

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

March 13, 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, STATS.

NOTICE

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No. 95-2390-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

FAYE W. LLOYD,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Fond du Lac County: HENRY B. BUSLEE, Judge. *Affirmed.*

SNYDER, J. Faye W. Lloyd appeals from a judgment of conviction of nine counts of mistreatment of animals, contrary to § 951.02, STATS. Lloyd claims that the trial court erred in improperly admitting "other acts" evidence and in allowing the State to make an improper reference to penalties during closing arguments. She further contends that the verdict was based on insufficient evidence and that errors by the trial court culminated in a

misuse of sentencing discretion.¹ We conclude that the trial court properly exercised its discretion with regard to the admissibility of the other acts evidence and that the reference to penalties was not in error. Because there was sufficient evidence to support the verdict and the sentence imposed was an appropriate exercise of discretion, we affirm.

The complaint against Lloyd was the result of a visit to her property by Fond du Lac County Sheriff's Department Detective Charles Sosinski. Prior to this, Lloyd had reported two dead horses to James McCreedy,² a state agricultural animal compliance officer, and he had recommended that Sosinski be notified. Lloyd called Sosinski to advise him that she had two deceased horses on her property and that she had concerns as to the causes of death.

A few hours after Lloyd reported the dead horses to Sosinski, he received a call from Diane Horlamus, executive director of the Washington County Humane Society, who stated that she had received a complaint about the dead animals from a neighbor of Lloyd's. Sosinski and Horlamus determined that necropsies (autopsies) should be performed on the dead

¹ Lloyd's brief actually frames three appellate issues. Based on our review of the briefs and record, we will address the foregoing. Throughout her brief, Lloyd also raises other contentions without citation to the record or to legal authority. These we decline to address. See *Keplin v. Hardware Mut. Casualty Co.*, 24 Wis.2d 319, 324, 129 N.W.2d 321, 323 (1964); see also *State v. Shaffer*, 96 Wis.2d 531, 545-46, 292 N.W.2d 370, 378 (Ct. App. 1980).

² The record contains two different spellings for McCreedy. We will adopt the spelling of his name as it appears in the criminal complaint.

horses, and Daniel J. Bushard, D.V.M. was asked to perform the postmortem examinations.³

Horlamus and Bushard met Sosinski at the Lloyd property to perform the necropsies. Lloyd was also present. The postmortem examinations were inconclusive as to the causes of death. However, after observing the remaining nine horses and conditions on the property, Bushard recommended that the live animals be impounded in order to provide necessary care. The remaining nine horses were loaded into a trailer and taken to another facility for boarding and treatment.

Following their removal, Bushard assessed the condition of the horses. He noted that several of them were in extreme stages of malnutrition, while the remainder were in poor condition.⁴ All were extremely dirty and in need of care.

Lloyd was subsequently charged with nine counts of mistreatment of animals. *See* § 951.02, STATS. A jury found her guilty and she appeals.

Lloyd first contends that the trial court erred in admitting evidence of other acts. Appellate review of the admissibility of evidence is not

³ Lloyd testified that she discussed the possibility of a postmortem examination with her veterinarian, but he advised against it.

⁴ Bushard used the Henke rating system which allows a horse to be scored on a scale of one to nine based on its general body condition and the amount of fat on its body. A rating of "one" would be given to an extremely thin animal with very little body fat; a "nine" rating would apply to an extremely obese animal. Five of Lloyd's nine horses were rated one and were estimated to be between 100 to 200 pounds underweight. A sixth horse received a rating of two.

whether this court would have permitted the contested evidence to come in, but whether the trial court exercised its discretion in accordance with accepted legal standards. See *State v. Plymesser*, 172 Wis.2d 583, 591, 493 N.W.2d 367, 371 (1992). The trial court's decision will be upheld if there is a reasonable basis for it. *Id.*

Lloyd contends that by allowing testimony that on the day the complaint was filed she had reported two dead horses on her property and testimony that a horse had died several years earlier while under her care, the jury heard improper evidence of other acts for which “[s]he was never charged.”

The first mention of the dead animals was made during the testimony of Bushard, who described in detail his observations upon arriving at the property. His testimony included the fact that he had been called to perform necropsies on two dead horses. During cross-examination of Bushard, defense counsel repeatedly questioned him about the dead animals and his postmortem findings, focusing on his admission that the examinations were inconclusive as to the causes of death.

A strategic and deliberate choice made by trial counsel amounts to a waiver binding upon the defendant. *State v. McDonald*, 50 Wis.2d 534, 538, 184 N.W.2d 886, 888 (1971). Our independent review of the record convinces us that Lloyd's strategy was to highlight the fact that she had initially contacted authorities, that the postmortem findings were inconclusive, and that it was apparent from the necropsies that the animals did not die of starvation. During

her testimony, Lloyd offered an alternative explanation for the horses' deaths when she referred to several examples of vandalism alleged to have occurred just prior to this and intimated that the horses may have been poisoned. We conclude that Lloyd's trial strategy operates as a waiver.

