

1994

West Valley City v. Lynn Poulsen : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 940507-CA

IN THE UTAH COURT OF APPEALS

WEST VALLEY CITY,
Appellee/Plaintiff,
vs.
LYNN POULSEN,
Appellant/Defendant

)
)
) TRIAL COURT CASE NO. 941000493
)
) CASE NO. 940507-CA
)
) PRIORITY 2
)

APPELLANT'S BRIEF

An appeal from the Jury trial convictions and
post judgment motions of a municipal ordinance,
Third Circuit Court - West Valley Department
Honorable William B. Bohling, Judge

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FILED

JUN 10 1996

COURT OF APPEALS

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
JURISDICTION.....	1
ISSUES ON APPEAL AND STANDARDS OF REVIEW.....	1
DETERMINATIVE PROVISIONS.....	3
STATEMENT OF THE CASE.....	3
STATEMENT OF THE FACTS.....	5
SUMMARY OF ARGUMENT	
POINT I.....	10
POINT II.....	10
POINT III.....	11
ARGUMENT	
POINT I.....	11
ARGUMENT	
POINT II.....	15
ARGUMENT	
POINT III.....	17
CONCLUSION.....	22
SIGNATURE.....	23
CERTIFICATE OF SERVICE.....	23
ADDENDUM.....	24

TABLE OF AUTHORITIES

CONSTITUTION

<u>Utah State Const.</u> , Art. I, Sec. 7.....	6
--	---

STATUTES

<u>Utah Code Ann.</u> § 76-1-401.....	14
<u>Utah Code Ann.</u> § 76-1-402.....	14
<u>Utah Code Ann.</u> § 76-1-501.....	15
<u>Utah Code Ann.</u> § 76-1-601(2)(4)(7).....	12

RULES

<u>Utah Rules of Criminal Proc.</u> , Rule 23.....	14
<u>Utah Rules of Criminal Proc.</u> , Rule 24.....	20

RULES OF EVIDENCE

<u>Utah Rules of Evidence</u> , Rule 403.....	20
<u>Utah Rules of Evidence</u> , Rule 404.....	17,18,20

CITY ORDINANCE

<u>West Valley City Ordinance</u> , § 23-5-105.....	3,7
---	-----

CASES CITED

<u>Christo v. People</u> 19 N.Y. 2d 678 (N.Y. 1967)	17
<u>City of Monticello v. Christensen</u> 788 P.2d 513, 516 (Utah)	2
<u>Hornsby v. Corp. of the Presiding Bishop</u> 758 P.2d 929 (Utah App. 1988)	12,13
<u>Kunzler v. O'Dell</u> 855 P.2d 270, 275 (Ut. App. 1993)	2

<u>McEvoy v. Brown</u>	13
150 N.E. 2d 652,656 (Ill. App. Ct. 1958)	
<u>Neztosie v. Meyer</u>	13
883 P.2d 920 (Utah 1994)	
<u>Provo City v. Wilden</u>	2
768 P.2d 455, 456 (Utah 1989)	
<u>Santanello v. Cooper</u>	13
106 Ariz. 262, 475 P.2d 245 (1970)	
<u>State v. Dunn</u>	2
850 P.2d 1201, 1221 (Utah 1993)	
<u>State v. Emmett</u>	14,19,20
839 P.2d 781, 782, 784-86 (Utah 1992)	
<u>State v. Frampton</u>	16
737 P.2d 183, 192 (Utah 1987)	
<u>State v. Haig</u>	16
578 P.2d 837 (Utah 1978)	
<u>State v. Hay</u>	3
859 P.2d 1,6 (Utah 1993)	
<u>State v. James</u>	2
819 P.2d 781, 796 (Utah 1991)	
<u>State v. Jones</u>	21
823 P.2d 1059 (Utah 1991)	
<u>State v. Morgan</u>	3
865 P.2d 1377, 1380 (Ut. App. 1993)	
<u>State v. Olsen</u>	2
860 P.2d 332, 334 (Utah 1993)	
<u>State v. Pena</u>	2,3
869 P.2d 932, 938-40 (Utah 1994)	
<u>State v. Ramirez</u>	2,3
817 P.2d 774, 781-82 (Utah 1991)	
<u>State v. Russell</u>	2
791 P.2d 188, 192-93 (Utah 1990)	

<u>State v. Stevenson</u>	21
884 P.2d 1287, 1290 (Ut. App. 1994)	
<u>State v. Taylor</u>	14
884 P.2d 1293-94 (Ut. App. 1994)	
<u>State v. Verde</u>	19
770 P.2d 781, 789 (Utah 1991)	
<u>State v. Watts</u>	18
639 P.2d 158 (Utah 1981)	
<u>State v. Workman</u>	15
806 P.2d 1198 (Ut. App. 1991), aff'd 852 P.2d 981 (Utah 1993)	
<u>West Valley City v. Streeter</u>	2
849 P.2d 613, 614 (Ut. App. 1993)	

TEXT AUTHORITY

1 <u>ALR</u> 4th 994[b].....	12
<u>Am. Jur.</u> 57A 2d. § 439 p.422.....	22
<u>Am. Jur.</u> 57A 2d. § 442 p.424.....	22
<u>Am. Jur.</u> 57A 2d. § 446 p.428.....	14

(Key for transcript and record notations in this brief: R. refers to record and T. refers to transcript).

IN THE UTAH COURT OF APPEALS

WEST VALLEY CITY,)	
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vs.)	CASE NO. 940507-CA
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LYNN POULSEN,)	
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APPELLANT'S BRIEF

JURISDICTION

The Utah Court of Appeals has jurisdiction to hear this matter pursuant to Utah Code Ann. § 78-2a-3(f).

