STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v STEPHEN R. FENNELL, Defendant-Appellant.	FOR PUBLICATION January 8, 2004 9:00 a.m. No. 241339 Wayne Circuit Court LC No. 01-009601-01 Updated Copy March 26, 2004

Before: Gage, P.J., and White and Cooper, JJ.

WHITE, J. (*dissenting*).

I respectfully dissent. The instruction given failed to convey the essential elements of the offense, and defendant is therefore entitled to a new trial. The statute uses the words "willfully" and "maliciously." At a minimum, this phrase requires that a defendant either intend to kill, torture, mutilate, maim, or disfigure an animal, or act with a heedless disregard that the prohibited harm is a plain and strong likelihood. The instruction given permitted the jury to convict defendant on a finding that he threw a firecracker in the direction of the barn, knowing that it was wrong to do so, with the intent to cause any degree of mental harm to the horses, including simply scaring them, without regard to whether defendant intended to kill, torture, mutilate, maim, or disfigure, and without regard to whether defendant intentionally acted in heedless disregard that the killing torture, mutilation, maiming, or disfiguring of the horses was a plain and strong likelihood.

The cases relied on by the majority do not lead to a contrary conclusion. In *People v Nowack*, 462 Mich 392; 614 NW2d 78 (2000), the Court discussed common-law arson. The Court stated that common-law arson is a general intent crime:

> Common-law arson is a general intent crime. "[T]he enduring common law definition of the mental element of" arson is that the burning be done "maliciously and voluntarily." Poulos, *The metamorphosis of the law of arson*, 51 Mo L R 295, 319 (1986). A malicious burning occurs when the defendant "either intentionally or wantonly burns property without justification or excuse." *Id.*, p 403. Wanton arson "required an intentional act which created a very high risk of burning a dwelling house, which risk was known by the actor and disregarded

when the actor performed the risk taking act." *Id.*, p. 408. "[T]he word 'willfully' adds nothing to the common law concept of malice . . . ." *Id.*, p. 404.

> The common law defines arson as the performance of any act resulting in the burning of a dwelling house that was done with malice. Perkins, Criminal Law (2d ed), ch 3, § 2, pp 216-219. *Common-law malice requires either: 1) an actual intent to commit the actus reus,* or *2) an intent to act with a heedless disregard that the prohibited harm is a plain and strong likelihood. Id.,* ch 7, § 4, pp 766-768, and n 25. [462 Mich 406-407. Emphasis added.]

Although *Nowack* declares that common-law arson is a general intent crime, and that within the definition of that offense the concept of "willfully" adds nothing to the common-law concept of "malice," the case nevertheless requires either an intent to set fire or an intent to act with a heedless disregard that the prohibited harm is a plain and strong likelihood. Here, the instruction given required neither intent.

In *People v Tessmer*, 171 Mich 522; 137 NW 214 (1912), the issue was whether the predecessor to MCL 750.377 required proof that the defendant acted with malice toward the owner of the animal. Tessmer had put a strap around a horse's tongue and had pulled on it with his full strength, while remarking that he would make the mare draw or he would kill her. The horse was so badly injured that she had to be killed. There was no evidence of any malice toward the owner, and it appeared that the defendant had become angry at the mare for refusing to work. The *Tessmer* Court, *id.* at 524-527, quoted from *People v Minney*, 155 Mich 534; 119 NW 918 (1909), in which the defendant was charged under the same statute for mutilating a horse by cutting out its tongue:

> "It was not shown that respondent had any motive for the commission of the crime. He had no ill will against Mr. Murphy (the owner), had done some work for him about two years before, and they had had no intercourse since. * * * *The act itself is one of those which, when proven, conclusively establishes the malicious intent if committed by a sane person.* * * * If the evidence established the fact that the respondent committed the deed, he would escape conviction only by a further finding by the jury that he was irresponsible by reason of insanity."
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> Coming to the discussion of the question involved in the instant case, at the bottom of page 540 of 155 Mich. (119 N.W. 921), attention is called to the error assigned upon the instruction of the court that "it is not necessary that there be malice towards the owner of the animal in a case like this." Justice GRANT then says:
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> "Malice is an essential ingredient of the crime, and under the clear weight of authority, both in England and the United States, the *malice* required must be toward the owner or custodian of the animal, and not malice toward the animal. The rule to be deduced from the authorities is that it is not essential to show express malice, but that the malice required may be shown by the character of, and the circumstances surrounding, the crime"—citing authorities.

