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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1254**

State of Minnesota,
Respondent,

vs.

Donald Richard Niemi,
Appellant.

**Filed August 18, 2009
Affirmed
Shumaker, Judge**

St. Louis County District Court
File No. 69DU-CR-07-4719

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

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Considered and decided by Halbrooks, Presiding Judge; Lansing, Judge; and Shumaker, Judge.

UNPUBLISHED OPINION

SHUMAKER, Judge

On appeal from his convictions of mistreatment/killing of an animal/pet and mistreatment/inflicting substantial bodily harm upon an animal/pet, appellant argues that (1) the state failed to prove that his actions were unjustified and (2) the district court erred when it did not instruct the jury to consider each charge separately. We affirm.

FACTS

Appellant Donald Richard Niemi lives on rural property in St. Louis County, about 20 miles south of Hibbing near Highway 18. His neighbors, the Davis family, own and live on 50 heavily wooded acres on the opposite side of Highway 18.

On the afternoon of June 21, 2007, Niemi was watching a movie in his home when he saw two dogs—a yellow Lab and a black dog—chasing his dog. He went outside and heard the dogs growling at his dog. The black dog chased his dog around a garage on Niemi's property. Each time the black dog and Niemi's dog ran around the garage, the yellow Lab moved in closer so as to block the path of Niemi's dog. Finally, Niemi's dog ran into the garage, and Niemi prevented the other two dogs from following. Niemi scared the dogs away and went back inside of the house.

A short while later, the dogs returned. Niemi went back outside. The black dog ran back onto Niemi's property, tackled his dog, and nipped at it. Niemi's dog broke free and hid underneath the steps to Niemi's house. Niemi said that he was not afraid of the dogs for himself, but was worried they would harm his dog, so he went inside of his house to get a 12-gauge shotgun.

Niemi came back out with the shotgun and fired one warning shot in the air to try to scare the dogs off. When the dogs did not react to the gunshot, Niemi shot and killed the black dog. He admitted that he intended to kill the black dog. The black dog was not approaching Niemi's dog and was at least 35 feet away from his dog when Niemi shot it.

During this time, the yellow Lab had headed down Niemi's driveway and was going away from Niemi and towards Highway 18. The yellow Lab was not approaching Niemi's dog and was at least 65 feet away from Niemi's dog when Niemi aimed and fired one shot at it, intending to kill it. He missed, so he fired again. This time he hit and wounded the yellow Lab, and it ran away. Niemi put his shotgun in the house, got in his car, and went to look for the yellow Lab. He admitted that if he found the wounded animal, he planned to kill it with a tire iron that he had in his trunk.

Niemi drove down the driveway to the Davis's residence, looking for the dog. He was then confronted by Scott Davis, who had arrived home from work around 4:15 p.m. and had heard the four gunshots. Davis went outside to see his yellow Lab come limping into the yard. The dog was bleeding from the rear and head areas.

Davis saw Niemi and asked him if he had shot the yellow Lab. Niemi admitted that he had, but claimed that he did not know to whom the dog belonged and that he had tried to scare the dog with a warning shot. Davis swore at Niemi and told him to leave the property. He then took the yellow Lab to the veterinarian and called the police.

Davis's daughter, Chelsea Davis, had overheard the conversation between her father and Niemi. She had arrived home less than an hour earlier and had let out the

yellow Lab and her dog, Rider. Rider was a dark-colored, shepherd-collie mix. He was 14 months old, and still a puppy.

When she learned that the yellow Lab had been shot, Chelsea Davis became upset and extremely concerned about her other dog. She drove to Niemi's property and confronted him. Niemi admitted that he had shot her dog, Rider, but insisted that he did not know to whom the dog belonged. He apologized for killing the dog and showed Chelsea Davis where he had put the animal's body. She took her dog's body back to her house.

Niemi was charged with (1) reckless discharge of a firearm within a municipality; (2) mistreatment/killing of an animal/pet, and (3) mistreatment/inflicting substantial bodily harm upon an animal/pet. The district court dismissed the first count for lack of probable cause. A jury trial on the two remaining charges was held in March 2008.

Niemi testified at the trial, explaining that he shot the dogs because he was afraid they would hurt his dog. He also insisted that he did not know to whom the dogs belonged at the time. But his testimony was contradicted by testimony from Chelsea Davis, Joanne Davis (Chelsea Davis's mother), and Scott Davis. They all testified that they had seen Niemi on numerous occasions when they walked their dogs.

The jury found Niemi guilty of felony mistreatment/killing of an animal/pet and misdemeanor mistreatment/inflicting substantial bodily harm upon an animal/pet. The district court stayed imposition of the felony sentence and placed Niemi on probation for two years. The district court also ordered Niemi to pay a \$50 fine and restitution, provide

DNA, and provide 50 hours of community service at an animal shelter. This appeal followed.

