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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 09/11/2012
RUTH A. WILLINGHAM,
CLERK
BY: DLL

STATE OF ARIZONA,) 1 CA-CR 11-0354
)
Appellee,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
)
DIANE LYNN HABENER,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-065403-001DT

The Honorable Janet E. Barton, Judge

AFFIRMED

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Diane Lynn Habener Phoenix
Appellant

B R O W N, Judge

¶1 Diane Lynn Habener appeals her convictions for nine counts of cruelty to animals. Habener's counsel has filed a brief in accordance with *Anders v. California*, 386 U.S. 738, 744 (1967), and *State v. Leon*, 104 Ariz. 297, 299, 451 P.2d 878, 880 (1969), advising this court that after a search of the entire record on appeal, there are no arguable grounds for reversal. Counsel requests that we search the record for fundamental error. *Anders*, 386 U.S. at 744; *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999). Habener filed a supplemental brief raising numerous issues which we address below. Because we find no reversible error, we affirm Habener's convictions and placement on probation.

BACKGROUND

¶2 The State charged Habener with sixteen counts of cruelty to animals, all class one misdemeanors, after law enforcement officials investigated conditions at her two animal shelters. After a fifteen-day bench trial, the trial court acquitted Habener of seven counts of animal cruelty and found her guilty of the nine remaining counts. The court suspended the imposition of sentence and placed Habener on probation for an aggregate term of six years—eight concurrent terms of three years' probation followed by one consecutive term of three years' probation. Habener timely appealed.

DISCUSSION

I. Grand Jury Proceedings

¶13 Habener first raises several issues relating to grand jury proceedings and her attempt to seek a remand to the grand jury. Regarding the proceedings themselves, Habener argues the State submitted misleading evidence, witness testimony was "incompetent" and "false" and the State failed to submit exculpatory evidence from two witnesses. As to the remand, Habener argues the State took too long to agree that the matter should be remanded to the grand jury and that the trial court erred when it granted the State additional time to remand, which ultimately never occurred.

¶14 We find no error because these issues are not properly before this court and they are moot. The charges in the instant case were brought pursuant to an information filed on October 1, 2010, not an indictment. The grand jury proceedings Habener complains of and her attempts to remand to the grand jury were part of a prior case the trial court dismissed on September 28, 2010. While the two cases may have arisen from the same facts, the grand jury proceedings in the dismissed case played no role in the instant case. We further note that challenges to grand jury proceedings must be made by motion followed by special action before trial and are not reviewable on appeal. *State v.*

Moody, 208 Ariz. 424, 439-40, ¶ 31, 94 P.3d 1119, 1134-35 (2004).¹

II. Failure to Prosecute Other Persons

¶5 Habener further argues the prosecutor engaged in misconduct when she failed and/or refused to prosecute two people who Habener alleges were responsible for the care of the animals at issue. We find no error because it is within the prosecutor's discretion to determine whether to file criminal charges and which charges to file. *State v. Tsosie*, 171 Ariz. 683, 685, 832 P.2d 700, 702 (App. 1992).

III. Right to a Speedy Trial

¶6 Habener also claims the trial court violated her right to a speedy trial. However, she does not identify a specific date by which trial should have begun. Regardless, we find no error. The court arraigned Habener in this case on August 27, 2010. The trial court correctly calculated that the last day to begin trial was February 23, 2011. See Ariz. R. Crim. P. 8.2(a)(2)(trial for a defendant released from custody must begin

¹ All of the citations in Habener's pro per supplemental opening brief are to exhibits attached to the brief. Almost all of those exhibits consist of documents and transcripts from the dismissed case and a separate justice court case and are not part of the record on appeal. We will not consider materials outside the record on appeal, *State v. Schackart*, 190 Ariz. 238, 247, 947 P.2d 315, 324 (1997), nor will we consider any "extraneous" factual assertions not found in the record on appeal. *State v. Fassler*, 108 Ariz. 586, 596, 503 P.2d 807, 817 (1972).

within 180 days of arraignment). Habener's trial began on January 3, 2011, well within the applicable time limits. Habener's arguments to the contrary are based on dates associated with the dismissed case.

IV. Filing the Instant Case

¶7 As noted above, the trial court dismissed the initial case and the State brought the instant misdemeanor charges through an information. Habener argues the court erred when it (1) dismissed the first case instead of forcing the State to follow through with its agreement to remand, and (2) allowed the State to file the instant charges through the information. We disagree. If Habener wanted to challenge the dismissal of the prior case she should have filed a timely appeal in the prior case. Regarding the State's decision to file an information and bring the instant case, we reiterate, the decision to file criminal charges and what charges to file or dismiss is left to the discretion of the prosecutor. See *Tsosie*, 171 Ariz. at 685, 832 P.2d at 702; see also *United States v. Goodwin*, 457 U.S. 368, 382 (1982) ("A prosecutor should remain free before trial to exercise the broad discretion entrusted to him [or her] to determine the extent of the societal interest in prosecution. An initial decision should not freeze future conduct.")

V. Hearing on the Petition to Revoke

¶18 Habener argues reversible error occurred when the State was not ready to proceed at a hearing in the dismissed case. The hearing addressed the State's petition to revoke Habener's release conditions. This issue arose in the dismissed case and is therefore not properly before us. For the same reason, the issue is also moot.

VI. "Implausible Crucial Witnesses"

¶19 Habener argues there were two "implausible crucial witnesses" who were not credible for numerous reasons. We find no error. The two witnesses Habener identifies did not testify in the instant case, but testified and/or made statements in the course of other proceedings not before us, including the dismissed case. None of that testimony and none of those statements were admitted in this trial. Further, none of the evidence cited by Habener to support her argument is contained within the record on appeal. Finally, even if the issue were properly preserved and presented for appellate review in this case, we would find no error because the credibility of witnesses is a matter for the trier of fact. *See State v. Cid*, 181 Ariz. 496, 500, 892 P.2d 216, 220 (App. 1995).

VII. Portrayal of Habener's Character

¶10 Habener contends the State attempted to "besmirch, taint, defile and otherwise slander" her character. Because all

the purported incidents identified by Habener occurred during the course of the dismissed case, this issue is not properly before us. Further, the issue would be moot because, again, that case was dismissed.

VIII. Continuance of Trial Date

¶11 Habener argues the trial court erred when it continued the trial in this matter from December 6, 2010 to a later date. We will not disturb a trial court's decision on whether to grant a continuance absent an abuse of discretion and prejudice to the defendant. *State v. Garcia-Contreras*, 191 Ariz. 144, 149, ¶ 21, 953 P.2d 536, 541 (1998).

¶12 The trial court continued the trial in this matter for several reasons. First, Habener did not disclose one of her experts until November 15, 2010. At the time of the continuance, that expert's work was not yet complete and the expert was not available for an interview. Second, other witness interviews were still ongoing. More importantly, Habener's counsel, the prosecutor, and the trial court all had upcoming trials that took precedence over Habener's case because those cases involved defendants who were in custody, whereas Habener was not in custody. See Ariz. R. Crim. P. 8.1(b)(trials of in-custody defendants have priority over other criminal cases). Under these circumstances, the trial court did not

abuse its discretion when it found the December trial date was not realistic and continued the matter.

IX. "Missing Witnesses"

¶13 Habener contends several witnesses could not be found because of the State's "unnecessary and unethical protraction of the proceeding, particularly the sham conduct by the State Attorney with regard to the alleged remand of the matter to the Grand Jury[.]" We find no error. First, Habener presents this issue primarily in the context of the dismissed case. For the reasons stated above, any issues regarding that case, including any issue regarding an improper delay, are not before us. Second, the record shows the instant matter was not unnecessarily protracted. Finally, Habener's bald assertions regarding how these witnesses would have testified at trial is not sufficient to establish any sort of error. *See State v. Borbon*, 146 Ariz. 392, 399, 706 P.2d 718, 725 (1985).

X. Sufficiency of the Evidence

¶14 Habener next argues the evidence was insufficient to support her convictions for Counts 6 and 11 because there was evidence that the two dogs in those counts received medical treatment. Even though Habener challenges the sufficiency of the evidence for only Counts 6 and 11, we address the sufficiency of the evidence to support all of Habener's convictions.

¶15 “Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction.” *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) (citation omitted). “We construe the evidence in the light most favorable to sustaining the verdict, and resolve all reasonable inferences against the defendant.” *State v. Greene*, 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998) (citation omitted). Further, we draw all reasonable inferences that support the verdict. *State v. Fulminante*, 193 Ariz. 485, 494, ¶ 27, 975 P.2d 75, 84 (1999). In our review of the record, we resolve any conflict in the evidence in favor of sustaining the verdict. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989). We do not weigh the evidence, however. That is the function of the fact finder. *See id.*

A. Counts Based on Cruel Neglect or Abandonment

¶16 The State alleged two theories of animal cruelty. For Counts 1, 2, 3 and 4, the State alleged Habener intentionally, knowingly or recklessly subjected an animal under her custody or control to cruel neglect or abandonment. *See* Ariz. Rev. Stat. (“A.R.S.”) § 13-2910(A)(1)(2009). In support of these counts, the State presented the following evidendce.

¶17 Investigators found the cat identified in Count 1 in a bedroom at one of Habener’s properties. The cat had multiple

broken teeth and was dehydrated because Habener failed to provide adequate water. The room in which Habener kept the cat smelled so badly of ammonia from urine that it burned the investigators' eyes. A veterinarian further testified the room did not constitute adequate shelter.

¶18 The cat identified in Count 2 had a discharge from its eyes and was also dehydrated because Habener failed to provide adequate water. This cat was kept in the same ammonia-filled room that a veterinarian testified did not constitute adequate shelter.

¶19 Investigators found the dog identified in Count 3 in a "pet store kennel" in a shed at Habener's property. The dog had matted fur, hair loss, and a rash on its neck. Investigators found the dog in a container that did not permit the dog to stand up straight, had poor ventilation, and had no water. A veterinarian testified the container was not adequate for the dog.

¶20 Investigators found the dog identified in Count 4 in a living room of one of Habener's properties. Habener kept the dog in a crate with no available water. This dog was underweight and had visible bony protrusions where there should have been indications of muscle attachment. The dog tested positive for both parasitic and bacterial disease. The dog had an infected surgical site where it had been neutered and the

sutures from that procedure were still present. An investigator concluded the sutures should have been removed and the infected surgical site required medical treatment.

¶21 The evidence identified above was sufficient to permit the trial court to find beyond a reasonable doubt that Habener intentionally, knowingly or recklessly subjected each of those four animals under her custody or control to cruel neglect or abandonment.

B. Counts Based on the Failure to Provide Medical Attention

¶22 For Counts 6, 7, 9, 11 and 13, the State alleged Habener intentionally, knowingly or recklessly failed to provide necessary medical attention to an animal under her custody or control to prevent the animal's protracted suffering. See A.R.S. § 13-2910(A)(2). The following evidence was produced at trial.

¶23 Investigators found the dog identified in Count 6 in a kennel on one of Habener's properties. The dog had pus around its eyes, mange, mites, skin infections and areas of inflamed and/or irritated skin, and thin hair on its face and neck. A veterinarian testified the skin disorders and mange would have been painful.

¶24 Investigators found the dog identified in Count 7 in a kennel on one of Habener's properties. The dog was very thin,

"very, very dirty," and covered in feces and urine. The dog required medical treatment, showing signs of systemic infection and testing positive for valley fever and both parasitic and bacterial disease.

¶125 Investigators found the dog identified in Count 9 in a grooming kennel in a shed on one of Habener's properties. The dog tested positive for parasitic disease. The dog also had an infected and bruised surgical site where the dog had been spayed, and the sutures still present in that site should have already been removed. A veterinarian testified the infected site could have been painful and required medical attention.

¶126 Investigators found the dog identified in Count 11 loose in the backyard of one of Habener's properties. The dog was very malnourished, vomiting, and had diarrhea. The dog suffered from fly bites to its ears and tested positive for valley fever and parasitic and bacterial disease. A veterinarian testified the dog needed medical attention.

¶127 Finally, investigators found the dog identified in Count 13 in a kennel in the living room of one of Habener's properties. The dog was anemic and tested positive for bacterial disease. The dog also had an infected surgical site where the dog had been spayed. As with the other dogs, the sutures that remained in the surgical site should have already been removed. The dog required medical attention.

¶128 The evidence identified above was sufficient to permit the trial court to find beyond a reasonable doubt that Habener intentionally, knowingly or recklessly failed to provide necessary medical attention to each of these five animals to prevent the animals' protracted suffering.

XI. Comments by the Court at Sentencing

¶129 Habener further argues that a comment made by the trial court at sentencing was not supported by the evidence. The court made the comment at issue while a person spoke on behalf of Habener at the sentencing hearing. That person stated that Habener's two horses, which were not the subject of any criminal charges and which Habener got to keep, "for some reason get a pass on all this[.]" The speaker was not sure why the horses were treated differently. The trial court responded,

I don't think that's at all the case here. I think there was no evidence that the two horses were being mistreated and that's why they were left on the property. But I don't think that there was any suggestion that they are not worthy of as much care and attention as any other animal. They were not being housed in small little crates, and there were not 65 of those being housed in one room in a small little crate

¶130 Habener argues the court was incorrect regarding the number of animals that were in crates and how many crates were in any particular room. Habener does not argue the comment played any role in the court's decision to impose probation or

the court's determination of the appropriate length or conditions of probation. Habener simply disagrees with what the court said. Because Habener failed to object below, we review for fundamental error. See *State v. Gendron*, 168 Ariz. 153, 154, 812 P.2d 626, 627 (1991).

¶31 We find no error. The court merely provided a simplified explanation for why the State did not bring any charges against Habener based on the care of her horses. The court communicated to the speaker, with an acceptable degree of hyperbole, that Habener was not charged with any offenses regarding her horses because she did not subject her horses to the same conditions and treatment she did the dogs and cats in her care. The court was not trying to explain literally how many animals were kept in crates, the size of the crates, the location of the crates, or the number of crates in any one particular room. Moreover, based on the evidence contained in the record on appeal, including the many photographs, the court's characterization was apt even if not exact. We also note there is nothing in the record to indicate the court's comment played any role in the ultimate disposition of this case.

XII. The Failure to Acknowledge "Beneficial Care"

¶32 Finally, Habener argues the trial court failed to acknowledge the beneficial care she provided to animals. Again,

Habener does not argue the court's alleged omission played any role in the court's decision to impose probation or the court's determination of the length or conditions of probation. Because Habener did not raise this issue below, we review for fundamental error. *Id.*

¶33 We find no error. Nothing in the record suggests the trial court failed to consider all of the sentencing factors Habener submitted for the court's consideration, including beneficial care animals may have received while at the shelters. The court was required to do nothing more. See *State v. Jenkins*, 193 Ariz. 115, 121, ¶ 25, 970 P.2d 947, 953 (App. 1998) (a trial court need not find mitigating factors simply because evidence is presented, but is only required to consider them).

CONCLUSION

¶34 We have read and considered counsel's brief and Habener's supplemental brief and have searched the entire record for reversible error. See *Leon*, 104 Ariz. at 300, 451 P.2d at 881. We find none. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. So far as the record reveals, Habener was represented by counsel at all stages of the proceedings, there was sufficient evidence for the trial court to find beyond a reasonable doubt that Habener committed the offenses, and the terms of probation imposed were within statutory limits.

¶135 After the filing of this decision, counsel's obligations pertaining to Habener's representation in this appeal have ended. Counsel need do no more than inform Habener of the status of the appeal and of her future options, unless counsel's review reveals an issue appropriate for submission to the Arizona Supreme Court by petition for review. See *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). On the court's own motion, Habener has thirty days from the date of this decision to proceed, if she desires, with a motion for reconsideration or petition for review *in propria persona*.

¶136 Accordingly, we affirm Habener's convictions and the imposition of probation.

/s/

MICHAEL J. BROWN, Presiding Judge

CONCURRING:

/s/

MARGARET H. DOWNIE, Judge

/s/

RANDALL M. HOWE, Judge