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Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,
v.
Robert Wallace UTECH, Appellant.

No. A09-1766.
|
Sept. 28, 2010.

Dodge County District Court, File No. 20-CR-07-121.

**Attorneys and Law Firms**

Lori A. Swanson, Attorney General, John B. Galus, Assistant Attorney General, St. Paul, MN; and Paul Kiltinen, Dodge County Attorney, Mantorville, MN, for respondent.

David W. Merchant, Chief Appellate Public Defender, Lydia Villalva Lijo, Assistant Public Defender, St. Paul, MN, for appellant.

Considered and decided by HUDSON, Presiding Judge; PETERSON, Judge; and LARKIN, Judge.

## UNPUBLISHED OPINION

LARKIN, Judge.

***1** Appellant challenges his convictions of mistreatment of animals, misconduct of a public officer or employee, and reckless discharge of a firearm in a municipality, claiming that his right to a unanimous jury verdict was violated. Appellant also claims that the evidence was insufficient to sustain his convictions of mistreatment of animals and misconduct of a public officer or employee. We conclude that the evidence was sufficient to sustain the convictions. But because the state presented evidence of separate and distinct acts to prove the elements of the charged offenses and did not elect on which act it relied for conviction, the district court's refusal to provide a unanimity instruction violated appellant's right to a unanimous verdict. We therefore reverse appellant's convictions and remand for a new trial.

## FACTS

Appellant Robert Wallace Utech began working as West Concord's police chief in December 2005. One of his duties as police chief was to serve as the town's animal-control officer. In October 2006, an investigation into Utech's activities as the town's animal-control officer began. During an interview with an investigator in January 2007, Utech stated that he and T.S., a part-time West Concord police officer, used a .22 caliber rifle to shoot skunks, raccoons, opossums, and feral cats. Utech admitted that he had personally shot approximately 20 cats with the .22 rifle. Utech also said that the shootings took place on the "east side of town" and that he disposed of the animals' bodies in a ditch. Utech told the investigator that he suspected that T.S. had shot West Concord resident G.L.'s cats.

In February 2007, Utech was charged with one count of mistreating animals and one count of misconduct of a public officer or employee. The complaint was later amended to add three additional counts of mistreating animals, five additional counts of misconduct of a public officer or employee, and one count of reckless discharge of a firearm within a municipality. The charges were tried to a jury in March 2009.

At trial, T.S. testified that in February or March 2006, he and Utech were on patrol together in West Concord. At approximately 1:00 a.m., Utech noticed a couple of cats. He said: "Look at that f---ing cat. I have been watching that son-of-a-b---h. You know there isn't much to do in this town, so this is what I do." They drove to Utech's house to retrieve his .22 caliber rifle and then returned to the area where they had seen the cat. Utech instructed T .S. to roll down the driver's side window, and Utech fired the rifle through the open window, approximately six inches from T.S.'s face. T.S. testified that the shooting occurred within the city limits of West Concord. According to T.S., after Utech fired the rifle, he said something to the effect of "D-n, I missed it." As the cat ran away, Utech reloaded the rifle, got out of the squad car, and pursued the cat on foot. Utech continued to fire and reload as he chased the cat for approximately 100 to 150 yards. At one point, the cat was underneath or near a van in a residential area. T.S. testified that Utech shot at the cat, even though there were houses on the far side of the vehicle.

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***2** T.S. further testified that when Utech returned to the car, he was laughing. He told T.S. that it did not matter to him whether that cat or any other cat was a pet or a stray. Utech said that if the cat was a pet, it should be licensed and in a house and if it was out on the street, it was "fair game." Later that evening, Utech took T.S. to the vicinity of the West Concord grain elevator to show him where he had been disposing of dead cats. While near the grain elevator, Utech shot at one or possibly two cats with his .22 caliber rifle. One of the cats ran into G.L.'s garage. Utech said something to the effect of: "Well, he should have him leashed up or licensed." Utech also complained that G.L. had four cats even though a city ordinance authorized residents to possess only one cat.

