STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 24, 2009
v	No. 283853 Kalkaska Circuit Court
FRED GORDON ZIRKLE, Defendant-Appellant.	LC No. 07-002883-FH

Before: Owens, P.J., and Servitto, and Gleicher, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of animal torture, MCL 750.50b(2), possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and possession of a weapon under the influence of alcohol, MCL 750.237(2). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant's convictions arise out of the shooting of his dog. While defendant claimed that he shot at the dog as it was trying to attack him and that he accidentally wounded it, other witnesses testified that defendant admitted shooting his dog because it had urinated on his floor. When the police arrived at defendant's home after the shooting, they determined that defendant had been drinking. A later blood test revealed that defendant's blood contained a blood alcohol level of 0.16 grams of alcohol per 100 milliliters of blood.

On appeal, defendant claims that there was insufficient evidence to support his convictions. Defendant specifically argues that the prosecution failed to refute his assertion that he acted in self-defense, failed to prove that he acted with the requisite malice, and failed to prove that he was intoxicated at the time he shot his dog. We disagree on all counts.

We review a claim of insufficiency of the evidence de novo, *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001), considering the evidence adduced below "in a light most favorable to the prosecutor to determine whether any trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt," *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006). This Court is mindful of the roles played by the trial court, the trier of fact, and this Court on appeal, and we will not interfere with the jury's role of determining the weight of the evidence or the credibility of the witness. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992).

At the time of the incident underlying this prosecution, MCL 750.50b(2) provided in pertinent part as follows:

> A person who willfully, maliciously and without just cause or excuse kills, tortures, mutilates, maims, or disfigures an animal . . . is guilty of a felony, punishable by imprisonment for not more than 4 years, or by a fine of not more than $5,000.00, or community service for not more than 500 hours or any combination of these penalties.[1]

Defendant first argues that the prosecution failed to prove beyond a reasonable doubt that he did not act in self-defense. In order to show that he acted in self-defense, a defendant must present evidence that he honestly and reasonably believed that his life was in imminent danger or that there was a threat of serious bodily harm. *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993). A defendant is not, however, entitled to use any more force than is necessary to defend himself. *Id.* "'Once evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt.'" *People v James*, 267 Mich App 675, 677; 705 NW2d 724 (2005), quoting *People v Fortson*, 202 Mich App 13, 19-20; 507 NW2d 763 (1993).

Here, the prosecution presented three witnesses–two neighbors and the investigating sheriff's deputy–who all testified that defendant admitted shooting the dog. One of the neighbors and the deputy sheriff testified that defendant explained he shot his dog because it urinated on the floor. Defendant was the only person who testified that he shot his dog in his own defense. The claim of self-defense, then, rested on a credibility determination. Deferring to the jury's superior position to assess witness credibility, we will not revisit the issue of credibility anew. *Wolfe, supra* at 514-515. Accordingly, we conclude that the prosecution met the burden of proving that defendant did not act in self-defense.

Defendant next argues that there was insufficient evidence that he acted with malice. Defendant further argues, citing *People v Fennell*, 260 Mich App 261, 266; 677 NW2d 66 (2004), that a finding of malice requires evidence that the defendant attempted to "shield his activities from discovery". We disagree with both assertions.

In *Fennell*, a panel of this Court held that animal torture statute, MCL 750.50b(2), is a general intent crime. *Id.* at 263. When considering the element of malice, *Fennell* rejected the proposition that the malice required "is akin to the malice required in the context of murder." *Id.* at 270. *Fennell* instead looked favorably upon (and adopted) the definition of malice utilized by *People v Iehl*, 100 Mich App 277; 299 NW2d 46 (1980) in its consideration of MCL 750.377,[2] a forerunner of MCL 750.50b. The *Iehl* court determined that the element of malice under MCL 750.377 "requires only that the jury find that defendant 1) committed the act, 2) while knowing it

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[1] The legislature amended § 50b(2) in 2008 PA 339.

[2] Repealed by 1994 PA 126.

to be wrong, 3) without just cause or excuse, and 4) did it intentionally or 5) with a conscious disregard of known risks to the property of another. *Id.* at 280.

There is not, as argued by defendant, any suggestion in *Fennell* that in order to find that defendant knew his activity to be wrong, there must be evidence that the defendant attempted to "shield his activities from discovery." The *Fennell* court merely acknowledged that the defendants' activities after the fireworks were thrown into the stable suggested that they knew their actions were wrong. The Court did not, as claimed by defendant, expand the *Iehl* definition of malice to include an element of concealment.

In the present matter, the prosecution provided sufficient evidence for a reasonable jury to conclude that the defendant acted with malice. The prosecution provided the jury with testimony by defendant's neighbors and the sheriff's deputy that defendant injured the dog to "teach him a lesson." This is sufficient to prove that defendant shot the dog and did so intentionally. Also, it is reasonable to infer that by telling one of his neighbors that he was going to "finish the job", while telling a completely different story at trial, defendant knew what he was doing was wrong. The jury could also reasonably conclude that shooting the dog for urinating inside the house did not set forth a just cause or excuse for the action. Given this evidence, the plaintiff provided sufficient evidence from which a reasonable jury could have found that defendant acted with the requisite malice.

Finally, there was sufficient evidence for the jury to conclude that defendant was intoxicated at the time he shot his dog. The deputy sheriff who interviewed defendant within approximately minutes after the incident testified that defendant appeared highly intoxicated. Plaintiff also presented evidence that defendant's blood alcohol content was twice the legal limit 4.5 hours after the incident. The only evidence refuting this evidence was defendant's own self-serving testimony. And as stated earlier, it is in the sole jurisdiction of the jury to weigh the credibility of a witness.

Therefore, we conclude that the jury was provided with sufficient evidence to conclude beyond a reasonable doubt that defendant is guilty of animal cruelty and possession of a firearm while under the influence of alcohol.

Affirmed.

/s/ Donald S. Owens
/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher