STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LORRI ELIZABETH NICHIOW-BRUBAKER,

Defendant-Appellant.

UNPUBLISHED
September 18, 2007

No. 270464
Macomb Circuit Court
LC No. 05-005048-AR

Before: Borrello, P.J., and Jansen and Murray, JJ.

PER CURIAM.

Defendant appeals by leave granted the circuit court's order affirming her district court conviction of two counts of animal abandonment or cruelty, MCL 750.50. Following a jury trial in the district court, defendant was sentenced to two years of non-reporting probation, random monthly kennel inspections, $2,000 in fines and costs, and $5,555 in costs and restitution for the care of six dogs seized from her kennel. We affirm in part, vacate in part, and remand to the district court for proceedings consistent with this opinion.

I

Defendant owns Lornich Kennels in Sterling Heights. In January 2004, Sterling Heights Animal Control Officer Ann Marie Rogers visited the kennel to investigate an animal abandonment or cruelty complaint. Rogers' report indicates that, among other things, the cages were overcrowded and unclean, many of the animals had no potable water, and several of the animals were shivering and thin.

In August 2004, defendant was charged with six counts of animal abandonment or cruelty relating to the dogs under her care. Pursuant to a search warrant, six dogs were seized from defendant's kennel and officers took photographs of the property. All six of the dogs required medical attention. In December 2004, defendant's attorney moved to suppress the evidence seized from the kennel, arguing that the supporting search warrant affidavit was flawed by omissions and misstatements. The district court denied the motion, finding no need for an evidentiary hearing.

Defendant was tried before a district court jury in June 2005. Before jury selection on the first day of trial, defense counsel argued that the charging complaint failed to allege or describe a specific animal for each of the six counts of animal abandonment or cruelty. The district court

overruled this objection. Then, following the prosecution's opening statement, defendant moved for a directed verdict on the ground that the prosecution had still made no reference to any particular animal with respect to each charge. The district court denied defendant's motion. Defendant was ultimately acquitted of four counts of animal abandonment or cruelty, but was convicted of the remaining two counts.

Defendant moved for new trial and an evidentiary hearing. Defendant argued that her original attorney had rendered ineffective assistance of counsel by failing to properly support his challenge to the search warrant affidavit by making an offer of proof. The district court denied defendant's motion. Thereafter, defendant appealed her conviction and sentence to the circuit court. Defendant raised the same issues before the circuit court that she now presents on appeal to this Court. The circuit court affirmed defendant's convictions and sentence.

II

Defendant first argues that her original trial attorney was ineffective for failing to bring a properly supported challenge to the search warrant affidavit. Specifically, defendant alleges that he failed to establish by way of an offer of proof that the affidavit was flawed by material misstatements and omissions. We disagree.

To establish ineffective assistance of counsel, defendant must show that trial counsel's performance was so deficient that it fell below an objective standard of reasonableness and that it prejudiced her to the extent that it denied her a fair trial. *People v Henry*, 239 Mich App 140, 145-146; 607 NW2d 767 (1999). To establish the requisite degree of prejudice, defendant must show that but for trial counsel's error, there is a reasonable probability that the proceeding's outcome would have been different. *Id*. at 146. Effective assistance of counsel is presumed, and a defendant must overcome the presumption that trial counsel's performance constituted sound trial strategy. *Id*.

"[I]f false statements are made in an affidavit in support of a search warrant, evidence obtained pursuant to the warrant must be suppressed if the false information was necessary to a finding of probable cause." *People v Stumpf*, 196 Mich App 218, 224; 492 NW2d 795 (1992); see also *Franks v Delaware*, 438 US 154, 155-156; 98 S Ct 2674; 57 L Ed 2d 667 (1978). "In order to prevail on a motion to suppress the evidence obtained pursuant to a search warrant procured with alleged false information, the defendant must show by a preponderance of the evidence that the affiant had knowingly and intentionally, or with reckless disregard for the truth, inserted false material into the affidavit and that the false material was necessary to a finding of probable cause." *Stumpf*, *supra* at 224. This rule has been extended to encompass material omissions as well. *Id*.; *People v Kort*, 162 Mich App 680, 685-686; 413 NW2d 83 (1987).

