010, Bergem timely filed a Notice of Appeal. CP 54.

## **2. Summary of Trial Testimony**

Emily Diaz was the Animal Control Officer for the Skagit County Sheriff's Office for over five years at the time of trial. 10/25/10 RP 4. Diaz had training in enforcement of animal cruelty laws. 10/25/10 RP 4-5. Diaz knew Richard Bergem. 10/25/10 RP 5. In October of 2009, Diaz had seen Bergem keeping a black and white pinto gelding and a sorrel mare in a two

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<sup>1</sup> The State will refer to the verbatim report of proceedings by using the date followed by "RP" and the page number. The report of proceedings in this case are as follows:

9/23/10 RP	Trial Continuance
9/30/10 RP	Trial Continuance
10/13/10 RP	Motion Hearing
10/25/10 RP	Trial Day 1 – Volume I - Testimony
10/26/10 RP	Trial Day 2 – Volume II – Testimony, Jury Instructions, Closing
12/10/10 RP	Sentencing.

to three acre pasture at 5198 Tenneson Road in Sedro Woolley. 10/25/10 RP 5, 28. Diaz became involved on October 26, 2009, because a neighbor had called concerned about the welfare of the horses. 10/25/10 RP 6. Officer Diaz went out the next day and spoke with Bergem who allowed Diaz to look at the horses. 10/25/10 RP 6-7. Diaz evaluated the horses, and determined the body condition of the gelding to be a 2.5 out of 9 and the mare to be a 4 out of 9 on the Henneke scale. 10/25/10 RP 7, 10/26/10 RP 61-2. Diaz explained that 1 would mean that the horse was completely emaciated, near death and a 9 would mean grossly obese. 10/25/10 RP 7.

Diaz described that the gelding's hind end was sunken in, the spine was protruding, and there was a shelf between its spine and rib cage, which were all indicators of loss of fat and muscle. 10/25/10 RP 7-8. The mare was beginning to have a slop[e] in her hind end, and that the 4 score was an indicative of a horse on the leaner side. 10/25/10 RP 8. Diaz considered the mare's weight was okay at that time. 10/25/10 RP 8.

Diaz discussed her concerns about the body conditions of the horses with Bergem. 10/25/10 RP 8. Bergem told Daiz what he was feeding the horses, and she noted there was not enough grass to support the horses. 10/25/10 RP 9. Diaz recommended Bergem increase the feed and supplement with alfalfa. 10/25/10 RP 9. Diaz had previously given Bergem care instructions as well as a voucher from a horse aid foundation to

supplement feed. 10/25/10 RP 9. Bergem did not fill the voucher. 10/25/10 RP 18. Diaz had spoken with Bergem about doing an owner release if he was struggling to provide for horses. 10/25/10 RP 18.

Diaz also talked to Bergem about shelter for the horses. 10/25/10 RP 16-7. Bergem told Diaz he was three pieces of plywood short. 10/25/10 RP 17. Diaz attempted to, but could not find plywood to contribute. 10/25/10 RP 17. Diaz testified that the shelter was necessary to protect the horses from the elements and that those horses without enough weight or body fat need shelter to keep rain and snow from them to help regulate body temperature. 10/25/10 RP 17. At the end of the visit, Bergem had told Diaz “you’ve seen my horses. Now get the hell off.” 10/25/10 RP 16.

Photographs showing the conditions of the horses and pasture on October 27, 2009 were admitted. 10/25/10 RP 13-4.

On November 25, 2009, just under a month later, Diaz made a second visit to the pasture. 10/25/10 RP 14-5. Eight photographs from that day were admitted. 10/25/10 RP 15. The horses had lost weight instead of gaining weight. 10/25/10 RP 16. Because the horses were not getting better and were losing weight, Diaz sought and was granted a search warrant to remove the animals. 10/25/10 RP 20.

On December 4, 2009, the horses were seized. 10/25/10 RP 19-20. Over the one week period, the conditions of the horses worsened. 10/25/10

RP 20. Diaz described that both horses were severely underweight and the gelding was emaciated. 10/25/10 RP 21. The pictures of the horses and pasture from that day were admitted. 10/25/10 RP 22. There was very little vegetation in their pasture. 10/25/10 RP 22. Diaz observed a 25 to 30 gallon bucket for watering the horses which had a centimeter of water. 10/25/10 RP 22. Diaz testified the two horses and the one mule in the pasture each needed 5 to 15 gallons a day. 10/25/10 RP 22-3. The bucket would have to be filled two times a day to provide enough water. 10/25/10 RP 23. There was no float system to fill water automatically. 10/25/10 RP 23. The horses were examined by Dr. Knopf at the fairground. 10/25/10 RP 20.

The gelding's tailbone was protruding, there was a shelf between the spine and rib cage, his rib cage was visible and his neck and flanks were sunken. 10/25/10 RP 24. The gelding also had rain rot caused by too much moisture accumulating on the horses's skin due to lack of shelter. 10/25/10 RP 24-5. The mare also appeared to have rain rot at first, but it turned out that poor grooming had caused it to appear like rain rot. 10/25/10 RP 25.

Deanne Long was a neighbor to Bergem. 10/25/10 RP 29. Long had her own horses. 10/25/10 RP 33. Long testified she had seen the gelding and the mare on the property twice every day when she drove past. 10/25/10 RP 30. Long called Officer Diaz because she was concerned about the condition of the horses and had seen weight dropping off. 10/25/10 RP 31. Long was

concerned enough to call in October because their bones were showing.  
10/25/10 RP 31-2.

Kerry McGoff was a next-door neighbor to Bergem. 10/25/10 RP 33-4. McGoff owned three horses. 10/25/10 RP 36. McGoff testified that one of Bergem's horses got loose into McGoff's yard and McGoff had a discussion with the owner of the property because the horse looked hungry and skinny. 10/25/10 RP 34. McGoff called the sheriff to report the horses being very underweight. 10/25/10 RP 34. McGoff described the pasture as extremely overgrazed. 10/25/10 RP 37.