T.S. also testified that G.L. had reported that someone had been shooting his cats. G.L. further reported that one of his cats had suffered a gunshot wound to one of its front legs and that part of the leg had to be amputated. Utech told T.S. to interview G.L., but stated: "Make it go away, don't do any reports, but tell him he has got to get his cats licensed." T.S. resigned from his position as a West Concord police officer in August or September 2006.

E.H. also testified at trial. E.H. is an acquaintance of T.S. and Utech. After T.S. told E.H. about the possible availability of a part-time position with the West Concord Police Department, E.H. contacted Utech and went to West Concord to participate in a ride-along with him. During the ride-along, Utech stopped by his apartment to retrieve his .22 caliber rifle. Later, T.S. joined them and drove the squad car. Utech rode in the passenger seat, and E.H. rode in the backseat. E.H. heard some discussion along the lines of "there's one." T.S. stopped the vehicle, and Utech fired his rifle through the open passenger window. It appeared to E.H. that Utech was firing toward a nearby car. Although he only saw an unidentifiable shadow, E.H. assumed that the animal was a cat based on the conversation in the vehicle. Later that night, Utech and T.S. pointed out areas where dead cats had been disposed of near a grain elevator. They also talked about baiting cats with tuna or cat food in a grassy area by the elevator.

B.L., another acquaintance of T.S. and Utech, testified that when he asked Utech, during a ride-along, why he shot cats Utech responded: "I don't like cats" or "I hate cats." That same evening, B.L. again asked Utech why he shot cats, and Utech stated: "I shoot them all the time. I hate cats."

Utech testified that when he was initially hired as police chief, town-council members told him that there were a lot of feral cats in town and that Utech, as the animal-control officer, was expected to deal with them. In response to this directive, and because he believed that shooting feral cats was the most humane way to eliminate them, Utech purchased a .22 caliber rifle. Because he assumed that he would be shooting feral cats at night, he also purchased an illuminated scope for the rifle.

***3** Utech testified that he misspoke when he told the investigator that he had killed 20 cats and that he meant to say that he had killed a total of 20 animals, including skunks, opossums, raccoons, and cats. Utech denied that he ever shot across a passenger in an automobile or shot underneath a motor vehicle. He also denied saying that he hates cats. And he insisted that T.S.'s testimony that he had chased a cat down the street while shooting at it was a "total lie."

After the parties rested, the state dismissed two of the mistreatment-of-animals counts and four of the misconduct counts. The district court submitted four verdict forms to the jury. The first required the jury to indicate whether Utech was guilty or not guilty of the crimes of "mistreatment of animals (intentional and unjustifiable killing of a pet or companion animal)"; "mistreatment of animals (intentional and unjustifiable injury or maiming of a pet or companion animal resulting in substantial bodily harm)"; and "mistreatment of animals (unjustifiable injury, maiming, or killing of any animal)." The second verdict form required the jury to indicate whether Utech was guilty or not guilty of misconduct of a public officer or employee. The third verdict form required the jury to indicate whether Utech was guilty or not guilty of reckless discharge of a firearm in a municipality. The verdict forms did not contain any information identifying the acts that constituted each offense.

The jury found Utech guilty of intentional and unjustifiable killing of a pet or companion animal; unjustifiable injury, maiming, or killing of any animal; misconduct of a public officer or employee; and reckless discharge of a firearm in a municipality. At sentencing, Utech was ordered to pay $765.90 in restitution to G.L.'s daughter.[1] This appeal follows.

## DECISION

### I.

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We first address Utech's claim that his right to a unanimous jury verdict was violated. At trial, the state introduced evidence of several different incidents as proof of the charged offenses. But the state did not specify on which incident it relied to establish each of the offenses. Utech complained that the state's failure to identify the act on which it relied as proof of each offense violated his right to due process and to a unanimous jury verdict. While Utech did not propose a particular jury instruction, he complained that the lack of specificity and detail in the charges gave rise to the possibility that a given verdict would not be unanimous. And Utech asked the district court to instruct the jury regarding which acts it had to consider in determining whether he had committed each of the charged offenses. The district court denied Utech's request and instead provided a portion of the general unanimity instruction found in CRIMJIG 3.04, instructing the jury that its verdict "must be unanimous" for each of the charges against Utech. 10 *Minnesota Practice,* CRIMJIG 3.04 (2006).

