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

STATE OF WASHINGTON,	)	No. 30102-8-III
Respondent,	)	
v.	)	
SHARON LYNNE PROVOST,	)	UNPUBLISHED OPINION
Appellant.	)	

Brown, J. • Sharon L. Provost appeals her convictions for four counts of first degree animal cruelty and two counts of confining domestic animals in an unsafe manner based on July 2008 events. The cruelty counts and one confining count are alleged to have first been observed at Ms. Provost's Smart Road property about one mile from her residence in Lind, Washington. The other confining count was later developed at her Lind residence based on a search warrant. She contends the trial court erred in denying her CrR 3.6 suppression motion, partly because of the lack of a nexus between the Smart

Road events and her Lind residence. Finally, she contends the evidence is insufficient to support the animal cruelty convictions and contained certain unfairly prejudicial evidence.

We conclude the trial court erred in deciding probable cause existed to search the Lind residence and allowing unfairly prejudicial evidence collected from that search to be cross-admissible at trial on the Smart Road counts. We conclude the trial court properly decided probable cause existed to search the Smart Road property and the evidence is sufficient to support the animal cruelty convictions. We dismiss the Lind-residence confining count. Because of the prejudicial effect of allowing the Lind-residence evidence, we vacate the remaining convictions and remand for a new trial. Accordingly, we do not reach Ms. Provost's other assignments of error and her statement of additional grounds for review mainly concerning ineffective assistance and sentencing.

FACTS

Considering our review standard, the facts are presented most favorably for the State and summarize similar information presented at trial and at the CrR 3.6 suppression hearing. On July 3, 2008, Adams County Deputy Sheriff Benjamin Buriak received a dispatch call regarding an animal welfare concern at Ms. Provost's rural property on Smart Road. An unidentified woman had reported she saw several dead dogs and large amounts of garbage on the property when she visited there to look at dogs for sale.

Deputy Buriak described his entry to the Smart Road property by and through an unsigned gate and a deteriorated fence surrounding 80 acres of pasture land. Deputy Buriak saw three shed buildings containing around 25 dogs, four were dead and later labeled A-D. Dog D had been chained and appeared to have hung itself over a wall. It was unclear how the dogs A-C died. The deceased dogs appeared to have been dead for some time. Deputy Buriak saw a 55-gallon plastic drum filled with water inside the fence line of one of the sheds, but little available food and water. The food and water dishes appeared dirty. Deputy Buriak saw dog fur, garbage, pieces of wood, old feces and old straw inside the sheds on the floors of the kennels.

Deputy Buriak left the Smart Road property and contacted Ms. Provost at her home on East Third Street in Lind, located about one mile away from the Smart Road property. Ms. Provost gave incriminating statements about the conditions and the dead dogs at Smart Road that were subject to an unappealed CrR 3.5 hearing. For example, Ms. Provost told Deputy Buriak she knew about the dog that had hung itself, but she did not have time to remove it. While at the Lind residence, Deputy Buriak heard dogs barking and scratching and recited he had learned from Deputy Daniel Verhey that in August 2007, the department had received and cleared an animal treatment complaint regarding Ms. Provost concerning her Lind residence. Deputy Buriak did not observe any mistreated animals at the Lind residence on July 3, 2008.

On July 9, 2008, Deputy Buriak obtained a search warrant for both of Ms. Provost's properties. The July 9 affidavit for a search warrant recited two and one-half pages of facts, mostly related to the Smart Road investigation. Deputy Buriak described his observations regarding the Smart Road property and Ms. Provost's incriminating statements regarding the Smart Road events.

Critical here, Deputy Buriak stated, "Sharon Provost is operating a puppy mill business from her residence" and the "Smart Rd." properties. Clerk's Papers (CP) at 37. Deputy Buriak related, "[d]uring the past year the Sheriff's office has received several complaints about Provost's treatment of her animals and those complaints have been investigated." *Id.* Deputy Buriak described but one investigation where Pet Rescue had relayed complaints of "unsuitable conditions" at the Lind residence that Deputy Verhey investigated in August 2007. *Id.* Then, Ms. Provost was warned to "clean up the area" and by September 6, 2007 "the living conditions had improved." *Id.* Deputy Buriak stated he saw the sheds "where Deputy Verhey observed unsafe and unsanitary conditions during his visit" in August 2007. CP at 38. The sole remaining factual reference to the Lind residence was Deputy Buriak's statement: "At the Provost residence, I could hear numerous dogs in the sheds barking and scraping at the walls as I spoke to Provost." CP at 39. Regarding the Lind residence, Deputy Buriak concluded: "It is reasonable to believe the conditions of the kennels at Smart Rd. are similar to the

ones at her residence. This belief is further supported by my own observations when I contacted Provost at her residence." *Id.*

