STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF LEELANAU

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellee,

v

File Nos. 2014009227AR (Consolidated)
HON. PHILIP E. RODGERS, JR.

WILLIAM KASBEN,

Defendant/Appellant.
_____/

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DECISION AND ORDER DENYING APPEAL

The above, consolidated appeal stems from an action in the 86th District Court for violation of the Leelanau County Animal Control Enforcement Ordinance.[1] Defendant/Appellant was convicted and sentenced to serve 90 days in jail, with 45 days held in abeyance pending one-year of probation. The Defendant/Appellant (hereinafter "Appellant") filed a Claim of Appeal with the 13th Circuit Court on February 15, 2013.[2]

Subsequently, the Appellant was charged with a probation violation on August 9, 2013. He pled not guilty and a probation violation hearing was held on January 17, 2014. Appellant was found guilty of the violation, his probation was revoked and he was ordered to serve the remaining 45 days of his jail sentence. On January 29, 2014, the Appellant filed a Claim of Appeal with the Circuit Court.[3]

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[1] Defendant/Appellant was charged under Article IX §1(g), Allowing Livestock to be at Large.
[2] This Appeal was assigned Case No. 2013008976AR.
[3] This Appeal was assigned Case No. 2014009227AR.

On May 5, 2014, the Court issued an Order of Consolidation consolidating Case No. 2013008976AR and Case No. 2014009227AR and ordering the parties to file briefs in conformance with MCR 7.111. Appellant filed his brief on June 2, 2014, and Appellee filed his brief on July 23, 2014.[4] The Court having now reviewed all documents submitted, dispenses with oral argument, pursuant to MCR 2.119(E)(3), and in consideration of the parties' arguments and the evidence, the Court now issues this written decision and order.

I. THE TRIAL COURT VIOLATED DEFENDANT'S RIGHT TO PRESENT A DEFENSE AND TO A FAIR TRIAL WHEN IT ABUSED ITS DISCRETION WHEN IT EXCLUDED EXHIBITS WITHOUT FOLLOWING MCR 6.201(J) DEFENDANT WAS DEPRIVED OF A FAIR TRIAL

Court Rule 6.201, pertaining to discovery, states in part, "If a party fails to comply with this rule, the court, in its discretion, may order the party to provide the discovery or permit the inspection of materials not previously disclosed, grant a continuance, prohibit the party from introducing in evidence the material not disclosed, or enter such other order as it deems just under the circumstances." When determining the appropriate remedy for discovery violations, the trial court must balance the interests of the courts, the public and the parties in light of all the relevant circumstances, including the reasons for noncompliance.[5] A trial court has the inherent power to control the admission of evidence in order to promote the interests of justice.[6] Discovery sanctions are reviewed for abuse of discretion.[7]

Mandatory disclosure requires that a party must provide to all other parties a description of and an opportunity to inspect any tangible physical evidence that the party may introduce at trial, including any document, photograph or other paper, with copies to be provided on request.[8] The relevant discovery materials in this case were photographs of fences located on Appellant's property. However, Appellant first produced this discovery material the morning of trial.[9] The proposed photographs were electronically stored and the Appellant did not bring the appropriate

[4] Pursuant to the Order of Consolidation, Appellee's Brief was to be filed on or before June 23, 2014. Appellant filed a Motion to Strike on August 1, 2014, and Appellee filed a Response to Appellant's Motion to Strike on August 5, 2014. See FN 39, *infra*.
[5] *People v Greenfield*, 271 Mich App 442; 722 NW2d 254 (2006).
[6] *Id*.
[7] *Dean v Tucker*, 182 Mich App 27; 451 NW2d 571 (1990).
[8] MCR 6.201((A).
[9] Appellant indicated he had photographs for "rebuttal" at an earlier motion hearing and the trial court stated, "If you don't produce [the photographs] and then you try to get it in it won't come in at trial if you don't produce it, so it's better to err on the side of caution and whatever requests that you produce you really – well, you have to produce, otherwise it can't come in at trial." Motion Hearing Transcript, January 18, 2013, page 32.

technology to display the photographs, nor did he have physical copies of the photographs. Further, Appellant indicated to the trial court that he would not use his scan disk photographs and would instead use the prosecutor's photographs of the fence during the trial.[10] While the Appellant failed to comply with the mandatory disclosure rule, he also indicated to the trial court, on the record, that he would use the prosecutions photographs in lieu of his own, therefore, the trial court properly excluded the photographs at trial.