ISSUES ON APPEAL AND STANDARDS OF REVIEW

I

WHETHER THE TRIAL COURT PROPERLY DENIED POULSEN'S MOTION FOR A DIRECTED VERDICT OF ACQUITTAL AT THE CLOSE OF THE CITY'S CASE-IN-CHIEF.

a. Poulsen's Motion to Dismiss should have been granted by the trial court as there was not a prima facie case to submit to the jury.

The applicable standard of review is under the abuse of discretion standard for legal determinations or clearly erroneous

for factual determinations. State v. Olsen, 860 P.2d 332, 334 (Utah 1993); State v. Pena, 869 P.2d 932, 939-40 n. 5 (Utah 1994); State v. Dunn, 850 P.2d 1201, 1221 (Utah 1993); State v. Ramirez, 817 P.2d 774, 781-82 n. 3 (Utah 1991); State v. Russell, 791 P.2d 188, 192-93 (Utah 1990); Kunzler v. O'Dell, 855 P.2d 270, 275 (Ut. App. 1993).

II

WHETHER THE WEST VALLEY CITY ORDINANCE IS UNCONSTITUTIONAL AS APPLIED TO FACTS AND THE LAW IN POULSEN'S CASE.

a. Whether the language is so overbroad it prohibits lawful as well as unlawful conduct.

The standard of review is for correctness and presents a question of law under a correction of error standard. State v. James, 819 P.2d 781, 796 (Utah 1991); Provo City v. Wilden, 768 P.2d 455, 456 (Utah 1989); West Valley City v. Streeter, 849 P.2d 613, 614 (Ut. App. 1993); City of Monticello v. Christensen, 788 P.2d 513, 516 (Utah).

III

WHETHER THE TRIAL COURT PROPERLY DENIED POULSEN'S MOTION FOR A NEW TRIAL IN LIGHT OF THE PREJUDICIAL REMARKS MADE BY THE CITY'S PROSECUTOR THROUGHOUT THE TRIAL AND REFERENCE TO MATTERS NOT PROPERLY BEFORE THE JURY'S CONSIDERATION.

a. Whether the jury instructions combined with the prosecutor and the courts misstatement of the law of strict

liability denied Poulsen a fundamentally fair trial.

The standard of review is abuse of discretion as to legal conclusions and the rulings on admissibility of evidence as a question of law reviewed for correctness with a clearly erroneous standard for subsidiary factual findings. State v. Morgan, 865 P.2d 1377, 1380 (Ut. App. 1993); State v. Pena, 869 P.2d 932, 938 (Utah 1994); State v. Ramirez, 817 P.2d 774, 781 (Utah 1991); State v. Hay, 859 P.2d 1,6 (Utah 1993).

CONSTITUTION, STATUTORY AND RULE CONSTRUCTION
THOUGHT TO BE DETERMINATIVE OF ISSUES

Utah State Const., Art. I, Sec. 7

Utah Code Ann. § 76-1-401

Utah Code Ann. § 76-1-402

Utah Code Ann. § 76-1-501

Utah Code Ann. § 76-1-601(2)(4)(7)

Utah Rules of Criminal Proc., Rule 23

Utah Rules of Criminal Proc., Rule 24

Utah Rules of Evidence, Rule 403

Utah Rules of Evidence, Rule 404

West Valley City Ordinance, § 23-5-105

STATEMENT OF CASE

On February 15, 1994, Poulsen was charged with 6 counts of Animals At Large, West Valley City Ordinance § 23-5-105 and 6 counts of Nuisance Animals, West Valley City Ordinance § 23-5-101.

(R.26,27)

During the course of the pretrial proceedings Poulsen filed several challenges to the constitutionality of ordinance (R.70,85) and claims of double jeopardy. (R.89) All Poulsen's motions were summarily disposed by the trial court on June 23, 1994, at pretrial conference.

On July 5, 1994, prior to a jury being empaneled, Poulsen renewed her Motion to Dismiss on claims of double jeopardy, and constitutionality of the ordinance as applied. Six of the counts of Nuisance Animals were dismissed by the court on these grounds and Poulsen was tried on the remaining 6 counts of Animals at Large.

After the city rested its case-in-chief, Poulsen moved the court for a directed verdict of dismissal based on the grounds the city had failed to prove an essential element of "responsibility" to the animals. (T.78-89) The court denied Poulsen's motion based on only part of the elements of the ordinance that charged a person with "care, custody, or control of Animals at Large". (T.90)

The case was submitted to the jury and after deliberation returned with 4 verdicts of guilty and 2 acquittals. (R.157-168) Poulsen timely filed a Motion for Arrest of Judgment (R.180-192) and a Motion for a New Trial. (R.214-219, 238-241, 259-275) An order denying Poulsen's motions was entered on August 22, 1994.

(R.276, 314-316) Poulsen filed a Notice of Appeal with the trial court on August 30, 1994.

