2016 IL App (2d) 140343-U
No. 2-14-0343
Order filed December 20, 2016

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Boone County.
Plaintiff-Appellee,	)	
v.	)	No. 08-CM-287
MARIE SLATER,	)	Honorable John H. Young,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Birkett and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: A circuit court judge properly recused himself due to a perceived conflict and the defendant's subsequent motion for substitution was correctly denied; an error in the jury instructions was harmless; and the trial court's restitution order was not erroneous.

¶ 2 In April 2008, animal control officials in Boone County entered defendant Marie Slater's property, a 40-acre farm in Capron, Illinois, for the purpose of vaccinating and licensing roughly 40 canines that had been observed "running wild" on the property. Defendant's refusal to vaccinate or license her canines had been a longstanding issue between defendant and the local

authorities. When the animal control officials entered the farm, however, they discovered dozens of unhealthy animals—30 dogs, 10 horses, 6 donkeys, and 8 goats—living in filthy conditions. Defendant was taken into custody and the animals were seized and turned over to County authorities for their rehabilitation and, in some cases, to be euthanized.

¶ 3 The State charged defendant with several violations of the Humane Care for Animals Act (Humane Care Act) (510 ILCS 70/1 *et seq.* (West 2008)), and a jury found her guilty of one count of cruel treatment of animals (see 510 ILCS 70/3.01 (West 2008)), and seven counts of violating an owner's duty to provide animals with sufficient nourishment (see 510 ILCS 70/3(a) (West 2008)). The trial court sentenced defendant to 24 months' conditional discharge, ordered defendant to pay various fines and court costs, and ordered defendant to pay roughly $32,000 in restitution. The amount of restitution was based on the costs of caring for defendant's animals pending her conviction, as provided for in the Humane Care Act (510 ILCS 70/3.05, 3.06 (West 2008)). Defendant appeals and raises several issues.

¶ 4 The first issue defendant raises concerns the "loss" of her statutory right to an automatic substitution of the trial judge because a prior circuit judge in the case, in her view, "failed" to recuse himself. We note that defendant did not raise any claim concerning the substitution of judges or of recusal in her posttrial motion, which forfeits review of the issue. See *People v. Wade*, 116 Ill. 2d 1, 9 (1987). The State neglects to point out defendant's forfeiture and defendant neglects to acknowledge her forfeiture and to present the matter for our review under the plain-error exception. Although we would be within our rights to "honor[ ]" defendant's procedural default (*People v. Hillier*, 237 Ill. 2d 539, 545 (2010)), we elect to address the issue because it implicates the judicial system's integrity (*People v. Smeathers*, 297 Ill. App. 3d 711, 715 (1998)), and, furthermore, is easily resolved.

¶ 5 Some background information is required to understand defendant's contention. Section 114-5(a) of the Code of Criminal Procedure (725 ILCS 5/114-5(a) (West 2008)) provides as follows:

> "(a) Within 10 days after a cause involving only one defendant has been placed on the trial call of a judge the defendant may move the court in writing for a substitution of that judge on the ground that such judge is so prejudiced against him that he cannot receive a fair trial. Upon the filing of such a motion the court shall proceed no further in the cause but shall transfer it to another judge not named in the motion." 725 ILCS 5/114-5(a).

In addition to an as-of-right substitution under section 114-5(a), section 114-5(d) provides that: "[a] defendant may move at any time for substitution of judge for cause, supported by affidavit." 725 ILCS 5/114-5(d) (West 2008). A for-cause substitution motion triggers a hearing on the matter before a different judge. "If the motion is allowed, the case shall be assigned to a judge not named in the motion. If the motion is denied the case shall be assigned back to the judge named in the motion." *Id.*

¶ 6 With this statutory framework in mind, we turn to the history of judicial assignments in this case. Defendant was arrested on April 21, 2008, and posted bond that same day. Her criminal case was then assigned to Judge John Young. On April 25, 2008, defendant was arraigned and entered a plea of not guilty. On April 29, 2008, the court held a hearing on the forfeiture of defendant's animals pending trial (510 ILCS 70/3.05, 3.06), at which Becky Tobin, the county administrator who oversees animal control, testified. On May 8, 2008, the court stated that it found probable cause and ordered the animals seized. On July 15, 2008, Judge Young transferred the case to Judge J. Todd Kennedy for defendant to possibly enter a guilty plea. The negotiations proved unsuccessful, however. On November 30, 2008, Judge Kennedy retired (see

http://www.illinoiscourts.gov/supremecourt/jud_conf/AnnualReport/2009/Retired09.pdf (last visited Dec. 12, 2016 as were all other websites in this opinion) and, per the docket sheets, on December 12, 2008, defendant's case was heard by Judge Fernando L. Engelsma who took over Judge Kennedy's court call.

