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ATTORNEY FOR APPELLANT:

MATTHEW D. ANGLEMEYER
Marion County Public Defender Agency
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

NICOLE M. SCHUSTER
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

MICHELLE BOLDEN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0809-CR-843
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Lisa Borges, Judge
Cause No. 49F15-0709-FD-192727

May 22, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Michelle Bolden appeals her convictions, following a jury trial, of four counts of promoting an animal fighting contest, all Class D felonies, one count of possession of animal fighting paraphernalia, a Class B misdemeanor, and four counts of abandonment or neglect of an animal, all Class B misdemeanors. For our review, Bolden raises five issues, which we consolidate and restate as: 1) whether the trial court abused its discretion when it admitted the tape of a 911 call into evidence; 2) whether the trial court abused its discretion when it provided a definition of the word "own" to the jury during deliberation; and 3) whether the evidence is sufficient to sustain Bolden's convictions for promoting an animal fighting contest and possession of animal fighting paraphernalia. Concluding the trial court properly admitted the tape of the 911 call and properly instructed the jury, and sufficient evidence supports the convictions, we affirm.

Facts and Procedural History

On September 17, 2007, an anonymous caller telephoned 911 to report dog fighting at Bolden's residence. The following conversation occurred between the 911 operator and the caller:

Operator:	911, what's your emergency?
Caller:	Uh, I'm just gonna tell ya, 3136 Eastern, in the backyard, Fightin' pit bulls right now. 3136 Eastern. I can see them do that right now, tryin' to get 'em apart.
Operator:	And what's your name, sir?
Caller:	Would you just, it's 3136 Eastern. All right, I got to go cause I know you aint gonna come. [Caller hangs up]

State's Exhibit 2 (transcribed from audio tape).

Indianapolis Metropolitan Police Officer Jeremy Gates was dispatched to the scene. As he approached Bolden's home, Gates was stopped by a school bus. While stopped, Gates observed four to five black males, aged eighteen to twenty-five, moving quickly away from Bolden's house. By the time Gates actually arrived at the house, no one remained. However, Gates saw an unleashed pit bull terrier wandering in front of the house. Gates requested assistance and Marion County Sherriff's Deputy Keith Johnson and Animal Control Officer Jerry Bippus soon arrived.

The officers discovered a total of five dogs, all pit bull terriers, on Bolden's property. In addition to the free-roaming dog, one dog was found injured, lying on its side secured to a fence and three dogs were found in the back yard secured by heavy chains such as would be used to tow a vehicle.[1] Two of the dogs had fresh wounds consistent with dog fighting including puncture wounds, bite wounds, and lacerations. All but one of the dogs had scars from old wounds consistent with dog fighting. In addition, the dogs were covered in mud, feces, and fleas, malnourished, and dehydrated, and several dogs had wound or ear infections.

The officers also discovered a tire suspended from a tree in the back yard bearing bite marks, a stethoscope lying in the corner of the yard, and a bloody leash and bloody bowl in the front of the house. Inside the residence, the officers found a fifty-pound bag of dog food in the kitchen and muddy paw prints in the kitchen and rear entryway. The officers also noticed bite and scratch marks on the back door and the door and walls leading down to the basement.

[1] The chains securing these three dogs weighed 9.4, 11.5, and 12.7 pounds, respectively.

When questioned by the police, Bolden initially denied any responsibility for or knowledge of the dogs in her backyard. However, at trial, Bolden testified she allowed her son to keep a dog at her house and had recently noticed two other dogs were being kept in her backyard as well. Bolden further testified she keeps her kitchen blinds closed, a door separates her kitchen from the rear entryway where the scratch and bite marks were found, she pays no attention to what is happening in the backyard, and she spends much of her time away from the house at work.