***4** District courts are allowed "considerable latitude" in the selection of language for jury instructions. *State v. Baird,* 654 N.W.2d 105, 113 (Minn.2002). The refusal to give a requested 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 focus of the analysis is on whether the refusal resulted in error. *State v. Kuhnau,* 622 N.W.2d 552, 555 (Minn.2001).

"Jury verdicts in all criminal cases must be unanimous." *State v. Pendleton,* 725 N.W.2d 717, 730 (Minn.2007) (citing Minn. R.Crim. P. 26.01, subd. 1(5)). The jury must unanimously agree that the government has proved each element of the charged offense. *Id.* at 730-31 (citing *State v. Ihle,* 640 N.W.2d 910, 918 (Minn.2002)) (other citation omitted). But "unanimity is not required with respect to the alternative means or ways in which the crime can be committed." *State v. Begbie,* 415 N.W.2d 103, 106 (Minn.App.1987) (quotation omitted), *review denied* (Minn. Jan. 20, 1988). The jury therefore "does not have to unanimously agree on the facts underlying an element of a crime in all cases." *Pendleton,* 725 N.W.2d at 731. And unanimous agreement is not required when " 'certain statutory alternatives are mere means of committing a single offense, rather than independent elements of the crime.' " *State v. Stempf,* 627 N.W.2d 352, 355 (Minn.App.2001) (quoting *Schad v. Arizona,* 501 U.S. 624, 636, 111 S.Ct. 2491, 2499, 115 L.Ed.2d 555 (1991)). But if the acts constitute an element of the crime, the jury must unanimously agree regarding which acts the defendant committed. *Id.* (citing *Richardson v. United States,* 526 U.S. 813, 824, 119 S.Ct. 1707, 1713, 143 L.Ed.2d 985 (1999)). Thus, in *Stempf,* this court concluded that a "defendant's right to a unanimous verdict is violated when the state charges the defendant with only one count of criminal conduct but presents evidence of more than one distinct act to prove an element of the offense." *Id.* at 353.

Utech relies on *Stempf* as support for his unanimity claim. The state counters that "*Stempf* was wrongfully decided, and is no longer good law in light of the Minnesota Supreme Court's more recent decisions" in *State v. Crowsbreast,* 629 N.W.2d 433 (Minn.2001) and *State v. Kelbel,* 648 N.W.2d 690 (Minn.2002). We disagree. *Crowsbreast* and *Kelbel* involved crimes that include a pattern-of-conduct element. In *Crowsbreast,* the supreme court held that in a prosecution for first-degree domestic abuse homicide under Minn.Stat. § 609.185(6) (2000), "jurors are not required to unanimously agree on which acts comprised the past pattern of domestic abuse." 629 N.W.2d at 439. Similarly, in *Kelbel,* the supreme court concluded that "the district court did not err in failing to instruct the jury that it must find that the state proved beyond a reasonable doubt each of the acts that constituted a past pattern of child abuse." 648 N.W.2d 691. In reaching this conclusion, the court determined that "a past pattern of child abuse" is a single element of the crime of first degree murder under Minn.Stat. § 609.185(5) (2000) rather than several elements, and that the jurors need not agree about which particular acts make up the pattern. *Id.* at 701-03.

***5** Because Utech was not charged with an offense that includes a pattern-of-conduct element, *Crowsbreast* and *Kelbel* are not controlling. Moreover, the Minnesota Supreme Court has continued to focus on the elements-verses-means distinction in determining whether a defendant's right to a unanimous verdict has been violated. *See Pendleton,* 725 N.W.2d 730-33 (holding that jury unanimity regarding a defendant's purpose in kidnapping a victim was not required and explaining that while a jury must unanimously find that the state has proved each element of the charged offense, "the jury does not have to unanimously agree on the facts

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underlying an element of a crime"); *Ihle,* 640 N.W.2d at 912 (concluding that the jury was not required to unanimously agree upon which acts satisfied the elements of obstructing legal process where the governing statute provided alternative ways to satisfy those elements).