He then quotes from Mr. East as follows:

> "But it does not appear to have been decided that it is necessary to give express evidence of previous malice against the owner in order to bring a case within the act; but, *the fact being proved to be done wilfully, which can only proceed from a brutal or malignant mind, it seems a question solely for the consideration of the jury to attribute the real motive to it, to which the transaction itself will most probably furnish a clue*."
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> The opinion then *proceeds* to state that the question under this statute had not before arisen in this State, but that it had arisen upon two other statutes involving malicious injury to property. Section 9275 of Howell (which was repealed in 1891 [Act No. 23, Pub. Acts 1891]) is then quoted in full. . . .
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> An examination of *People v. Petheram* [64 Mich 252; 31 NW 188 (1887)] will show that the question was fully discussed and the distinction between malicious mischief and these statutory offenses is pointed out, and Justice MORSE said on pages 265 and 266 of 64 Mich. (31 N.W. 194):
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> "*Malice is best defined, in my opinion, as 'a wicked intent to do an injury'; and it is not necessary that the malice be directed against any particular person; it may be deduced from an intent generally to injure.*
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> "It is a general rule, governing the law of malice, that when a man commits an act, unaccompanied by any circumstances justifying its *commission*, the law presumes that he has acted advisedly, and with an intent to produce the consequences which have ensued."
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> * * *
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> It appears from this record that the respondent, at the time of the offense charged, was a man of mature years; that he was sane; that he did in fact maim the animal; that he maimed it so badly that it was found necessary to shoot it; that he was urged at the time by a person present not to commit the acts that he did commit; that he refused to desist, and declared that, if necessary, he would kill the animal. [Emphasis added.]

I do not find *Tessmer* inconsistent with requiring either an intent to kill, torture, mutilate, maim, or disfigure, or an act done intentionally in heedless disregard that the prohibited harm is a plain and strong likelihood. In *Tessmer*, it was clear that the defendant intentionally mutilated or

maimed the horse, or that he pulled on her tongue with a heedless disregard that it was likely that he would mutilate or maim her.[1] The only issue for the Court was whether the defendant was entitled to a directed verdict of acquittal on the basis that he bore no malice toward the horse's owner.

In *People v Iehl*, 100 Mich App 277; 299 NW2d 46 (1980), the defendant, who apparently shot and killed a dog, claimed error on the basis that the court instructed the jurors that they could find the defendant guilty if they found that he acted with malice towards either the owner or the dog, when they should have been required to find that the defendant acted with malice toward the dog. The Court determined that the jury need not find that a defendant acted with malice toward either the owner or the animal, but only that he committed the act, knowing it to be wrong, without just cause or excuse, and did it intentionally *or with a conscious disregard of known risks to the property of another*.[2]

When a criminal statute uses the words "willfully and maliciously" more is required to convict than a finding that the defendant intended to do the act that resulted in the prohibited harm, although the harm may have been unintended and unanticipated. No case has been cited that allows a conviction under a willful and malicious statute on a mere showing that the defendant intentionally performed an act that resulted in the prohibited harm, even knowing the act to be in some sense wrong, without regard to the defendant's state of mind (intending or in conscious disregard) in relation to the prohibited harm. When the cases state the requirement that the act be done intentionally or with a conscious disregard of the known risk, *Iehl, supra* at 280, or with an actual intent to commit the actus reus, or with an intent to act with a heedless disregard that the prohibited harm is a plain and strong likelihood, *Nowack, supra* at 407, the act that must be done intentionally is the act prohibited by the statute, i.e., the killing, torturing, mutilating, maiming, or disfiguring of the animal, not some intermediate act that may have led to that result. There must be some intent to cause the prohibited harm, or a heedless disregard that

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[1] This is evident from the Court's statements, quoted above. Further, the actual instruction to the jury required a finding of intent to deprive the horse of the use of its tongue.

