IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. RICHARD CARL BERGEM, Respondent.	)	No. 66417-4-I DIVISION ONE UNPUBLISHED OPINION FILED: July 16, 2012

Appelwick, J. — Bergem appeals from his convictions for first degree animal cruelty and second degree animal cruelty, arguing both crimes are alternative means crimes and that there was insufficient evidence to support all of the alternative means presented to the jury. The trial court did not instruct the jury that it must reach a unanimous agreement as to the alternative means, nor was there a special verdict form specifying the means relied upon. We reverse and remand.

FACTS

Richard Bergem owned two horses, a black and white pinto gelding and a sorrel mare. He kept the horses in a two to three acre fenced pasture and allowed them to roam the property. Officer Emily Diaz, an animal control officer with the Skagit County Sherriff's Office, went out to the property on October 27, 2009, in response to a neighbor's call. She was concerned at that time about the horses' body weight and about "rain rot." Rain rot is caused by too much moisture accumulating on a horse's skin due to poor grooming or a lack of shelter. It is a fungal issue that gets worse if left untreated. She testified that the pinto gelding had rain rot, but that the sorrel mare did not.

At the time of that visit, Officer Diaz evaluated the horses and determined the body condition of the pinto gelding to be 2.5 out of 9 on the Henneke Scale. The sorrel mare's body condition was four out of nine. A one on the scale means completely emaciated and close to death, a nine means grossly obese, and a healthy weight for a horse is between a four and six. When Officer Diaz conducted a return visit on November 25, she observed that the horses had dropped weight. The pinto gelding was emaciated. She then applied for a search warrant to seize the horses. .

The animals were seized on December 4 and taken to veterinarian Dr. Emily Knopf for examination. Dr. Knopf scored the pinto gelding a one out of nine on the body condition scale, and noted she could not find a reason for the lack of weight other than lack of nutrition due to insufficient food. She estimated the pinto gelding dropped between 75 to 100 pounds between October 27 and December 4, and also opined that it likely suffered substantial and unjustifiable pain over a period of time sufficient to

cause considerable suffering. Dr. Knopf also noticed the rain rot on the pinto gelding. She testified that rain rot is avoided by providing the horses with shelter to keep them out of the rain. It can progress to deep festering sores. It had not progressed to that point with the pinto gelding, but it was sufficient to cause "discomfort" to the horse. There were some trees around the pasture to provide shelter, but Bergem had not built any structural shelter for the animals, despite having most of the materials to do so. Dr. Knopf also examined the sorrel mare, but said nothing about its condition in terms of weight or suffering.

The State charged Bergem with two counts of first degree animal cruelty, one against the pinto gelding (count I) and one against the sorrel mare (count II). The State also charged Bergem with two counts of second degree animal cruelty, one against each animal (counts III and IV). Count II, first degree animal cruelty against the sorrel mare, was subsequently dismissed. The case went to trial and a jury returned general guilty verdicts against Bergem on the remaining three counts: both first and second degree animal cruelty convictions for the pinto gelding, and a second degree animal cruelty conviction for the sorrel mare.

Bergem timely appeals.

DISCUSSION

Criminal defendants have a right to an expressly unanimous jury verdict. Wash. Const. art. I, § 21; State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). When the charged crime can be committed by more than one means, however, unanimity is not required as to the means by which the crime was committed so long as

substantial evidence supports each alternative means. State v. Kitchen, 110 Wn.2d 403, 410, 756 P.2d 105 (1988). As a general rule, such alternative means crimes are set forth in a statute stating a single offense, under which are set forth more than one means by which the offense may be committed. State v. Smith, 159 Wn.2d 778, 784, 154 P.3d 873 (2007). If the evidence is insufficient to present a jury question as to whether the defendant committed the crime by any one of the means submitted to the jury, the conviction will not be affirmed. Ortega-Martinez, 124 Wn.2d at 708.

On the other hand, a defendant may not simply point to an instruction or statute that is phrased in the disjunctive in order to trigger a substantial evidence review of a conviction. Smith, 159 Wn.2d at 783. Likewise, where a disputed instruction involves alternatives that may be characterized as a "means within a means," the constitutional right to a unanimous jury verdict is not implicated and the alternative means doctrine does not apply. Id.

When reviewing a party's challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State, and ask whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Engel, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009).