When the search warrant was executed at the Smart Road property on July 12, 2008, the four deceased dogs had been removed and there was more straw for the dogs. Some of the garbage had been picked up, but feces remained. Some food and water was accessible to the dogs. One bucket of water had dead mice floating in it.

Outside Ms. Provost's Lind home, deputies, with the assistance of Pet Rescue, found 93 live dogs in kennels made of wood and had metal roofs covered by tarps. Feces and old straw covered the ground and kennel floors, along with dog food and water dishes, some dirty.

Exhibit 55 depicted a mummified dog's carcass on the kitchen floor with maggots around the carcass. Exhibits 58 and 59 depicted a carcass of some form inside an enclosed shower in one of the bathrooms of the home. Scratch marks were visible on the walls of the shower, apparently where the animal had tried to escape. Exhibits 61 and 62 depicted a blue child's-type swimming pool sitting on top of a bed in one of the bedrooms. The swimming pool contained torn up newspaper and fecal matter. Exhibit 66 depicted a shoe on the ground with what appeared to be a dead mouse inside. Exhibit 67 depicted a picture of the toilet in one of the bathrooms filled with fecal matter. Exhibits 76 and 77 depicted a litter box with a mummified cat next to it in the basement

of the home. Exhibit 79 depicted a pile of fecal matter on the floor of one of the rooms in the basement. The fecal matter had built up into a pile, apparently as a result of the door to the room being opened. Exhibit 81 depicted a large cardboard box, approximately four or five feet high, filled with animal fecal matter.

Deputy Verhey testified about his 2007 contacts with Ms. Provost. According to Deputy Verhey, several of the dogs were sleeping on top of fecal matter and very little, if any fresh straw or bedding was inside the kennels. Ms. Provost's trial counsel had unsuccessfully moved in limine under ER 404(b) to exclude testimony of Deputy Verhey's observations and contact with Ms. Provost in August 2007.

Dr. William Grant, a forensic psychiatrist at Eastern State Hospital, testified he spoke with Ms. Provost on two occasions about her dogs; he related her explanations concerning the dead animals.

Nicole Montano of the Spokane County Regional Animal Protection Service testified as an animal welfare expert. In her opinion, the kennel conditions were poor and inadequate and posed severe health and safety risks to animals.

The State called Janet Bowman, the Treasurer for Adams County Pet Rescue, who assisted in the execution of the search warrant at Ms. Provost's properties. Ms. Bowman did not see any food in any of the kennels, but did see a couple of empty bags of dog food.

Ms. Provost testified and called three other witnesses. Ms. Provost testified she was 74 years old and had begun breeding Australian shepherds in 1996. She bred dogs to supplement her low income. She portrayed herself as well meaning, caring, and not negligent in the treatment of her dogs. Ms. Provost related she had fed and watered her dogs on July 3, but had not yet done the same at Smart Road. Generally, she gave innocent explanations concerning dogs A-D. Ms. Provost's witnesses generally supported her testimony.

Ms. Provost's counsel proposed and the court gave a jury instruction on the lesser included crime of second degree animal cruelty. Counsel did not request an instruction on economic distress, an affirmative defense to second degree animal cruelty, despite filing a notice of intent to use the defense at trial. Ms. Provost complains her trial counsel failed to cross-examine witnesses.

The jury found Ms. Provost guilty as charged. For the four counts of first degree animal cruelty, the court sentenced her as a first-time offender; she received zero days in total confinement with 12 months of community custody. Ms. Provost was sentenced to 60 days in jail for each misdemeanor, with all 120 days suspended. The court imposed an exceptional sentence, ordering her not to own, house, harbor or care for domestic animals such as dogs and cats for a period of 20 years. She appealed.

