

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN B. HUGUELET,

Defendant-Appellant.

UNPUBLISHED

October 13, 2011

No. 299379

Isabella Circuit Court

LC No. 09-1241-FH

Before: SHAPIRO, P.J., and SAAD and BECKERING, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of abandonment or cruelty of four to nine animals, MCL 750.50(4)(c). Defendant was sentenced to serve 36 months probation, as well as 90 days in jail, the latter to be suspended pending successful completion of probation. Defendant appeals as of right. We affirm.

Defendant's conviction arose after law enforcement officers responded to a report of possible animal neglect and observed several horses that appeared to be underfed. Defendant was present and cooperative with the officers and agreed to have a veterinarian come out to the property to check out the animals. The veterinarian, Dr. DaMore, had to euthanize two animals after discovering septic lines in their mouths.¹ Dr. DaMore advised defendant to get the horses more feed; defendant immediately provided some additional feed and agreed to obtain more.

The following day, an animal control officer visited defendant's property at Dr. DaMore's request. The animal control officer observed the horses with defendant's permission and described the animals as looking "skinny" and "in very bad shape." Thereafter, the animal control officer obtained a warrant to seize the horses. The animal control officer returned later the same day with the warrant, deputies, and two veterinarians, including Dr. DaMore. The second veterinarian, Dr. Pol, also opined that the horses appeared to be malnourished. One horse was down when the group arrived and had to be immediately euthanized. A total of four horses were put down that day, either from being too thin, having bad feet, or, in one case, being too

¹ A septic line is evidence that toxins have entered a horse's blood stream and usually appears in the last 10 to 12 hours before a horse's demise.

wild during the roundup. The remaining five horses were taken away. A few weeks later, one of those horses had to be euthanized as well.

Defendant was charged with one count of abandonment or cruelty involving more than 10 animals, pursuant to MCL 750.50(4)(d). However, following a four-day jury trial, defendant was convicted of the lesser included offense of abandonment or cruelty involving four to nine animals, MCL 750.50(4)(c).

Defendant first argues he is entitled to a new trial because the jury was not provided with a specific unanimity instruction. However, defendant's trial counsel affirmatively approved the instructions provided to the jury, thereby waiving this claim of error. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). Waiver extinguishes the underlying error and the relevant issue cannot be appealed. *People v Adams*, 245 Mich App 226, 239-240; 627 NW2d 623 (2001). Nevertheless, a discussion of the merit of defendant's argument related to the appropriateness of the instruction is necessary to evaluate defendant's alternative claim that he was denied the effective assistance of counsel due to trial counsel's failure to request a unanimity instruction and failure to object to the instructions as given.

To prevail on a claim of ineffective assistance of counsel, defendant must show: (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) the resultant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Accordingly, to be entitled to relief, defendant must show that trial counsel's failure to request a specific unanimity instruction was objectively unreasonable and that such failure resulted in prejudice.

The Michigan Constitution provides that a criminal defendant has a right to a unanimous verdict. Const 1963, art 1, § 14; *People v Cooks*, 446 Mich 503, 510-511; 521 NW2d 275 (1994). In most cases a general unanimity instruction will protect that right. *Cooks*, 446 Mich at 524. However, a specific unanimity instruction is required when there is evidence of alternative acts allegedly committed by the defendant, each satisfying the actus reus element of the charged offense, and (1) "the alternative acts are materially distinct (where the acts themselves are conceptually distinct or where either party has offered materially distinct proofs regarding one of the alternatives)," or (2) "there is reason to believe the jurors might be confused or disagree about the factual basis of defendant's guilt." *People v Martin*, 271 Mich App 280, 338; 721 NW2d 815 (2006), quoting *Cooks*, 446 Mich at 524.

Defendant alleges that the prosecution had two distinct theories at trial. First, he argues that the prosecution introduced evidence of underfed horses to show that defendant failed to provide adequate care, in violation of MCL 750.50(2)(a). Second, he asserts that the prosecution produced evidence of overgrown hooves as an alternative to show that defendant negligently allowed the animals to suffer in violation of MCL 750.50(2)(f). However, review of the record leads to the clear conclusion that the jury was provided with one theory of continuous neglect involving both insufficient food and insufficient veterinary care. The prosecution repeatedly urged the jury to view the facts as a unified whole. The facts were not presented as alternate

theories of guilt. A series of acts comprising one conceptual group does not trigger a need for a unanimity instruction. *Cooks*, 446 Mich at 524.

Subsection (2)(a) prohibits the failure “to provide an animal with adequate care.” MCL 750.50(2)(a). Adequate care is defined as “the provision of sufficient food, water, shelter, sanitary conditions, exercise, and veterinary medical attention in order to maintain an animal in a state of good health.” MCL 750.50(1)(a). Both overgrown hooves and insufficient food are thus contemplated under subsection (2)(a). Similarly, subsection (2)(f) prohibits “[n]egligently allow[ing] any animal . . . to suffer unnecessary neglect, torture or pain.” MCL 750.50(2)(f). Neglect means a failure “to sufficiently and properly care for an animal to the extent that the animal’s health is jeopardized.” MCL 750.50(1)(h). This standard also encompasses provision of both food and veterinary attention. Thus, at least under the facts of this case, the two subsections at issue are substantively indistinguishable. Further, “[w]hen a statute lists alternative means of committing an offense which in and of themselves do not constitute separate and distinct offenses, jury unanimity is not required with regard to the alternate theory.” *People v Johnson*, 187 Mich App 621, 629-630; 468 NW2d 307 (1991).

Because a specific unanimity instruction was not required in this case, trial counsel’s failure to request such an instruction was not objectively unreasonable. Therefore, defendant was not denied effective assistance of counsel.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Henry William Saad
/s/ Jane M. Beckering