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## State v. Harmon Respondent's Brief Dckt. 40858

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IN THE SUPREME COURT OF THE STATE OF IDAHO

**COPY**

STATE OF IDAHO, )  
 )  
 Plaintiff-Respondent, )  
 )  
 vs. )  
 )  
 MARY K. HARMON, )  
 )  
 Defendant-Appellant. )

No. 40858  
Twin Falls Co. Case No.  
CR-2012-5911

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF TWIN FALLS

HONORABLE THOMAS D. KERSHAW, JR., Magistrate Judge  
HONORABLE JOHN K. BUTLER, District Judge

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PLAINTIFF-RESPONDENT

PRO SE  
DEFENDANT-APPELLANT

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## STATEMENT OF THE CASE

### Nature of the Case

Mary K. Harmon appeals from the district court's decision affirming her conviction for owning a vicious dog.

### Statement of Facts and Course of Proceedings

The Stones lived in a Twin Falls triplex whose yard was separated from their neighbor Mary Harmon's yard by a six-foot high chain link fence. (Tr., p.5, L.16 – p.6, L.3.) On the evening of May 17, 2012, Kristine Stone, her husband Kevin, her daughter A.S., and a friend were inside the residence. (Tr., p.8, L.17 – p.9, L.1.) Kristine's two grandchildren and the Stone family's yellow lab were playing in the backyard. (Tr., p.9, Ls.2-9.)

At some point, Kristine's two grandchildren ran into the house crying. (Tr., p.9, Ls.12-15.) Kristine and A.S. ran outside and saw Harmon's dog in their yard, on top of and biting their lab. (Tr., p.9, L.15 – p.10, L.14.) Kristine tried to separate the dogs and then yelled to her husband Kevin for help. (Tr., p.10, Ls.3-7.) Kevin ran outside and was able to pull Harmon's dog off of the lab. (Tr., p.18, L.19 – p.20, L.2.) Harmon then retrieved her dog from the Stones' yard. (Tr., p.21, L.19 – p.22, L.3.)

After the attack, Kristine observed that her lab had puncture wounds. (Tr., p.10, L.20 – p.11, L.2.) She also observed that the fence bordering her and Harmon's yard was "beat up" and bent forward in a manner which would allow Harmon's dog to enter the Stones' yard. (Tr., p.11, Ls.6-14.)

Officer Neil Schulz responded to the scene and cited Harmon for owning a vicious dog in violation of Twin Falls City Ordinance 6-4-14(l). (Tr., p.29, L.21 – p.32, L.4; R., p.5.) Kristine's daughter, Amanda, who was listed on vet records as being the owner of the lab, and who was at work at the time of the attack, returned home and signed the citation. (R., p.5; Tr., p.16, Ls.6-11; p.32, Ls.2-4; p.34, Ls.19-23.)

After a bench trial, the magistrate court found Harmon guilty of the charge and imposed a \$150 fine. (Tr., p.47, L.10 – p.48, L.25.) In its intermediate appellate capacity, the district court affirmed Harmon's conviction, and also denied Harmon's subsequent motion for reconsideration. (R., pp.91-97, 99-102, 123.) Harmon timely appealed. (R., pp.124-128.)

## ISSUES

Harmon's brief does not contain a statement of issues on appeal as required by I.A.R. 35(a)(4). The state construes the issue on appeal as:

1. Has Harmon failed to demonstrate that the evidence presented was insufficient to support her conviction for owning a vicious dog?
2. Has Harmon waived her challenge to the uniform citation by failing to raise it to the magistrate court?
3. Has Harmon failed to preserve any assertions of trial error for appeal?