¶ 7 Judge Engelsma presided over the next 28 court dates during which the case was set for trial numerous times, ultimately unsuccessfully. Judge Engelsma was reassigned and, when the case was called for status on April 27, 2012, Judge C. Robert Tobin was presiding. On the first page of the transcript from that court date, defendant (then *pro se*) told Judge Tobin that he had "a conflict of interest" because his sister, Becky Tobin, "[wa]s the one that [had] instigated this lawsuit against me," by which defendant meant her criminal prosecution. Judge Tobin then stated that under the circumstances, he would "certainly *** send it" to a different judge for reassignment. On the prosecutor's suggestion, Judge Tobin entered an order stating that "[defendant's] oral motion for substitution [of judge] is heard [and] granted."

¶ 8 On May 8, 2012, Judge Brendan Maher entered a form order indicating that defendant's substitution motion had been granted "as a matter of right" and assigned the case to Judge Young (again). On May 29, 2012, defendant filed a handwritten motion "for a new judge to replace Judge John Young." The motion did not specify whether defendant sought to invoke an automatic, or as-of-right, substitution under section 114-5(a), or whether defendant was alleging actual prejudice under section 114-5(d). A docket entry from June 26, 2012, indicates that defendant's substitution motion was stricken with leave to refile.

¶ 9 On July 16, 2012, defendant filed an amended substitution motion in which she averred that Judge Young would be actually prejudiced against her and specifically invoked section 114-5(d) of the Criminal Code. First, according to defendant, on April 30, 2012, Judge Young had

stated that he "knew nothing about farming." The context of the alleged statement is unclear from defendant's affidavit and we note there is no entry of any court date on April 30, 2012. In any event, according to defendant, since "the entire case took place on a 40[-]acre farm," Judge Young's alleged statement had caused defendant to file a complaint against him with the Judicial Inquiry Board, which remained "pending" at the time defendant filed her amended substitution motion. In addition, defendant alleged that Judge Young would be prejudiced against her because he "ha[d] already presided over the animal forfeiture part of this case."

¶ 10 On August 21, 2012, Judge Maher held a hearing on defendant's substitution motion at which she presented no evidence. The following day, Judge Maher issued a four-page, single-spaced memorandum order denying defendant's motion. In the order, Judge Maher explained that defendant's conclusory allegations were insufficient and stated that defendant had presented no evidence that Judge Young was actually prejudiced against her. In April 2013, a jury heard the case with Judge Young presiding, which resulted in an unfavorable verdict for defendant.

¶ 11 Defendant takes no issue with Judge Maher's ruling on her motion to substitute for cause. Rather, defendant asserts that Judge Tobin "should have recused himself" pursuant to the judicial canon (see Ill. Code Jud. Conduct, Canon 3 (now Ill. S. Ct. R. 63 (eff. Jan 1, 2016)), and argues that if Judge Tobin had recused himself, she "could have availed herself" of an automatic substitution motion under section 114-5(a) against Judge Young—in other words, *after* the case was reassigned from Judge Tobin to Judge Young by Judge Maher. We note that defendant's argument makes two critical assumptions about the timeliness of her hypothetical automatic-substitution motion. The statute and case law are arguably ambiguous concerning whether the 10-day clock to file an automatic-substitution motion under section 114-5(a) starts anew when a case is reassigned to the trial call of a judge who had previously presided over the matter. And,

case law is ambiguous on whether a stricken substitution motion can toll the 10-day clock for filing automatic-substitution motions under section 114-5(a).

¶ 12 We think either assumption is likely unwarranted since there is no suggestion that the 10-day clock can be tolled or reset at all. See *People v. McDuffee*, 187 Ill. 2d 481, 488 (1999); *People v. Tate*, 2016 IL App (1st) 140598, ¶ 13. Nevertheless, we need not decide those issues to resolve this case because, to the extent defendant is arguing that her automatic-substitution motion would have been filed on the date she filed her first substitution motion, it still would have been too late to warrant Judge Young's automatic substitution. Defendant's case was initially assigned to Judge Young on April 25, 2008, and was reassigned to him on May 8, 2012. Defendant filed a substitution motion on May 29, 2012, which was stricken, and filed a second substitution motion on July 16, 2012. Even if we assume the 10-day clock began anew on Judge Young's reassignment on May 8, 2012, and further assume that defendant's initial stricken substitution motion, filed on May 29, 2012, tolled the 10-day clock—which, again, is unlikely (see *id.*)—it would not matter: Defendant's motion *still* would have been filed 21 days after the re-assignment to Judge Young, which was 11 days too late to merit Judge Young's automatic substitution. *Cf. People v. Hanson*, 120 Ill. App. 3d 84, 87 (1983) ("the defendant must bring himself within the statutory requirements before he has a right to [an automatic] substitution of judges").

