IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 23-603

SCA EFiled: Mar 01 2024
12:16PM EST
Transaction ID 72217505

STATE OF WEST VIRGINIA,

Respondent,

v.

AUSTIN STEVENS,

Petitioner.

BRIEF OF RESPONDENT

PATRICK MORRISEY
ATTORNEY GENERAL

Mary Beth Niday (WV Bar # 9092)
Assistant Attorney General
State Capitol Complex
Building 6, Suite 406
Charleston, WV 25305-0220
Email: Mary.B.Niday@wvago.gov
Telephone: (304) 558-5830
Facsimile: (304) 558-5833

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Petitioner Austin Stevens is not entitled to relief. The circuit court properly instructed the jury on felony animal cruelty, including giving instructions defining malice and torture. Because misdemeanor animal cruelty is not a lesser included offense of felony animal cruelty, the court was not required to give the misdemeanor instruction. Moreover, Petitioner does not dispute the sufficiency of the evidence for the felony animal cruelty conviction. Nevertheless, to the extent the court may have committed error in failing to give the misdemeanor instruction, such error is harmless because the evidence of malice was so strong that a jury would not have convicted Petitioner of mistreating the calf under the misdemeanor statute. The Court should affirm the Cabell County Circuit Court's sentencing order.

ASSIGNMENT OF ERROR

Petitioner raises a single assignment of error in his brief: "The circuit court erred in ruling that misdemeanor animal cruelty, as a matter of law, is not a lesser included offense of felony animal cruelty and accordingly erred in refusing to instruct the jury on that lesser included offense." Pet'r's Br. 1.

STATEMENT OF THE CASE

I. Indictment, Underlying Crime, and Trial Testimony.

In the mid-morning hours of December 4, 2021, Vickie Scarberry found one of her young calves, not more than two months old, with blood pouring down its face and struggling to breathe as it was trying to get back into the pasture "to its mom." App.165:1-3; 166:13-15, 19-21; 176, 180:13-14; 180:13-17. The baby calf was struggling to walk and fell at least once because it had been shot twice with arrows: once in the heart and once in the head. App. 165:19-21; 166:19-20. Mrs. Scarberry immediately called 9-1-1, and then her husband. App. 166:12, 22-24. When Rusty Scarberry arrived home, he and Mrs. Scarberry followed the blood trail. App. 167:7-11; 169:22-

24; 170:1. Mrs. Scarberry soon returned to the house while Mr. Scarberry continued across a bridge until he arrived at his neighbor's house where Petitioner lived. App. 168:19-23; 170:1-6; 180:6-8. Petitioner was living in a house belonging to his grandmother, who was Mrs. Scarberry's cousin. App. 168:9-11; 177:2-4; 189:18-24; 253:19-24.

When Mr. Scarberry arrived at Petitioner's residence, Petitioner was attempting to leave. So, while standing in the road, Mr. Scarberry told Petitioner "you ain't going nowhere, you're going to jail." App. 183:24; 184:1-2; 191:7-8. According to Mr. Scarberry, Petitioner, angrily responded: "I didn't shoot your effing calf." App. 184:14-15. Petitioner then backed his Jeep across the bridge "and took off running for the house." App. 184:19-21.

At this point, law enforcement had arrived. App. 184:3-7. Mr. Scarberry, quite upset, asked Petitioner if he was proud of himself and told Petitioner he would go to jail. App. 187:18-24; 188:1-2.

Mr. Scarberry testified that while he was following the baby calf's trail earlier, his wife called Karen LeGrand, Petitioner's grandmother, to ask if Petitioner was home. App. 185:17-21. During the conversation, Ms. LeGrand told Ms. Scarberry she saw a baby calf in Petitioner's yard earlier that morning. App. 185:21-23. Also prior to this incident, Petitioner had worked for Mr. Scarberry for four months in his construction business. App. 177:17-24. The working relationship did not end well; Mr. Scarberry had to have an unfriendly discussion with Petitioner, and Petitioner quit. App. 178:6-13.