Defendant asserts that officer Rogers, the affiant, willfully misstated the facts and omitted crucial information in executing the search warrant affidavit, and that her original attorney failed to provide the district court with proof of Rogers' misstatements and omissions. Rogers' affidavit avers:

> Affiant [Rogers] is the officer in charge of an investigation . . . involving a cruelty complaint . . . investigated in January 2004. We observed numerous dogs and cats kept in poor conditions. This includes animals kept in filthy kennels

> filled with urine and feces . . . . Upon initial investigation in January with subzero temperatures, the dogs had frozen food and water, feces filled dishes, insufficient insulation . . . . Over the last couple of months subsequent observations have been made from the adjoining neighbor's property in which filthy conditions were observed . . . . The odor emitted from the kennel is foul. After receiving a complaint that a dead animal was seen in a box [on the premises] affiant went to [the premises] to speak with the [defendant] . . . .

Defendant argues that some of the facts included in the affidavit contradict the facts in Rogers' official report. Specifically, defendant points out that the affidavit avers that the temperature was "subzero" when Rogers visited the kennel, whereas the report states that the temperature was "28 degrees." Further, while the affidavit indicates that the animals' food and water was frozen, the report only references frozen water. Defendant also asserts that the statement in the affidavit regarding a complaint about a dead animal is misleading. In so arguing, defendant cites a telephone conversation with Rogers in which Rogers purportedly stated that the complaint about the dead animal "was nothing."[1] Defendant additionally asserts, and the prosecution concedes, that Rogers omitted evidence (1) that defendant informed her that the animals' cages were cleaned daily, (2) that when she returned to the premises, the indoor kennel had been partially cleaned, and (3) that the kennel passed additional inspections conducted between January and April 2004.

Even assuming arguendo that Rogers misstated certain minor facts and omitted others in executing the search warrant affidavit, we agree with the circuit court's finding that the remainder of the information in the affidavit was sufficient to support a finding of probable cause. "Probable cause to search exists when facts and circumstances warrant a reasonably prudent person to believe that a crime has been committed and that the evidence sought will be found in a stated place." *People v Brzezinski*, 243 Mich App 431, 433; 622 NW2d 528 (2000). Because the affidavit contained information sufficient for a finding of probable cause without regard to any misstatements or omissions, defense counsel's performance cannot be considered ineffective. Although the evidence seized pursuant to the search warrant was detrimental to defendant's case, defendant cannot establish that her attorney's performance was outcome determinative. *Henry*, *supra* at 145-146. Even if counsel had presented a more elaborate argument or offer of proof on this issue, the proposed challenge to the affidavit would still have failed and the challenged evidence would still have been admissible. Defendant failed to overcome the presumption of effective assistance of counsel. *Id*.

Defendant also requests a remand for further fact finding on this issue pursuant to MCR 7.211(C)(1)(a)(*ii*). But because defendant has failed to demonstrate that an evidentiary hearing would support her ineffective assistance of counsel claim, we must deny her request for further fact finding.

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[1] Contrary to defendant's argument, however, this alleged telephone conversation merely confirms that Rogers had indeed received a complaint regarding a dead animal on defendant's property.

III

Defendant next argues that her convictions should be reversed because the complaint in this matter was constitutionally deficient. Defendant specifically argues that the complaint was deficient because, although she was charged with six separate counts of animal abandonment or cruelty, the complaint failed to reference any particular animal or date with respect to each individual charge. We disagree. The sufficiency of the complaint is a constitutional question, which we review de novo. See *People v Darden*, 230 Mich App 597, 600; 585 NW2d 27 (1998).

