**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**August 23, 2006**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 2005AP1458-CR** **Cir. Ct. No. 2003CF236**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JULIEANNE M. SEDLMEIER,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Washington County: ANNETTE K. ZIEGLER, Judge. *Affirmed*.

Before Brown, Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Julieanne M. Sedlmeier appeals from a judgment of conviction of intentional mistreatment of an animal resulting in death and the misdemeanor crimes of failure to provide animals with proper food and drink, failure to provide animals with proper shelter, and mistreatment of an animal. She

also appeals from an order denying her postconviction motion for a new trial. She argues that the criminal complaint was inadequate, the use of other acts evidence was improper, the evidence was insufficient to support the conviction of mistreatment of an animal resulting in death, and that she was denied the effective assistance of trial counsel. We reject her claims and affirm the judgment and order.

¶2 Sedlmeier kept numerous animals on her farm including ducks, horses, dogs and a pig. The criminal complaint charged four counts for conduct occurring between May 26 and June 19, 2003: (1) failure to supply a sufficient supply of food to maintain all animals in good health, (2) failure to provide the animals with proper shelter, (3) negligent treatment of an animal in a cruel manner, and (4) intentional treatment of an animal in a cruel manner resulting in the animal's death. The probable cause portion of the complaint detailed the observations of six individuals that Sedlmeier's ducks, dogs, horses and the pig lacked water and food and appropriate shelter. A foal was removed from the property on May 27, 2003, and died the next day from malnutrition.

¶3 Sedlmeier argues that the complaint is insufficient to satisfy the due process requirement of giving notice of the charges because it does not identify the specific animals to which each charge applies. She also claims that the complaint is duplicitous and deprives her of her right to a unanimous jury verdict. *See* ***State v. Lomagro***, 113 Wis. 2d 582, 586, 335 N.W.2d 583 (1983). Her challenge

presents a question of law which we independently review.[1] *See* ***State v. Fawcett***, 145 Wis. 2d 244, 250, 426 N.W.2d 91 (Ct. App. 1988).

¶4 It has been consistently held that

> acts which alone constitute separately chargeable offenses, "when committed by the same person at substantially the same time and relating to one continued transaction, may be coupled in one count as constituting but one offense" without violating the rule against duplicity. If the defendant's actions in committing the separate offenses may properly be viewed as one continuing offense, it is within the state's discretion to elect whether to charge "one continuous offense or a single offense or series of single offenses."

***Lomagro***, 113 Wis. 2d at 587 (citations omitted). This principle governs here. Although Sedlmeier could be separately charged for the maltreatment of each individual animal kept at her farm, the allegations of the complaint apply to all the animals referred to in the probable cause portion of the complaint. These were continuous offenses applicable to all the animals she kept. We need only consider whether the dangers of duplicity are present. *See* ***id.*** at 589.

¶5 Contrary to Sedlmeier's contention, the charging as continuous, cumulative offenses does not deprive her of her right to a unanimous jury verdict. When the alternative means of committing a crime are conceptually similar, jury unanimity is not required on the particular acts constituting the crime. ***Id.*** at 592.

[1] We agree with the State's position that because Sedlmeier did not raise the issue before trial, it is waived. *See* ***State v. McMahon***, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). However, one of Sedlmeier's claims of ineffective assistance of trial counsel is that counsel failed to request more specificity on the charges. We choose to address the issue despite waiver because only if there was actual error could counsel's performance be deemed deficient or prejudicial. *See* ***State v. Smith***, 170 Wis. 2d 701, 714 n.5, 490 N.W.2d 40 (Ct. App. 1992).

The acts of depriving a dog, horse, duck or pig of food, water and appropriate shelter are conceptually similar.

