A14-0137

STATE OF MINNESOTA

IN COURT OF APPEALS

State of Minnesota,

Respondent,

v.

Dayna Kristine Bell,

Appellant.

RESPONDENT'S BRIEF

LORI SWANSON
Attorney General
State Capitol
1100 Bremer Tower
445 Minnesota Street
St. Paul, MN 55101

JAMES C. BACKSTROM
Dakota County Attorney

By: STACY ST. GEORGE
Assistant Dakota County Attorney
Attorney Registration #0341113
Dakota County Judicial Center
1560 Highway 55
Hastings, MN 55033
Telephone: (651) 438-4438

ATTORNEYS FOR RESPONDENT

STEPHEN V. GRIGSBY
ATTORNEY AT LAW
Attorney Registration #291973

5901 12TH Avenue South
Minneapolis, MN 55417
Telephone (612) 562-1150

ATTORNEY FOR APPELLANT.

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Procedural History

This appeal is taken from Dakota County District Court, First Judicial District, the Honorable Tim D. Wermager presiding.

April 16, 2012:	Complaint filed charging Appellant with sixteen counts of animal cruelty.
April 17, 2012:	Appellant makes first appearance. Order for conditional release is filed.
July 6, 2012:	Appellant files motion to dismiss all charges.
July 23, 2012:	Appellant proceeds to omnibus hearing. District Court issues order reserving probable cause and enters Appellant's plea of not guilty.
November 16, 2012:	Appellant proceeds to contested omnibus hearing.
January 14, 2013:	Omnibus Order filed denying Appellant's motion to dismiss charges as unconstitutionally vague and denying Appellant's motion to dismiss charges based on the inapplicability of the "penalty phase" of Minn. Stat. § 343.21.
January 16, 2013:	Appellant proceeds to settlement conference.
February 4, 2013:	Appellant proceeds to hearing.
February 20, 2013:	Appellant files a motion to suppress the identification of the frozen dogs and to dismiss for lack of probable cause.
March 28, 2013:	Appellant proceeds to evidentiary hearing.

June 7, 2013:	Trial court issues Omnibus order finding sufficient probable cause to proceed to trial on all charges and denying Appellant's motion to suppress the identification of the dogs.
November 4, 2013:	Jury trial begins.
November 7, 2013:	Amended complaint filed charging Appellant with fourteen counts of animal cruelty.
November 8, 2013:	The jury finds Appellant guilty on counts 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14; and not guilty on count 3.
November 8, 2013:	District Court orders a pre-sentence investigation, chemical dependency evaluation and psychological evaluation of Appellant.
November 8, 2013:	The jury finds Appellant guilty of thirteen counts of animal cruelty.
December 24, 2013:	Order filed reserving the state's motion to require Appellant to surrender all animals in her care until sentencing.
January 17, 2014:	Appellant is sentenced.
January 21, 2014:	Appellant files timely Notice if Appeal.
February 6, 2014:	Appellate Court receives certificate of transcript delivery for trial transcript.
February 26, 2014:	Appellant files a motion to reconsider staying the sentence.
February 27, 2014:	Trial court issues order denying Appellant's request for a stay of the sentence.

April 16, 2014: Record transmitted to Appellate Court.

LEGAL ISSUES

I. Was the evidence sufficient to sustain appellant's conviction?

The jury found the defendant guilty of 13 out of 14 counts.

State v. Taylor, 650 N.W.2d 190, 206 (Minn. 2002)
State v. Andersen, 784 N.W.2d 320, 329 (Minn. 2010)

II. Did the court err in allowing the fact question of whether the dogs were pet or companion animals to be determined by the jury?

The district court determined there was probable cause to find the dogs were pet or companion animals.

Minn. Stat. § 343.20 subd. 6 (2006)

III. Did the district court commit error when it ruled that the prosecutor did not commit misconduct, read a curative instruction, and denied the motion for mistrial?

The district court ruled (1) the prosecutor did not commit misconduct when information about a statement from the appellant was given to the jury, (2) when he read a curative instruction, and (3) when he denied two motions for mistrial.

State v. Washington, 521 N.W.2d 35, 39-40 (Minn. 1994)
State v. Jorgensen, 660 N.W.2d 127, 133 (Minn. 2003)
Poston v. Colestock, 540 N.W.2d 92, 93 (Minn. Ct. App. 1995)
State v. Manthey, 711 N.W.2d 498, 506 (Minn. 2006)
State v. Griese, 565 N.W.2d 419, 428 (Minn. 1997)
State v. Bettin, 244 N.W.2d 652 (Minn. 1976)
State v. Williams, 525 N.W.2d 538 (Minn. 1994)

IV. Did the court err when it did not allow the appellant to argue alternative perpetrator evidence?

The district court denied the appellant's oral motion at trial to argue alternative perpetrator because she (1) failed to give notice and (2) did not give evidence linking the alternative perpetrator to the crime.

State v. Taylor, 650 N.W.2d 190, 206 (Minn. 2002)
State v. Stone, 784 N.W.2d 367, 370 (Minn. 2010)

State v. Blom, 682 N.W.2d 578, 621 (Minn. 2004)
State v. Silvernail, 831 N.W.2d 594 (Minn. 2013)
State v. Nissalke, 801 N.W.2d 82 (Minn. 2011)

V. Did the lower court give the proper jury instructions?

The district court gave appropriate and legal instructions.

Hilligoss v. Cargill, Inc., 649 N.W.2d 142, 147 (Minn. 2002)
State v. Andersen, 784 N.W.2d 320, 340 (Minn. 2010)
10 Minn. Prac., Jury Instr. Guides--Criminal CRIMJIG 3.03 (5th ed.)

VI. Did the lower court error when it denied the defendant's motion to suppress the identification of the dogs?

The district court denied the defendant's motion to suppress.

STATEMENT OF THE CASE

The appellant was charged with fourteen counts of animal cruelty for killing fourteen dogs in violation of Minn. Stat. § 343.21 subd. 7. The charge was based on evidence found on her dog breeding farm and statements of her former employees. The appellant plead not guilty.

Following a trial presided over by The Honorable Timothy D. Wermeger in Dakota County, a jury found the appellant guilty of thirteen out of fourteen counts of animal cruelty. The jury found the appellant not guilty of count three. This direct appeal followed.

STATEMENT OF THE FACTS

On September 27, 2011, the Dakota County Sherriff's Department received a report of cruelty and maltreatment of animal by Appellant. T252[1]. Appellant is the owner and operator of Bell Kennels and Farm. The dogs were bred to be companion animals. T162. Witnesses testified that the animals had names. *Id.* They were pet, spoken to in an affectionate manner, and the appellant had paperwork from the USDA that stated, "This pet is being purchased and sold strictly as a companion/pet." T162, 517. The appellant's Kennel and Farm had over 200 dogs; in addition to at least nineteen litters of puppies. T300. With all of the animals, each kennel had two or more dogs. T318. With three employees, it was difficult to care for all of them. T301.

Three former employees reported various incidents of appellant mistreating the dogs. *Id.* In September of 2011, AJ came into the kennel and saw that a litter of puppies were born. T165. Tragically, the puppies had fallen in between the bars of the kennel. T165, 166. In response, the adult dog had bitten their legs off. The mother dog was biting the legs off in attempt to pull the puppies up from falling into the cracks of the kennel. *Id.* At least two were injured. T165. AJ left the kennel and went to get the appellant. T166. The appellant came in. T167. The puppies were still making noises and still alive. *Id.* She placed the puppies without legs, alive, into a bucket of water. *Id.* She placed another bucket on top of that one. *Id.* The second bucket contained water and a Clorox bottle for weight to hold the top bucket drown thereby drowning the puppies. *Id.* After about fifteen minutes Appellant placed the four puppies, all now dead, into a plastic

[1] T refers to trial transcript.

garbage bag and then threw the bag into the garbage. *Id.* The appellant did not check the water for its temperature. T167.

It is evident when a bitch is going to give birth to its litter. T431. Approximately two weeks prior to birth, the owner should move the bitch out of general population and isolate her in the event that they come early. *Id.* They should be placed in a whelping or individual isolation box where they are warm, comfortable, and quiet. *Id.* The purpose is that the puppies are small, blind, and helpless. *Id.* The puppies will need to be secure and not be able to get out from the mother. *Id.* A typical size of a newborn puppy is the size of a cucumber or shorter. T432. Given the size, the whelping or isolation box is necessary so they do not fall between the bars of the kennel. T432. This is a common practice in the commercial breeding facilities. *Id.*

On September 26, 2011, appellant was complaining about money issues. T182, 269. Appellant took four or five dogs from the big kennels and put them in smaller travel kennels and took them down to the barn. T172. The appellant told AJ that "a friend was coming to pick them up." *Id.* About an hour passed, Appellant returned to the barn without the dogs and proceeded to take more dogs with her; totaling eight to ten. T173. All the dogs were of a smaller breed. *Id.* After AJ is told to assist her in loading them, the appellant told AJ to go to lunch. T174. AJ then saw Appellant place a rope on the neck of a small black and white dog. T175, 183. The other end of the rope was tied to a cinder block. T175. The witness reported that Appellant proceeded to throw the dog and the block into the pool. *Id.* When the dog was thrown in the pool, AJ heard it yell "but then nothing after." *Id.* The appellant did not see AJ watching her throw the dog into the

pool. Because of disbelief and fear, AJ didn't report the incident until the following day. T178.

On September 27, 2011, Appellant was bit on her right arm by a dog. T185. Appellant was seen taking that dog from the building. *Id.* When Appellant returned she stated "that mother fucker will never bother any of us again. I broke its damn neck." *Id.* The dog was not seen by AJ again.

Between September 15, 2011, and September 29, 2011, JI witnessed the appellant drown a small puppy. T263. The appellant stuck a small puppy in a bucket of water. *Id.* The appellant said that it was too small and that she was going to put it out of its misery. *Id.* According to JI, she was able to see the puppy. *Id.* All the legs were on the animal. *Id.* She worked with the appellant from 2010 through September 29, 2011. T261. She was familiar with the animals. It was her opinion that nothing was wrong with the animal. T263. She became upset because she didn't "think you should drown a dog that is alive and well..." T264.

On September 29, 2011, a warrant was executed on Appellant's property. T454. Ten small breed adult dogs, each in individual plastic bags, were found in a freezer on the property. T456, 513. The appearance of the fur of the ten adult dogs lead to the conclusion that the dogs were wet when placed in the freezer. T513, 531. On the premises the investigators found a pool with dirty water. T468. The investigators located and photographed a cinder block that had rope tied to it. T474.

The appellant told the Sheriff's investigator and the Animal Humane Society investigator that the dogs in the freezer were euthanized by Dr. Driefus because they

were considered unadoptable. T426, 427, 446, 456. However, is also indicated that she didn't know what was in the freezer. T439. The appellant said the animals were drowned because they were beyond repair. She said that she used drowning as a form of euthanasia. She indicated to the investigators that she did not have any employees at that time and that she personally places her retired dogs. T430. The appellant told the investigators that there was a dog that bit her, but the animal was "given to a friend." T475. The investigator from the Humane Society estimated that there were 200-250 dogs on the premise; inclusive of puppies. *Id.*

Investigator Schroeder showed AJ photos of the dogs found in the freezer. AJ identified one as "Sasha" a dog that went missing about a month prior to the "pool incident." T189. Sasha was AJ's favorite. *Id.* AJ asked the appellant if she could take Sasha home to live with her. T190. The appellant denied this request. *Id.* The appellant told her she was selling Sasha on the internet for $100. *Id.* One day AJ came to work and Sasha was no longer there. The appellant said she "gave her away." She also identified some of the smaller black and white dogs as being the dogs she kenneled for the appellant. T192. She saw one photo and believed it was of the dog that she saw being thrown into the pool, attached to a cinder block. T193. She identified one dog as the dog that bit the appellant and AJ. T193, 194. She identified another as the dog that she "loaded up." T194. The appellant said she was giving it away. *Id.* AJ asked if she could take it home. *Id.* The request was denied. *Id.* She also identified one of the dogs as the dog that recently had puppies. T195. This was the dog that bit her puppies' legs as a means to save them. *Id.* After that incident, the dog was not seen again. *Id.*

The appellant stood trial for fourteen counts of animal cruelty. During her trial, Dr. Arnien[2], a veterinarian forensic pathologist testified. Dr. Arnien conducted necropsy examinations on three of the ten frozen dogs. T342. Because the dogs were frozen and thawed, the cause of death was not able to be determined. T363. However, none of the dogs were found to have any diseases. T347, 351, 355. There was indication of "stress" found in necropsy #2. T353. The dog examined in the necropsy #3 showed that it had recently given birth. T357. Dr. Arnien categorized the animals in the freezer as being companion animals. T365. Dr. Arnien testified that any animal placed in water and in a freezer would suffer. T368. If a puppy was screaming, it was alert enough to be cognizant of being put into the water.

The appellant's primary veterinarian, Dr. Dreifus, reported that in 2011 she euthanized two adult dogs for the appellant. T382. They were large dogs. *Id.* She said she did not euthanize any other dogs. *Id.* Dr. Dreifus testified that she never instructed the appellant that wrapping a puppy in a wet rag and putting it in the freezer was a proper way to euthanize it. T383. She also testified that she never indicated it was acceptable to drown, suffocate, or freeze an animal. The appellant never called the veterinarian in September of 2011 to discuss or consult her regarding ill dogs; nor to discuss her coming out to euthanize any puppies or small dogs. T386.

During the closing arguments, the appellant's counsel said, "If you would have found hair in the pool that matches the DNA on the dogs, that would be circumstantial

[2] The trial transcripts indicate the name is spelled Arnien, the motion transcript dated March 28, 2013, spells the name Armien.

evidence that provides only one inference, that dog was in the pool. That is the dog's DNA, it matches the hair. But this is not that kind of case." T630. In rebuttal, the prosecutor said,

> "And I have to address this hair issue again. It's an issue of using it when the argument works for you. If, let's say that there had been hair taken and let's say that it matched the dog's the response would have been, well, those dogs are on that property. The hair could have gotten in the pool..."

The defense then objected; arguing that the prosecutor disparaged his defense. T636. In front of the jury he stated that the prosecutor committed prosecutorial misconduct. The judge overruled the objection. T637. The prosecutor concluded her argument regarding the hair by stating that there was dog hair everywhere. There were 200 dogs on the premises and that dog hair in the pool would not have been conclusive. *Id.*

Drowning, suffocating, nor freezing a companion animal is not an acceptable method of euthanasia. T365, 383, 394.

ARGUMENT

I. THE EVIDENCE WAS MORE THAN SUFFICIENT TO SUSTAIN APPELLANT'S CONVICTION.

Appellant claims on appeal that the evidence was insufficient to prove that she committed fourteen counts of animal cruelty. Appellant, therefore, wants this Court to reject the credibility determination of the jury. Appellant's argument is without merit.

A. Standard of Review

In reviewing a sufficiency of the evidence claim, this Court's review is "limited to determining whether the evidence, when viewed in the light most favorable to the conviction, was sufficient to allow the jurors to reach the verdict they did." *State v. Taylor*, 650 N.W.2d 190, 206 (Minn. 2002) (citing *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989)). "A defendant bears a heavy burden to overturn a jury verdict." *State v. Vick,* 632 N.W.2d 676, 690 (Minn. 2001). The appellate courts view the evidence in the light most favorable to the state and presumes that the jury believed the state's witnesses and disbelieved any contrary evidence. *State v. Steinbuch,* 514 N.W.2d 793, 799 (Minn. 1994). All inconsistencies in the evidence are resolved in favor of the state. *State v. Bergeron,* 452 N.W.2d 918, 924 (Minn. 1990).

The jury verdict will not be overturned if the reviewing court determines that the jury, "acting with due regard for the presumption of innocence and for the requirement of proof beyond a reasonable doubt, could reasonably conclude the defendant was proven guilty of the charged offense." *Taylor,* 650 N.W.2d at 206 (citing *State v. Alton,* 432 N.W.2d 754, 756 (Minn. 1988)).

Appellant notes that the evidence against her was mostly circumstantial. In a criminal case, however, circumstantial evidence, "is entitled to as much weight as any other kind of evidence," when the circumstances are consistent with the hypothesis that the accused is guilty and inconsistent with any other rational hypothesis. See *State v. Race,* 383 N.W.2d 656, 661 (Minn. 1986) (citing *State v. Jacobson,* 326 N.W.2d 663, 666 (Minn. 1982)).

Under the circumstantial-evidence standard, the appellate courts apply a two-step analysis. *State v. Ortega,* 813 N.W.2d 86, 100 (Minn. 2012). The first step is to identify the circumstances proved. *State v. Andersen,* 784 N.W.2d 320, 329 (Minn. 2010). In identifying the circumstances proved, the appellate courts defer, "'to the jury's acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the State.'" *Id.* (quoting *State v. Stein,* 776 N.W.2d 709, 718 (Minn. 2010) (plurality opinion)). As with direct evidence, we "construe conflicting evidence in the light most favorable to the verdict and assume that the jury believed the States witnesses and disbelieved the defense witnesses." *State v. Tscheu,* 758 N.W.2d 849, 858 (Minn. 2008). Stated differently, in determining the circumstances proved, we consider only those circumstances that are consistent with the verdict. *State v. Hawes,* 801 N.W.2d 659, 668–69 (Minn. 2011). This is because the jury is in the best position to evaluate the credibility of the evidence even in cases based on circumstantial evidence. *Id.* at 670.

The second step is to, "determine whether the circumstances proved are 'consistent with guilt and inconsistent with any rational hypothesis except that of guilt.' "

State v. Palmer, 803 N.W.2d 727, 733 (Minn. 2011) (quoting *Andersen,* 784 N.W.2d at 330). We review the circumstantial evidence not as isolated facts, but as a whole. *State v. Hurd,* 819 N.W.2d 591, 599 (Minn. 2012). We, "'examine independently the reasonableness of all inferences that might be drawn from the circumstances proved'; [including the] inferences consistent with a hypothesis other than guilt." *Andersen,* 784 N.W.2d at 329 (quoting *Stein,* 776 N.W.2d at 716 (plurality opinion)). We give "no deference to the fact finder's choice between reasonable inferences." *Andersen,* 784 N.W.2d at 329–30 (citation omitted) (internal quotation marks omitted).

The evidence as a whole need not exclude all possibility that the defendant is innocent; it need only make that theory seem unreasonable. See *State v. Anderson,* 379 N.W.2d 70, 78 (Minn. 1985). Moreover, the circumstantial evidence standard, "still recognizes a jury is in the best position to evaluate the circumstantial evidence surrounding the crime." *State v. Bias,* 419 N.W.2d 480, 484 (Minn. 1988) (quoting *Race,* 383 N.W.2d at 662). "As in all cases, the jury determines the credibility and weight to be given to the testimony of individual witnesses." *Id.* (Citations omitted.)

B. There Is Sufficient Evidence And Corroboration To Convict Appellant.

As measured by the above standards, appellant's claim of insufficient evidence should be rejected. Viewing the evidence in the light most favorable to the state and presuming the jury believed the state's witnesses and disbelieved any contrary evidence, the jury reasonably found the appellant guilty of thirteen out of fourteen counts of animal cruelty.

1. Evidence of the ten dogs found in the freezer (counts five through fourteen).

The appellant argues that there is not sufficient evidence to prove that the ten dogs in the freezer had been drowned and that the drowning was done by the appellant.

(a) Step One: Circumstances proved.

Investigator Schroeder showed AJ photos of the dogs found in the freezer. AJ identified the dogs to the investigator and to the jury at trial. First, she identified count five as "Sasha;" a dog that went missing about a month prior to the "pool incident." T189. Sasha was AJ's favorite. *Id.* AJ asked the appellant if she could take Sasha home to live with her. T190. The appellant denied this request. *Id.* The appellant told her she was selling Sasha on the internet for $100. *Id.* One day, AJ came to work and Sasha was no longer there. The appellant said she "gave her away."

