

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
City of Gahanna,	:	
	:	No. 08AP-816
Plaintiff-Appellee,	:	(M.C. No. 2008 ER B 072897)
	:	
v.	:	(REGULAR CALENDAR)
	:	
Beverly T. Campbell,	:	
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on July 23, 2009

The Law Office of Jay G. Perez, LLC, and Jay G. Perez, for appellant.

J. Kevin Mantel, City of Gahanna Prosecuting Attorney, for appellee.

APPEAL from the Franklin County Municipal Court,
Environmental Division.

CONNOR, J.

{¶1} Defendant-appellant, Beverly Campbell ("appellant"), appeals the judgment of the Franklin County Municipal Court, Environmental Division, convicting her of two minor misdemeanor counts of failure to confine or restrain a dog pursuant to R.C. 955.22, and designating her dogs as "dangerous" pursuant to R.C. 955.11. For the following

reasons, we affirm the convictions, but reverse the judgment on the dangerous dog designations.

{¶2} On July 16, 2008, appellant was charged with two violations of R.C. 955.22(C). The complaints alleged that on or about June 20, 2008,¹ appellant failed to keep her dogs, a clumber spaniel² and a German shepherd, physically confined or restrained upon her premises by leash, tether, adequate fence, supervision or secure enclosure to prevent escape and that she failed to keep the dogs under reasonable control. These charges were filed as a result of an incident that occurred involving a greyhound owned by Lori Deas. Ms. Deas alleged that appellant's dogs attacked her dog.

{¶3} Appellant entered a plea of not guilty on August 14, 2008. The case was scheduled for trial on Monday, September 15, 2008.

{¶4} On Friday, September 12, 2008, Attorney Joseph Mas, along with the assistant prosecuting attorney for the city of Gahanna, met with the judge who was scheduled to hear appellant's case the following Monday. Although Attorney Mas was not retained to represent appellant, he approached the judge on her behalf and requested a continuance.

{¶5} On Monday, September 15, 2008, appellant appeared pro se and requested a continuance. Appellant asserted that she would be representing herself.

¹ Testimony provided during the trial indicates that the date of the incident was likely June 21, 2008 or June 22, 2008.

² The complaint actually refers to appellant's dog as a "cocker spaniel." However, throughout the record, this dog has been referred to as both a "cocker spaniel" and a "clumber spaniel." For consistency purposes, we shall simply refer to it as a "clumber spaniel."

She represented that, approximately a week and one-half prior to the trial date, she began taking prescription medication that affected her mental ability and diminished her ability to represent herself. Appellant also expressed to the court that she was operating with the understanding that Attorney Mas had already presented this information to the court on Friday, September 12, 2008. The court overruled appellant's request for a continuance, stating Attorney Mas had never mentioned appellant's health or her use of prescription medication as a reason for the continuance request and, in fact, simply indicated that appellant was not prepared for trial.

{¶6} The case was tried to the court. The prosecuting attorney presented the testimony of four witnesses: Animal Control Officer Charles Henderson, Lori Deas, Christine Levy, and Christine Marsey.

{¶7} Officer Henderson testified as to his investigation of the incident and his contact with appellant regarding an alleged prior incident with her German shepherd that occurred approximately five years earlier.

{¶8} Ms. Deas testified regarding the June 2008 incident. She testified she was walking her greyhound dog, Popeye, on the sidewalk near appellant's house when she observed appellant enter her house. She noticed that appellant's storm door did not immediately latch and that appellant's clumber spaniel was able to push the door open and run out, followed by appellant's German shepherd. Appellant's two dogs ran towards Ms. Deas' greyhound, who then moved into the street in an effort to get away from appellant's dogs. Both of appellant's dogs proceeded to attack the greyhound, who subsequently suffered various injuries, including serious injuries to his legs and chest, which required surgery. Several photographs of the injuries were admitted into evidence.

Ms. Deas was not injured in the attack. She did not testify that appellant's dogs were menacing towards her or that they attempted to bite her.

