IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-496

Filed: 20 December 2016

Lenoir County, No. 13 CRS 51601

STATE OF NORTH CAROLINA

v.

JENNIFER MARIE WILSON

Appeal by Defendant from judgment entered 2 December 2015 by Judge Benjamin G. Alford in Lenoir County Superior Court. Heard in the Court of Appeals 4 October 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Brenda Menard, for the State.

Hollers & Atkinson, by Russell J. Hollers, III, for Defendant.

STEPHENS, Judge.

Defendant appeals from her conviction of felony cruelty to animals, contending that the trial court erred in refusing to instruct the jury on the lesser included offense of misdemeanor cruelty to animals. Because no evidence was presented from which a jury could find that Defendant intentionally injured her son's dog by dragging him behind her vehicle but did so without malice, the trial court was not required to instruct on the lesser included offense.

Factual and Procedural Background

On 4 March 2014, a Lenoir County grand jury indicted Defendant Jennifer Marie Wilson on the charge of felony cruelty to animals. The matter came on for trial before a jury during the 30 November 2015 criminal session of Lenoir County Superior Court, the Honorable Benjamin G. Alford, Judge presiding.

The evidence presented tended to show that, during the early morning hours of 6 July 2013, law enforcement officers with the Kinston Department of Public Safety ("KDPS") responded to a report of a motor vehicle collision at a gas station/convenience store in Kinston. Prior to the collision, a patron of the store had observed a white SUV drive into the parking lot, with a small, brown pit bull dog tied to the back bumper. Photos introduced at trial showed severe abrasions on the dog's legs and body, and blood streaks and blood puddles on the parking lot. The patron pointed out to Wilson that a dog was tied to her bumper. Wilson walked to the rear of the SUV and unleashed the dog, then walked into the convenience store. When she returned, the patron spoke to Wilson.

> Q. [D]id . . . Wilson say anything about the dog that was attached?
>
> A. She—she said the dog—she didn't know the dog was tied to the truck—the vehicle.
>
> Q. And did she say anything about the dog?
>
> A. She said she didn't want the dog . . . .

The patron then took the dog to the side of the convenience store. Wilson entered her vehicle, and began to back out of her parking space when she hit a vehicle parked at a gas pump. Wilson spoke to the owner of the vehicle she hit and waited until law enforcement officers arrived. The owner of that vehicle testified he was standing at the gas pump when Wilson initially pulled in.

> A. Well, before the [collision] I saw—observed her pulling into the parking lot.
>
> Q. And what did you observe?
>
> A. Well, the—by her pulling in there was a dog hooked to the back of her bumper. It drew the attention to everybody that was out there, and that made me turn around and look and see what was happening. And I saw that.

In response to the collision report, KDPS Field Training Officer James Marshburn and Officer in Training Jordan B. Hill soon arrived on the scene. During the course of their investigation, Wilson initially refused to cooperate. After observing "a large pool of fresh blood" on the pavement behind Wilson's vehicle and speaking with witnesses, the law enforcement officers observed the injured dog "and how severe his injuries were[:] his broke[n] leg, his paws were almost rubbed off. We decided to place her in to [sic] custody for animal cruelty." Following her arrest and placement in a patrol car, Officer Hill noted "an odor—overwhelming odor of alcohol from" Wilson. When Officer Hill requested that Wilson submit to a field sobriety test, Wilson refused. Officer Marshburn observed that Wilson's eyes "were red and kind

of unfocused." Wilson was then charged with DWI and transported to the police station to submit to an intoxilyzer test. Her blood alcohol content was measured to be 0.09. At trial, on cross-examination, Officer Marshburn gave the following testimony:

> Q. Did you do any investigation at any time to determine whether or not . . . Wilson had any knowledge that the puppy was on the truck?
>
> A. By her actions and her mannerisms, that indicated to me that she knew the puppy was back there.
>
> Q. And what actions and mannerisms did you observe to bring you to that conclusion?
>
> A. At any—at any point in time did anyone see on the video that . . . Wilson actually showed any compassion at all for the animal. . . . [I]t seems like she took the puppy['s leash off the back bumper], . . . and she walked into the store. She didn't check on the puppy.
>
> When we questioned her about the puppy, she wouldn't say anything about it. When we arrived on the scene to investigate the collision, she didn't show any—she didn't say the puppy's injured. She didn't show any compassion or remorse for this animal at all.