Bea Robson was another next-door neighbor of Bergem. 10/25/10 RP 39-40. Robson was familiar with Bergem's horses. 10/25/10 RP 40. Robson testified that when the horses first showed up in August that they were in good health and had decent weight. 10/25/10 RP 41. But the minute the grass stopped growing in late fall, the horses took a bad turn. 10/25/10 RP 41-2. Robson called to the sheriff's office to report the condition. 10/25/10 RP 42. Robson never saw Bergem feed the horses. 10/25/10 RP 44.

Michelle Miner, president of Ripley's Horse Aid Foundation, testified. 10/25/10 RP 44-6. In 2009, Miner had trained Bergem on the Henneke weight and feeding guidelines for horses. 10/25/10 RP 47. Miner had given Bergem a voucher for feed, mineral, salt block, weight tape and

hay, which he never redeemed. 10/25/10 RP 48. Miner saw the condition of the horses in November of 2009 with Diaz. 10/25/10 RP 46-7. Miner would have scored the horses at a high of 1 on the scale. 10/25/10 RP 48. The pasture consisted of mud and inedible buttercups and a few scattered trees, but no shelter. 10/25/10 RP 49. Miner described that shelter was important for horses, especially those with a compromised immune system to protect itself. 10/25/10 RP 49. Miner believed the horses needed to be removed. 10/25/10 RP 49. The mule on the pasture did not want to be caught, had more weight on it and was not removed. 10/25/10 RP 51.

Veterinarian Dr. Emily Knopf testified. 10/25/10 RP 59. Dr. Knopf evaluated a pinto gelding and a sorrel mare at the fairgrounds on December 4, 2009. 10/26/10 RP 60.

Dr. Knopf testified that the pinto's biggest problem was minimal fat covering across his entire body caused by a severe lack of nutrition. 10/26/10 RP 60. The pinto gelding did not have any oral conditions or abnormalities that could account for the weight loss. 10/26/10 RP 61, 64. Dr. Knopf testified that a castrated horse gains weight. 10/26/10 RP 72. Dr. Knopf rated the pinto gelding as a scale of one out of nine on the Henneke scale. 10/26/10 RP 61. Dr. Knopf testified that the Henneke scale is a way to evaluate body condition and fat covering of a horse. 10/26/10 RP 61-2. The score of 1 indicates an emaciated horse with minimal fat covering.

10/26/10 RP 62. Dr. Knopf opined that the gelding's condition was a result of inappropriate amounts of food or poor quality food. 10/26/10 RP 62. Dr. Knopf described how the photograph from October showed the gelding was a 2.5 or 3 the on the scale. 10/26/10 RP 63. Dr. Knopf opined that due to the lack of feed that the gelding had suffered substantial and unjustifiable pain over a period of time sufficient to cause suffering. 10/26/10 RP 64. The horse was one of the worst she had seen. 10/26/10 RP 71.

Dr. Knopf was asked if the horses showed effects of a lack of shelter. 10/26/10 RP 64-5. Dr. Knopf testified that the pinto gelding had rain rot, a bacterial infection, consistent with the hair layer being consistently wet. 10/26/10 RP 65. Rain rot is caused by a lack of shelter and can progress to deep festering sores. 10/26/10 RP 65. Knopf testified that the rain rot had progressed to sores around the eyes and top line of the pinto gelding which was a chronic bacterial infection. 10/26/10 RP 65, 71.

Dr. Knopf described that the sorrel mare had considerable mud caked around her legs indicating a lack of dry area to stand. 10/26/10 RP 66.

Dr. Knopf was asked about the amount of hay that Bergem had said he fed the horses daily. 10/26/10 RP 67. Dr. Knopf testified that the amount described by Bergem was not enough for the horses. 10/26/10 RP 67.

Jaime Taft runs a horse rescue group named SAFE in Monroe, Washington. 10/26/10 RP 75. Taft testified that SAFE took the pinto

gelding in December of 2009. 10/26/10 RP 75. Taft said the gelding had extreme emaciation at the time, at a level one on the scale of nine. 10/26/10 RP 76. Taft testified that in October of 2010, the gelding's body condition score was at 5.5 which was achieved in about four months. 10/26/10 RP 76, 78. Taft said the only things they did were feed the horse and dealt with the rain rot. 10/26/10 RP 76. Taft described the gelding's rain rot as being moderate which had scabs and crusting and could be painful. 10/26/10 RP 76. Taft described that the horse would be susceptible to the rain rot due to the body condition and lack of shelter. 10/26/10 RP 77.

Bergem called James Baher to testify. 10/26/10 RP 79. Baher said he had given Bergem the pinto gelding in the first or second week of October, 2009. 10/26/10 RP 79. Baher was a professional farrier, who had been working with horses since he was seven. 10/26/10 RP 80. Baher had received the gelding in September, a few weeks before he transferred it to Bergem. 10/26/10 RP 81-2, 87, 91. Baher had the gelding castrated. 10/26/10 RP 82. Baher had tried to sell the gelding but couldn't so Bergem took the gelding. 10/26/10 RP 87.

On cross-examination, Baher said he had known Bergem for nine or ten years. 10/26/10 RP 90. Baher also said that contrary to his prior testimony, he sold the gelding to Bergem for \$1,000 on payments. 10/26/10

RP 91. Baher said he was paid by Bergem putting cabinets in a fifth-wheel trailer and paying \$500 in cash in May of 2010. 10/26/10 RP 91, 97.