DECISION

I

Niemi first argues that the evidence was legally insufficient to support the jury's verdicts of guilty on both counts of animal mistreatment. Evidence is sufficient to support a conviction if the facts in the record, viewed in the light most favorable to the verdict, and any legitimate inferences drawn from those facts, support the conclusion that the defendant committed the crime charged. *State v. Wilson*, 535 N.W.2d 597, 605 (Minn. 1995). When reviewing a claim of insufficient evidence, we must assume that 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). We 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).

Niemi was charged with two counts of violating Minn. Stat. § 343.21, subd. 1 (2006), which provides that “[n]o person shall overdrive, overload, torture, cruelly beat, neglect, or unjustifiably injure, maim, mutilate, or kill any animal, or cruelly work any animal when it is unfit for labor, whether it belongs to that person or to another person.”

Niemi admits that he shot both dogs, killing the black dog and wounding the yellow Lab. But he argues, as he did at trial, that his actions were justified because he shot the dogs after they returned to his property, after the black dog knocked over and

appeared to nip at his dog, after he fired a warning shot, and after the black dog continued to growl at and approach his dog despite the warning shot.

Whether Niemi's actions were justified is a credibility issue that the jury clearly resolved against him. *See State v. Bliss*, 457 N.W.2d 385, 390 (Minn. 1990) (stating that determinations of witness credibility and the weight to be given to each witness's testimony is left to the jury). Niemi testified that neither of the dogs had acted aggressively toward him and that he did not fear for his own safety, but only the safety of his dog. Although he claimed that the black dog had twice charged and appeared to nip his dog, he admitted that his dog had not been injured, was not bleeding, and did not have any scrapes or bruising. He further admitted that when he shot the dogs, Rider was at least 35 feet away from his dog and the yellow Lab was 65 feet away. Additionally, on cross-examination, Niemi conceded that he had taken no other steps to avoid confrontations between the dogs. He did not attempt to contact the dogs' owners or the police. He did not take any measures to extract his dog from the situation by bringing him in the house or putting him in the garage. Furthermore, Niemi's claim that he did not know who the dogs belonged to was contradicted by testimony from three other witnesses. Chelsea Davis, Joanne Davis, and Scott Davis each testified that they had walked their dogs past Niemi's home numerous times and testified about specific instances when Niemi encountered them and their dogs.

The jury concluded that Niemi was not justified in shooting either dog, and when viewed in a light most favorable to the jury's verdicts, the evidence supports that determination.

II

Niemi next argues that the district court erred when it did not instruct the jury to consider each charge separately. Niemi did not request the instruction he now claims was required nor did he object to the instructions as given. As a result, we review his claim for plain error affecting substantial rights. *State v. Malaski*, 330 N.W.2d 447, 451 (Minn. 1983). Plain error exists if there is (1) error; (2) that is plain; and (3) that affects substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). An error is plain if it “contravenes case law, a rule, or a standard of conduct.” *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). An error affects substantial rights if it “was prejudicial and affected the outcome of the case.” *Griller*, 583 N.W.2d at 741. Even if the plain-error test is satisfied, this court may only reverse such error “if the fairness, integrity, or public reputation of the judicial proceeding is seriously affected.” *State v. Jones*, 678 N.W.2d 1, 18 (Minn. 2004).

The Minnesota Supreme Court has stated that “for trial of all offenses joined under Minn. R. Crim. P. 17.03, subd. 1, the jury must be instructed to consider each of the charges separately.” *State v. Kates*, 610 N.W.2d 629, 631 (Minn. 2000) (footnote omitted); *State v. Dick*, 638 N.W.2d 486, 491 (Minn. App. 2002), *review denied* (Minn. Apr. 16, 2002). If the district court errs in failing to give this instruction, reversal is not necessary if the error is harmless. *Dick*, 638 N.W.2d at 491.

Here, the district court did not specifically instruct the jury to consider each charge separately. But even if plain error occurred, reversal is unwarranted because the error, if any, did not affect Niemi’s substantial rights.

The two offenses in this case were not merely joined for trial but rather they arose out of the same incident. By Niemi's own admission, two dogs were shot, one after another, at nearly the same time and in nearly the same location. The jury was clearly instructed that there were two separate counts, each charging a different crime. At the outset, the district court instructed the jury that the state was claiming that Niemi "did unjustifiably injure, maim, or kill an animal resulting in the death of one animal and bodily harm to another, both animals being family pets." And at the conclusion of the case, the district court instructed the jury that Niemi had been charged with two counts and then separately instructed the jury on the elements of each count. The district court also explained to the jury that they would receive four verdict forms (two "not guilty" forms and two "guilty" forms) and that each verdict form would be complete in and of itself. The district court then separately instructed the jury on the use of each form. Likewise, during closing arguments, the prosecution reiterated that count 1 arose from Niemi's actions against Rider and count 2 arose from Niemi's actions against the yellow Lab.

The error, if any, in failing to instruct the jury to consider the two charges separately did not affect the outcome of this case. Considering the instructions given, the use of four verdict forms, and the distinctions between the charges, we are persuaded that the jury was not confused about the offenses, their differences, or their respective applications to the dogs involved. Therefore, Niemi's substantial rights were not affected, and reversal on this basis is unwarranted.

Affirmed.