STATEMENT OF FACTS

West Valley City officers were dispatched by Salt Lake County deputies to help contain 6-8 horses running at large between the boundaries of West Valley City and Magna area on February 15, 1994, at 1:30 A.M. (T.16) The horses bolted and ran North down 7200 West to 2100 South freeway where they turned West and went into some tall grass where the officers lost sight of them. (T.19, 22-23, 28)

Poulsen and her daughter spotted the loose horses and opened a gate to a pasture on 2100 South and approximately 7700 West, where the officers assisted Poulsen in containing the horses. After the horses were contained, Salt Lake County deputies departed and only the West Valley City officers remained. (T.24-26, 29, 33, 38-39)

West Valley City officer Stan Larsen (Larsen) approached Poulsen after she had closed the gate and asked her if she was the owner of the horses. Poulsen stated that she was not the owner of the horses but did know the owner of the horses. Larsen then told Poulsen by closing the gate she "assumed charge, care, custody, and control of the horses". He also told her that the animals should be impounded. (T.42-43) However, Larsen tacitly consented for Poulsen to keep the horses there the night.

Poulsen's daughter, age approximately 20, was also on the scene, and while the officers were talking to Poulsen, the daughter hopped on one of the horses (not one identified by the officers as loose) and rode it to the back of the field. Poulsen's daughter also took a bag of feed out of her car and fed the horses. (T.43-45)

Poulsen told the officers that the horses could stay in the area for the night (T.105) because it was snowing (T.53) and she didn't believe the officers could catch the animals without an incident. (T.105) Poulsen also expressed concern that one of the officers might be hurt by trying to catch the blind horse or the one that kicked. (T.71-72) So the officers authorized Poulsen to keep the animals for the night. (T.106-107)

Larsen then told Poulsen he was going to issue her a citation for the animals being loose and asked Poulsen for her name, address, and phone number which Poulsen gave him. (T.50,97,103)

Larsen then asked Poulsen for some identification which she looked through her purse for a while but was unable to locate her identification cards. (T.49) However, officer Presbrey eventually went through Poulsen's purse and did find identification cards with Poulsen's name on them. (T.100-101)

Larsen then asked Poulsen to produce a drivers license. (T.49) When Poulsen couldn't produce a drivers license, Larsen

asked Poulsen for her date of birth which Poulsen refused to give Larsen, stating it was against her religious belief to use a birth date. (T.51)

Poulsen was then arrested for failing to identify herself and taken to Salt Lake County jail. (T.113,139-140)

Poulsen was charged with 6 counts of Animals at Large under West Valley City Ordinance § 23-5-105 and 6 counts of Nuisance Animals under West Valley City Ordinance § 23-5-101. (R.26-27) Numerous motions to dismiss on various grounds were heard and denied by the trial court on June 23, 1994.

On July 5, 1994, prior to the empaneling the jury, Poulsen renewed her motions to dismiss on unconstitutionality of ordinance, double jeopardy, and jurisdiction. The trial court dismissed the 6 counts of Animal Nuisance charges on these grounds. After the jury was empaneled the city improperly stated to the jury in opening statement that Poulsen was the owner of the animals. (T.7)

During the city's Officer Coxs' testimony and the only one who saw the horses in West Valley City, he testified he did not know who the owner of the horses was, as he'd left that up to the animal control officers. (T.28-29)

Larsen testified that he only "assumed" Poulsen was the owner because she was there that night but had no knowledge of who the actual owner of the horses was (T.64) and stated it was not his

job to find out who owned the horses as they were "county animals".
(T.65)¹

The city brought up the issue of Poulsen's drivers license status and Poulsen objected to the relevancy which was overruled by the court (T.46).

Again the city brought up that Poulsen didn't have a drivers license and Poulsen objected as no vehicle stop was involved. The city stated that it went to Poulsen's ability to tell the truth. (T.50) However, Poulsen never placed her character into issue.

After the city presented their case-in-chief, Poulsen moved for dismissal for the city's failure to prove the essential element of "allow" and "responsibility" to the horses and for the city's prejudicial remarks about Poulsen's drivers license status. (T.78-88)

Further, the city never did dispute that the horses were owned by a Mr. Rokich and the only facts the city had proven were as follows: (1) West Valley City Officers chased down some horses (2) the offense had occurred in West Valley City (3) the horses arrived at a pasture with a gate on it (4) the defendant and her daughter are at the pasture (5) defendant repairs a gate (6)

¹ In a jurisdictional hearing and also throughout discovery Poulsen had requested to see the contractual agreement between the city and the county for animal control as provided for in U.C.A. § 4-25-2 (1982).

daughter has a bag of food in her car (7) daughter rides one of the horses (not identified as one that was loose) (8) defendant knows one horse kicks and one horse is blind. (T.85-86)

The trial court denied Poulsen's Motion to Dismiss on the grounds that no legal duty needed to be proven, just "charge, care, custody, and control". (T.90)

At closing arguments the city prosecutor made several prejudicial comments concerning matter outside the elements of the charges against Poulsen. (T.158,160,170-171) The city prosecutor also stated several times that Poulsen had a burden to present evidence against the city. Also that only the city's witnesses were to be believed and not Poulsen's witnesses. However, Poulsen's witnesses had not been impeached by the city. (T.156,171-172)

The city also misstated the law regarding strict liability offenses and asked the trial court to also misinstruct the jury with regard to strict liability offenses. (T.155,157,168-169) The jury returned 4 counts of guilty and 2 counts of acquittal.

Poulsen filed two post trial motions prior to sentencing for Arrest of Judgment and for a New Trial, both were denied by the court on August 22, 1994. The court imposed a fine, surcharge, restitution and probation and 30 days in jail against Poulsen.

Poulsen filed a Motion for a New Trial and to Vacate sentence which was denied by the court.

SUMMARY OF ARGUMENTS

POINT I

The trial court should have granted Poulsen's motion for dismissal at the close of the city's case in chief for the city's failure to prove the essential element of "allowing" or being "responsible" for the horses to run at large.

