COURT OF APPEALS DECISION DATED AND RELEASED

JANUARY 17, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

NOTICE

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

No. 95-2147-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DARRELL W. HOWSDEN,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Taylor County: DOUGLAS T. FOX, Judge. *Affirmed.*

CANE, P.J. Darrell Howsden appeals a judgment convicting him of mistreating an animal in violation of § 951.02, STATS., and endangering another's safety by use of a dangerous weapon in violation of § 941.20(1)(a), STATS. Howsden contends: (1) the evidence may be sufficient for the jury to convict him of one of the charges, but not both; (2) the trial court erred by excluding the testimony of the defense expert witness; (3) the prosecutor continually raising the issue of ownership and trespass constituted unfair prosecution and reversible error; and (4) the prosecution was discriminatory, selective or retaliatory requiring dismissal of the complaint. This court rejects these contentions and affirms the convictions.

From his home, Howsden had observed a hunter walking quickly down a road located between his properties and became concerned about his wife who was working outside in the area. He armed himself with a .410 gauge shotgun and, after finding his wife, told her to notify the sheriff's department of the trespasser. After Howsden located the hunter, he heard two rifle shots and heard a rifle slug strike a tree about twenty to twenty-five feet from him. He then saw two dogs running toward him on a walking trail and shot one of the dogs, wounding it in the head area. One of the hunters, David Jankee, was in the immediate area when Howsden shot the dog and testified that he was in Howsden's direct line of fire.

First, Howsden argues that it was impossible to shoot down at the dog and also shoot in a direct line of fire at Jankee, who was standing on a hill somewhere between ten to twenty feet above the dog and forty yards away. He reasons therefore that it is inconsistent to find him guilty of both counts as the evidence indicates that he fired either at the dog or Jankee, but not both.

Howsden acknowledges that the standard to be applied by this court when reviewing the sufficiency of evidence is set forth in ***State v. Poellinger***, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990), which provides:

> [A]n appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. ... If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

Additionally, when an appellate court is presented with a record of facts that supports more than one inference, the reviewing court must accept and follow the inference drawn by the trier of fact unless the evidence on which

the inference is based is incredible as a matter of law. ***Id.*** at 507, 451 N.W.2d at 757.

Here, the evidence is overwhelming that Howsden mistreated an animal by intentionally shooting the dog. Jankee testified that he observed Howsden armed with a shotgun and yelled to him, "Don't shoot our dogs." Howsden responded, "Well, we can shoot any dog that's on our property." Jankee then observed Howsden shoot at and miss the first dog, but then shoot the second dog, wounding it while Jankee was in the direct line of fire. Howsden also told the investigating officer that he shot the dog because it was on his property. This evidence is sufficient to support the jury's guilt finding on the mistreating an animal charge.

The evidence also supports the jury's finding that Jankee was endangered at the time of the shooting. Howsden shot in Jankee's direction, and the investigator's testimony established that the shot would easily more than carry the distance of forty yards. Additionally, the investigator testified that if the shotgun is held loosely against the shoulder as the trigger is pulled, the end of the barrel would have a tendency to rise causing some of the pellets to also rise as in an arc and go into the area where Jankee was standing. Given this testimony, the jury could reasonably infer that Jankee's life was endangered when Howsden shot the dog while Jankee was standing in the path of fire. It is for the jury to determine the credibility of the witnesses, and this court cannot say it was unreasonable to believe the State's witnesses.

Next, Howsden contends the trial court erred by excluding the testimony of his expert witness who had violated the court's sequestration order. Apparently, the expert entered the courtroom during Howsden's testimony and remained there for approximately fifteen minutes before his presence was discovered. Defense counsel had delegated to Mrs. Howsden the responsibility of notifying this expert not to attend the court proceeding because of the sequestration order. However, the expert entered and remained in the courtroom without the Howsdens' or counsel's knowledge. Only after the expert had testified for the defense and in the middle of the State's cross-examination did the State discover that the witness had been present during Howsden's testimony. The trial court then, after arguments from both counsel, struck the expert's testimony and excluded further testimony of this witness.

Howsden argues that although it is within the trial court's discretion as to whether a witness who has violated the sequestration order is permitted to testify, ***Nyberg v. State,*** 75 Wis.2d 400, 409-10, 249 N.W.2d 524, 528-29 (1977), it was inappropriate in this case to exclude the witness's testimony because Howsden had not participated in the violation and the State was not prejudiced. This court is not persuaded.

