Supreme Court No. _____
Court of Appeals No. 39696-7-III

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

TIFFANY R. DENNEY,
Petitioner.

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

PETITION FOR REVIEW

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A. INTRODUCTION

Ms. Denney lives in rural Endicott, Washington; her home surrounded by a chain link fence with a latched gate. Her dogs, including a five-year-old pit bull mix named Kimarhi, were in her fenced yard.

Ms. Denney was not expecting company when two officers showed up unannounced. One officer saw a small dog in the front yard and, when it appeared friendly, the officer unlatched the gate and entered the fence area. A few steps in, the officer heard a bark and saw Kimarhi running towards her. Kimarhi bit the officer on the arm and leg. The officer was brought to a hospital where she ultimately received stitches for the bite on her elbow.

Ms. Denney was convicted of owning a dog that bites. Ms. Denney appealed, arguing the State failed to meet its burden. The Court of Appeals concluded that because her neighbors were "terrified" of the dog, and because she "took precautions," a jury could reasonably infer that Ms. Denney

knew or should have known Kimarhi had "a known propensity, tendency, or disposition to attack unprovoked . . . [or] to threaten the safety of humans."

This Court should grant review for two reasons. First, the Court of Appeals improperly found sufficient evidence supported the conviction for owning a dangerous dog in violation of the constitutional protections. RAP 13.4(b). And second, this Court should accept review as guidance is needed regarding the inferences permissible under such circumstances. RAP 13.4(b). This Court should grant review of these important issues.

B. IDENTITY OF PETITIONER AND DECISION BELOW

Tiffany Denney, the petitioner, asks this Court to grant review of the Court of Appeals' opinion in *State v. Tiffany Denney*, No. 39696-7-III (Wash. Ct. App. March 11, 2025) and its order denying reconsideration on April 3, 2025. App. A, B.

C. ISSUE FOR WHICH REVIEW SHOULD BE GRANTED

The Fourteenth Amendment Due Process protections require sufficient evidence to support a criminal conviction. The offense of owning a dog that attacks requires evidence that the owner knew or should have known their dog was "potentially dangerous," meaning the dog previously bit a person or a pet, or had a known "propensity, tendency, or disposition to attack unprovoked" causing injury or otherwise threatening the safety of humans or pets. Here, the Court of Appeals incorrectly assumed that because Ms. Denney kept Kimarhi away from the public, she did so because Kimarhi was dangerous. Kimarhi had never harmed anyone so Ms. Denney did not know her dog was capable of doing so. The State had to prove Ms. Denney knew or should have known Kimarhi was dangerous. The Court of Appeals erred by concluding the State did so and met its burden. This Court should grant review to correct the Court of Appeals misunderstanding of the law and as a matter of substantial public interest. RAP 13.4(b)(3).

D. STATEMENT OF THE CASE

Tiffany Denney's home in rural Endicott, Washington, was surrounded by a chain link fence about five feet tall. RP 113-14, 116. The gate on the fence was latched closed. RP 116. Her dogs were in her yard. RP 147. She was not expecting company when two officers opened the latch and entered the enclosed yard. RAP 150. When the officer entered the yard, she did not look for anyone else in the yard. RP 117, 133. She did not call out or make her presence known. RP 133.

Once the officer was inside the yard, she heard a bark from the back of the house. RP 117-18. She turned and saw a dog running towards her. RP 118. Before she was able to exit the yard, the dog reached her and bit her arm and leg. RP 118. The officer was taken to the hospital where she received stitches from the bite on her elbow. RP 120. The officer had other scratches, bruises, and abrasions on her arm, leg, and face from this incident. RP 120-21.

Ms. Denney later spoke with one of the officers and explained that she was not expecting anyone to enter her yard. RP 150. She explained that because Endicott is such a rural community, people simply did not enter her yard unannounced. RP 149. When she did have visitors, she welcomes them and Kimarhi is "a sweetie" once they are inside the yard. *Id.* She explained that "normally she'll do just fine" and has "never had a - - otherwise." RP 150. Ms. Denney had never seen Kimarhi bite or act aggressively towards other people. RP 148-49. Kimarhi lived in that fenced yard and never left the yard. RP 148.

The jury convicted Ms. Denney of owning a dog that bites. CP 28.

On appeal, Ms. Denney argued, among other things, the State failed to prove she knew or should have known that Kimarhi was dangerous as required for conviction. The State argued that circumstantial evidence supported the inference that

Ms. Denney knew Kimarhi was a dog capable of biting another person. BOR 12-17.