Count six was dog A. AJ stated that it matched the description of one of the dogs she placed in a kennel. T191. It was one of the dogs the appellant said would be picked up by "a friend." T172.

AJ also identified some of the smaller black and white dogs as consistent with the color and description of the dogs she kenneled for the appellant. T192. (Counts seven through ten.) It is important to note that these dogs were kenneled by AJ and the appellant immediately before AJ saw the appellant drown one of the dogs. The appellant told AJ that all the dogs, including the dog she drowned in the pool, were going to be

picked up by a friend and brought to another kennel. T192. In fact, AJ described count ten as a dog that was attached to a cinder block, found in the pool.[3]

AJ identified the dog in count eleven as the dog that bit the appellant and AJ. T193, 194. AJ was unable to recognize count twelve in particular. However, this dog was identified by the investigator as being found in the freezer with blocks of ice on its hind quarters. The investigator concluded that the dog's fur in the freezer had been wet prior to freezing. AJ identified the dog in count thirteen as the dog that she "loaded up." T194. The appellant said she was giving it away. *Id.* AJ asked if she could take it home. *Id.* The request was denied. *Id.* Count fourteen was also identified by Dr. Arnien as a dog on which she performed a necropsy; finding that the dog suffered. AJ also identified her as the dog that recently had puppies. T195. This was the dog that bit her puppies' legs as a means to save them. Id. After that incident, the dog was not seen again. *Id.* Dr. Arnien corroborated AJ's testimony by saying the dog in count fourteen had recently given birth.

(b) Step Two: Taken as a whole, the evidence is consistent with guilt and inconsistent with any rational hypothesis.

On September 26, 2011, appellant was complaining about money issues. T182, 269.

Although AJ only saw the appellant drown one dog in the pool, she saw four or five taken in smaller travel kennels. T172. An hour passed and she saw the appellant return to the barn without the small dogs. T173. AJ was told that a friend is coming to pick them up. T172. Those dogs were never seen alive again. It is then that AJ assists her

[3] Appellant mistakenly argues that the dog whose drowning was witnessed by AJ was not charged in the complaint. It is count eleven and, therefore, not 404(b) evidence.

with more dogs; totaling eight to ten dogs. All dogs were of a smaller breed and black and white. *Id.* After helping, the appellant tells AJ to go to lunch. T174. While leaving, AJ sees the appellant drowning the dog in the pool. T175. The dog she sees that day, September 26, 2011, was found in the freezer. T193 (count eleven). The idea that eight to ten dogs were removed from the premises and were to be given to a friend, yet one dog would be drowned by the defendant is not a rational hypothesis. Neither is the idea that one dog was drowned by the defendant, but those other dogs were drowned by someone else. The photos clearly depict a dog whose fur was wet prior to entering the freezer. The circumstances of that day; removing eight to ten dogs, drowning them one by one, then placing them together in the freezer with wet fur, is consistent with the hypothesis that the accused is guilty. Any other theory as to what happened to the other dogs in the freezer is unreasonable.

In addition, Investigator Schroeder testified that each of the dogs in the freezer were smaller; indicating that these dogs were not the dogs euthanized by the veterinarian. He also testified that each dog was "very hard," "icy," and "slippery like if you were to hold like an ice cube it was slippery. When you touched it, it was very solid." T514. In fact, he testified that the animals had ice buildup on them. *Id.* Based on his training and experience, the item was consistent with having been immersed in water and placed in the freezer. T531.

The pathologist testified that dogs would experience drowning like humans; they would suffer.

The veterinarian testified as to the expense of euthanizing a dog. AJ and JI testified that the appellant complained of money troubles.

Lastly, the appellant's ever-changing version of events can also be attributed to the jury verdict. The appellant stated that the dogs in the freezer were euthanized by her veterinarian. T456. However, she also stated that she didn't know what was in the freezer. The appellant said that she drowned dogs based on advice from Dr. Driefus. The veterinarian testified that she did not euthanize any small dogs and that she did not give the appellant any advice regarding drowning, suffocating or freezing dogs as an acceptable means of euthanasia.

The jury was in the best position to evaluate the circumstantial evidence, weigh the credibility of the witnesses, and determine the guilt of the appellant. They found her guilty. Taken all the evidence as a whole, including the direct evidence heard regarding counts one, two and four, their verdict is consistent with the hypothesis that the accused is guilty and inconsistent with any other rational hypothesis.

2. There is sufficient evidence to support the convictions of counts one, two, and four[4].

Counts one and two addressed the puppies that the appellant drowned after AJ discovered the bitch had chewed parts of their legs in an effort to save them. Count four is the puppy that the appellant deemed "too small" to live. T263. All three acts of drowning were witnessed and therefore direct, not circumstantial evidence. AJ and JI

[4] The jury found the appellant not guilty of count three.

witnessed the acts of drowning and testified to the jury about what they saw. The jury was able to make a credibility determination as to the two witnesses.

As with circumstantial evidence, the appellate courts review is "limited to determining whether the evidence, when viewed in the light most favorable to the conviction, was sufficient to allow the jurors to reach the verdict they did." *Taylor*, 650 N.W.2d.

"[W]eighing the credibility of witnesses is a function exclusively for the jury." *State v. Pippitt,* 645 N.W.2d 87, 94 (Minn. 2002). The jury is in the best position to evaluate witness credibility and this Court assumes that the jurors believed the state's witnesses and did not believe any defense witnesses. *State v. Tovar,* 605 N.W.2d 717, 726 (Minn. 2000); *accord State v. Bauer,* 598 N.W.2d 352, 370 (Minn. 1999) (holding that the appellate court assumes that the jury believed the prosecution's witnesses and disbelieved any contrary evidence). The verdict "may be based on the testimony of a single witness no matter what the issue." *Caldwell v. State,* 347 N.W.2d 824, 828 (Minn. Ct. App. 1984), *accord State v. Bernardi,* 678 N.W.2d 465, 468 (Minn. Ct. App. 2004).

Here, the evidence is sufficient to support the jury's verdict of all three counts. Appellant is the owner and operator of Bell Kennels and Farm. The appellant's Kennel and Farm had over 200 dogs; in addition to at least nineteen litters of puppies. T300. Each kennel had two or more dogs. T318. With three employees, it was difficult to care for all of them. T301. Yet, the appellant continued to breed the dogs. According to the testimony, it is evident when a bitch is going to give birth to its litter. T431. Approximately two weeks prior to birth, the owner should move the bitch out of general

population and isolate her in the event that they come early. *Id.* She should be placed in a whelping or individual isolation box where they are warm, comfortable, and quiet. *Id.* The purpose is because the puppies are small, blind, and helpless. *Id.* The puppies will need to be secure and not be able to get out from the mother. *Id.* A typical size of a newborn puppy is the size of a cucumber or shorter. T432. Given the size, the whelping or isolation box is necessary so they do not fall between the bars of the kennel. T432. This is a common practice in the commercial breeding facilities. *Id.*

The appellant bred dogs for a living. But her farm was out of control by the sheer number of dogs. She was unable to properly manage the business and care for each animal. Because of her inability, dogs suffered, unnecessarily, at her hands. The puppies that were born in September of 2011 needlessly suffered because the appellant chose not to move the mother to a whelping box prior to the birth. Because of this, the tiny, helpless, blind puppies started to move. They moved about and started to slip through the bars of the kennel. The mother attempted to save them, but harmed them instead. This incident was foreseeable. This incident was preventable. This incident was cruel and it was the criminal act of the appellant. The appellant created the environment were at least two puppies had their legs bitten off. They were alive when AJ came into the room. They were alive when the appellant grabbed them and drowned them in a bucket. During their short life, they suffered pain. It was needless, it was unjustified, and it was criminal. There is sufficient evidence to support the jury verdict for counts one and two.

As to count four, the appellant took a small dog and placed it in a bucket. T263. However, the witness testimony was that the dog was small, but that nothing appeared to

be wrong with the puppy. *Id.* The appellant said that it was too small and that she was going to put it out of its misery. *Id.* According to JI, she was able to see the puppy. *Id.* All the legs were on the animal. *Id.* She worked with the appellant from 2010 through September 29, 2011. T261. She was familiar with the animals. It was her opinion that nothing was wrong with the animal. T263. She became upset because she didn't, "think you should drown a dog that is alive and well..." T264. There was not any immediate reason to "put the dog out of its misery." Dr. Driefus testified that she had not been consulted about any sick puppies during that month. T386. The defense alludes in their cross of the veterinarian that the runt may eventually suffer from hypothermia. T390. But that was not evidence before the jury. The witness testified that the puppy was alive and well. T264. Additionally, not all runts need to be euthanized. If the breeding facility had a manageable number of litters and dogs to workers, a caretaker could take care of a runt instead of letting it suffer or euthanize the puppy. Again, the appellant created the environment in which she then claims justification to kill the dogs.

The evidence is sufficient to support the verdict of guilty for count four. The jury is in the best position to judge the credibility of JI. When viewed in the light most favorable to the conviction, the evidence was sufficient to allow the jurors to reach the verdict of guilty on count four.

II. THE DECEASED DOGS WERE PET OR COMPANION ANIMALS.

The jury found the appellant guilty in thirteen out of fourteen counts of animal cruelty. In order to find her guilty they must have found, beyond a reasonable doubt, that the dogs in question were pet or companion animals. There is nothing in the record that

shows the appellant raised the dogs for anything other than adoption to families as pets. Whether the dogs were companion animals is a fact question for the jury.

A. The District Court properly denied the appellant's motion to dismiss for lack of probable cause; finding that there is probable cause to believe the animals were pets or companions.

a. Standard of Review

In reviewing the construction of a statute, the appellate courts review is de novo. *State v. Colvin,* 645 N.W.2d 449, 452 (Minn.2002). The object of statutory interpretation is to effectuate the intent of the legislature. Minn. Stat. § 645.16 (2002); *Chapman v. Comm'r of Revenue,* 651 N.W.2d 825, 831 (Minn. 2002). The rules of statutory construction require that a statute's words and phrases are to be given their plain and ordinary meaning. Minn. Stat. § 645.16; *Hince v. O'Keefe,* 632 N.W.2d 577, 582 (Minn. 2001). When the language of the statute is ambiguous, the intent of the legislature controls. Minn. Stat. § 645.16; *Colvin,* 645 N.W.2d at 452. When reviewing a statute, we assume that the legislature does not intend to violate the United States and Minnesota constitutions or intend absurd or unreasonable results. Minn. Stat. § 645.17 (2002); *Chapman,* 651 N.W.2d at 831. However, strict construction does not require that we assign the narrowest possible interpretation to the statute. *State v. Zacher,* 504 N.W.2d 468, 473 (Minn. 1993).