The trial court should have also granted Poulsen's motion for Arrest of Judgment on the grounds that the facts so proven by the city did not constitute a public offense.

POINT II

The language of the ordinance in the case at bar is unconstitutional as applied to Poulsen. When the city stated they did not need to prove that Poulsen had a legal relationship to the horses, it shifted the burden of production to Poulsen to prove her innocence. This is fundamentally unfair and denied Poulsen the constitutional right to have the city prove all the elements against her beyond reasonable doubt.

Also the conduct of one having "charge, care, custody or control" of animals is overbroad and describes lawful as well as unlawful conduct minus the element of legal duty. The language of the ordinance is overbroad in describing the conduct prohibited which is a protectable conduct of one who is entitled to have charge, care, custody, or control of horses.

POINT III

The trial court improperly overruled Poulsen's objections to the city's continuous references to Poulsen's driving license status. Poulsen was not charged with giving false information to an officer nor driving without a license and the remarks that Poulsen "lied" about her drivers license were prejudicial in having the jury consider matters outside the case. There is no logical connection between not having a drivers license and having or not having "charge, care, custody, or control" of horses at large. The city's remarks concerning Poulsen's reluctance to admit or confess to any possible criminal offenses was prejudicial wherein Poulsen has a constitutional privilege to not incriminate herself.

ARGUMENT

POINT I

WHETHER THE TRIAL COURT PROPERLY DENIED POULSEN'S MOTION FOR A DIRECTED VERDICT OF ACQUITTAL AT THE CLOSE OF THE CITY'S CASE-IN-CHIEF.

After West Valley City had presented its case-in-chief Poulsen moved for dismissal or a directed verdict of acquittal for the city's failure to prove the essential element of "responsibility" or a legal duty owed by Poulsen to the animals. Utah Code Ann. § 76-1-601 gives the following definitions used in criminal cases:

(2) "Actor" means a person whose

- criminal responsibility is in issue
in a criminal action.
- (4) "Conduct" means an act or omission
 - (7) "Omission" means a failure to act
when there is a legal duty to act
and the actor is capable of acting"
(1989).

Animals at Large essentially means that the owner or other person responsible omitted to containing their animals and had a legal duty to do so. The city stated that they had proven that the animals were out in West Valley City and that Poulsen closed a gate and by virtue of that single act was thereby "assuming charge, care, custody, or control of the animals", (T.42-43) void of any duty to keep the animals contained.

However, according to all the elements of the city's ordinance Poulsen had to "allow" the horses to run at large.

"The use in the pleadings of the word "allow" implied that the Defendant was sufficiently in control, ownership, or possession of the [dog] as to be chargeable with regulation of his conduct.... The word is synonymous with "permit".... When used in conjunction with a statute charging a duty to the owner... to regulate his activities, connotes a positive duty, failure to perform which would violate the ordinance. 1 ALR 4th 994[b].

The meanings of words like "allow" in statutory construction, are to be construed "under the common definition of those terms." Hornsby v. Corp. of the Presiding Bishop, 758 P.2d 929 (Utah App. 1988). This court stated that "allow" means to sanction, permit, acknowledge, approve of" Id. at 935 [quoting

Santanello v. Cooper, 106 Ariz. 262, 475 P.2d 245 (1970)]. In Santanello, the Arizona Supreme Court specified that:

"The word "allow" means to approve of, to sanction, to permit, to acknowledge. Webster's 3rd International, unabridged (1961). So defined, "allow" requires some degree of knowledge, either actual or constructive, on the part of the dog owner that his dog is at large;...". Id. at 250.

In Neztosie v. Meyer, 883 P.2d 920 (Utah 1994) the Supreme Court gave the following definition concerning the term "keeper" of an animal and found the words "custody, management, and control intrinsic to the following definition":

"...the exercise of a substantial number of incidents of ownership by one who, though not the owner assumes to act in his stead... undertakes to manage, control or care for it... as owners in general are accustomed to do" (emphasis added).

This means more than merely checking to see if [an animal] has sufficient food and water for a time. See McEvoy v. Brown, 150 N.E. 2d 652,656 (Ill. App. Ct. 1958). Poulsen only offered to contain the horses for the night as it was dark, snowing and for the safety of the officers. (T.72-73) There was no evidence that Poulsen owed a legal duty to the animals nor was Poulsen the legal cause of their being loose. Neither did Poulsen have prior knowledge of the horses being at large, therefore she did not "allow" them to "run at large" nor would she sanction such an act.

Poulsen properly moved for dismissal after the city's

case-in-chief as to whether Poulsen was the legal cause of the horses being loose which was a question of law and one for the court to decide. Am. Jur. 57A 2d. § 446 p.428.

"When a Motion for a Directed Verdict is made at the close of the states case, the court should dismiss the charge if the state did not establish a prima facia case against the defendant by producing believable evidence of all the elements of the crime charged." State v. Emmett, 839 P.2d 781 (Utah 1992) (emphasis added).

a. Poulsen's Motion to Dismiss should have been granted by the trial court as there was not a prima facia case to submit to the jury.

"In determining whether there is sufficient evidence to send case to [the] jury, [the] court uses same standard for [the] claim of insufficient evidence to support jury verdict." State v. Taylor, 884 P.2d 1293-94 (Ut. App. 1994).