II. UNDER THE PLAINT LANGUAGE OF ARTICLE 9, SECTION 1, PARAGRAPH G OF THE LEELANAU COUNTY ANIMAL CONTROL ENFORCEMENT ORDINANCE, AND DUE PROCESS, APPELLANT COULD NOT BE CONVICTED OF THE CRIME OF ALLOWING HIS CATTLE TO RUN AT LARGE. THE TRIAL COURT ERRED IN MISINSTRUCTING THE JURY.

On December 14, 2012, the trial court held a hearing to discuss jury instructions and proposed trial witnesses.[11] At this hearing, the Honorable Judge Michael S. Stepka, noted that the prosecutor had timely filed his Witness List, a Motion to Introduce 404(b) Evidence and a proposed special jury instruction, but Appellant had failed to file any of the documents as instructed on November 30, 2012.[12] Regardless, the trial court agreed to let Appellant late-file his witness list and proceeded with the hearing on the special jury instruction. The relevant section of the Leelanau County Animal Control Ordinance states:

> It shall be unlawful for any person who owns, possesses or has custody or control of a dog or other animal, livestock and/or poultry where:
> (g) The livestock or poultry are allowed to run at large unaccompanied by its owner upon the premises of another or upon any public street, lane, alley or other public ground in the County unless otherwise the preceding specifically allowed.

The prosecutor proposed the following special jury instruction be read at trial:

> Article 9, Section 1, Paragraph G of the Leelanau County Animal Control Enforcement Ordinance provides that allowing livestock to be at large is a

[10] In addition, when discussing the discovery request sent by the prosecutor and the production of Appellant's proposed photographs, Appellant stated, "Your Honor, I got it last week. Your Honor, that's no problem. If – all it was, was pictures of the fence, I won't introduce any, I'll use [the prosecutor's]."

[11] This particular hearing was scheduled by the trial court at the conclusion of jury selection on November 30, 2012. On November 30, 2012, the trial court instructed the prosecutor and Appellant to file their respective witness lists with anticipated testimony and proposed jury instructions by December 7, 2012. See Conclusion of the Jury Selection Instructions from the Court Regarding Filing of Witness Lists and Jury Instructions from November 30, 2012.

[12] See Motion Transcript from December 14, 2012; pages 3 and 4.

violation of the ordinance. In the ordinance, the word 'allow' means 'failure to take reasonable care and effort to contain livestock to prevent escape.'

The trial court indicated:

> That [instruction] would allow [the jury], I would imagine, to determine [the question of whether or not Appellant takes reasonable care and effort to contain the animals within the appropriate structures on the farm.] Let's assume for the moment that some fencing was not properly maintained or perhaps a gate was inadvertently left open, or a tree fell on a fence, maybe acknowledgement of that. But if [jurors] believe that you didn't take reasonable steps to, you know, make sure the fences were in good repair, the gates were closed and that kind of thing, and that's how the animals got out, then they'd be able to interpret—or use this instruction to find you guilty. It doesn't mean—it doesn't have anything to do with you intentionally allowing them to run at large, nor does it have anything to do with ownership of the animals. Basically, what it means is if you possessed these animals, regardless of who they belonged to, on your property and you didn't take steps to make sure that they were contained—reasonable steps to make sure that they were contained to prevent their escape, because you had control over these animals, it is your property, you're charged with the duty to make sure they don't escape using reasonable fencing or whatever. So that's what the instruction means. I think it appropriate; it comports with the ordinance statute.[13]

Appellant then informed the court that he had previously delegated responsibility for his livestock and was not liable for the animals being at large. The court explained to Appellant the principle of agency and that Appellant was still responsible for the action or inactions of his agent.[14]

The special jury instruction was given at the trial and Appellant now argues that this instruction improperly interpreted the ordinance and went beyond the legal definition of the word "allowing."

Appellant's interpretation of the ordinance requires that a person who owns/possesses/has custody or control of an animal "permit" or specifically intend to let their animal run at large. However, one can act negligently, without specific intent, and still "allow" or "permit" their

[13] *Id*. at pages 6-7. At a motion hearing on January 18, 2013, the court again told the Appellant that, "If you're not keeping an eye on your fences all the time to be sure that they're strong enough to prevent this from happening and these animals are getting out, then, you know, that could be seen as permitting them to get out," and "the way the instructions reads is that if you, you have, to violate the ordinance you have to allow the livestock to run at large; allow is defined as failing to take reasonable care and effort to contain the livestock, prevent escape." Motion Hearing Transcript from January 18, 2013; pages 10-12.