We are also not persuaded by the state's citation to several unpublished cases of this court in which we purportedly rejected unanimity claims similar to the one raised here. "Unpublished opinions of the [c]ourt of [a]ppeals are not precedential." Minn.Stat. § 480A.08, subd. 3(c) (2008). And while unpublished cases may have persuasive value, *see Dynamic Air, Inc. v. Bloch,* 502 N.W.2d 796, 800 (Minn.App.1993) (holding that unpublished opinions are of persuasive value "[a]t best" and not precedential), the cases cited by the state[2] are factually distinguishable in that they involve charges of criminal sexual conduct against child victims. As the United States Supreme Court has explained, child-sex-abuse cases present an exception rather than a rule.

> State courts interpreting [statutes criminalizing sexual abuse of children] have sometimes permitted jury disagreement about a 'specific' underlying criminal 'incident' insisting only upon proof of a 'continuous course of conduct' in violation of the law.... The state practice may well respond to special difficulties of proving individual underlying criminal acts.... And their special subject matter indicates that they represent an exception; they do not represent a general tradition or rule.
>
> *Richardson,* 526 U.S. at 821, 119 S.Ct. at 1712 (citations omitted).

And the Minnesota Supreme Court has explained:

> We agree with the district court that the acts constituting a pattern of child abuse are difficult to prove, particularly when a child is so young that she cannot self-report abuse. Accordingly, tradition weighs against interpreting "past pattern of child abuse" as creating several elements, each of which must be proven beyond a reasonable doubt.

*Kelbel,* 648 N.W.2d at 702-03 (citation omitted). Because this case does not involve the special subject matter of child sexual abuse and the attendant proof difficulties, this court's unpublished opinions in child-sex-abuse cases are not persuasive.

Our review of the caselaw indicates that when the state presents evidence of multiple acts as proof of a charged offense at trial, it must be determined whether the acts establish an element of the offense. If so, the jury must unanimously agree regarding the act that establishes the element. We now apply this principle to the present case.

**A. Mistreatment of Animals**

***6** Utech was charged and convicted under Minn. Stat § 343.21, subd. 1 (2006), which provides, in relevant part: "No person shall ... unjustifiably injure, maim, ... or kill any animal ... whether it belongs to that person or to another person." The statute criminalizes the act of unjustifiably injuring, maiming, or killing any animal. Minn. Stat § 343.21, subd. 9(a)-(h) (2006). The act of injuring, maiming, or killing an animal is an element of the offense. The jury therefore had to unanimously agree on the act that constituted the unjustifiable injuring, maiming, or killing of an animal.

The state presented evidence tending to show that Utech injured or killed different cats, at different times, and in different locations. And in closing argument, the prosecutor told the jury that it had "a variety of choices" with regard to the mistreatment-of-animals charges and that it could "pick any two strays" that Utech admitted to shooting. The jury heard T.S. testify that on a night in February or March 2006, he saw Utech shoot at two or three cats. And E.H. testified that on another night, he saw Utech shoot at an animal, which he assumed to be a cat. Each of these factual scenarios could circumstantially establish that Utech killed or injured an animal, and each could support a conviction for mistreatment of animals. But the alleged incidents did not constitute a single act: they lack unity of time and place. And where the state alleges separate and distinct acts as proof of an element of a charged offense, any one of which could support a conviction, and the state does not elect on which act it relies for conviction, a district court's refusal to give a unanimity instruction violates the defendant's right to a unanimous verdict. *See* *Stempf,* 627 N.W.2d at 357-59.