In defense, Wilson presented testimony from her cousin, her son, and herself. Wilson's cousin, Devon Wilson, twenty-one years old at the time of trial, testified that, on 5 July 2013, Wilson was hosting a cook-out at her residence, and Devon went to her house to cut the grass before the cook-out. Devon testified that before he cut the

grass, he asked Wilson's son, Javion, then eight years old, to remove his dog from the back yard. Javion testified about tying his pit bull, Lashell, whom he had just gotten a few days before the cook-out, to the back of his mother's truck:

> Q. And where did you move the puppy to?
>
> A. On the back of my momma [sic] truck.
>
> Q. And how did you put the puppy on the back of the truck?
>
> A. I had got the leash and, you know, the circle part? I put that on the [trailer hitch].

Javion testified that his mother asked him to move the dog back into the backyard, but he forgot.

> Q. Now, when your mom told you—[the prosecutor] asked you a question: your mom said go out and tie the dog back up?
>
> A. Yes.
>
> Q. So, she knew that the dog was tied to the bumper of that truck?
>
> A. Yes.

Wilson testified that she purchased the dog for her children and, in the few days the dog lived with them, also bought a doghouse, a leash, a collar, food, shampoo, and flea powder. When Devon showed up to cut the grass, Wilson observed Javion move the dog from the backyard and tie him to the bumper of Wilson's SUV. Wilson testified that around six o'clock, she directed Javion to move the dog back to the

backyard. Thirty people came to Wilson's home for the cook-out: "I was entertaining, cooking. I was drinking. I had a couple of drinks. I was just having fun. It was July 5. I was enjoying my family from out of town, and my friends, my children." Wilson testified that she had two or three mixed drinks, including vodka. After midnight, at about one o'clock in the morning, Wilson backed out of her driveway and drove to the convenience store, approximately one mile away. She testified that she did not know the dog was tied to the back of her SUV until she reached the convenience store, at which point people told her the dog was there.

At the close of all of the evidence, Wilson moved to dismiss the charge of felony cruelty to animals. The trial court denied the motion. During the charge conference, Wilson requested that the trial court instruct the jury on the lesser included offense of misdemeanor cruelty to animals. The court denied the motion, reasoning that the elements of misdemeanor animal cruelty were not included with the elements for felonious animal cruelty and, thus, misdemeanor animal cruelty was not a lesser included offense of felonious animal cruelty. Following the court's instruction, the jury returned a guilty verdict on the charge of felony cruelty to animals. The court sentenced Wilson to an active term of 10 to 21 months. Wilson appeals.

Discussion

Wilson argues that she is entitled to a new trial due to the trial court's error in denying her request for an instruction on misdemeanor cruelty to animals.

Specifically, she contends that the crime of misdemeanor cruelty to animals is a lesser included offense of felony cruelty to animals, and there was sufficient evidence presented at trial that supported a conviction of the lesser offense. While Wilson is correct that misdemeanor cruelty to animals is a lesser included offense of felony cruelty to animals, the evidence presented at trial would not have supported Wilson's conviction of the misdemeanor, and, accordingly, the trial court did not err in refusing to instruct the jury on the lesser included offense.

"As a question of law, this Court reviews the sufficiency of jury instructions *de novo*." *State v. Boyd*, 214 N.C. App. 294, 299, 714 S.E.2d 466, 471 (2011) (citation omitted), *disc. review allowed and remanded*, 366 N.C. 210, 739 S.E.2d 838 (2012).

It is well-established that

> the trial court must submit and instruct the jury on a lesser included offense when, and only when, there is evidence from which the jury could find that [the] defendant committed the lesser included offense. . . . The determining factor is the presence of evidence to support a conviction of the lesser included offense.
>
> Failure to so instruct the jury constitutes reversible error not cured by a verdict of guilty of the offense charged.

State v. Boozer, 210 N.C. App. 371, 377, 707 S.E.2d 756, 762 (2011) (citations and internal quotation marks omitted), *disc. review denied*, 365 N.C. 543, 720 S.E.2d 667 (2012). This Court has held that "[t]he crime of misdemeanor cruelty to animals is a lesser included offense of felony cruelty to animals." *State v. Gerberding*, 237 N.C.