Here, under a plain meaning analysis, we must examine the definition given by the statute for the term "pet or companion." Minnesota defines pet or companion animals as any animal owned, possessed by, cared for, or controlled by a person for the present or

future enjoyment of that person or another as a pet or companion animal or any stray pet or stray companion animal. Minn. Stat. § 343.20 subd. 6.

First, the district court ruled that "one of the elements of the offense is that the animals at issue must have been owned, possessed by, cared for, or controlled by the [appellant]." RA-1[5]. There is no dispute that the dogs in question were owned and controlled by the appellant. The only issue is whether or not the ownership was for the present or future enjoyment of the appellant or another person as a pet or companion animal. The district court ruled that "'enjoyment' can mean a variety of things, including profit." *Id.*

Profit is a manner of enjoyment, as is possessing animals for the purpose of running the business. The appellant is in the business of breeding and selling dogs for profit. Possessing breeding stock that produces more puppies for sale or for breeding is enjoying the product of the breeding dogs.

Appellant argues that a dog is not a pet or companion animal unless and until it has been promised to another for future ownership. Assuming the legislature did not intend absurd or unreasonable results, this argument fails. First, the definition includes, "any stray pet or stray companion animal." Minn. Stat. § 343.20 subd. 6 (2006). The legislature's inclusion of, "any stray pet" indicates that it, "does not require that the pet have tags, a color, or other observable indicia of its status as a pet." *State v. Johnson*, A07-0537, 2008 WL 2415371 (Minn. Ct. App. June 17, 2008) RA-2. Its inclusion of stray also would mean that it did not intend for the animal to only be a pet if one allows

[5] RA means Respondent's Appendix.

the animal in its home, pets the animal, or has an emotional attachment to it. A stray cat kept in a barn for purposes of killing mice is deemed a companion pet or animal. This is no different than a dog kept in a kennel for purposes of breeding. It's no different than sled dogs kept outside in a kennel for purposes of pulling a sled for sport.

Lastly, the appellant's argument is a slippery slope. The retired dogs at the appellant's place of business were born a pet or companion animal. It was how the appellant chose to raise it or care for it that, according to her argument, makes the animal not a pet. It was the appellant's manner in which she raised them that created a dog that she deemed not "suitable" for placement. If this Court adopts the appellant's argument, a defendant can create an abusive environment for the dog, raise it to be unsuitable, and then justify drowning the animal based on how she chose to raise the dog.

The district court had probable cause to submit the question of companion animal to the jury.

B. There is sufficient evidence to support the jury verdict because the State proved the dogs were pet or companion animals.

a. Standard of Review

In reviewing a sufficiency of the evidence claim, this Court's review is "limited to determining whether the evidence, when viewed in the light most favorable to the conviction, was sufficient to allow the jurors to reach the verdict they did." *Taylor*, 650 N.W.2d 190, 206 (Minn. 2002) (citing *Webb*, 440 N.W.2d 426, 430 (Minn. 1989)). "A defendant bears a heavy burden to overturn a jury verdict." *Vick,* 632 N.W.2d 676, 690 (Minn. 2001). The appellate court views the evidence in the light most favorable to the

state and presumes that the jury believed the state's witnesses and disbelieved any contrary evidence. *Steinbuch,* 514 N.W.2d 793, 799 (Minn. 1994). All inconsistencies in the evidence are resolved in favor of the state. *Bergeron,* 452 N.W.2d 918, 924 (Minn. 1990).

b. Argument

The appellant owned the dogs. She was in the business of breeding and selling dogs for profit. In fact, the evidence presented to the jury was that the dogs were bred to be placed in homes. Dr. Driefus testified that the appellant "bred forty to fifty puppies a month that I would examine before she adopted them out to private individuals." T379. The appellant's business was licensed by the USDA. T394. The businesses that are licensed by USDA are routinely inspected to ensure they comply with the Animal Welfare Act. T393.[6] The inspector for the USDA testified that he had not heard that the appellant was selling the dogs for any other reason other than as pets and companions. T395. The investigator for the Humane Society testified that the appellant indicated she personally places the breeding dogs after retirement. T429. The pathologist testified that she would classify the dogs in the freezer as "companion animals." T365.

The appellant states in her brief that Keith Streff "also said not all dogs owned by a breeder are pets." Appellant brief at 20. Looking closely at his testimony, Mr. Streff did not testify "not all dogs owned by a breeder are pets." Instead, Mr. Streff was asked

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[6] The "Animal Welfare Act's" full name is the "*Pet and Companion* Animal Welfare Act. Minn. Stat. Ann. § 346.35. *Italics added.* By obtaining a license from the USDA and acknowledging the requirements of the Pet and Companion Animal Welfare Act, the appellant is acknowledging her dogs are, in fact, pet and companion animals.

about placement of the retired dogs. He said that the appellant told him she personally places the animal. When asked what "personally place" means, he replied, "putting them in a household or environment other than where she has them, or to cull them out or to euthanize them." T429 at 22-24. First, he was talking about the female dogs used for breeding, not the puppies or dogs born on the business property. Secondly, the witness didn't say that not all dogs owned by breeders are pets. Instead, he said she places them, then defines placement as putting them in a household or environment; somewhere other than where she has them, other than culling them, other than euthanizing them. He did not say that placement is culling/euthanizing the dogs. The context of the question and answer was to show that the appellant was not truthful to the investigator regarding what she does with the dogs she no longer deems valuable.

There is sufficient evidence to support the jury verdict.

III. THE PROSECUTOR DID NOT COMMIT ERROR OR MISCONDUCT.

A. The District Court did not abuse its discretion when it found the prosecutor did not commit misconduct, when he read a curative instruction to the jury, and denied a motion for mistrial.

a. Standard of Review

When reviewing an appeal for prosecutorial misconduct, the defendant is entitled to a new trial if this Court makes the determination that the challenged actions were improper and the improprieties deprived the [appellant], in this case, of a fair trial. *State v. Washington,* 521 N.W.2d 35, 39-40 (Minn. 1994). The sole determination of the prosecutorial misconduct and whether they acted improperly is left to the sound discretion of the district court. *State v. Parker,* 353 N.W.2d 122, 127 (Minn. 1984); see

also *State v. Wahlberg,* 296 N.W.2d 408, 420 (Minn. 1980) (holding that whether a new trial should be granted is not subject to a fixed set of rules or standards but is subject to the sound discretion of the district court that heard the case, as it is in the best position to make the determination and apprise the effect of the misconduct).

An appellate court reviews the denial of a motion for a mistrial for an abuse of discretion. *State v. Jorgensen*, 660 N.W.2d 127, 133 (Minn. 2003). "A mistrial should not be granted unless there is a reasonable probability that the outcome of the trial would be different if the event that prompted the motion had not occurred." *State v. Manthey*, 711 N.W.2d 498, 506 (Minn. 2006) (quotations omitted).

b. Argument

The USDA inspector testified that the appellant admitted to wrapping an injured puppy in a wet rag and placing it in the freezer based on advice from the veterinarian. T395. The veterinarian said she did not give this advice. The appellant objected to the testimony after the State concluded its direct. T398. The appellant moved for a mistrial. *Id.* The district court denied the motion, found the prosecutor did not commit misconduct, and read a curative instruction.[7] T409. The purpose of the testimony was to show that the veterinarian has not advised the appellant on other acceptable ways to euthanize dogs.

Appellant contends the instruction was inadequate. However, the district court has the discretion to determine whether giving a curative instruction is an appropriate action to correct an erroneous statement. *Poston v. Colestock,* 540 N.W.2d 92, 93 (Minn. Ct.

[7] The appellant was asked to contribute the content of the instruction. By actions and response, she declined.

App. 1995). When a court gives a curative instruction that instruction is discretionary and should be upheld unless the misconduct constitutes a miscarriage of justice. *Id.* at 94 (citing *Mueller v. Sigmond,* 486 N.W.2d 841, 844 (Minn. Ct. App. 1992), *review denied* (Minn. Aug. 27, 1992)). Moreover, the court gave the appellant the chance to give her input into what the curative instruction should be. T412. Appellant did not weigh in as to what the curative instruction should include.

The district court did not abuse its discretion when it found the prosecutor did not commit misconduct, gave a curative instruction and denied the motion for mistrial.

B. The District Court did not abuse its discretion when it denied the appellant's motion for a new trial. The prosecutor did not intend to illicit an answer that inferred the defendant invoked her right to remain silent when she asked "And did she tell you where [JK] lives?"

a. Standard of Review

An appellate court reviews the denial of a motion for a mistrial for an abuse of discretion. *Jorgensen*, 660 N.W.2d 127, 133 (Minn. 2003).[8] "A mistrial should not be granted unless there is a reasonable probability that the outcome of the trial would be different if the event that prompted the motion had not occurred." *Manthey*, 711 N.W.2d 498, 506 (Minn. 2006) (quotations omitted). Appellant has not established that the outcome of her trial would have been different absent the investigator's brief reference.

b. Argument

The prosecutor did not intend to illicit an answer that inferred the appellant invoked her right to remain silent when she asked, "And did she tell you where [JK] lives?" The

[8] The appellant is incorrectly asserting prosecutorial misconduct. There is no misconduct when the prosecutor did not solicit the response given by the witness.

answer provided did infer that the appellant invoked her right to remain silent. However, the appellant has not established that the outcome of her trial would have been different absent the investigator's brief reference.

