STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0537

State of Minnesota,
Respondent,

vs.

Edwin Johnson,
Appellant.

Filed June 17, 2008
Affirmed
Willis, Judge

Itasca County District Court
File No. CR-06-2608

Lori Swanson, Attorney General, Peter R. Marker, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

John J. Muhar, Itasca County Attorney, Itasca County Courthouse, 123 Fourth Street Northeast, Grand Rapids, MN 55744 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Melissa Sheridan, Assistant Public Defender, 1380 Corporate Center Curve, Suite 320, Eagan, MN 55121 (for appellant)

Considered and decided by Willis, Presiding Judge; Shumaker, Judge; and Harten, Judge.[*]

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

WILLIS, Judge

Appellant challenges his conviction of felony cruelty to an animal, arguing that the evidence was insufficient to support his conviction and that the prosecutor committed prejudicial misconduct. Because we conclude that the evidence is sufficient to support appellant's conviction and that any prosecutorial misconduct did not deny appellant his right to a fair trial, we affirm.

FACTS

In April 2006, appellant Edwin Johnson lived with M.G. and her two sons. On the evening of April 7, Johnson and his daughter and M.G. and her two sons learned that the family's dog had cornered a porcupine and that, as a result of the encounter, the dog had numerous porcupine quills stuck in its legs, chin, nose, and mouth. M.G. suggested taking the dog to a veterinarian to have the quills pulled out, but Johnson refused, claiming that he could not afford to.

After Johnson and M.G. argued for several minutes about whether to take the dog to a veterinarian, M.G., although she disagreed with Johnson that the dog needed to be "put down," stated that they could not simply let the dog suffer and suggested that Johnson borrow a gun from a neighbor and shoot the dog. Johnson responded that he did not want to talk to the neighbor about borrowing a gun. Instead, he grabbed a baseball bat that M.G.'s older son had used to fend off the porcupine and told the family to go inside the house. M.G.'s younger son testified that before he went around the corner of

the house, he saw Johnson hit the dog in the neck, and the older son testified that he heard the blow as he went around the corner. After the first blow, the dog yelped and ran around the corner of the house and up the steps to the front door. Johnson then kicked the dog off the front steps and again told the family to go inside the house.

The next morning, M.G.'s two sons discovered the dog's body on a trail behind the house. The younger son testified that "it looked like he beat her brains out." When M.G.'s sons told her about their discovery of the body, M.G. confronted Johnson and asked him what he had done to the dog. M.G. testified that Johnson told her that "he had hit [the dog] four to five times with the bat, but the dog was still alive . . . [although] unconscious, so he[] had to stab [the dog] a few times."

A police investigation followed and Johnson was charged with felony torture of an animal and felony cruelty to an animal. A jury found Johnson not guilty of torture but guilty of cruelty. The district court sentenced Johnson to a stayed prison term of one year and one day and placed him on probation for three years with the condition that he serve 30 days in jail. Johnson appeals.

D E C I S I O N

I. The evidence is sufficient to support Johnson's conviction.

Johnson argues first that the evidence is insufficient to support his conviction. When considering a claim of insufficient evidence, this court carefully examines the record to determine "whether the jury could reasonably find the defendant guilty given the facts in evidence and the legitimate inferences which could be drawn from those

facts." *State v. Miles*, 585 N.W.2d 368, 372 (Minn. 1998). A reviewing court views the evidence in the light most favorable to the conviction. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). And we must "assum[e] the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). This is especially true when resolution of the matter depends on conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). This court will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004). Circumstantial evidence is entitled to as much weight as any other kind of evidence and a conviction based on circumstantial evidence will be upheld if the reasonable inferences drawn from that evidence are consistent with a defendant's guilt and are inconsistent with any rational theory except that of guilt. *State v. Dominguez-Ramirez*, 563 N.W.2d 245, 257 (Minn. 1997).