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The state argues that because "the identity of the cat victim" is not an element of mistreatment of animals, the unanimity requirement is satisfied if six jurors believed that Utech killed one cat one day and six believed that he killed another cat on another day. *See* *Begbie,* 415 N.W.2d at 106 (concluding that, in a terroristic-threats case, the jury did not have to unanimously decide who the defendant intended to terrorize). But this argument ignores the fact that the act of injuring, maiming, or killing an animal is an element of the offense, on which there must be unanimous agreement. While the jury was not required to unanimously agree on the identity of the animal that was injured, maimed, or killed, the jury was required to agree on the act that caused the injury, maiming, or death.

Because the evidence tended to show that Utech's acts of injuring or killing cats occurred at different times and locations, different jurors could have believed that Utech injured or killed different cats on different occasions. But the law requires unanimous agreement on any act that constitutes an element of the crime-in this case, the act of injuring or killing an animal. The district court's refusal to give a unanimity instruction under these circumstances violated Utech's right to a unanimous verdict. *See* *Stempf,* 627 N.W.2d at 358-59 (reversing where the incidents alleged to prove an element of the charged offense were separate and distinct culpable acts, either one of which could have supported a conviction.). We therefore reverse Utech's convictions of mistreatment of animals.

**B. Reckless Discharge of a Firearm in a Municipality**

***7** Utech was also charged under Minn.Stat. § 609.66, subd. 1a (a)(3) (2006), which provides:

> Subd. 1a. Felony crimes; silencers prohibited; reckless discharge. (a) Except as otherwise provided in subdivision 1h, whoever does any of the following is guilty of a felony and may be sentenced as provided in paragraph (b):
>
> ....
>
> (3) recklessly discharges a firearm within a municipality.

The reckless discharge of a firearm is an act that constitutes an element of this offense. The jury was therefore required to agree regarding which of Utech's alleged acts established the reckless-discharge element. But the state presented evidence of different acts to establish this element. T.S. testified that he saw Utech shoot at a cat underneath a van, in a residential neighborhood, within the city limits of West Concord. E.H. testified that he witnessed Utech shoot at a small animal underneath a car. And in closing argument, the prosecutor told the jury that more than one incident satisfied the charge. Because these acts occurred at different times and locations, different jurors could have believed that Utech recklessly discharged his firearm on different occasions.

Because the state alleged separate and distinct acts to prove that Utech recklessly discharged a firearm and did not elect on which act it relied for conviction, the district court's refusal to give a unanimity instruction violated Utech's right to a unanimous verdict. *See* *Stempf,* 627 N.W.2d at 358-59. We therefore reverse Utech's conviction of reckless discharge of a firearm.

**C. Misconduct of a Public Officer or Employee**

Lastly, Utech was charged under Minn.Stat. § 609.43(3) (2006), which provides:

> A public officer or employee who does any of the following, for which no other sentence is specifically provided by law, may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than $3,000, or both:
>
> ....
>
> (3) under pretense or color of authority intentionally and unlawfully injures another in the other's person, property, or rights[.]

The intentional and unlawful injury of another is an element of this offense. At trial, the state presented evidence of separate and distinct acts that could establish this element. And during closing argument, the prosecutor told the jury that "there are a variety that you can pick based upon the evidence." The prosecutor argued that the rights of unidentified vehicle and home owners were injured when Utech discharged his firearm in the vicinity of their property. The state asserted: "What rights are being violated? The right to be secure in your home and your possessions." The state also argued that G.L. was a victim of the alleged misconduct, asserting that G.L. "had a right to expect law enforcement to investigate his complaint. He had a right to have an official record kept. He had a right to be heard. He had a right to be taken seriously." The state's evidence also supported a finding that Utech injured G.L. by injuring his property-his

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pet cat, which the district court defined as property in its jury instructions.

***8** Once again, the state alleged separate and distinct acts as proof of an element of the charged offense, any one of which might support a conviction, without electing on which act to rely for conviction. As a result, different jurors could have believed that different acts established the element of injury to another. The district court's refusal to give a unanimity instruction under these circumstances violated the defendant's right to a unanimous verdict. *See* *Stempf,* 627 N.W.2d at 358-59. We therefore reverse Utech's conviction of misconduct of a public officer.

