

66876-5

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No. 66876-5

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MARY DAWN PETERSON,

Appellant.

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

APPELLANT'S REPLY BRIEF

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A. COUNTER-STATEMENT OF FACTS

The State points out that, on the day Tyme was seized, Ms. Peterson was told Tyme was in pain and replied, “We all live in pain.” SRB at 10. Ms. Peterson testified that what she meant was that “everybody has pain, but that doesn’t mean we go around and put everyone down.” RP 835.

The State also points out that Ms. Peterson intended to breed Tyme. SRB at 9. But the record is unequivocal that Ms. Peterson did not intend to breed Tyme until the horse was sound. Ms. Peterson acknowledged Tyme’s feet were still a problem although they had improved significantly since she had acquired the horse. RP 107, 835. Ms. Peterson told Dr. Miller she “was trying to rehabilitate the horse,” and hoped the horse could become a brood mare *in the future*. RP 131, 149. Ms. Peterson told Dr. Holohan “it was her intent to try and rehabilitate [Tyme] and utilize her *down the road* as a brood mare.” RP 210 (emphasis added). Tyme was not being used as a brood mare at the time of her death. RP 149.

Finally, the State asserts Dr. Miller had worked with Ms. Peterson “in 2006, and found her horses *then* to be in decent shape and appropriately cared for.” SRB at 8 (emphasis added) (citing

RP 98, 142-43). But the record shows Dr. Miller had worked with Ms. Peterson consistently *since* 2006 and never found her horses to be ill-treated. Dr. Miller first started working with Ms. Peterson in 2006, providing routine care. RP 97. She had six to twelve appointments with Ms. Peterson between 2006 and 2009, “at least a couple a year.” RP 97, 142. Ms. Peterson “handled most minor things herself,” and appeared to handle them competently. RP 143. According to Dr. Miller, Ms. Peterson’s “horses were always in decent shape and had appropriate care.” RP 98.

B. ARGUMENT IN REPLY

1. THE FIRST DEGREE ANIMAL CRUELTY  
STATUTE IS UNCONSTITUTIONALLY  
VAGUE AS APPLIED TO MS. PETERSON'S  
CONDUCT

The State contends Ms. Peterson was not justified in relying upon the advice of her farrier in caring for her horses. SRB at 31. The State contends following the farrier’s advice did not amount to an accepted husbandry practice. Also, the State contends relying upon the farrier’s advice was not “reasonable” because other people—Dr. Miller, Dr. Holohan, and two animal control officers—gave Ms. Peterson contrary advice.

First, Dr. Holohan did not give Ms. Peterson advice in caring for her horses. The only contact Dr. Holohan had with Ms.

Peterson was on July 15, 2009, when she went to the farm to euthanize Tyme, upon the request of the animal control officers. RP 153-55. There is no evidence Dr. Holohan provided Ms. Peterson with advice on caring for her horses.

Also, Dr. Miller did not give Ms. Peterson advice that was contrary to the farrier's advice. In fact, Dr. Miller *approved* of the way Ms. Peterson cared for her horses. Dr. Miller had several routine appointments with Ms. Peterson between 2006 and 2009. RP 97, 142. Ms. Peterson's "horses were always in decent shape and had appropriate care." RP 98. Ms. Peterson called Dr. Miller to the farm in July 2009 to look at Tyme. RP 99. Dr. Miller recommended euthanasia, primarily due to the foot condition. RP 106, 117. Ms. Peterson told her she was working with her farrier and Tyme's condition had improved. RP 107, 129. According to Dr. Miller, if a horse has laminitis, the owner *should* work with a farrier. RP 129. Dr. Miller did not discuss the other horses with Ms. Peterson, except for the yearling who had pneumonia. RP 142. Other than recommending euthanasia for Tyme, there is no evidence Dr. Miller provided advice that was contrary to the farrier's advice.

Second, the law enforcement officers' advice did not provide Ms. Peterson sufficient notice that her treatment of the horses was unjustified. The principal question in a vagueness challenge is whether the *statute*, not law enforcement officers, provided the defendant with adequate notice. In addition, an officer's determination that a person's conduct is criminal is immaterial if the statute is not sufficiently specific to guide the officer's judgment.