When Jon Rutherford, who was then the Cabell County animal control officer, observed the baby calf, it had blood coming out of its nose, was having trouble breathing, and had an arrow sticking out of its chest that "was ticking to each heartbeat," indicating a "shot directly into the heart." App. 203:14-20. The calf was standing next to its mother, not moving. App. 204:2-4. At

that point, based on their training and experience, both Mr. Scarberry and Officer Rutherford realized the baby calf had received a fatal injury and was not going to survive. App. 182:19-24; 199:8-20; 204:13-17. Officer Rutherford chose to euthanize the baby calf due to its suffering. App. 183:11-13; 223:22-24; 224:1-5; 245:15-18. He testified that the calf would not have survived. App. 224:4-7; 245:12-13.

Officer Rutherford asked Petitioner what happened and he admitted that he shot the calf with the arrows because he "was sick of it coming over on his property" and defecating "everywhere." App. 208:20-22. Ms. LeGrand confirmed at trial that the Scarberry's cows and calves had a pattern of "tearing up the ground, making it uneven to mow, and leaving their piles of stool." App. 256:14-15. Officer Rutherford testified that Petitioner also told him he did not like Mr. Scarberry. App. 209:2.

As part of Officer Rutherford's investigation, Petitioner made an initial sworn, recorded oral statement and provided a second written statement on December 4, 2021. App. 210:23-24; 211:1-2; 214:17-24. In the written statement, Petitioner stated that when he got home from work that day, he saw "the cow in my front yard next to our outbuilding." App. 215:24; 216:1; 368; 382. He did not think anything of it until after his puppy returned to him and "the cow approached." App. 216:6-7; 368; 382. Petitioner attempted to shoo the cow away to no avail and Petitioner "became flustered." App. 216:13; 368; 382. The puppy ran back toward the cow which then "turned" and Petitioner "ran inside grab[b]ed [his] bow out of instinct, came out[side] and fired—once to[ ] the heart and then once to[ ] the head." App. 216:15-17; 218:1-6; 368; 382. Officer Rutherford explained to the jury that the Rage broadhead arrows Petitioner used to shoot the baby calf contained razor blades held together by a band that, upon impact, "flip open to create a large wound channel to cause maximum damage." App. 222:13-15. Prior to this incident, Mr.

and Mrs. Scarberry were unaware that either Petitioner or Mrs. LeGrand were upset about the cows and calves being on their property at any time and testified that neither one called the Scarberrys to complain. App. 169:10-17; 171:20-24; 172:1, 16-19; 195:6-10. Likewise, Officer Rutherford did not receive any complaints about the Scarberrys' cows or calves during his time with animal control. App. 223:12-17.

Petitioner's recorded oral statement essentially confirmed the written statement. *See generally* App. 230-36; 384. Petitioner added, however, that his puppy initially sniffed the cow and returned to Petitioner but then started barking at the cow before again returning to Petitioner. App. 233:4-13; 384:6:59-7:04. The puppy then ran back toward the cow and Petitioner attempted to shoo away the cow. App. 233:14-15; 384:7:13-7:22. Petitioner stated that he then began "to worry. And as a result of worrying about the cow, I acted, and did put the animal down." App. 233:16-18. After Petitioner twice shot the calf with his compound bow, "the cow then proceeded to trot off." App. 234:21-22; 384:8:50. Petitioner went inside his house, "scared, to be honest[,] … sat down, calmed down for a few, and then [his] girlfriend asked [him] if [they] could leave." App. 234:22-24.

Petitioner's testimony at trial was much the same. He testified that when he came home from work on December 4, 2021, he saw the cow in the yard and thought that was nothing out of the ordinary as the cow was there on a "pretty frequent basis." App. 262:19-24. Nevertheless, he testified that he "was not real happy about" the calf being on his grandmother's property. App. 275:22-24. He let his four-month-old, ten-pound puppy out of the house and it immediately approached the calf and sniffed it. App. 263:2-19. The puppy then began barking at the calf which "turned its head real quickly at it." App. 263:22-24; 264:1-6. Petitioner began to shoo the calf away and called the puppy to him. App. 264:3-5, 9-10. At first, the puppy came to Petitioner so

Petitioner made further attempts to coax the calf to leave, telling the calf "I don't want you here. I don't want you to tear up my yard, and I don't want you to hurt my dog." App. 264:11-13.