The lead investigator spoke to the defendant at her home. The defendant's statement was incriminating in that she told the officer that she gave away the dog that bit her. However, this was not consistent with the testimony of AJ. The prosecutor asked the investigator if the defendant told him to whom she gave the dog. T476. He responded that she told him a name, JK. *Id.* The prosecutor then asked, "And did she tell you where [JK] lives?" *Id.* It is clear from reading the transcript that the answer the prosecutor intended to illicit was, "Yes, Eau Claire, Wisconsin." *Id.* However, the investigator said, "we started to get into that conversation but at some point our conversation ended and she chose not to speak with us anymore and I wasn't able to verify where that was but she did state that it was in Eau Claire, Wisconsin, I think." *Id.*

Appellant has failed to establish a reasonable probability that the outcome of the trial would have been different had the brief statement not been made. While the right to remain silent is constitutional, any mention whatsoever does not automatically entitle a defendant to reversal of the conviction and a new trial. See *State v. Juarez*, 572 N.W.2d 286, 292 (Minn. 1997) (holding admission of defendant's statement during custodial interrogation, "I'm gonna have to get a lawyer next" was error, but not reversible error in light of other evidence of defendant's guilt).

In this case, the reference to appellant's invocation of his right to remain silent and his right to counsel consisted of only two sentences of the officer's testimony, which

amounted to more than fifty-seven 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 appellant on count three 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 neither the defense lawyer, the prosecutor, nor the judge could recall what the witness said just moments after the statement shows the matter was not prejudicial. While the witness' comments were not appropriate, the two lines do not deprive appellant of a fair trial. Therefore, the judge did not abuse his discretion when he denied the appellant's motion for mistrial.

C. The prosecutor did not commit error when she countered an argument given in the appellant's closing.

a. Standard of Review

When reviewing an appeal for prosecutorial misconduct, the appellant is entitled to a new trial if this Court makes the determination that the challenged actions were improper and the improprieties deprived the [appellant], in this case, of a fair trial. *Washington,* 521 N.W.2d 35, 39-40 (Minn. 1994). The sole determination of the prosecutorial misconduct and whether they acted improperly is left to the sound discretion of the district court. *Parker,* 353 N.W.2d 122, 127 (Minn. 1984); see also *Wahlberg,* 296 N.W.2d 408, 420 (Minn. 1980) (holding that whether a new trial should be granted is not subject to a fixed set of rules or standards but is subject to the sound discretion of the

district court that heard the case, as it is in the best position to make the determination and apprise the effect of the misconduct).

During closing arguments, the appellant's counsel said, "If you would have found hair in the pool that matches the DNA on the dogs, that would be circumstantial evidence that provides only one inference, that dog was in the pool. That is the dog's DNA, it matches the hair. But this is not that kind of case." T630. In rebuttal, the prosecutor said,

> "And I have to address this hair issue again. It's an issue of using it when the argument works for you. If, let's say that there had been hair taken and let's say that it matched the dog's the response would have been, well, those dogs are on that property. The hair could have gotten in the pool..."

The appellant then objected; arguing that the prosecutor disparaged his defense. T636. In front of the jury he stated that the prosecutor committed prosecutorial misconduct. The judge overruled the objection. T637. The prosecutor concluded her argument regarding the hair by stating that there was dog hair everywhere. There were 200 dogs on the premises and dog hair in the pool would not have been conclusive. *Id.*

b. Argument

First, the statement was not disparaging the appellant. The statement was a counter argument to the appellant's closing. The prosecutor was responding to the idea that DNA from dog hair taken from a pool in the middle of a dog breeding business would only mean dogs were present on the premises.

The appellant focuses on one line, "It's an issue of using it when the argument works for you." Taken in context, this line was responding to the appellant saying there

wasn't direct evidence because DNA hadn't been collected. But the response [it's an issue of using it when the argument works for you] is referring to the prosecutor's position with the evidence. Regardless of what the prosecution did regarding DNA, there would be a counter-argument. If the DNA is not collected then the state didn't have enough evidence; the police didn't do their jobs. If the police collect dog hair that matches DNA from a dog, then the appellant can argue that there was dog hair everywhere and the evidence doesn't mean anything. The argument explains why the police didn't drain the pool, take every hair in the pool and test it against the DNA of each dog in the freezer.

Secondly, the appellant argues that the comments are misconduct that are liken to comments made in *State v. Griese*, 565 N.W.2d 419, 428 (Minn. 1997)[9], *State v. Williams*, 525 N.W.2d 538 (Minn. 1994); *State v. Bettin*, 244 N.W. 2d 652 (Minn. 1976). In *Williams* and *Bettin*, the prosecutor directly indicated that the argument the defense counsel made was because it was the "only defense that might work." *Griese*, 565 N.W.2d at 428.

However, unlike *Williams* and *Bettin*, the prosecutor in this case simply referred to the fact that regardless of what the prosecution did regarding DNA, there would be a counter-argument. It was a reasonable comment and not misconduct or error.

Lastly, if this Court were to determine the attorney committed error by her comments, the Court gave an instruction regarding attorneys and their remarks. The

[9] It is important to note that the Supreme Court determined that the misconduct in *Griese* was limited and the evidence against him strong. Therefore, they did not reverse the conviction.

district court judge instructed, "arguments or other remarks of an attorney are not evidence." T563. The jury found the appellant guilty of thirteen out of fourteen counts. The appellant is unable to prove that the prosecutor's statements affected her substantial rights or that the judge abused his discretion in overruling the appellant's objection.

IV. BECAUSE THE DEFENSE DID NOT GIVE NOTICE, INFORM THE COURT OF THE ALTERNATIVE PERPETRATOR, OR INFORM THE COURT OF WHAT CONNECTION THE ALTERNATIVE PERPETRATOR HAD TO THE CRIME, THE LOWER COURT PROPERLY RULED THE AFFIRMATIVE DEFENSE WAS NOT ADMISSIBLE.

A. Standard of Review

In reviewing a sufficiency of the evidence claim, this Court's review is "limited to determining whether the evidence, when viewed in the light most favorable to the conviction, was sufficient to allow the jurors to reach the verdict they did." *Taylor*, 650 N.W.2d 190, 206 (Minn. 2002) (citing *Webb*, 440 N.W.2d 426, 430 (Minn. 1989)). "A defendant bears a heavy burden to overturn a jury verdict." *Vick,* 632 N.W.2d 676, 690 (Minn. 2001). The appellate court views the evidence in the light most favorable to the state and presumes that the jury believed the state's witnesses and disbelieved any contrary evidence. *Steinbuch,* 514 N.W.2d 793, 799 (Minn. 1994). All inconsistencies in the evidence are resolved in favor of the state. *Bergeron,* 452 N.W.2d 918, 924 (Minn. 1990).

Evidentiary rulings are "within the sound discretion of the district court and we will not disturb those rulings on appeal absent a clear abuse of that discretion." *State v. Stone*, 784 N.W.2d 367, 370 (Minn. 2010).

B. Argument

Appellant asserts that the District Court violated her right to present a complete defense by excluding evidence that someone else committed the crime. AB at 31. The evidence sought to be admitted was alternative perpetrator evidence. Because the appellant did not meet her affirmative defense burden, the district court judge did not abuse his discretion when he did not allow the appellant to argue "someone else killed the dogs." Even if the judge erred, the appellant cannot show prejudice because the evidence strongly supports appellant's conviction.

A defendant has a right to present a meaningful defense, which "includes the right to present evidence that a third party may have committed the crime for which the defendant is charged." *State v. Jenkins*, 782 N.W.2d 211, 226 (Minn. 2010); see also Minn. Const. art. 1 § 6. But "with that right comes the obligation to comply with procedural and evidentiary rules." *State v. Blom*, 682 N.W.2d 578, 621 (Minn. 2004). A defendant who wishes to admit alternative perpetrator evidence must first make a threshold showing that the evidence the defendant seeks to admit has an "inherent tendency to connect the alternative party with the commission of the crime." *State v. Larson*, 788 N.W.2d 25, 36–37 (Minn. 2010) (citation omitted) (internal quotation marks omitted). The "purpose of this foundational requirement is to avoid the use of bare suspicion and safeguard a third person from indiscriminate use of past differences with the deceased." *Jenkins*, 782 N.W.2d at 224 (alterations omitted) (citation omitted) (internal quotation marks omitted). If the appellant meets this foundational requirement, "the court must still evaluate [the

alternative perpetrator] evidence under the ordinary evidentiary rules as it would any other exculpatory evidence." *State v. Jones*, 678 N.W.2d 1, 16 (Minn. 2004).

The appellant argued that a series of cases discussed whether or not the state's evidence excluded the possibility of an "unidentified alternative perpetrator" as a possible hypothesis of innocence. AB at 33. However, the appellant cited *State v. Silvernail*, 831 N.W. 2d 594 (Minn. 2013) and *State v. Andersen*, 784 N.W. 2d 320 (Minn. 2010).[10] The reliance on those cases is misleading. There are not any facts in *Silvernail* that show that during the trial the defense attempted to or was allowed to argue "an unidentified alternative perpetrator." It was a sufficiency of the evidence argument on the appellate level. The argument of "unidentified alternative perpetrator" was argued as to the second step; "determin(ing) whether the circumstances proved are 'consistent with guilt and inconsistent with any rational hypothesis except that of guilt,' not simply whether the inferences that point to guilt are reasonable." *Silvernail* 831 N.W. 2d at 599. (quoting *Andersen*, 784 N.W.2d at 330). The Court in *Silvernail* said, "At the same time, there are no reasonable inferences to be drawn from the circumstances proved that Roberts was killed by another individual." See *Silvernail,* 831 N.W. 2d at 600 (explaining that the court must "examine independently the *reasonableness* of all inferences that might be drawn from the circumstances proved") (emphasis added) (citation omitted) (internal quotation marks omitted)."

