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No. A19-1919
STATE OF MINNESOTA IN COURT OF APPEALS

State v. Robertson

Decided Dec 7, 2020

A19-1919

12-07-2020

State of Minnesota, Respondent, v. Roger Lars Robertson, Appellant.

Keith Ellison, Attorney General, St. Paul, Minnesota; and Donald F. Ryan, Crow Wing County Attorney, Kelsey Hopps, Assistant County Attorney, Brainerd, Minnesota (for respondent) Cathryn Middlebrook, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Ross, Judge

This opinion will be unpublished and may not be cited except as provided by Minn . Stat. § 480A.08, subd. 3 (2018). **Affirmed**

Ross, **Judge** Crow Wing County District Court File No. 18-CR-18-3584 Keith Ellison, Attorney General, St. Paul, Minnesota; and Donald F. Ryan, Crow Wing County Attorney, Kelsey Hopps, Assistant County Attorney, Brainerd, Minnesota (for respondent) Cathryn Middlebrook, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, St. Paul, Minnesota (for appellant) Considered and decided by Bryan, Presiding Judge; Ross, Judge; and Bjorkman Judge.

UNPUBLISHED OPINION

ROSS, Judge

A jury watched a video recording of Rogers Robertson hammering his dog to death. Robertson appeals from his felony conviction of mistreating

2 an animal, arguing that the *2 district court improperly instructed the jury so as to undermine his right to a unanimous verdict, the state failed to present sufficient evidence to convict him, and the district court ordered unconstitutionally broad probation conditions. Because the district court's plainly erroneous jury instruction did not prejudice Robertson, the state presented sufficient evidence to convict Robertson, and Robertson's claim of improper probation terms raises only a hypothetical future violation of his rights, we affirm.

FACTS

Crow Wing County Deputy David Davis went to Roger Robertson's home in August 2018 to verify that Robertson had complied with a directive requiring him to microchip his Border collie, Blue, after Blue bit a child. The deputy's body camera captured the grim event that followed. Robertson told Deputy Davis that he could not afford to microchip Blue and that he would instead kill him with his hammer. The deputy urged Robertson not to do so, advising him that other options were available. Robertson struck Blue's head with the hammer. Blue quivered. Robertson hit him again and again. Blue died.

The state charged Robertson with animal cruelty in violation of Minnesota Statutes § 343.21, subdivision 1 (2016). Both the deputy and Robertson testified at the one-day jury trial, and the jury saw the video footage of the killing and a photograph of the bludgeoned dog with Robertson standing over it.

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Deputy Davis and Robertson both testified. The deputy detailed the episode just described. He said that after the first blow, "the dog was shaking" and that Robertson "return[ed] with a hammer and str[uck] the dog multiple times after that." He explained that Robertson could have taken the dog
3 to an animal shelter and more humanely *3 euthanized it. Robertson testified that Blue was his best friend and "made [him] smile and laugh every day." Robertson said he could not afford to microchip Blue but that he did not want to kill him. Robertson explained that after he initially struck the dog with the hammer, he "[did not] believe he would have survived." When he saw Blue quivering and "flick[ing] his tail," he struck him three times more.

The district court instructed the jury on the elements of felony mistreatment of an animal under Minnesota Statutes § 343.21, subdivisions 1, 9(d) (2016). The district court told the jury that the offense requires proof of "death or *great* bodily harm," but then the court gave the jury the definition of "*substantial* bodily harm." The district court defined "torture" under the statute as "every act, omission, or neglect which causes or permits unnecessary or unjustifiable pain, suffering, or death." Minn. Stat. § 343.20, subd. 3 (2016).

The jury found Robertson guilty and the district court sentenced him to a 15-month prison term, stayed for two years on probationary conditions. This appeal follows.

DECISION

Robertson challenges his conviction on three theories. He first maintains that the district court improperly instructed the jury. He next contends that the evidence was not sufficient to convict him. And finally he argues that certain conditions of his probation violate his constitutional rights. None of these theories prevail.

I

Robertson argues that the district court wrongly instructed the jury on the degree of harm necessary to violate the animal-cruelty statute at a
4 felony level. Where, as here, a *4 defendant failed to object to an instruction during trial, we review only for plain error. *State v. Ramey*, 721 N.W.2d 294, 297 (Minn. 2006). To succeed under the plain-error standard, Robertson must show that the district court erred, that the error was plain, and that the error affected his substantial rights. *State v. Moore*, 863 N.W.2d 111, 119 (Minn. App. 2015), *review denied* (Minn. July 21, 2015). If he establishes these elements, we may reverse if we conclude that the error also significantly undermined the fairness and integrity of the proceeding. *Id*. Robertson does not meet this standard.

We agree with Robertson that the district court erroneously instructed the jury, and that the error is plain. The district court told the jury that it could find Robertson guilty if he inflicted "great bodily harm" on Blue, but then the court defined *great* bodily harm using the definition describing the lesser, *substantial* bodily harm. The distinction matters in this case because proof of the higher level is essential to a felony conviction. *See* Minn. Stat. § 343.21, subd. 9(d). This was error because the instruction does not "fairly and adequately" convey the applicable law. *State v. Carridine*, 812 N.W.2d 130, 142 (Minn. 2012). And we as a panel of this court persuasively explained in an unpublished opinion, the district court's failure to properly advise the jury on the distinction between "great bodily harm" and "substantial bodily harm" fails to adequately explain the law. *State v. Bauer*, No. A18-0876, 2019 WL 10733147, at *4-5 (Minn. App. July 1, 2019); *see also Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800-01 (Minn. App. 1993) (observing that unpublished opinions, although not precedential, may offer persuasive reasoning). An error is plain when it is clear or obvious and it "contravenes a rule, case law, or a standard of conduct, or when it disregards well-established and longstanding legal principles."