{¶9} Ms. Levy testified regarding an incident that occurred on May 9, 2004. Ms. Levy testified that she was bitten on the arm by appellant's German shepherd. She testified that the incident was unprovoked. Ms. Levy also authenticated a letter written by appellant following that incident. In the letter, appellant apologized and offered to reimburse Ms. Levy for her medical bills. Appellant objected to the testimony of Ms. Levy, arguing it was not relevant because it referred to an unrelated incident that occurred over four years ago.

{¶10} Ms. Marsey testified to an incident that occurred the previous winter when she was dog-walking. Ms. Marsey testified she was walking a dog when she observed appellant walking her own dogs on the opposite side of the street. Appellant's dogs were barking and lunging at Ms. Marsey and her dog. Ms. Marsey testified she observed the dogs pull appellant, who then fell down. Appellant, however, submitted that she had fallen as a result of ice on the sidewalk, not as a result of the dogs' actions.

{¶11} Appellant presented the testimony of her two sons, Samuel Campbell and Drew Thompson, as well as her own testimony. Appellant disputed Ms. Deas' testimony that she was on the sidewalk with her dog at the time appellant's dogs exited the house. Appellant testified that just prior to the incident, she observed Ms. Deas' dog wandering in and out of the neighbors' yards. Both appellant and her son, Mr. Campbell, testified that the attack occurred in appellant's front yard and that the German shepherd was lying off to the side and was not a part of the attack. Appellant testified that she observed the fight

being pulled into the street. Mr. Campbell testified that he had never seen appellant's dogs do anything like this and he had never seen them fight with each other.

{¶12} Appellant's older son, Drew Thompson, did not have any first-hand knowledge regarding the June 2008 incident. He initially testified that he was unaware of any previous dog fights, but subsequently testified he was aware that the German shepherd had bitten someone in the past.

{¶13} Following the close of evidence, appellant argued that the June 2008 incident was an unforeseeable event and that all reasonable efforts were made to control the dogs. The trial court determined that, although this incident was an accident, these offenses do not require specific intent and thus the court entered guilty findings as to both counts. The court also categorized appellant's dogs as dangerous pursuant to statute. This appeal followed.

{¶14} Appellant raises the following three assignments of error:

1. THE JUDGE ABUSED HIS DISCRETION BY NOT ALLOWING A CONTINUANCE SO THAT DEFENDANT COULD HAVE ADEQUATE REPRESENTATION.
2. THE JUDGE ERRED BY ALLOWING TESTIMONY OF PRIOR ACTS.
3. THE JUDGE ERRED BY FINDING DEFENDANT'S DOGS DANGEROUS PURSUANT TO ORC 955.11

{¶15} In her first assignment of error, appellant argues the trial court abused its discretion by refusing to grant appellant's continuance request for several reasons. Appellant argues there had been no previous continuance requests; the matter had been scheduled for trial very quickly (within 30 days); at that time, appellant was taking prescription medication that interfered with her ability to be sharp; and there was no

reason not to grant a short continuance to ensure that appellant's constitutional rights were protected.

{¶16} "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, quoting *State v. Adams* (1980), 62 Ohio St.2d 151. " '[T]he grant or denial of a continuance is a matter [that] is entrusted to the broad, sound discretion of the trial judge. An appellate court must not reverse the denial of a continuance unless there has been an abuse of discretion.' " *State v. Jones*, 91 Ohio St.3d 335, 342, 2001-Ohio-57, quoting *State v. Unger* (1981), 67 Ohio St.2d 65, 67. In evaluating a request for a continuance, several factors may be considered, such as the length of delay requested, prior continuances, inconvenience, the reasons for the delay, whether the defendant contributed to the delay, and any other relevant factors. *State v. Landrum* (1990), 53 Ohio St.3d 107, 115.