ANALYSIS

A. Evidence Suppression

Did the trial court err in denying Ms. Provost's CrR 3.6 suppression motion? She contends the trial court erred in going beyond the four corners of the affidavit for a search warrant and in taking witness testimony when she solely challenged the validity of the warrant. Further, Ms. Provost contends the court erred in concluding a nexus existed between the Smart Road criminal activity and the search of her Lind residence.

We review the trial court's conclusions of law resulting from a suppression hearing de novo. *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513 (2002). When determining whether a search warrant should have been issued, the trial court's review is limited to the four corners of the probable cause affidavit. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d (2008). Article I, section 7 of the Washington Constitution provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." A warrantless search is per se unreasonable unless it falls under one of Washington's recognized exceptions. *State v. Hendrickson*, 129 Wn.2d 61, 70-71, 917 P.2d 563 (1996). While the State has the burden of proving an exception to the warrant requirement, the defendant has the burden of proving a disturbance of his or her private affairs. *State v. Cheatam*, 112 Wn. App. 778, 786-87, 51 P.3d 138 (2002) (citing *State v. Hendrickson*, 129 Wn.2d at 71; *State v. Thorn*, 129 Wn.2d 347, 354, 917 P.2d 108 (1996)).

First, the State aptly argues the court needed to take witness testimony because the court needed to determine if the initial Smart Road search was legal. Because Ms. Provost challenged the legality of the deputy being on her Smart Road property in response to the neglect complaint, supplementary evidence was necessary at the suppression hearing. The whole purpose of such hearings is to screen out unreliable or illegally obtained evidence. CrR 3.6; *see also Federated Publ'n, Inc. v. Swedberg*, 96 Wn.2d 13, 19-20, 633 P.2d 74 (1981) (regarding pretrial publicity suppression hearings). Therefore, Deputy Buriak's related observations at the Smart Road property were admissible.

The Smart Road property was impliedly open to the public. Our case is similar to *State v. Rose*, 128 Wn.2d 388, 390, 909 P.2d 280 (1996). In *Rose*, an officer responded to the defendant's residence following a report of the odor of marijuana coming from a shed on the property. *Id.* The primary issue involved observations made on the porch of the residence, which was located in a rural area. Concerning the question of whether the curtilage was impliedly open to the public, the court reasoned, "[n]othing in the record indicates that any attempt was made to prevent people from approaching the residence." *Id.* at 393. Specifically, although the defendant's residence "was at the end of a private driveway off a private road . . . there was no 'private' sign posted, and the property was not fenced." *Id.* The trial court specifically found that no trespassing signs did not mark

the gate Deputy Buriak traveled through to view the sheds. We are bound by the trial court's fact finding.

Deputy Buriak had legitimate police interest in investigating the neglect allegation. He followed the one road to the premises. The gate was not locked. The area was rural. The trial court found there were no no-trespassing signs. Nothing indicates Ms. Provost actively discouraged visitors to her property. Indeed, based on her sales efforts Ms. Provost likely encouraged visits like that of the prospective dog buyer who reported the animal neglect.

Ms. Provost questions the deputy's intent, but "[t]he conduct of an officer at residential premises does not exceed the open view doctrine just because the officer is there deliberately to look for evidence of a crime." *Rose*, 128 Wn.2d at 393 (citing *State v. Maxfield*, 125 Wn.2d 378, 397-99, 886 P.2d 123 (1994)). The conditions observed by Deputy Buriak were plainly visible without resort to intrusive measures. We conclude the point on the Smart Road property where Deputy Buriak first viewed criminal activity was a lawful vantage point because it was impliedly open to the public to the same extent as the porch in *Rose*. In a manner of speaking, a "search" does not occur within the meaning of the Fourth Amendment where the vantage point is impliedly open to the public. *State v. Graffius*, 74 Wn. App. 23, 26-27, 871 P.2d 1115 (1994); *State v. Seagull*, 95 Wn.2d 898, 901, 632 P.2d 44 (1981). "[W]hat is voluntarily exposed to the general

public . . . is not considered part of a person's private affairs." *State v. Young*, 123 Wn.2d 173, 182, 867 P.2d 593 (1994). In sum, the open view doctrine applied to Deputy Buriak's observations.

Second, regarding Ms. Provost's Lind residence, "[a] person's home has generally been viewed as the area most strongly protected by the constitution." *State v. Ross*, 141 Wn.2d 304, 312, 4 P.3d 130 (2000). Probable cause is required to issue a search warrant. *State v. Jackson*, 150 Wn.2d 251, 264, 76 P.3d 217 (2003). A trial court's legal conclusion as to whether an affidavit establishes probable cause is also reviewed de novo within the four corners of the warrant. *Neth*, 165 Wn.2d at 182. "'[P]robable cause requires a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched.'" *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999) (quoting *State v. Goble*, 88 Wn. App. 503, 509, 945 P.2d 263 (1997)).

Here, the affidavit in support of the search warrant offered information obtained from an anonymous informant's report. To establish probable cause based on an informant's tip, the affidavit must demonstrate the basis for the informant's information and the basis for the officer's conclusion that the informant was credible (the two prongs of the *Aguilar-Spinelli*[1] test). *State v. Vickers*, 148 Wn.2d 91, 112, 59 P.3d 58 (2002).

[1] *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969).

Usually both prongs of the *Aguilar-Spinelli* test must be established by information provided to the magistrate; however, any deficiency in one or both prongs may be cured by independent police investigation that corroborates the informant's tip. *Id.* This investigation must point to indications of criminal activity along the lines indicated by the informant. *State v. Huft*, 106 Wn.2d 206, 210, 720 P.2d 838 (1986); *State v. Rakosky*, 79 Wn. App. 229, 239, 901 P.2d 364 (1995). Nothing shows the informant's credibility or any basis of knowledge for any events at the Lind residence. Thus, nothing from the anonymous informant advances probable cause to search the Lind residence.

Given the remaining evidence, it was not reasonable to believe criminal activity

was taking place within Ms. Provost's residence. Deputy Buriak merely speculated that because criminal activity took place at Smart Road, similar criminal activity was likely taking place at the Lind residence. An open field containing sheds is a distinctly different place than Ms. Provost's residence located a mile away. And, the affidavit's facts were limited to stale evidence of certain 2007 events, none of which suggested dead dogs or animal cruelty of the nature observed at Smart Road. Deputy Buriak's factual observations were limited to hearing dogs barking and scratching and seeing garbage at the Lind residence. Deputy Verhey's 2007 investigation was stale information about a situation apparently resolved about one year earlier.

Moreover, Ms. Provost aptly argues the affidavit does not show a nexus between criminal activity and her home. Indeed, the nexus between the alleged criminal activity and the interior of Ms. Provost's home was the surmise that she was "operating a puppy mill business from her residence." CP at 37. That fact is not supported by any evidence. The affidavit does not allege animals might be in the house. The affidavit fails to make the necessary connection between the alleged crimes at Smart Road and the interior of her residence. Accordingly, no probable cause existed to search the home. Thus, the warrant to search the Lind residence should not have been issued. Accordingly, we dismiss the confining count related to the Lind residence, count 5.

B. Unfair Prejudicial Evidence

Considering our analysis this far in determining that the search of the Lind residence was improper, evidence of the Lind residence conditions was entirely irrelevant in the prosecution of the charges arising at the Smart Road property, and, as explained below, improper. Given the irrelevancy of the Lind-residence evidence, no ER 403 balancing is necessary because without probative value, the horribly sensational and inflammatory evidence of the conditions at the Lind residence was entirely prejudicial and, thus, unfair.

We review the admission of photographic evidence for an abuse of discretion. *State v. Crenshaw*, 98 Wn.2d 789, 806, 659 P.2d 488 (1983). "Relevant evidence" is evidence which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Relevant evidence is usually admissible. ER 402. However, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." ER 403.

Ms. Provost's trial counsel timely objected to admission of several photographs on the basis of undue prejudice. Numerous photographs were admitted; Ms. Provost challenged solely State's Exhibits 50-82. The trial court admitted the photographs

without articulating a basis for overruling the objection and did not weigh the probative value against the danger of undue prejudice. The inflammatory photographs depicted dead and rotting animal carcasses, piles of excrement, and lack of running water at the Lind residence. The photographs related solely to count 5.

> [W]e take this opportunity to warn prosecutors that we look unfavorably on the admission of repetitious, inflammatory photographs.
> . . . .
> Prosecutors are not given a carte blanche to introduce every piece of admissible evidence if the cumulative effect of such evidence is inflammatory and unnecessary. In other words, in such situations where proof of the criminal act may be amply proven through testimony and noninflammatory evidence, we caution prosecutors to use restraint in their reliance on gruesome and repetitive photographs.

Crenshaw, 98 Wn.2d at 807.

And, the trial court erred in admitting Deputy Verhey's testimony regarding an August 2007 animal welfare complaint concerning the Lind-residence property. As explained above, the lack of probative value to counts 1-4 and 6 was substantially outweighed by the danger of unfair prejudice. And, the evidence was stale.

Further, ER 404(b) prohibits the use of evidence of other crimes, wrongs, or acts to show action in conformity therewith. While ER 404(b) generally prohibits evidence of a defendant's prior bad acts, it contains a list of purposes for which evidence of past acts *is* admissible.[2] ER 404(b). The list of other purposes is not exclusive. *State v. Hepton*,

[2] This list of other purposes for which past acts evidence may be admitted includes "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

113 Wn. App. 673, 688, 54 P.3d 233 (2002). Also, ER 404(b) is read in light of ER 401, ER 402, and ER 403. *State v. Smith*, 106 Wn.2d 772, 775, 725 P.2d 951 (1986). The trial court ruled the evidence was a continuing course of conduct, but Ms. Provost aptly states that the State did not allege criminal conduct dating back to 2007.

In sum, because we cannot say the admission of the Lind-residence evidence did not prejudicially and unfairly color the outcome of the prosecution of the counts related to the Smart Road property, we conclude Ms. Provost is entitled to a new trial on counts 1-4 and 6.

C. Evidence Sufficiency

In order to remand for retrial instead of dismiss, we briefly address the sufficiency of the evidence. The issue is whether the evidence is sufficient to establish each element for the first degree animal cruelty counts (counts 1-4) beyond a reasonable doubt.

Due process requires the State to prove every element of the crime beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it would permit 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). An insufficiency claim admits the truth of the State's evidence and requires that all reasonable inferences be drawn in the State's favor and interpreted most strongly against the defendant. *Id.* 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. Galisia*, 63 Wn. App. 833, 838, 822 P.2d 303 (1992). Circumstantial evidence is equally as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). "Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the declared premise." *In re Marriage of Hall*, 103 Wn.2d 236, 246, 692 P.2d 175 (1984).

To prove the charges of first degree animal cruelty, the State had to show, beyond a reasonable doubt, that Ms. Provost, with criminal negligence, starved, dehydrated, or suffocated dogs A-D and, as a result, caused the deaths of dogs A-D. RCW 16.52.205(2).

First, Ms. Provost argues the evidence was insufficient to show that the dogs were dead. But Deputy Buriak testified the four dogs appeared to be deceased, that one was hanging by its neck, and that he called to another one and it did not respond, and that it was partially buried in debris. He testified Ms. Provost acknowledged to him that she knew there were deceased dogs on the property.

Second, Ms. Provost argues the evidence insufficiently shows causation. She

argues the evidence is "speculative" without "qualified medical evidence, to conclude otherwise." Br. of Appellant at 36. But as the State responds, the dogs were solely in Ms. Provost's care. Ms. Montano testified the kennels were constructed in a manner which were unsafe for the animals, noting strangulation risks particularly. She testified the lack of sufficient water could lead to severe dehydration and death. And, she testified the dogs were aggressive which may have been caused by spending so much time in a kennel and a lack of social interaction.

In sum, the evidence, when viewed in the light most favorable to the State and with all reasonable inferences drawn in the State's favor and interpreted most strongly against Ms. Provost, permitted the jury to find that the dogs were indeed deceased and that their deaths were caused by Ms. Provost's lack of care. Accordingly, the evidence was sufficient to support her first degree animal cruelty convictions.

Reversed.

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.

_____
Brown, J.

WE CONCUR:

_____ _____

Siddoway, A.C.J. Sweeney, J.