

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs February 25, 2009

STATE OF TENNESSEE v. ALEX STEWART

**Direct Appeal from the Criminal Court for Hancock County
No. 07-CR-2765 John F. Dugger, Jr., Judge**

No. E2008-00969-CCA-R3-CD - Filed August 3, 2009

A Hamblen County Criminal Court jury convicted the appellant, Alex Stewart, of animal cruelty, and the trial court sentenced him to eleven months, twenty-nine days to be served at seventy-five percent. On appeal, the appellant contends that the evidence is insufficient to support the conviction and that the trial court erred by imposing the maximum sentence and not ordering probation. Based upon the record and the parties' briefs, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., J., joined. JOSEPH M. TIPTON, P.J., concurred in results only.

Deanna M. Snyder, Morristown, Tennessee, for the appellant, Alex Stewart.

Robert E. Cooper, Jr., Attorney General and Reporter; Deshea Dulany, Assistant Attorney General; C. Berkeley Bell, Jr., District Attorney General; and Connie Trobaugh, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

The appellant originally was charged with aggravated animal cruelty, a Class E felony, for shooting Melissa Nichols' black Labrador retriever, Lady. At the appellant's April 2008 trial, Nichols testified that she lived on Fox Branch Road in Kyles Ford. In 2006, the appellant was her neighbor and lived in a trailer about two houses away from her property. On January 6, 2006, Nichols' neighbor, Hobart Kinsler, telephoned Nichols with information about her dog. Nichols said she later saw that Lady had been shot in the rear left leg, that a "gigantic hole" was in the dog's thigh, and that the dog was "bleeding to death." The bullet struck a main artery, and Nichols used forty gauze bandages and two rolls of paper towels to slow the bleeding enough to take the dog to a veterinarian in Morristown. Lady received blood transfusions, had surgeries, and stayed at the

veterinarian's office for two days. Nichols said the veterinarian had to leave the "beads or whatever comes out of a shell" in the dog's leg. It took two weeks for the dog to recuperate from the shooting. During that time, Nichols cleaned the dog's wound twice per day and administered medication.

Nichols testified that Lady was eleven years old at the time of the shooting and suffered from arthritis. After the shooting, the dog's arthritis became much worse. During the summer of 2007, the appellant told Nichols that he regretted shooting her dog and that he shot the dog for "no real reason." He also told Nichols that he was going to start making payments to her for damages because he did not want to go to jail. Nichols stated that prior to the shooting, Lady was allowed to run free in the neighborhood and that no one ever complained. She said she had never known Lady to go onto another person's property to fight another dog.

On cross-examination, Nichols testified that Lady refused to wear a collar and continued to run loose in the neighborhood. She stated that the appellant knew she owned Lady and that if the dog had been bothering him, he should have contacted her. She acknowledged that she had never heard anything about Lady attacking the appellant's dog or being on his property. She said Lady could walk but had not fully recovered from the shooting.

Hobart Kinsler, Melissa Nichols' neighbor, testified that he had never had any problems with Lady and that she was not a "fighting dog." On January 6, 2006, Kinsler was in his front yard when he heard a gunshot and a dog "holler." He looked up and saw the appellant lower a gun from the appellant's shoulder. Kinsler stated that Lady was on his property when the appellant shot the dog. Kinsler telephoned Nichols and told her Lady had been hurt by the appellant.

On cross-examination, Kinsler testified that he did not see the dog when he heard the gunshot but that he heard the dog. A few seconds later, he saw Lady run off his property and run toward Nichols' property.

Tim Kerney testified for the appellant that he worked for the Claiborne County Sheriff's Department and was the appellant's good friend. In January 2006, the appellant and Heather Seal were renting a trailer from Kerney on Fox Branch Road. The appellant kept a pit bull dog and the dog's puppies in a shed at the edge of the road. The appellant's dog was always chained. Kerney had seen a black Labrador retriever on the property several times. The retriever had gotten into the trash, but Kerney had never seen the retriever fight with the appellant's dog. On January 6, 2006, Kerney saw the appellant shoot the retriever with Kerney's .17 caliber Savage rifle. After the shooting, the retriever ran across the main highway and into Hobart Kinsler's field.