A Motion for Arrest of Judgment is proper when "the facts proved or admitted do not constitute a public offense...". Ut. R. Cr. Procedure, Rule 23. The city never proved a prior legal duty Poulsen owed to the loose horses. In fact, the city requested the court to misstate the law with regard to strict liability offenses stating that the city need not have to prove a legal duty. (T.168-169) "A judgment may be arrested based on an insufficiency of the evidence or facts as proved in trial or as admitted by the parties." State v. Workman, 806 P.2d 1198 (Ut. App. 1991), aff'd,

852 P.2d 981 (Utah 1993).

In light of the city's admission that it did not need to prove a [legal] duty, the trial court should have granted Poulsen's Motion for an Arrest of Judgment as this was a necessary element to prove a public offense had been committed.

POINT II

WHETHER THE WEST VALLEY CITY ORDINANCE IS UNCONSTITUTIONAL AS APPLIED TO FACTS AND THE LAW IN POULSEN'S CASE

Poulsen contends that West Valley City Ordinance as applied to Poulsen shifted the burden of proving the animals were not in her "charge, care, custody, or control", thus destroying the constitutional protection of the presumption of innocence as provided for in Ut. Code Ann. § 76-1-501 as follows:

- "(1) A defendant in a criminal proceeding is presumed to be innocent until each element of the offense charged against him is proved beyond a reasonable doubt. In absence of such proof, the defendant shall be acquitted.
- (2) ...[Element[s] of the offense" mean[s]:
 - (a) The conduct, attendant circumstances, or results of conduct proscribed, prohibited, or forbidden in the definition of the offense;" (emphasis added).

The West Valley City Ordinance clearly states ... "or the person charged with the responsibility". The city admitted they did not talk to the owner of the horses nor even asked the owner if Poulsen had a legal responsibility for the horses. (T.85) In fact

the city stated all it had to prove was that the incident happened and Poulsen was there (T.155-157) The city's only reference to any responsibility to the animals was when Poulsen told the officers she would be responsible to see that the horses stayed contained for the night (T.107,120). The horses were not "at large" at that point. the city even admitted that they didn't know where the horses had gotten loose from. (T.69)

a. Whether the language is so overbroad it prohibits lawful as well as unlawful conduct.

The ordinance as applied to Poulsen is a violation of the due process clause of the Ut. St. Const. Art. I, Sec. 7, with the ordinance being overbroad in its application to lawful conduct as well as unlawful. The Utah Supreme Court has stated:

"Statutory overbreadth... is a substantive due process question which addresses the issue of whether "the statute in question is so broad that it may not only prohibit unprotected behavior but may also prohibit constitutionally protected activity as well". State v. Frampton, 737 P.2d 183, 192 (Utah 1987).

It is just as legal and lawful to have charge, care, custody or control of horses as it would be unlawful conduct if a person were liable for the animals and they escaped. "A criminal statute is overbroad when it in a substantial way prohibits lawful act as well as unlawful acts". State v. Haig, 578 P.2d 837 (Utah 1978).

The court simply ignored the plain wording of the ordinance and found that the city only had to prove "charge, care, custody, or control" of the animals in one specific isolated context. The "[t]erm "run at large" in relation to domestic animals does not normally mean that animal is found on property of neighbor in an isolated instance...". Christo v. People, 19 N.Y. 2d 678 (N.Y. 1967). The city's ordinance as applied in this way to Poulsen has shifted an unreasonable burden upon Poulsen to prove a negative in a criminal action, which is in violation of Poulsen's constitutional protections to be presumed innocent until proven guilty.

POINT III

WHETHER THE TRIAL COURT PROPERLY DENIED POULSEN'S MOTION FOR A NEW TRIAL IN LIGHT OF THE PREJUDICIAL REMARKS MADE BY THE CITY'S PROSECUTOR THROUGHOUT THE TRIAL AND REFERENCE TO MATTERS NOT PROPERLY BEFORE THE JURY'S CONSIDERATION.

During the course of the trial the city continuously made references to Poulsen's drivers license status. These remarks were objected to by Poulsen on the grounds of relevancy, and was overruled by the court. (T.46,49-50,110-112) The city stated the grounds for getting into Poulsen's drivers license status was because it was Poulsen "who wanted to get into the arrest and what occurred" (T.46) and Poulsen's "tendency to tell the truth" (T.49-50)

The rules pertaining to relevancy are expressly set forth concerning matters of the accused character. "Evidence of a persons character or trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except (1) ...offered by the accused...". UT. R. EVID. 404. Poulsen did not ever place her truthfulness in issue at trial for the city to have brought Poulsen's drivers license status to light.

"By offering witnesses as to his reputation as a truthful person, defendant opens the door for the prosecution to impeach his character witnesses. State v. Watts, 639 P.2d 158 (Utah 1981). Poulsen never offered any witness testimony concerning her reputation to tell the truth. This remark played a significant part in prejudicing the jurors against Poulsen and had nothing to do with the charges.

In closing argument the city improperly asked the jury to consider remarks about Poulsen's refusal to produce a drivers license, stating that Poulsen's reluctance to admit to not having a license constituted Poulsen being a "deceptive person", (T.160,170) "playing games" with the police officers. (T.158) It had been brought to the courts attention that these remarks were improper. (T.84,86) Further, if Poulsen was driving without a license, it could be a criminal act and Poulsen had a constitutional right not to volunteer any admissions to the officers.