The United States Supreme Court recognizes "that the more important aspect of vagueness doctrine is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement." Kolender v. Lawson, 461 U.S. 352, 357-58, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983) (citation omitted). If the legislature fails to provide such minimal guidelines, the "statute may permit a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." Id. at 358 (citation omitted).

In determining whether a statute provides adequate standards for law enforcement, the question is "whether the [statute] proscribes conduct by resort to 'inherently subjective terms.'" City of Spokane v. Douglass, 115 Wn.2d 171, 181, 795

P.2d 693 (1990) (quoting State v. Maciolek, 101 Wn.2d 259, 267, 676 P.2d 996 (1984)).

Here, the statute does not provide adequate standards for law enforcement because it proscribes conduct by resort to inherently subjective terms. The statute provides a person is guilty of first degree animal cruelty if he or she, with criminal negligence, starves or dehydrates an animal and as a result causes “[s]ubstantial and *unjustifiable* pain.” RCW 16.52.205(2) (emphasis added). As argued in the opening brief, the term “unjustifiable” in the statute is unconstitutionally vague as applied in this case. The statute did not provide adequate guidelines for the animal control officers to determine whether the horses’ pain, if any, was justifiable. Thus, the statute permitted the officers to pursue their personal predilections in deciding whether the horses were being mistreated. Animal control officers may have much different ideas about how horses should be treated than individuals engaged in the business of horse breeding.

Finally, as argued in the opening brief, the record shows that it is customary and “accepted” to rely on the advice of one’s farrier when engaged in the commercial raising of horses. See RCW 16.52.185 (“Nothing in this chapter applies to accepted husbandry

practices used in the commercial raising . . . of livestock . . . .“).

AOB at 5-8, 28-29.

Under the circumstances of this case, the statute did not provide adequate notice that Ms. Peterson's treatment of her horses was unjustifiable. Ms. Peterson wanted to start a horse-breeding business but had limited finances. RP 786, 865. She acquired several horses that were already underweight. RP 788, 790, 795-96, 811, 854. She believed she had official permission to keep Tyme alive. RP 836. She relied on the advice of her farrier Mr. Serjeant and her assistant Mr. Osborne, two men with significant horse experience who approved of her treatment of the animals. RP 591, 610-11, 737, 741, 746, 753, 758, 797. Tyme's condition improved significantly during the time Ms. Peterson owned her. RP 744-45. Ms. Peterson fed the horses two to three flakes of hay two times a day. RP 593-95, 605, 824-25. That amount is consistent with the amount recommended by the veterinarian witnesses. RP 109, 166-67, 326. The horses never went without a meal. RP 597. Ms. Peterson's veterinarian, Dr. Miller, generally approved of her treatment of her horses. RP 97-98. Although the Trout Farm property was small, Ms. Peterson had acquired the property at the last minute, in a pinch, and was hoping

to acquire a larger piece of property. RP 815-16, 821. Because the statute did not provide adequate notice that Ms. Peterson's treatment of the horses under these circumstances was unjustifiable, the statute is unconstitutionally vague as applied.

2. THE STATE DID NOT PRESENT SUFFICIENT EVIDENCE TO PROVE ONE OF THE ALTERNATIVE MEANS CHARGED

- a. The separate acts set forth in RCW 16.52.205(2) are alternative means of committing the crime.

The State contends that the different acts set forth in RCW 16.52.205(2) are not alternative means of committing the crime but are merely means within a means. SRB at 36-38. To the contrary, the acts set forth in RCW 16.52.205(2) are statutory alternative means because they are distinct acts the State must prove and are not merely descriptive or definitional of an element of the crime. It is not determinative that the means are not set forth in separate, numbered, statutory subsections.