I. First Degree Animal Cruelty

Bergem argues that starvation and dehydration are alternative means of committing first degree animal cruelty, that the State was required to provide sufficient evidence satisfying both means, and that there was insufficient evidence to support that he dehydrated the pinto gelding horse.

A. Alternative Means

It is undisputed that RCW 16.52.205 contains several alternative means by which a person can commit the crime of animal cruelty in the first degree. For example, a person can be guilty if he or she kills an animal by a means causing undue suffering, RCW 16.52.205(1)(c); and a person is guilty if he or she knowingly engages in sexual conduct or sexual contact with an animal, RCW 16.52.205(3)(a).[1] In this case, Bergem was convicted under RCW 16.52.205(2)(a), which provides that a person is guilty of animal cruelty in the first degree if the person, "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." The jury instruction omitted the suffocation component, and provided, in pertinent part, that to convict Bergem of first degree animal cruelty, the State was required to prove:

> (1) That on or about December 4, 2009, the defendant, with criminal negligence, *starved and/or dehydrated* a black and white pinto gelding horse; and
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> (2) The defendant's actions caused the animal substantial and unjustifiable physical pain extending for a period sufficient to cause considerable suffering.

(Emphasis added.) The State did not make an election as to whether it was charging Bergem under a starvation or a dehydration theory.

The essence of the parties' dispute, then, is whether starvation and dehydration are two alternative means for committing the crime, as Bergem argues, or if they are merely "means within a means," as the State argues. The State relies principally on

Smith to support its assertion. 159 Wn.2d 778. In that case, the jury received an instruction stating that a person commits second degree assault when "'he or she assaults another with a deadly weapon.'" Id. at 780. The jury was given an additional instruction that set forth the three common law definitions of assault.[2] Id. at 781. The

[1] RCW 16.52.205 sets out the alternative means in subsections (1) through (3):

> (1) A person is guilty of animal cruelty in the first degree when, except as authorized in law, he or she intentionally (a) inflicts substantial pain on, (b) causes physical injury to, or (c) kills an animal by a means causing undue suffering, or forces a minor to inflict unnecessary pain, injury, or death on an animal.
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> (2) A person is guilty of animal cruelty in the first degree when, except as authorized by law, he or she, *with criminal negligence, starves, dehydrates, or suffocates an animal and as a result causes: (a) Substantial and unjustifiable physical pain that extends for a period* sufficient *to cause considerable suffering*; or (b) death.
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> (3) A person is guilty of animal cruelty in the first degree when he or she:
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> (a) Knowingly engages in any sexual conduct or sexual contact with an animal;
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> (b) Knowingly causes, aids, or abets another person to engage in any sexual conduct or sexual contact with an animal;
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> (c) Knowingly permits any sexual conduct or sexual contact with an animal to be conducted on any premises under his or her charge or control;
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> (d) Knowingly engages in, organizes, promotes, conducts, advertises, aids, abets, participates in as an observer, or performs any service in the furtherance of an act involving any sexual conduct or sexual contact with an animal for a commercial or recreational purpose; or
>
> (e) Knowingly photographs or films, for purposes of sexual gratification, a person engaged in a sexual act or sexual contact with an animal.

(Emphasis added.)

[2] The instruction read:

> An assault is an intentional touching, striking, cutting, or shooting of

Washington State Supreme Court concluded that these common law definitions do not constitute essential elements of the crime, but are merely descriptive of the term "assault," which constitutes an element of the crime of second degree assault. Id. at 788. It held that the common law definition of assault, presented as a separate jury instruction, gave rise to a "means within a means" situation, which neither required jury unanimity nor had to be supported by substantial evidence on the record. Id. In other words, the alternative means doctrine did not apply. Id. at 783. This holding was consistent with other cases such as State v. Linehan, 147 Wn.2d 638, 649, 56 P.3d 542 (2002) and State v. Laico, 97 Wn. App. 759, 762, 987 P.2d 638 (1999). In those cases, the courts similarly concluded that merely because a definition statute states methods of committing a crime in the disjunctive does not mean that the definition creates alternative means of committing the crime. Laico, 97 Wn. App. at 762.