{¶17} We find the trial court did not abuse its discretion in denying appellant's request for a continuance. Although there had been no prior continuance requests, the trial court cited to the inconvenience to the various witnesses who had been subpoenaed in this matter. The trial court also indicated that it had informed Attorney Mas on the Friday prior to the Monday trial date that it would not be granting a continuance and that Attorney Mas had never indicated that the grounds for the continuance request were that appellant was ill or on heavy prescription medication. Furthermore, the trial court indicated that this discussion had been placed on the record.

{¶18} The trial court also confirmed with the assistant prosecuting attorney that Attorney Mas had not mentioned those reasons asserted by appellant as grounds for a

continuance. In fact, the trial court stated that Attorney Mas had indicated the reason for the continuance request was because appellant was not prepared, a fact which is supported by her failure to request discovery or a witness list from the city of Gahanna. (Tr. 26-27.) Instead of waiting until the morning of trial, or the business day immediately preceding trial, appellant could have requested a continuance as soon as she began taking the prescribed medication which she alleged interfered with her mental abilities. However, she failed to do so.

{¶19} Furthermore, we note that appellant indicated to the trial court that she herself was a lawyer and that she intended to represent herself in this matter. We note that she did not request a continuance for the purpose of obtaining counsel to represent her on these minor misdemeanor offenses. Moreover, given the strict liability nature of these offenses, the outcome of the trial was unlikely to be different even if the continuance had been granted.³

{¶20} Accordingly, appellant's first assignment of error is overruled.

{¶21} In her second assignment of error, appellant argues the trial court erred in allowing several witnesses to testify regarding prior incidents involving her dogs. Appellant argues, pursuant to Evid.R. 404, evidence of one's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion. We agree that such evidence is not admissible, although we find any error which may have occurred to be harmless, as the trial court did not consider the evidence in reaching its determination.

³ R.C. 955.22(C) imposes strict criminal liability upon a dog owner who fails to restrain or confine a dog to the owner's premises. *State v. Rife* (June 13, 2000), 10th Dist. No. 99AP-981.

{¶22} The "prior acts" testimony regarding the May 2004 incident involving Ms. Levy cannot be used to prove the offenses of failure to confine or restrain a dog because such testimony related to an alleged incident that occurred over four years ago and is unrelated to the present matter. Generally, evidence of other wrongs or bad acts which are independent of or unrelated to the offense for which the individual is on trial are inadmissible to demonstrate criminal propensity. *State v. Wickline* (1990), 50 Ohio St.3d 114, 120.

{¶23} However, the admission of prior bad acts evidence is harmless unless there is some reasonable probability the evidence contributed to the conviction. In order to hold the error harmless, the court must be able to declare a belief that the error was harmless beyond a reasonable doubt. *State v. Abrams* (1974), 39 Ohio St.2d 53; *State v. Rahman* (1986), 23 Ohio St.3d 146; *City of Columbus v. Taylor* (1988), 39 Ohio St.3d 162.

{¶24} It is apparent from the record that, although the trial court heard testimony regarding the incident with Ms. Levy, it recognized that it could not consider any testimony regarding that bite or attack with respect to the criminal offenses at issue. "And in this case, I must consider what we're charged with here, and in this case, despite the attack or the bite to Ms. Levy, it's not relevant, or it's not directly on point on this case as to when it happened." (Tr. 121.)

{¶25} Additionally, in spite of any error that may have occurred here, we point out that this matter was tried to the court. Unlike the difficulties encountered in a jury trial, where there is a greater danger of prejudice when improper evidence is admitted and a limiting instruction must be given, the challenges faced by the judge in sorting out the evidence are vastly different. A reviewing court presumes that, in a bench trial in a

criminal case, the trial court considered only the relevant, material, and competent evidence in arriving at its judgment unless the record affirmatively demonstrates otherwise. *State v. Post* (1987), 32 Ohio St.3d 380, 384; *State v. Hill* (1992), 64 Ohio St.3d 313, 323. Here, there is no reasonable probability that the evidence of the prior acts contributed to the conviction, as it is evident, based upon the record, that the court did not consider this evidence in convicting appellant of the two counts of failure to confine or restrain a dog.