¶6 Sedlmeier relies heavily on ***Richardson v. United States***, 526 U.S. 813 (1999). In ***Richardson***, the United States Supreme Court held that to convict a defendant under the federal "continuing criminal enterprise" drug statute, the jury must unanimously agree on the specific underlying drug code violations that comprise the "continuing criminal enterprise." ***Id.*** at 815. Yet the court's concern was that the federal statute criminalized a series of violations of federal drug laws which could cover many different kinds of behavior. ***Id.*** at 819. The allegations here do not involve a large statutory scheme and potentially significantly different kinds of criminal behavior. The unfairness in dispensing with unanimity is not present when the range of criminal behavior is limited and conceptually similar as here. *See* ***State v. Johnson***, 2001 WI 52, ¶26, 243 Wis. 2d 365, 627 N.W.2d 455. This is not a ***Richardson*** case.

¶7 Sedlmeier argues that count three (negligent mistreatment of animals) and count four (intentional mistreatment of an animal resulting in death) are multiplicitous and violate the double jeopardy prohibition because the jury might have convicted her of negligent mistreatment of the same foal that was the focus of the intentional mistreatment resulting in death. Whether an individual has been twice placed in jeopardy for the same offense in violation of the Fifth Amendment's protection against multiple punishments for the same offense is a question of law. ***State v. Lechner***, 217 Wis. 2d 392, 401, 576 N.W.2d 912 (1998). One of the considerations in the applicable analysis is whether the offenses are identical in law and in fact. *See* ***id.*** at 403. In a continuous-offense case such as this, the question turns on whether the factual circumstances may be separated in time or are sufficiently different in nature. *See* ***id.*** at 414.

¶8 Here the offenses Sedlmeier challenges as multiplicitous are different in fact. One count is a negligence offense; the other is an intentional offense and required proof that the animal died. Further, the negligence offense targets Sedlmeier's mistreatment of all the animals at her farm over a lengthy period. The intentional offense targets the death of the foal on a specific day. The charges do not offend the prohibition against double jeopardy.

¶9 At trial several witnesses testified about the animals' conditions at times other than the May 26 to June 19, 2003 charging period. One witness explained that in the winter of 2002-03, she observed the lack of adequate food or water for more than nineteen horses on the farm. She indicated that in a conversation with Sedlmeier in April 2003 about Sedlmeier's intent to sell a mare and baby, the witness suggested to Sedlmeier that the animals could only be sold for slaughter. The witness also described conditions at the farm in the summer of 2002 when she observed malnourished and wormy looking foals, dirty cages of unhealthy rabbits, and too many cats and the smell of cat urine. Another witness, Sedlmeier's brother, described conditions he observed at the farm in December 2002. He indicated that the horses would only get food if he provided it, that the water pails were frozen, and that the stalls were dirty. He also observed a dead goose and five or six ducks huddled together that were frozen. He knew that in February or March 2003, Sedlmeier had purchased three pigs at auction and only one was left when he visited the farm on May 26, 2003. Sedlmeier told him two pigs had died. In total four out of six of the prosecution's citizen witnesses testified about conditions they observed at the farm prior to the charging period.[2]

[2] Only one of the four witnesses testified exclusively about periods outside the charging period.

¶10 Sedlmeier argues that evidence of conditions at the farm outside of the charging period was improper other acts evidence and inadmissible because its probative value was outweighed by unfair prejudice. Other acts evidence is admissible if offered for an acceptable purpose, if relevant, and if the probative value outweighs the danger of unfair prejudice. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998); WIS. STAT. § 904.04(2) (2003-04).[3] Admission of such evidence is entrusted to the sound discretion of the trial court. ***State v. Derango***, 2000 WI 89, ¶37, 236 Wis. 2d 721, 613 N.W.2d 833. The trial court's decision to admit the other acts evidence will be upheld if it is in accordance with legal standards and facts of record, if the court undertook a reasonable inquiry and examination of the underlying facts, and if there exists a reasonable basis for the determination. *See* ***Sullivan***, 216 Wis. 2d at 780-81. If the trial court fails to articulate its reasoning, we independently examine the record to determine if there was a reasonable basis for the admission of the evidence.[4] ***Derango***, 236 Wis. 2d 721, ¶37.