The jury found Johnson guilty of cruelty to an animal. The offense is described in Minn. Stat. § 343.21, subd. 7 (2004), which provides: "No person shall willfully instigate or in any way further any act of cruelty to any animal or animals, or any act tending to produce cruelty to animals." "Cruelty" is defined as "every act, omission, or neglect which causes or permits unnecessary or unjustifiable pain, suffering, or death." Minn. Stat. § 343.20, subd. 3 (2004). And because the jury found that Johnson acted intentionally and that his actions resulted in the death of a "pet or companion animal,"

Johnson's offense was a felony under Minn. Stat. § 343.21, subd. 9(d) (2004), which provides that anyone "who intentionally violates subdivision . . . 7 where the violation results in death or great bodily harm to a pet or companion animal may be sentenced to imprisonment for not more than two years or to payment of a fine of not more than $5,000, or both."[1]

Johnson argues that "animals are chattel" under the law and that "a pet owner can 'necessarily' and 'justifiably' put down a pet for any reason, as long as the owner does not cause the animal unnecessary or unjustifiable pain or suffering in the process." He claims that under the circumstances, he was justified in killing the dog because the family could not afford the expense of having a veterinarian treat the dog and killing the dog was necessary to put it "out of its misery." Therefore, he claims, the only question is "whether the state proved that, in putting down the dog, Johnson intentionally did so in a manner that caused unnecessary or unjustifiable pain or suffering."

We believe that whether the circumstances justified killing the dog and whether Johnson caused the dog unnecessary or unjustifiable pain or suffering are questions for the jury. The state offered evidence at trial suggesting that killing the dog was unnecessary and unjustifiable. M.G. and her two sons all testified that there was very little blood from the dog's injuries from the porcupine quills. The older son, who had seen three other dogs sustain similar injuries from porcupines in the past, testified that he did not think that the dog needed to be killed and that its injuries could have been treated

[1] There is no dispute that the dog was a "pet or companion animal," as defined in Minn. Stat. § 343.20, subd. 6.

as had been done with the other three dogs. And there was evidence that Johnson had the option of taking the dog to a veterinarian whose office was as close as ten to 15 minutes away.

And even if killing the dog was necessary or justified, the state presented evidence that Johnson caused the dog unnecessary and unjustifiable pain or suffering. Johnson hit the dog with a baseball bat, kicked it off the porch when it attempted to run away after the first blow, hit it as many as four more times with the baseball bat, and then stabbed it a "few times" before the dog finally died. There was evidence that Johnson had, at the very least, the option of borrowing a neighbor's gun to shoot the dog. Viewing the evidence in the light most favorable to the verdict, the jury reasonably could have found that killing the dog was unnecessary or unjustifiable and that in any event Johnson caused the dog unnecessary or unjustifiable pain or suffering.

Johnson also argues that the evidence was insufficient to show that he had the necessary intent to support the conviction. He claims that the state failed to prove that he "acted with the intent to cause the dog to suffer unnecessary or unjustifiable pain or suffering" and that he cannot be convicted simply because he "failed in his initial attempt to put the dog down quickly and humanely."

The district court's instruction to the jury on the intent that the state needed to prove to convict Johnson tracked the standard jury instruction and provided that "intentionally" means that "the actor either has a purpose to do the thing or cause the result specified, or believes that the act performed by the actor, if successful, will cause

the result. In addition, the actor must have knowledge of those facts that are necessary to make the actor's conduct criminal."[2] *See* 10 *Minnesota Practice*, CRIMJIG 7.10 (2006). Determination of intent is a question for the jury. *State v. Edge*, 422 N.W.2d 315, 318 (Minn. App. 1988), *review denied* (Minn. June 21, 1988). It is generally proved circumstantially through evidence from which the jury can draw reasonable inferences. *State v. Cooper*, 561 N.W.2d 175, 179 (Minn. 1997). Here, in light of the evidence suggesting that the dog's injuries from encountering the porcupine were not severe and that Johnson had options for dealing with the situation other than beating the dog with a baseball bat and stabbing it to death, the jury reasonably could have inferred that Johnson intentionally committed an act of cruelty to the dog and that the act resulted in the dog's death. There is sufficient evidence to support Johnson's conviction.

II. The prosecutor did not commit misconduct that warrants a new trial.

Johnson argues next that he is entitled to a new trial because the prosecutor committed misconduct by (1) eliciting testimony about Johnson's invocation of his right to counsel and his right to remain silent and (2) commenting, during closing argument, on Johnson's invocation of those rights and on his failure to testify. Johnson did not object to either of these instances of claimed prosecutorial misconduct.

In reviewing a claim of prosecutorial misconduct that was not objected to at trial, appellate courts apply the plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006). Under that standard, a defendant must establish that an error occurred and

[2] We note that Johnson makes no claim that the district court's instruction to the jury on intent was incorrect or inadequate.

that the error was plain. *Id.* at 302. If the defendant does so, the burden shifts to the state to establish that the misconduct did not prejudice the defendant's substantial rights by showing that there is no reasonable likelihood that the misconduct had a significant effect on the jury's verdict. *Id.* But even if the state fails to meet its burden, an appellate court will not grant a new trial unless doing so is necessary "to ensure fairness and integrity of the judicial process." *State v. Reed*, 737 N.W.2d 572, 584 (Minn. 2007).