Petitioner allowed the puppy to go back to the calf, and Petitioner testified, contrary to his two statements to Officer Rutherford, that the calf "started snorting" and "moving around a lot." App. 265:5-7; 283:8-15. Petitioner said he then became "flustered" because the calf "would not walk away," and because the calf "then proceeded to try to attack [his] puppy." App. 277:2-5. Also contrary to Petitioner's prior statements, Petitioner testified that the calf was "snorting and stomping," App. 278:23-24, and "bucking at [the puppy]," App. 279:8-9. He then testified that the calf was "[p]icking up its foot and coming down next" to the puppy. App. 280:17-18. So, worried the calf "would either buck or kick or stomp on [his] dog," Petitioner ran inside his house, retrieved his compound bow, again attempted to shoo away the calf, and then shot the calf as "[i]t would not go away." App. 265:15-16; 266:1-2, 6-14. He did not want to get close to the calf and grab his puppy because the calf, according to Petitioner "was as big, if not larger than [him]." App. 268:11-14. Even by Petitioner's testimony, though, the baby calf stood only to his knee to mid-thigh. App. 181:10-12; 194:2-4; 236:19. Nevertheless, Petitioner said he believed that had he bent down to retrieve the puppy, he would have "put [himself] in harm's way of getting hit or injured possibly worse by that animal." App. 268:16-18.

Petitioner testified that the calf "started to get agitated" and he could not "let this proceed any further." App. 266:21-23. So he shot the calf twice: "The first shot was the heart shot" and the second "was the head shot." App. 267:8, 16. Petitioner testified that he intended to kill the calf and used broadhead arrows designed "to open up and cause a large wound cavity" on impact. App. 267:9-10, 17-18, 22; 268:1-3. 8-10. The broadhead arrows are designed to kill an animal "[a]s quickly and humanely as possible." App. 268:4-7. Despite Petitioner's supposed intent to

kill the calf humanely, App. 286:10-15, he then watched the calf "start walking back home" after twice shooting it, App. 269:6-8. He knew the calf did not die right away but did not call Mr. or Mrs. Scarberry, 9-1-1, or animal control to advise of the incident and ensure the calf did not further suffer. App. 284:22-23; 285:4-14.

Petitioner went back inside his house and then attempted "to go out" with his girlfriend. App. 271:3-10. As he was leaving in his vehicle on the single lane road, Petitioner was blocked in by Mr. Scarberry who told Petitioner: "you're going to jail, you've done it now, I hope you're proud of yourself." App. 271:10-15. Law enforcement officers then arrived.

Regarding his history with the Scarberrys, Petitioner explained that he used to work for Mr. Scarberry and had known him and his family for years. App. 272:8-10. As time passed, their relationship deteriorated. App. 272:10-11.

In April 2022, Petitioner was indicted by a Cabell County grand jury on one count of felony animal cruelty, in violation of West Virginia Code § 61-8-19(b), 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." App. 365.

II. Jury Instructions, Conviction, and Sentencing.

Petitioner asked the circuit court to instruct the jury on misdemeanor animal cruelty, as set forth in West Virginia Code § 61-8-19(a). App. 295:5-7; 397. The State objected. App. 295:7-8. The court initially refused the instruction because it contained the possible penalty for the offense. App. 296:15-18. Petitioner then attempted to amend the instruction to remove the penalty language. App. 296:19-22. The court rejected that too, pointing out that Petitioner's own testimony proved that "he shot [the calf] with the intent to kill it, to put it out of its misery as quickly as possible." App. 296:23-24; 297:1. The court advised it would instruct the jury on the

definition of maliciousness. App. 297:5-6. Petitioner, however, continued to request the misdemeanor instruction, arguing that if the jury "felt that it wasn't malicious, or intentionally torturing this animal," they could find Petitioner wanted to "inflict cruelty upon it under the misdemeanor statute." App. 297:7-11. The court denied Petitioner's request, stating the State had to prove maliciousness for the felony charge and that the misdemeanor offense was not "a lesser included offense." App. 297:12-14.