The Court of Appeals affirmed. Slip Op. at 1. It held sufficient evidence supported the conviction. It found the jury could infer that Ms. Denney knew Kimarhi was a dangerous dog based on Ms. Denney's statements that her neighbors were terrified of Kimarhi, knew not to enter the yard, and that Kimarhi had to wear a muzzle when she visited a vet who would treat aggressive dogs. Slip Op. at 7-8.

Ms. Denney moved for reconsideration but the Court denied Ms. Denney' motion to reconsider without comment.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. This Court should accept review to correct the Court of Appeals determination that sufficient evidence supported the conclusion that Ms. Denney knew her dog was dangerous.

Due process requires the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the charged crime. U.S. Const. amend XIV; *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 368 (1970); *State v. Owens*, 180 Wn.2d 90, 99, 323 P.3d 1030 (2014). The prosecution can meet this burden only if the evidence, viewed in the light most favorable to the prosecution, permits a rational trier of fact to find each essential element of the crime beyond a reasonable doubt. *Owens*, 180 Wn.2d at 99; *State v. Green*, 94 Wn.2d 216, 219, 616 P.3d 628 (1980).

a. The Court of Appeals accurately concluded that the State had to show that Ms. Denney knew or should have known Kimarhi was a dangerous dog.

The State charged Ms. Denney with owning a dog that bites. RCW 16.08.100(3); CP 1-2. To meet its burden, the Court

of Appeals correctly concluded the State had to prove that Ms. Denney owned a dog "aggressively attacks and causes severe injury or death of any human." Slip Op. at 7. The State had to "prove beyond a reasonable doubt that the defendant either knew or should have known that his or her dog was a potentially dangerous or dangerous dog as an element of the crime." *State v. Bash*, 130 Wn.2d 594, 611, 925 P.3d 978 (1996).[1] The Court of Appeals correctly recognized that the jury is allowed to make "reasonable inferences from the evidence." Slip Op. at 6. The Court, however, erred where the jury exceeded the scope of reasonable inferences based on circumstantial evidence, condoned inferences based on

[1] RCW 16.08.070(1) requires evidence that a dog owner knew or should have known their dog had (a) "previously bit a person or animal" or (b) chases or approaches a person upon the streets, sidewalks, or any public grounds in a menacing fashion," or had a "known propensity, tendency or disposition to attack unprovoked, to cause injury . . . or otherwise to threaten the safety of humans or domestic animals." RCW 16.08.070(1). Here, there is no dispute that RCW 16.08.070(1)(a) and (b) do not apply. Slip Op. at 7.

speculation, and allowed an unconstitutional conviction to persist.

b. The evidence does not support the conclusion that Ms. Denney knew Kimarhi was a dangerous dog.

Because Kimarhi had never harmed anyone, Ms. Denney did not know she was capable of doing so. RP 148-49. The Court erred by concluding the State presented sufficient evidence to support a conclusion that she knew or should have known this risk.

At trial, the State attempted to prove Ms. Denney had, or should have had, this knowledge based on statements Ms. Denney made to a deputy. RP 145-53. Ms. Denney told the deputy that Kimarhi is "part pit bull part something else" but she "shows more of pit bull" with "the pit bull build." RP 147. She testified that Kimarhi is "terrified of people" and rarely leaves her fenced property. RP 148.

Ms. Denney explained that when Kimarhi would need treatment at a veterinarian's office, Kimarhi was "muzzled . . . and they still couldn't get near her." RP 148. She did not

explain why they could not get near her or how Kimarhi reacted to the veterinarian's attempt to get closer to her. The veterinarian evaluated Kimarhi from outside of the fence. RP 150-151.

Ms. Denney explained that because she lived in a rural environment, people simply did not just enter her property. RP 149. When they did, she would bring Kimarhi inside the house first and then bring her out to meet the visitor where she behaves like a "sweetie." RP 150. While she said people outside of the fence are "terrified" of Kimarhi, she did not explain why. RP 149. It is unclear if people were "terrified" because of Kimarhi's behavior or simply because Kimarhi had a "pit bull build." Importantly, Kimarhi had never bit anyone or been aggressive towards people or animals. RP 148-49.

At the conclusion of the trial, the prosecutor urged the jury to find that Ms. Denney knew that Kimarhi was "a dog with a propensity, tendency or disposition to attack unprovoked." RP 179. The prosecutor argued there was

"circumstantial evidence . . . that she knew things" because Kimarhi needed a muzzle at the vet, was terrified of people, and did not leave the home. RP 181-182.