¶ 13 But defendant's argument fails for a more basic reason: that Judge Tobin *did* recuse himself at the earliest opportunity under Supreme Court Rule 63. Despite what was indicated in the written order from Judge Tobin and on the form order from Judge Maher, the transcript from the court date before Judge Tobin shows that once the alleged conflict was brought to Judge Tobin's attention, he stated that he would "certainly" remove himself from the case and send the

matter to a different courtroom for reassignment. That transcript of the proceeding, and not the orders mischaracterizing the proceeding, is what controls our review. See *People v. Maxey*, 2015 IL App (1st) 140036, ¶ 46 (where a court's written order conflicts with a transcript of its oral pronouncement, the oral pronouncement controls). And the transcript shows that Judge Tobin recused himself under Rule 63, as opposed to having acceded to a substitution motion under section 114-5(a). *Compare* Ill. S. Ct. R. 63 *with* 725 ILCS 5/114-4(a); see also *Schaller v. Weier*, 319 Ill. App. 3d 172, 177 (2001) (distinguishing between a substitution and a recusal). Moreover, to the extent the prosecutor, Judge Tobin, and, later, Judge Maher all characterized the reassignment as having been on defendant's motion, we note that defendant suffered no prejudice from their mistaken characterization. It was not as though Judge Maher denied defendant's motion to substitute for cause under section 114-5(d) on the basis that defendant had previously filed a substitution motion under section 114-5(a). Judge Maher's memorandum opinion makes clear that he denied defendant's motion *for cause* because, at a hearing on defendant's motion, defendant had failed to *prove cause* under section 114-5(d); *i.e.*, that Judge Young was so prejudiced against her that she cannot receive a fair trial. Again, defendant does not argue that Judge Maher erred concerning her for-cause substitution motion, and since Judge Tobin did in fact recuse himself, we reject defendant's claim that there was *any* error concerning the assignment of her case by the judges of the circuit court.

¶ 14 Defendant's second contention is that the trial court improperly instructed the jury regarding the violation of an owner's duty. Specifically, defendant argues that the issues instructions for the seven charges of violation of owner's duty to provide the animals with sufficient nourishment (see 510 ILCS 70/3(a)) were incorrect because they stated that "[t]o sustain the charge of *neglect* *** the State must prove the following propositions" none of which

required the jury to find that defendant was the animals' "owner." In addition, defendant claims the court erred when it used the word "knowingly" to describe the mental state necessary to commit the offense. Defendant would have preferred the jury find that her neglect of the animals was intentional, since " 'intent' requires a higher degree of culpability than does 'knowledge.' " *People v. Tolliver*, 147 Ill. 2d 397, 406 (1992) (Freeman, J., concurring, joined by Miller, C.J.). Thus, according to defendant she was erroneously found guilty of seven counts of violation of an owner's duty.

¶ 15 These arguments have been forfeited because defendant did not object to the issues instructions nor propose alternative instructions on either issue. *People v. Walker*, 2012 IL App (2d) 110288, ¶ 14 (quoting *People v. Sargent*, 239 Ill. 2d 166, 188-89 (2010)); see also Ill. S. Ct. R. 366(b)(2)(i) (eff. Feb. 1, 1994) ("No party may raise on appeal the failure to give an instruction unless the party shall have tendered it"). Plain-error review allows us to bypass defendant's forfeiture; however, after doing so, we determine that to the extent there was error, it was not plain error. See *id*.

¶ 16 As the State points out, the jury was instructed, pursuant to the Humane Care Act, as follows:

> "A person commits the offense of *owner's duties* to animals when the owner of the animal knowingly fails to provide: a sufficient quantity of good quality, wholesome food and water, or veterinary care when needed to prevent suffering, or [*sic*] humane care and treatment." See 510 ILCS 70/3(a).

The jury was also instructed that an "owner" means "any person who (a) has a right of property in an animal, (b) keeps or harbors an animal, (c) has an animal in his care, or (d) acts as custodian of an animal." 510 ILCS 70/2.06 (West 2008).