On September 18, 2007, the State charged Bolden with four counts of promoting an animal fighting contest, all Class D felonies,[2] one count of possession of animal fighting paraphernalia, a Class B misdemeanor, and five counts of abandonment or neglect of an animal, all Class B misdemeanors. A jury trial was held on July 8, 2008, after which the jury found Bolden guilty of all counts except for one count of neglect or abandonment of an animal. The trial court entered judgments of conviction accordingly and sentenced Bolden to 545 days, 180 days executed as home detention and 365 days suspended to probation, for each of the Class D felonies, and 180 days suspended for each of the Class B misdemeanors, with all sentences to be served concurrently. Bolden now appeals.

Discussion and Decision

I. Admission of the 911 Call

A. Standard of Review

We review the admission of evidence for an abuse of the trial court's discretion. Taylor v. State, 891 N.E.2d 155, 158 (Ind. Ct. App. 2008), cert. denied, 129 S.Ct. 1008

[2] Only four of the five dogs at the scene had scars or injuries consistent with dog fighting.

(2009). An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the trial court. Cochran v. State, 843 N.E.2d 980, 982-83 (Ind. Ct. App. 2006), cert. denied, 549 U.S. 1122 (2007). We do not reweigh evidence, and we consider conflicting evidence in a light most favorable to the trial court's ruling. Cole v. State, 878 N.E.2d 882, 885 (Ind. Ct. App. 2007).

Bolden raises three challenges to the admission of the 911 call: 1) admission of the call violated her Sixth Amendment right to confront witnesses against her under Crawford v. Washington, 541 U.S. 36 (2004); 2) the call is inadmissible hearsay not subject to an exception; and 3) the call presents an opinion of guilt or a legal conclusion prohibited by Indiana Evidence Rule 704(b). We address each of the challenges separately below.

B. Right of Confrontation

The Sixth Amendment's confrontation clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him." U.S. Const. amend. VI.[3] The Sixth Amendment prohibits the admission of "testimonial" statements of a witness who does not appear at trial unless he or she is unavailable to testify and the defendant had a prior opportunity for cross-examination of the witness. Collins v. State, 873 N.E.2d 149, 153-54 (Ind. Ct. App. 2007) (citing Crawford, 541 U.S. at 53-54).

[3] The Indiana Constitution's confrontation clause includes a face-to-face requirement that is separate and in addition to the confrontation right afforded by the Sixth Amendment of the United States Constitution. Ind. Const. art. 1, § 13; Hart v. State, 578 N.E.2d 336, 337 (Ind. 1991). However, Bolden has waived any argument regarding Article 1, section 13, both by failing to raise it before the trial court and by failing to provide a separate Indiana constitutional analysis on appeal. See Richardson v. State, 800 N.E.2d 639, 647 (Ind. Ct. App. 2003) (holding appellant waived Article 1, section 13, argument by failing to make any separate argument specific to the State constitutional provision).

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis v. Washington, 547 U.S. 813, 822 (2006).

Here, the 911 call consists entirely of volunteered statements made by the caller: "3136 Eastern, in the backyard, fightin' pit bulls right now. 3136 Eastern. I can see them do that right now, tryin' to get 'em apart." State's Exh. 2 (transcribed from audio tape). Prior to these statements by the caller, the 911 operator had only asked "What's your emergency?" Id. After the statements, the operator asked for the caller's name; however, the caller gave no new information after the request. The caller made the call with the clear intent of having police respond to the scene. In addition, the caller was describing ongoing criminal conduct, which posed a risk of harm not only to the dogs, but also to the participants and the surrounding community should the dogs get loose.

In Collins, the 911 operator questioned a caller reporting a murder regarding the identity of the killer, the identity of the victim, the location of the crime, the vehicle driven by the killer and whether the caller knew his present location. 873 N.E.2d at 154. This court held the statements were nontestimonial, and "their primary purpose was to assist police in meeting an ongoing emergency." Id. at 155. Similarly, here, the caller is not attempting to provide evidence to convict Bolden; rather, the caller is simply trying to inform the police that a crime is occurring at a certain location. In addition, the statements were volunteered and not the product of detailed questioning by the 911

operator or by police. Therefore, the statements made in the 911 call are nontestimonial and their admission did not violate Bolden's Sixth Amendment right of confrontation under Crawford.