Bergem called William Cabana. 10/26/10 RP 97. Bergem lived on Cabana's five acre property for three and half years. 10/26/10 RP 97, 105. Cabana said that Bergem had lived on the property but did not pay rent. 10/26/10 RP 100. Bergem did work for Cabana around the house. 10/26/10 RP 100. Cabana testified that the property had spotty trees. 10/26/10 RP 99. Cabana said Bergem normally fed the horses twice a day. 10/26/10 RP 101-2. Cabana was asked if there was plenty for horses to eat, but he said he had no experience with horses. 10/26/10 RP 103.

On cross-examination, Cabana testified that there was a well on the property for water, there was a frost-free faucet in the garden and the horses are about thirty to forty feet away. 10/26/10 RP 105-6.

Gary Cabana, William's son, testified. 10/26/10 RP 108. Ten photographs he took on October 28, 2009, were admitted. 10/26/10 RP 109.

Terrisa Boots, a friend of Bergem's for six years, testified. 10/26/10 RP 112. Boots said that she saw Bergem feeding the gelding, mare and mule. 10/26/10 RP 113. Boots was at the property about six times since Bergem lived there. 10/26/10 RP 115, 117. Boots said the horses appeared fine to her, and that the pinto gelding was a little under weight. 10/26/10 RP

114-5. Boots said that Bergem brushed the horses and rode the mare all the time. 10/26/10 RP 115.

Sherry Mills, a friend of Bergem's for fifteen years, testified. 10/26/10 RP 119. Mills said that the gelding showed up at Bergem's property in late October of 2009. 10/26/10 RP 120. Mills testified that Bergem fed the horses hay and alfalfa twice a day. 10/26/10 RP 122.

Richard Bergem testified. 10/26/10 RP 126. Bergem said he had the gelding, mare and mule on the property in October and November of 2009. 10/26/10 RP 127. Bergem got the gelding in September. 10/26/10 RP 128. Bergem said he did not provide shelter for the horses because the property had trees. 10/26/10 RP 129. Bergem claimed he fed the horses twice a day. 10/26/10 RP 129. Bergem claimed he filled the twenty-five gallon water pail three or four times a day. 10/26/10 RP 130. Bergem claimed there was no water on the day of the search warrant due to a pipe break. 10/26/10 RP 130. Bergem said he did not have a regular job but does odd jobs and subcontracting. 10/26/10 RP 131-2. Bergem claimed he would never do anything to harm his animals. 10/26/10 RP 134.

On cross-examination, Bergem admitted that there was insufficient vegetation on the pasture for the animals and that he had to supplement. 10/26/10 RP 135. Bergem said he had most of the materials to put up shelter

but had not done that. 10/26/10 RP 136. Bergem said the pinto had been gelded quite a while before he got it. 10/26/10 RP 147.

Bergm also admitted to having pled guilty to an animal cruelty charge in 2009. 10/26/10 RP 147,

#### IV. ARGUMENT

1. **Given the emaciated condition of the pinto gelding, there was sufficient evidence for the jury to convict Bergem of Animal Cruelty in the First Degree.**

i. **Animal Cruelty in the First Degree has separate means, but dehydration, starvation and strangulation are methods within the means of criminal negligence and proof of each is not required.**

Animal Cruelty in the First Degree is defined as follows:

(1) A person is guilty of animal cruelty in the first degree when, except as authorized in law, he or she **intentionally** (a) **inflicts substantial pain** on, (b) **causes physical injury** to, or (c) **kills an animal by a means causing undue suffering**, or forces a minor to inflict unnecessary pain, injury, or death on an animal.

(2) 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**.

(3) A person is guilty of animal cruelty in the first degree when he or she:

(a) **Knowingly engages in any sexual conduct or sexual contact** with an animal;

(b) **Knowingly causes, aids, or abets another person to engage in any sexual conduct** or sexual contact with an animal;

(c) **Knowingly permits any sexual conduct** or sexual contact with an animal to be conducted on any premises under his or her charge or control;

(d) **Knowingly engages in, organizes, promotes, conducts, advertises, aids, abets, participates in as an observer, or performs** any service in the furtherance of **an act involving any sexual conduct** or sexual contact with an animal for a commercial or recreational purpose; or

(e) Knowingly photographs or films, for purposes of sexual gratification, a person engaged in a sexual act or sexual contact with an animal.

(4) Animal cruelty in the first degree is a class C felony.

...

RCW 16.52.205 (subsections 5-8 omitted) (emphasis added). Of the alternative means listed in the statute, the State charged Bergem under RCW 16.52.205(2)(a) by criminal negligence, starving, dehydrating or suffocating the gelding causing substantial and unjustifiable physical pain for a period sufficient to cause considerable suffering. CP 9. The jury was instructed as follows:

The jury instruction provided the following:

To convict the defendant of Animal Cruelty in the First Degree – Owner, in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about December 4, 2009, the defendant with criminal negligence, starved and/or dehydrated a black and white pinto gelding horse; and

(2) The defendant's actions cause the animal substantial and unjustifiable physical pain extending for a period sufficient to cause considerable suffering; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, it will be your duty to return a verdict guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 22.

Bergem contends that the means of Animal Cruelty in the First Degree by criminal negligence contains means within that means of dehydration and starvation and that there was only insufficient evidence to support dehydration requiring that this Court reverse the conviction.

The State contends that given the language of the statute, intentional infliction of pain, injury or death under RCW 16.52.205(1), by criminal negligence under RCW 16.52.205(2), and by sexual contact under RCW 16.52.205(3), are alternative means. However, Animal Cruelty in the First Degree by criminal negligence under RCW 16.52.205(2) does not provide for alternative means of starvation, dehydration or strangulation.

To determine whether a statute describes several multiple offenses or a single offense which may be committed in different ways, the following factors are considered: “[1] the title of the act; [2] whether there is a readily perceivable connection between the various acts set forth; [3] whether the acts are consistent with and not repugnant to each other; [4] and whether the acts may inhere in the same transaction.” Arndt, 87 Wn.2d at 379, 553 P.2d 1328, quoting State v. Kosanke, 23 Wn.2d 211, 213, 160 P.2d 541 (1945).