"Our courts have resisted efforts to interpret statutory definitions as creating additional means, or means within a means, of committing an offense." State v. Nonog, 145 Wn. App. 802, 812, 187 P.3d 335 (2008); State v. Smith, 159 Wn.2d 778, 785-86, 154 P.3d 873 (2007). "[D]efinition statutes do not create additional

alternative means, 'means within means,' of committing an offense." State v. Strohm, 75 Wn. App. 301, 309, 879 P.2d 962 (1994). Thus, the various ways a person can "traffic" under the separate statutory provision defining the term "are merely factual circumstances which support the traffics alternative under RCW 9A.82.050(2)." Id. Similarly, the different methods of causing "great bodily harm" set forth in the provision defining the term are "merely descriptive of a term that constitutes . . . an element of the crime of first degree assault." State v. Laico, 97 Wn. App. 759, 763, 987 P.2d 638 (1999). Likewise, the three common law methods of committing assault "merely elaborate upon and clarify the terms 'assault' or 'assaults,' which are used throughout chapter 9A.36 RCW"; they do not create separate alternative means of committing the crime. Smith, 159 Wn.2d at 786.

But here, the different methods set forth in RCW 16.52.205(2) do not merely define or describe an element of the crime. The statute 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.

RCW 16.52.205(2). The methods provided—starving, dehydrating, or suffocating an animal—do not elaborate upon or clarify any other term in the statute. Instead, they are separate and “*distinct acts* that amount to the same crime.” State v. Peterson, 168 Wn.2d 763, 770, 230 P.3d 588 (2010). Therefore, they are not means within a means.

In addition, the statute does not criminalize all acts that could constitute negligent treatment of an animal, but only those three specific acts. See Nonog, 145 Wn. App. at 812 (interfering with domestic violence reporting is an alternative means crime “because the statute does not criminalize all acts that might appear to constitute interfering with the reporting of domestic violence. Interference is culpable only when a victim or witness is trying to report the crime to a particular entity.”). Thus, first degree animal cruelty under RCW 16.52.205(2) must be regarded as an alternative means crime.

It is not determinative that the three alternative means are not set forth in separate, numbered, statutory subsections. For many alternative means crimes, the means are not set forth in separate statutory subsections. Examples include: (1) leading organized crime, RCW 9A.82.060(1)(a), State v. Hayes, 164 Wn.

App. 459, 474, 262 P.3d 538 (2011); (2) second degree burglary, RCW 9A.52.030(1), State v. Gonzales, 133 Wn. App. 236, 243, 148 P.3d 1046 (2006); (3) first degree possession of stolen property, RCW 9A.56.140(1), .150(1), State v. Lillard, 122 Wn. App. 422, 434-45, 93 P.3d 969 (2004); (4) operation of a drug house, RCW 69.50.402(1)(f), State v. Fernandez, 89 Wn. App. 292, 299, 948 P.2d 872 (1997); and (5) joyriding under former RCW 9A.56.075 (2003), State v. Crittenden, 146 Wn. App. 361, 366, 189 P.3d 849 (2008).

In State v. Andree, 90 Wn. App. 917, 923, 954 P.2d 346 (1998), this Court characterized the crime of first degree animal cruelty, under former RCW 16.52.205(1), as an “alternative means” crime.<sup>1</sup> Just as the acts set forth in RCW 16.52.205(1) are alternative means of committing the crime, so are the acts set forth in RCW 16.52.205(2). In sum, this is an alternative means case.

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<sup>1</sup> Before the Legislature added the criminal negligence prong to the first degree animal cruelty statute, the statute provided:

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. Former RCW 16.52.205(1) (1994).

- b. The State did not present sufficient evidence to prove the dehydration means of committing the crime.

The State contends sufficient evidence supports the dehydration prong because the evidence showed the horses did not have the recommended amount of water and because they were rehabilitated with both food and water. SRB at 41-42. But the State points to no affirmative evidence that, as a result of dehydration, the horses were in substantial physical pain that extended for a period sufficient to cause considerable suffering.

The reasonable inference to draw from the evidence is that the horses were *not* in substantial physical pain as a result of dehydration. Dr. Miller testified dehydration causes changes in a horse's blood work. 2/08/11RP 115. But Tyme's blood work was normal. 2/08/11RP 117. Dr. Miller could not say that Tyme was in pain due to a lack of hydration. 2/08/11RP 136.