C. Inadmissible Hearsay

An out-of-court statement offered in evidence to prove the truth of the matter asserted is hearsay and is inadmissible except as provided by law or the Indiana Rules of Evidence. Ind. Evidence Rules 801(c) and 802. The present sense impression exception provides "[a] statement describing or explaining a material event, condition or transaction, made while the declarant was perceiving the event, condition or transaction, or immediately thereafter" is not excluded by the hearsay rule. Evid.R. 803(1); Jones v. State, 780 N.E.2d 373, 376-77 (Ind. 2002) (present sense impression rule "requires the statement to describe or explain the event or condition during or immediately after its occurrence, and it must be based on the declarant's perception").

The 911 caller stated "3136 Eastern, in the backyard, fightin' pit bulls right now. 3136 Eastern. I can see them do that right now, tryin' to get 'em apart." State's Exh. 2 (transcribed from audio tape). Here the caller clearly expresses that he is witnessing the event as he describes it to the 911 operator. In addition, the caller is describing exactly what he is seeing, providing the address, location, and activity occurring. Therefore, the statements in the 911 call meet the present sense impression exception to the hearsay rule.

D. Legal Conclusion

Indiana Evidence Rule 704(b) provides "[w]itnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case …." Bolden provides no citations to authority to support her argument that the statements made in the 911 call violate Indiana Evidence Rule 704(b), and therefore she has waived the argument for review. See Ind. Appellate Rule 46(A)(8)(a); Matthews v. State, 866 N.E.2d 821, 826 (Ind. Ct. App. 2007), trans. denied. Waiver notwithstanding, Bolden's argument has no merit. The statements made to the 911 operator express no opinions regarding the intent, guilt, or innocence of Bolden. At best, they express an opinion of the intent of the persons present at the time of the call. However, the evidence clearly demonstrated that Bolden was not at her home at that time.

In addition, Bolden overlooks Indiana Evidence Rule 704(a), which states "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable merely because it embraces an ultimate issue to be decided by the trier of fact." The caller expresses his opinion that a dog fight is occurring based on his observation of ongoing activities. The caller does not express an opinion of Bolden's intent, guilt, or innocence in relation to the charges she faced, or mention Bolden by name at all. In addition, none of Bolden's charges stem from that specific dog fight. Therefore, the admission of the 911 call does not violate Indiana Rule of Evidence 704(b).

In light of the foregoing discussion, the trial court did not abuse its discretion when it admitted the 911 call into evidence.

II. Instruction of the Jury

A. Standard of Review

The manner of instructing the jury lies within the trial court's sound discretion. State v. Snyder, 732 N.E.2d 1240, 1244 (Ind. Ct. App. 2000). Thus, the trial court's ruling will not be reversed unless the instructional error is such that the charge to the jury misstates the law or otherwise misleads the jury. Id. Bolden challenges the trial court's supplemental instruction defining the word "own" in response to a question from the jury during deliberations.

As a general rule, once jury deliberations commence, the trial court should not give any additional instructions. Hero v. State, 765 N.E.2d 599, 602 (Ind. Ct. App. 2002), trans. denied. However, Indiana Code section 34-36-1-6 "empowers a [trial] court to respond to either juror disagreement over testimony or the jury's desire 'to be informed as to any point of law arising in the case.'" Ronco v. State, 862 N.E.2d 257, 260 (Ind. 2007) (quoting Ind. Code § 34-36-1-6.). Indeed, "[t]he trial court must respond to a jury question regarding a point of law involved in the case." Id. (emphasis added).