But this evidence does not support the conclusion that Ms. Denney knew or should have known Kimarhi had a propensity, tendency or disposition to attack unprovoked, cause injury or threaten the safety of others. There was no evidence that Kimarhi ever bit or harmed another person or animal. There was no evidence that Kimarhi bit or even snapped when she was afraid. There was no evidence to conclude that neighbors were afraid of Kimarhi because of her behavior and not simply because of her breed.

Additionally, despite the fact that Ms. Denney described Kimarhi's behavior as "aggressive" at the veterinarian's office, there was no explanation of what she meant when she used the term. Aggressive behavior can include things such as barking, growling, cowering, or snapping at attempted physical contact. These behaviors are all common dog behaviors and there was

no evidence to conclude Kimarhi was going to physically injure another. There was no forewarning that Kimarhi would actually bite anyone.

While the jury could draw some reasonable inferences based on circumstantial evidence, those inferences "cannot be based on speculation." *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013); *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016) (citing *Vazquez*, 178 Wn.2d at 16.).

Here, it is purely speculative for a fact-finder to assume that Ms. Denney knew Kimarhi was capable of harming another person. The Court of Appeals impermissibly assumed that Ms. Denney thought Kimarhi would hurt someone simply because she took precautionary actions. Slip. Op. 7-8. The Court erred when it declared "[t]he fact that the dog was reacting to its fear of people does not change the fact that Denney knew the dog reacted by aggressively attacking anyone with whom the dog was not familiar." Slip Op. at 8. No evidence supports that conclusion and no such prior attacks had occurred.

The opinion is contrary to controlling decisions requiring the State to prove each element to support of a conviction beyond a reasonable doubt. This Court should grant review and reverse this unconstitutional conviction. RAP 13.4.

F. CONCLUSION

To justify conviction, the State was required to prove every element necessary to show that Ms. Denney knew or should have known Kimarhi was a dangerous dog. Here, the State did not present sufficient evidence to support the finding that Ms. Denney knew or should have known that Kimarhi was, or had the potential of being, a dangerous dog. The Court of Appeals erred by condoning inferences based on speculation from circumstantial evidence. Affirming a conviction despite this significant constitutional violation is an issue of substantial public interest. This Court should accept review. RAP 13.4.

This document contains 2118 words (word count by Microsoft Word) and complies with RAP 18.17.

Respectfully submitted this 5th day of May, 2025.

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Appendix A

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CASE # 396967
State of Washington v. Tiffany R. Denney
WHITMAN COUNTY SUPERIOR COURT No. 2210019338

Dear Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through the court's e-filing portal or if in paper format, only the original motion need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Tristen L. Worthen
Clerk/Administrator

TLW:ko
Attach.
c: **Email:** Hon. Roger Sandberg
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MARCH 11, 2025
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON, Respondent, v. TIFFANY R. DENNEY, Appellant.	)))))))))	No. 39696-7-III UNPUBLISHED OPINION

STAAB, A.C.J. — After Tiffany Denney's dog attacked and injured a Whitman County Sherriff's Deputy, a jury convicted her of "owning a dog that attacks," in violation of RCW 16.08.100. On appeal, she contends (1) the State's evidence was insufficient to convict, and (2) Washington's dangerous dog statutes are unconstitutionally vague, both facially and as applied. We disagree and affirm.

BACKGROUND

Tiffany Denney lives in rural Endicott, Washington. Denney's property consists of a single-story house, surrounded by a chain link fence that is between three and five feet tall with a gate that closes with a latch. Denney owned multiple dogs, including a five-year-old pit bull mixed breed, which Denney had raised since it was a puppy.

On September 9, 2022, a Whitman County Sheriff's Deputy and Sergeant were dispatched to Denney's home for a nonemergency welfare check. When they arrived, Deputy Amy Pilloud observed a small dog in the front yard. She hesitated to enter the fenced area because of the dog, but after it approached her, sniffed her fingers, and appeared friendly, she decided to enter through the gate and knock on the front door of the house.

Deputy Pilloud made it a few steps into the yard when she "heard a loud bark, growl from the back of the house." Rep. of Proc. (RP) at 118. She turned to the side of the house and saw a different dog running toward her at full speed. The dog lunged at her, hitting her in the chest. As she scrambled to get away, the dog bit her arm and leg as she tried to exit the gate.

As the Sergeant applied a tourniquet to Deputy Pilloud's arm, Denney came out of the house, tried calling her dog off, and asked the officers, "[d]id she bite you?" RP at 124.

Deputy Pilloud was taken to the hospital, where she was treated with five sutures for lacerations near her elbow. She had bite marks on her arm, punctures and abrasions on her leg, and some scratches and bruising on her face.

