2013 IL App (2d) 111272-U
No. 2-11-1272
Order filed January 23, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	
v.	)	No. 10-CF-4248
DIANE ELDRUP,	)	Honorable James K. Booras,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Hutchinson and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: There was sufficient evidence to sustain defendant's convictions of animal torture and aggravated cruelty to an animal. Also, the State's remarks during closing rebuttal argument did not constitute error. However, we agreed with defendant that her convictions of aggravated cruelty to an animal must be vacated under the one-act, one-crime rule. Therefore, we affirmed in part and vacated in part.

¶ 2 Following a jury trial, defendant, Diane Eldrup, was convicted of 18 counts of animal torture (510 ILCS 70/3.03(a) (West 2010)) and 18 counts of aggravated cruelty to an animal (510 ILCS 70/3.02 (West 2010)). The charges resulted from the December 16, 2010, discovery of the corpses of 14 starved dogs and four live, malnourished dogs at defendant's kennel, Muddy Paws Boarding

and Grooming (Muddy Paws), in Deer Park. On appeal, defendant argues that: (1) there was insufficient evidence of the crimes' intent elements to prove her guilty beyond a reasonable doubt; (2) the State made improper remarks in its closing rebuttal argument, thereby denying her a fair trial; and (3) her convictions of aggravated cruelty to an animal must be vacated under the one-act, one-crime rule. We disagree with defendant's first two arguments but agree with defendant's third argument. We therefore affirm in part and vacate in part.

¶ 3 I. BACKGROUND

¶ 4 On January 5, 2011, a grand jury indicted defendant on 16 counts of animal torture and 16 counts of aggravated cruelty to an animal. Two additional counts for each crime were added in the following months.

¶ 5 Defendant's trial took place in September 2011. Kildeer Police Officer Nick Baibus testified as follows. On December 16, 2010, he was called to Muddy Paws to assist Kurt Eldrup in removing some personal belongings from the facility, which also contained a residence, pursuant to court order. Kurt and defendant were divorcing, and Kurt stated that he had not lived at that location for two years. Kurt did not have keys, so Kurt cut a lock at the rear entrance of the house. Kurt then opened the front door and told Baibus that there was a dead dog in a cage near the rear entrance.

¶ 6 Baibus walked through the house to the rear entrance. The house was in complete disarray, with feces throughout, and a strong odor of decaying animals. There were two cages on the kitchen table with two live cats. At the back of the house, Baibus saw a deceased dog in a cage with its head partially protruding from the cage.

¶ 7 Kurt said that there were possibly other dogs in the kennel area, so the men proceeded there. On the way, Baibus saw an uncaged dog standing over a dead dog and barking. Baibus also saw

bones under some debris. In the kennel, he saw four dead dogs in feces-filled cages. He found three more live, caged dogs as well; the dogs were skin and bones. In a sub-basement area, Baibus saw more cages with dead dogs, including one cage with two decomposed dogs under a dog bed and blanket.

¶ 8 Baibus obtained approval of criminal charges against defendant, and she surrendered to authorities.

¶ 9 Cindy Williams testified that she was an animal control warden with Lake County Animal Control. Williams was dispatched to Muddy Paws on December 16 and took a video of the facility. She testified that it truly and accurately depicted what she saw that day, and the video was played for the jury, with Williams narrating what was being shown. The video showed various kennel cages with dead dogs inside. The dogs' bones were visibly protruding. Williams testified that all areas of the building were very cold and dark; the building's floors were covered in trash, urine, and feces; and the kennel cages had moldy feces and sticky urine all over. One kennel had two dead dogs wrapped in blankets, with a mattress on the inside of the gate door that shielded the dogs from view. The kennel was full of frozen maggots. All of the kennel gates were closed, and the cages had dirty bowls with no food or water. However, there were plastic jugs with water, cans of unopened dog food, and plastic bins with dry dog food in the building.

¶ 10 In the apartment, the video showed a bedroom closet containing two latched animal crates facing the back wall. Each crate contained a dead, decomposed dog amidst a lot of feces. The kitchen/laundry area contained a wire crate with a dead dog; the dog's head was sticking out of the bottom of the door. On the east side building, there were dead dogs in closed crates stacked outside. The crates all had dirty bowls and piles of feces in them.

