

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 12, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal Nos. 02-0159-CR
02-0160-CR
STATE OF WISCONSIN**

**Cir. Ct. Nos. 99-CM-346
99-CM-347**

**IN COURT OF APPEALS
DISTRICT IV**

No. 02-0159-CR

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DORIAN B. STOCK,

DEFENDANT-APPELLANT.

No. 02-0160-CR

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

BETH E. ZURKOWSKI,

DEFENDANT-APPELLANT.

APPEALS from judgments of the circuit court for Green County:
JAMES R. BEER, Judge. *Affirmed and causes remanded with directions.*

¶1 DYKMAN, J.¹ Dorian Stock and Beth Zurkowski appeal from judgments convicting them of two counts of failing to provide adequate shelter to animals confined outdoors, contrary to WIS. STAT. § 951.14. Defendants make four arguments: (1) the criminal complaints did not provide adequate notice of the charges against them; (2) the jury instruction given did not contain an essential element of the crime; (3) trial counsel was ineffective for failing to object to the instruction; and (4) the evidence was insufficient to convict them. We affirm the judgments but remand to correct errors in the judgments of conviction.

BACKGROUND

¶2 On August 26, 1999, Green County Sheriff's Deputy Gilbert entered defendants' property while investigating a complaint that a dog was running loose. Gilbert noticed a number of dogs on the property, some running loose and some caged or tied. Concerned that the dogs lacked adequate food, water, and shelter, Gilbert contacted the Humane Society, and called for an additional deputy to assist in controlling the dogs. Upon arrival, Humane Society workers determined that all of the dogs lacked adequate food, water, and shelter and decided to remove the dogs.

¶3 A total of thirteen dogs were removed by the Humane Society. State witnesses testified that it was a hot and humid day with very little cloud cover. An

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

adult dog was tied to a pole by a rope leash, which, according to State witnesses, did not allow the dog to reach food, water or shelter. Three or four dogs were caged in a square wire enclosure. The enclosure had no covering other than a piece of tarpaulin draped over one of the sides. There was no food in this enclosure and only a small amount of dirty water. Another group of three to four dogs was in a smaller pen. This pen had a plywood roof. A number of dogs were running loose on the property.

¶4 Defendants were each charged with one count of mistreating animals, contrary to WIS. STAT. § 951.02, and three counts of failing to provide an animal with proper shelter, contrary to WIS. STAT. § 951.14. The State’s complaints did not specify a subsection for the shelter counts, but alleged that defendants failed to “supply adequate shelter from direct sunlight.”

¶5 Defendants pleaded not guilty to all charges. After a trial, a jury convicted them on two of the shelter counts: one pertaining to the dog tied to the pole and one pertaining to the dogs in the larger square enclosure. The jury acquitted the defendants of the other shelter count and the mistreating animals count. They appeal.

DISCUSSION

Notice Issue

¶6 The issues in this appeal stem primarily from the parties’ disagreement about which subsection of WIS. STAT. § 951.14 the State alleged defendants violated. The complaints did not specify a subsection. Defendants have based most of their arguments on their belief that they were prosecuted and convicted under § 951.14(2)(a), which reads in part: “(2) OUTDOOR STANDARDS.

Minimum outdoor standards of shelter shall include: (a) *Shelter from sunlight*. When sunlight is likely to cause heat exhaustion of an animal tied or caged outside, sufficient shade ... shall be provided” The State contends, however, that defendants were prosecuted and convicted under § 951.14(2)(b)2, which reads in part: “If a dog is tied or confined unattended outdoors under weather conditions which adversely affect the health of the dog, a shelter of suitable size ... shall be provided.”

¶7 We agree with the State that the case proceeded under WIS. STAT. § 951.14(2)(b)2, the subsection dealing generally with the health of a dog. We note that during opening statements the State framed its case in terms of § 951.14(2)(b)2 stating that the shelter counts “all have a common element ... that the defendants ... failed to provide adequate shelter to a dog under their control which was confined where there were weather conditions that adversely affected the health of the dog.” The State did not refer to heat exhaustion during the trial. Instead, the evidence the State presented dealt more generally with the weather conditions, the manner in which the animals were confined, and the health of the animals. Further, the jury was given an instruction which mirrored § 951.14(2)(b)2. The instruction read in part: “Shelter is proper when it is sufficient to maintain the animal in good health. Where a dog is tied or confined unattended outdoors under weather conditions which adversely affect the health of the dog, a shelter of suitable size to accommodate the dog shall be provided.” We conclude that the trial proceeded under subsection (2)(b)2. The judgments of conviction, which indicate that defendants were found guilty of § 951.14(2)(a), should therefore be corrected to reflect the subsection of which defendants were convicted.

¶8 Defendants argue that if this case was tried under WIS. STAT. § 951.14(2)(b)2, they did not have proper notice of this, denying them their right to due process guaranteed by the Fourteenth Amendment of the United States Constitution and article I, section 1 of the Wisconsin Constitution. They argue that while the complaints did not indicate which subsection they allegedly violated, the complaints used the term “direct sunlight,” a term only appearing in § 951.14(2)(a). Defendants assert that they were charged under § 951.14(2)(a) and prepared their defense accordingly. The State refers to the “direct sunlight” language as “unfortunate” and admits that the phrase may have been the reason the clerk’s office incorrectly entered subsection (2)(a) on defendants’ judgments of conviction.