## II.

We next address Utech's claim that the evidence was insufficient to support his convictions of mistreatment of animals and misconduct of a public officer or employee. Although we reverse these convictions, we review the sufficiency of evidence to sustain the convictions because if the evidence was insufficient, Utech could not be retried for the underlying offenses on remand. *See generally State v. Harris,* 533 N.W.2d 35, 36 n. 1 (Minn.1995) (holding that double jeopardy bars further prosecution of a defendant whose conviction has been reversed because the evidence is insufficient as a matter of law).

In considering a claim of insufficient evidence, this court's review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach the verdict that they did. *State v. Webb,* 440 N.W.2d 426, 430 (Minn.1989). The reviewing court must assume "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore,* 438 N.W.2d 101, 108 (Minn.1989). This is especially true when resolution of the matter depends mainly on conflicting testimony. *State v. Pieschke,* 295 N.W.2d 580, 584 (Minn.1980). The reviewing court will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude the defendant was guilty of the charged offense. *Bernhardt v. State,* 684 N.W.2d 465, 476-77 (Minn.2004). "A conviction based on circumstantial evidence receives stricter scrutiny than a conviction based on direct evidence." *State v. Stein,* 776 N.W.2d 709, 714 (Minn.2010). "Even in cases based on circumstantial evidence, however, we have recognized that the jury is in the best position to evaluate the evidence, and we will not overturn a conviction based on circumstantial evidence on the basis of mere conjecture." *Id.* (quotation omitted).

### A. Mistreatment of Animals

Utech argues that the evidence was insufficient to sustain his convictions of mistreatment of animals because the state did not produce evidence to corroborate the admissions he made during the initial investigation. Minn.Stat. § 634.03 (2008), provides, in relevant part, that "[a] confession of the defendant shall not be sufficient to warrant conviction without evidence that the offense charged has been committed." One of the purposes of the statute is to ensure the reliability of the confession. *State v. Brant,* 436 N.W.2d 468, 470 (Minn.App.1989). Under the statute, a confession by itself is insufficient to support a conviction; it must be corroborated. *State v. Fader,* 358 N.W.2d 42, 45 (Minn.1984). But "[e]ach element of an offense need not be independently corroborated to meet the statute's standard. Instead, the elements should be sufficiently substantiated by independent evidence of attending facts or circumstances from which the jury may infer the trustworthiness of the confession." *Brant,* 436 N.W.2d at 471 (quotations and citation omitted).

***9** The following evidence corroborated Utech's confession: Utech purchased a .22 caliber rifle and an illuminated scope to kill animals as West Concord's animal-control officer; Utech expressed his hatred or dislike of cats to others; T.S. witnessed Utech shoot at several cats, including one that ran into G.L.'s garage; Utech told T.S. that it did not matter to him whether the cat was a pet or a stray and that if a pet was out on the street, it was "fair game"; Utech showed T.S. where he had disposed of dead cats; when G .L. complained that someone had been shooting his cats and that one of them was injured as a result, Utech instructed T.S. to "make it go away, don't do any reports"; and E.H. observed Utech shoot at a small animal that E.H. believed to be a cat. Moreover, Utech admitted, while testifying under oath at trial, that he had killed 20 animals, which included cats. Thus, the record contains independent evidence of attending facts or circumstances from which the jury could infer the trustworthiness of Utech's confession that he had killed cats. Utech's confession was sufficiently corroborated.

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And an audio recording of Utech's statement to the investigator, which was received as evidence and played for the jury, tends to show that Utech killed a pet or companion animal. In this recording, the investigator discusses veterinary bills that were provided by G.L., relating to the shooting of his cats. The investigator states that the bills indicate that some of G.L.'s cats were injured and some were dead. If the jury had been properly instructed with regard to the need for a unanimous verdict, the jury, acting with due regard for the presumption of innocence and the necessity of proof beyond a reasonable doubt, could reasonably have concluded that Utech was guilty of mistreatment of animals.