The appellant also looks to *State v. Nissalke*, 801 N.W.2d 82, (Minn. 2011) to make her argument that the appellant was prejudiced in not being able to cross examine the

[10] Appellant misspelled Andersen.

investigators about the appellant's husband. But *Nissalke* is not on point. In *Nissalke*, a woman was murdered for reporting a sexual assault. *Id.* at 90. *Nissalke* argued that they should be able to cross examine an investigator regarding his investigation, "not for the truth of the matter asserted," but to show why the BCA agent took the next steps. *Id.* at 100. Secondly, *Nissalke* gave six different proffers that specifically showed why the alternative perpetrator could have murdered the victim. Lastly, the Supreme Court found that the district court did not abuse its discretion in limiting the introduction of an alternative perpetrator. They said, "Our review of the record establishes that to the extent that the district court did limit the alternative perpetrator testimony, the court did not abuse its discretion in determining that the threshold foundational requirement had not been met." *Id.* at 102.

Here, the appellant pled not guilty. The appellant filed numerous motions. However, the appellant never filed a notice of the affirmative defense of alternative perpetrator. During the trial, the appellant attempted to introduce evidence that someone else could have killed the dogs. T124, T125, T128. The district court ruled that (1) it is an affirmative defense of which the defendant had to give notice, (2) the defendant did not give notice (3) the defense has not given any evidence connecting another individual with the crime. T125, T332. Because of this, the district court precluded the appellant from making any arguments or mention of alternative perpetrator. *Id.* The appellant argued that she was not naming another individual; however, wanting to cross examine the

police on whether or not they looked into the spouse of the appellant.[11] Yet this is not factual. The appellant argued that she wanted to question the USDA agent about a comment the appellant said to him. She told the USDA agent that "my husband did it." T133. First, this is alternative perpetrator. Secondly, the appellant cannot illicit self-serving hearsay. The appellant also argues it is not alternative perpetrator because the appellant "developed exclusively by a defense investigation" and because it will be developed solely by cross examination. However, there is no law to support that argument.

The appellant also argues that the state is not prejudiced by lack of notice. However, the state is prejudiced by the lack of notice. While in trial, the state would need to find Mr. Johnson and have him testify regarding his whereabouts and whether or not he committed the crime.

Most importantly, the court not only ruled the appellant didn't provide notice, but that the appellant didn't articulate the theory of alternative perpetrator. T332. The court said, "And I haven't even heard from the defense that we want to argue that the husband did it, and here is why." *Id.* Later, the appellant argued that she just wanted to cross examine the officers on matters "that were simply included within the state's investigation." T329. However, this isn't what the appellant intended to argue. The

[11] The police questioned Mr. Johnson. He did not live on the premises with the appellant any longer. The police ruled him out as a suspect or co-defendant. The appellant is not prejudiced by not being able to cross examine the police especially given what they discovered regarding the third party.

appellant wanted to argue, "if my client didn't do it then it's possible, necessarily that somebody else did." T561.

Just prior to closing arguments, the appellant again attempted to introduce alternative perpetrator. The appellant told the court, "I am allowed to argue you did it. I am allowed to argue your court reporter did it." T546. The court ruled, again, that appellant was unable to do this. The argument is alternative perpetrator and appellant hasn't met the burden. T547.

The court allowed the appellant to argue that the state did not prove its case and that they did not prove that it was Ms. Bell who committed the crimes. T547. The court also allowed the appellant to "point out that other individuals were present on the premises..." T562.

Given that appellant wanted to argue that someone else did it, yet didn't disclose who or how that person is connected, the lower court did not abuse its discretion.

Even if this Court were to find that the district court abused its discretion, it is at most, harmless error. See *Blom*, 682 N.W.2d at 622 (applying harmless error analysis where exclusion of evidence violated defendant's right to present defense). The error is harmless beyond a reasonable doubt if the verdict rendered was "surely unattributable to the error." *Id.* "If . . . there is a reasonable possibility that the verdict might have been different if the evidence had been admitted, then the erroneous exclusion of the evidence is prejudicial." *Id.* at 623. Yes, other individuals had access to the dogs; however only one person, the appellant, was seen drowning them.

V. THE LOWER COURT GAVE THE APPROPRIATE JURY INSTRUCTIONS.

A. Grammatical Error in the Reasonable Doubt Jury Instruction

Appellant is asserting that a new trial is warranted because the court made a grammatical error in one of the jury instructions it gave that made the jury instruction faulty and erroneous. Appellant believes because the court used the term "it" two different times in one sentence, instead of using "reasonable doubt" as it used in the previous sentence, the instruction was so misleading that a jury could not have figured out what the court was referring to. Also, appellant argues that the use of "it" made the sentence grammatically incorrect.

The district court has a broad discretion in determining what jury instructions they will use, and the appellate courts will not reverse in absence of abuse of discretion. *Hilligoss v. Cargill, Inc.,* 649 N.W.2d 142, 147 (Minn. 2002); see *State Farm Fire & Cas. Co. v. Short,* 459 N.W.2d 111, 113 (Minn. 1990); *Alholm v. Wilt,* 394 N.W.2d 488, 490 (Minn. 1986). When an instruction is so misleading it renders incorrect the instruction as a whole it will then be reversible error, but "a jury instruction may not be attacked successfully by lifting a single sentence or word from its context." *Lindstrom v. Yellow Taxi Co.,* 214 N.W.2d 672, 676 (1974). When a jury instruction in its entirety fairly and correctly states applicable law, then the appellant is not entitled to have a new trial. *Id.* (citing *Kohoutek v. Hafner,* 383 N.W.2d 295, 300 (Minn. 1986).

In this case, Appellant is trying to lift single words from the jury instruction, instead of looking at the instruction as a whole. As a whole the jury instructions

themselves make a fair and correct representation of the applicable law the jury is supposed to follow.

The jury instruction given by the district court was the model jury instruction adopted by the Minnesota Practice Series. See 10 Minn. Prac., Jury Instr. Guides--Criminal CRIMJIG 3.03 (5th ed.). The district court did not modify this jury instruction it gave from the CRIMJIGs. The refusal to give the proposed jury instructions lies within the discretion of the district court and will not be reversed absent an abuse of discretion. *State v. O'Hagan,* 474 N.W.2d 613, 620 (Minn. App. 1991), *review denied* (Minn. Sept. 25, 1991). Appellant fails to show how the district court failed to give a proper jury instruction when they followed the CRIMJIG verbatim.

The court had discretion in choosing an applicable jury instruction. The court's use of the CRIMJIG does not amount to reversible error.

B. Rational Hypothesis Instruction

Appellant also states that the district court failed to give a rational hypothesis instruction on circumstantial evidence. In support, she cites the concurrence opinion of Justice Meyer in *Andersen,* 784 N.W.2d 320, 340 (Minn. 2010). The concurrence is not law.

Instead, the law instructs, "(d)etailed instructions on circumstantial evidence, such as the rational hypothesis other than guilt language," although applied to appellate review of the sufficiency of the evidence, need not be given as part of the jury instructions. *State v. Beard,* 574 N.W.2d 87, 92 (Minn. Ct. App. 1998), citing *State v. Turnipseed,* 297 N.W.2d 308, 312 (Minn. 1980). If an instruction is given with such detail on the

weighing of circumstantial evidence, then the court risks confusing the jury. *Id.* See also *Holland v. United States,* 348 U.S. 121 (1954). The *Beard* court found that giving the instruction is at the discretion of the district court, and held that they couldn't find an abuse of discretion by the district court when they declined to give the requested instruction. 574 N.W.2d 87 at 92.

This case is analogous to the *Beard* court, where the district court decided that a circumstantial evidence was not to be given. There was no error in failing to give this instruction.

VI. THE LOWER COURT DID NOT ERROR WHEN, AFTER A HEARING, IT DENIED THE APPELLANT'S MOTION TO SUPPRESS IDENTIFICATION OF THE DOGS.

The district court held a lengthy hearing regarding the identification of the dogs. The district court, after hearing testimony from the lead investigator, held that the identification of the dogs was admissible. The investigator showed eleven photos to witness AJ. T481. The purpose was to see if the witness was able to identify the animals as animals that she had seen on the property. The defense conducted a thorough cross examination of the investigator. T521-T533. During the cross examination the defense attacked integrity of the identification procedure. T521.

The appellant argues that identification process was inherently suggestive and therefore, the district court erred when it denied her motion to suppress.[12] The appellant argues that precedent is provided to this Court by a series of federal cases. AB-38.

[12] Appellant mistakenly states in her heading that the court erred when it did not hold a pretrial hearing on the matter. A hearing, with testimony, was held on March 28, 2013. The lower court denied the appellant's motion to suppress in an order dated June 7, 2013.

However, the cases provided by the appellant are not on point; they question the identification of the appellant, not the victims. The appellant cites no case law to show that the district court abused its discretion in allowing AJ to testify as to each photo.

AJ testified at trial as to her memory of each dog. Her statement was not played to the jury. The investigator did not testify as to whether or not she identified each dog in each photo. The original statement became irrelevant because the jury never heard it.

The appellant was able to argue in opening, closing, and during cross examination that AJ's testimony was less credible because she was told the dogs were drowned before seeing the photos. The jury, with that information and argument, still found the defendant guilty of thirteen out of fourteen counts.

CONCLUSION

In conclusion, the appellant received a lengthy and fair trial. The jury acquitted her of one count and found her guilty of thirteen.

Dated: 5/20/14

JAMES C. BACKSTROM
DAKOTA COUNTY ATTORNEY

By: _____

Stacy St. George
Assistant Dakota County Attorney
Attorney Registration No. 0341113
Dakota County Judicial Center
1560 Highway 55
Hastings, MN 55033
Telephone: (651) 438-4438

APPENDIX

Index to Appendix

CA12-00048
J. Beer

State of Minnesota
Dakota County

District Court
First Judicial District

Court File Number: **19HA-CR-12-1294**
Case Type: Crim/Traf Mandatory

Notice of Filing of Order

JESSICA ANN BIERWERTH
DAKOTA COUNTY JUDICIAL CENTER
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1560 W HIGHWAY 55
HASTINGS MN 55033-2392

State of Minnesota vs DAYNA KRISTINE BELL

You are notified that an order was filed on this date.

Dated: June 7, 2013

Carolyn M. Renn
Court Administrator
Dakota County District Court
1560 Highway 55
Hastings MN 55033
651-438-8100

cc: State of Minnesota
DAYNA KRISTINE BELL
STEPHEN VINCENT GRIGSBY

STATE OF MINNESOTA

COUNTY OF DAKOTA

DISTRICT COURT

FIRST JUDICIAL DISTRICT

STATE OF MINNESOTA,

Plaintiff,

v.