[14] *Id*. at pages 10-12. After additional discussion with the Appellant, the court instructed the Appellant that he would need to provide evidence of his agent's joint ownership of the property and animals at trial.

animal to run at large. The owner/possessor/custodian of the animal need not intentionally unlatch the gate or open the barn door to violate the ordinance. The instruction, as read to the jury, indicates that an individual may "allow" their animal to run at large by failing to act in a reasonable manner or by acting negligently.

Appellant's interpretation of the word "allowing" is contrary to the plain meaning and intent of the ordinance. Leelanau County's Animal Control Ordinance prohibiting the allowing of animal to run at large is not a specific intent crime and the term "allowing" includes culpable negligence in failing to adequately contain the animals. Therefore, the trial court did not err in instructing the jury that "allow" means failure to take reasonable care and effort to contain livestock to prevent escape.

III. WHERE THE PROSECUTION WAS PERMITTED TO OFFER IN ITS CASE IN CHIEF EVIDENCE [OF] THE APPELLANT'S OTHER, UNRELATED, UNCHARGED ACTS OF CATTLE GETTING OUT, AND WHERE THIS EVIDENCE DID NOT MEET THE STANDARDS FOR ADMISSIBILITY UNDER MRE 404(B) OR THE DUE PROCESS CLAUSES, AND WHERE THE EVIDENCE WAS MORE PREJUDICIAL THAN PROBATIVE, THE APPELLANT WAS DEPRIVED OF A FAIR TRIAL.

Prior to trial, the prosecutor provided Appellant with a 404(b) Notice and the trial court indicated to Appellant that he would allow the prosecutor to introduce the prior acts evidence at trial to show that it was not an accident that Appellant's animals were loose.[15]

At trial, Appellant asked witness Corey Miller, "You understand that the charges here are that I allowed [the cattle] to be out? …and…that means I don't take reasonable – put reasonable effort into keeping [the cattle] in?" After the witness answered, "Yes." The Appellant asked, "Do you see anything unreasonable about the fences or anything that allowed these cattle to be out in these two instances?"[16] In essence, Appellant was questioning whether the witness had any evidence to show that he had not taken reasonable care to contain his animals. The trial court explained, "I think by asking whether [the witness] believed that you took reasonable care or effort to contain your livestock, I think that suggests that there were other incidents because that would help [the witness] if there were such incidents, that would help [the witness] form the belief that you hadn't been taking reasonable steps."[17] On re-direct, the court allowed the prosecutor to ask the witness about other occasions where the Appellant's animals had been at

[15] *Id*. at page 17.
[16] Emphasis added.
[17] Trial Transcript from February 8 2013; page 38.

large and Appellant objected. Appellant's objection was overruled and he now asserts that uncharged acts evidence did not meet the standards for admissibility under MRE 404(b).

MRE 404(b) states:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Appellant's string of questions to the witness clearly opened the door for her to discuss her perception of Appellant's negligence. The prosecutor asked about other instances where the Appellant's livestock was at large to demonstrate Appellant's knowledge that the fences were inadequate and/or that the animals being at large was not an accident, as claimed by Appellant. Evidence of other uncharged acts is admissible to demonstrate knowledge and absence of mistake. Therefore, the trial court did not err in allowing the prosecutor to ask about other uncharged acts.

IV. THE PROSECUTOR DENIED APPELLANT HIS RIGHT TO DUE PROCESS AND A FAIR TRIAL BY ASKING THE JURY TO CONVICT HIM FOR THE FREQUENCY OF CATTLE ESCAPING AS PROOF OF ONGOING CRIMINAL ACTIVITY OF VIOLATIONS OF AN ORDINANCE.

Claims of prosecutorial misconduct are decided on a case by case basis.[18] A prosecutor's comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to evidence admitted at trial.[19] In closing, the prosecutor stated:

> And the People would concede that on occasion and at time animals escape. And on each and every occasion when an animal escapes criminal charges are not appropriate, but it becomes an issue of frequency, it becomes an issue of the proof being in the pudding and when the animals are continuously at large, that's evidence in and of itself of a failure to take reasonable precautions to adequately contain them on the property.

Appellant argues that this closing statement made by the prosecutor rose to the level of prosecutorial misconduct, which violated his due process because it infected the trial with unfairness that rendered the trial fundamentally unfair.

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[18] *People v Noble*, 238 Mich App 647; 608 NW2d 123 (1999).
[19] *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

Before a trial begins, the jury is instructed that "After all the evidence has been presented, the prosecutor and the defendant's lawyer will make their closing arguments. Like opening statements, **these are not evidence**. They are only meant to help you understand the evidence and the way each side sees the case. **You must base your verdict only on the evidence**."[20] Further, the jury is instructed there are some things presented during trial that are not evidence, including the lawyers' statements, questions and arguments.[21]

The jury in this case heard from the trial court that their decision must be based on the evidence and that the prosecutor's closing statement is not evidence. As discussed above, the uncharged acts presented to the jury were admissible under MRE 404(b). Therefore, the mention of the uncharged acts in the prosecutor's closing was proper given the facts and circumstances of the case. This Court does not find that the prosecutor's comments rose to the level of prosecutorial misconduct, nor violated the Appellant's due process.

V. REVERSAL ON ALL COUNTS IS REQUIRED BECAUSE THE PROSECUTION FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT FAILED TO TAKE REASONABLE CARE AND EFFORT TO CONTAIN LIVESTOCK TO PREVENT ESCAPE.

Appellant further claims that the prosecution failed to establish guilt beyond a reasonable doubt. In determining whether a verdict was against the great weight of evidence, an appellate court must examine the evidence to determine whether it preponderated heavily against the verdict to the extent that it would be a miscarriage of justice to allow the verdict to stand.[22] A court should consider whether to overrule the jury with great reserve and with all presumptions running against the grant of a new trial.[23] An appellate court will not interfere with the role of a trier of fact of determining weight of evidence or credibility of witnesses.[24] In reviewing the sufficiency of evidence in criminal trials, the court must view the evidence de novo in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.[25]

Here, the evidence presented, when viewed in the light most favorable to the prosecution, was sufficient to permit a rational jury to find Appellant guilty beyond a reasonable doubt of

[20] M Crim JI 2.3. Emphasis added.
[21] M Crim JIs 2.7; 3.5.
[22] *People v Lemmon*, 456 Mich 625; 576 NW2d 129 (1998).
[23] *Id*.
[24] *Id*.
[25] *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).

failing to take reasonable care and effort to contain livestock to prevent escape and allowing his livestock to be at large.

VI. THE TRIAL COURT VIOLATED APPELLANT'S DUE PROCESS RIGHTS BY FINDING HIM GUILTY OF PROBATION VIOLATION ON A TERM THAT WAS NOT IN HIS ORDER OF PROBATION.

A defendant placed on probation has a right to know conditions with which he is required to comply, but he is presumed to know the conditions prescribed by law.[26] A probationary order should be definite and certain in its provisions and must be sufficiently clear to enable the probationer to know what he is required to do in order to comply with the order.[27] A sentence of probation shall include the following: (1) the probationer shall not violate any criminal law of this state, the United States or another state *or any ordinance of any municipality in this state* or another state; (2) probationer shall not leave the state without the consent of the court; (3) probationer shall report to the probation officer as required; (4) probationer shall pay various fees according to sentencing court, pay restitution, pay assessment pursuant to MCL § 780.905; and (5) other probationary conditions as determined by the court.[28]

Appellant argues that he was found guilty of a probation violation for a provision that was not included in his probation order. Appellant states that "failure to contain livestock (horses) that are on the property on 7/22/2013" was never a term of his probation. However, his probation order did include that he not violate any criminal law of this state or any ordinance of any municipality in this state. The Leelanau County Animal Control Ordinance states:

> It shall be unlawful for any person who owns, possesses or has custody or control of a dog or other animal, livestock and/or poultry where:
> (g) The livestock or poultry are allowed to run at large unaccompanied by its owner upon the premises of another or upon any public street, lane, alley or other public ground in the County unless otherwise the preceding specifically allowed.

Appellant was well aware from prior legal proceedings that, pursuant to the ordinance, the word 'allow' means 'failure to take reasonable care and effort to contain livestock to prevent escape.' Therefore, Appellant knew that by failing to take reasonable care and effort to contain

[26] *People v Pippin*, 316 Mich 191; 25 NW2d 164 (1946).
[27] *People v Sutton*, 322 Mich 104; 33 NW2d 681 (1948).
[28] MCL § 771.3. Emphasis added.

horses to prevent their escape from his property he was violating a state ordinance and in turn, violating the terms of his probation.

VII. THE TRIAL COURT VIOLATED APPELLANT'S DUE PROCESS RIGHTS BY FINDING HIM GUILTY OF PROBATION VIOLATION FOR HAVING HORSES THAT WERE NOT HIS GETTING OUT OF A FENCED AREA THAT HE DID NOT OWN.

