Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NOS. 2006-511 & 2007-073

APRIL TERM, 2008

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 2, Bennington Circuit
	}	
Larry R. Mason	}	DOCKET NO. 733-8-06 BnCr
		Trial Judge: David A. Howard

In the above-entitled cause, the Clerk will enter:

Defendant appeals from a conviction, based on a jury verdict, of animal cruelty in violation of 13 V.S.A. § 352(4), and a related order of civil forfeiture under 13 V.S.A. § 354(d). Defendant contends: (1) the forfeiture order was unjustified absent a showing that the conditions found to constitute animal cruelty were relatively permanent and incurable; and (2) the court's instructions failed to ensure that the jury's verdicts on two of three animal cruelty counts were unanimous. We affirm.

The facts may be summarized as follows. On July 18, 2006, two Bennington police officers responded to a report of possible animal neglect. The officers found an old school bus parked at the Top Notch Diner in Bennington and observed that it contained a number of dogs. They located the owner, identified as defendant, who reported that he had "two dozen" dogs inside the bus. The total number was later found to be thirty-two. Two animal control officers also arrived at the scene. All four officers reported a powerful stench of urine and fecal waste inside the bus. The animal control officers observed that many of the dogs were filthy with what appeared to be fecal matter. They also observed plastic and metal crates in the bus and saw dogs both inside the crates and roaming free in the bus. A number of crates were too small for the dogs. The officers observed a bag of dog food but no dishes for food or water.

The dogs were removed from the bus, given water which they drank eagerly, and later examined by two veterinarians. The exams revealed that many of the dogs were extremely underweight, had matted dirty coats, and revealed signs of longterm medical neglect, including injuries that had been untreated, skin ulcers, scars, and rashes. Many had to be de-wormed. Defendant indicated that he had been traveling with the dogs for an undetermined time in the bus.

Defendant was charged with three counts of animal cruelty, in violation of 13 V.S.A. §352. Shortly thereafter the State filed a motion to forfeit the seized dogs under 13 V.S.A. § 354(d). Following the forfeiture hearing, the court issued a written decision granting the motion. The court found that defendant had violated the animal cruelty statute by depriving nineteen of the dogs of adequate food, and by depriving all of the dogs of adequate sanitation. A subsequent jury trial resulted in a judgment of conviction on all three charges. Defendant appealed from both decisions, which we have consolidated for purposes of review.

Defendant first contends the court erred in concluding that forfeiture was mandated upon a showing of animal cruelty. He contends that a forfeiture is not justified under the statute unless the conduct constituting the animal cruelty is of a permanent nature and not subject to "cure" within a reasonable period of time. The interpretation of a statute is a question of law which we review de novo. Heffernan v. Harbeson, 2004 VT 98, ¶ 7, 177 Vt. 239. In construing a statute, our goal is to give effect to the intent of the Legislature, and in order to do so we look first to the plain, ordinary meaning of the text. If the language is clear and unambiguous, we enforce the provision according to its terms. State v. Eldredge, 2006 VT 80, ¶7, 180 Vt. 278.

The language of the statute at issue here certainly appears to be plain and unambiguous. It provides that, in a forfeiture proceeding, "the state shall have the burden of establishing by clear and convincing evidence that the animal was subjected to cruelty, neglect or abandonment in violation of section 352 or 352a," and that, "[i]f the state meets its burden of proof, the motion shall be granted and the court shall order the immediate forfeiture of the animal in accordance with the provisions of subsection 353(c) of this title." 13 V.S.A. § 354(f) (emphasis added). The text itself thus appears to mandate a forfeiture order upon a finding of animal cruelty; there is no provision conditioning such an order upon a finding that the conduct was of a relatively permanent nature, or was not amenable to cure or remediation.

