IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

Supreme Court No.: 23-603
Case No.: 22-F-93
Circuit Court of Cabell County

AUSTIN STEVENS,

Defendant Below, Petitioner.

PETITIONER'S REPLY BRIEF

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REPLY ARGUMENT

In a trial for felony animal cruelty the circuit court erred by failing to give a requested jury instruction on the lesser included offense of misdemeanor animal cruelty. The Respondent, the State of West Virginia, makes three arguments as to why this is not reversible error. All three are without merit, and each is addressed below.

A. The State Claims Misdemeanor Animal Cruelty is Not a Lesser Included Offense of Felony Animal Cruelty

The State maintains in its Response that a misdemeanor violation of W. Va. Code § 61-8-19(a) is not a lesser included offense of felony animal cruelty under W. Va. Code § 61-8-19(b). Resp. Br. 7, 11. The State correctly points out that a felony violation of subsection (b) can be committed in one of two ways, either *directly* or *indirectly*. Resp. Br. 9-10. That is, by either, (1) intentionally torturing, or mutilating or maliciously killing an animal, ***or*** by (2) causing, procuring, or authorizing any other person to do so. Resp. Br. 9-10. The State further correctly asserts that misdemeanor animal cruelty pursuant to subsection (a) may only be committed by directly and personally mistreating an animal in a cruel manner, not by causing, procuring, or authorizing another person to violate the law. Resp. Br. 10. The State then goes on to conclude that since it is possible to violate felony subsection (b) by *indirectly* causing, procuring, or authorizing torture, mutilation or killing an animal, the misdemeanor violations of subsection (a) cannot not be lesser included offenses of the felony. Resp. Br. 10-11. The State is wrong.

Because § 61-8-19(b) may be violated two different ways, those two different ways represent *two different offenses* for purposes of analyzing whether the offenses are the same or different offenses for double jeopardy and lesser included offense purposes. Since each way of violating subsection (b) requires proof of a different and contrary element, one that the crime was committed personally (directly) by the accused, and the other that it was committed by an agent (indirectly), logically a defendant can only be guilty of one of the two. Moreover, because each way of violating subsection (b) requires a different and contrary element, they are not the same offense under *Blockburger v. U.S.*, 284 U.S. 299, 304 (1932).

The problem with the State's argument is that in the present case the Petitioner was only indicted for the *direct* violation of § 61-8-19(b). The indictment provides that the Petitioner "committed the offense of 'CRUELTY TO ANIMALS' by unlawfully, feloniously, and

intentionally torturing, mutilating, or maliciously killing an animal, to wit: by shooting an Angus calf two (2) times with a compound bow, ..." A.R. 365. Furthermore, all the evidence establishes beyond any doubt that the Petitioner was the sole actor and there was no question of him causing, procuring, or authorizing another person to act. Pet. Br. 2-3, Resp. Br. 3-5.

A greater offense can be alleged in ways that may or may not entitle a defendant to a lesser included instruction. A concrete and familiar example is first degree murder and its recognized lesser included offense of second degree murder. First degree murder may be alleged to have been committed by "willful, deliberate and premeditated killing" in which case the accused would normally be entitled to an instruction for second degree murder. W. Va. Code § 61-2-1. Indicted in this way the difference between first and second degree murder is whether there was deliberation and premeditation. Charged in this way no person could be guilty of first degree murder without also being guilty of second degree murder. But first degree murder can also be committed by felony murder during certain crimes, including arson, robbery, burglary and kidnapping. W. Va. Code § 61-2-1. In such a case a defendant would not normally be entitled to an instruction for second degree murder since one could be guilty of first degree murder without committing second degree murder. In determining whether an accused is entitled to a lesser included offense instruction it matters which type of first degree murder he or she is charged with. This same principle applies in the present case. The Petitioner was charged with what the State calls *direct* animal cruelty. This form of felony animal cruelty has a lesser included offense of misdemeanor animal cruelty provided by § 61-8-19(a)(1)(A) because the felony cannot be committed without also "[m]istreat[ing] an animal in cruel manner" in violation of the misdemeanor part of the statute.

The Response relies upon the proposition that the "focus is on the legal elements of the offense" in determining if one offense is a lesser included of another. Resp. Br. 7. The State simply focuses on the wrong greater offense. Accordingly, the State's argument fails.

