IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 64526-9-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	UNPUBLISHED OPINION
LANETTE E. SMITH,	)	
	)	
Appellant.	)	FILED: July 25, 2011

Grosse, J. — Defense counsel's decision to forego affirmatively arguing in the alternative for a lesser included offense in a bench trial was a matter of reasonable trial strategy where the court could consider the possibility of the lesser offense regardless of counsel's argument. The belated filing of the court's bench trial findings did not prejudice the defendant. The State properly concedes the court's sentencing order barring the defendant from caring for any herd animals for the rest of her life was overbroad under the controlling statutory authority. We accordingly affirm Lanette Smith's convictions for animal cruelty, but remand for correction of the judgment and sentence.

FACTS

Whatcom County animal control officers began investigating a herd of 41 llamas in the care of the defendant, Lanette Smith, after a neighbor reported a dead llama on the property. A court issued a warrant authorizing inspection of the herd and seizure of any animals showing signs of abuse. Animal control officers and police, along with a veterinarian contracted by animal control and approximately a dozen volunteers from a local animal rescue society began

evaluating the herd. Two other veterinarians also assisted during part of the evaluation process. Ultimately, all animals in the herd were confiscated. Seven were euthanized by the contract veterinarian within a few days. She was assisted for some of the procedures by another veterinarian with more experience dealing with large animals. Two of the other animals died in rescue care within a month of the seizure.

The State charged Smith with eight counts of first degree cruelty to animals.[1] Smith later waived her right to a jury trial.

At the bench trial, the State called the lead animal control officer, the case detective, an organizer of the llama rescue volunteers, neighbors who had reported the dead llama and the veterinarian contracted to assist animal control. In the view of the State's witnesses, Smith had provided inadequate pasturage, shelter, food, water and medical care to the animals, with the result that they were heavily infested with parasites, both external and internal, and many were starving. Some also suffered serious problems with their feet and teeth. The contract veterinarian testified to her opinion that it was medically necessary to euthanize the seven animals not adopted out, and other evidence supported the inference that the two animals that died within the month also died because of Smith's neglect.

Based on her 16 years of experience working with llamas, Smith was

[1] The State later added a count of bail jumping, which is not at issue in this appeal.

allowed to testify to her opinion as to the condition and general good health of the animals. The animals in the worst condition were ones she herself had accepted from others as rescue animals. She disputed the State's evidence regarding the adequacy of the food, water, shelter and medical care she had provided, and testified that she was just one week short of conducting the normal spring check for parasites that would have remedied such issues. Other evidence showed that animal control had evaluated the herd in recent months and found no problems, despite earlier complaints about Smith by neighbors. Smith also testified that signs the State's witnesses interpreted as suffering by the llamas in photographs taken during the seizure were actually signs of stress resulting from the process of capturing and moving the herd.

In addition, the defense called the other two veterinarians who had participated in the assessment of the herd pursuant to the seizure warrant. They voiced concerns that the animal rescue volunteers who participated were heavily biased against Smith, were taking too large a role in the process and compromised its fairness. They also testified about individual animals they examined that they did not find were starving or were otherwise in need of being removed from the herd. One also provided evidence arguably disputing the State's evidence about the condition of the premises and its suitability, and the other was concerned by the media coverage and vigorously disputed whether the animals he viewed possessed any external parasites at all.

The defense also called the veterinarian who had assisted the contract veterinarian in euthanizing some of the seized animals. She provided testimony suggesting that the contract veterinarian lacked the proper equipment and training to euthanize large animals such as llamas. She also inferentially suggested that it had not been necessary to euthanize all of the animals as they did not appear to be at death's door and struggled and fought during the process.

In closing argument, the defense challenged every aspect of the State's case and asked the court to find Smith not guilty of first degree animal cruelty for each count. In rebuttal, the State acknowledged the court's legal authority to convict Smith of only the lesser degree offense of second degree animal cruelty, but urged the court not to do so. In its oral findings, the trial court expressly considered the elements of both the greater and lesser degree offenses and indicated it gave special consideration to the appropriate degree of the offense. The court, however, ultimately found Smith guilty of each offense as charged.