Later that day, the Undersheriff went to Denney's house to investigate the attack and whether the dog was vaccinated for rabies. The Undersheriff's body camera

recorded his interview with Denney. During the interview the following exchange occurred:

> UNDERSHERIFF CHAPMAN: And so where have you been getting her vaccinations at?
> MS. DENNEY: So we went to [a veterinarian] and they couldn't do anything because she—they muzzled her and they still couldn't get near her.
> UNDERSHERIFF CHAPMAN: What do you mean? Why—was she—[INAUDIBLE] wouldn't let them give her a shot?
> MS. DENNEY: They couldn't even get near her.
> UNDERSHERIFF CHAPMAN: Okay. Is that something—is she—
> MS. DENNEY: She's terrified of people.
> UNDERSHERIFF CHAPMAN: She's terrified of people, okay.
> MS. DENNEY: She's been in this yard and never gone anywhere but the vet's and that's it.
> UNDERSHERIFF CHAPMAN: Okay. So, like, how does she—
> MS. DENNEY: We've never walked her, nothing.
> UNDERSHERIFF CHAPMAN: Okay. How does she present to the vets? I mean—oh, you muzzled her so she must try to bite people.
> MS. DENNEY: She—if she leaves this yard, she is terrified.
> UNDERSHERIFF CHAPMAN: Okay. Got it.
> MS. DENNEY: Yeah, she does not like leaving her yard.
> UNDERSHERIFF CHAPMAN: Okay. Has she ever bit anybody else that you know of or been, like, scare people or been aggressive toward them or anything?
> MS. DENNEY: No.
> UNDERSHERIFF CHAPMAN: No. Like none of your neighbors—
> MS. DENNEY: They—so they do—
> UNDERSHERIFF CHAPMAN: —if I talk to them?
> MS. DENNEY: —like if they're outside of the fence, yes, they are terrified of her. But usually once I get people in, she does just fine.
> UNDERSHERIFF CHAPMAN: What do you mean once you get people in?
> MS. DENNEY: Like she has to—I have to show her that people are okay.
> UNDERSHERIFF CHAPMAN: Okay. And so how do you keep her away from people until you shown they're okay?

MS. DENNEY: Most of the time people don't come in our yard.

UNDERSHERIFF CHAPMAN: Oh, okay. Don't you have friends come over or anything like that?

MS. DENNEY: I do. I have two sets of friends and once I get them into our yard, they're fine with her. And she's a sweetie once you're in our yard and—

UNDERSHERIFF CHAPMAN: Yeah, but how do you keep her away from the people until you figure out?

MS. DENNEY: Most people just don't come in our yard.

UNDERSHERIFF CHAPMAN: Yeah, but you said you do, sometimes. So how does that work? Like if I came in to come talk to you, where would the dog be to acclimate?

MS. DENNEY: No normally what I do is I put her in the house. Once you're in the yard I'll let her out and meet you—let her meet you. And normally she'll do just fine.

UNDERSHERIFF CHAPMAN: Normally. What happens sometimes?

MS. DENNEY: Never had a—otherwise.

UNDERSHERIFF CHAPMAN: Okay. And today—today was she just out running around in here?

MS. DENNEY: Umm-hmm.

UNDERSHERIFF CHAPMAN: Is that the idea? Okay.

MS. DENNEY: I don't know even why they were here to begin with.

UNDERSHERIFF CHAPMAN: Okay.

MS. DENNEY: I didn't know anything happened until I came out and it already happened.

UNDERSHERIFF CHAPMAN: Okay. Got it. So [the veterinarian], who—where's [the veterinarian] out of?

MS. DENNEY: Palouse.

UNDERSHERIFF CHAPMAN: Palouse. Did you use to live in Palouse?

MS. DENNEY: Nope. They were the only ones I found that would take aggressive dogs. She went in because she—her ears were swollen and red—

UNDERSHERIFF CHAPMAN: Right.

MS. DENNEY: —and she had this big rash on her stomach. And so they—the closest they could get is, like, from me to the fence and they just kind of glanced at her and said it was a food allergy and that was it.

RP at 148-51.

The State charged Denney with one count of owning a dog that attacks, a class C felony. The case proceeded to a jury trial.

The jury was instructed that to convict, the State had to prove beyond a reasonable doubt that (1) Denney "owned a dog that aggressively attacked and caused severe injury to [the deputy];" (2) "at the time of the attack, [Denney] knew or should have known that the dog was potentially dangerous;" and (3) that the act "occurred in the state of Washington." Clerk's Papers (CP) at 16.