## ARGUMENT

### I.

#### Harmon Has Failed To Demonstrate That The Evidence Presented Was Insufficient To Support Her Conviction For Owning a Vicious Dog

##### A. Introduction

Harmon contends that the state presented insufficient evidence to support her conviction for possessing a vicious dog in violation of the Twin Falls City Code. (Appellant's brief, pp.2-4.) Specifically, Harmon contends that the state failed to present sufficient evidence that her dog was not provoked into attacking the Stones' dog. (Id.) Harmon's claim fails because a review of the record reveals that the state presented substantial evidence upon which a rational trier of fact could have found that Harmon owned a dog which bit the Stones' dog, and that Harmon's dog was not tormented or injured by the Stones' dog prior to the attack.

##### B. Standard Of Review

An appellate court will not set aside a judgment of conviction if there is substantial evidence upon which a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Miller, 131 Idaho 288, 292, 955 P.2d 603, 607 (Ct. App. 1997); State v. Reyes, 121 Idaho 570, 826 P.2d 919 (Ct. App. 1992); State v. Hart, 112 Idaho 759, 761, 735 P.2d 1070, 1072 (Ct. App. 1987). In conducting this review the appellate court will not substitute its view for that of the finder of fact as to the credibility of witnesses, the weight to be given to the testimony, or the reasonable inferences to be drawn

from the evidence. Miller, 131 Idaho at 292, 955 P.2d at 607; State v. Knutson, 121 Idaho 101, 822 P.2d 998 (Ct. App. 1991); Hart, 112 Idaho at 761, 735 P.2d at 1072. Moreover, the facts, and inferences to be drawn from those facts, are construed in favor of upholding the verdict. Miller, 131 Idaho at 292, 955 P.2d at 607; Hart, 112 Idaho at 761, 735 P.2d at 1072

C. The Evidence Presented Was Sufficient To Support Harmon's Conviction For Owning A Vicious Dog

Pursuant to 6-4-14(l) of the Twin Falls City Code, it is unlawful “[f]or any person to own, have custody of or control of any dog or any other animal which is vicious or dangerous.” Ordinance 6-4-1 of the Twin Falls City Code defines “vicious dog” as a “dog that has bitten, clawed or otherwise harmed, or constitutes a physical threat, or a dog whose temperament or habits endanger or menace any person or other animal without provocation by such person or animal.” Ordinance 6-4-1 further provides that the term “vicious dog” “shall not include a dog that bites, attacks or menaces a person or other animal that has tormented or injured the dog.”

Thus, Ordinance 6-4-1 deems a dog “vicious” in three circumstances: (1) where the dog has bitten, clawed or otherwise harmed; (2) where the dog constitutes a physical threat; or (3) where the dog possesses a temperament or habits which endanger or menace any person or other animal without provocation by such person or animal. A dog is not vicious under this ordinance



if it bites, attacks, or menaces a person or animal that has tormented or injured it.<sup>1</sup>

On appeal, Harmon does not appear to dispute that the state presented substantial evidence from which a reasonable trier of fact could find that her dog bit the Stones' dog. The state introduced numerous photographs of the Stones' dog's injuries into evidence. (State's exhibits 2, 3, 4, 5, 6.) Kristine and Kevin Stone described the attack, and their dog's injuries, at trial. (Tr., p.9, L.15 – p.11, L.5; p.18, L.19 – p.21, L.18.)

The state also presented substantial evidence from which a reasonable trier of fact could find that Harmon's dog was not "tormented or injured" by the Stones' dog prior to the attack. The attack occurred in the Stones' yard. (Tr., p.10, Ls.8-12.) Kristine Stone testified that her dog had never previously exhibited any vicious or overprotective tendencies, and that her grandchildren "had always been kind of scared" of Harmon's dog. (Tr., p.8, Ls.11-14; p.11, Ls.17-19.) She also testified that she had previously observed Harmon's dog "charge the fence" bordering her and Harmon's yard. (Tr., p.13, Ls.15-20.) Kevin Stone testified that his family's lab was not aggressive. (Tr., p.22, Ls.23-24.) Based upon its review of the admitted photographs, the magistrate court observed the Stones' lab to be a "fat old yellow dog" that was unlikely to have provoked or menaced Harmon's dog. (Tr., p.48, Ls.3-5.)

