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IN THE COURT OF APPEALS OF THE STATE OF ALASKA

JAMES W. MOLLET SR.,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-12533
Trial Court No. 3KN-13-1642 CR

MEMORANDUM OPINION

No. 6780 — March 20, 2019

Appeal from the District Court, Third Judicial District, Kenai,
Sharon Illsley, Judge.

Appearances: Katherine Elsner (opening brief) and William Walton (reply brief), Walton, Theiler & Winegarden, LLC, Kenai, under contract with the Office of Public Advocacy, Anchorage, for the Appellant. Michal Stryszak, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, and Allard and Wollenberg,
Judges.

Judge WOLLENBERG.

James W. Mollet Sr. was convicted of four counts of cruelty to animals.¹ The jury found that Mollet failed to care for a horse, which died, and two cows and a bull calf, which survived. On appeal, Mollet raises two claims of error.

First, Mollet contends that the district court erred when it allowed the State's expert witness, a veterinarian, to testify as to the cause of the horse's death. Mollet argues that the expert's testimony lacked an adequate "scientific" foundation. We conclude that no error occurred.

Second, Mollet contends that he was denied a fair trial because, during final argument, the prosecutor told the jury that Mollet had a duty to take affirmative steps to ensure that the animals he owned were receiving adequate care. We also reject this claim.

We therefore affirm the judgment of the district court.

Background facts

In 2012, Mollet owned property in Nikiski where he kept a number of animals — including a horse and some cows. One of Mollet's neighbors, Kelly Jeffreys, noticed that Mollet's animals were in poor condition. In particular, Jeffreys saw that Mollet's horse, a mare named Dumpling, was in poor condition and was tied up in random areas on Mollet's land — places where the horse did not have access to shelter, food, or water.

During this same time period, another person also observed Dumpling's poor physical condition. At Mollet's trial, this person testified that Dumpling was emaciated and that she was eating dirt, sticks, and her own manure. (This person made a video recording of Dumpling's condition, and this video was played at trial.)

¹ Former AS 11.61.140(a)(2) (2012).

Jeffreys was concerned that Dumpling was starving to death, so she spoke to Mollet on a number of occasions about Dumpling's condition. At one point before Dumpling died, Jeffreys and her husband offered to take Dumpling, nurse her back to health, and then return her to Mollet. But Mollet told them that he would shoot Dumpling and eat her before he let Jeffreys and her husband take the horse.

Mollet farmed and was also a plumber. Working as a plumber, Mollet traveled frequently and was away from his property for extended periods. As a result, he was home only some of the time in the month or two prior to Dumpling's death. According to Jeffreys, Mollet acknowledged that the animals on his property, including Dumpling, were in poor condition because he was not home to take care of them.

Jeffreys testified that between October and December 2012, she would see Dumpling four or five times a day. In early December 2012, Jeffreys saw Dumpling lying on the ground. She checked on Dumpling and found that the horse — who was little more than “skin on bones” by then — had died. At trial, Jeffreys testified that December 6 was the day that Dumpling died.

Dr. Gerald Nybakken, a large-animal veterinarian and the State's expert witness, examined Dumpling's body sixteen days after the horse died. He concluded, based on the totality of the circumstances, that Dumpling had died from starvation and dehydration. Nybakken based his opinion on his observation of Dumpling's physical condition — in particular, Dumpling's high level of emaciation. (Dumpling's corpse had frozen while lying out in the open pen and remained frozen until Nybakken examined the body.) Nybakken also based his opinion on the emaciated condition of Mollet's other animals (who were still alive), and on that fact that there was no food where the horse and cows had been kept, nor was there any water in the water trough.

Nybakken noted that, in addition to a lack of food and water in the pen, there was little to no manure in the pen. Nybakken explained that there was little to no

manure because the animals had reached a level of starvation where they were eating their own manure.

Based on all of these circumstances, Nybakken concluded that the horse had starved to death.

On the same day that Nybakken assessed Dumpling's corpse, Nybakken spoke with Mollet about the condition of the remaining animals on Mollet's property. Nybakken expressly told Mollet that the animals needed more food.