When asked if Tyme was in pain due to dehydration, Dr. Holohan answered, "I don't believe so." 2/08/11RP 204.

As for the other horses, Dr. Haskins testified their blood tests did *not* show dehydration. 2/09/11RP 377-78.

In sum, the State did not present sufficient evidence to prove the dehydration prong and the convictions must be reversed.

3. THE RESTITUTION AWARD TO THE COUNTY WAS NOT AUTHORIZED

The State contends RCW 16.52.200 authorized the trial court to award restitution to the county. Notably, the State does not contend the Sentencing Reform Act (SRA) authorized the restitution award or that the county was a “victim” for purposes of the SRA.

As argued in the opening brief, when a person is convicted of a felony, the court is authorized to impose punishment only as provided in the SRA. RCW 9.94A.505(1). If the sentence includes payment of a legal financial obligation, “it *shall* be imposed as provided in RCW 9.94A.750, 9.94A.753, 9.94A.760, and 43.43.7541.” RCW 9.94A.505(4) (emphasis added). Also, “[t]he court *shall* order restitution as provided in RCW 9.94A.750 and 9.94A.753.” RCW 9.94A.505(7) (emphasis added).

Thus, for Ms. Peterson’s felony sentence, the court was authorized to impose restitution only as provided in RCW 9.94A.753. Because the county was not a “victim” for purposes of the statute, restitution was not authorized.

The State contends Ms. Peterson is arguing that RCW 16.52.200 applies only to misdemeanor and gross misdemeanor sentences. SRB at 43. To the contrary, Ms. Peterson takes no

position on whether the statute applies only to misdemeanors and gross misdemeanors. The argument is, instead, that, notwithstanding RCW 16.52.200, the court was authorized to impose restitution as part of Ms. Peterson's sentence only as authorized by the SRA. Even if restitution can be characterized as both punitive and remedial, the restitution award was unequivocally part of Ms. Peterson's sentence and it was therefore governed by the SRA.

The State contends Ms. Peterson's argument was rejected in State v. Paulson, 131 Wn. App. 579, 128 P.3d 133 (2006). But Paulson is distinguishable because it involved the requirement that the defendants complete an animal cruelty prevention program. It did not involve restitution. Moreover, the opinion does not address whether the requirement that the defendants complete an animal cruelty prevention program was authorized by the SRA.

As argued in the opening brief, RCW 16.52.200(6) does not conflict with the SRA because it provides that a person convicted of animal cruelty "shall be *liable* for reasonable costs incurred pursuant to this chapter by law enforcement agencies, animal care and control agencies, or authorized private or public entities involve with the care of the animals." (emphasis added). The statute does

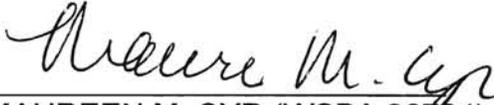
not state those costs must be imposed as part of a person's *sentence*. The county may recover its costs in a civil proceeding.

In sum, the SRA did not authorize the restitution award and it must be vacated.

C. CONCLUSION

For the reasons set forth above and in the opening brief, the convictions must be reversed and the charges dismissed because the statute is unconstitutionally vague as applied to Ms. Peterson's conduct. In the alternative, the convictions must be reversed and remanded for a new trial because the State did not present sufficient proof of an alternative means of committing the crimes. Finally, the restitution award must be vacated because it was not authorized by the SRA.

Respectfully submitted this 17th day of May 2012.

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 66876-5-I
	)	
MARY DAWN PETERSON,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17<sup>TH</sup> DAY OF MAY, 2012, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- |     |  |                   |                                     |
|-----|--|-------------------|-------------------------------------|
| [X] | CHARLES BLACKMAN, DPA<br>SNOHOMISH COUNTY PROSECUTOR'S OFFICE<br>3000 ROCKEFELLER<br>EVERETT, WA 98201 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |
| [X] | MARY PETERSON<br>5904 W CONKLING RD<br>WORLEY, ID 83876  | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON, THIS 17<sup>TH</sup> DAY OF MAY, 2012.

X \_\_\_\_\_ 

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