The decision to revoke probation is a matter within the sentencing court's discretion.[29] A trial court's discretionary authority regarding the admission of evidence at a probation revocation hearing is broad and an appellate court reviews a trial court's decision to admit or exclude evidence in a probation revocation hearing for an abuse of discretion.[30] The abuse of discretion standard recognizes that there will be circumstances in which there will be more than one reasonable and principled outcome and under this standard, an abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes.[31] Where resolution of a factual issue in probation revocation hearing turns on the credibility of witnesses or the weight of evidence, deference is given to the trial court's resolution of these issues.[32]

Appellant argues that the escaped horses were owned by his daughter, Michelle Bailey, and were not located on his property prior to their escape. However, at the hearing, Appellant argued that the horses escaped his property because an unknown third-party undid the wire and opened the gate.[33] While Appellant was attempted to offer a defense by implicating a third-party, he effectively admitted that the horses had escaped from his property.[34]

As the court previously indicated, an individual, who possesses or has custody or control of an animal, regardless of actual ownership, can violate the Leelanau County Animal Control Ordinance states by failing to contain said animal on his or her property.[35] With limited information, based on its assessment of witness credibility and the weight of the evidence, the

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[29] *People v Breeding*, 284 Mich App 471; 772 NW2d 810 (2009).
[30] *Id*.
[31] *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006); *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).
[32] *Breeding, supra*.
[33] See generally, Probation Violation Hearing Transcript.
[34] Michelle Bailey offered evidence at the probation violation hearing that she was the owner of the horses and that the horses were located on "Sid's" property, not the Appellant's. Probation Violation Hearing Transcript, pages 60 and 76. However, Bailey also indicated that she had secured the gate and walked the fence line of *Appellant's property* three times the day the horses escaped. Probation Violation Hearing Transcript, pages 71 and 74.
[35] *Supra*, at FN 13.

trial court resolved that the Appellant had possession, custody and/or control of the horses and the animals had escaped from his property. This determination falls within the principled range of outcomes, and thus, the trial court did not abuse its discretion by finding the Appellant guilty of violating his probation.

VIII. PROBATION VIOLATION CONVICTION SHOULD BE VACATED WHERE THE PROSECUTOR FAILED TO PROVE BY THE PREPONDERANCE OF THE EVIDENCE THAT APPELLANT FAILED TO CONTAIN LIVESTOCK (HORSES) ON HIS PROPERTY.

A finding of a probation violation is a two-step process: (1) a factual determination that the probationer is in fact guilty of violating probation, and (2) a discretionary determination of whether the violation warrants revocation.[36] The prosecution bears the burden of establishing a probation violation by a preponderance of the evidence and rules of evidence, other than those concerning privileges, do not apply.[37] Evidence is sufficient to sustain a conviction for a probation violation if, viewed in the light most favorable to the prosecution, it would enable a rational trier of fact to conclude that the essential elements of the charge were proven by a preponderance of the evidence.[38]

As indicated above, lack of control and/or custody of an animal is sufficient to violate the ordinance and Appellant admitted that the horses were located on his property prior to their escape. Whether the horses escaped Appellant's property due to his or his agent's negligence or horses were intentionally permitted to be at large by Appellant or his agent, the ordinance was violated. Viewed in the light most favorable to the Prosecution, the essential elements demonstrating a violation of Article 9, Section 1, Paragraph G of the Leelanau County Animal Control Enforcement Ordinance were proven by a preponderance of the evidence.

Based solely on a review of the trial documents, transcripts, and pleadings filed prior to July 1, 2014, the Court does not find there was prejudicial legal error in the proceedings leading to Appellant's conviction for violating the Leelanau County Animal Control Enforcement Ordinance, nor error in the probation violation hearings. Further, the Court finds that there was sufficient evidence to convict the Appellant for violating the ordinance and subsequently, for

[36] *People v Pillar*, 233 Mich App 267, 269; 590 NW2d 622 (1998).
[37] *People v Ison*, 132 Mich App 61; 346 NW2d 894 (1984).
[38] *Id.*

violating his probation.[39] Therefore, for the reasons stated herein, the consolidated Claim for Appeal is denied.

IT IS SO ORDERED.

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HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

[39] Based on the Court's findings, the Appellant's Motion to Strike is dismissed as moot. The Court chooses to resolve the appeal based on substance, not procedure.