State v. Whitney, 108 Wn. 2d 506, 510, 739 P.2d 1150 (1987).

Alternative means crimes are ones that provide that the proscribed criminal conduct may be proved in a variety of ways. As a general rule, such crimes are set forth in a statute stating a single offense, under which are set forth more than one means by which the offense may be committed. *See State v. Arndt*, 87 Wn.2d 374, 384, 553 P.2d 1328 (1976).

State v. Smith, 159 Wn. 2d 778, 784, 154 P.3d 873, 876 (2007).

Typically, an alternative means statute will state a single offense, using subsections to set forth more than one means by which the offense may be committed. State v. Smith, 159 Wash.2d 778, 784, 154 P.3d 873 (2007). Our courts have resisted efforts to interpret statutory definitions as creating additional means, or means within a means, of committing an offense. *See Smith*, 159 Wn.2d at 785–86, 154 P.3d 873 and cases cited therein. Merely because a definition statute states methods of committing a crime in the disjunctive does not mean that the definition creates alternative means of committing the crime. State v. Laico, 97 Wn. App. 759, 762, 987 P.2d 638 (1999).

State v. Nonog, 145 Wn. App. 802, 812, 187 P.3d 335, 339 (2008) *aff'd*, 169 Wn.2d 220, 237 P.3d 250 (2010).

The framework of the three statutory subsections of Animal Cruelty in the First Degree sets forth one offense completed by three means. One of those three means is established by the mens rea of criminal negligence occurring by starvation, dehydration or suffocation. Whether sufficient evidence is available to support the means of criminal negligence is a jury determination.

The crime of Robbery in the First Degree has a similar statutory scheme where a single offense can be committed by arming oneself with a deadly weapon, displaying what appeared to be a deadly weapon, inflicting bodily harm or committed the crime against a financial institution. RCW 9A.56.200. Each of those is a separate means of Robbery in the First Degree. But Robbery in the First Degree also requires proof of force or fear to obtain or retain possession, prevent or overcome resistance to the taking or prevent knowledge of the taking. RCW 9A.56.190, 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 37.02 (3d Ed). Each of the three ways of causing the taking does not create additional means.

Another similar example is Assault in the Second Degree, which carries multiple alternative means.

Between the crimes of first, second, and third degree assault, the legislature has delineated a total of 17 alternative means of commission. *See* RCW 9A.36.011-.031. As promulgated by the legislature, the second degree criminal assault statute articulates a single criminal offense and then provides six separate subsections by which the offense may be committed. RCW 9A.36.021(1)(a)-(f). Each of these six subsections represents an alternative means of committing the crime of second degree assault.

State v. Smith, 159 Wn. 2d 778, 784, 154 P.3d 873 (2007) (footnote reference omitted).

What Bergem is proposing here is for this Court to adopt a means within means interpretation for each term within the animal cruelty statutes, which a principle not applied by Washington appellate courts.

But, in order to safeguard the defendant's constitutional right to a unanimous verdict as to the alleged crime, substantial evidence of each of the relied-on alternative means must be presented. Yet, a defendant may not simply point to an instruction or statute that is phrased in the disjunctive in order to trigger a substantial evidence review of her conviction. Likewise, **where a disputed instruction involves alternatives that may be characterized as a “ ‘means within [a] means,’ ” the constitutional right to a unanimous jury verdict is not implicated and the alternative means doctrine does not apply.** In re Pers. Restraint of Jeffries, 110 Wn.2d 326, 339, 752 P.2d 1338 (1988) (refusing to accept defendant's claim that the jury should be additionally instructed on the subalternatives of the statutory alternatives at issue).

State v. Smith, 159 Wn. 2d at 783, 154 P.3d 873, 875-76 (2007) (evaluating Assault in the Second Degree). Rape in the Second Degree has also been addressed on the “means within means” theory in State v. Al-Hamdani, 109 Wn. App. 599, 36 P.3d 1103 (2001).<sup>2</sup> In that case, the court held Rape in the

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<sup>2</sup> The relevant portion of Rape in the Second Degree under RCW 9A.44.050 reads:  
(1) A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person:  
(a) By forcible compulsion;  
(b) When the victim is incapable of consent by reason of being physically helpless or mentally incapacitated;  
(c) When the victim is a person with a developmental disability and the perpetrator is a person who is not married to the victim and who:  
(i) Has supervisory authority over the victim; or

Second Degree does not have alternative means with means of physical helplessness and mental incapacity. The Court held that even if instructed in both terms, proof of both is required and proof of mental incapacity was sufficient. State v. Al-Hamdani, 109 Wn. App. at 607, 36 P.3d 1103 (2001).

Similarly, the jury was instructed on Animal Cruelty in the First Degree by the means of criminal negligence. Providing the terms dehydration in addition to starvation to the jury did not create additional means such that proof of both is required.<sup>3</sup>

**ii. The emaciated condition and drastic drop of weight of the horse over a month was sufficient to find Bergem guilty of Animal Cruelty in the First Degree.**

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d 201. Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

State v. McNeal, 98 Wn. App. 585, 592, 991 P.2d 649 (1999).

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(ii) Was providing transportation, within the course of his or her employment, to the victim at the time of the offense....

<sup>3</sup> The jury need not reach unanimity concerning any of the definitions, 'nor must substantial evidence support each definition.' State v. Linehan, 147 Wn.2d 638, 650, 56 P.3d 542 (2002), cert. denied, 538 U.S. 945 (2003). The mere fact that a definition statute 'states methods of committing a crime in the disjunctive' does not create alternative means of committing that crime. State v. Laico, 97 Wn.App. 759, 762, 987 P.2d 638 (1999).

