

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERNEST HAROLD LEACH,

Defendant-Appellant.

UNPUBLISHED

September 19, 2006

No. 260819

Oakland Circuit Court

LC No. 2004-196002-FH

Before: Murray, P.J., and Smolenski and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of willfully and maliciously killing an animal, in violation of MCL 750.50b. He was sentenced to probation for one year and ordered to pay a fine, costs, and fees totaling approximately \$1,400. Because we do not find MCL 750.50b unconstitutionally vague and further find sufficient evidence in support of defendant's conviction, we affirm.

Defendant's conviction arises from the killing of a rabbit during the execution of a civil court order at defendant's home on April 15, 2004. At trial, the prosecution presented evidence that community development and other personnel from the city of Pontiac went to defendant's home to clean it and remove unsafe structures and Pontiac police officers were present to provide security. Animal control personnel removed a couple of dogs and checked on the welfare of some caged rabbits, but did not remove the rabbits.

Pontiac Police Officer Joseph Marougi testified that he asked defendant to move the rabbits so that they would not be harmed when a shed near the rabbits was torn down. According to Officer Marougi, defendant became angry and told Officer Marougi to contact animal control if he wanted the rabbits moved. After Officer Marougi indicated that he would do so, defendant said that he would move the rabbits. Defendant then pulled a rabbit out of a cage, said "I'm going to kill all the rabbits before animal control gets here," slammed the rabbit against a camper located next to the cage, threw the rabbit down to the ground, and said that it was dead. At this point, defendant was arrested. Pontiac Police Officer Cedric Bell testified that he also saw defendant become angry and pull the rabbit out of the cage and kill it. Officer Bell further testified that when he first arrived at defendant's residence, defendant informed him the rabbits were pets.

Conversely, defendant testified that he took the rabbit from his wife, pushed Officer Marougi out of the way, said that he was going to kill the rabbit, and then did so by bumping it against the camper. Defendant denied that he killed the rabbit because he was angry. Rather, defendant claimed that he intended to use the rabbit as food and that he believed he was acting within the scope of customary animal husbandry when he killed the rabbit. Defendant indicated that he had raised rabbits for food for as long as he could remember. Defendant also indicated that he probably would have killed all the rabbits if he had not been arrested, inasmuch as he feared that personnel at the scene would take them.

Defendant first argues on appeal that MCL 750.50b is unconstitutionally vague on its face and as applied in this case. Because defendant did not raise this constitutional issue in the trial court, we review it under the standard for unpreserved issues set forth in *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999), to determine whether defendant has established plain error affecting his substantial rights. See also, *People v Sands*, 261 Mich App 158, 160; 680 NW2d 500 (2004). An inquiry into the constitutionality of a statute is guided by the following general principles:

Statutes are presumed to be constitutional unless their unconstitutionality is clearly apparent. *In re AH*, 245 Mich App 77, 82; 627 NW2d 33 (2001). Statutes must be construed as proper under the constitution if possible. *In re Trejo Minors*, 462 Mich 341, 355; 612 NW2d 407 (2000). The party opposing the statute bears the burden of overcoming the presumption and proving the statute unconstitutional. *Id.*; *In re AH*, *supra* at 82. This Court must consider the factual evidence in the light most favorable to the prosecution, *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000), and leave questions of credibility for the jury, *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). [*People v MacLeod*, 254 Mich App 222, 226; 656 NW2d 844 (2002).]

A penal statute may be unconstitutionally vague if it (1) fails to provide fair notice of the conduct proscribed, (2) permits arbitrary and discriminatory enforcement, or (3) is overbroad and impinges on First Amendment freedoms. *People v Boomer*, 250 Mich App 534, 539; 655 NW2d 255 (2002). Because defendant's constitutional challenge does not implicate First Amendment rights, we limit our review to defendant's claim that the statute is constitutionality vague as applied to the alleged conduct in this case, without concern for the hypothetical rights of others. *People v Vronko*, 228 Mich App 649, 652; 579 NW2d 138 (1998). Thus, viewing the factual evidence in a light most favorable to the prosecution, we consider defendant's claim in light of the trial evidence indicating that defendant killed the rabbit in a display of anger arising from the execution of a court order.