¶11 We first question whether the evidence of conditions at the farm outside the charging period is truly other acts evidence admissible only under WIS. STAT. § 904.04(2). *See* ***State v. Bauer***, 2000 WI App 206, ¶7 n.2, 238 Wis. 2d 687, 617 N.W.2d 902 (recognizing a trend in criminal cases to misidentify

[3] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[4] A motion in limine was filed to prohibit evidence of other dead animals found at the farm. The motion was denied except that evidence of other horses that died at the farm was excluded. We recognize that there may not have been adequate objections to the plethora of other evidence that Sedlmeier now argues to be inadmissible. However, we address the admission of such evidence because it is an element of Sedlmeier's ineffective assistance of trial counsel claim. *See* note 1.

evidence as other acts evidence). "[S]imply because an act can be factually classified as 'different'—in time, place and, perhaps, manner than the act complained of—that different act is not necessarily 'other acts' evidence in the eyes of the law." ***Id.***

¶12 Evidence is not "other acts" evidence if it is part of the panorama of evidence needed to completely describe the crime that occurred and is thereby inextricably intertwined with the crime. *See* Jason M. Brauser, *Intrinsic or Extrinsic?: The Confusing Distinction Between Inextricably Intertwined Evidence and Other Crimes Evidence Under Rule 404(b)*, 88 NW. U. L. REV. 1582, 1606 (1994) (discussing FED. R. EVID. 404(b), which governs the admissibility of other crimes, wrongs or acts.). *See also* ***State v. Hereford***, 195 Wis. 2d 1054, 1069, 537 N.W.2d 62 (Ct. App. 1995) ("Testimony of other acts for the purpose of providing the background or context of a case is not prohibited by § 904.04(2), STATS." (citation omitted)). The conditions observed at the farm when the sheriff's department came to the property on May 26, 2003, did not come into existence overnight. Evidence about the conditions of the farm prior to the intervention of the sheriff's department was necessary background information. The trial court found that observations about conditions at the farm at times other than the charging period was necessary to provide a context for the crimes and a complete presentation. We agree and conclude that the trial court did not err in admitting the evidence because it was not other acts evidence.

¶13 Assuming the evidence, particularly evidence about other animals that may have died at the farm prior to the charging period, was other acts evidence, we conclude that the evidence was admissible. As the trial court recognized, such evidence was relevant to the issues of intent and knowledge. That is particularly true with respect to the testimony of one witness who observed

poor conditions at the farm and in turn talked to Sedlmeier about the condition of the animals and devoted a day cleaning the barn for Sedlmeier. Evidence concerning other dead animals was probative on Sedlmeier's knowledge that her conduct was practically certain to result in mistreatment. The trial court found the evidence to be near in time and it was in fact probative because it involved the same place and persons. *See* ***Sullivan***, 216 Wis. 2d at 786 (probative value lies in the similarity between the other act and the charged offense). The trial court also determined that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. There was no risk that the evidence would confuse the jury. The trial court properly exercised its discretion in admitting the evidence.

¶14 Sedlmeier argues that the evidence was not sufficient on the intent element to permit her conviction on count four of the complaint—intentional mistreatment of an animal resulting in the death of the animal. We may not reverse a conviction on the basis of insufficient evidence "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). We must accept the reasonable inferences drawn from the evidence by the jury. ***Id.*** at 506-07.

¶15 The prosecution was required to prove that Sedlmeier intentionally treated an animal in a cruel manner. The prosecution was not required to prove that Sedlmeier intended to cause the foal's death. Intentionally means that she acted with the "mental purpose to treat the animal in a cruel manner or was aware that the conduct was practically certain to cause that result." WIS JI—CRIMINAL 1980. There was ample evidence that Sedlmeier did not keep adequate feed and

water for the horses she kept. Although Sedlmeier testified that when she left the farm for the weekend before May 26, 2003, she was unaware that the foal was having any difficulties, the jury could reject that testimony. A veterinarian testified that the foal died from malnutrition. He explained that it would have taken about three to four weeks of inadequate food for the foal to reach the condition that prompted its removal from the farm. The veterinarian confirmed that the foal would have suffered during that period and that three days before the foal's death, a caretaker would have noticed signs of the foal's physical distress. There was also evidence that the horses were visibly extremely thin. It was not condition that occurred overnight. It is a reasonable inference that Sedlmeier knew that the foal was suffering from malnutrition and her failure to provide for the foal was practically certain to result in cruel mistreatment. We affirm the conviction on count four of the complaint.