B. Definition of "Own"

The trial court received the following questions from the jury: "Question number one, we need clarification on does possession of an animal qualify as ownership. Number two, does possession after a certain amount of time denote ownership? And three, what is the definition of ownership?" Transcript at 516. The trial court convened both counsel, read the questions, and engaged in a lengthy discussion regarding the trial court's proper response. The trial court concluded it could not answer questions one or

two because they ask for an interpretation of the law as applied to the facts of the case, but it could answer question three because it is a pure legal question. The trial court then decided to instruct the jury with the definition of "own" contained in its copy of Black's Law Dictionary: "the definition of own is to have a good legal title, to hold as property, to have a legal or rightful title to, to have, to possess." Id. at 537. Bolden agreed that the trial court should issue a supplemental instruction defining the word "own"; however, she objected to the actual instruction because it equated possession with ownership.

The trial court's original instructions did not include a definition of the word "own" as that word is used in its instruction of the elements of the crime of abandonment or neglect of an animal. The jury's request for such a definition presents a question of statutory interpretation, which is a pure question of law. See Houston v. State, 898 N.E.2d 358, 361 (Ind. Ct. App. 2008). Therefore, the trial court was required to respond to the jury's request by clarifying the definition of "own" as used in Indiana Code section 34-46-3-7.

The Indiana Code does not define "own" or "owner" in the context of offenses relating to animals in chapter 34-46-3. However, within the context of dog bites, the Code defines "owner" to include "a person who possesses, keeps, or harbors a dog." Ind. Code § 15-20-1-2. The trial court conducted searches of several online dictionaries and Black's Law Dictionary, all of which included possession in the definition of ownership. In addition, our supreme court has affirmed a conviction for abandonment or neglect of a dog left in the care of the defendant by its owners.

In Trimble v. State, 842 N.E.2d 798 (Ind. 2006), adhered to on reh'g, 848 N.E.2d 278, Trimble agreed to care for a dog after its owners moved from his farmhouse. 842 N.E.2d at 800. On rehearing, our supreme court held the evidence of the dog's starved appearance, injured leg, and frost bitten extremities was sufficient to allow the judge to infer that Trimble was responsible for feeding and caring for the dog and failed to do so despite Trimble's testimony to the contrary. 848 N.E.2d at 279. This holding also supports the notion of including possession in the definition of ownership in the context of the crime of neglect or abandonment of an animal. Where the language of a statute is clear and unambiguous, the words and phrases in the statute should be understood in their plain, ordinary, and usual sense. Houston, 898 N.E.2d at 361. In light of the consensus of the sources discussed above, the trial court did not abuse its discretion when it instructed the jury on the definition of the word "own."

III. Sufficiency of the Evidence

A. Standard of Review

In reviewing sufficiency of the evidence claims:

> [we] must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. [T]he evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (citations and quotations omitted) (emphasis in original). When reviewing a case based on circumstantial evidence, we ask whether reasonable minds could reach the inferences drawn by the jury. Fuller v. State, 674 N.E.2d 576, 578 (Ind. Ct. App. 1996) (citing Gibson v. State, 643 N.E.2d 885, 888 (Ind. 1994)).

B. Promoting an Animal Fighting Contest

In order to sustain a conviction for promoting an animal fighting contest, the State had to prove beyond a reasonable doubt that Bolden: (1) knowingly or intentionally possessed animal fighting paraphernalia; (2) with the intent to commit a violation of Indiana Code section 35-46-3-9;[4] and (3) possessed, harbored, or trained a dog bearing a scar, a wound, or an injury consistent with participating in or training for an animal fighting contest. Ind. Code § 35-46-3-9.5. Bolden argues that there is insufficient evidence to prove any of the three elements.

1. Possession of Animal Fighting Paraphernalia

As to the possession of paraphernalia, we note the police officers found a hanging tire with bite marks, a stethoscope, several heavy chains, and a lighter, longer chain all on Bolden's property. Bippus testified that these items were consistent with use for dog fighting. Specifically, Bippus testified the hanging tire is used to strengthen the jaws and neck muscles of the dogs and for hanging contests; the stethoscope is used to check a dog's heart rate after a fight and to check for a punctured lung; the heavy chains are used to strengthen the dogs; and the longer, lighter chain is used to secure a "bait dog" used to

[4] A person violates Indiana Codes section 35-46-3-9 if the person "[k]nowingly or intentionally: (1) promotes or stages an animal fighting contest; (2) uses an animal in a fighting contest; or (3) attends an animal fighting contest having an animal in the person's possession."

provoke and train the fighting dogs. Although Bolden maintains that she had no idea what was going on in her back yard, it is reasonable for the jury to disbelieve her and infer that she was aware of the presence of items located on her own property. This is especially true given the evidence that the dogs had been inside the house and that Bolden kept the dogs' food inside the house.