The State now argues this case merits the same conclusion. But, the first degree animal cruelty statute and the instruction given in Bergem's case are not

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> another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person. A touching, striking, cutting, or shooting is offensive, if the touching, striking, cutting, or shooting would offend an ordinary person who is not unduly sensitive.
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> An assault is also an act, with unlawful force, done with intent to inflict bodily injury upon another, tending, but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.
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> An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

Smith, 159 Wn.2d at 781-82.

definitional, and are thus plainly distinguishable from the instructions given in Smith, Linehan, or Laico. Here, neither RCW 16.52.205(2) nor RCW 16.52.205(2)(a) simply define or describe some other term; instead, they together set forth central elements of the crime Bergem was charged with. The State's reliance on Smith and other such cases is misplaced.

This court's reasoning in State v. Nonog is far more instructive. 145 Wn. App. 802, 187 P.3d 335 (2008), aff'd, 169 Wn.2d 220, 237 P.3d 250 (2010). In that case, the charged crime was interfering with domestic violence reporting. Id. at 806. The statute provides:

> A person commits the crime of interfering with the reporting of domestic violence if the person:
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> (a) Commits a crime of domestic violence, as defined in RCW 10.99.020; and
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> (b) Prevents or attempts to prevent the victim of or a witness to that domestic violence crime from [1] calling a 911 emergency communication system, [2] obtaining medical assistance, or [3] making a report to any law enforcement official.

RCW 9A.36.150(1); Nonog, 145 Wn. App. at 812. The State argued that the three ways of attempting to report a crime "are simply definitional and that the crime itself may be committed by only one means, i.e., by preventing (or attempting to prevent) the victim or witness from making a report." Id. This court rejected that argument, holding that the variations in RCW 9A.36.150(1) are not merely descriptive or definitional of essential terms, but are themselves essential terms, and that the variations established alternative means of committing the crime. Id. at 812-13. We apply the same reasoning to Bergem's case and to the animal cruelty statute. RCW 16.52.205(2) and

the jury instructions given in this case set out two distinct means—starvation and dehydration—that are not descriptive or definitional, but are essential elements of the crime itself.[3] We hold that starvation and dehydration are alternative means that require either jury unanimity or must each be supported by substantial evidence.

B. Sufficiency of the Evidence

Bergem concedes that there was sufficient evidence to support the finding that he starved the pinto gelding horse to the point where the animal suffered substantial and unjustifiable physical pain that extended for a period sufficient to cause considerable suffering. But, he argues there was no substantial evidence supporting the alternative means of dehydration. We view the evidence in the light most favorable to the State, asking whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Engel, 166 Wn.2d at 576.

The State's witness, Officer Diaz, testified that when she went out to Bergem's property, she observed a water pail in the pasture that held approximately 25 to 30 gallons of water and had a hose running into it. She testified that horses need between 5 and 15 gallons of water a day, per horse, and that there were three horses in the pasture. She also testified that on the day she was there, she observed that the bucket had only a centimeter of water in it—an insufficient amount to provide for a horse's

[3] The Nonog Court ultimately affirmed the conviction, holding that while the statute contained three alternative means, the State's "to-convict" instruction and closing argument expressly limited the jury's consideration to just one means, for which there was sufficient evidence. 145 Wn. App. at 813. In this case, the State's closing argument focused only on starvation, but the "to-convict" instruction listed both starvation and dehydration. The State did not expressly elect a means for purposes of prosecution. Accordingly, it is not possible here to conclusively determine under which of the alternative means the jury was convicting.

daily water needs.

Bergem testified about how he provided water to the horses. He stated that he checked their water every time he fed them—a minimum of three or four times per day. He also directly addressed Officer Diaz's testimony about the small amount of water in the 25 gallon pail on the day she was there. Bergem stated that a pipe had broken and his well was down that day, but he hauled water by bucket to the pasture.

The State suggests Officer Diaz's testimony, coupled with the pinto gelding's emaciated state, is sufficient to support the inference that the horse was dehydrated. We reject this argument. Even taking the evidence in the light most favorable to the State, a single instance where the bucket was almost empty does not support an inference of dehydration—indeed, it does not even support an inference that Bergem failed to provide adequate water to the horse. There was no evidence that Bergem failed to water the horses later that day or on other days. And, there was no testimony from anyone at trial that the horse exhibited any signs or symptoms of dehydration. Under these facts, the only thing establishing dehydration is conjecture. In determining the sufficiency of evidence, existence of fact may not rest upon guess, speculation, or conjecture. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006).