¶ 11 While the video was being played, a woman in the courtroom started retching and was escorted out. The jury was taken from the courtroom, and the defense moved for a mistrial. The trial court denied the motion, stating that the reaction was not due to the fault of the State or the court. The trial court instructed the jury to disregard the incident and stated that the woman was not connected to either party.

¶ 12 Williams further identified a series of photographs that included the 14 dead dogs and four live dogs found at Muddy Paws. She testified that all of the dogs had long and curled nails. She described pictures showing water, unopened cans of dog food, and full bags of dry dog food. Williams also identified pictures showing closets with neat and orderly clothing.

¶ 13 Williams testified that the four live dogs were taken to a veterinarian and then the Lake County animal control kennel. Williams started out feeding them very small meals, which were gradually increased. She identified pictures of one dog from December 17, 2010; December 28, 2010; and January 12, 2011. The dog weighed about 14 pounds when it was removed from the shelter and almost doubled its weight by December 28. Williams identified pictures of the other three dogs from the same dates, and she testified that they similarly gained weight.

¶ 14 Veterinarian Sahid Amin was accepted as an expert in veterinarian medicine. He testified that on December 16, 2010, he treated the four live dogs that Williams brought in. Three of the dogs were emaciated with prominent rib cages and hip bones. The fourth dog was closer to normal condition and had access to food of some sort; Williams told Amin that the dog had escaped from its kennel. Amin diagnosed the dogs as suffering from malnutrition and dehydration. He prescribed giving them small amounts of specialized food, water, and Gatorade.

¶ 15 Paul Moller testified that he boarded his two dogs at Muddy Paws from November 24 to 28, 2010. Defendant told him to bring his dogs to the side door rather than the front door, where he previously had dropped the dogs off. Defendant said that she had "transport dogs" in the kennel that she wanted to keep separate from Moller's dogs. When Moller picked up his dogs, defendant returned them at the side door. Moller did not enter the facility.

¶ 16 Kildeer Police Officer William Bukovsky testified that he saw defendant outside Muddy Paws on December 15, 2010. He also saw her outside the facility five to six times in the two to three months prior to December 15.

¶ 17 Courtney Randle, an animal warden with Lake County Animal Control, testified that she was dispatched to Muddy Paws on November 16, 2010. No one answered the front door, but defendant called to her from the breezeway between the house and garage. Randle asked to go inside the kennel. Defendant refused, saying that she was going to be moving in six weeks, and the house was too messy. Randle asked if defendant had any dogs, and defendant said no. Defendant said that some had passed away and that she had gotten rid of the others because "they had ruined her marriage." Randle agreed that she did not put defendant's marriage comment in her initial report of the visit. At the prosecution's request, she filed a supplemental report on January 17, 2011, in which she memorialized the statement.

¶ 18 The State presented evidence that six of the deceased dogs were selected for necropsies, and the remaining bodies were placed in a dumpster.

¶ 19 Veterinarian Ned Bartlett testified that he examined three of the dogs found suitable for necropsy, which he identified in photographs. The dogs all appeared to be about five years old, and none of them had food in their intestines or feces in their colons. One dog weighed about 17.9

pounds whereas that type of dog would generally weigh 45 to 55 pounds. Bartlett opined that the animal suffered cachexia, which was a wasting of muscle mass, loss of fat tissue, and shrinkage of organs. Bartlett estimated that it would take at least two months for the dog to have reached that stage. He opined that the dog died of starvation, dehydration, or a combination of the two. Bartlett offered similar testimony regarding the other two dogs he examined.

¶ 20 On cross-examination, Bartlett agreed that he was not certified in veterinarian pathology. He based his estimate of how much the dogs should have weighed on experience rather than a mathematical formula. There were dog diseases that could cause weight loss, such as inflammatory bowl disease. However, that disease was rare, so Bartlett would not have expected to see it in three dogs. Also, Bartlett sent organs and slides from the animals to a veterinary pathologist and received a histopathology report, which did not show any such disease. Bartlett relied on both the report and his observation of the lack of lesions and abnormalities in ruling out the disease. Dr. Bartlett agreed that intestinal worms or parasites can cause weight loss and can spread from animal to animal. He found heartworm and intestinal parasites in two dogs, but the amounts were insignificant and would not have contributed to weight loss.

¶ 21 Douglas Lymann, a veterinary pathologist, testified that he performed necropsies on the three remaining dogs recovered from Muddy Paws. One dog weighed 18 pounds whereas he would have normally expected it to weigh 30 or 35 pounds. It had lacked any observable body fat and had only non-food material in its stomach. He analyzed the fat content of the dog's bone marrow, which was .087%, whereas a normal animal would have a 60% or greater fat content.