Kerney testified that the rifle was a "varmint rifle" used to kill rabbits, turkeys, deer, or "whatever you want to kill." He said he knew the retriever belonged to Melissa Nichols but did not tell the appellant before the shooting that Nichols owned the dog. Although the dog had been on his property and had gotten into the trash previously, Kerney never complained to Nichols. He said that he gave the gun to the appellant to shoot the retriever and that he was not present when the retriever was supposedly fighting the appellant's dog.

Heather Seals Stanzak testified that in January 2006, she was dating the appellant and living with him in Tim Kerney's trailer on Fox Branch Road. The couple had two dogs, Cassie and Angel, and some puppies. Cassie stayed in the trailer with the couple, and Angel and her puppies stayed in a building on the property. Stanzak acknowledged that if Angel was not in the building, she was chained outside the building. Several weeks before the shooting, Stanzak saw a black Labrador retriever on the property. The dog got into the trash and "strung [trash] out all over the yard." The dog also attacked Angel. Although Stanzak did not see the retriever attack Angel, she saw the retriever run off the property and saw wounds on Angel's head, left ear, right front leg, and back. Stanzak said she and the appellant did not know who owned the retriever.

Stanzak testified that on January 6, 2006, the Labrador retriever returned and attacked Angel. Stanzak and the appellant heard Angel yelping and heard two dogs barking. The appellant went outside to check on Angel, and the retriever ran away when the appellant yelled at it. The retriever later returned, and the appellant shot it. Stanzak said that she was standing next to the appellant at the front door of the trailer when he shot the dog and that the dog was not close to Angel at the time of the shooting. After the shooting, the retriever ran toward Hobart Kinsler's property and into a field. Stanzak and the appellant checked on Angel and then rode into town with Tim Kerney. The next day, police officers came to the trailer. Stanzak and the appellant told the officers that the retriever had attacked their dog and that the appellant shot the retriever. Stanzak said she was no longer dating the appellant, was married, and had not spoken with the appellant since June 2007.

On cross-examination, Stanzak testified that only she and the appellant were present when he shot the dog. She acknowledged that she was not sure Angel was chained up on January 6 and that photographs taken of Angel's injuries may have been taken one week after the shooting. She stated that she had never known Angel to fight any other dogs but that Angel had fought with Cassie about two months prior to the shooting. However, she said Cassie did not leave scars on Angel's body. On redirect examination, Stanzak testified that Tim Kerney arrived at the trailer about ten to fifteen minutes after the shooting and that they left the property with him.

The appellant testified that in January 2006, he lived in a trailer at 386 Fox Branch Road and owned two pit bull dogs. One of the dogs had puppies and was chained outside. The appellant would see a black dog with a white face on the property. The dog would get into the trash, aggravate the appellant's dogs, and "get into it with Angel." On January 6, the appellant was inside the trailer and heard Angel barking loudly. The appellant looked out the window and saw the black dog and Angel fighting. He yelled at both dogs, and they stopped. A short time later, Tim Kerney arrived and told the appellant that the black dog had returned. The appellant looked and saw the black dog approaching Angel. Kerney yelled at the black dog, and the dog turned and walked away. The appellant grabbed Kerney's .17 caliber Savage rifle because he was "fed up with it," fired the gun, and shot the black dog's rear leg. The dog screamed and ran across the road and into a field. The appellant said that he did not know anyone owned the dog and that he did not see Hobart Kinsler standing outside. He said he was not trying to kill the dog and that he fired the gun to scare it away permanently. He said that he had seen the dog since the shooting, that the dog did not look injured, and that the dog ran away whenever it saw him.

On cross-examination, the appellant acknowledged that although he was only trying to scare the dog, he did not fire the gun into the air. He also acknowledged that the dog was leaving the property when he shot it. He said the rifle bullet was the size of a “B.B.,” that “[y]ou’d have to aim pretty good to kill something with it,” and that he “lucked out and [shot] it.” He acknowledged that he took matters into his own hands but said he did so “[t]o protect my own land and my personal property.” After the shooting, the appellant went to Tim Kerney’s home. About twenty minutes later, the police arrived at Kerney’s house and served the appellant with a warrant. Upon being shown the warrant by the State, the appellant acknowledged that it was issued on January 9, 2006. He said some kind of “papers” were served on him the day of the shooting. The appellant denied using his pit bull dogs to fight.