Lloyd also contends that testimony that another horse had died several years earlier while under her care was not relevant and therefore inadmissible. The complaint charged Lloyd with mistreating animals. The trial court determined that the evidence concerning the death of the other horse and its condition at death were "relevant to the issue of whether or not these animals were treated properly." We conclude that the trial court's determination that evidence of the earlier death was relevant was a proper exercise of discretion.

Lloyd's second claim of error is predicated on a statement made by the State during closing arguments. She contends that the State referred to possible penalties in its closing argument and that this reference was prejudicial, inflammatory and improper. The State argues that Lloyd's failure to object during closing arguments has waived her right of review. We agree. An appellate court will not look with favor upon claims of error based upon the trial court's failure to act when no objection was raised by counsel. *McClelland v. State*, 84 Wis.2d 145, 158, 267 N.W.2d 843, 849 (1978).⁵

⁵ Although we conclude that Lloyd's failure to object has waived her right of review, we note that the State's comments were made only in response to a statement by defense counsel. During closing arguments, defense counsel stated, "[T]here is no criminal case to throw this lady in jail. There is nothing there to take her freedom away from her." The State's response to this, "it's not appropriate that Faye Lloyd goes to jail. Sentencing is a

Lloyd next argues that there was insufficient evidence to support the conviction. She maintains that § 951.02, STATS., requires cruel treatment and that there was never any testimony that conditions under which the horses were kept caused them any pain. As a consequence, Lloyd reasons, she must have been convicted on the basis of the deaths of the horses, a crime for which she was never charged. We disagree with this characterization of the evidence.

In a review of the sufficiency of the evidence, an appellate court may not overturn a conviction unless the evidence is so insufficient in probative value that it can be said that no reasonable jury could have found guilt beyond a reasonable doubt. See *State v. Poellinger*, 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990). If more than one reasonable inference can be drawn from the evidence, the reviewing court must adopt the inference which supports the conviction. *State v. Hamilton*, 120 Wis.2d 532, 541, 356 N.W.2d 169, 173-74 (1984).

Lloyd was charged with nine counts of mistreatment of animals, contrary to § 951.02, STATS.⁶ The word “cruel” is defined as “causing unnecessary and excessive pain or suffering or unjustifiable injury or death.” Section 951.01(2), STATS. Lloyd's argument focuses on the first half of the

(.continued)

matter for the Court,” was a fair and accurate statement of the law.

⁶ The relevant portion of § 951.02, STATS., reads as follows:

No person may treat any animal, whether belonging to the person or another, in a cruel manner.

definition, but overlooks the second half, which states that “cruel” can also mean *unjustifiable injury*.

The jury was presented with testimony that all nine of the horses were underweight, and according to the testimony of a veterinarian, “They needed to be fed, they needed to be watered. There [were not] any real positive signs that any of that was going to occur on [the] premise[s].” Testimony of one witness was that the conditions on the property where the horses were kept was “probably the second worst farm that I had been on.”

There was also testimony that one of the horses was mired in mud and manure approximately twenty inches deep and the animal was unable to move. The three animals in stalls were caked with mud and manure, had no water accessible and only a few pellets of food. All of the animals had a biting horse louse. A neighbor testified that often there was no hay to feed the horses and that water was not always accessible.

The statute defines cruel treatment as treatment that results in *unjustifiable injury*. There was sufficient evidence presented that the conditions on the property and the lack of food, water and basic care caused harm to the horses. We conclude that the jury could reasonably infer that Lloyd's treatment of the horses resulted in unjustifiable injury to these animals.

Based in part on her previous claims of error, Lloyd's last contention is that the sentence imposed was “inappropriate.” There is a strong public policy against interfering with the sentencing discretion of a court, and

we presume the sentencing court acted reasonably. *State v. Perez*, 170 Wis.2d 130, 142, 487 N.W.2d 630, 634 (Ct. App.), *cert. denied*, 506 U.S. 957 (1992). If the record shows a process of reasoning based upon legally relevant factors, the sentence will be upheld. *Anderson v. State*, 76 Wis.2d 361, 364, 251 N.W.2d 768, 770 (1977).

In imposing sentence, the trial court made reference to the evidence presented, letters it had received and Lloyd's professional accomplishments, as well as her past contacts with the authorities related to her treatment of animals. The court also considered the recommendations of both the State and defense counsel and invited Lloyd to make a statement. She declined. The trial court properly considered a variety of factors before imposing sentence. We conclude that the sentence imposed was a proper exercise of the trial court's sentencing discretion.

By the Court. – Judgment affirmed.

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