¶16 The final issue is whether Sedlmeier was denied the effective assistance of counsel. The two-pronged test for ineffective assistance of counsel is deficient performance of counsel and prejudice to the defendant. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Whether counsel's performance was ineffective presents a mixed question of fact and law. ***State v. Maloney***, 2005 WI 74, ¶15, 281 Wis. 2d 595, 698 N.W.2d 583. The trial court's determination of what counsel did or did not do, along with counsel's basis for the challenged conduct, are factual matters which we will not disturb unless clearly erroneous. *See* ***id.*** However, the ultimate determination of whether counsel's conduct constituted ineffective assistance is a question of law. ***Id.*** The test for measuring an attorney's performance is the *reasonableness* of counsel's challenged conduct on the particular facts of the case, viewed as of the time of counsel's conduct.

***Strickland***, 466 U.S. at 690. The test for prejudice is whether our confidence in the outcome is sufficiently undermined. *See* ***id.*** at 694.

¶17 Sedlmeier first argues that her trial counsel should have requested that the charges be made more specific. She contends that more specificity was needed because confusion existed as to what animals the charges applied to and the charges were multiplicitous. We have already concluded that the charges were sufficiently stated and were neither duplicitous nor multiplicitous. Thus, trial counsel's failure to press for more specificity in the charges was not ineffective performance. Since any motion for more specificity could have been successfully resisted, Sedlmeier was not prejudiced by trial counsel's failure to make the motion.

¶18 The same is true of Sedlmeier's contention that trial counsel was ineffective with respect to the admission of other acts evidence. We have concluded that evidence of conditions at the farm outside of the charging period and of other dead animals at the farm was admissible. Therefore, trial counsel's performance, if deficient in not flushing out the motion in limine or making contemporaneous objections, was not prejudicial.

¶19 Sedlmeier contends that trial counsel was ineffective in eliciting testimony from one witness that at one point the witness was concerned that Sedlmeier suffers from hoarder's syndrome. Sedlmeier argues there is no justifiable reason why trial counsel would want the jury to hear that Sedlmeier suffered from a mental disorder. However, trial counsel explained his rationale for eliciting the witness's concern that Sedlmeier might have been a hoarder of

animals. Trial counsel brought that in as an attempt to negate intent as to the mistreatment of the foal. It was reasonable trial strategy, albeit unsuccessful.[5] Trial counsel's performance was not deficient on this point. *See* ***State v. Felton***, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983) (we are not to second-guess trial counsel's selection of trial tactics or the exercise of professional judgment based upon rationality founded on the facts and the law); ***State v. Teynor***, 141 Wis. 2d 187, 212, 414 N.W.2d 76 (Ct. App. 1987) (merely because counsel's strategy was unsuccessful does not mean that his performance was legally insufficient).

¶20 Sedlmeier's final contention is that trial counsel was ineffective for not requesting a lesser-included offense instruction regarding count four of the complaint—intentional mistreatment of an animal resulting in the animal's death. She suggests a negligence offense was a lesser-included offense of the intentional mistreatment charge. A lesser-included offense instruction is appropriate only when there are reasonable grounds in the evidence both for the acquittal on the greater charge and conviction on the lesser offense. ***State v. Echols***, 152 Wis. 2d 725, 739, 449 N.W.2d 320 (Ct. App. 1989). The evidence that Sedlmeier intentionally mistreated the foal was sufficient and overwhelming. The evidence did not allow for a possible acquittal of that offense in favor of a lesser one. Sedlmeier was not prejudiced by counsel's failure to request a lesser included offense instruction.

*By the Court.*—Judgment and order affirmed.

[5] On cross-examination, the witness explained that her initial concern that Sedlmeier was a hoarder was dispelled when Sedlmeier freely gave up several animals to the witness and when the witness returned to the property, she found that Sedlmeier had actually gotten rid of some of the animals and did not display an inability to sell the animals.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.