B. The State Claims that there was No Evidentiary Dispute between the Elements of the Greater Offense and the Lesser Included Offense and Accordingly the Petitioner was Not Entitled to a Lesser Included Offense Instruction

The State hedges its bet and takes the position that even if misdemeanor animal cruelty is a lesser included offense of felony animal cruelty, the Petitioner was not entitled to that instruction because "there was no evidentiary dispute or insufficiency on the elements of the greater offense which are different from the elements of the lesser included offense." Resp. Br. 11-12, citing *Sowards v. Ames*, 248 W.Va. 213, 225, 888 S.E.2d 23, 35 (2023) and *State v. Neider*, Syl. Pt. 2, 170 W.Va. 662, 666, 295 S.E.2d 902, 906 (1982). First, the court below never reached or ruled on this issue and the State is attempting to get this Court to substitute its judgment for a hypothetical ruling of the circuit court that was never made. A.R. 296-97. The court below merely ruled that the misdemeanor was not a lesser included offense of the felony and ended its inquiry there. A.R. 297. But even if this Court accepts the invitation of the State to substitute its judgment for that of the circuit court, the State's argument is still without merit.

To be guilty of the felony the Petitioner had to intentionally torture, mutilate or maliciously kill an animal. W. Va. Code § 61-8-19(b). There was no evidence of torture or mutilation, only evidence that, if believed, showed the Petitioner may have killed the calf with malice and in a cruel manner. At trial the prosecution focused on the fact that the calf could have been killed more humanely with a gun and that it suffered. In evidence at A.R. 203-04, 222-24, 242, 245, 269-70. In closing argument at A.R. 307-08, 319.

To be guilty of the misdemeanor the State only needed to prove that the animal was mistreated in a cruel manner. W. Va. Code § 61-8-19(a)(1)(A). If the evidence presented by the State at trial is believed, it cannot be said that it did not demonstrate mistreatment in a cruel manner in violation of subsection (a)(1)(A). Seen in the light most favorable to the State the jury could have found cruel mistreatment *or* malicious killing. It was the jury's task to decide whether to acquit, convict of misdemeanor animal cruelty, or convict of felony malicious killing. But the jury was never given that choice. The Petitioner's counsel was deprived of the ability to argue for the jury to only convict of the misdemeanor since there was no lesser included instruction and the misdemeanor conviction was not on the verdict form. A.R. 402.

Petitioner does not dispute that the evidence at trial was sufficient to support the felony conviction under the minimum standard in *State v. Guthrie,* Syl. Pt. 1, 194 W.Va. 657, 461

S.E.2d 163 (1995). But that is not the issue. If the evidence could support both a conviction for the lesser included offense *or* the greater offense the Petitioner is entitled to the lesser included instruction. By not giving the lesser included instruction the trial court impaired the Petitioner's "ability to effectively present a given defense" in violation of *State v. Blankenship,* Syl. Pt. 3, 208 W.Va. 612, 542 S.E.2d 433 (2000), quoting *State v. Derr*, Syl. Pt. 11, 192 W.Va. 165, 451 S.E.2d 731 (1994). That defense being that the Petitioner was only guilty of the less serious charge of misdemeanor animal cruelty. This is the rule "no matter how tenuous that defense might seem to the court." *State v. Hinkle,* 200 W.Va. 280, 285, 489 S.E.2d 257, 262 (1996), quoting *U.S. v. Dove*, 916 F.2d 41, 47 (2d Cir. 1990). The Petitioner was foreclosed from bringing this defense to the felony prosecution in the present case.

Finally, if sufficient evidence presented at trial alone were enough to protect a verdict of guilty of the greater offense from being set aside for failure to give a lesser included jury instruction, it would mean that a defendant is only entitled to that instruction in cases where the guilty verdict for the greater offense would also be set aside and a verdict of not guilty entered as a result of the failure to meet the *Guthrie* standard. It would also mean that it would never be reversible error for a court to refuse to give a clearly proper second degree murder instruction in a first degree murder case so long as the evidence in support of the first degree murder conviction met the *Guthrie* standard. That is absurd.

C. The State Claims that Even If the Failure to Give the Lesser Included Offense Instruction was Error, it was Harmless

The State argues that the evidence presented at trial was insufficient to support a misdemeanor conviction for animal cruelty. Resp. Br. 13. To meet this sufficiency standard would only require presenting some evidence that the calf was mistreated in a cruel manner pursuant to W. Va. Code § 61-8-19(a)(1)(A).

The State presented evidence in an attempt to prove malicious mistreatment of the calf. The evidence was that the calf suffered. A.R. 203-04, 223-24. The Petitioner shot it twice with an arrow, once in the forehead and once in the heart. A.R. 164, 180, 267. The Petitioner could have killed it humanely with a gun, but did not. A.R. 242. The Petitioner used a type of arrow that contained razor blades that upon impact would flip open to create a large wound channel. A.R. 222. The Petitioner watched the calf start walking back home after shooting it and knowing

that it would not die right away did not call its owners or Animal Control so that it would not suffer further. A.R. 269.

In closing argument, the prosecutor emphasized that the Petitioner maliciously shot the calf with arrows and not a gun. A.R. 307. He told the jury that the animal suffered, couldn't breathe, and was having trouble walking. A.R. 307-08. The prosecutor said that the Petitioner used arrows specially designed to cause mass destruction and the calf suffered before it died. A.R. 308. And again, in rebuttal closing argument the prosecutor told the jury that the Petitioner used a "compound bow with a razor edge, not to put it humanely down at that time, not like they did when they euthanized it. No. He used it to cause this animal some pain, and the animal was unfortunately caused some pain." A.R. 319.

The Petitioner on the other hand presented testimony that he did not act maliciously since the calf was tearing up his yard. A.R. 264. The calf was agitated and acting aggressively. A.R. 266. He was afraid, after the calf started snorting, that it would hurt his puppy by bucking, kicking, or stomping. A.R. 264-65, 282. He repeatedly tried to shoo the calf away. A.R. 264, 266-67. Petitioner testified that he used special arrows to try to put the animal down quickly and he did not want the calf to suffer. A.R. 267-68, 286. Accordingly, the evidence presented could support either a misdemeanor or felony conviction, depending on what the jury believed.

The proposition that the State did not present evidence that if believed was "sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt" of the misdemeanor is frivolous. *Guthrie, supra*, Syl. Pt. 1. As *Guthrie* makes clear, "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 proved beyond a reasonable doubt." *Guthrie, supra,* Syl. Pt. 1.

Had the Petitioner been tried and convicted of misdemeanor animal cruelty for mistreating an animal in a cruel manner pursuant to W. Va. Code § 61-8-19(a)(1)(A) based upon the evidence in this case, and then appealed based upon a claim of insufficient evidence, this Court would rightly rule the appeal to be without merit. Likewise, the contention of the State that the evidence presented at trial below was insufficient to support a conviction for a subsection (a)(1)(A) violation is devoid of merit. It was the jury's job to determine whether to find the Petitioner not guilty, guilty of the misdemeanor, or guilty of the felony. But the jury never got that choice.

Accordingly, there was nothing harmless about the circuit court's error in not instructing the jury on misdemeanor animal cruelty.

CONCLUSION

In trying to rescue from reversal the circuit court's error in refusing to give the lesser included offense instruction, the State abandons common sense and ignores the fact that the Petitioner was charged with direct and personal felony animal cruelty, and that therefore the misdemeanor of mistreating an animal in a cruel manner under W. Va. Code § 61-8-19(a)(1)(A) is obviously a lesser included offense of the felony set forth in subsection (b) of that same statute. Resp. Br. 9-11. If the State is right, it means that a defendant could be charged, tried, convicted, and sentenced consecutively for both misdemeanor animal cruelty and felony animal cruelty since they would be separate offenses under *Blockburger* double jeopardy analysis. The Legislature could not possibly have intended that.

Next the State makes the spurious argument that because the evidence at trial was sufficient to support the felony conviction there was no error in refusing to give the lesser included offense instruction. Resp. Br. 12. But that is not the law. The failure to give the lesser included instruction eliminated the ability of the Petitioner to present a defense and argue for a conviction for misdemeanor animal cruelty rather than the far more serious felony offense. And if the only time a petitioner is granted a new trial for failure to give a lesser include offense instruction is when the evidence is insufficient under the *Guthrie* case standard, such a petitioner would not want or need a new trial since he would be ordered acquitted by this Court based on that insufficient evidence.

Finally, in a last desperate attempt to avoid reversal, the State claims any error of the circuit court is harmless because the evidence at trial was not sufficient under the *Guthrie* standard to support a guilty verdict for the misdemeanor of mistreating an animal in a cruel manner. Resp. Br. 13. As set forth above, the evidence, if believed, was more than adequate to support such a verdict of guilty of both the misdemeanor or the felony and had the Petitioner been tried and convicted of the misdemeanor version of animal cruelty this Court would not have set such a verdict aside.

In light of all the above, this Court should reverse the conviction of the Petitioner and remand this case to the circuit court for a new trial in which the Petitioner, if he chooses, can

argue for conviction of the lesser included offense, and the jury has an opportunity to consider whether the Petitioner, if he is guilty, is guilty of misdemeanor or felony animal cruelty.

Respectfully submitted,
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