In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case. State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107 (2000), *rev. denied*, 141 Wn.2d 1023, 10 P.3d 1074 (2000). Substantial evidence is evidence that "would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed." State v. Hutton, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). In finding substantial evidence, we cannot rely upon guess, speculation, or conjecture. Hutton, 7 Wn. App. at 728, 502 P.2d 1037.

**Credibility determinations are for the trier of fact and are not subject to review.** State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). **We must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.** State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533, *rev. denied*, 119 Wn.2d 1011, 833 P.2d 386 (1992). **The trier of fact is free to reject even uncontested testimony as not credible as long as it does not do so arbitrarily.** State v. Tocki, 32 Wn. App. 457, 462, 648 P.2d 99, *rev. denied*, 98 Wn.2d 1004 (1982).

State v. Prestegard, 108 Wn. App. 14, 22-3, 28 P.2d 817 (2001)

The charge as to the pinto gelding included Animal Cruelty in the First Degree as well as Second Degree. Bergem acknowledges that there was sufficient evidence for the jury to find that with criminal negligence he starved the pinto gelding and thereby caused the horse to suffer substantial and unjustifiable pain. Appellant's Opening Brief at page 19. Bergem claims there was a lack of evidence of dehydration or that dehydration caused substantial and justifiable pain to the pinto gelding. Appellant's Opening Brief at pages 19-20.

The State contends as argued above that dehydration and starvation are not alternative means such that proof of both is required.

Even if they were both required, the State contends that the emaciated condition of the horse and the near complete lack of water at the time that the animal control officer seized the horse demonstrated that Bergem was failing to provide the basic food and water for the pinto gelding. Therefore, the jury could conclude by a rational inference that in addition to not providing the necessary food, he was not providing the necessary water. Since Bergem claimed he watered the horses when they were fed, his obvious failure to feed the horses, demonstrated that he was not tending to the horses as he claimed. 10/26/10 RP 129-30. And just one centimeter of water which is essentially no water available when they were seized. 10/25/10 RP 22-3. Therefore, the jury could draw the rational inference that he was not providing water.

There was sufficient evidence of dehydration for the jury to find Bergem guilty of Animal Cruelty in the First Degree.

**iii. Where there was overwhelming evidence of starvation, any error in instructing the jury as to dehydration was harmless beyond a reasonable doubt.**

Alternatively, should this Court determine that dehydration is a means required to be separately established and the evidence of dehydration

was insufficient, this Court should find that the error was harmless beyond a reasonable doubt, given the overwhelming evidence of starvation of the pinto gelding. A conviction need not be reversed on insufficiency of the evidence on one of the modes, if the error affirmatively appears to be harmless. State v. Garvin, 28 Wn. App. 82, 84-85, 621 P.2d 215 (1980) *citing* State v. Golladay, 78 Wn.2d 121, 470 P.2d 191 (1970).

Past Washington case law has determined that if there is sufficient evidence of each of the alternative means, then the defendant is not deprived of juror unanimity. “Unanimity is not required, however, as to the *means* by which the crime was committed so long as substantial evidence supports each alternative means. “ State v. Kitchen, 110 Wn.2d 403, 410, 756 P.2d 105 (1988) *citing*, State v. Whitney, 108 Wn.2d 506, 739 P.2d 1150 (1987); State v. Franco, 96 Wn.2d 816, 639 P.2d 1320 (1982), and, State v. Arndt, 87 Wn.2d 374, 553 P.2d 1328 (1976).

But if this Court can be certain that the alternative means by which the jury was instructed upon did not result in the verdict, the verdict need not be set aside.

“If one of the alternative methods upon which a charge is based fails, the verdict must be set aside unless the court can ascertain that it was based on remaining grounds for which sufficient evidence was presented.” State v. Maupin, 63 Wn. App. 887, 894, 822 P.2d 355 (1992) (*citing* Green, 94 Wn.2d at 230, 616 P.2d 628). *See also* State v. Whitney, 108 Wn.2d 506, 512, 739 P.2d 1150 (1987); State v. McAllister, 60 Wn.

App. 654, 658, 806 P.2d 772 (1991). In this regard, we note Mr. Chiariello did not deny the assault, but relied upon the defense of diminished capacity, claiming he was intoxicated at the time the crime was committed. Because Mr. Chiariello admitted assaulting Mr. Cruz, it is certain the jury based its verdict on the assault, and not only on the “deadly weapon” alternative means. Thus, any error in submitting the latter alternative to the jury was harmless.

State v. Chiariello, 66 Wn. App. 241, 244, 831 P.2d 1119 (1992). See also State v. Rudolph, 141 Wn. App. 59, 72, 168 P.3d 430, 436 (2007) (determining that the instruction of another element without providing a unanimity instruction if error it was harmless beyond a reasonable doubt, *citing*, State v. Scott, 110 Wn.2d 682, 686, 757 P.2d 492 (1988); State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005).

Bergem concedes that there was sufficient evidence of starvation. Appellant’s Opening Brief at page 19. The State contends that there was more than just sufficient evidence, but was instead overwhelming evidence. The pinto gelding’s weight was a 2.5 on a scale of 1 to 9 just over a month before seized. 10/25/10 RP 7, 48, 10/26/10 RP 61-2. At the time it was seized, it was down to a 1 on the scale. 10/25/10 RP 22, 10/26/10 RP 61, 76. CP \_\_, (Supplemental Designation of Clerk’s Papers pending of Exhibits 10-19). The neighbors had called based on concern for the horse. 10/25/10 RP 31-2, 34, 41-4. The veterinarian testified that insufficient diet was the cause of the condition. 10/26/10 RP 62. The veterinarian opined that due to the

lack of food, the gelding had suffered substantial and unjustifiable pain over a period of time sufficient to cause suffering. 10/26/10 RP 64. The gelding had no oral condition or other abnormalities accounting for the weight loss. 10/26/10 RP 61, 64. Within four months of being seized, the gelding had reached a score of 5.5 on the weight scale with the only treatment being feeding and dealing with the rain rot. 10/26/10 RP 76, 78. Bergem claimed he had fed the horse sufficiently. 10/26/10 RP 129.