2. Intent to Promote or Use an Animal in a Fighting Contest

Next Bolden argues that there is no evidence she intended to violate Indiana Code section 35-46-3-9. Bolden claims there is no evidence that she "had actual knowledge of any dog fights or facilitated them in any way." Brief of Appellant at 23. Only one case, Fuller, has addressed the sufficiency of evidence supporting a conviction of promoting or staging an animal fighting contest or using an animal in a fighting contest. In Fuller, police officers arrived at Fuller's residence in response to a report of dog fighting. 674 N.E.2d at 577. They encountered Fuller in front of the house; walking to the rear of the house, the officers saw two men holding two pit bull dogs by the legs within five feet of each other. Id. Both dogs had open, bleeding wounds. Id. Officers also discovered heavy chains, blood stains, and several dead dogs on the property. Id. at 577, 579. This court affirmed Fuller's conviction concluding there was substantial evidence of probative value from which a jury could reasonably infer that Fuller staged animal fighting contests and used an animal in a fighting contest. Id. at 579.

Admittedly, the circumstantial evidence against Bolden is not as damning as that against Fuller. However, the evidence is substantial nonetheless. The police officers found four dogs secured by chains on Bolden's property along with dog houses and

various devices used to train dogs for fighting. Four of the five dogs discovered had extensive scars and injuries consistent with dog fighting. The officers also found a bloody collar and a bloody dog bowl in the front of the house. In addition, there was evidence from which the jury could infer that Bolden fed the dogs and that the dogs were sometimes confined inside her house. A jury could reasonably infer that Bolden knew there were pit bulls being kept on her property and that dog fighting contests were being staged there, or at least knew the dogs were used in dog fighting contests. The decision of whether to believe Bolden's version of events is one for the jury and we will not reweigh their decision. Drane, 867 N.E.2d at 146-47.

3. Possessing, Harboring, or Training Dogs for Fighting Contests

With respect to possessing, harboring, or training of the dogs, Bolden argues only that there is no evidence she knew about the scars or new injuries. Once again, a reasonable jury could infer that Bolden knew the dogs were in her backyard, that she fed the dogs, and that the dogs had been confined in the house. Based on this evidence, it is reasonable to assume that Bolden had at least seen the scars. In addition, the statute does not require that Bolden know of the existence of the scars, only that she possess, harbor, or train an animal bearing such injuries or scars, and the evidence is sufficient to allow a reasonable jury to so find. As a result, the evidence is sufficient to sustain Bolden's conviction for promoting an animal fighting contest.

C. Possession of Animal Fighting Paraphernalia

In order to convict Bolden of possession of animal fighting paraphernalia, the State had to prove beyond a reasonable doubt that Bolden knowingly or intentionally

possessed animal fighting paraphernalia with the intent to commit a violation of Indiana Code section 35-46-3-9. With respect to this claim, Bolden re-raises the above arguments. Similarly, we point to our above discussion, specifically parts III.B.1 & 2 in holding the evidence is sufficient to sustain Bolden's conviction for possession of animal fighting paraphernalia.

Conclusion

The trial court did not abuse its discretion when it admitted the 911 call into evidence. The trial court also did not abuse its discretion when it instructed the jury on the definition of "own." Finally, the evidence is sufficient to support Bolden's convictions for promoting an animal fighting contest and possession of animal fighting paraphernalia.

Affirmed.

DARDEN, J., and BAILEY, J., concur.