We fully agree with defendant that a criminal complaint must be sufficiently specific to apprise the accused of the nature of the charges. *People v Quider*, 172 Mich 280, 285-286; 137 NW 546 (1912). It is well established that a defendant has a constitutional right to be informed of the nature of the charges pending against her. Const 1963, art 1, § 20; *People v Higuera*, 244 Mich App 429, 442-443; 625 NW2d 444 (2001). A criminal complaint is a written accusation that a named or described person has committed a specific criminal offense, and it must include the substance of the accusation and the name and statutory citation of the offense. MCR 6.101(A). A criminal complaint must also "adequately inform of the substance of the accusations," and its factual allegations must "provide the basis from which commission of the legal elements of the charge can be inferred." *Higuera*, *supra* at 447. However, it must also be remembered that "'[t]he primary function of a complaint is to move the magistrate to determine whether a warrant shall issue.'" *Id*. at 443, quoting *Wayne Co Prosecutor v Recorder's Court Judge*, 119 Mich App 159, 162; 326 NW2d 825 (1982).[2]

Among other things, the complaint in this case listed the charges against defendant, i.e., six counts of animal abandonment or cruelty, and provided the statutory citation for each charge. Therefore, the information contained in the complaint satisfies the minimum requirements under MCR 6.101(A). Furthermore, we agree with the circuit court's finding that, in light of the allegations of continuing animal abandonment or cruelty over several months, "a specific date and a specific dog were not required as to each count." Finally and perhaps most importantly, six particular dogs were seized from defendant's kennel, all of which were in need of medical treatment. Therefore, we cannot conclude that defendant was unaware of the nature of the charges against her or that she did not know which specific dogs were involved in this case. See *Higuera*, *supra* at 447; see also *Quider*, *supra* at 286.

IV

Defendant also suggests that because the district court failed to instruct the jury that its verdict must be unanimous with regard to each specific animal, there is no way to ensure that her convictions were the result of a unanimous jury verdict. Again, we disagree. Because defendant

[2] We note that many of the cases relied on by defendant in her brief on appeal are concerned with the sufficiency of the indictment or information rather than the sufficiency of the initial criminal complaint. The criminal complaint serves different purposes than the indictment or information, and therefore "[t]he requirements for a criminal complaint are not the same as for an indictment or information." *Higuera*, *supra* at 443.

failed to request a more specific jury instruction at trial, we review her claim for plain error affecting her substantial rights. *People v Gonzalez*, 468 Mich 636, 643; 664 NW2d 159 (2003).

The district court provided the jury with a general unanimity instruction in this case. In reviewing claims of instructional error, we examine the instructions in their entirety, and if the instructions adequately protected the defendant's rights by fairly presenting the issues to the jury, there is no basis for reversal. *People v Martin*, 271 Mich App 280, 337-338; 721 NW2d 815 (2006). In most cases, a general unanimity instruction is sufficient to protect the defendant's right to a unanimous verdict. *Id*.; *People v Cooks*, 446 Mich 503, 524; 521 NW2d 275 (1994). A specific unanimity instruction is only required when there is evidence of alternative acts allegedly committed by the defendant, each satisfying the actus reus element of the charged offense, *and* (1) "'the alternative acts are materially distinct (where the acts themselves are conceptually distinct or where either party has offered materially distinct proofs regarding one of the alternatives),'" or (2) "'there is reason to believe the jurors might be confused or disagree about the factual basis of defendant's guilt.'" *Martin*, *supra* at 338, quoting *Cooks*, *supra* at 524.

Here, the prosecutor argued that defendant was guilty of six counts of animal abandonment or cruelty in relation to six dogs seized from defendant's kennel. We find that each of the charged counts involved a continuous course of conduct. *Cooks*, *supra* at 522-526. The prosecution presented evidence that defendant committed ongoing acts of animal abandonment or cruelty, involving each of the six dogs, over a period of several months. Accordingly, under the "continuing offense" exception, no specific unanimity instruction was required with respect to the dates and times of each alleged instance of animal cruelty. *Id*.