Johnson contends first that the prosecutor committed plain error by eliciting testimony from a police officer that referred to Johnson's post-accusation invocation of his right to remain silent and his right to counsel. In support of his claim, Johnson points to the following exchange:

[Prosecutor:]	All right. And did you ever take a statement from Edwin Johnson?
[Officer:]	No, I did not.
[Prosecutor:]	And why didn't you have an opportunity to do that?
[Officer:]	By the time I found where he was, he already had counsel.

An error is plain if it is clear or obvious, which is usually shown if "the error contravenes case law, a rule, or a standard of conduct." *Ramey*, 721 N.W.2d at 302 (quotation omitted). "[I]t has long been recognized that a defendant's decision to exercise his constitutional rights to silence and to counsel may not be used against him at trial." *State v. Litzau*, 650 N.W.2d 177, 185 (Minn. 2002). Such references are prohibited because a jury is "likely to infer from the testimony that [the] defendant was

concealing his guilt." *Id.* (quotation omitted). In light of this clear prohibition, therefore, the testimony elicited from the officer constitutes plain error.

But we conclude that the state has met its burden of showing that Johnson's substantial rights were not prejudiced because the testimony did not likely have an effect on the jury's verdict. *See State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998). First, the reference to Johnson's invocation of his right to remain silent and his right to counsel was isolated; it consisted of only two sentences of the officer's testimony, which amounted to more than 15 transcribed pages. *See State v. Haynes*, 725 N.W.2d 524, 530 (Minn. 2007) (explaining that the isolated nature of alleged misconduct decreased the probability that it influenced a jury's verdict). Second, the jury's acquittal of Johnson on the charge of torture of an animal suggests that the witness's improper reference did not influence the jury's verdict. *See State v. DeWald*, 463 N.W.2d 741, 745 (Minn. 1990) (explaining that a jury's acquittal of one count showed that the jury was not prejudicially influenced by misconduct). Finally, the fact that Johnson did not object to the officer's testimony suggests that it was not prejudicial. *See State v. Parker*, 353 N.W.2d 122, 128 (Minn. 1984).

The prosecutor's line of questioning of the police officer clearly was inartful and elicited improper testimony. But while we do not condone the prosecutor's conduct, we conclude that it did not deprive Johnson of a fair trial.

Johnson contends next that the prosecutor also committed plain error when, during her closing argument, she indirectly referred to his failure to testify. Specifically, Johnson points to the following comments:

> Now, when we take a look at intent, what did the defendant intend? What was on his mind? We never heard from [sic] what was on his mind. There [were] no statements or anything taken from what was on his mind, but you can infer by his actions, you can infer what happened, as to what was on his mind.

When evaluating whether a prosecutor committed misconduct during closing argument, "[w]e look . . . at the closing argument as a whole, rather than just select[ed] phrases or remarks that may be taken out of context or given undue prominence." *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993).

Although the prosecutor's comments implied that Johnson did not give a statement to the police and indirectly referred to the fact that he did not testify, there appears to have been no intent by the prosecutor to call attention to Johnson's invocation of his rights. *See State v. DeRosier*, 695 N.W.2d 97, 107 (Minn. 2005) (holding that indirect references to a defendant's failure to testify are prohibited if they manifest a prosecutor's intent to call attention to the defendant's failure to testify or if they are such that a jury would naturally understand them as a comment on the defendant's failure to testify). The comments do not appear to have been aimed at persuading the jury to infer that Johnson was guilty based on the fact that he did not testify, nor are they of such a nature that the jury would have naturally so understood them. Instead, the comments were an argument regarding the evidence. *See State v. Walhberg*, 296 N.W.2d 408, 419 (Minn. 1980)

(explaining that a prosecutor has the "right to present to the jury all legitimate arguments on the evidence, to analyze and explain the evidence, and to present all proper inferences to be drawn therefrom"). The prosecutor's comments correctly explained to the jury that although there was no testimony expressly showing what Johnson's state of mind was, the jury was allowed to draw inferences about his state of mind based on other evidence. The prosecutor's comments during her closing argument do not constitute misconduct. We therefore find no plain error.

Affirmed.