¶9 The complaints were not clear and may have caused confusion as to which subsection of WIS. STAT. § 951.14 defendants allegedly violated. But, we need not determine if the notice was sufficient because, even if the lack of notice violated due process, the error was harmless.

¶10 Constitutional error is harmless if this court can conclude that there is no reasonable possibility that the error contributed to the conviction. *State v. Stark*, 162 Wis. 2d 537, 548, 470 N.W.2d 317 (Ct. App. 1991). This standard is met because we see no reason why better notice of the applicable subsection would have affected the outcome of the trial.

¶11 There is an overlap between WIS. STAT. §§ 951.14(2)(a) and 951.14(2)(b)2. Both deal with the requirement that animals be provided with adequate shelter when weather conditions threaten the health of the animal. Rather than creating a crime totally distinct from the one contained in § 951.14(2)(b)2, subsection (2)(a) does little more than specify a specific weather

induced aliment, heat exhaustion, which an animal may suffer without adequate shelter. The distinction between the two subsections was further minimized by the State's theory in the present case. The State proceeded under the theory that the shelter was inadequate given the temperature, humidity, cloudless conditions, and lack of water. Had the State proceeded under § 951.14(2)(a) and attempted to prove likelihood of heat exhaustion, it probably would have presented its case in a manner very similar to that which actually took place. Therefore, given the minimal distinction between the subsections, there is little to suggest that defendants' preparation for trial under § 951.14(2)(a) would have been different than for a prosecution under § 951.14(2)(b)2.

¶12 More importantly, the defendants do not explain, nor do we see, what they could have done differently had there been better notice that the State was proceeding under WIS. STAT. § 951.14(2)(b)2. State witnesses testified that it was a hot and humid day with little cloud cover. They also testified that the dogs did not have access to adequate water or shelter. Finally, a State witness testified that the dogs appeared to be dehydrated. Defense counsel attempted to counter this testimony by suggesting that State witnesses had misperceived the heat and suggesting that the State witness who gave her opinion that the dogs were dehydrated was unqualified to make such a diagnosis. The defendants also produced a veterinarian who testified that the dogs had no serious medical problem when he examined them a day after they were seized. Stock testified that the dogs had sufficient water and that the dog tied to the pole could find shelter in the tall weeds. Defendants do not explain what additional steps could have been taken to counter the State's case. They do not refer us to any evidence that they would have presented, nor to any witnesses they would have called, had there been better notice of the charges.

¶13 Nor did Defendants explain to the trial court that they believed they were charged with violating WIS. STAT. § 951.14(2)(a), and needed time to prepare a defense to § 951.14(2)(b)2. The trial court gave its proposed jury instruction at the instruction and jury conference. The instruction was specific and referred to the language of § 951.14(2)(b)2. Defendants did not object to the instruction, or ask that an alternate instruction be given.

¶14 Given the overlap between subsection (2)(a) and (2)(b)2, the lack of complaint from the defendants, and the fact that there is no indication that defendants would have done things differently had they received better notice, we conclude that there is no reasonable possibility that the deficiency in notice affected the outcome. Therefore, if defendants were inadequately notified of the subsection they were allegedly violating, the error was harmless beyond a reasonable doubt.

Sufficiency of the Evidence

¶15 “[A]n appellate court may not reverse a conviction unless the evidence, viewed most favorably to the state ... is so insufficient ... that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.” *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Defendants argue that the evidence was insufficient because it did not include evidence concerning the likelihood of heat exhaustion. But this is an element of WIS. STAT. § 951.14(2)(a) and not an element of § 951.14(2)(b)2. There was sufficient evidence to convict under § 951.14(2)(b)2. State witnesses testified as to the heat, humidity, lack of water, and lack of shelter. A State witness testified that the dogs involved in the counts of conviction appeared dehydrated. A reasonable jury could determine that the dogs were not provided

with adequate shelter necessary to maintain their health, and thus find defendants guilty.

Jury Instruction

¶16 Defendants argue that the jury instruction given was incomplete because it failed to require the likelihood of sunlight causing heat exhaustion. Since this is not an element of WIS. STAT. § 951.14(2)(b)2, the omission is not erroneous.

Ineffective Assistance of Counsel

¶17 Defendants assert that counsel was ineffective because he failed to object to the jury instruction. To show ineffectiveness of trial counsel, appellate counsel must show: (1) deficient performance and (2) prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also State v. Sanchez*, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996) (adopting *Strickland* test for ineffectiveness claims based on state constitution). It is not deficient performance to fail to object to a proper jury instruction. Trial counsel was not ineffective.

¶18 We conclude that defendants were convicted under WIS. STAT. § 951.14(2)(b)2 and that if there was a constitutional defect in notice, the defect was harmless beyond a reasonable doubt. Therefore, we affirm the judgments of conviction and remand to permit the trial court to amend the judgments of conviction to show convictions of § 951.14(2)(b)2.

By the Court—Judgments affirmed and causes remanded with directions.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.