Consistent with RCW 16.08.070(1), the jury was instructed that "potentially dangerous dog" means

> any dog that when unprovoked: (a) Inflicts bites on a human or a domestic animal either on public or private property, or (b) chases or approaches a person upon the streets, sidewalks, or any public grounds in a menacing fashion or apparent attitude of attack, or any dog with a known propensity, tendency, or disposition to attack unprovoked, to cause injury, or to cause injury or otherwise to threaten the safety of humans or domestic animals.

Compare CP at 18 *with* RCW 16.08.070(1).

The jury found Denney guilty and the court sentenced her to serve 30 days in jail.

Denney timely appeals.

ANALYSIS

1. SUFFICIENCY OF EVIDENCE

Denney contends that there was insufficient evidence that she knew or should have known that her dog was a "potentially dangerous dog." We disagree.

"The sufficiency of the evidence is a question of constitutional law that we review de novo." *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). "Our review . . . is highly deferential to the jury's decision." *State v. Davis*, 182 Wn.2d 222, 227, 340 P.3d 820 (2014).

Due process mandates that the State must prove every element of a crime beyond a reasonable doubt to secure a conviction. *State v. Aver*, 109 Wn.2d 303, 310, 745 P.2d 479 (1987); U.S. CONST. amend. XIV; WASH. CONST. art. I, § 3. When reviewing a challenge to the sufficiency of the evidence, we ask "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id*. Additionally, "[a] claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id*. If evidence is insufficient to prove an element of the crime, the remedy is reversal of the conviction and dismissal of the charge with prejudice. *State v. Smith*, 155 Wn.2d 496, 505-06, 120 P.3d 559 (2005).

The jury found Denney guilty of owning a dog that attacks. "The owner of any dog that aggressively attacks and causes severe injury or death of any human, whether or not the dog has previously been declared potentially dangerous or dangerous, shall, upon conviction, be guilty of a class C felony." RCW 16.08.100(3); *see also State v. Bash*, 130

Wn.2d 594, 611, 925 P.2d 978 (1996). "[T]he State has the burden of proving that the owner of the dog either knew or should have known that the dog was potentially dangerous." RCW 16.08.100(3).

> (1) [A] "potentially dangerous dog" means any dog that when unprovoked: (a) Inflicts bites on a human or a domestic animal either on public or private property, or (b) chases or approaches a person upon the streets, sidewalks, or any public grounds in a menacing fashion or apparent attitude of attack, or *any dog with a known propensity, tendency, or disposition to attack unprovoked, to cause injury, or to cause injury or otherwise to threaten the safety of humans or domestic animals*.

RCW 16.08.070(1) (emphasis added).[1]

Viewing the evidence in the light most favorable to the State, we conclude that a rational jury could have found Denney guilty of owning a dog that attacks beyond a reasonable doubt. Denney admitted that her neighbors were terrified of the dog and most people who knew of the dog would not enter the yard. She also took precautions to keep the dog away from people until the dog could accept a person. Denney admitted that she had to find a vet who would treat aggressive dogs, and even when the dog was muzzled the veterinarian would not get close to it. From this evidence, a jury could reasonably infer that Denney either knew or should have known that her dog had "a known

[1] The parties agree that the State had to prove that Denney "knew or should have known" that her dog was potentially dangerous as defined by the emphasized portion of the definition above because the other portions of the definition did not apply in Denney's case. Br. of Appellant at 16; Br. of Resp't at 13.

propensity, tendency, or disposition to attack unprovoked . . . [or] to threaten the safety of humans." RCW 16.08.070(1)(b).

Denney argues that the statements she made to the Undersheriff about her dog being terrified of people and taking her dog to a veterinarian that treats aggressive animals was insufficient to show that she knew or should have known that her dog had a "known propensity" to "attack unprovoked." Br. of Appellant at 17-18. The fact that the dog was reacting to its fear of people does not change the fact that Denney knew the dog reacted by aggressively attacking anyone with whom the dog was not familiar.

2. CONSTITUTIONAL CHALLENGE TO DANGEROUS DOG STATUTES

Denney contends that RCW 16.08.100(3) and RCW 16.08.070(1) are unconstitutionally vague, both facially and as applied to the facts of her case. Specifically, she contends the statutes criminalize regular dog behavior based on a subjective determination about the presence or lack of provocation. We decline to review her facial vagueness challenge and conclude that the statutes are not unconstitutionally vague as applied to the facts of her case.

A. Standard of Review

We review the constitutionality of a statute de novo. *State v. Watkins*, 191 Wn.2d 530, 535, 423 P.3d 830 (2018). We begin by presuming that a statute is constitutional. *In re Det. of Danforth*, 173 Wn.2d 59, 70, 264 P.3d 783 (2011). Because of this presumption, the challenger bears the heavy burden of proving the statute's

unconstitutional vagueness beyond a reasonable doubt. *City of Spokane v. Douglass*, 115 Wn.2d 171, 177, 795 P.2d 693 (1990).