¶ 22 The second dog Lymann examined should have weighed around 20 pounds but weighed 13.5. The dog was very thin, and its rear claws were long and curled. Its stomach and intestines were

empty, and it had a 1.8% bone marrow fat content. The third animal weighed five pounds whereas it should have weighed around 7 pounds. Lymann opined that all three dogs died of starvation. He did not find any disease that was a contributing factor to the deaths.

¶ 23 Jeffrey Crell testified for the defense that he boarded his dog at Muddy Paws for one week in July 2010 and again for four or five days in August 2010. When he picked up his dog, he did not notice anything unusual about him. Crell also entered the kennel for about 30 minutes each time he went there. He did not notice anything unusual, except that his was the only dog there whereas Muddy Paws used to be a strong business.

¶ 24 Kurt Eldrup testified that there were currently divorce proceedings between himself and defendant, as well as an order of protection against him. He last lived in Muddy Paws in 2008. That year, he was taken into police custody at Muddy Paws for resisting arrest and was convicted of a felony.

¶ 25 Defendant provided the following testimony. She was 48 years old. She had trained, groomed, and boarded dogs and horses before purchasing Muddy Paws in 1996 from a woman who was retiring. Defendant married Kurt Eldrup, and they lived at the facility. Their son was born in 2002. In 2008, defendant filed an order of protection against Kurt, and he was arrested at the residence. Divorce proceedings were initiated after that time, and their son continued to live with defendant.

¶ 26 In 2008, business had slowed down "quite a bit" at Muddy Paws, which defendant attributed to the recession. Defendant had taken in "rescue dogs" from kennels and individuals who could no longer care for them, but she stopped doing so in 2009. That year, she had also become behind on the mortgage. The dogs in the photographs the State had shown were rescue dogs she had received

from southern Illinois in May 2008. When she got them, many of them were older, underweight, and had internal parasites and skin conditions. Defendant initially fed the dogs holistic dog food, but they started to rapidly lose weight. She then put them on a "dog grain diet," and they slowly regained weight. However, they returned to a "roller coaster" of weight loss and gain, despite defendant consulting professionals and nutritionists.

¶ 27 In summer 2010, defendant was initially living at Muddy Paws but started the process of moving out because she knew the building would be going into foreclosure. In fall 2010, she was not living at Muddy Paws anymore but would go there once or twice a day to give the dogs food and water. Defendant was slowly packing up her personal possessions. The dogs were still fluctuating in weight. Defendant could not figure out what was going on and "[p]eople were nonchalant about [her] concern for the dogs getting thin ***." Some of the dogs started to die, but in response she "didn't do anything" because she "shutdown emotionally." When asked why she did not remove the dogs or take them somewhere, defendant replied that she did not know and "just [did not] handle those types of things very well."

¶ 28 Defendant denied that the dogs ruined her marriage, stating that they were her "entire life" and livelihood. She never made such a statement to Randle. Her conduct was not motivated by an intent to increase or prolong the dogs' pain or suffering. Defendant did not intend to subject them to extreme physical pain, and she did not want them to suffer serious injury or die.

¶ 29 Defendant agreed that she knew animal control would take in stray dogs and dogs that could not be handled. She admitted telling Randle that she did not have dogs anymore, and she admitted that this was a lie because there were at least four living dogs inside Muddy Paws at that time. She lied because she was afraid and not thinking clearly. When defendant went to the kennel to feed the

dogs, she would "look for eyes." She stated, "If I didn't see the eyes, I would just walk straight through, I couldn't handle it, I just shut it out. I couldn't handle it, I just shut it out." Defendant "couldn't acknowledge" the dogs' deaths. She stated, "I had done this for so long and to have that many dead *** I had shutdown. I seeked [*sic*] professional help to find out what I was doing, I didn't understand it because that is not me, that is not me." She agreed that the dogs were in her sole and exclusive care. Defendant put the two dogs found in blankets together after they were dead. She could not explain it, but she did not want them to be alone. The dog found in the apartment was alive when defendant brought her there. She sat with the dog on the floor and had the dog's head on her knee. When the dog passed away, defendant closed the top of the cage door but not the bottom. She was "just in a zone" and could not explain why she did that.