¶ 17 We determine that ownership was an essential element of the charged offenses, and thus it was error to not require that the jury determine whether defendant qualified as the animals' "owner." But such errors "will not always justify reversal when the evidence of defendant's guilt is so clear and convincing that the jury could not reasonably have found [the defendant] not guilty." *People v. Pearson*, 252 Ill. App. 3d 1, 14 (1993). Here, the evidence of defendant's ownership of the animals—as that term is broadly defined by the Humane Care Act—was overwhelming. Although defendant testified that the horses "belong" to her son, Mark, there was considerable evidence that defendant "ke[pt,]" "harbor[ed,]" "ha[d] *** in [her] care[,]" and "act[ed] as custodian" for the 30 dogs, 10 horses, 6 donkeys, and 8 goats, and that all were found in poor health and in abysmal conditions. See 510 ILCS 70/2.06. In other words, no reasonable jury could have found that defendant was not the animals' owner. See *Pearson*, 252 Ill. App. 3d at 14.

¶ 18 With respect to the issue of the required mental state, we note that the statute does not provide one, but we determine that the trial court was not incorrect to select the mental state of "knowledge" for the jury instructions. See generally *People v. Anderson*, 148 Ill. 2d 15, 23 (1992) (noting that courts should not automatically assume the legislature intended strict liability when the statute fails to specify a culpable mental state). As our supreme court has explained, criminal neglect is comprised of a series of overt acts, not mere omissions, and a jury may reasonably find that the acts in that series were knowingly and intentionally undertaken as opposed to mere inadvertence. See *People v. Banks*, 161 Ill. 2d 119, 132-35 (1994) (upholding murder conviction in severe case of child neglect). Accordingly, there was no error in instructing the jury that in order to find defendant guilty of violating her duty as an owner that it had to *additionally* find that her underlying acts of neglect were undertaken "knowingly."

¶ 19 Finally, defendant challenges the $32,000 restitution order entered against her as part of her sentence. First, to the extent defendant asserts there was insufficient evidence that the care and disposition of her animals cost $32,000, we note there was considerable evidence as to the costs borne by the County and by its treatment partners for the care and disposition of defendant's animals. Defendant's second assertion is that at least some of these costs, those specific to the goats, were imposed on her improperly pursuant to section 3.06 of the Humane Care Act (510 ILCS 70/3.06(a) (West 2008)). That section provides that:

> "Upon the conviction of the person charged, all animals seized, if not previously ordered forfeited or previously forfeited by operation of law, are forfeited to the facility impounding the animals and must be humanely euthanized or adopted. Any outstanding costs incurred by the impounding facility for boarding and treating the animals pending the disposition of the case and any costs incurred in disposing of the animals must be borne by the person convicted." 510 ILCS 70/3.06(a).

As defendant observes, section 3.06 of the Act "only pertain[s] to companion animals and animals used for fighting purposes." Defendant further notes that her animals were not used for fighting purposes, and that elsewhere in the Act, a "companion animal" is defined as "includ[ing], but *** not limited to, canines, felines, and equines" (510 ILCS 70/2.01a (West 2008). Thus, defendant asserts that section 3.06(a) does not enable the County to recover veterinary costs for the care of her 8 goats, since goats are part of the *bovidae* or bovine family of animals (see generally *Wikipedia: Goat*. https://en.wikipedia.org/wiki/Goat), and she was not charged with any criminal violation for the goats' neglect.

¶ 20 Defendant's assertion overlooks the plain language of both section 3.06(a) and section 2.01a of the Humane Care Act. The purpose of section 3.06(a) is to provide restitution for the

treatment and care of neglected animals; it provides that the costs for care and disposal of "all animals *seized* *** must be borne by the person convicted." (Emphasis added.) 510 ILCS 70/3.06(a). If the legislature intended to limit the amount of recoverable care costs in restitution to only those animals whose neglect resulted in a criminal conviction, it easily could have said as much. In addition, the legislature has noted that its definition of that term is "*not limited to*, canines, felines, and equines." (Emphasis added.) 510 ILCS 70/2.01a. Although one would not normally think of a goat as a "companion animal," one would not normally consider a donkey a companion animal even though it clearly belongs to the *equus* or equine animal family. See *Wikipedia: Donkey*. https://en.wikipedia.org/wiki/Donkey. We determine that the limited purpose of section 3.06(a) is to provide prompt and certain compensation for the care of neglected animals after they have been seized; consequently, for that limited purpose, we determine that defendant's goats qualified as "companion animal[s]" under section 2.01a of the Humane Care Act. See *People v. Almore*, 241 Ill. 2d 387, 396 (2011) (stating that statutes should be interpreted in a manner that furthers the legislature's purpose in its enactment).

¶ 21 For the foregoing reasons, we affirm defendant's conviction and sentence. In addition, as part of our judgment, we grant the State's request and hereby assess defendant statutory State's Attorney's fees of $50 toward the cost of this appeal. See 55 ILCS 5/4-2002(a) (West 2008).

¶ 22 Affirmed.