Further, neither party offered materially distinct proofs of separate and alternative acts with respect to any of the charged counts. Instead, because defendant completely denied committing the charged offenses, the sole task of the jury was to determine whether or not the prosecution had proven that she engaged in the alleged instances of animal cruelty at all. At least six specific dogs had been confiscated from defendant's property, and evidence was introduced at trial that established this fact. Therefore, there is no reasonable probability that the jury could have been confused about the six particular dogs that were allegedly mistreated. Defendant has not shown that any of the evidence differed with respect to each individual count or that the jurors might have improperly confused evidence concerning one dog with other evidence concerning another dog. Moreover, it is not readily apparent from the form and style of the verdict that the jurors were in disagreement concerning which of the dogs was actually mistreated. Absent any indication of juror confusion or disagreement regarding any of the charged acts, a specific unanimity instruction was not required in this case. *Id*. at 529.

We note in passing that a jury may reach inconsistent verdicts as the result of compromise or leniency. *People v Goss*, 446 Mich 587, 597-598; 521 NW2d 312 (1994). Indeed, juries in criminal cases have "the power to dispense mercy by returning verdicts less than warranted by the evidence." *People v St Cyr*, 129 Mich App 471, 474; 341 NW2d 533 (1983). We find it most likely that notwithstanding the evidence presented in this case, the jury decided to acquit on four of the six charges as an exercise of compromise or leniency. We perceive no outcome-determinative plain error in the general unanimity instruction provided at defendant's trial. *Gonzalez*, *supra* at 643.

V

Defendant finally argues that the district court abused its discretion when it ordered her to pay $5,555 in restitution for the cost of housing and medical care for six dogs seized from her kennel. Defendant claims that because she was only convicted of two counts of animal abandonment or cruelty, she should only be responsible to pay the costs of housing and care for two of the seized dogs. We agree.

Generally, an order of restitution is reviewed for an abuse of discretion. *People v Gubachy*, 272 Mich App 706, 708; 728 NW2d 891 (2006). However, when the question of restitution involves a matter of statutory interpretation, our review is de novo. *Id*.

When faced with a question of statutory interpretation, "[w]e begin by construing the language of the statute itself." *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004). "Our concern is to ascertain and give effect to the legislative intent as expressed by the plain language of the statute." *People v Thomas*, 260 Mich App 450, 458; 678 NW2d 631 (2004). "If the language is clear and unambiguous, the plain meaning of the statute reflects the legislative intent and judicial construction is not permitted." *People v Giovannini*, 271 Mich App 409, 412; 722 NW2d 237 (2006). The Legislature is presumed to have intended the meaning it plainly expressed, *People v Petty*, 469 Mich 108, 114; 665 NW2d 443 (2003), and we may not speculate as to the probable intent of the Legislature beyond the language expressed in the statute, *People v Hock Shop, Inc*, 261 Mich App 521, 528; 681 NW2d 669 (2004). We presume that every word in a statute has some significance, *People v Borchard-Ruhland*, 460 Mich 278, 285; 597 NW2d 1 (1999), and we afford each word its plain and ordinary meaning, *People v Fennell*, 260 Mich App 261, 267; 677 NW2d 66 (2004).

MCL 750.50 governs the imposition of costs and restitution for the care and housing of animals seized and impounded pending the outcome of an action under MCL 750.50. MCL 750.50 provides in relevant part:

> (3) If an animal is impounded and is being held by an animal control shelter or its designee or an animal protection shelter or its designee or a licensed veterinarian pending the outcome of a criminal action charging a violation of this section or section 50b, before final disposition of the criminal charge, the prosecuting attorney may file a civil action in the court that has jurisdiction of the criminal action, requesting that the court issue an order forfeiting the animal to the animal control shelter or animal protection shelter or to a licensed veterinarian before final disposition of the criminal charge . . . . At the hearing, the prosecuting attorney has the burden of establishing by a preponderance of the evidence that a violation of this section or section 50b occurred. If the court finds that the prosecuting attorney has met this burden, the court shall order immediate forfeiture of the animal . . . unless the defendant . . . submits . . . an amount determined by the court to be sufficient to repay all reasonable costs incurred, and anticipated to be incurred, by the animal control shelter or animal protection shelter or the licensed veterinarian in caring for the animal from the date of initial impoundment to the date of trial. . . .

* * *

(5) If forfeiture is not ordered pursuant to subsection (3), as a part of the sentence for a violation of subsection (2), the court may order the defendant to pay the costs of the care, housing, and veterinary medical care for the animal, as applicable. If the court does not order a defendant to pay all of the applicable costs listed in this subsection, or orders only partial payment of these costs, the court shall state on the record the reason for that action.

Because the prosecutor did not commence civil proceedings pursuant to MCL 750.50(3), "forfeiture [wa]s not ordered pursuant to subsection (3)," and this issue is consequently controlled by MCL 750.50(5).

According to the plain language of MCL 750.50, costs or restitution ordered under subsection (5) must be "*part of the sentence for a violation of subsection (2)* . . . ." MCL 750.50(5) (emphasis added). The natural implication of this language is that costs and restitution may *only* be ordered under subsection (5) for the purpose of paying for the housing and care of animals that the defendant has been convicted of mistreating or abandoning under subsection (2). Moreover, under the plain statutory language, the court may order costs and restitution for the housing and care of "*the animal* . . . ." MCL 750.50(5) (emphasis added). The word "the" is a definite article. *In re Costs and Attorney Fees*, 250 Mich App 89, 102; 645 NW2d 697 (2002). It has a """specifying or particularizing effect, as opposed to the indefinite or generalizing force of the indefinite article a or an . . . .""" *Id*. (citations omitted). Therefore, the phrase "the animal" in MCL 750.50(5) contemplates only the one, particular animal that the defendant has been convicted of mistreating or abandoning under subsection MCL 750.50(2). See *id*.; see also *Robinson v Detroit*, 462 Mich 439, 462; 613 NW2d 307 (2000).

Under MCL 750.50(5), the court may only require payment of costs and restitution for the housing and care of the specific animal or animals that the defendant has been convicted of mistreating or abandoning. Thus, the district court was without authority to order statutory costs and restitution for the housing and care of the six dogs that were confiscated from defendant's kennel. MCL 750.50(5). The court was only authorized to impose costs and restitution for the two dogs that defendant was convicted of mistreating. The district court abused its discretion in ordering defendant to pay restitution and costs for all six dogs. We vacate the portion of defendant's sentence requiring the payment of $5,555 in costs and restitution for all six dogs. On remand, the district court shall amend the amount of costs and restitution payable under MCL 750.50(5) accordingly.

Affirmed in part, vacated in part, and remanded to the district court for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen

S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN,

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Before: Borrello, P.J., and Jansen and Murray, JJ.

MURRAY, J., (*concurring*).

I concur in the majority's opinion affirming defendant's convictions and vacating the order of restitution. However, I disagree with the majority's statement – which is unnecessary to the resolution of this appeal – that the jury "most likely" decided to acquit defendant on four of the six charges as a compromise for leniency. Although it is true that juries in criminal cases have the power to dispense mercy by returning verdicts less than that warranted by the evidence, *People v St Cyr*, 129 Mich App 471, 474; 341 NW2d 533 (1983), they unquestionably do not have the *right* to do so. *Id.* I am not willing to speculate as to why the jury acquitted defendant on four of the six charges, other than to assume it properly dispensed its function of reviewing the evidence and determining whether defendant was guilty beyond a reasonable doubt.

Additionally, the prosecutor's argument that MCL 780.766(2) allows for the restitution order in this case is without merit. Since the Legislature provided a specific remedy for this specific crime within MCL 750.50(5), it is that statutory provision that controls over the more general enactment. *Glisson v Gerrity,* 274 Mich App 525, 536; 734 NW2d 614 (2007).

/s/ Christopher M. Murray