These remarks were clearly made for the sole purpose of prejudicing the jury against Poulsen. The remarks of the city in the case at bar and State v. Emmett 839 P.2d 781, 782, 784-86 (Utah 1992) are analogous in that in Emmett, the prosecution suggested to the jurors that Emmett was the type of person who "took advantage of his own family member[s]" [referring to victim of previous forgery] and that "he did it again"... clearly urged the jury to view Emmett as a person who commits crime against his family" and to use this characteristic as evidence that Emmett sodomized his son" Id. at 785-86. In Poulsen's case, the city continuously made references to Poulsen's reluctance to confess to police officers that she didn't have a drivers license to prove she had charge, care, custody, and control of animals that were loose. "Generally, the test used for determining whether a prosecutors statements are improper and constitute error is whether the remarks "called to the jurors' attention matters which they would not be justified in considering in reaching a verdict." Improper remarks require reversal when they are harmful. Id. at 785 [quoting, State v. Tillman, 750 P.2d 546, 555 (Utah 1987)]. "The test for determining an error's harmfulness is whether there is a reasonable likelihood that absent the error a different result would have occurred". Id. at 784. See, e.g. State v. Verde, 770 P.2d 781, 789 (Utah 1991). The Court in Emmett also held that "this determination should be made on the basis of the record as a whole.

In the instant case, the determination is best made by viewing this error in conjunction with other errors which occurred during the trial, specifically, instances of prosecutorial misconduct." Id. at 784-85. This impropriety was objected to by Poulsen throughout the trial and when she argued her Motion to Dismiss after the city's case-in-chief. The trial court should have been fully aware of its harmfulness as it was obvious that the remarks were for no other purpose than to prejudice Poulsen from having a fair trial. Rule 404(b) expressly state, "Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith". Given the blatant irrelevant comments of the prosecutor in Poulsen's case it should have been obvious to the court that the prosecutors remarks called to the jurors matters they were not "justified in considering" Emmett at 786.

a. Whether the jury instructions combined with the prosecutor and the courts misstatement of the law of strict liability denied Poulsen a fundamentally fair trial.

The trial court failed to give the jury the proper elements instruction concerning what the city had to prove against Poulsen beyond a reasonable doubt. (See Addendum) (T.152) Instead, the court gave a informational jury instruction which did not clearly define the city's burden to prove all the elements against Poulsen. (T.152) A trial courts failure to give accurate elements

in a jury instruction will be reviewed for correctness. State v. Jones, 823 P.2d 1059,1061 (Utah 1991). "Jury instructions to which a party failed to object will not be reviewed absent manifest injustice". State v. Stevenson, 884 P.2d 1287, 1290 (Ut. App. 1994) [quoting Ut. R. Cr. Proc., Rule 19(c) and State v. Perdue, 813 P.2d 1201,1203 (Ut. App 1991)].

This court overturned the conviction in Jones for the very same error Poulsen is presenting before the court now. Because Poulsen brought the issue of the city's failure to carry its burden to prove these elements before the court at her Motion to Dismiss and in her closing arguments, the court improperly instructed the jury with regard to strict liability offenses and requires reversal for manifest injustice.

Had the proper instruction been given to the jury, then the wording in the ordinance of "allow" and "responsibility" would have made it clear to the jury that the city did indeed need to prove that Poulsen had a legal duty to keep the horses from escaping. Further, the very use of the wording "allow" and responsible" as used in the ordinance negates any intention to create strict liability for violation of the ordinance. Santanello, at 252.

However, even though Poulsen pointed this scienter requirement out to the court several times, and moved to dismiss the charges, the court ignored the wording of the ordinance and

allowed the city prosecutor to misstate the law of strict liability to the jury. (T.169) "Whether proceeding under a strict liability or negligence theory, proximate cause is a necessary element of the Plaintiff's case". Am. Jur. 57A 2d. § 442 p.424).

"[P]roximate cause is not an affirmative defense to be specially plead; it is a requirement of the Plaintiff's cause of action and is put at issue by a general denial". Am. Jur. 57A 2d. § 439 p.422.

CONCLUSION

Poulsen respectfully requests that the Appellate court reverse the convictions and judgment against Poulsen and either vacate judgment or reverse for a new trial since the city did not prove the element of "allow" and "responsible" in the city's case. It is for this reason that the trial court plainly erred in not granting Poulsen a new trial on the city's charges. The ordinance was unconstitutionally applied to Poulsen. Poulsen contends that manifest injustice is what the prosecutors comments cumulatively misled the jury to believe. The cumulative effect of the prosecutors prejudicial comments and misstating the elements of the ordinance and irrelevant comments caused manifest injustice and requires this court to reverse and dismiss the charges against Poulsen.

Respectfully submitted,



LYNN POULSEN, APPELLANT/DEFENDANT

CERTIFICATE OF SERVICE

I Lynn Poulsen, certify that on June 10, 1996, I served two copies of the attached Appellant's Brief upon Richard Catten, the counsel for the Appellee in this matter, by mailing it to him by first class mail with sufficient postage prepaid to the following address:

3636 Constitution Blvd., West Valley City, Utah 84119.



ADDENDUM

Utah State Const., Art. I Sec. 7.

"No person shall be deprived of life, liberty or property, without due process of law."

Utah Code Ann. § 76-1-401.

"Single criminal episode" defined - Joinder of offenses and defendants.

In this part unless the context requires a different definition, "single criminal episode" means all conduct which is closely related in time and is incident to an attempt or an accomplishment of a single criminal objective.

Nothing in this part shall be construed to limit or modify the effect of Section 77-21-31 in controlling the joinder of offenses and defendants in criminal proceedings" (1975).

Utah Code Ann. § 76-1-402.

"Separate offenses arising out of single criminal episode - Included offenses.

