[Cite as *Strongsville v. Eskander*, 2009-Ohio-5370.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92448

CITY OF STRONGSVILLE

PLAINTIFF-APPELLEE

vs.

ESHAK ESKANDER

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED

Criminal Appeal from the
Berea Municipal Court
Case No. 08 CRB 00630

BEFORE: Kilbane, P.J., Blackmon, J., Dyke, J.

RELEASED: October 8, 2009

JOURNALIZED:

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MARY EILEEN KILBANE, P.J.:

{¶ 1} Appellant, Eshak Eskander ("appellant"), appeals the trial court's decision finding him guilty of two counts of prohibitions concerning companion animals. After a review of the transcript and pertinent law, we reverse.

{¶ 2} The following facts give rise to this appeal.

{¶ 3} The Strongsville Animal Warden, Michael Roth ("Roth"), received a call from appellant's neighbor, reporting that appellant had a cage containing dead dogs located in his backyard. Using the county auditor's website, Roth determined appellant to be the owner of the property located at 16271 Windsor Drive, in Strongsville, Ohio. On April 11, 2008, Roth, accompanied by Strongsville police officer, Dan McNeal ("McNeal"), went to appellant's house to investigate the matter. Appellant's wife answered the door, stated her husband was not home, and denied the two entrance to the backyard.

{¶ 4} The same day a search warrant was obtained, and Roth and McNeal returned to inspect the backyard. They found a cage located in appellant's backyard that was covered with a rug and a piece of plywood, and the cage contained two dead dogs. Roth estimated that the dogs were dead approximately four months; therefore, he could not determine the cause of death. Based on his experience, Roth believed the two dogs were young pitbulls. (Tr. 6-7.) Roth and McNeal spoke with appellant's wife and her adult son, Beshoy Eskander. Appellant was not at home anytime during the visits from Roth and McNeal.

{¶ 5} Appellant was charged with two counts of prohibitions concerning companion animals, in violation of R.C. 959.131(B), misdemeanors of the first degree. R.C. 959.131(B) provides, "[n]o person shall knowingly torture, torment, needlessly mutilate or maim, cruelly beat, poison, needlessly kill, or commit an act of cruelty against a companion animal."

{¶ 6} The case proceeded to a bench trial, at the conclusion of which appellant was found guilty of both counts. On Count 1, appellant was sentenced to 90 days in jail; two years of probation, during which time no pets are to reside in appellant's household; a $250 fine; and a $750 donation to Strongsville Animal Control. On Count 2, appellant was sentenced to 30 days in jail, to be served consecutively to the 90-day sentence imposed on Count 1, which may be served on house arrest at a rate of 3.76 days per one day of jail time credit; an additional two years of probation, to be served consecutively with the two years probation imposed on Count 1, for a total of four years probation; and a $250 fine.

{¶ 7} Appellant appeals, asserting four assignments of error for our review.

{¶ 8} ASSIGNMENT OF ERROR NUMBER ONE

"THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION FOR ACQUITTAL UNDER CRIM.R. 29 BECAUSE THE CITY OF STRONGSVILLE FAILED TO PRESENT EVIDENCE TO ESTABLISH BEYOND A REASONABLE DOUBT THE ELEMENTS NECESSARY TO SUPPORT THE CONVICTIONS."

{¶ 9} Appellant argues that the City of Strongsville ("the city") failed to introduce sufficient evidence of the elements of the charged offenses; therefore,

the trial court erred in denying appellant's Crim.R, 29 motion for acquittal. After a review of the record, we agree.

{¶ 10} The government is always required to present sufficient evidence of each of the elements of a crime in order to obtain a conviction. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541. "The relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Smith*, 89 Ohio St.3d 112, 1997-Ohio-355, 684 N.E.2d 668, citing *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492. When the prosecution has failed to present sufficient evidence of the offense, a judgment of acquittal must be entered pursuant to Crim.R. 29.

{¶ 11} Crim.R. 29 provides, "[t]he court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information or complaint, if the evidence is insufficient to sustain a conviction of offense or offenses." The evidence must be reviewed in the light most favorable to the prosecution. *State v. Smith* (1997), 80 Ohio St.3d 89, 684 N.E.2d 668. If reasonable minds could reach different conclusions as to whether the material elements of the crime have been established, a judgment of acquittal is not appropriate. *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 263, 381 N.E.2d

184, citing *State v. Swiger* (1966), 5 Ohio St.2d 151, 214 N.E.2d 417, paragraph two of the syllabus.

{¶ 12} Although the transcript does not document appellant's Crim.R. 29 motion, the city does not dispute that appellant moved for an acquittal pursuant to Crim.R. 29. Several portions of the transcript are incomplete. Where a transcript is incomplete this court presumes regularity. *City of Warrensville Hts. v. Ohio Patrolmen's Benevolent Assn.*, Cuyahoga App. No. 89406, 2008-Ohio-2179, at ¶43. After a thorough review of the record, we conclude that the city failed to present sufficient evidence of the elements of the charged offenses; therefore, the trial court erred in not granting appellant's Crim.R. 29 motion.

{¶ 13} The State bears the burden to prove each element of the charged crime beyond a reasonable doubt. *State v. Hilton*, Cuyahoga App. No. 89220, 2008-Ohio-3010, at ¶72, citing *In re Winthrop* (1970), 397 U.S.358, 90 S.Ct. 1068, 25 L.Ed.2d 368. R.C. 959.131(B) requires the city to present evidence to establish that appellant knowingly tortured, tormented, needlessly mutilated or maimed, cruelly beat, poisoned, needlessly killed, or committed an act of cruelty against the dogs. Even Roth, who testified on behalf of the city, admitted that he could not determine how the dogs died. As the State failed to present either direct or circumstantial evidence in its case-in-chief sufficient to support the charges, the trial court should have granted appellant's Crim.R. 29 motion before appellant ever presented his case.