If one or more of the alternative means is not supported by substantial evidence, the verdict will stand only if we can determine that the "'verdict was based on only one of the alternative means and that substantial evidence supported that alternative means.'" State v. Howard, 127 Wn. App. 862, 872, 113 P.3d 511 (2005) (quoting State v. Rivas, 97 Wn. App. 349, 351-52, 984 P.2d 432 (1999)). Here, there is not

substantial evidence supporting the alternative means of dehydration. The trial court did not instruct the jury that it must reach a unanimous agreement as to the alternative means, nor was there a special verdict form specifying the means relied upon. Because this is a circumstance where the jury was presented with two alternative means, it is unclear based on the verdict alone that the jury was unanimous in relying on one or the other or both in convicting Bergem.

The State asserts that even if starvation and dehydration are alternative means, and even if there was insufficient evidence of dehydration, we should affirm the conviction based on harmless error, because there was "overwhelming evidence" of starvation. We also reject this argument. As the Supreme Court has made clear, "A general verdict of guilty on a single count charging the commission of a crime by alternative means will be upheld only if sufficient evidence supports *each* alternative means." State v. Kintz, 169 Wn.2d 537, 552, 238 P.3d 470 (2010) (emphasis added).

We reverse and vacate Bergem's conviction for first degree animal cruelty, without prejudice to the State's ability to recharge on the means of starvation.

II. Second Degree Animal Cruelty

The parties raise the same arguments with regards to Bergem's two second degree animal cruelty convictions. Instruction 12(a) provided that to convict Bergem of animal cruelty in the second degree, the following elements must be proved beyond a reasonable doubt:

> (1) That on or about December 4, 2009, the defendant owned or possessed a black and white pinto gelding horse; and
> (2) The defendant knowingly, recklessly, or with criminal negligence;
> (a) inflicted unnecessary suffering or pain upon a black and white pinto

> gelding horse; OR
> (b) *failed to provide a black and white pinto gelding horse with necessary shelter, rest, sanitation, space or medical attention*; and the animal suffered unnecessary or unjustifiable physical pain as a result of the failure; and
> (3) That the acts occurred in the State of Washington.

(Emphasis added.) Instruction 13 was identical to instruction 12(a), except it identified the sorrel mare instead of the pinto gelding.

These instructions track the language of RCW 16.52.207(2):

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

At issue here is whether (1) shelter, (2) rest, (3) sanitation, (4) space, and (5) medical attention constitute alternative means by which to commit second degree animal cruelty. Id. The State again concedes that RCW 16.52.207 contains alternative means, as set out in RCW 16.52.207(1), (2)(a), (2)(b), and (2)(c), but it argues that the five means contained within subsection (2)(a) constitute "means within a means," collectively establishing only one means of committing animal cruelty. We reject the State's argument for the same reasons addressed above. They are not definitional.

The State's theory at trial for the second degree counts was that both animals had inadequate shelter. The prosecutor stated at closing that Bergem is guilty of these counts "for failing to provide that shelter that caused them pain, caused them to suffer." It is also possible the jury could have inferred—from evidence about the pinto gelding's rain rot—that Bergem failed to provide necessary medical attention to that horse. But,

even assuming Bergem failed to properly care for the horses under one or two of the five alternative means, there is no evidence pertaining to or establishing Bergem's failure to provide necessary rest, sanitation, or space. The State has not supported *each* of the alternative means. If one or more of the alternative means is not supported by substantial evidence, the verdict will stand only if we can determine that the "'verdict was based on only one of the alternative means and that substantial evidence supported that alternative means.'" Howard, 127 Wn. App. at 872 (quoting Rivas, 97 Wn. App. at 351-52). Here, again, the State did not make an election as to which means it was charging Bergem under and did not submit an alternative means instruction or special verdict form.

We reverse and vacate Bergem's convictions for both counts of second degree animal cruelty. On remand, the trial court may consider which of the five alternative means were supported by substantial evidence and which were not. Only those supported by substantial evidence in the first trial may properly form the basis for recharging Bergem. Double jeopardy precludes the State from recharging under a theory of those alternative means deemed unsupported by substantial evidence.

We reverse and remand.

WE CONCUR: