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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. DANIEL DICK, Appellant.	2 CA-CR 2012-0256 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100CR201100448

Honorable Robert Carter Olson, Judge

AFFIRMED IN PART;
VACATED IN PART AND REMANDED

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E C K E R S T R O M, Presiding Judge.

¶1 After a retrial to the court, appellant Daniel Dick was convicted of disorderly conduct and animal cruelty, both of which were designated class one misdemeanors. He was sentenced to sixty days in jail for animal cruelty to be followed by a suspended sentence and three-year term of probation for disorderly conduct. Dick also was ordered to pay $3,138.72 in restitution to the victims. He argues on appeal that the indictment charging him with disorderly conduct was duplicitous, the state improperly amended the indictment, there was insufficient evidence of disorderly conduct, he was "illegally convicted" of animal cruelty, the trial court erred in imposing consecutive sentences, and the award of restitution was improper. Because we find structural error in the record based on the violation of Dick's right to a jury trial on the disorderly conduct charge, we vacate his conviction and probationary term for disorderly conduct. However, we affirm his conviction and sentence for animal cruelty and remand for clarification regarding restitution.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the convictions. *State v. Kiper*, 181 Ariz. 62, 64, 887 P.2d 592, 594 (App. 1994). Tim P. testified that on the morning of March 29, 2010, he was living with Matthew and Tina M. Their mobile home was situated on about one acre of land in rural Pinal County. Tim was on the deck of the home when he saw Mr. and Mrs. M.'s neighbor, Dick, standing on his own back porch about 400 feet away. Dick pointed a gun downward, fired it, and then said, "I can't believe I didn't just kill you." Tim then saw "Panda," Mr. and Mrs. M.'s six-month old

puppy, "stumbling back towards the property[.] . . . [B]lood was gushing out of her muzzle, and she was hobbling, too."

¶3 Matthew M. testified he was getting ready for work that morning when he "heard a fairly large-caliber handgun go off." The gunshot sounded like it was not more than "a couple hundred yards" away. Tim ran in the house and told Matthew, "The neighbor shot Panda." Matthew went outside and "saw Panda on the front porch, bleeding profusely," with a "large hole through her nose" and one of her front legs severely injured. After being unable to obtain treatment for Panda's injuries, Matthew euthanized her later that day.

¶4 Dick was charged with animal cruelty and disorderly conduct, both class six felonies, but the jury could not reach a verdict on either charge. Before his second trial on the charges, the state moved to amend the indictment to designate the charges as misdemeanors rather than felonies. After a bench trial, the court found Dick guilty of both counts. This timely appeal followed the judgment of conviction and sentence.

Discussion

Disorderly Conduct

¶5 Although we do not search the record for error, we do not ignore structural error when it is apparent in the course of our review. *See State v. Valverde*, 220 Ariz. 582, ¶ 10, 208 P.3d 233, 236 (2009) ("If an appellate court finds structural error, reversal is mandated regardless of whether an objection is made below or prejudice is found."); *see also United States v. Atkinson*, 297 U.S. 157, 160 (1936) ("In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may,

of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings."); *State v. Hickman*, 205 Ariz. 192, n.7, 68 P.3d 418, 425 n.7 (2003) (structural error requires reversal because it implicates rights "so bound up with the reliability of the process that courts irrebuttably presume their violation had an effect on the outcome"). Our review of the record in this case reveals structural error in Dick's disorderly conduct conviction. Dick was charged with disorderly conduct pursuant to A.R.S. § 13-2904(A)(6), by intentionally or knowingly disturbing the peace of Tim, Matthew, and Tina when he "recklessly handled, displayed, or discharged a deadly weapon or dangerous instrument." After the jury in his first trial could not reach a verdict, the state moved to amend the indictment "to designate the present charges of Disorderly Conduct, Dangerous, in violation of A.R.S. [§] 13-2904(A)(6), 13-704, and Animal Cruelty, in violation of A.R.S. [§] 13-2910(A)(9) as misdemeanors."

¶6 On the first day of trial, the court stated, "My understanding is there was an agreement that this was going to proceed as two misdemeanor counts . . . . Those misdemeanor counts are . . . the same counts as the indictment except as Class 1 misdemeanors; is that correct?" The prosecutor responded that the court was correct, and that "there was some conversation about the subsections and I'm not sure if that made it into writing, but I do have them written out if the Court would like." The court took a copy of the document and asked the prosecutor to provide a copy to Dick. The record does not provide further details about the document or whether the prosecutor actually provided Dick with a copy. But the court's minute entry order from the second day of

trial states, "The court was provided corrected counts and cites at the start of the trial and the Court is amending and clarifying that the counts are Count 1, Disorderly Conduct, [§] 13-2904, and Count 2, Animal Cruelty, [§] 13-2910(A)(3), both class 1 misdemeanors."

¶7 During trial, the state presented evidence focused on proving disorderly conduct under § 13-2904(A)(6): that Dick disturbed the neighbors' peace when he displayed and then fired his gun. No other subsections of the disorderly conduct statute involve a "deadly weapon or dangerous instrument," which the indictment alleged. *See* § 13-2904(A)(1)-(6). And, on appeal, the state operates under the presumption Dick was convicted pursuant to subsection (6). But the trial court did not specify the subsection of § 13-2904 under which he was convicted at trial, at the sentencing hearing, or in the minute entry setting forth the judgment of conviction.

¶8 In general, when an offense is a class six felony and is not a dangerous offense, it can be reduced to a class one misdemeanor either by the state at the charging phase or by the trial court upon conviction. *See* A.R.S. § 13-604(A), (B). Here, however, neither the state nor the court had the authority to reduce Dick's disorderly conduct charge from a class six felony to a misdemeanor because the offense charged pursuant to § 13-2904(A)(6) both expressly involved the use of a deadly weapon and was alleged as a dangerous nature offense. *See* A.R.S. §§ 13-105(13), 13-604(A), (B) (state has no authority to reduce "dangerous offense" to misdemeanor).

¶9 In supplemental briefing ordered by this court, the state maintains that § 13-604(A) and (B) authorize a prosecutor to reduce any class six offense to a class one misdemeanor so long as any allegation of dangerous nature has been dismissed,

regardless of whether the elements of the underlying offense involve use of a deadly weapon. And, the state contends it implicitly dismissed the dangerous nature allegation here when it moved to amend the indictment to redesignate the offenses as misdemeanors. We cannot agree with either contention.

¶10 The plain language of § 13-604 only allows the state or court to redesignate those class six felonies "not involving a dangerous offense." The legislature has expressly defined a "[d]angerous offense" as an offense "involving the discharge, use or threatening exhibition of a deadly weapon." § 13-105(13). The offense charged here, disorderly conduct pursuant to § 13-2904(A)(6), requires proof that the defendant "recklessly handle[d], display[ed] or discharge[d] a deadly weapon." Accordingly, § 13-2904(A)(6) is a "dangerous offense" that may not be reclassified as a misdemeanor pursuant to § 13-604. *See State v. Garcia*, 219 Ariz. 104, ¶¶ 4-5, 16, 193 P.3d 798, 799, 802 (App. 2008) (prohibiting reduction of class six felony involving use of weapon to misdemeanor under provision of former A.R.S. § 13-702 now found in § 13-604).[1]

¶11 Relying on *Montero v. Foreman*, 204 Ariz. 378, 64 P.3d 206 (App. 2003), the state contends that it had the authority to recharacterize the offense as "non-

[1]Although the statute in effect at the time *Garcia* was decided expressly precluded class six felonies "involving the intentional or knowing infliction of serious physical injury or the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument" from being reduced to misdemeanors, the current statute substituted that language with the term "dangerous offense." *Compare* 2006 Ariz. Sess. Laws, ch. 148, § 1 (former § 13-702(G)), *with* § 13-604(A). Because the term carries the same meaning, *see* § 13-105(13), and because the changes to the criminal sentencing laws in 2009—when the substitution of "dangerous offense" occurred—were not intended to be substantive, *see* 2008 Ariz. Sess. Laws, ch. 301, §§ 16, 24, 119, we conclude the reasoning of *Garcia* remains applicable to the current § 13-604.

dangerous" by implicitly dismissing the dangerous nature allegation it had filed. But *Montero* did not involve the court or prosecutor's discretion to reduce a charge to a misdemeanor under § 13-604; rather, we simply noted in the procedural history of the case that, pursuant to a plea agreement, the state had dismissed the dangerousness allegation connected to a prior disorderly conduct charge. *See Montero*, 204 Ariz. 378, ¶ 2, 64 P.3d at 207.

¶12 In essence, the state's argument overlooks the difference between its authority to enhance a sentence by proving a dangerous nature allegation and the legislature's ultimate authority to classify offenses. Section 13-704(L), the provision that authorizes the state to enhance a sentence by filing an allegation of dangerousness, contains no language suggesting the filing or dismissal of such an allegation can alter the classification of the underlying offense. And, were we to interpret § 13-604 as allowing the state to reclassify otherwise dangerous offenses as misdemeanors simply by dismissing a dangerous nature allegation used for felony sentence enhancement, the language therein prohibiting the redesignation of dangerous offenses to misdemeanors would be rendered a nullity. *See State v. Rogers*, 227 Ariz. 55, ¶ 8, 251 P.3d 1042, 1044 (App. 2010) (we interpret statutes to give every phrase and clause meaning); *see also Garcia*, 219 Ariz. 104, n.4, 193 P.3d at 802 n.4 (rejecting argument § 13-604 "preclude[s] from misdemeanor designation only those class 6 felonies where there has been a jury determination of dangerousness" under § 13-704).[2] For this reason, Dick was

[2]Moreover, while logic may support the suggestion the prosecutor intended to dismiss the dangerous nature allegation originally filed when she amended the offenses to

charged with, tried for, and convicted of, an offense the legislature clearly has decided can only be a class six felony.

¶13 Although Dick was sentenced only for a misdemeanor and, therefore, arguably suffered no prejudice in terms of the punishment he received, both the United States Constitution and the Arizona Constitution provide the right to a jury trial for those accused of "serious offenses." *Derendal v. Griffith*, 209 Ariz. 416, ¶¶ 8, 13, 104 P.3d 147, 150, 151 (2005); *see* U.S. Const. amend. VI; Ariz. Const. art. II, §§ 23, 24. And when the legislature has both classified an offense as a felony and provided that it cannot be reduced to a misdemeanor, it has determined that offense is a "serious" one that encompasses the right to a jury trial. *See Derendal*, 209 Ariz. 416, ¶¶ 17, 21, 104 P.3d at 152, 153 (legislature's classification of offense sets maximum penalty, which entails "'a judgment about the seriousness of the offense'"), *quoting Blanton v. City of N. Las Vegas*, 489 U.S. 538, 541 (1989); *Stoudamire v. Simon*, 213 Ariz. 296, ¶ 11, 141 P.3d 776, 779 (App. 2006) (defendant entitled to jury trial for "serious" offense when, as charged, crime carries maximum penalty greater than six months' imprisonment); *Amancio v. Forster*, 196 Ariz. 95, ¶ 16, 993 P.2d 1059, 1062 (App. 1999) (classification of offense as felony does not mandate jury trial when prosecutor exercises legislatively granted discretion to reduce charge to misdemeanor).

¶14 Here, the legislature both classified the offense as a class six felony and excluded the offense from the group of class six felonies that can be reduced to

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make them misdemeanors, the record does not support that this occurred. To the contrary, the state explicitly referred to § 13-704, the dangerous offender sentencing statute, in describing the newly reclassified offenses in its motion to amend.

misdemeanors under § 13-604, thereby making clear its determination that disorderly conduct with a weapon under § 13-2904(A)(6) is a "serious offense" requiring a jury trial. Dick did not waive his right to a jury trial, and, therefore, the fact he was not provided one constitutes structural error we cannot overlook. *See Sullivan v. Louisiana*, 508 U.S. 275, 281-82 (1993) (recognizing violation of right to jury trial structural error); *State v. Becerra*, 231 Ariz. 200, ¶ 16, 291 P.3d 994, 998 (App. 2013) (same); *State v. Innes*, 227 Ariz. 545, ¶ 6, 260 P.3d 1110, 1111 (App. 2011) (same); *cf. State v. Frey*, 141 Ariz. 321, 322-23, 686 P.2d 1291, 1292-93 (App. 1984) (reversing conviction on ground defendant deprived of right to jury trial when trial court stated its intention to designate offense misdemeanor if defendant convicted, then conducted bench trial on felony charge).[3] Dick's conviction for disorderly conduct therefore is vacated.

Animal Cruelty

¶15 Dick argues his conviction for animal cruelty must be reversed because he was not charged with the crime for which he was convicted nor is it a lesser-included

[3]A defendant knowingly, voluntarily, and intelligently can waive his right to a jury trial, *Innes*, 227 Ariz. 545, ¶ 5, 260 P.3d at 1111, but there is no evidence in our record Dick did so here. *See* Ariz. R. Crim. P. 18.1(b)(2) (jury trial waiver must be in writing or in open court on record); *cf. Innes*, 227 Ariz. 545, ¶ 9, 260 P.3d at 1112 (refusing state's request for additional factfinding on waiver when "record d[id] not evidence a knowing, voluntary and intelligent jury-trial waiver"). Rather, it appears the state and court proceeded with a bench trial based on the erroneous assumption the amended crimes charged were misdemeanors, and Dick therefore was not entitled to a jury trial. The court's minute entry from a motions hearing in September 2011 provides as follows: "Counsel for the state advises the state has designated the charges as misdemeanors, and the next hearing shall be a Bench Trial." The court then affirmed the bench trial for the same date a jury trial previously had been set.

offense of the crime with which he was charged.[4] He also contends "the state's insistence upon re-designating the statute number at the time of trial constitutes an illegal modification of the indictment."[5]

¶16 Dick originally was charged with violating § 13-2910(A)(9) "by intentionally or knowingly subjecting an[] animal to cruel mistreatment, to wit: sho[oting] a puppy." "Cruel mistreatment" occurs when a person "torture[s] or otherwise inflict[s] unnecessary serious physical injury on an animal or . . . kill[s] an animal in a manner that causes protracted suffering to the animal." § 13-2910(H)(2). In its motion to amend the indictment after Dick's first trial, the state did not change the subsection with which he was being charged. Rather, it contended it was designating the same offense, § 13-2910(A)(9), a misdemeanor.

¶17 Nevertheless, at the end of trial, the state alleged that Dick was being tried for violating § 13-2910(A)(3), which prohibits "[i]ntentionally, knowingly or recklessly inflict[ing] unnecessary physical injury to any animal," *id.*, and is designated a class one

[4]He bases his argument mainly on the erroneous contention that the state had argued "that Subsection (A)(3) is the lesser offense of Subsection (A)(8)" of § 13-2910. However, the record is clear the state only misspoke when it mentioned subsection (8). Accordingly, we will not address further the portions of his argument that pertain solely to this misstatement.

[5]The state contends he has waived the arguments due to his failure to develop them. But whether to apply waiver is within this court's discretion. *See, e.g., State v. Smith*, 203 Ariz. 75, ¶ 12, 50 P.3d 825, 829 (2002). In finding error in the disorderly conduct conviction, we came across the same potential error in the animal cruelty conviction. And the likelihood of the same error in the animal cruelty conviction suggested we should address Dick's arguments related to the validity of that conviction in the interests of justice, although we ultimately found no error in that conviction. *See Liristis v. Am. Family Mut. Ins. Co.*, 204 Ariz. 140, ¶ 11, 61 P.3d 22, 25 (App. 2002) ("[W]e may forego application of the [waiver] rule when justice requires.").

misdemeanor. § 13-2910(G). Dick did not disagree or object. And, in its sentencing minute entry setting forth the judgment of conviction, the trial court specified Dick had been convicted under § 13-2910(A)(3). Thus, the record appears to support Dick's contention that he was convicted of a crime with which he never was charged. Such a conviction is valid "only if it is included in the offense charged." *State v. Sanders*, 115 Ariz. 289, 290, 564 P.2d 1256, 1257 (App. 1977).[6] This is because "a defendant is on notice of lesser-included offenses from the time of indictment." *State v. Blakley*, 204 Ariz. 429, ¶ 51, 65 P.3d 77, 88 (2003); *accord* Ariz. R. Crim. P. 13.2(c).

¶18 Whether an offense is a lesser-included offense is determined either by analyzing the general statutory elements of a crime or by examining the offense specifically alleged in the charging document. *State v. Larson*, 222 Ariz. 341, ¶¶ 7-8, 13, 214 P.3d 429, 431, 432 (App. 2009). Under the elements test, a lesser-included offense is "composed solely of some but not all of the elements of the greater crime so that it is impossible to have committed the crime charged without having committed the lesser one." *State v. Celaya*, 135 Ariz. 248, 251, 660 P.2d 849, 852 (1983). Under the charging document test, a lesser-included offense does not always have to be "'a constituent part of the greater offense,'" as long as "'the charging document describes the lesser

[6]The conviction also "can be valid . . . if defendant consented to the amendment of the charge[]." *State v. Foster*, 191 Ariz. 355, ¶ 7, 955 P.2d 993, 995 (App. 1998); *accord Sanders*, 115 Ariz. at 291, 564 P.2d at 1258. The record suggests Dick acquiesced to the later implicit amendment, but it is not clear that he expressly consented. *Cf. Sanders*, 115 Ariz. at 293, 564 P.2d at 1260 (determining silence could not be construed as consent under circumstances of case). But because we have determined the offense he was convicted of is a lesser-included offense of the one with which he was originally charged, we need not decide whether his acquiescence was sufficient to constitute consent.

offense.'" *State v. Brown*, 195 Ariz. 206, ¶ 5, 986 P.2d 239, 240-41 (App. 1999), *quoting State v. Chabolla-Hinojosa*, 192 Ariz. 360, ¶ 12, 965 P.2d 94, 97 (App. 1998).

¶19 Dick argues that § 13-2910(A)(3) is not a lesser-included offense of § 13-2910(A)(9) because "an individual can commit cruel mistreatment of an animal without inflicting unnecessary physical injury." In the abstract, this statement may be true. However, the term "cruel mistreatment" has been given a special meaning by the legislature, which has defined it as, "to torture or otherwise inflict unnecessary serious physical injury on an animal or to kill an animal in a manner that causes protracted suffering to the animal." § 13-2910(H)(2). In light of that definition, we can imagine no scenario in which a person could subject an animal to cruel mistreatment under § 13-2910(A)(9) without also violating § 13-2910(A)(3), which prohibits inflicting unnecessary physical injury on an animal. Thus, it appears that subsection (3) is always a constituent part of subsection (9). Even if this is not always the case, the indictment here states Dick committed animal cruelty when he "shot a puppy," making § 13-2910(A)(3) a lesser-included offense of § 13-2910(A)(9) as charged. *See Brown*, 195 Ariz. 206, ¶ 5, 986 P.2d at 240-41.

¶20 To the extent Dick argues the indictment was amended erroneously, he did not raise this argument below and, therefore, he has the burden of showing he has suffered actual prejudice from any implicit amendment. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005). Here, Dick can show no prejudice. He had notice the state was alleging and intending to prove that shooting the puppy had caused it to suffer unnecessary physical injury. His only defense was self-defense. There

was no dispute that he shot the dog and caused it to be injured. Nor was there a dispute about the extent of the dog's injuries. *Cf. Freeney*, 223 Ariz. 110, ¶¶ 27-28, 219 P.3d at 1043-44 (finding improper amendment of indictment harmless error when defendant had notice of charges and no suggestion amendment affected defense). Accordingly, we affirm Dick's conviction for animal cruelty under § 13-2910(A)(3).

Restitution

¶21 A defendant who has been convicted of a crime shall be ordered "to make restitution to the person who is the victim of the crime . . . in the full amount of the economic loss as determined by the court." A.R.S. § 13-603(C); *see also* A.R.S. § 13-804(A); *State v. Madrid*, 207 Ariz. 296, ¶ 4, 85 P.3d 1054, 1056 (App. 2004). The court ordered Dick to pay restitution to the victims in the amount of $3,138.72, with $3,000 to be paid to Matthew and $138.72 to Tim. Those amounts represented the replacement cost of the puppy, lost wages, and mileage for travel to and from court proceedings. Dick concedes that lost wages are appropriate for restitution but contends that the restitution award should be vacated because "there was no evidence here that either [Tim] or [Matthew] actually suffered an economic loss, or even lost vacation time or annual leave." We will uphold a restitution award "if it bears a reasonable relationship to the victim's loss." *State v. Lindsley*, 191 Ariz. 195, 197, 953 P.2d 1248, 1250 (App. 1997).

¶22 The state presented evidence in the form of Matthew's sworn declaration, paystubs, and restitution logs that enumerated Matthew's lost wages and mileage incurred for attending the court proceedings. Tim requested mileage reimbursement for three days he attended court proceedings and the mileage was proven by a map showing the distance

he had traveled to court. This was sufficient evidence from which the trial court could have found the victims were entitled to restitution for lost wages and mileage of approximately $2,800.

¶23 Dick also complains that he was ordered to pay $300 for the cost of replacing Panda, "even though the M[. family] had not purchased the dog, and there was no evidence they replaced it." But Dick has not provided any authority for the proposition that those factors are a requirement for restitution. And indeed, Dick agreed at the restitution hearing that paying for the cost of the puppy or a replacement was "reasonable." We find no error in the amount of restitution awarded.

¶24 Finally, Dick argues that because "the court ordered restitution on Count 1, but not on Count 2," and because we are vacating count one, the disorderly conduct conviction, the restitution order must also be vacated. Although the sentencing minute entry suggests the trial court imposed restitution only on count one, the record from the sentencing hearing is unclear. But because his animal cruelty conviction still stands, and because the victims' losses were caused by Dick's criminal actions, the court could have awarded restitution as to count two. We remand the case to the court to clarify whether the restitution award applies to the animal cruelty conviction.

Disposition

¶25 For the foregoing reasons, we vacate Dick's conviction and sentence for disorderly conduct, affirm his conviction and sentence for animal cruelty, and remand the case for the court to clarify the restitution order.[7]

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge*

*A retired judge of the Arizona Court of Appeals authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court Order filed December 12, 2012.

[7]Because we have vacated the disorderly conduct conviction, we do not address Dick's argument that the trial court erred by imposing consecutive sentences.