App. 502, 507, 767 S.E.2d 334, 337 (2014). Thus, we must consider whether "there is evidence from which the jury could find that [Wilson] committed the lesser included offense" of misdemeanor cruelty to animals. *See Boozer*, 210 N.C. App. at 377, 707 S.E.2d at 762 (citation omitted).

In *Boozer*, the defendant, who had been charged with kidnapping, argued that the trial court had erred in refusing to instruct the jury on the lesser included offense of false imprisonment. *Id.* In addressing that question, this Court noted:

> *The distinguishing factor between kidnapping and false imprisonment is the purpose of the confinement, restraint or removal of another person*. So, whether a defendant who confines, restrains, or removes another is guilty of kidnapping or false imprisonment, depends upon whether the act was committed to accomplish one of the purposes enumerated in our kidnapping statute.

Id. (citation and internal quotation marks omitted; emphasis added). Under our State's cruelty to animals statute, the distinguishing factor between the felony and misdemeanor offenses is the presence of malice. The offense of cruelty to animals is a misdemeanor if "any person shall *intentionally* overdrive, overload, wound, injure, torment, kill, or deprive of necessary sustenance . . . any animal . . . ." N.C. Gen. Stat. § 14-360(a) (2015) (emphasis added). The offense of cruelty to animals is punishable as a felony "[i]f any person shall *maliciously* torture, mutilate, maim, cruelly beat, disfigure, poison, or kill . . . any animal . . . ." § 14-360(b) (emphasis added). As used in the statute, "the word 'maliciously' means an act committed *intentionally and with*

malice or bad motive." § 14-360(c) (emphasis added). Thus, "in order to be guilty of felonious cruelty to animals, a defendant must have acted both 'maliciously' and 'intentionally.' In the [offense of misdemeanor cruelty to animals], there is no element of 'malice' required . . . ." *Gerberding*, 237 N.C. App. at 507, 767 S.E.2d at 337-38. In sum, *misdemeanor* cruelty to animals occurs when a person *intentionally but without malice* injures an animal, *felony* cruelty to animals occurs when a person *intentionally and maliciously* injures an animal, and *neither offense* occurs when a person *unintentionally* injures an animal.

Here, Wilson was charged with felony cruelty to animals for causing her son's puppy severe injuries by dragging him behind her vehicle. At trial, the evidence was uncontested that Wilson caused the terrible wounds to the puppy by dragging him down the street behind her truck. The State's theory of the case was that Wilson knew the puppy was tied to her truck when she drove to the store and *intentionally* dragged him behind the vehicle with malice, to wit, because she did not want the dog. Wilson's theory was that she did not realize the dog was tied to the trailer hitch, and therefore, although she caused the injuries to the puppy, she did so *unintentionally*. Thus, the only element upon which the evidence was disputed at trial was the *intentionality* of Wilson's act in harming the dog. In other words, if the jury found Wilson's evidence entirely credible, it could not find her guilty of *misdemeanor* animal cruelty, but rather could then only acquit her of any offense under section 14-360. In

analogous circumstances involving other offenses, this Court has found no error in a trial court's refusal to instruct on a lesser included offense where the evidence, depending on the jury's credibility determinations, would support either the charged offense or no offense at all. *See, e.g.*, *State v. Simpson*, 299 N.C. 377, 382, 261 S.E.2d 661, 664 (1980) ("An unexplained breaking and entering into a dwelling house in the nighttime is in itself sufficient to sustain a verdict that the breaking and entering was done with the intent to commit larceny rather than some other felony. Thus, [the] defendant was either guilty of burglary in the first degree or not guilty of any offense triable under the bill of indictment.") (citations omitted).

Likewise, here, neither the State nor Wilson presented *any* evidence that Wilson intentionally injured the puppy but did so for an acceptable reason and without malice or bad motive. Because there simply was no evidence presented at trial "from which the jury could find that [Wilson] committed the lesser included offense[,]" *see Boozer*, 210 N.C. App. at 377, 707 S.E.2d at 762 (citation and internal quotation marks omitted), the trial court was not required to instruct the jury on misdemeanor cruelty to animals.