On the facts presented, however, we need not decide whether, in the appropriate case, the court nevertheless retains the discretion to deny a forfeiture where the neglect is of a particularly short-term nature or subject to extenuating circumstances, and the court's discretion to deny a forfeiture may be genuinely at issue. For the evidence and the court's findings here plainly show that the neglect was longstanding; the emaciated condition of many of the dogs clearly developed over time, and, as the court observed, the unsanitary "condition of the bus was far beyond what even a number of dogs might cause for dirt and waste over a day or so." Nor was there any credible or substantial evidence that defendant recognized, and was prepared to undertake, remedial efforts adequate to address the problem. Accordingly, even assuming for the sake of argument that the court had the discretion to deny the forfeiture, there was no basis here to support such a ruling. Accordingly, we find no basis to disturb the forfeiture order.

Defendant further contends that the court's instructions were inadequate to ensure unanimous verdicts on counts II and III of the animal cruelty charges. Counts I and III each charged that defendant had deprived a specific dog, "Mini Tatonka" under Count I and "Jody" under count III, of adequate food, water, shelter, sanitation and necessary medical attention. Count II charged that defendant had transported an animal in an overcrowded vehicle. To ensure that the jurors agreed upon the specific form of deprivation under counts I and III, the court provided a special verdict form for the jury to indicate its decision. In addition, in response to

concerns expressed by defendant that count II might be seen as duplicative of counts I and III, the court specifically instructed that, while the jury did not have to identify a particular animal by name, it could not be either Mini Tatonka or Jody. The jury, as noted, found defendant guilty on all three counts. As to Count III, it specifically found that defendant had failed to provide Mini Tatonka with adequate sanitation and medical attention.

Defendant maintains on appeal that the instruction on Count III failed to ensure a unanimous verdict because, while the State alleged four circumstances under which Jody failed to receive medical attention (fractures of her front legs, pregnancy, worms, and coat matting), neither the instructions nor the verdict form required unanimity as to the act or acts which constituted medical neglect. Defendant has not shown that this argument was raised below, however, and we therefore review solely for plain error. See State v. Doleszny, 2004 VT 9, ¶ 10, 176 Vt. 203 (litigant must raise objections to jury instructions on the record, or this Court will review only for plain error).[*] In view of the fact that the jury here unanimously found, under the same count, that defendant had failed to provide Jody with adequate sanitation, we find no basis to conclude that any error in the instruction represented a "miscarriage of justice" or fundamentally undermined confidence in the verdict. See State v. Carpenter, 170 Vt. 371, 375 (2000). Nor does it appear that the verdict on medical inattention for Jody, as distinct from inadequate sanitation, affected the sentence, which was minimal (consecutive two to six months sentences on Counts I and III, and a concurrent two to six months on Count II, all suspended except for five days work crew). Although the court noted the specific verdicts, it explained that its principal concern was defendant's continuing inability to recognize that he had generally neglected the dogs. See State v. Baird, 2006 VT 86, ¶ 38, 180 Vt. 243 (harmless-error doctrine applies to sentencing).

Defendant further asserts that the instructions failed to ensure unanimity on Count II, which charged that defendant had "transported an animal . . . in an overcrowded vehicle." Defendant maintains that, in reaching a verdict on this count, the jurors could have had different dogs in mind, and therefore might not have reached a unanimous verdict as to the identity of the victim of the offense. See State v. Couture, 146 Vt. 268, 272 (1985) (where charge involves potentially more than one victim, jury instructions must ensure unanimity as to the "particular" victim or victims). As the State correctly observes, however, "logically one animal cannot be overcrowded." The charge of overcrowding inherently involves more than one animal, and therefore did not require unanimity as to any one in particular; if any of them was overcrowded, all were. Accordingly, we find no error, and no basis to disturb the judgment.

Affirmed.

[*] Although defendant suggests that an objection may have been raised during an un-transcribed bench conference, he has not submitted any support for the claim.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Denise R. Johnson, Associate Justice

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Brian L. Burgess, Associate Justice