- (1) A defendant may be prosecuted in a single criminal actio for all separate offenses arising out of a single criminal episode; however, when the same act of a defendant under a single criminal episode shall establish offenses which may be punished in different way under different provisions of this code, the act shall be punishable under only one such provision; an acquittal or conviction and sentence under any such provision bars a prosecution under any other such provision.
- (2) Whenever conduct may establish separate offenses under a single criminal episode, unless the court otherwise orders to promote justice, a defendant shall not be subject to separate trials for multiple offenses when:
 - (a) the offenses are within the

- jurisdiction of a single court, and
- (b) The offenses are known to the prosecuting attorney at the time the defendant is arraigned on the first information or indictment.
- (3) A defendant may be convicted of an offense included in the offense charged but may not be convicted of both the offense charged and the included offense. An offense is so included when:
- (a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
 - (b) It constitutes an attempt, solicitation, conspiracy, or form of preparation to commit the offense charged or an offense otherwise included therein; or
 - (c) It is specifically designated by a statute as a lesser included offense.
- (4) The court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.
- (5) If the district court on motion after verdict or judgment, or an appellate court on appeal or certiorari, shall determine that there is insufficient evidence to support a conviction for the offense charged but that there is sufficient evidence to support a conviction for an included offense and the trier of fact necessarily found every fact required for conviction of that included offense, the verdict or judgment of conviction may be set aside or reversed and a judgment of conviction entered for the included offense, without necessity of a new trial, if such relief is sought by the defendant (1974).

Utah Code Ann. § 76-1-501.

Presumption of innocence - "Element of the offense" defined.

- "(1) A defendant in a criminal proceeding is presumed to be innocent until each element of the offense charged against him is proved beyond a reasonable doubt. In absence of such proof, the defendant shall be acquitted.
- (2) As used in this part the words "element of the offense" mean:
 - (a) The conduct, attendant circumstances, or results of conduct proscribed, prohibited, or forbidden in the definition of the offense;
 - (b) The culpable mental state required.
- (3) The existence of jurisdiction and venue are not preponderance of the evidence (1973).

Utah Code Ann. § 76-1-601(2)(4)(7).

Definitions.

"Unless otherwise provided, the following terms apply to this title:

- (2) "Actor" means a person whose criminal responsibility is in issue in a criminal action.
- (4) "Conduct" means an act or omission.
- (7) "Omission" means a failure to act when there is a legal duty to act and the actor is capable of acting" (1989).

Utah Rules of Criminal Proc., Rule 23.

"At any time prior to the imposition of sentence, the Court upon its own initiative may, or upon motion of a defendant shall arrest judgment if the facts proved or admitted do not constitute a public offense or the defendant is mentally ill, or there is other good cause for the arrest of judgment."

Utah Rules of Criminal Proc., Rule 24.

Motion for new trial.

- "(a) The court may, upon motion of a party or upon its own initiative, grant a new trial in the interest of justice if there is any error or impropriety which had a substantial adverse effect upon the rights of a party.
- (b) A motion for a new trial shall be made in writing and upon notice. The motion shall be accompanied by affidavits or evidence of the essential facts in support of the motion. If additional time is required to procure affidavits or evidence the court may postpone the hearing on the motion for such time as it deems reasonable.
- (c) A motion for a new trial shall be made within 10 days after imposition of sentence, or within such further time as the court may fix during the ten-day period.
- (d) If a new trial is granted, the party shall be in the same position as if no trial had been held and the former verdict shall not be used or mentioned either in evidence or in argument.

Utah Rules of Evidence, Rule 401.

"Definition of "relevant evidence"

"Relevant evidence" means evidence having 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".

Utah Rules of Evidence, Rule 402.

"Relevant evidence generally admissible; irrelevant evidence inadmissible.

All relevant evidence is admissible, except as otherwise provided by the

constitution of the United States or the Constitution of the state of Utah, statute, or by these rules, or by other rules applicable in courts of this state. Evidence which is not relevant is not admissible".

Utah Rules of Evidence, Rule 403.

"Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence".

Utah Rules of Evidence, Rule 404.

"Character evidence not admissible to prove conduct; exceptions; other crimes.

- (a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
 - (1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;
 - (2) character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;
 - (3) character of witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.
- (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not

admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident" (Amended effective October 1, 1992).

West Valley City Ordinance, § 23-5-105.

"It shall be unlawful for the owner or person having charge, care, custody or control of any animal to allow such animal at any time to run at large. The owner or person charged with responsibility for an animal found running at large shall be strictly liable for a violation of this section regardless of the precautions taken to prevent the escape of the animal and regardless of whether or not he knows that the animal is running at large."

THIRD CIRCUIT COURT - WVC
SALT LAKE COUNTY, STATE OF UTAH

CITY OF WEST VALLEY CITY
VS

JUDGMENT, SENTENCE
(COMMITMENT)

POULSEN, LYNN
3660 S 7236 W
MAGNA

UT 84044

CASE NO: 941000493
DOB: 05/17/53
TAPE: COUNT:
DATE: 08/03/94
CITATION: ,

THE ABOVE NAMED DEFENDANT BEING ADJUDGED GUILTY FOR THE
OFFENSE(S) AS FOLLOWS:

Charge: 23-3-105 DOG AT LARGE
Plea: Not Guilty Find: Guilty - Jury
Fine: 500.00 Susp: 250.00
Jail: 30 DA Susp: 30 DA ACS: 50 HR
COMMUNITY SERVICE IN LIEU OF FINE.