Examined in this factual context, we reject defendant's argument that the statute is unconstitutionally vague as applied because it does not provide fair notice of that proscribed conduct. "To afford proper notice of the conduct proscribed, a statute must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Sands*, *supra* at 161. The meaning of the statute must be fairly ascertainable by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meaning of words. *Id.* It cannot use terms requiring persons of ordinary intelligence to speculate regarding its meaning and differ about its application. *Id.*

The statute at issue provides, in pertinent part, that “a person who willfully, maliciously, and without just cause or excuse kills, torture, mutilates, maims, or disfigures an animal . . . is guilty of a felony” MCL 750.50b(2). The Legislature enacted the statute as a general intent crime, but the malice element requires that the defendant commit the prohibited act while knowing that his or her actions were wrong, and without just cause or excuse. See *People v Fennell*, 260 Mich App 261, 269-270; 677 NW2d 66 (2004).

The statute expressly “does not prohibit the lawful killing of livestock or a customary animal husbandry or farming practice involving livestock.” MCL 750.50b(7). Here, we are presented with the issue whether the phrase “lawful killing of livestock” is vague.

MCL 750.50b(7) provides that “livestock” is defined as used in the Animal Industry Act, MCL 287.701 to 287.747. The Animal Industry Act defines “livestock” as “those species of animals used for human food and fiber or those species of animals used for service to humans,” and specifically lists “rabbits” within the definition. MCL 287.705(2). Although MCL 750.50b(7) does not expressly define what constitutes a lawful killing, the word “lawful” is commonly understood to mean “allowed by law” and “sanctioned by law.” *Random House Webster’s College Dictionary* (1997), p 743. A person of ordinary intelligence would have a reasonable opportunity to know from this statutory language that the killing of a rabbit must be sanctioned by law in order to invoke the “lawful killing of livestock” provision in MCL 750.50b(7). It provides fair notice of the conduct that is not prohibited by MCL 750.50b and, hence, is not unconstitutionally vague.

We reject defendant’s alternative claim that the statute permits arbitrary and discriminatory enforcement of the statute. A penal statute is unconstitutionally vague if it confers unstructured and unlimited discretion on a trier of fact to determine whether an offense has been committed. *Vronko, supra* at 654. The Legislature must establish minimal guidelines to govern law enforcement (*People v Petrella*, 424 Mich 221, 254-258; 380 NW2d 11 (1985)) and basic policy decisions should not be delegated to policemen, judges, and juries to resolve on an ad hoc or subjective basis. *In re Forfeiture of 719 N Main*, 175 Mich App 107, 112-113; 437 NW2d 332 (1989).

Although a lawful killing of livestock is required to invoke the exception in subsection (7), the Legislature did not give the trier of fact discretion to determine the law. The straightforward language in the statute prohibits the malicious and wilful killing of an animal without just cause, excepting the lawful killing of livestock or a customary animal husbandry practice involving livestock. “Malicious”, “willful”, and “without just cause” are sufficiently specific terms with commonly understood meanings such that enforcement of the statute will not be arbitrary or discriminatory. Therefore, subsection (7) cannot be said to render the statute unconstitutionally vague, as applied in this case.

Further, while defendant intertwines the arguments, whether there was evidence that defendant’s killing of the rabbit was sanctioned by law and whether the trial court properly instructed the jury regarding subsection (7) and how that exception relates to the elements of the offense set forth in MCL 750.50b(2) present distinct questions. We decline to address any instructional issue, however, because defendant has not properly presented any claim of instructional error on appeal. See *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999) (failure to brief merits of allegation of error is deemed abandonment of the issue); *People*

v Brown, 239 Mich App 735, 748; 610 NW2d 234 (2000) (argument not raised in the statement of the issues presented is not preserved for appellate consideration); MCR 7.212(C)(5).

Regarding defendant's challenge to the sufficiency of the evidence, we hold that the evidence, viewed in a light most favorable to the prosecution, was sufficient for the jury to find beyond a reasonable doubt that defendant killed the rabbit willfully, maliciously, and without just cause or excuse. MCL 750.50b(2). The prosecution was only required to prove its own theory beyond a reasonable doubt in the face of any contradictory evidence provided by defendant. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Two versions of the event were presented—one that defendant killed a pet rabbit out of anger or frustration, and one that defendant killed the rabbit for purposes of consumption as he allegedly had for years' prior. The jury was free to believe either version of the event. Moreover, even if defendant customarily engaged in animal husbandry or previously lawfully killed rabbits for his own consumption, the jury could reasonably find that defendant's killing that rabbit at that time was a willful and malicious killing undertaken without just cause and for purposes other than animal husbandry.

Affirmed.

/s/ Christopher M. Murray

/s/ Michael R. Smolenski

/s/ Deborah A. Servitto