Given the overwhelming evidence, error, if any as to providing the claimed “means” of dehydration was harmless.<sup>4</sup>

**2. Animal Cruelty in the Second Degree does not have means within means of shelter, rest, sanitation, space or medical attention.**

The flaws in Bergem’s claims of alternative means within means is highlighted in Bergem’s argument that Animal Cruelty in the Second Degree also has additional means of shelter, rest, sanitation, space or medical attention. Appellant’s Opening Brief at pages 22-3.

The State’s argument regarding means within means in the argument section (1)(i) applies equally to Animal Cruelty in the Second Degree.

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<sup>4</sup> The State contends that Bergem’s requested relief of dismissal is inappropriate. Should this Court determine there was insufficient evidence as Bergem claims of the “means” by dehydration since he acknowledged significant evidence of starvation. Therefore, should this Court reverse the conviction as to the gelding the appropriate remedy is to remand for retrial on the alternative mean for which sufficient evidence existed. See State v. Kitchen, 92 Wn. App. 442, 451-52, 963 P.2d 928 (1998) (remedy for failure of proof as to both alternative means is reversal of conviction and remand for a new trial on alternative means for which evidence was presented).

Animal Cruelty in the Second Degree provides another example terms within the means, rather than separate means. Animal Cruelty in the Second Degree under RCW 16.52.207 provides means by inflicting unnecessary suffering or pain under (1), failing to provide shelter, rest, sanitation, space or medical attention under (2)(a), abandonment under (2)(b) and abandonment causing body harm or imminent and substantial risk of bodily harm under (2)(c). Each means requires that the person act knowingly, recklessly or with criminal negligence. RCW 16.52.207 (1) & (2).

It is within these means that Bergem contends that additional separate means exist. As explained above, Washington courts have not accepted such means within means analysis such that proof of every one of the factual avenues is necessary to establish juror unanimity. State v. Smith, 159 Wn. 2d 778, 784, 785-6, 154 P.3d 873, 876 (2007).

Whether there are separate means is a judicial determination.

The legislature has not statutorily defined alternative means crimes, nor specified which crimes are alternative means crimes. This is left to judicial determination. “[T]here simply is no bright-line rule by which the courts can determine whether the legislature intended to provide alternate means of committing a particular crime. Instead, each case must be evaluated on its own merits.” State v. Klimes, 117 Wn. App. 758, 769, 73 P.3d 416 (2003). An example of an alternative means crime is theft because it may be committed by (1) wrongfully obtaining or exerting control over another's property *or* (2) obtaining control over another's

property through color or aid of deception. State v. Linehan, 147 Wn.2d 638, 644–45, 647, 56 P.3d 542 (2002).

State v. Peterson, 168 Wn.2d 763, 769, 230 P.3d 588 (2010). Shelter, rest, sanitation, space or medical attention under RCW 16.52.207 (2)(a) are all functions of animal care and with one means of committing animal cruelty.<sup>5</sup> Thus, sufficient evidence of one of the types of care establishes sufficient evidence for a jury to return guilty verdicts.

**3. The medical condition and significant weight loss of the pinto gelding was sufficient evidence for a jury to find the defendant inflicted unnecessary suffering or pain on the horse for Animal Cruelty in the Second Degree.**

Bergem claims there was insufficient evidence for Animal Cruelty in the Second Degree as to the pinto gelding. The State contends the evidence as sufficient to support both alternative means presented.

The animal cruelty in the second degree statuted provides:

(1) A person is guilty of animal cruelty in the second degree if, under circumstances not amounting to first degree animal cruelty, the person knowingly, recklessly, or with criminal negligence inflicts unnecessary suffering or pain upon an animal.

(2) An owner of an animal is guilty of animal cruelty in the second degree if, under circumstances not amounting to first degree animal cruelty, the owner knowingly, recklessly, or with criminal negligence:

(a) Fails to provide the animal with necessary shelter, rest, sanitation, space, or medical attention and the animal suffers

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<sup>5</sup> By Bergem's analysis, the State would have also be required to prove that both suffering of the horse was unnecessary and unjustifiable despite the statute using those terms in the disjunctive. RCW 16.52.207(2)(a).

unnecessary or unjustifiable physical pain as a result of the failure;

(b) Under circumstances not amounting to animal cruelty in the second degree under (c) of this subsection, abandons the animal; or

(c) Abandons the animal and (i) as a result of being abandoned, the animal suffers bodily harm; or (ii) abandoning the animal creates an imminent and substantial risk that the animal will suffer substantial bodily harm.

(3)(a) Animal cruelty in the second degree under subsection (1), (2)(a), or (2)(b) of this section is a misdemeanor.

(b) Animal cruelty in the second degree under subsection (2)(c) of this section is a gross misdemeanor.

(4) In any prosecution of animal cruelty in the second degree under subsection (1) or (2)(a) of this section, it shall be an affirmative defense, if established by the defendant by a preponderance of the evidence, that the defendant's failure was due to economic distress beyond the defendant's control.

RCW 16.52.207. Bergem was charged under subsections (1) and (2)(a) in relation to the gelding. CP 10. Bergem was not charged under the alternative means of Animal Cruelty in the Second Degree for abandonment under RCW 16.52.207(2)(b) or (c)

The jury instruction provided the following:

To convict the defendant of Animal Cruelty in the Second Degree – Owner, in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about December 4, 2009, the defendant owned or possessed a black and white pinto gelding horse; and

(2) The defendant knowingly, recklessly or with criminal negligence,

(a) inflicted unnecessary suffering or pain upon a black and white pinto gelding horse; or

(b) failed to provide a black and white pinto gelding horse with the necessary shelter, rest, sanitation or medical attention; and the animal suffered unnecessary or unjustifiable physical pain as a result of the failure.