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<sup>1</sup>The state did not argue below that this provision of Ordinance 6-4-1 constitutes an affirmative defense to Ordinance 6-4-14(l). The magistrate court required the state to prove beyond a reasonable doubt that Harmon's dog was not "tormented or injured," or "provoked" by the Stones' dog. (Tr., p.47, L.22 – p.48, L.11.)

On appeal, Harmon speculates that her dog may have been provoked by the Stones' grandchildren that were playing in the yard prior to the attack. (Appellant's brief, pp.2-4.) Such speculation is of the nature of a closing argument, and does not demonstrate that the evidence at trial was insufficient to support the conviction. Further, even had the Stones' grandchildren somehow harassed or annoyed Harmon's dog, the state was required to prove only that the Stones' lab, the victim of Harmon's dog's attack, did not itself torment or injure Harmon's dog. See Twin Falls City Code Ordinance 6-4-1 (providing that the term "vicious dog" "shall not include a dog that bites, attacks or menaces a person or other animal *that has tormented or injured the dog.*" (emphasis added).)

The state presented sufficient evidence from which a rational trier of fact could conclude that Harmon's dog attacked and bit the Stones' lab, and was not injured or tormented by the lab prior to that attack. This Court should therefore affirm the district court's order affirming Harmon's conviction.

## II.

### Harmon Waived Her Challenge To The Uniform Citation By Failing To Raise It To The Magistrate Court

For the first time on appeal, Harmon contends that the uniform citation charging her with owning a vicious dog was defective because it violated I.I.R. 5(b), which requires the signer of a "citizen's citation" to have been present when an alleged offense occurred. (Appellant's brief, p.3.) Harmon, however, waived this challenge by failing to raise it to the magistrate court.

Idaho Infraction Rule 5 provides that a uniform citation may take the form of either a “peace officer citation” or a “citizen’s citation.” I.I.R. 5(a), (b). A “peace officer citation” may be issued “for a citable offense in which the officer shall certify that the officer has reasonable grounds to believe, and does believe, that the person cited committed the offense.” I.I.R. 5(a). A “citizen’s citation” may be signed by “any person in whose presence an alleged offense occurred and be witnessed by a peace officer whose name shall be endorsed on the citation.” I.I.R. 5(b).

In this case, Amanda Stone, the owner of the dog that was attacked by Harmon’s dog, signed the citation as the “Officer/Party.” (R., p.5; Tr., p.33, Ls.20-23.) Amanda was not present at the time her dog was attacked. (Tr., p.32, Ls.2-4; p.35, Ls.19-23.) Officer Neil Schulz signed the citation as the “Witnessing Officer,” and served it upon Harmon. (R., p.5; Tr., p.32, Ls.2-4.)

On appeal, Harmon contends that Amanda Stone’s signing of the citation violated I.I.R. 5(b). (Appellant’s brief, pp.2-3.) However, Stone did not raise a challenge to the citation either prior to or during trial.<sup>2</sup> (See generally Tr.)

“It is a fundamental tenet of appellate law that a proper and timely objection must be made in the trial court before an issue is preserved for appeal.” State v. Carlson, 134 Idaho 389, 398, 3 P.3d 67, 76 (Ct. App. 2000). This same principle is embodied in I.C.R. 12, which reads, in relevant part:

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<sup>2</sup> Harmon has also failed to cite any authority for her apparent proposition that a violation of I.I.R. 5(b) renders a citation or a subsequent conviction based on that citation void.

(b) **Pretrial motions.** Any defense objection or request which is capable of determination without trial of the general issue may be raised before trial by motion. The following must be raised prior to trial:

....

(2) Defenses and objections based upon defects in the complaint, indictment or information (other than it fails to show jurisdiction of the court or to charge any offense which objection shall be noticed by the court at any time during the pendency of the proceedings);

....