Officer Anthony Maxey testified on rebuttal for the State that in January 2006, he worked part time for the Hancock County Sheriff’s Department and was called to Melissa Nichols’ home. Nichols’ dog had a gunshot wound, and the officer saw a lot of blood. The officer wrote a report and went to the appellant’s trailer, but the appellant was not home. Officer Maxey later returned to the trailer, spoke with the appellant, and looked at Angel. He saw fight wounds on the pit bull, but the wounds appeared to be a few days old. He said that the appellant was not charged with a crime at that time and that he did not remember if Tim Kerney was present.

Hobart Kinsler testified that two to four months prior to the shooting, he heard dogs fighting on the appellant’s property. He went to investigate and saw the appellant’s bulldog holding down another dog that did not belong to the appellant. The appellant’s dog was leashed, and Kinsler “watched him holding it.” When Kinsler arrived, the appellant “took his dog off the other dog.” The jury convicted the appellant of the lesser included offense of cruelty to animals, a Class A misdemeanor.

II. Analysis

A. Sufficiency of the Evidence

The appellant contends, without any explanation, that the evidence is insufficient to support the conviction. The State argues that the evidence is sufficient because it shows the appellant shot Melissa Nichols’ Labrador retriever, severely wounding the dog and resulting in permanent injuries. We agree that the evidence is sufficient.

When an appellant challenges the sufficiency of the convicting evidence, the standard for review by an appellate court is “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); see Tenn. R. App. P. 13(e). The State is entitled to the strongest legitimate view of the evidence and all reasonable or legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Questions concerning the credibility of witnesses and the weight and value to be afforded the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact. State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). This court will not

reweigh or reevaluate the evidence, nor will this court substitute its inferences drawn from the circumstantial evidence for those inferences drawn by the jury. *Id.* Because a jury conviction removes the presumption of innocence with which a defendant is initially cloaked at trial and replaces it on appeal with one of guilt, a convicted defendant has the burden of demonstrating to this court that the evidence is insufficient. *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). As instructed to the jury, a person commits cruelty to animals who intentionally or knowingly “[t]ortures, maims or grossly overworks an animal.” Tenn. Code Ann. § 39-14-202(a)(1).

Initially, we note that the appellant has risked waiving this issue because he failed to provide any argument as to why the evidence is insufficient to support the conviction. *See* Tenn. Ct. Crim. App. R. 10(b); Tenn. R. App. P. 27(a)(7). In any event, we conclude that the evidence is sufficient. The appellant admitted at trial that he intentionally shot Melissa Nichols’ dog and that he shot the dog as it was walking away from his property. Furthermore, although he claimed he shot the dog because it was fighting with his pit bull, an officer looked at the pit bull’s injuries and thought the wounds were several days old. The State argued during closing arguments that the appellant’s actions maimed the dog. The Merriam-Webster Online Dictionary defines “maim” as “to mutilate, disfigure, or wound seriously.” *See* <http://www.merriam-webster.com/dictionary/accomplish> (last visited May 27, 2009). The evidence shows that the appellant intentionally and seriously wounded Nichols’ dog. The evidence is sufficient to support the conviction.

B. Sentencing

The appellant contends that his sentence is excessive because the trial court failed to consider mitigation factors and relied too heavily on his prior criminal history when he had only one prior felony conviction. The appellant also contends that the trial court should have ordered that he serve the sentence at less than the maximum percentage of service and that he serve the sentence on probation. The State contends that the trial court properly sentenced the appellant. We agree with the State.

Immediately after the jury found the appellant guilty of animal cruelty, the appellant’s presentence report was made an exhibit. According to the report, the then twenty-five-year-old appellant graduated from high school and worked as a laborer, carpenter, and horse trainer. In the report, the appellant stated that his physical and mental health were good but that he had a history of drug and alcohol abuse. The report shows that the appellant has prior misdemeanor convictions for possession of a Schedule IV drug; escape; failure to appear; speeding; driving on a revoked license, third offense; underage consumption of alcohol; violating the driver’s license law; and failure to yield. The appellant also was convicted on September 5, 2006, of burglary of a habitation that was committed on April 24, 2006. The report shows that the appellant has violated probation at least three times since 2004.

The trial court applied the following enhancement factors: (1), that the “defendant has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range”; (8), that the “defendant, before trial or sentencing, failed to comply

with the conditions of a sentence involving release into the community”; and (9), that the defendant possessed or employed a firearm during the commission of the offense. Tenn Code Ann. § 40-35-114(1), (8), (9). The trial court found no mitigating factors applicable and stated, “Your criminal behavior is just outrageous and you deserve every bit of eleven months twenty-nine days at seventy five percent.”