Smith received a first offender waiver alternative sentence. As part of the sentencing conditions, at the request of the State, the court ordered that Smith be banned for the rest of her life from caring for any herd animals of any type.

Smith appeals.

ANALYSIS

Smith first contends that her counsel provided ineffective assistance by

failing to affirmatively argue to the trial judge that she should be convicted only of second degree animal cruelty. We disagree.

To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced his or her trial.[2] The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct.[3] "Deficient performance is not shown by matters that go to trial strategy or tactics."[4] To demonstrate prejudice, the defendant must show that but for the deficient performance, there is a reasonable probability that the outcome would have been different.[5]

Smith contends that her counsel's approach amounted to an improper "all or nothing" strategy that effectively removed the possibility of conviction only on the lesser degree offense of misdemeanor second degree animal cruelty. But Smith's argument relies entirely on an analogy to a series of Court of Appeals cases involving jury trials, the basic analysis of which our Supreme Court has disapproved in its recent opinion in State v. Grier.[6]

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[2] Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).
[3] McFarland, 127 Wn.2d at 336.
[4] State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).
[5] In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).
[6] 171 Wn.2d 17, 35-45, 246 P.3d 1260 (2011) (discussing State v. Ward, 125 Wn. App. 243, 248, 104 P.3d 670 (2004); State v. Pittman, 134 Wn. App. 376, 387-89, 166 P.3d 720 (2006); State v. Smith, 154 Wn. App. 272, 278-79, 223 P.3d 1262 (2009) (citing and relying on Pittman)).

Moreover, regardless of the cases Smith cites, Smith's fundamental analogy completely fails here because this case was a bench trial. As is demonstrated by the record, the court in a bench trial is free to consider, and if appropriate, find the defendant guilty of either the charged offense or any applicable lesser offense.[7] This is because RCW 10.61.003[8] and RCW 10.61.006[9] notify a defendant charged with a crime that he or she may also be tried on a lesser degree or a lesser included offense.[10] In contrast, for a jury to make a finding on a lesser included offense, the jury must have received an instruction as to that offense.[11]

The situation here is thus actually analogous to circumstances where defense counsel did successfully obtain a lesser offense instruction. The only question that remains is whether it could be a reasonable tactic for counsel to forego affirmatively arguing for a lesser offense result in this case. Given the

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[7] RCW 10.61.010; see State v. Peterson, 133 Wn.2d 885, 892-93, 948 P.2d 381 (1997) (In a bench trial, the judge "may properly find defendant guilty of any inferior degree crime of the crimes included within the original information.").

[8] RCW 10.61.003 states, "Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, or of an attempt to commit the offense."

[9] RCW 10.61.006 states, "In all other cases the defendant may be found guilty of an offense the commission of which is necessarily included within that with which he is charged in the indictment or information."

[10] State v. Foster, 91 Wn.2d 466, 472, 589 P.2d 789 (1979); Peterson, 133 Wn.2d at 889, 892-93 (RCW 10.61.003 and 10.61.006 provide the required notice and apply to a trial court sitting as a finder of fact as well as to a jury.).

[11] State v. Harris, 121 Wn.2d 317, 320, 849 P.2d 1216 (1993) ("To find an accused guilty of a lesser included offense, the jury must, of course, be instructed on its elements.").

strong presumption of competence we must afford counsel and the particular facts of this case, the tactic counsel chose was reasonable here.

As noted, the defense put on an extensive case strongly challenging many aspects of the State's evidence. The evidence was complex, and some witnesses, regardless of who called them, provided testimony arguably supporting the other side in some respects. But the defendant's own testimony could have supported an outright acquittal of all charges because she denied her actions caused pain or suffering to the animals. Counsel affirmatively argued in closing that there was no evidence that any of the seized animals were in any pain until after the raid and seizure. Even a conviction of second degree animal cruelty requires a finding that the caretaker's actions cause an animal to suffer unnecessary or unjustifiable physical pain.[12] Thus it cannot by any stretch be said that Smith's counsel was required to concede her guilt of the lesser charge.[13] The only other approach counsel thus could have taken would be to