¶ 30 Defendant believed that she had boarded Moller's dog in Thanksgiving 2010, but she was "not sure" if many dogs had been dead for months at that time. In 2010, she "had shutdown emotionally [, and her] main focus was [her] son." Defendant testified that this occurred due to:

> "everything that was going on between back and forth [*sic*] going to court for divorce, [her] husband's criminal trial, et cetera. It was just too much, everything that was going on, police being called out, [her] son being there constantly. Trying to keep everything together."

Defendant stated that she was not able to keep everything together.

¶ 31 The trial court granted defendant's motion to give jury instructions on the lesser-included offense of cruel treatment of an animal. The jury found defendant guilty of all 18 counts of each of the three crimes. The trial court entered judgment on only the animal torture and aggravated cruelty to an animal counts.

¶ 32 The trial court denied defendant's posttrial motion on October 18, 2011. It initially sentenced her to 30 months' probation, a condition of which was to serve 30 months' periodic imprisonment. She was also ordered to perform 200 hours of community service and pay various fees and costs. In response to her motion to reconsider the sentence, the trial court reduced the term of periodic imprisonment to 18 months. Defendant timely appealed.

¶ 33 II. ANALYSIS

¶ 34 A. Sufficiency of the Evidence

¶ 35 Defendant first argues that she was not found guilty beyond a reasonable doubt of animal torture or aggravated cruelty because the evidence failed to show that she acted with the specific intent to increase the animals' suffering or cause them to suffer serious injury or death. When a defendant challenges the sufficiency of the evidence, we must determine whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *People v. Collins*, 106 Ill. 2d 237, 261 (1985). The trier of fact has the responsibility to assess witnesses' credibility, weigh their testimony, resolve inconsistencies and conflicts in the evidence, and draw reasonable inferences from the evidence. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). We will not set aside a criminal conviction unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 225 (2009).

¶ 36 To convict defendant of animal torture, the State had to prove that, without legal justification, she inflicted or subjected an animal to extreme physical pain and that she was "motivated by an intent to increase or prolong the pain, suffering, or agony of the animal." 510 ILCS 70/3.03 (West

2010). To prove defendant guilty of aggravated cruelty to an animal, the State had to prove that defendant intentionally committed "an act that causes a companion animal to suffer serious injury or death." 510 ILCS 70/3.02 (West 2010). For this crime, the State must prove a specific intent to injure or kill the animal. *People v. Land*, 2011 IL App (1st) 101048, ¶ 88. An omission may qualify as "an act" under the statute. *Id.* ¶ 121.

¶ 37 On appeal, defendant challenges only the intent element of each crime. She argues that the evidence showed that she was experiencing a period of great turmoil in her life, including: divorce proceedings against an abusive husband; her belief that Muddy Paws would soon be foreclosed; her concern for her son's welfare; and her on-going struggles to maintain the animals' health. Defendant argues that the facts showed that she became emotionally distant from the animals' welfare, resulting in neglect that led to their starvation.

¶ 38 Defendant further maintains that the circumstantial evidence did not support a reasonable inference that she acted with the specific intent to bring about or increase the animals' suffering or cause them serious injury or death. Defendant argues that her alleged statement to Randle also did not show intent, as she denied the statement, and even otherwise, no rational trier of fact could infer that she starved the animals to avenge her failed marriage. She maintains that the "horrific conditions" at Muddy Paws showed only the result of her conduct and has minimal value in discerning her intent. Defendant contends that the conditions of the kennel and the animals were actually consistent with the negligent acts of a person engulfed by events and emotionally unable to deal with worsening conditions.

¶ 39 Intent must be proven beyond a reasonable doubt like any other element of an offense. *People v. Rudd*, 2012 IL App (5th) 100528, ¶ 14. However, intent can rarely be proven by direct

evidence because it is a mental state. *People v. Witherspoon*, 379 Ill. App. 3d 298, 307 (2008). Rather, it may be proven by circumstantial evidence, in that it may be inferred from surrounding circumstances (*id.*) and the character of the defendant's acts (*People v. Foster*, 168 Ill. 2d 465, 484 (1995)).

¶ 40 Viewing the evidence in the light most favorable to the State, a rational trier of fact could have concluded that defendant intended to injure or kill the dogs, as required for a conviction of aggravated cruelty to an animal. The condition of the shelter and the dogs is not irrelevant, as it was overwhelming evidence corroborating medical testimony that the dogs, who were undisputably in defendant's sole care, were provided with scant amounts, if any, of food, water, or other care for about two months or more. Evidence of defendant's awareness about their condition is shown through the deplorable conditions of the facility itself; defendant's testimony that she knew that dogs were dying; defendant's testimony that she would just "walk through" the kennel if she did not "see" the dogs eyes; defendant's admission that she lied to Randle and said that she did not have any dogs; and Moller's testimony that defendant told him to bring his dogs to the facility's side door instead of the kennel's front door, where he had previously dropped his dogs off. That there were containers of water and dog food at the facility, where defendant was seen and admittedly went to in the months before her arrest, is even greater evidence that defendant made a deliberate choice not to feed the animals. "The defendant is presumed to intend the natural and probable consequences of his acts." *People v. Terrell*, 132 Ill. 2d 178, 204 (1989). The natural and probable consequence of not feeding an animal, especially one that is locked in a cage or kennel, is that it will die. Thus, there was certainly sufficient evidence that defendant intended to kill the dogs, and she was proven guilty of the counts of aggravated cruelty to an animal beyond a reasonable doubt.

¶ 41 We also conclude that there was sufficient evidence that defendant intended to increase or prolong the pain, suffering, or agony of the dogs, as required for a conviction of animal torture. Randle testified that defendant told her that the dogs "ruined her marriage." Although defendant denied making the statement, it was the jury's prerogative to determine witness credibility and resolve conflicts in the evidence. See *Sutherland*, 223 Ill. 2d at 242. Thus, the jury could have believed that defendant expressed this sentiment to Randle. Further, if defendant blamed the animals for ruining her marriage, it is circumstantial evidence that the ghastly conditions the dogs faced were a result of her intent to make them suffer.

¶ 42 Also, contrary to defendant's testimony that she "didn't do anything" because she "shutdown emotionally," there was evidence that defendant made *calculated* choices to not let others find out what was going on and thereby prolong the dogs' pain and suffering. Again, she agreed to board Moller's dogs November 24 to 28, 2010, at a time where she admitted there could have been many dead dogs at Muddy Paws. She managed to take care of Moller's dogs despite her assertion that she was emotionally unable to care for animals. Defendant additionally told Moller to bring the dogs to the side door, as opposed to the front of the kennel where he had previously dropped off the dogs, which is evidence that she did not want him to see her dogs. Strikingly, when animal control warden Randle visited Muddy Paws on November 16, 2010, defendant refused to let her in the kennel and admittedly lied to her by saying that she had no dogs, even though she knew that animal control could take in dogs. These calculated actions undermine defendant's assertion that she was "in a zone" and unable to think clearly. To the extent that defendant provided an alternative explanation for her behavior, in the form of emotional distress, it was up to the jury to accept or reject her theory of innocence. See *People v. Milka*, 336 Ill. App. 3d 206, 228 (2003); see also *People v. DiVincenzo*,

183 Ill. 2d 239, 252 (1998) (determining a defendant's mental state is a "task [that] is particularly suited to the jury"). In the end, viewing the evidence in the light most favorable to the State, there was sufficient evidence supporting defendant's conviction for animal torture because a rational jury could find, beyond a reasonable doubt, that defendant intended to increase or prolong the dogs' pain, suffering, or agony.

¶ 43 B. Closing Argument

¶ 44 Next, defendant argues that the State committed reversible error in its closing rebuttal argument by blatantly appealing to the jurors' sympathy for the animals and by personally denigrating her. However, the defense did not object at trial to all of the comments defendant now challenges, and she did not raise the issue of closing arguments in her posttrial motion. Therefore, defendant has forfeited the issue for review. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (to preserve an issue for review, the defendant must object at trial and raise the issue in a written posttrial motion).

¶ 45 Defendant argues that the statements constitute plain error. The plain error doctrine allows a reviewing court to consider an unpreserved error where either (1) a clear error occurs and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, or (2) a clear error occurs that is so serious that it affected the fairness of the trial and challenged the integrity of the judicial process. *People v. Piatkowski*, 225 Ill. 2d 551, 564-65 (2007). Defendant has the burden of establishing plain error. *People v. Smith*, 2012 IL App (1st) 102354, ¶ 50. Whether a forfeited claim is reviewable as plain error is a question of law that we review *de novo*. *People v. Johnson*, 238 Ill. 2d 478, 485 (2010). In applying the plain error test, the first step is to determine whether error occurred at all. *People v. Kitch*, 239 Ill. 2d 452, 462 (2011).