(3) That the acts occurred in the State of Washington.

If you find from the evidence that elements (1), (3) and either of the alternative elements (2)(a) or (2)(b) have been proved beyond a reasonable doubt, it will be your duty to return a verdict guilty. To return a guilty verdict, the jury need not be unanimous as to which of alternatives (2)(a) or (2)(b) has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements (1), (2) or (3), then it will be your duty to return a verdict of not guilty.

CP 26.

As presented in argument section (1)(ii) above, there was sufficient evidence of knowing, reckless or criminally negligent infliction of unnecessary suffering or pain upon the pinto gelding caused in this case by starvation and dehydration. This is a lesser to Animal Cruelty in the First Degree. Sufficiency of the evidence of Animal Cruelty in the Second Degree was evaluated in State v. Zawistowski, 119 Wn. App. 730, 82 P.3d 698 (2004). In that case, there was little vegetation on the ground inside their paddock or suitable food on the property, and they had little or no protection from the elements, two horses suffered from poor detention and

were severely underweight. State v. Zawistowski, 119 Wn. App. at 732, 82 P.3d 698 (2004).

As noted above, evidence showed that the horses' paddock lacked adequate vegetation, that the food that was on the property did not meet the veterinarian's recommended daily allowances, and that the horses were severely underweight. A reasonable inference from this evidence is that the Zawistowskis knowingly, recklessly, or with criminal negligence failed to provide necessary food

State v. Zawistowski, 119 Wn. App. at 734, 82 P.3d 698, 700 (2004). In holding the evidence was sufficient the Court of Appeals ruled:

The State theorized, secondly, that the horses suffered pain as a result of being “severely underweight.” Br. of Appellant at 29. The Zawistowskis acknowledge that the horses were underweight, responding only that “no evidence [indicated] that the horses were suffering pain as a result of their diet or pasture conditions.” Br. of Resp't at 7.

The jury heard testimony from several neighbors, Humane Society officers, and the aforementioned veterinarian, all of whom supported the State's theory that the horses were underweight and malnourished. Specifically, the veterinarian testified that Princess Tarzana was “pretty much a rack of bones,” that her jawbone was very prominent, her eyes were sucked in, and her backbone and ribs were showing. RP at 467. The veterinarian stated that Silver was also severely underweight and had protruding ribs, pelvis, and jawbone.

That Princess Tarzana and Silver felt extreme hunger is a reasonable inference from this evidence. And that extreme hunger is capable of causing at least “mild discomfort” is also a reasonable inference. Webster's Third New International Dictionary 1621. The nature of our sufficiency review requires that we accept these inferences. Therefore, sufficient evidence indicates that Princess Tarzana and Silver suffered unnecessary and unjustifiable “pain.”

State v. Zawistowski, 119 Wn. App. at 736-37, 82 P.3d 698, 701 (2004).

Bergem's primary argument is that there was insufficient evidence of the other alternative means of knowingly, recklessly or with criminal negligent failure to provide a black and white pinto gelding horse with the necessary shelter, rest, sanitation or medical attention; and the animal suffered unnecessary or unjustifiable physical pain as a result. Appellant's Opening Brief at page 23-4.

There was no evidence that the lack of rest or space caused any harm to the pinto gelding. However, there was evidence of the lack of shelter, sanitation and medical attention for the pinto gelding causing unnecessary or unjustifiable pain.

The pasture had a few spotty trees. 10/26/10 RP 99. Bergem had gathered some materials to prepare shelter but had not done so. 10/26/10 RP 136. Shelter is necessary to protect horses from the elements and horses without enough weight or body fat need shelter to help regulate body temperature. 10/25/10 RP 17. The pinto gelding had lost significant weight. The mud caked on the mare showed there was no dry area to stand, and significant enough rain to cause stress to the horses. 10/26/10 RP 66. The pinto gelding had rain rot caused by hair layer being consistently wet with scabs and crusting that could be painful. 10/25/10 RP 24-5, 10/26/10 RP 76. The rain rot had progressed round the eyes and top line of the gelding into a

chronic bacterial infection. 10/26/10 RP 65, 71. The pinto gelding was susceptible to rain rot due to body condition and lack of shelter. 10/26/10 RP 77.

The State contends this was sufficient evidence of knowing, reckless or negligent care of shelter, sanitation and medical attention of the pinto gelding causing unnecessary or unjustifiable pain. CP 26.

**4. The lack of shelter and significant weight loss of the sorrel mare was sufficient evidence for a jury to find infliction of unnecessary suffering or pain on the mare.**

Like the charge for the pinto gelding, Bergem was charged with under RCW 16.52.207, (1) and (2)(a) in relation to the mare. CP 10.<sup>6</sup> Bergem was not charged under the alternative means of Animal Cruelty in the Second Degree for abandonment under RCW 16.52.207(2)(b) or (c).

The jury instruction provided the following:

To convict the defendant of Animal Cruelty in the Second Degree – Owner, in Count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (4) That on or about December 4, 2009, the defendant owned or possessed a sorrel mare horse; and
- (5) The defendant knowingly, recklessly or with criminal negligence,
  - (c) inflicted unnecessary suffering or pain upon a sorrel mare horse; or

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<sup>6</sup> As Bergem's brief indicated, the State had dismissed count II Animal Cruelty in the First Degree as to the mare and renumbered the instructions for presentation to the jury at trial. Count IV became count III which the jury was instructed applied to the mare. CP 27.

(d) failed to provide a sorrel mare horse with the necessary shelter, rest, sanitation or medical attention; and the animal suffered unnecessary or unjustifiable physical pain as a result of the failure.

(6) That the acts occurred in the State of Washington.