The ultimate question is whether the trial court reasonably exercised its discretion by excluding the expert's testimony. The trial court accepted the State's argument that it was prejudiced because the expert heard Howsden testify as to what the shot pattern from the shotgun would have been at thirty-five yards, and that the expert may have been influenced to shape his testimony to conform with Howsden's testimony. The trial court also reasoned that it was the defense's obligation to police its witness to ensure no violation of the sequestration order and the defense had failed in that respect. This court cannot say this was an unreasonable exercise of discretion.

Howsden next contends the prosecution unfairly tried this case by continually making reference to trespass issues throughout the trial in violation of the trial court's order prohibiting testimony on this subject. The trial court addressed Howsden's argument on this issue after trial by stating:

> [T]he trespass and these related issues was something that I had ordered precluded not so much because I was concerned about inflammatory or prejudicial evidence coming before the jury; it was my concern that unless I kept a very tight rein on the parties, that I was going to end up trying a case that dealt with property lines and property rights and trespass issues that were simply not related to this case. My concern was to keep the evidence restricted to the issues at hand.
>
> I did have some concerns, as I indicated during the trial, about getting into that, and I cut people off and scolded counsel at different points during the trial. But the point is, it was not—my concern was not that if the word "trespass" were mentioned or that these issues were gotten into that that was somehow going to

> taint the proceedings or inflame the jury; my concern was one of managing that trial efficiently.
>
> So, therefore, I don't think, to the extent that references were made to that, first of all, they were a relatively minuscule part of the evidence, and secondly, I did not then nor do I now have concerns that somehow references to that tainted the proceedings or prejudiced the jury. My concern was then strictly one of economy of time and not confusing issues, and I don't see that issues were confused.

This court will generally defer to the trial court's observations as to whether the defense has been unfairly prejudiced by the evidence. The trial court is present during the trial and has the greater opportunity to observe whether its orders had been violated and, if so, the effect of that violation on the jury. The trial court's explanation is reasonable, and this court will not disturb its conclusions on this issue.

Finally, Howsden contends the prosecution was selective, discriminatory or retaliatory. In essence, Howsden argues that the hunters admittedly trespassed on his posted property, but only the hunter who fired into the woods near Howsden was charged by the DNR for shooting from a roadway. He also contends that this conviction could now be used against him as a challenge to his credibility in his litigation against the Town of Maplehurst, suggesting that this was one of the motives for this criminal prosecution. These allegations claim that the district attorney's decision to prosecute was based on an improper motive.

In ***State v. Annala,*** 168 Wis.2d 453, 472-73, 484 N.W.2d 138, 146 (1992), the supreme court pointed out that the district attorney is afforded great discretion in determining whether to initiate prosecution in a particular case and that few limits are imposed upon the district attorney's prosecutorial discretion. It also recognized that the conscious exercise of some selectivity in enforcement is not in itself a constitutional violation so long as the selection was not deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification. ***Id.*** Only where there has been an aura of discrimination are the courts to check the prosecutor's charging decision. ***Id.*** Here, Howsden does not suggest the district attorney prosecuted him upon

some meritless charge nor does he suggest that discrimination played a part in the charging decision. As the Supreme Court reminded us in ***Annala***:

> When probable cause exists for prosecution, the court should not consider the subjective motivations of the district attorney in making his charging decision, except to determine whether a discriminatory basis was involved. On numerous occasions, we have explained that in general the district attorney is answerable to the people of the state and not to the courts or the legislature as to the manner in which he nor she exercises prosecutorial discretion. Political review through the electoral process is sufficient to ensure proper application of prosecutorial discretion. If this court placed the nondiscriminatory subjective motivations of the district attorney under scrutiny with respect to the charging decision, it would likely create an enormous amount of litigation challenging prosecutorial discretion that has little or nothing to do with the defendant's guilt or innocence.

Id. at 473-74, 484 N.W.2d at 146-47 (citations omitted).

Accordingly, this court need not proceed further to address the district attorney's nondiscriminatory subjective motivation for prosecution in this case. The judgment is therefore affirmed.

By the Court.—Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.