¶ 46 Prosecutors generally have wide latitude in closing arguments and may comment on the evidence and any reasonable inferences arising from the evidence, even if the inferences reflect negatively on the defendant. *People v. Perry*, 224 Ill. 2d 312, 347 (2007). However, a prosecutor may not make comments that are calculated solely to arouse prejudice and inflame the jury's passions. *People v. Jackson*, 2012 IL App (1st) 092833, ¶ 39. We consider statements in the context of the closing arguments as a whole instead of examining the contested phrases in a vacuum. *Perry*, 347 Ill. 2d at 347.

¶ 47 Defendant points out that Assistant State's Attorney (ASA) Michael Mermel began his rebuttal closing argument by stating that the trial court would instruct the jury that it should not be influenced by sympathy or prejudice. He then stated that the defense's closing argument, which focused on defendant's "difficulties" and how "the weight of the world was on her," was all "a cheap effort to get sympathy for his client; that is not an element in this case." The defense objected, and the trial court sustained the objection. ASA Mermel continued, "I will remove the word 'cheap.' He obviously intended to get her sympathy by going boo-hoo poor me, poor Diane Eldrup." The defense again objected, but the trial court overruled the objection, stating "It is argument, any argument not based on the evidence should be disregarded by you, Ladies and Gentlemen."

¶ 48 ASA Mermel later discussed the dogs' plight, stating:

> "Ladies and Gentlemen, the evidence in this case is clear. As one last example, imagine the final days and weeks of the existence of those two poor wretched creatures of the dogs in the closet. It is as if they were buried alive except for the dirt as the seconds, minutes and the days ticked. Dark and terrifying coffins that were their pet carriers; tick tick, tick. [*sic*] All day, all night but it would be forever night for them in the closet of death and

darkness to which the defendant subjected them. No one would hear their anguished cries or whimpers as they waited for someone to rescue them from their living hell, but no rescue would ever come to them. The defendant made sure of that."

ASA Mermel also stated:

"How can anyone do this to a creature? No food for their bellies or water for their tongues or hope that anyone would hear their whimpers and rescue them from their living hell. Each of them spent their last living moments in desperation, despair and agony, and incalculable pain because of the defendant's incomprehensive [*sic*] cruelty."

Finally, defendant challenges ASA Mermel's statement that "if any of you indulge in sympathy for the defendant or guess for her there must be a reason why, then you violate your oaths as jurors to follow the law as given to you and decide this case based solely on the evidence and you paid for that sympathy with the death of these animals." Defense counsel objected to this remark, and the trial court sustained "the last portion regarding the oath."

¶ 49 Defendant argues that the aforementioned comments were improper because they encouraged the jurors to return guilty verdicts based upon sympathy for the affected animals.

¶ 50 We note that the trial court sustained defense counsel's objections to the comments that he was engaging in a "cheap effort" to get sympathy for defendant and that the jurors would violate their oaths if they based their decision only on sympathy for defendant. The act of sustaining an objection to an argument generally cures any prejudicial error made in closing argument. *People v. Miller*, 363 Ill. App. 3d 67, 78 (2005). Further, while such an error may not be cured if the prosecutor persists in his or her comments after the trial court sustains an objection (*People v. Wheeler*, 226 Ill. 2d 92, 130 (2007)), that is not the situation here; the State did not revisit the concepts of a "cheap effort"

or the jurors' oaths. Moreover, the trial court instructed the jury several times throughout closing argument that it should disregard argument not based on the evidence. It also provided the jury with the instruction that neither opening statements nor closing arguments were evidence. See *People v. Hommerson*, 399 Ill. App. 3d 405, 417 (2010). Accordingly, we find no reversible error as to these remarks.

¶ 51 Regarding the State's remaining comments about the animals' suffering, we look first at defendant's closing argument. Defense counsel argued that defendant "didn't want these dogs to suffer *** but the world got so heavy, and [the] world just fell apart." Defense counsel stated that defendant "did the best she could." He further stated, "[W]e all have made mistakes in life but it – does it rise to the level that the State wants it at to [*sic*] torture, to aggravated cruelty or is it somewhere else?"