If you find from the evidence that elements (1), (3) and either of the alternative elements (2)(a) or (2)(b) have been proved beyond a reasonable doubt, it will be your duty to return a verdict guilty. To return a guilty verdict, the jury need not be unanimous as to which of alternatives (2)(a) or (2)(b) has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements (1), (2) or (3), then it will be your duty to return a verdict of not guilty.

CP 27.

Bergem contends that there was insufficient evidence for a jury to find that the mare suffered unnecessary or unjustifiable pain from lack of shelter. Appellant's Opening Brief at page 10. The State acknowledges that there was no direct testimony from any indicating that the mare suffered unnecessary or unjustifiable pain from the lack of shelter or sanitation.

However, the State contends that there was sufficient evidence for a rational trier of fact to conclude that the mare had suffered unjustifiable pain from lack of shelter causing the mare to lose weight. It was uncontested that at the same time that the pinto gelding had lost weight, the mare had lost weight such that it was severely underweight as well. 10/25/10 RP 7, 16, 21,

48. The pasture had a few spotty trees. 10/26/10 RP 99. Bergem had gathered some materials to prepare shelter but had not done so. 10/26/10 RP 136. Shelter is necessary to protect horses from the elements and horses without enough weight or body fat need shelter to help regulate body temperature. 10/25/10 RP 17. The mud caked around the legs of the mare indicated there was not a dry area to stand, showing there had been significant enough rain to cause stress to the horses. 10/26/10 RP 66. There had also been significant enough rain to cause rain rot on the pinto gelding. 10/25/10 RP 24-5.

Viewed in the light most favorable to the State, the jury could have concluded that the defendant knowingly, recklessly or with criminal negligence inflicted unnecessary suffering or pain on the sorrel mare. CP 27.<sup>7</sup>

**5. Where the defendant failed to object to the jury instructions, he should be precluded from raising issues pertaining to the jury instructions for the first time on appeal.**

Bergem did not object to the jury instructions as presented. Bergem did not note this upon his appeal. Although Bergem properly noted that the

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<sup>7</sup> As noted in footnote 4 above Bergem's requested relief of dismissal is inappropriate if this Court determines there was sufficient evidence supporting the other alternative means. See State v. Kitchen, 92 Wn. App. 442, 451-52, 963 P.2d 928 (1998) (remedy for failure of proof as to both alternative means is reversal of conviction and remand for a new trial on alternative means for which evidence was presented).

sufficiency of the evidence is of constitutional magnitude, the error must be manifest.

Bergem cites to State v. Baeza, 100 Wn 2d 487, 670 P.2d 646 (1983) for the proposition that “sufficiency of the evidence may be raised for the first time on appeal as manifest constitutional error.” Appellant’s Opening Brief at page 9. In fact, Baeza provided that “sufficiency of the evidence is a question of constitutional magnitude.” State v. Baeza, 100 Wn 2d at 488, 670 P.2d 646, 646 (1983). It did not determine that the claimed error is a manifest.

This Washington State Supreme Court construed RAP 2.5(a)(3) in State v. Scott, 110 Wn.2d 682, 688, 757 P.2d 492 (1988) (footnote omitted):

The proper way to approach claims of constitutional error asserted for the first time on appeal is as follows. First, the appellate court should satisfy itself that the error is truly of constitutional magnitude--that is what is meant by “manifest.” If the asserted error is not a constitutional error, the court may refuse review on that ground. If the claim is constitutional, then the court should examine the effect the error had on the defendant’s trial according to the harmless error standard set forth in Chapman v. California, [386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824, 24 A.L.R.3d 1065 (1967)].

This analysis essentially eliminates the word “manifest” from the rule. An error that is not “truly of constitutional magnitude” would simply not “affect a constitutional right.” Under Scott, any error “affecting a

constitutional right” will be reviewed unless it is harmless. The word “manifest” adds nothing.

Nevertheless, the Court of Appeals has given weight to the word “manifest”:

In normal usage, “manifest” means unmistakable, evident, or indisputable, as distinct from obscure, hidden, or concealed. “Affecting” means having an impact or impinging on, in short, to make a difference. A purely formalistic error is insufficient.

State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992) (footnote omitted). According to Lynn, a constitutional error that is “purely abstract and theoretical” will not be considered for the first time on appeal. *Id.* at 346.

Pursuant to RAP 2.5(a)(3), Bergem must establish that there was a manifest error affecting a constitutional right. He has not established he was prejudiced and his failure to object should not permit him to raise this his claims regarding the jury instructions for the first time on appeal.

The Washington State Supreme Court has explained the purpose of the contemporaneous objection rule in a case involving a defendant’s failure to object to instructions:

[Its] purpose is to give to the trial court the benefit of the study and research of counsel, and to advise the trial court of the contentions of the respective parties as to the law or the facts, at a time when the court can, if it so desire, correct any error which it may feel it has made in its instructions.

State v. Severns, 13 Wn.2d 542, 562, 125 Wn.2d 659 (1942). Whether or not the “manifest error” requirement saves appellate effort, it should be applied because it protects the integrity of the trial process. Given Bergem’s failure to object at the trial, the claimed errors are not manifest and should not be permitted to be raised for the first time on appeal.

**V. CONCLUSION**

For the foregoing reasons, Richard Bergem’s convictions for Animal Cruelty in the First and Second Degree must be affirmed.

DATED this 24<sup>th</sup> day of October, 2011.

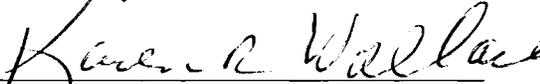
SKAGIT COUNTY PROSECUTING ATTORNEY

By:   
ERIK PEDERSEN, WSBA#20015  
Deputy Prosecuting Attorney  
Skagit County Prosecutor’s Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by;  United States Postal Service;  ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Casey Grannis, addressed as Nielsen Broman Koch, 1908 E Madison Street, Seattle, WA 98122. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 24<sup>th</sup> day of October, 2011.

  
KAREN R. WALLACE, DECLARANT