B. Unconstitutional Vagueness[2]

Washington courts have long recognized the fundamental principle that a criminal statute must give fair warning of the conduct that makes it a crime as required under the due process clause of the Fourteenth Amendment to the United States Constitution. *Id.*; *see, e.g.*, *State v. Galbreath*, 69 Wn.2d 664, 667, 419 P.2d 800 (1966). As a result, a defendant may "challeng[e] a statute as being unconstitutionally vague." *State v. Thompson*, 28 Wn. App. 2d 1, 6, 536 P.3d 682 (2023).

A statute "is unconstitutionally vague if a challenger demonstrates, beyond a reasonable doubt, either (1) that the ordinance does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed, or (2) that the ordinance does not provide ascertainable standards of guilt to protect against arbitrary enforcement." *Douglass*, 115 Wn.2d at 178.

[2] As an initial matter, we note that Denney uses both vagueness and overbreadth terminology in her briefing on this issue. However, overbreadth and vagueness are distinct legal doctrines. *See City of Seattle v. Eze*, 111 Wn.2d 22, 26-33, 759 P.2d 366 (1988) (analyzing a defendant's vagueness and overbreadth challenges separately based on the doctrines' different rules and standards). Denney's briefing only addresses and applies the rules for vagueness challenges and this is the argument we address. To the extent that she is also arguing that the dangerous dog statutes are unconstitutionally overbroad, we decline to review those arguments, as they lack supporting authority or analysis under the overbreadth doctrine.

"A statute can be challenged as [either] facially vague or vague as applied." *Thompson*, 28 Wn. App. 2d at 6. Denney challenges the dangerous dog statutes as both facially vague and vague as applied. We address each of her challenges in turn.

C. Denney's Facial Vagueness Challenge

It is well settled that vagueness challenges to statutes that do not involve First Amendment rights are to be evaluated as applied under the particular facts of the case. *See Douglass*, 115 Wn.2d at 182; *State v. Fraser*, 199 Wn.2d 465, 484-86, 509 P.3d 282 (2022).

Denney argues that she can mount a facial vagueness challenge to the dangerous dog statutes on the grounds that they implicate First Amendment rights. She cites the concurring opinion in *City of Sumner v. Walsh*, 148 Wn.2d 490, 503-04, 61 P.3d 1111 (2003) (Chambers, J., concurring), asserting that a facial vagueness challenge is permissible if it impacts the fundamental right to move freely in public spaces. Specifically, she contends that RCW 16.08.100(3) and RCW 16.08.070(1) are facially vague because they "criminalize[ ] a person's freedom to be in public with their dog." Br. of Appellant at 29.

As an initial matter, we are not bound by the concurring opinion in *Walsh* because it was not a majority opinion. *See Norg v. City of Seattle*, 200 Wn.2d 749, 757, 522 P.3d 580 (2023) (explaining that a concurrence is only precedential when it receives five votes from justices who also signed the majority opinion).

Additionally, Denney's reliance on *Walsh* is misguided. The concurring opinion in *Walsh* acknowledged a fundamental right to "move freely in public places," rooted in the "First Amendment's protection of association and expression," while analyzing an equal protection challenge to a curfew ordinance. 148 Wn.2d at 504 (Chambers, J., concurring) (citing *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972); *Waters v. Barry*, 711 F. Supp. 1125, 1134 (D.D.C. 1989)). However, the portion of the *Walsh* concurrence cited by Denney concerns an equal protection analysis, not a facial vagueness challenge. *Walsh*, 148 Wn.2d at 504-08 (Chambers, J., concurring). While the lead opinion in *Walsh* does analyze the defendant's facial vagueness challenge to the curfew ordinance, Denney does not cite to it or explain how the dangerous dog statutes are analogous to the curfew ordinance that was struck down as unconstitutionally vague. *See Walsh*, 148 Wn.2d at 497-502.

Nevertheless, the dangerous dog statutes do not criminalize the right to move freely in public spaces. Rather, they criminalize ownership of dangerous or potentially dangerous dogs if the owner knows or should know of the dog's propensity, tendency, or disposition to cause harm or threats. *See generally* RCW 16.08.100(3),.070(1). We are unconvinced by Denney's argument that owning a dangerous dog is a First Amendment protected right.