(f) **Effect of Failure to Raise Defenses or Objections.** Failure by the defendant to raise defenses or objections or to make requests which must be made prior to trial...shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.

I.C.R. 12; see also State v. Jones, 140 Idaho 755, 758, 101 P.3d 669, 702 (2004)

("[T]ardily raised objections based on defects in an indictment or information are waived unless they allege either (1) a failure to show jurisdiction, or (2) a failure to charge an offense.") "Convictions are no longer reversed because of minor and technical deficiencies which did not prejudice the accused." State v. Cahoon, 116 Idaho 399, 400, 775 P.2d 1241, 1242 (1989) (quoting United States v. Pheaster, 544 F.2d 353, 360, 361 (9th Cir.1976)).

Harmon did not attempt to raise a challenge to the uniform citation to the magistrate court, either prior to the trial, or prior to the court's verdict. She has

also not asserted any jurisdictional defect<sup>3</sup> in the charging document that may be raised for the first time on appeal. Correspondingly, the district court correctly declined to consider this issue in its intermediate appellate capacity. (R., p.94.) This Court should likewise decline to consider Harmon's challenge.

Harmon waived any non-jurisdictional challenges to the uniform citation by failing to raise them to the magistrate court. This Court should therefore decline to consider them for the first time on appeal.

### III.

#### Harmon Has Failed To Preserve Any Assertions Of Trial Error For Appeal

The general rule in Idaho is that an appellate court will not consider an alleged error on appeal in the absence of a timely objection at trial. State v. Norton, 151 Idaho 176, 181, 254 P.3d 77, 82 (Ct. App. 2011); State v. Thompson, 132 Idaho 628, 634, 977 P.2d 890, 896 (1999).

While Harmon's Appellant's brief does not contain a statement of issues on appeal as required by I.A.R. 35(a)(4), the Argument section of the brief contains several vague assertions of trial error, including: the "Stones' misidentified the breed of my dog as a Pitbull, collaborated with the State['s] Attorney to Prosecute me for something other than I was charged with, and

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<sup>3</sup> Further, any such jurisdictional challenge would fail. A charging document that is not challenged prior to trial will be upheld "unless it is so defective that it does not, by any fair or reasonable construction, charge an offense for which the defendant is convicted." Jones, 140 Idaho at 759, 101 at 703. A uniform citation confers jurisdiction on the court if it lists the date, time, charge, and applicable code section. State v. Cahoon, 116 Idaho 399, 775 P.2d 1241 (1989); see also I.C. § 19-3901. The uniform citation served on Harmon contained these required elements, and thus conferred jurisdiction upon the court. (R., p.6.)

exchanged unknown paperwork between their family and the Prosecutor's office"; "the Stones ignored the request for documents on the Subpoenas"; and "[t]here was a conflict of interest and confusion at my hearing." (Appellant's brief, pp.2-4.)

In its intermediate appellate capacity, the district court declined to consider these claims, correctly recognizing that Harmon failed to raise any of them in the course of her trial, thus depriving the magistrate court of the opportunity to rule on them. (R., p.94.) To the extent this Court construes Harmon's Appellant's brief as raising any of these claims, it should likewise decline to consider them.

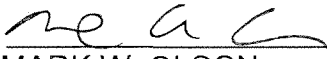
In the alternative, these claims should not be considered because Harmon has failed to support them with either argument or authority, thus waiving them. See State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996).

If this Court construes Harmon's Appellant's brief as alleging trial error, this Court should decline to consider these issues because Harmon failed to preserve them, or support them with authority or argument.

#### CONCLUSION

The state respectfully requests this Court to affirm Harmon's conviction for owning a vicious dog.

DATED this 15th day of November, 2013.

  
\_\_\_\_\_  
MARK W. OLSON  
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of November 2013, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

MARY K. HARMON  
Pro Se Defendant  
156 Austin Avenue  
Twin Falls, ID 83301



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Mark W. Olson  
Deputy Attorney General

MWO/pm