DAYNA KRISTINE BELL,

Defendant.

Court File No.: 19HA-CR-12-1294

OMNIBUS ORDER

The above-entitled case came on before the Honorable Tim D. Wermager, Judge of District Court, for Omnibus hearing on March 28, 2013 at the Dakota County Judicial Center, Hastings, Minnesota.

Defendant is charged with sixteen counts of animal cruelty, all felonies, in violation of Minn. Stat. § 343.21, subd. 7, subd. 9(d) for conduct that occurred on or about various dates in September, 2011 in Dakota County. The State has since dismissed two of those counts.

Defendant moved the Court to dismiss the charges for lack of probable cause to believe the offense was committed on the basis that the dogs in Defendant's care were not pets or companion animals. Defendant also moved the Court to suppress the identification of the dead dogs found in Defendant's freezer.

Defendant appeared in person and was represented by Stephen Grigsby, Esq. Jessica A. Bierwerth, Assistant Dakota County Attorney, appeared on behalf of the Plaintiff.

Based on the files, records, and proceedings, the Court makes the following FINDINGS OF FACT:

1. Defendant is the owner and operator of Bell Kennels and Farm located in Dakota County, Minnesota. Defendant has been involved in this business for at least thirty-five years.

2. On September 27, 2011, the Dakota County Sheriff's office received reports of various incidents of Defendant mistreating dogs from three of Defendant's former employees.
3. It was reported that Defendant placed two dead puppies and two injured puppies in a bucket of water, and drowned the living puppies by placing a second bucket (weighted with water and a bottle of bleach) on top of the first. Approximately fifteen minutes later, Defendant then allegedly placed the four dead puppies in a garbage bag and placed the bag in the garbage.
4. On September 26, 2011 a witness reported that Defendant was complaining about money issues. It was reported that Defendant took four dogs from the "big kennels" and transported them to the barn in smaller travel carriers. The witness asked Defendant what she was doing and Defendant indicated that "this is a one stop shop." After an hour had passed Defendant returned without the four dogs and took two more dogs with her.
5. A witness observed Defendant place a rope on the neck of a small black and white dog. The other end of the rope was tied around a cinder block. The witness reported that Defendant threw the dog and the block into the pool.
6. On September 27, 2011, Defendant was bitten on her right arm by a dog. A witness reported that Defendant took the dog away, and returned stating "that motherfucker will never bother any of us again" and that she had broken its "damn neck."
7. Sometime in late September of 2011, Defendant was witnessed placing another puppy in a bucket of water. A second bucket (weighted with a bottle of Pine Sol) was placed over the puppy to drown it.
8. On September 29, 2011, a warrant was executed on Defendant's property. A blue bucket and a cinder block with a rope tied around it were located on the property. Ten small breed adult dogs, each in individual plastic bags, were found in a freezer on the property. The appearance of the furs on these animals led to the conclusion that the dogs were wet when placed in the freezer.
9. Defendant's primary veterinarian reported that in 2011 two adult dogs were euthanized for the defendant.

10. A forensic pathologist from the University of Minnesota and a veterinarian with the Animal Humane Society report dogs would experience drowning similar to how humans experience it.
11. An investigator from the Dakota County Sheriff's Office located a document that indicated that the sale of one or more of Defendant's dogs were for the purpose of pet or companion.

Based upon the foregoing Findings of Fact the Court makes the following:

CONCLUSIONS OF LAW:

1. There is sufficient probable cause to proceed to trial on all charges.
2. Suppression of the identification of the dogs is not warranted in this matter.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Court makes the following ORDER:

1. Defendant's motion to dismiss the charges for lack of probable cause is hereby DENIED.
2. Defendant's motion to suppress identification of the dogs is hereby DENIED.
3. **The matter shall be set for Jury Trial before the undersigned on October 14, 2013 at 9:00 a.m., at the Dakota County Judicial Center, 1560 Highway 55, Hastings, MN 55033. The matter shall be set for Settlement Conference on a date and time to be determined**
4. The Memorandum of the Court is incorporated by reference.

Dated: June 7, 2013

Tim D. Wermager
Judge of District Court

MEMORANDUM

PROBABLE CAUSE

At this stage of the proceeding, "the court must determine whether there is probable cause to believe that an offense was committed and that the defendant committed that offense." State v. Hookom, 474 N.W.2d 624, 630 (Minn. Ct. App. 1991); Minn. R. Crim. P. 11.03 (2005). "[T]he test of probable cause is whether the evidence worthy of consideration...brings the charge against the [defendant] within reasonable probability." State ex rel. Hastings v. Bailey, 263 Minn. 261, 266, 116 N.W.2d 548, 551 (1962). A showing of probable cause does not require the same quantum of evidence as is required to convict. Id. Nevertheless, the State has the burden of showing, by a preponderance of the evidence, that a crime has been committed and that the defendant is the one who committed it. State v. Maletich, 384 N.W.2d 586, 587 (Minn. Ct. App. 1986). Ultimately, "the trial judge must exercise independent and concerned judgment addressed to this important question: Given the facts disclosed by the record, is it fair and reasonable...to require the defendant to stand trial?" State v. Florence, 306 Minn. 442, 457, 239 N.W.2d 892, 902 (Minn. 1976). It is this determination that serves to "relieve the defendant from the expense and ignominy of a prosecution on the merits in cases where the known facts, from whatever source derived, do not justify a trial." Florence, 306 Minn. at 446-447, 239 N.W.2d at 896.

In protecting a defendant from an unjustified trial, "[a] finding by the court of probable cause shall be based upon the entire record including reliable hearsay in whole or in part." Minn. R. Crim. P. 11.03 (2005). A defendant is given an opportunity at the Omnibus, or "Florence," hearing to challenge probable cause by presenting certain kinds of evidence, which might demonstrate that he was improperly charged and thus exonerate him. Florence, 306 Minn. at 448, 239 N.W.2d at 897. The prosecution is also entitled to present evidence in addition to the complaint and police reports. Minn. R. Crim. P. 11.03 (2005). From this record, and reliable hearsay, if any, the trial judge must determine whether he is satisfied that the facts therein would preclude the granting of a motion for a directed verdict of acquittal if proved at trial. Florence, 306 Minn. at 459, 239 N.W.2d at 903. "A motion for judgment of acquittal will be granted 'if the evidence is insufficient to sustain a conviction' of the charged offense." In the Matter of the Welfare of M.L.C., No. A04-2086, 2005 WL 1545630, *1 (Minn. Ct. App. July 5, 2005) (citing Minn. R. Crim. P. 26.03, subd. 17(1)). If the trial judge is so satisfied, then the defendant's motion to dismiss for lack of probable cause will be denied. Id.

In the present case, Defendant is charged with multiple counts of animal cruelty in violation of Minn. Stat. § 343.21, subd. 7. Such offense provides that "[n]o 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." Minn. Stat. § 343.21, subd. 7 (2012). The term "cruelty" is defined by Minn. Stat. 343.20, subd. 3 as "every act, omission, or neglect which causes or permits unnecessary or unjustifiable pain, suffering, or death." The definition of "pet or companion animal" is provided by Minn. Stat. § 343.20, subd. 6 and "includes any animal owned, possessed by, cared for, or controlled by a person for the present or future enjoyment of that person or another as a pet or companion, or any stray pet or stray companion animal."

In order to obtain a conviction for animal cruelty, the State must establish all the elements of the offense. Defendant argues that the charges should be dismissed because probable cause does not exist to believe that the animals at issue meet the statutory definition of "pet." In particular, Defendant argues that the animals at issue were not pets because they were not used for the "enjoyment" of Defendant or another person as a dog typically is, but rather sold as part

of a business. Defendant goes on to argue that there is insufficient evidence to establish that Defendant sold the animals at issue to be used as traditional pets. Defendant suggests that these animals may have been sold to laboratories or used in a manner other than as a pet. The State, on the other hand, argues that "enjoyment" comes in many forms and includes making a profit. Therefore, the State argues that regardless of whether the animals at issue were sold to be used as traditional pets, they still meet the statutory definition.

This issue was decided for all intents and purposes in the Court's previous Order discussing the applicability of the penalty phase of Minn. Stat. § 343.21, subd. 9(d). In that Order, this Court held that the penalty phase was applicable to the present matter. As noted above, one of the elements of the offense is that the animals at issue must have been "owned, possessed by, cared for, or controlled" by Defendant. While an argument could certainly be made that Defendant did not "care for" the animals at issue, probable cause exists to believe that the animals were owned, possessed by, or controlled by Defendant. It is this Court's opinion that "enjoyment" can mean a variety of things, including profit. Defendant's strained reading of the statute would leave her free to treat animals in any manner she wished, which is an absurd result. Probable cause exists to believe that the dogs were being held by Defendant for the future enjoyment of other people as a pet or companion.

Additionally, it is for a jury to decide whether it believes Defendant's various arguments and her version, or versions, of the facts. See e.g., Florence, 306 Minn. at 460, 239 N.W.2d at 903 (stating that "trial judge's function at the omnibus hearing does not extend to an assessment of the relative credibility of conflicting testimony"); State v. Hegstrom, 543 N.W.2d 698, 702 (Minn. Ct. App. 1996) (same), review denied (Minn. Apr. 16, 1996). Defendant will have the opportunity to make her arguments at trial and the jury can then assess the credibility of Defendant and other witnesses. Therefore, this Court finds that there exists probable cause to believe that the animals at issue in the present matter meet the statutory definition of pet and that Defendant caused those animals unnecessary pain and suffering. Accordingly, Defendant's motion to dismiss for lack of probable cause is denied.

SUPPRESSION

Defendant next argues that the identification procedure of the dogs found in the freezer was overly suggestive. As a result, Defendant argues that the Court should not permit an in-court identification based on the photographic display.