Regarding alternative sentencing, the trial court noted that according to the facts and circumstances of the case, the appellant did not need to shoot the dog. The court concluded that the appellant’s lengthy criminal history and poor potential for rehabilitation warranted denying any request for probation. The court also concluded that society needed to be protected from the appellant’s “outrageous” conduct, that measures less restrictive than confinement had been applied unsuccessfully to him, that granting probation would depreciate the seriousness of the offense, and that confinement was needed to deter others likely to commit similar offenses. The trial court ordered the appellant to serve his sentence in jail and pay restitution to Melissa Nichols in the amount of six hundred eighty-seven dollars and forty-five cents.

Appellate review of the length, range or manner of service of a sentence is de novo. See Tenn. Code Ann. § 40-35-401(d). In conducting its de novo review, this court considers the following factors: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on enhancement and mitigating factors; (6) any statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses in Tennessee; (7) any statement by the appellant in his own behalf; and (8) the potential for rehabilitation or treatment. See Tenn. Code Ann. §§ 40-35-102, -103, -210 (2006); see also State v. Ashby, 823 S.W.2d 166, 168 (Tenn. 1991). The burden is on the appellant to demonstrate the impropriety of his sentence. See Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments. Moreover, if the record reveals that the trial court adequately considered sentencing principles and all relevant facts and circumstances, this court will accord the trial court’s determinations a presumption of correctness. Id. at (d); Ashby, 823 S.W.2d at 169. However, in sentencing on misdemeanor convictions, the “trial court need only consider the principles of sentencing and enhancement and mitigating factors in order to comply with the legislative mandates of the misdemeanor sentencing statute.” State v. Troutman, 979 S.W.2d 271, 274 (Tenn. 1998).

An individual convicted of a Class A misdemeanor may receive a statutory maximum sentence of eleven months and twenty-nine days. See Tenn. Code Ann. § 40-35-111(e)(1). In sentencing the misdemeanor defendant, the trial court shall fix a percentage of the sentence, not to exceed seventy-five percent, that the defendant must serve in confinement before being eligible for release into rehabilitative programs. Tenn. Code Ann. § 40-35-302(d). In determining the percentage of the sentence to be served in confinement, the trial court shall consider the sentencing principles and enhancement and mitigating factors and “shall not impose such percentages arbitrarily.” Id.

The appellant contends that the trial court erred by failing to consider in mitigation that he expressed remorse to Melissa Nichols and offered to pay for Lady's medical expenses. See Tenn. Code Ann. § 40-35-113(13). However, we note that during sentencing, the trial court stated as follows:

[Y]ou talked about this dog and laughed and thought it was funny when the dog would see you it would run. And the jury picked up on that, as well as everyone else in the courtroom. You thought that was funny.

The trial court was in the best position to determine the appellant's attitude and demeanor, and the court's comment indicates that it believed the appellant lacked remorse. The appellant also claims that the trial court should have mitigated his sentence because the crime was not a crime of violence against a person. See Tenn. Code Ann. § 40-35-113(13). However, the appellant did not make that argument at sentencing and, in any event, we do not believe the fact that the crime did not involve violence against a person warrants mitigation.

Regarding the appellant's claim that the trial court relied too heavily on his prior criminal history when he had only one prior felony conviction, the appellant's presentence report shows that he has been convicted of numerous misdemeanor offenses and that he has abused illegal drugs. Therefore, the trial court properly applied enhancement factor (1) and gave the factor great weight. We conclude that a sentence of eleven months, twenty-nine days is appropriate and that the sentence should be served at seventy-five percent.

Regarding alternative sentencing, the appellant contends that the trial court should have sentenced him to probation because he expressed remorse, received no additional convictions after his 2006 aggravated burglary conviction, the crime did not involve violence against a person, and the appellant did not threaten to harm the "victim." However, the trial court determined that the appellant's prior criminal history was extensive, that society needed to be protected from him, and that his potential for rehabilitation was poor. Those factors alone justified the denial of alternative sentencing. Furthermore, given that the appellant has repeatedly violated sentences of probation previously, probation was not appropriate in this case.

III. Conclusion

Based upon the record and the parties' briefs, we affirm the judgment of the trial court.

NORMA McGEE OGLE, JUDGE