Alternatively, Denney contends that her facial vagueness challenge should be considered even if the statutes do not involve First Amendment rights. Our Supreme

Court has consistently reiterated, by citing to United States Supreme Court case law, that vagueness challenges to statutes that do not involve First Amendment rights are to be evaluated as applied under the particular facts of the case. *See Douglass*, 115 Wn.2d at 182 (citing *Maynard v. Cartwright*, 486 U.S. 356, 361, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988); *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 n.7, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982); *United States v. Powell*, 423 U.S. 87, 92-93, 96 S. Ct. 316, 46 L. Ed. 2d 228 (1975); *United States v. Mazurie*, 419 U.S. 544, 550, 95 S. Ct. 710, 42 L. Ed. 2d 706 (1975); *United States v. Nat'l Dairy Prods. Corp.*, 372 U.S. 29, 32-33, 36, 83 S. Ct. 594, 9 L. Ed. 2d 561 (1963)); *see also Fraser*, 199 Wn.2d at 484.

Denney's reliance on *State v. Hilt*, 99 Wn.2d 452, 662 P.2d 52 (1983) and *State v. Richmond*, 102 Wn.2d 242, 683 P.2d 1093 (1984), to support her argument that we can review a facial challenge to a statute that does not implicate First Amendment rights is unpersuasive. Br. of Appellant at 29-30. These cases, decided six and seven years before *Douglass*, did not analyze the relevance of the First Amendment, and *Douglass* later clarified that vagueness should be assessed as applied unless the statute implicates the First Amendment. *Douglass*, 115 Wn.2d at 182 (decided in 1990).

Denney also cites to several United States Supreme Court cases to support her assertion that we are permitted to review her facial vagueness challenge regardless of whether the challenged statute implicates First Amendment rights. Br. of Appellant at 30-31 (citing *Sessions v. Dimaya*, 584 U.S. 148, 173-74, 138 S. Ct. 1204, 200 L. Ed. 2d

549 (2018); *Johnson v. United States*, 576 U.S. 591, 595-96, 602, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015); *Kolender v. Lawson*, 461 U.S. 352, 358-61, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983)). However, she does not explain how Washington's dangerous dog statutes are analogous to the statutes invalidated in those cases to justify review of her facial vagueness challenge.

Moreover, we are bound to follow Washington Supreme Court precedent, including on when to review a facial vagueness challenge. *See 1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 590, 146 P.3d 423 (2006). Although the United States Supreme Court is the final authority on the federal constitution, only a clear directive from the Court controls where the Washington Supreme Court has not addressed the issue. *State v. Calloway*, 31 Wn. App. 2d 405, 415-16, 550 P.3d 77 (2024). Here, the United States Supreme Court cases cited by Denney do not provide a clear directive that would indicate the Court has abandoned the rule against facial vagueness challenges for statutes that do not implicate First Amendment rights. Further, the Washington Supreme Court has consistently addressed this issue and continues to apply the rule against facial vagueness challenges to statutes that do not involve First Amendment rights. *See Fraser*, 199 Wn.2d at 484. Thus, we should continue to adhere to the Washington Supreme Court's approach to this issue.

Given this precedent, we decline review of Denney's facial vagueness challenge and limit our review to her as-applied vagueness challenge.

D. Denney's As-Applied Challenge

Denney argues that the dangerous dog statutes are vague as applied to the facts of her case. When reviewing an as-applied vagueness challenge, we look at the actual conduct of the party challenging the statute and not to a hypothetical situation. *State v. Watson*, 160 Wn.2d 1, 6-7, 154 P.3d 909 (2007). "'[W]hile a statute may be vague . . . as to some conduct, [it] may [also] be constitutionally applied to one whose conduct clearly falls within the constitutional core of the statute.'" *Thompson*, 28 Wn. App. 2d at 7 (internal quotation marks omitted) (quoting *State v. Maciolek*, 101 Wn.2d 259, 263, 676 P.3d 996 (1984)).

Denney's argument is related to the first prong of a vagueness challenge, which requires her to show beyond a reasonable doubt that the statute "does not define the crim[e] . . . with sufficient definiteness that ordinary people can understand what conduct is [prohibited]." *Douglass*, 115 Wn.2d at 178. Under this prong, a statute is unconstitutionally vague "'if it is framed in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application.'" *City of Seattle v. Eze*, 111 Wn.2d 22, 26, 759 P.2d 366 (1988) (quoting *O'Day v. King County*, 109 Wn.2d 796, 810, 749 P.2d 142 (1988)). This test, however, does not demand impossible standards of specificity or absolute agreement." *Douglass*, 115 Wn.2d at 179. "If persons of ordinary intelligence can understand what the [statute prohibits],

notwithstanding some possible areas of disagreement, the [statute] is sufficiently definite." *See Id*.