{¶ 14} The statute specifically requires not only that an overt act of animal cruelty was committed, but also that the act was committed knowingly. Pursuant to R.C. 2901.22, "[a] person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist."

{¶ 15} The crux of the city's case is that appellant may be convicted under R.C. 959.131(B) merely because he is the legal owner of the property where the dogs were found. While appellant did admit that he is the owner of the property, mere ownership is insufficient to establish that appellant possessed any knowledge of their care or neglect. (Tr. 35.) This court has previously held that ownership of the property on which something illegal is discovered does not automatically impute liability to the property owner. *State v. Atterbury*, Cuyahoga App. No. 92031, 2009-Ohio-4370, at 19, citing, *State v. Hankerson* (1982), 70 Ohio St.2d 87, 434 N.E.2d 1362.

{¶ 16} In *State v. York* (May 1, 1998), Lake App. No. 97-L-037, a factually similar case, the defendant purchased a pony for his daughter. York worked long hours and was rarely home. His wife and daughter were responsible for the pony's care. The pony became severely malnourished and was removed by the humane society. York was charged and convicted of animal cruelty. The court reversed York's conviction, and concluded that although York purchased the pony, he was unaware of the pony's condition because he worked long hours and

was rarely home. In *York*, the court found that the State's evidence was insufficient to support the defendant's conviction, even though the charged offense in *York* required only recklessness, as opposed to the instant case where the appellant is required to have committed the act knowingly.

{¶ 17} As the city failed to produce any evidence, either direct or circumstantial, that would demonstrate appellant knowingly tortured, tormented, needlessly mutilated or maimed, cruelly beat, poisoned, needlessly killed, or committed an act of cruelty against the dogs, we find that the trial court erred in not granting appellant's Crim.R. 29 motion.

{¶ 18} Accordingly, this assignment of error is sustained. Finding this assignment of error merits reversal, we need not address the remaining assignments of error.

Judgment reversed.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of the Berea Municipal Court directing the court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, PRESIDING JUDGE

PATRICIA A. BLACKMON, J., CONCURS
ANN DYKE, J., DISSENTS (SEE SEPARATE DISSENTING OPINION)

ANN DYKE, J., DISSENTING:

{¶ 19} I respectfully dissent. I disagree with the majority and would find that the State presented sufficient evidence establishing appellant was guilty of two counts of prohibitions concerning companion animals.

{¶ 20} I reiterate that R.C. 959.131(B) provides, "[n]o person shall knowingly torture, torment, needlessly mutilate or maim, cruelly beat, poison, needlessly kill, or commit an act of cruelty against a companion animal." I note that, despite the majority's assertion to the contrary, it is of no importance that the animal warden was unable to specifically pinpoint the exact manner of death. Where the injuries are severe enough, an expert opinion as to the manner of death is not required because the trier of fact can infer that the injuries caused the death. *State v. Beaver* (1997), 119 Ohio App.3d 385, 393, 695 N.E.2d 332, relying on *State v. Carter* (1992), 64 Ohio St.3d 218, 226, 594 N.E.2d 595, 601. It is apparent by their appearance that the dogs died from unnatural causes. Both animals were emaciated, decaying, and neglected. In the least, an act of cruelty against the dogs was committed.

{¶ 21} Furthermore, I decline to follow the majority's conclusion that the facts presented at trial failed to establish that appellant "knowingly" committed these acts of cruelty. Again, R.C. 2901.22 provides that "[a] person acts

knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist."

{¶ 22} Generally, there is no direct evidence of a defendant's state of mind. *State v. Logan* (1979), 60 Ohio St.2d 126, 131, 397 N.E.2d 1345; *State v. Haendiges* (Feb. 25, 1998), Lorain App. No. 96CA006558. Therefore, the State must rely on circumstantial evidence to satisfy this element of its case. *Logan*, supra. More specifically, a defendant's state of mind can be established from reasonable inferences drawn from other proven facts and circumstances in the case. *State v. Johnson* (1978), 56 Ohio St.2d 35, 38, 381 N.E.2d 637. Circumstantial and direct evidence possess the same probative and evidentiary value. *State v. Jenks* (1991), 61 Ohio St.3d 259, 272, 574 N.E.2d 492.

{¶ 23} In this case, the State presented an abundance of circumstantial evidence indicating appellant had knowledge of the dogs. First, the police and animal warden discovered the emaciated, decaying, and neglected dogs in a fairly large metal cage that abutted the home, was within 10 feet of the back door, and next to a window of the home. This evidence is especially concerning coupled with the fact that appellant admitted in his testimony that he returned home every two weeks during the four months he was evidently driving a truck. Moreover, not only did appellant own the property in which the dogs were found,

but he testified that if there were any problems at the home while he was away, his family would inform him of the situation.

{¶ 24} Finally, appellant's assertions that he was not aware of the presence of these dogs, let alone any dogs on the property, was easily rebutted by the testimony that police found an empty dog kennel inside the home as well as an empty dog pen within feet of the cage. Additionally, police records indicated that two pit bulls were present at the home the year prior to this incident. In light of the aforementioned circumstances, I believe the State presented sufficient evidence for the element of "knowingly." I, therefore, would affirm appellant's convictions.