{¶26} We find that the admissible evidence presented to prove the criminal offenses, which includes the testimony of Ms. Deas, as well as much of the testimony of appellant and Mr. Campbell, is clearly sufficient to establish all the elements of the offenses upon which appellant was convicted. Based on this evidence alone, the court properly found appellant guilty. As the trial court correctly determined, appellant's intent or the reasonableness of her efforts to stop her dogs is not relevant here because the offense of failure to restrain or confine is a strict liability offense and she failed to comply with R.C. 955.22, which reads in relevant part as follows:

(C) Except when a dog is lawfully engaged in hunting and accompanied by the owner, keeper, harborer, or handler of the dog, no owner, keeper, or harborer of any dog shall fail at any time to do either of the following:

(1) Keep the dog physically confined or restrained upon the premises of the owner, keeper, or harborer by a leash, tether, adequate fence, supervision, or secure enclosure to prevent escape;

(2) Keep the dog under the reasonable control of some person.

{¶27} The testimony of Ms. Deas, which the trial court found to be credible, established the necessary elements of the offenses of failure to confine or restrain a dog.

Her testimony established that appellant's dogs were not confined or restrained by a leash or a fence or by any of the other acceptable methods set forth under the statute and the dogs were not under appellant's or her son's reasonable control at the time of the incident.

{¶28} Therefore, while appellant is correct to the extent that the testimony regarding the prior acts is not admissible evidence, appellant was not prejudiced by this testimony because the trial court established that it did not consider such testimony in arriving at its decision. Moreover, there is more than sufficient properly admissible evidence to support the convictions.

{¶29} Accordingly, appellant's second assignment of error is overruled.

{¶30} In her third assignment of error, appellant argues the trial court erred in finding her dogs to be "dangerous" pursuant to R.C. 955.11. We agree.

{¶31} Under R.C. 955.11, a "dangerous dog" is defined as follows:

[A] dog that, without provocation, * * * has chased or approached in either a menacing fashion or an apparent attitude of attack, or has attempted to bite or otherwise endanger any person, while that dog is off the premises of its owner, keeper, or harborer and not under the reasonable control of its owner, keeper, harborer, or some other responsible person, or not physically restrained or confined in a locked pen which has a top, locked fenced yard, or other locked enclosure which has a top.

{¶32} The statute further states "menacing fashion" means "a dog that would cause any person being chased or approached to reasonably believe that the dog will cause physical injury to that person."

{¶33} In order to be classified as a "dangerous dog," the encounter or attack must be directed at a person. Here, the attack involved another dog, not a person. There was absolutely no testimony indicating that the attack on Ms. Deas' dog involved any attempt

to bite, attack or endanger Ms. Deas or any other person. Nor does the record reflect any testimony that Ms. Deas or another person was approached in a menacing fashion during the June 2008 incident. Moreover, as noted above, the prior acts in 2004 involving Ms. Levy cannot be considered as relevant, admissible evidence to establish the dangerous dog classification. Therefore, without evidence of an attack or a qualifying approach involving a person, rather than a dog, appellant's dogs do not meet the definition of a "dangerous dog" as set forth under the statute. Based upon this finding, the classification of appellant's dogs as "dangerous" is improper. As a result, the trial court must remove this designation from the judgment entry and issue a corrected judgment entry reflecting appellant's convictions without designating her dogs as "dangerous."

{¶34} Accordingly, appellant's third assignment of error is sustained.

{¶35} For the foregoing reasons, we overrule appellant's first and second assignments of error and affirm the convictions for failure to confine or restrain a dog. We sustain appellant's third assignment of error and reverse the judgment on the designation of appellant's dogs as dangerous and remand this cause to the trial court for further proceedings in accordance with this decision.

Judgment reversed in part; cause remanded.

KLATT and TYACK, JJ., concur.