Charge: 23-5-101 NUIS ANIMAL
Plea: Not Guilty Find: Dismissed
Fine: 0.00 Susp: 0.00
Jail: 0 Susp: 0 ACS: 0

Charge: 23-3-105 DOG AT LARGE
Plea: Find: Guilty - Jury
Fine: 0.00 Susp: 0.00
Jail: 0 Susp: 0 ACS: 0

Charge: 23-3-105 DOG AT LARGE
Plea: Find: Guilty - Jury
Fine: 0.00 Susp: 0.00
Jail: 0 Susp: 0 ACS: 0

Charge: 23-3-105 DOG AT LARGE
Plea: Find: Guilty - Jury
Fine: 0.00 Susp: 0.00
Jail: 0 Susp: 0 ACS: 0

Charge: 23-3-105 DOG AT LARGE
Plea: Find: Not Guilty - Jury
Fine: 0.00 Susp: 0.00
Jail: 0 Susp: 0 ACS: 0

Charge: 23-3-105 DOG AT LARGE
Plea: Find: Not Guilty - Jury
Fine: 0.00 Susp: 0.00
Jail: 0 Susp: 0 ACS: 0

Charge: 23-5-101 NUIS ANIMAL

Plea:		Find:	Dismissed		
Fine:	0.00	Susp:	0.00		
Jail:	0	Susp:	0	ACS:	0

Charge: 23-5-101 NUIS ANIMAL

Plea:		Find:	Dismissed		
Fine:	0.00	Susp:	0.00		
Jail:	0	Susp:	0	ACS:	0

Charge: 23-5-101 NUIS ANIMAL

Plea:		Find:	Dismissed		
Fine:	0.00	Susp:	0.00		
Jail:	0	Susp:	0	ACS:	0

Charge: 23-5-101 NUIS ANIMAL

Plea:		Find:	Dismissed		
Fine:	0.00	Susp:	0.00		
Jail:	0	Susp:	0	ACS:	0

Charge: 23-5-101 NUIS ANIMAL

Plea:		Find:	Dismissed		
Fine:	0.00	Susp:	0.00		
Jail:	0	Susp:	0	ACS:	0

FEES AND ASSESSMENTS:

Trust Category: Restitution

Paid: 0.00 Due: 500.00

Name: WEST VALLEY CITY

Address: 3600 CONSTITUTION BLVD

Address: POLICE CASE #94-832 & 94-6941

City/State/Zip:

Fine Description: Fine- Prosecutor Spl

Credit: 0.00 Paid: 0.00 Due: 135.14

Fine Description: Surcharge - 85%

Credit: 0.00 Paid: 0.00 Due: 114.86

TOTAL FINES AND ASSESMENTS:

Credit: 0.00 Paid: 0.00 Due: 750.00

PROBATION TERMS & CONDITIONS:

12 MO PROB W/COURT TERMS: 1. NO OTHER VIOLATIONS 2. TIMELY
PAYMENT OF RESTITUTION BY 6/3/95 3. HORSE PROPERTY TO BE
PROPERLY FENCED OR NO HORSES PRESENT 4. VERIFICATION OF
COMPLETION OF COMMUNITY SERVICE WITH CHARITY OF CHOICE BY
2/3/95

CALENDAR:
SENTENCING

08/03/94 02:00 PM in rm 3 with WILLIAM B BOHLING

DOCKET INFORMATION:

Chrg: DOG AT LARGE Plea: Not Guilty Find: Guilty - Ju
Fine Amount: 500.00 Suspended: 250.00
Jail: 30 DAYS Suspended: 30 DAYS
Community Service: 50 HOURS in lieu of fine.

CREATE Trust A/R # 01 Restitution 500.00

IT IS ADJUDGED THAT THE DEFENDANT IS GUILTY OF FOUR COUNTS OF
ANIMAL AT LARGE, A CLASS "B" MISD, BASED UPON A GUILTY VERDICT
BY A JURY. JUDGMENT IS HEREBY ENTERED DATED THIS 3RD DAY OF
AUGUST 1994.

BY THE COURT

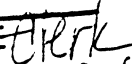
JUDGE, CIRCUIT COURT

NOTE: APPEAL MUST BE FILED WITHIN 30 DAYS
OF ENTRY OF THIS JUDGMENT.

JUDGMENT ENTERED


CIRCUIT COURT JUDGE

DATED


8-3 19 94

LYNN POULSEN,
DEFENDANT.

)
)
)
)
) ORDER ON DEFENDANT'S
) MOTIONS TO VACATE JUDGMENT
) AND SENTENCE AND FOR A NEW
) TRIAL
)
) CASE NO. 941000493
)
)
)
)
)
)

BY THE COURT

1994.

BY THE COURT:

William B. Schling

SALT LAKE COUNTY - WEST JARVIS
CLERK OF COURT
STATE OF UTAH
CIRCUIT COURT

INSTRUCTION NO. 1b

The Defendant is charged with the crimes in Counts 1-6, of "ANIMAL RUNNING AT LARGE", in violation of Section 23-5-102, West Valley City Ordinance, a Class "B" misdemeanor.

Before you find the Defendant guilty of the crime of Animal Running at Large, you must find from the evidence, beyond a reasonable doubt, the following elements of that crime:

1. That on or about the 15th day of February, 1994;
2. In West Valley City; —
3. The Defendant, Lynn Poulsen; —
4. had charge, care, custody or control of — any animal and allowed such animal to run at large;

If you believe that the evidence establishes each and all of the elements of the offense beyond a reasonable doubt, it is your duty to find the Defendant guilty. On the other hand, if the evidence has failed to so establish one or more of said elements, then you should find the Defendant not guilty.