[2] *People v McKnight*, 102 Mich App 581; 302 NW2d 241 (1980), a case not addressed by the majority but involving the statute, also supports that the instant instruction was deficient. In *McKnight*, the defendant, who had kicked a dog to death, argued that his guilty plea should be reversed because there was insufficient factual basis to support a finding that he had the requisite willful and malicious intent to kill the dog. After stating the rule that a factual basis for accepting a plea exists if an inculpatory inference can reasonably be drawn from the facts admitted, the Court concluded:

> A jury could properly infer willful and malicious intent to kill, even where defendant disclaims such intent, from evidence that he intentionally set in motion a force likely to cause death or grievous bodily harm—here kicking the dog. [*Id.* at 585.]

the likely consequence or known risk of the intentional act is to result in the prohibited harm. *Nowack, supra.*[3]

Here, it was not enough that the jury was required to find that defendant killed or tortured an animal or did anything that resulted in the killing or torturing of an animal; and that at the time of the commission of the crime, defendant knew that his actions were wrong and intended to cause physical or mental harm to an animal. The instruction permitted a finding of guilt based on an intent to cause any physical or mental harm to an animal, and made no reference to an intent to cause the prohibited harm or to a conscious or heedless disregard of the likelihood of causing such harm.

The instruction given in the instant case omitted an essential element of the offense charged. An instructional error omitting an element of a crime is error of constitutional magnitude. *People v Carines*, 460 Mich 750, 761; 597 NW2d 130 (1999), citing *United States v Gaudin*, 515 US 506, 510; 115 S Ct 2310; 132 L Ed 2d 444 (1995). Because defendant preserved this error below, this Court must determine whether the beneficiary of the error has established that it is harmless beyond a reasonable doubt. *Carines, supra* at 774.

The prosecution has not established that the error was harmless beyond a reasonable doubt. The jury could have found defendant guilty on a finding that he did not intend to cause any physical harm at all to the horses, that setting the barn on fire, with the attendant result of the horses being killed or tortured, was neither intended nor a plain and likely result or a known risk of throwing the firecracker, and that defendant's only intent was to scare the horses. Because the instruction given required neither an intent to kill, torture, mutilate, maim, or disfigure, nor an intentional act in heedless disregard that the killing, torturing, mutilation, maiming, or disfiguring of an animal was the plain and likely result, or in conscious disregard of the known risk that such harm would occur,[4] defendant's criminal conviction did not rest on a jury

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[3] In both *Tessmer* and *Iehl*, the defendants were alleged to have committed acts that, if done intentionally, necessarily established that they willfully and maliciously killed or maimed the animals. In *Tessmer*, the defendant was accused of pulling on the horse's tongue until she lost the use of it. If this act was done intentionally, then perforce, the maiming was intentional or done with heedless disregard of the likelihood of maiming. In *Iehl*, the defendant was accused of shooting a dog. If this was done intentionally, then perforce, the killing or torture of the dog was intentional or done with heedless disregard of the likelihood of causing the killing or torture.

[4] I note that the prosecutor, in fact, made this argument:

> Well, the instruction tells you, either he killed or tortured and/or did anything that resulted in the killing and/or torture. And it goes on to tell you, torture means severe physical or mental pain, agony or anguish. That's the act that results here. Obviously, these horses were severely physically and mentally in pain, agony or anguish as a result of that fire.
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> But look it [sic], and that's the part that I highlighted here. Second, that at

(continued…)

determination that he was guilty beyond a reasonable doubt of every element of the crime charged. Defendant is therefore entitled to a new trial. *Carines, supra.*

I would reverse.

/s/ Helene N. White

(…continued)

the time of the commission of the crime, the defendant knew that his actions were wrong, and intended to cause physical or mental harm to the animal. This is the intent that's required in doing these acts up here. Intended to cause physical or mental harm to an animal. *You notice that the same words are not repeated down here. It don't* [sic] *say severe physical or mental pain, agony or anguish. It says cause physical or mental harm.*

Did the defendant intend to cause, without using the words severe anguish and so forth. Did he mean to cause physical or mental harm to an animal? That's exactly what he meant to do. He said it. He said he wanted to scare the horses. [Emphasis added.]