¶ 52 If defense counsel provokes a response in closing argument, the defendant cannot complain that the State's reply in rebuttal argument denied him a fair trial. *People v. Swart*, 369 Ill. App. 3d 614, 637 (2006). Here, defense counsel argued that the evidence did not "rise to the level" of torture or aggravated cruelty. As stated, the elements of animal torture include subjecting an animal to "extreme physical pain" and a motivation to increase or prolong the pain, suffering, or agony of the animals. Thus, the State's comments were within the bounds of propriety, as it was an attempt to portray relevant elements of the crime, those being the pain, suffering, and agony to which defendant subjected the animals.

¶ 53 Defendant also argues that ASA Mermel's following comments denigrated her and can only be interpreted as an attempt to impugn her character and inflame the jury's passions:

"Who could look into the inky dark abyss that is the soul and spirit of someone like

> the defendant and try to fathom the depth of depravity that could motivate someone to perform such unspeakable monstrous acts of torture on helpless creatures such as these poor dogs. How can anyone make sense of that?"

ASA Mermel argued that "[f]ortunately," the State had to prove only the elements of the crimes and not why defendant acted the way she did.

¶ 54 A prosecutor may not characterize the defendant as an evil person or tell the jury it is deciding between good and evil. *Jackson*, 2012 IL App (1st) 092833, ¶ 45. Still, a prosecutor may comment on the evil effects of the crime and urge the jury to administer the law without fear, where the argument is based upon competent and pertinent evidence. *People v. Nicholas*, 218 Ill. 2d 104, 121-22 (2005). In *Nicholas*, the supreme court stated that the prosecutor engaged in permissible commentary in describing the defendant's specific actions surrounding his murder of his mother as " 'pure evil,' " a phrase which the prosecutor repeated three times. *Id.* at 113, 122-23. Similarly, we find that the prosecutor's portrayal of the starvation of the animals as "monstrous acts of torture" to be an allowable description of the evidence.

¶ 55 Moreover, here the State did not describe defendant as "evil." The State referred to the "depravity" that could motivate someone to do such acts, but it then stated that the motivation was irrelevant, as it was not an element of the charged crimes. Thus, rather than being an invitation to speculate on defendant's character, the State ultimately deemed the subject irrelevant. That is not to say that the argument itself was immaterial, as ASA Mermel prefaced the commentary with the recognition that the jury was probably wondering why the dogs were starved. "The wide latitude extended to prosecutors during their closing remarks has been held to include some degree of both sarcasm and invective to express their points." *People v. Banks*, 237 Ill. 2d 154, 183 (2010). Given

the wide latitude afforded in closing argument, we conclude that the challenged remarks were not improper.

¶ 56 As we have found no error in the State's closing rebuttal argument, there can be no plain error. See *People v. Lopez*, 2012 IL App (1st) 101395, ¶ 64. Therefore, defendant's argument fails.

¶ 57 C. One-Act, One-Crime Rule

¶ 58 Last, defendant argues that her convictions of aggravated cruelty to an animal must be vacated under the one-act, one-crime rule enunciated in *People v. King*, 66 Ill. 2d 551 (1977), because the acts underlying those convictions are the same as her convictions of animal torture. Under the one-act, one-crime rule, multiple convictions may not be based on the exact same physical act. *People v. Kuntu*, 196 Ill. 2d 105, 130 (2001). Defendant did not raise her one-act, one-crime argument at the trial level, but forfeited one-act, one-crime arguments may be addressed under the plain error doctrine because they affect the integrity of the judicial process. *People v. Harvey*, 211 Ill. 2d 368, 389 (2004). We review *de novo* the application of the one-act, one-crime rule. *People v. Artis*, 232 Ill. 2d 156, 161 (2009).

¶ 59 We agree with defendant that the 18 counts of aggravated cruelty to an animal arose from the same physical acts as the 18 counts of animal torture, with the acts being starving each of the dogs found. The State concedes error on this issue. Where a defendant is convicted of two crimes based on the same physical act, we vacate the conviction for the less serious offense. *People v. Johnson*, 237 Ill. 2d 81, 97 (2010). Animal torture is a Class 3 felony (510 ILCS 70/3.03(c) (West 2010)), whereas aggravated cruelty to an animal is a Class 4 felony (510 ILCS 70/3.02(c) (West 2010)). Accordingly, we vacate defendant's convictions of aggravated cruelty to an animal.

¶ 60 III. CONCLUSION

¶ 61 For the reasons stated, we affirm defendant's convictions of animal torture but vacate her convictions of aggravated cruelty to an animal under the one-act, one-crime doctrine.

¶ 62 Affirmed in part and vacated in part.