An out-of-court identification can be inadmissible if it was the product of a suggestive identification procedure. State v. Taylor, 594 N.W.2d 158, 161 (Minn. 1999). The court must first determine whether the identification procedure was "unnecessarily suggestive." Id. Second, if the court determines that the identification procedure was unnecessarily suggestive, the court must then determine whether the identification caused "a very substantial likelihood of irreparable misidentification." Id.

While Defendant asserts that these basic principles of law are applicable to the present matter, she cites no binding authority for that position and this Court has found none. Indeed, these principles of law apply to the identification procedures of a defendant. Accordingly, this Court finds that suppression is unwarranted.

TDW

Not Reported in N.W.2d, 2010 WL 3544539 (Minn.App.)
(Cite as: 2010 WL 3544539 (Minn.App.))

H

Only the Westlaw citation is currently available.

Court of Appeals of Minnesota.
STATE of Minnesota, Respondent,
v.
Ajalon Thomas CORCORAN, Appellant.

No. A09-2029.
Sept. 14, 2010.
Review Denied Dec. 14, 2010.

West KeySummary**Animals 28** 3.5(5)

28 Animals
28k3.5 Regulation in General
28k3.5(5) k. Protective and anti-cruelty regulation in general. Most Cited Cases
The plain language of the mistreating an animal statute did not require that defendant knew that the cat being killed was a pet. The statute did not include a knowledge requirement. The legislature's inclusion of "any stray pet" indicated that it did not require that the pet have tags, a collar, or other observable indication of its status as a pet. section 343.21.

Winona County District Court, File No. 85-CR-07-3951.
Lori Swanson, Attorney General, St. Paul, Minnesota; and Charles E. MacLean, Winona County Attorney, Kevin P. O'Laughlin, Assistant County Attorney, Winona, MN, for respondent.

J.P. Plachecki, Price, McCluer & Plachecki, Winona, MN, for appellant.

Considered and decided by KALITOWSKI, Presiding Judge; HUDSON, Judge; and COLLINS, Judge.

UNPUBLISHED OPINION

COLLINS, Judge.[FN*]

FN* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

*1 Appellant challenges his conviction of felony mistreating an animal, arguing that the district court erred by finding probable cause to support the charge and abused its discretion by ruling out appellant's proposed jury instruction on the element of intent. We affirm.

FACTS

A St. Charles police officer responded to a complaint of cruelty to an animal. A family, including an 11-year-old child, had reported that the child was outside in the yard when she saw the family's pet cat cross the street from a neighbor's yard with the shaft of an arrow protruding from its abdomen. The officer went to the neighbor's house and talked to appellant Ajalon Corcoran, age 22, and his father. Corcoran stated that he shot the cat because he believed it was a stray and it had been coming into the yard since the previous spring. The cat could not be saved due to the extent of its injuries.

Corcoran was charged with misdemeanor mistreating an animal, a violation of Minn.Stat. § 343.21, subd. 1 (2006), and felony mistreating an animal, a violation of Minn.Stat. § 343.21, subds. 1, 9(d) (2006)

(intentional violation of subdivision 1 resulting in death of pet).

Corcoran moved to dismiss the felony charge for lack of probable cause. The district court denied the motion, concluding that, contrary to Corcoran's argument, the statute does not require proof of intent to kill a pet. Instead, the district court concluded that in order to support the charges, it must find sufficient cause to believe that Corcoran intentionally shot a cat and that death of a pet resulted from his action. Because Corcoran admitted that he intentionally shot the cat, resulting in its death, and there is no dispute that the cat was a family pet, the district court found probable cause to support both charges.

Corcoran moved the district court to declare Minn.Stat. § 343.21 unenforceable as overbroad and vague, and he proposed a jury instruction that conviction under subdivision 9(b) requires a finding that

> [t]he actor must have knowledge of those facts which are necessary to make the actor's conduct criminal and which are set forth after the word "intentionally." [Minn.Stat. § 609.02.] The State has the burden of proving that ... Corcoran knew that he was shooting someone's pet.

The district court denied the motion and ruled out the proposed instruction, based on the reasoning set forth in its probable-cause order.

Corcoran subsequently waived his right to a jury trial, pleaded guilty to misdemeanor mistreating an animal, and stipulated to the facts of the state's case regarding the felony charge. Reserving his right to appeal the district court's orders denying his motion to dismiss the complaint and ruling out his proposed jury instruction, Corcoran admitted he intentionally and unjustifiably shot the cat, resulting in its death, but denied knowing that he was shooting someone's pet. The district court found Corcoran guilty of felony mistreating an animal. This appeal followed.

DECISION

*2 Corcoran challenges the district court's order denying his motion to dismiss the felony charge for lack of probable cause, arguing that the court erroneously construed Minn.Stat. § 343.21, subds. 1, 9(d). As with other legal determinations, the question of statutory construction is reviewed de novo. *See State v. Linville,* 598 N.W.2d 1, 2 (Minn.App.1999) (reviewing statutory interpretation de novo).

Corcoran also challenges the district court's order ruling out his proposed instruction modifying the element of intent. The refusal to give a requested jury instruction lies within the discretion of the district court and will not be reversed absent an abuse of discretion. *State v. Cole,* 542 N.W.2d 43, 50 (Minn.1996).

The central issue underlying both challenges is whether a felony conviction of mistreating an animal requires proof beyond a reasonable doubt that the accused acted with knowledge that the animal being killed is a pet. Whether a statute has been properly construed is a question of law subject to de novo review. *State v. Murphy,* 545 N.W.2d 909, 914 (Minn.1996).

"No person shall ... unjustifiably injure, maim, mutilate, or kill any animal ... whether it belongs to that person or to another person." Minn.Stat. § 343.21, subd. 1. "A person who intentionally violates subdivision 1 ... 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." *Id.,* subd. 9(d). A **pet** or **companion** animal "includes any animal owned, possessed by, cared for, or controlled by a person for the present or future enjoyment of that person or another as a **pet** or **companion**, or any stray pet or stray companion animal." Minn.Stat. § 343.20, subd. 6 (2006).

Section 343.21, subd 1 prohibits a person from unjustifiably killing "any animal." And the statute expressly provides that the mens rea requirement for violation of subdivision 9(d) is intent to violate subdivision 1. The plain language of the statute limits the mens rea requirement by using the word "intentionally" to modify only the violation of subdivision 1. Subdivision 9(d) then goes on to make the offense a felony when, as a result of the intentional violation of subdivision 1, a pet is killed or suffers great bodily harm. The legislature has thus clearly indicated that it does not intend that the accused must have knowledge that the animal is a pet. Indeed, if the legislature intended that the accused know that the animal he or she is mistreating is someone's **pet** or **companion** animal, it easily could have included an express knowledge requirement in subdivision 9(d). Construction of the statute to require such a mental state would exceed the legislature's intent as expressed by the plain language of the statute. *See* Minn.Stat. § 645.16 (2010) ("When the words of a law in their application to an existing situation are clear and free from ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit"); *State v. Al-Naseer,* 734 N.W.2d 679, 683 (Minn.2007) (stating that if the language of the statute is not ambiguous, this court must apply its plain meaning). Moreover, if the accused were required to know that the animal he or she is killing is someone's pet, the requirement that the conduct "results in death ... to a pet" becomes superfluous, as the intentional killing of an animal one knows to be someone's pet will necessarily result in the death of a pet. *See* Minn.Stat. § 645.16 ("Every law shall be construed, if possible, to give effect to all of its provisions").

*3 The definition of "**pet** or **companion** animal" also supports the view that the legislature intended to prohibit mistreatment of all pets, regardless of the accused's knowledge as to whether the animal is a pet. The definition includes "any stray pet or stray companion animal." Minn.Stat. § 343.20, subd. 6 (2006). A stray pet is one that is "wandering or lost." *The American Heritage Dictionary* 1776 (3d ed.1992). The legislature's inclusion of "*any* stray pet" indicates that it does not require that the pet have tags, a collar, or other observable indicia of its status as a pet. This language supports the conclusion that the legislature intended to prohibit the killing of a pet animal, regardless of whether it is readily distinguishable as such.

Corcoran further argues that the definition of "intentionally" requires that an accused must have knowledge that the animal was a pet in order for his or her conduct to be a felony. "Intentionally" means that the actor either has a purpose to do the thing or cause the result specified ... [and] must have knowledge of those facts which are necessary to make the actor's conduct criminal." Minn.Stat. § 609.02, subd. 9 (2006). Section 343.21, subd. 1 prohibits the unjustifiable killing of any animal. In pleading guilty to misdemeanor mistreating an animal, Corcoran admitted he intentionally and unjustifiably shot the cat, causing its death. One who intentionally and unjustifiably kills an animal is on notice by the plain language of subdivision 9(d), without more, that when the animal is a pet the offense is enhanced to a felony. Subdivision 9(d) does not contain the element of knowledge that the animal is a pet. Again, the legislature could have included "knowledge" as an element of enhancement of the offense to a felony. It did not. The district court properly declined to read such an element into the statute, as do we. *See* Minn.Stat. § 645.16 (requiring courts to construe statutes according to their plain language.) *Cf. State v. Angulo,* 471 N.W.2d 570, 572-73 (1991) (analyzing first-degree murder statute for causing the death of a peace officer and holding that offender's knowledge that victim is a peace officer not required for conviction), *review denied* (Minn. Aug. 2, 1991).

Finally, Corcoran contends that failure to require that the accused know the animal is a pet would result in a person in rural Minnesota being charged with a

felony if he or she kills a raccoon or rabbit that happens to be a pet. But Minn.Stat. § 343.21, subd. 1, provides the safeguard that the killing must be unjustifiable. This qualification alleviates any concerns that, for example, a lawful hunter who kills a raccoon or rabbit would be charged with a felony, as the conduct would presumably be justifiable.

Because the plain language of section 343.21, subds. 1, 9(d), does not require that the accused know that the animal being killed is a pet, the district court did not erroneously construe the statute. Accordingly, the district court did not err by denying Corcoran's motion to dismiss the complaint or abuse its discretion by ruling out his proposed jury instruction requiring proof of knowledge that the animal was someone's pet.

***4 Affirmed.**

Minn.App.,2010.
State v. Corcoran
Not Reported in N.W.2d, 2010 WL 3544539 (Minn.App.)

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