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[12] RCW 16.52.205(2) provides: "A person is guilty of animal cruelty in the first degree when, except as authorized by law, he or she, with criminal negligence, starves, dehydrates, or suffocates an animal and as a result causes: (a) Substantial and unjustifiable physical pain that extends for a period sufficient to cause considerable suffering; or (b) death."
RCW 16.52.207(2) provides, in pertinent part: "An owner of an animal is guilty of animal cruelty in the second degree if, under circumstances not amounting to first degree animal cruelty, the owner knowingly, recklessly, or with criminal negligence: (a) Fails to provide the animal with necessary shelter, rest, sanitation, space, or medical attention and the animal suffers unnecessary or unjustifiable physical pain as a result of the failure."

[13] Counsel carefully phrased his closing argument to repeatedly ask the court to find Smith not guilty of the charged counts of animal cruelty in the first degree. Thus, while counsel never advocated for a lesser offense result, neither did counsel's request for relief actually foreclose such a result, notwithstanding

somehow craft an argument in the alternative, i.e., that Smith was either not guilty of anything or of only the lesser offense. But counsel could reasonably regard such an approach as reducing the considerable force of his overall argument, and could reasonably choose to forgo that strategy, knowing that the court would, as it did, consider the lesser offense in any event.[14]

Smith, in short, has shown neither deficient performance nor resulting prejudice from counsel's tactical choice of how to frame his closing argument.

Next, Smith contends that her conviction must be reversed because the trial court failed to enter written findings of fact. See CrR 6.1(d). But the trial court belatedly entered the required findings and conclusions after Smith's opening brief was filed. This court will not reverse a conviction for the late entry of findings unless the defendant can show prejudice resulting from the delay or that the findings were tailored to address the issues raised on appeal.[15] Smith has not filed a reply brief alleging any prejudice from the delayed entry of written findings. The written findings closely track the court's initial oral findings. We see no indicia of tailoring. Accordingly, reversal is not warranted.[16]

Finally, Smith challenges the court's sentencing order imposing a lifetime

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counsel's argument that the State had not proved the animals suffered pain caused by Smith's care. This sophisticated approach may explain why it was the State, in its rebuttal closing, who first raised the topic of possible conviction of the lesser offense for some of the charges.

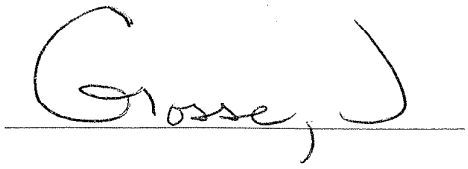
[14] See Grier, 171 Wn.2d at 34 ("'[A] court should presume ... that the judge or jury acted according to the law.'") (quoting Strickland, 466 U.S. at 694).

[15] State v. Cannon, 130 Wn.2d 313, 329-30, 922 P.2d 1293 (1996).

[16] See State v. Byrd, 83 Wn. App. 509, 512, 922 P.2d 168 (1996).

ban on her ownership, working with or caring for any herd animals under RCW 16.52.200(3). Smith argues, and the State correctly concedes, that the order is infirm because (1) the trial court did not affirmatively order forfeiture of the animals seized from Smith, which is a statutory prerequisite to a such a ban; (2) the statute applies only to "similar animals," which under RCW 16.52.011(2)(k) means animals within the same genus; and (3) the pre-2009 version of the statute applicable to Smith's 2007 offenses provides for only a two-year ban, not a lifetime ban. We accept the State's concessions as well-taken and accordingly remand to the sentencing court to address these errors.[17]

We affirm Smith's convictions for animal cruelty and remand for further proceedings consistent with this opinion.



WE CONCUR:

[17] The State nonetheless suggests that no action need be taken regarding the first of these problems because, since an animal involved in the offense died, ordering forfeiture was mandatory under the terms of the statute. While it may be true that under the facts of this case forfeiture was mandatory, it is not the role of this court to supply missing findings relating to sentencing conditions. The trial court should address all three issues on remand.

Appelwick, J.

Leach, A.C.J.