The jury convicted Petitioner of felony animal cruelty as charged in the indictment. App. 330, 406-07. Following trial, Petitioner moved for a new trial, alleging among other things that the circuit court erred in not including "a lesser misdemeanor animal cruelty included instruction." App. 403. The circuit court orally denied Petitioner's motion at the sentencing hearing on September 15, 2023. App. 349.

By order entered September 20, 2023, the circuit court sentenced Petitioner to an indeterminate period of imprisonment of not less than one nor more than five years. App. 357, 408. The court then suspended the sentence and imposed a four-year term of probation, with the first year being served on home confinement, and ordered $1,5000 in restitution. App. 357, 408-09.

SUMMARY OF ARGUMENT

Petitioner has failed to demonstrate that he was entitled to a misdemeanor jury instruction for three reasons. First, misdemeanor animal cruelty is not a lesser included offense of felony animal cruelty. Under the categorical approach set forth in Syllabus Point 6, *State v. Thomas*, 249 W. Va. 181, 895 S.E.2d 36 (2023), the focus is on the legal elements or definition of the offense. Here, the elements of the crime require either direct or indirect action for the felony offense but only direct action for the misdemeanor. Because it is possible to commit the felony indirectly it

makes it possible to commit it without having first committed the misdemeanor that requires only direct action.

Second, Petitioner does not dispute that the evidence at trial was sufficient to support the elements of felony animal cruelty—intentionally torturing or maliciously killing an animal—as s opposed to mistreating the calf. Petitioner simply argues that the jury might have found the evidence adequate to convict Petitioner of the misdemeanor offense. This is not enough and Petitioner has not demonstrated his entitlement to the lesser instruction.

Third, any error the circuit court may have committed in not giving the misdemeanor instruction is harmless. This is because the evidence at trial was more than sufficient to prove the elements of the greater offense of Petitioner intentionally torturing or maliciously killing the baby calf.

For these reasons, this Court should affirm the circuit court's order.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is unnecessary and this case is suitable for disposition by memorandum decision because the record is fully developed and the arguments of both parties are adequately presented in the briefs. W. Va. R. App. P. 18(a)(3), (4).

STANDARD OF REVIEW

"As a general rule, the refusal to give a requested jury instruction is reviewed for an abuse of discretion. By contrast, the question of whether a jury was properly instructed is a question of law, and the review is de novo." Syl. pt. 1, *Thomas*, 249 W. Va. 181, 895 S.E.2d 36 (quoting syl. pt. 1, *State v. Hinkle*, 200 W. Va. 280, 489 S.E.2d 257 (1996)). "Whether facts are sufficient to justify the delivery of a particular instruction is reviewed by this Court under an abuse of discretion standard." Syl. pt. 2, *State v. Bland*, 239 W. Va. 463, 801 S.E.2d 478 (2017). When a criminal

conviction results, "the evidence and any reasonable inferences are considered in the light most favorable to the prosecution." *Id.*

ARGUMENT

"Jury instructions on possible guilty verdicts must only include those crimes for which substantial evidence has been presented upon which a jury might justifiably find the defendant guilty beyond a reasonable doubt." Syl. pt. 5, *State v. Demastus*, 165 W. Va. 572, 270 S.E.2d 649 (1980). This Court looks to a two-part inquiry to determine whether a lesser included offense meets that test and a defendant was entitled to a jury instruction on it. The first inquiry is a legal question: "whether the lesser offense is by virtue of its legal elements or definition included in the greater offense." Syl. pt. 3, *Thomas*, 249 W. Va. 181, 895 S.E.2d 36 (quoting syl. pt. 3, *State v. Wilkerson*, 230 W. Va. 366, 738 S.E.2d 32 (2013) (internal citations omitted)). This Court has not considered whether misdemeanor animal cruelty under Section 61-8-19(a)(1) is a lesser included offense of felony animal cruelty under Section 61-8-19(b). It is not. Regardless, the Court could save that issue for another day because Petitioner cannot meet the second inquiry.