NO ERROR.

Judge CALABRIA concurs.

Judge BRYANT dissents by separate opinion.

Report per Rule 30(e).

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BRYANT, Judge, dissenting.

The majority states that "[b]ecause no evidence was presented from which a jury could find that Defendant intentionally injured her son's dog by dragging him behind her vehicle but did so without malice, the trial court was not required to instruct on the lesser included offense." Without minimizing the terrible results of defendant's actions, in this case, the law requires that the question of whether defendant's actions were *intentional, but not malicious*, should have at least been presented to the jury. Thus, because my review of the record in this appeal reveals that the evidence would have supported a verdict of guilty on the lesser-included offense, I would find the trial court's denial of defendant's request for the instruction was error and order a new trial. Accordingly, I respectfully dissent.

The evidence presented at trial showed that defendant purchased the dog because her children wanted it. Defendant purchased a doghouse, a leash, a collar, dog food, shampoo, and flea powder. On 6 July 2013, defendant's cousin came to the house to cut the grass, and defendant observed her son move the dog from the backyard and tie him to the bumper of her SUV. Defendant testified that around 6:00 p.m. she directed her son to move the dog back to the backyard. Later that night, defendant hosted a cookout: "I was entertaining, cooking. I was drinking. I had a couple of drinks. I was just having fun. It was July 5. I was enjoying my family from out of town, and my friends, my children." Defendant testified she had two or three

mixed drinks. Later, at around 1:00 a.m., defendant backed out of her driveway and drove to a convenience store. She testified that she did not know the dog was tied to the back of her SUV until she reached the store, at which point others told her the dog was there.

The majority opinion states that "the only element upon which the evidence was disputed at trial was the *intentionality* of Wilson's act in harming the dog. In other words, if the jury found Wilson's evidence entirely credible, it could not find her guilty of misdemeanor animal cruelty, but rather could then only acquit her of any offense under section 14-360." Here is where I disagree.

The majority opinion correctly notes that the distinguishing factor between misdemeanor and felony cruelty to animals is the element of malice. *Compare* N.C.G.S. § 14-360(a) (2015), *with id.* § 14-360(b). However, both offenses include the element of *intent*. *See id.* § 14-360(c) "[T]he word 'intentionally' refers to an act committed *knowingly* and without justifiable excuse[.]" *Id.* (emphasis added).

"A person *knows* of an activity if he is aware of a high probability of its existence. *See* Black's Law Dictionary (5th ed. 1979)." *State v. Bright*, 78 N.C. App. 239, 243, 337 S.E.2d 87, 89 (1985) (emphasis added).

Here defendant "kn[ew] of an activity [because she was] aware of a high probability of its existence[,]" namely, she was aware that (1) her son tied the dog to the car, (2) she asked him to put the dog back in the backyard, and (3) her then-eight-

year-old-son *might not have done the thing she asked him to do*. *See id.* Then, "knowing" that there was a high probability her eight-year-old did not move the dog to the backyard, she drove to the convenience store around 1:00 a.m., and, "without justifiable excuse[,]" *see* N.C.G.S. § 14-360(c), she failed, or forgot, to check for the dog's presence.

"[T]he word 'intentionally' refers to an act committed *knowingly* and *without justifiable excuse*[.]" *Id.* § 14-360(c) (emphasis added). Notwithstanding defendant's conduct at the convenience store which reflected her indifference to the dog's condition, pain, and suffering after she had caused severe injury to the dog, there was sufficient evidence for a jury to find that defendant's actions were done intentionally (knowingly and without justifiable excuse), but without malice or bad motive. The majority opinion invades the province of the jury when it finds as fact that defendant "*intentionally* dragged [the dog] behind the vehicle *with malice*, to wit, *because she did not want the dog*." (Emphasis added). The jury did not make this explicit finding, and nor should this Court. Accordingly, I would reverse and remand for a new trial as the jury could have found that defendant was guilty of cruelty to animals punishable as a Class 1 misdemeanor and a jury instruction on misdemeanor cruelty to animals as a lesser-included offense was required. Therefore, I respectfully dissent from the majority opinion.