As discussed above, only a portion of the definition of "potentially dangerous dog" supplied by RCW 16.08.070(1)(b) is relevant to Denney's case:

> [A] "[p]otentially dangerous dog" means . . . any dog with a known propensity, tendency, or disposition to attack unprovoked, to cause injury, or to cause injury or otherwise to threaten the safety of humans or domestic animals.

Denney contends that she could only guess at the meaning and application of the emphasized portion of the statute above. She argues that all she knew was that her dog was terrified of people and aggressive with the veterinarian. Br. of Appellant at 32-33. This argument fails. Denney admitted to knowing that her dog acted aggressively toward the veterinarian and anyone who came up to the fence or her house. She therefore knew that her dog had some propensity, tendency, or disposition to threaten the safety of humans and would not have to guess at the meaning and application of the statute. Her conduct falls within the constitutional core of the statute. Moreover, a person of ordinary intelligence would know that the statute applies to their dog when their dog was so aggressive with the veterinarian that even after being muzzled, the veterinarian would not get close to the dog. The statute does not make an exception for dogs that are aggressive only toward veterinarians.

Denney argues that the term "attack" is not defined by the statute. She contends that she could reasonably have viewed her dog as fearful with a tendency to attack, but cause no harm. Br. of Appellant at 33. This argument also fails.

First, a "statute is not unconstitutionally vague merely because it fails to define some terms." *In re Pers. Restraint of Troupe,* 4 Wn. App. 2d 715, 723, 423 P.3d 878 (2018). Instead, "[w]hen a statute does not define terms alleged to be unconstitutionally vague, we 'may look to existing law, ordinary usage, and the general purpose of the statute to determine whether the statute meets constitutional requirements of clarity.'" *State v. Zigan,* 166 Wn.2d 596, 603, 270 P.3d 625 (2012) (internal quotation marks omitted) (quoting *State v. Hunt,* 75 Wn. App. 795, 801, 880 P.2d 96 (1994)).

In this case, the general purpose of the dangerous dog statutes is to make it illegal for an owner to own a dog that "aggressively attacks and causes severe injury or death," when the owner knew or should have known that their dog was potentially dangerous and fails to take necessary precautions. RCW 16.08.100(3). When reading the word "attack" in RCW 16.08.070(1)(b) alongside the "aggressively attacks and causes severe injury or death" language in RCW 16.08.100(3), Denney's argument fails. The dangerous dog statutes are not vague as applied to Denney because a person of ordinary intelligence could understand that the statute objectively prohibits owning a dog that attacks in an aggressive manner and causes injury. Even if there was some area of disagreement as to whether a playful attack would constitute an attack under the statute, which we do not

purport to decide here, the statutes when read together are sufficiently definite as applied to Denney's case.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Staab, A.C.J.

WE CONCUR:

Fearing, J.

Melnick, J.P.T.[†]

[†] Rich Melnick, a retired judge of the Washington State Court of Appeals, is serving as a judge pro tempore of the court pursuant to RCW 2.06.150(1).

Appendix B

Tristen L. Worthen
Clerk/Administrator

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April 3, 2025

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CASE # 396967
State of Washington v. Tiffany R. Denney
WHITMAN COUNTY SUPERIOR COURT No. 2210019338

Counsel:

Enclosed is a copy of the order deciding a motion for reconsideration of this court's March 11, 2025 opinion.

A party may seek discretionary review by the Washington Supreme Court of a Court of Appeals' decision. RAP 13.3(a). A party seeking discretionary review must file a petition for review in this Court within 30 days after the attached order on reconsideration is filed. RAP 13.4(a). Please file the petition electronically through the Court's e-filing portal. The petition for review will then be forwarded to the Supreme Court. The petition must be received in this court on or before the date it is due. RAP 18.5(c).

If the party opposing the petition for review wishes to file an answer, that answer should be filed in the Supreme Court within 30 days of the service on the party of the petition. RAP 13.4(d). The address of the Washington Supreme Court is Temple of Justice, P.O. Box 40929, Olympia, WA 98504-0929.

Sincerely,

Tristen L. Worthen
Clerk/Administrator

TLW:ko
Enc.

FILED
APRIL 3, 2025
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. TIFFANY R. DENNEY, Appellant.	)))))))))	No. 39696-7-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of March 11, 2025 is hereby denied.

PANEL: Staab, Fearing, Melnick J.P.T.

FOR THE COURT:

Lawrence-Berrey, C.J.

Robert Lawrence-Berrey
Chief Judge

WASHINGTON APPELLATE PROJECT

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