The first inquiry involves a legal question, which looks to whether the circuit court correctly determined that misdemeanor animal cruelty is not a lesser included offense of felony animal cruelty. This Court has held that "[t]he test of determining whether a particular offense is a lesser included offense is that the lesser offense must be such that it is impossible to commit the greater offense without first having committed the lesser offense." *Id.* at syl. pt. 4 (internal quotation marks and citations omitted). Furthermore, an offense is not considered "a lesser included offense if it requires the inclusion of an element not required in the greater offense." *Id.*

West Virginia Code § 61-8-19(b) criminalizes animal cruelty as a felony offense when a person "intentionally tortures, or mutilates or maliciously kills an animal." Someone *also* commits

felony animal cruelty who "causes, procures or authorizes any other person to torture, mutilate or maliciously kill an animal." *Id.* So, felony animal cruelty can be committed directly or indirectly. Subsection (a), by contrast, criminalizes animal cruelty as a misdemeanor offense, and focuses solely on direct action, not things they can induce someone else to do. This section provides that it is unlawful for "any person to, intentionally, knowingly or recklessly mistreat an animal in [a] cruel manner; abandon an animal; withhold" sustenance, shelter, or medical treatment; "abandon an animal to die; leave an animal unattended and confined in a motor vehicle"; ride a physically unfit animal; bait or harass an animal for amusement; "cruelly chain or tether an animal; or use, train or possess a domesticated animal for the purpose of seizing, detaining or maltreating any other domesticated animal." *Id.* § 61-8-19(a). While misdemeanor animal cruelty may be committed in several different ways, all require personal action rather than directing another to act.

So the elements of each of the two offenses demonstrate how neither formulation of the lesser included test fits here. It is in fact quite possible to commit the greater felony offense without committing the lesser misdemeanor. If a person commits the felony in the indirect way—causing, procuring, or authorizing another person to commit animal cruelty—then that person has not necessarily committed the misdemeanor offense. The misdemeanor offense "requires the inclusion of an element not required in the greater offense" because it requires a defendant to personally engage in the mistreatment while that is just one way to commit the felony.

Here, Petitioner could not have committed the greater felony offense without first committing the lesser misdemeanor offense because no one suggests he had someone else shoot the calf. In fact, Petitioner admits he shot the calf. In *Thomas*, the determination of whether one crime is a lesser included offense was treated in categorical terms when the Court held that

"[a]ttempted sexual assault in the first degree is not a lesser included offense of sexual assault in the first degree." Syl. pt. 6, *Thomas*, 249 W. Va. 181, 895 S.E.2d 36. The Court did not qualify its holding based on the facts of the case because the categorical approach focuses exclusively on the "legal elements or definition." *Id.* at __, 895 S.E.2d at 43 (quoting syl. pt. 3, *Wilkerson*, 230 W. Va. 366, 738 S.2d 32 ("The first inquiry is a legal one having to do with whether the lesser offense is by virtue of its *legal elements or definition* included in the greater offense.") (emphasis added)).

Moreover, the test uses the term "impossible" to commit—that is a high standard that necessarily excludes any argument that if a person *sometimes but not always* commits the lesser along the way to committing the greater, that is good enough. In *Thomas*, the Court found that the purported "lesser included" had an element the greater offense did not when that element was present sometimes but not always in the greater: "[A]ttempt requires the specific intent to commit a crime," but "not all crimes are intentionally committed." *Id.* at __, 895 S.E.2d at 44. So it was not enough for the Court that in *some* cases there might be specific intent for the greater offense. In some cases, like this one, there was direct action required for the felony and misdemeanor animal cruelty. The fact that is not true in *all* cases is enough, though, to show that a crime is not a lesser included offense, and the same is true here. Misdemeanor animal cruelty is not a lesser included offense of felony animal cruelty.

The second inquiry involves a factual question, which looks to whether the circuit court correctly determined that there was "evidence which would tend to prove such lesser included offense." *Id.* at syl. pt. 3. "[T]the fact that a lesser offense is included within a greater offense[, however,] does not automatically entitle a defendant to obtain an instruction on the lesser included offense." *Sowards v. Ames*, 248 W. Va. 213, 225, 888 S.E.2d 23, 35 (2023) (quoting *State v.*

Neider, 170 W. Va. 662, 666, 295 S.E.2d 902, 906 (1982)). "Where there is no evidentiary dispute or insufficiency on the elements of the greater offense which are different from the elements of the lesser included offense, then the defendant is not entitled to a lesser included offense instruction." *Id.* (quoting syl. pt. 2, *Neider*, 170 W. Va. 662, 295 S.E.2d 902).

Section 61-8-19(b) requires that a person "intentionally tortures, or mutilates or maliciously kills an animal." W. Va. Code § 61-8-9(b). Here, Petitioner does not dispute that the evidence adduced at trial was sufficient to support the distinct elements of the greater offense—intentionally torturing or maliciously killing an animal as opposed to mistreating the animal cruelly. Rather, he simply argues that a jury "*might*" have found the evidence "adequate to convict Petitioner of the misdemeanor." Pet'r's Br. 11 (emphasis added). Given that effective concession, even if the Court concludes that misdemeanor animal cruelty is a lesser included offense, Petitioner was "not entitled to a lesser included offense instruction." *Sowards*, 248 W. Va. at 225, 888 S.E.2d at 35. "There is a presumption of regularity of court proceedings in courts of competent jurisdiction," and Petitioner—as the person alleging "irregularity"—has "the burden of proving" it. *Id.* at syl. pt. 6. So Petitioner must *prove* an "evidentiary dispute or insufficiency" over the malicious killing or torture elements of the felony. *Id.* at 225, 888 S.E.2d at 35. Mere speculation about what the jury might have done with a lesser included instruction does not meet his burden.

But even if the circuit court erred in failing to give a misdemeanor animal cruelty instruction, such error is harmless. The "[f]ailure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt." *Id.* at syl. pt. 8 (quoting syl. pt. 5, *State ex rel. Grob v. Blair*, 158 W. Va. 647, 214 S.E.2d 330 (1975)). "In conducting a harmless error analysis, the inquiry is fact specific." *State v. Byers*, 247 W. Va. 168, 179, 875 S.E.2d 306, 317 (2022) (citing *State v. Blake*, 197 W. Va. 700, 709, 478 S.E.2d 550,

559 (1996) ("Assessments of harmless error are necessarily content-specific."). A review of the record shows that any error was harmless beyond a reasonable doubt as the evidence was insufficient to support a misdemeanor instruction.

Here, the circuit court instructed the jury as to felony animal cruelty. App. 393. As part of its instructions, the court first defined torture (quoting the end of Section 61-8-19(b)) to "mean an action taken for the primary purpose of inflicting pain." *Id.* Moreover, the court instructed that malice "includes not only anger, hatred and revenge, but other unjustifiable motives" and that the jury could make a reasonable inference of malice from the evidence proven beyond a reasonable doubt. App. 394. The court also instructed that malice may be inferred "from any deliberate and cruel act done by the defendant without any reasonable provocation or excuse, however sudden." *Id.* The court further defined malice to include "every evil design in general" attendant upon ordinary circumstances "of wicked, depraved and malignant spirit," including "the plain indications of a heart, regardless of social duty, fatally bent upon mischief." *Id.* Finally, the court instructed that malice need not "have existed for any particular length of time and it may first come into existence at the time of the act or at any previous time." *Id.*

At trial, the State proved beyond a reasonable doubt that Petitioner maliciously killed and intentionally tortured the Scarberrys' calf. In his brief, Petitioner does not fully state the evidence and limits it to that of Petitioner twice shooting the baby calf, the calf suffering, and that based on the State's closing argument, Petitioner could have more humanely shot and killed the calf with a firearm. Pet'r's Br. 11. The reasonable evidence, proved beyond a reasonable doubt, established much more than Petitioner alleges. First, Petitioner's testimony alone established the requisite intent when he testified that he intended "to put it down" by shooting it first in the heart and then in the head. App. 267:6-10, 15-18. Petitioner, thus, intended to kill the baby calf. Second,

Petitioner used broadhead arrows designed to create a significant injury cavity and shot the calf in the heart and head to accomplish such purpose. App. 267:9-10, 17-18, 22; 268:1-10. Third, Petitioner testified that his dog twice returned to him on command during the incident with the baby calf. App. 265:2-4; 283:8-15. Yet, Petitioner never once picked up the puppy such that it could not access the calf. The jury could have reasonably inferred an unjustifiable motive based on Petitioner's failure to curtail any perceived threat to his dog.

Fourth, the baby calf was two months old and stood no taller than Petitioner's knee or mid-thigh. App. 181:10-12; 194:2-4; 236:19. The jury could have reasonably inferred, given the calf's age and small size, that it did not present a threat to Petitioner. Fifth, Mr. and Mrs. Scarberry and Petitioner's grandmother all testified to the fact that animosity existed between Mr. Scarberry and Petitioner. App. 178:6-13; 254:20-22. Despite Petitioner's testimony that he harbored no "ill will" toward Mr. Scarberry, Officer Rutherford testified that Petitioner told him he did not like his neighbor, Mr. Scarberry. App. 209:2. So, the jury could have reasonably inferred based on all the testimony that the animosity could have provoked Petitioner to kill the calf in anger or for revenge. *See e.g.*, *State v. Burgess*, 205 W. Va. 87, 90 n.2, 516 S.E.2d 491, 494 n.2 (1999) (finding that killing an animal "out of spite or to extract vengeance or to simply annoy the owner" is proof of malice). Sixth, Officer Rutherford testified that Petitioner admitted he shot the calf because he "was sick of it coming over on his property and, . . . [defecating] everywhere." App. 208:20-22. Again, the evidence was such that the jury could have reasonably inferred that Petitioner killed the calf out of anger or revenge, no matter how long such motive existed. Finally, Petitioner testified that after intending to kill the baby calf with arrows designed to create largescale injury, he watched the calf walk away and did nothing more to ease its suffering. Again, the jury could have reasonably found that such inaction was designed to intentionally torture the calf. *See e.g.*,

Burgess, 205 W. Va. at 90, 516 S.E.2d at 494 (describing tortious acts of an animal to include, but not limited to beating "the animal with a stick or club until it died a slow, agonizing death");

The evidence at the underlying criminal trial was more than sufficient to prove the elements of the greater offense of Petitioner intentionally torturing or maliciously killing the baby calf. Thus, under *Sowards*, there is no insufficiency of the elements of the greater offense and contrary to Petitioner's allegation, Pet'r's Br. 11, he was not denied the defense of misdemeanor animal cruelty. Though the misdemeanor instruction was not given, had the jury not found that the State proved the elements of the felony animal cruelty charge, then the jury would have acquitted Petitioner. "Instructions must be based upon the evidence and an instruction which is not supported by evidence should not be given." Syl. pt. 4, *State v. Collins*, 154 W. Va. 771, 180 S.E.2d 54 (1971). The evidence here simply did not support giving a misdemeanor animal cruelty instruction.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court affirm the September 20, 2023, sentencing order of the Circuit Court of Cabell County.

Respectfully submitted,

PATRICK MORRISEY
ATTORNEY GENERAL

/s/Mary Beth Niday
Mary Beth Niday (WV Bar # 9092)
Assistant Attorney General
State Capitol Complex
Building 6, Suite 406
Charleston, WV 25305-0220
Email: Mary.B.Niday@wvago.gov
Telephone: (304) 558-5830
Facsimile: (304) 558-5833
Counsel for Respondent

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 23-603

STATE OF WEST VIRGINIA,

Respondent,

v.

AUSTIN STEVENS,

***Petitioner*.**

CERTIFICATE OF SERVICE

I, Mary Beth Niday, do hereby certify that the foregoing Brief of Respondent is being served on counsel of record by File & Serve Xpress this 1st day of March, as follows:

Gary A. Collias
Appellate Counsel
Appellate Advocacy Division
Public Defender Services
One Players Club Drive, Suite 301
Charleston, WV 25311

/s/Mary Beth Niday
Mary Beth Niday
Assistant Attorney General