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5 *Moore*, *s 863 N.W.2d. at 122 (quotation omitted). The error here was plain because it is obvious and breaches the clear statutory description of an element of the charged crime.

Because the error is plain, we turn to whether the plain error affected Robertson's substantial rights. An error affects substantial rights when there is a reasonable likelihood that a more accurate jury instruction would have changed the outcome of the case. *Id*. at 123. Robertson bears a "heavy burden" of proving this degree of prejudice. *State v. Huber*, 877 N.W.2d 519, 525 (Minn. 2016). For the following reasons, we conclude that he does not carry this burden.

Again, our recent unpublished *Bauer* decision informs our analysis on the issue. After discerning plain error on the same basis that we have seen error today, we concluded that the error did not affect the defendant's substantial rights because the evidence established that he used force sufficient to kill, meeting either harm standard and compelling the jury to find the defendant guilty. *Bauer*, 2019 WL 10733147, at *5. When a statute allows for alternative means of satisfying an element of a crime, the jury need not agree unanimously on the precise means by which the defendant committed the offense in order to find the defendant guilty beyond a reasonable doubt. *State v. Ihle*, 640 N.W.2d 910, 918 (Minn. 2002) (citing *Richardson v. United States*, 526 U.S. 813, 817-18, 119 S. Ct. 1707, 1710 (1999)). Here Robertson faced trial for cruelty to an animal. A defendant commits this crime if, among other possibilities, he "torture[s], cruelly beat[s] . . . or unjustifiably injure[s], maim[s], mutilate[s], or kill[s] any animal." Minn. Stat. § 343.21, subd. 1. Robertson therefore violated the statute if he either
6 cruelly beat Blue or unjustifiably killed him. *6

Whether Robertson killed Blue was never in doubt. The prosecutor's opening statement to the jury emphasized that the evidence would demonstrate conclusively that Robertson killed the dog. Both Robertson and the deputy testified that Robertson killed the dog, and the video recording confirmed their testimony. The prosecutor never mentioned "substantial bodily harm" or "great bodily harm." The degree of harm that Robertson caused the dog is not essential to the conviction because the evidence establishes that Robertson killed the dog, an act that provides an independent means of conviction. Because of this, Robertson cannot establish any reasonable likelihood that a more accurate jury instruction would have resulted in a different verdict. And we hold that the error did not affect his substantial rights.

II

We are not persuaded by Robertson's contention that the state presented insufficient evidence to convict him. We review whether the state presented sufficient evidence by "carefully examin[ing] the record to determine whether the facts and the legitimate inferences drawn from them would permit the [fact-finder] to reasonably conclude that the defendant was guilty beyond a reasonable doubt." *State v. Boldman*, 813 N.W.2d 102, 106 (Minn. 2012). We draw all reasonable inferences from the evidence in the light most favorable to the verdict and assume that the jury rejected any conflicting evidence. *See State v. Griffin*, 887 N.W.2d 257, 263 (Minn. 2016). We also review de novo whether a defendant's conduct meets the definition of a particular offense. *See State v. Hayes*, 826 N.W.2d 799, 803 (Minn. 2013). Robertson's contention on appeal fails
7 under this standard. *7

Robertson argues specifically that the state failed to prove that he unjustifiably or cruelly killed the dog. Again, the statute prohibits a person from "tortur[ing], cruelly beat[ing] . . . or unjustifiably injur[ing], maim[ing], mutilat[ing], or kill[ing] any animal." Minn. Stat. § 343.21, subd. 1. Torturing and cruelty include "every act, omission, or neglect which causes or permits unnecessary or unjustifiable pain, suffering, or death." Minn. Stat. § 343.20, subd. 3. The evidence supports the conviction if it established that Robertson

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unnecessarily or unjustifiably killed or caused the dog to suffer. It did. The jury heard evidence that the deputy was willing to take the dog to a shelter and no evidence that a shelter would have either rejected the dog or refused to find a suiter willing to adopt it. Construing this evidence in the light most favorable to the verdict, the jury could have reasonably found that killing the dog in any fashion was either unnecessary or unjustified (or both). The jury might alternatively have found that the manner of killing the dog—bashing at it with a hammer—caused it to suffer unnecessarily. Both witnesses testified that the dog was shaking or quivering after the primary blow. And the jury was free to reject as not credible Robertson's assertion that he could not have afforded to have his dog euthanized more humanely. We hold that the state presented sufficient evidence to convict Robertson of animal cruelty.

III

We need not look deeply into Robertson's assertion that the district court's probationary conditions are unconstitutional, even though the state agrees that the district court improperly authorized searches without including a reasonable-suspicion requirement or specifying that probation officers must perform the searches.

8 *Cf. State v.* *8 *Heaton*, 812 N.W.2d 904, 911 (Minn. App. 2012) (upholding as valid the search of parolee's home "[b]ecause appellant was a parolee when officers searched his home and the search was conducted pursuant to a condition of parole and supported by reasonable suspicion"). Despite the district court's failure to include the required standard of suspicion necessary to justify a constitutionally valid search, however, we do not presume that any peace officer or probation officer will disregard the limits of her constitutional authority because of the omission. We therefore will not reverse based on mere speculation that the omission will result in any actual constitutional violation. Although we decline to correct the asserted error, we add that, if Robertson "disagrees with the probation agent concerning the terms and conditions of probation, [he] may return to [the district] court for clarification." *See* Minn. R. Crim. P. 27.03, subd. 4(E)(5). On this basis, Robertson is not without remedy for his concern about a potential future violation regardless of whether the district court amends the order *sua sponte*.

Affirmed.

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