**B. Misconduct of a Public Officer**

Utech asserts that his conviction under Minn.Stat. § 609.43(3), which makes it a crime for a public officer or employee to "intentionally and unlawfully [injure] another in the other's person, property, or rights," must be reversed because he did not injure another person's rights. Utech argues that the term "right" was not defined for the jury and section 609.43(3) cannot support the broad interpretation suggested by the state in its closing argument. According to Utech: "The state failed to identify the constitutional or statutory source from which these rights flow, and the state, therefore, has failed to allege any actions ... that are a criminal offense under Minn.Stat. Sec. 609.43(3)." We construe Utech's argument as a challenge to the sufficiency of the evidence to sustain his conviction, which is based on his proposed construction of the word "rights" in section 609.43(3).

While Utech objected to the district court's inclusion of the "rights" prong in its jury instructions, he did not advance an argument in support of the objection, much less the argument he now makes on appeal. Appellate courts generally do not decide issues that were not argued to, or considered by, the district court. *Roby v. State,* 547 N.W.2d 354, 357 (Minn.1996). Moreover, there is no need for statutory construction to determine the type of "rights" that are protected under section 609.43(3), because the statute provides alternative means of injuring another: injury to the other's person, property, or rights. And the jury was instructed as to two of these means: injury to property and injury to rights. Utech argues that we must limit our review of the sufficiency of the evidence to the injury-to-rights theory emphasized by the state in its closing argument. But the sufficiency of the evidence to sustain a conviction is reviewed in the context of the law as instructed. *See* *Schunk v. Wieland,* 286 Minn. 368, 370, 176 N.W.2d 119, 121 (1970) ("[T]he [district] court's instructions, even if erroneous, have become the law of the case, and whether the evidence is sufficient to sustain the verdict must be determined by testing the evidence against the law as set forth in the [district] court's instructions." (citation omitted)).

***10** The district court instructed the jury that a person's property includes his or her pet or companion animal. T.S. testified that he saw Utech shoot at a cat that subsequently ran into G.L.'s garage. T.S. also testified that G.L. reported that someone had been shooting his cats and that one of his cats had suffered a gunshot wound to one of its front legs. Utech told T.S. to interview G.L. and to "Make it go away." Had the jury been properly instructed with regard to the need for a unanimous verdict, the jury, acting with due regard for the presumption of innocence and the necessity of proof beyond a reasonable doubt, could reasonably have concluded that Utech was guilty of misconduct of a public officer because he injured another in the other's property.

**III.**

Utech also claims that the district court erred by ordering him to pay $765.90 in restitution to G.L.'s daughter. Utech argues that the award is inappropriate because although he was convicted of mistreatment of animals, the jury did not specifically find that he had injured or killed any of G.L.'s cats. The state agrees, explaining that even though Utech was found guilty of two counts of mistreating animals "there is no way to determine from the record whether [G.L.]'s cats were the subject of either of those counts."

Because we reverse all of Utech's convictions, the restitution award cannot stand, and there is no need to review Utech's restitution claim. *See* Minn.Stat. § 611A.04, subd. 1(a) (2008) ("A victim of a crime has the right to receive restitution as part of the disposition of a criminal charge or juvenile delinquency proceeding against the offender if the offender is convicted or found delinquent."). Nor is it necessary to address Utech's remaining claims of error.

**Reversed and remanded.**

**All Citations**

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## Footnotes

1 G.L. was deceased by the time of trial.

2 The state relies on *State v. Henderson,* No. C5-02-780 (Minn.App. May 6, 2003), *review denied* (Minn. July 15, 2003); *State v. Buchanan,* No. C7-99-1845 (Minn.App. Aug. 15, 2000), *review denied* (Minn. Oct. 17, 2000); and *State v. Bandy,* No. C9-99-1371 (Minn.App. May 23, 2000), *review denied* (Minn. July 25, 2000).

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