Two months later, in February 2013, three of Mollet's animals that Nybakken had observed — two cows and a bull calf — roamed into Jeffreys's yard and lay down underneath a tree. When Jeffreys checked on these animals, she discovered that they were now too weak to move on their own. Jeffreys and her children attempted to move the animals into Jeffreys's barn, but one cow was so weak that it kept falling, with its head sinking into the snow. When this happened, Jeffreys and her children would help the cow get up, and then pull her along until she fell again. Eventually, Jeffreys and her children managed to move all three animals into their barn; once in the barn, the animals drank water and ate all of Jeffreys's hay.

All three of these cows were in a poor physical state and severely underweight. Their bones were clearly visible under the skin on their backsides. They had bloody sores and lesions. And they were missing hair all over their bodies.

The State charged Mollet with committing four counts of cruelty to animals — *i.e.*, “with criminal negligence, fail[ing] to care for an animal and, as a result, caus[ing] the death of the animal or caus[ing] severe physical pain or prolonged suffering to the animal.”² Counts I-III pertained to the two malnourished cows and the bull calf; Count IV pertained to the dead horse, Dumpling.

² *Id.*

The State provided Mollet with pretrial notice that it intended to call Nybakken as an expert witness. Nybakken had been a large-animal veterinarian since 1987, and he had previously testified as an expert witness in other animal neglect or abuse cases.

Mollet's defense attorney moved to preclude Nybakken from testifying about Dumpling's cause of death, arguing that the State had not shown that Nybakken's testimony satisfied the standard for the admissibility of scientific evidence. Following an evidentiary hearing, the district court ruled that Nybakken could testify as an expert concerning the cause of Dumpling's death.

The jury found Mollet guilty of all four counts. Mollet then moved for a new trial, arguing that the prosecutor had misrepresented the law during his summation to the jury, when the prosecutor asserted that Mollet had an affirmative duty to ensure that his animals were receiving proper care. The district court denied this motion, ruling that the jury had been properly instructed on the elements of the offense (and that the evidence was sufficient to support Mollet's convictions).

The trial court did not err in allowing Nybakken to testify as to the cause of the horse's death

As we have explained, Mollet sought to exclude Nybakken's testimony that Dumpling starved to death. Mollet's attorney argued that Nybakken did not have an adequate scientific basis for reaching this conclusion.³ Mollet's attorney noted that Nybakken had not performed a necropsy of Dumpling's body, nor had he conducted

³ See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) (announcing a new test for assessing the admissibility of scientific evidence under the Federal Rules of Evidence); *State v. Coon*, 974 P.2d 386, 395-98 (Alaska 1999) (adopting the *Daubert* test under the Alaska Rules of Evidence).

scientific testing of any other kind to determine the cause of Dumpling's death. The defense attorney argued that Nybakken should not be allowed to testify as to the cause of Dumpling's death, since all Nybakken had done was view the condition of the horse (and the condition of the other animals) some "weeks after the expiration of the horse."

The prosecutor opposed Mollet's motion, arguing that even though Nybakken had not conducted testing of tissue samples, his expert opinion was based on his knowledge and experience as a large-animal veterinarian and practitioner, his education (and continuing education), his personal on-site inspection of the dead horse, his knowledge of the eyewitness observations of Dumpling's appearance prior to her death, and his review of the pertinent Alaska State Trooper investigation. The prosecutor's position was that Nybakken's expertise regarding the likely cause of Dumpling's death was based on Nybakken's training and personal experience, and thus it did not constitute the kind of "scientific" evidence that would require a *Daubert/Coon* hearing.

Despite the prosecutor's argument, the trial court held a *Daubert/Coon* hearing to resolve the defense motion. At this hearing, Mollet's attorney did not dispute Nybakken's education, training, and qualifications as a large-animal veterinarian and practitioner. Rather, the defense attorney disputed only the scope of what Nybakken could properly testify to, based on the examination he conducted of Dumpling. The defense attorney also questioned whether one of the assessment tools that Nybakken used — the "Henneke Body Condition Scoring System" (the "Henneke method") — could validly be used to assess a deceased horse.

During this hearing, the prosecutor asked Nybakken to discuss his use of the Henneke method when investigating and testifying in animal neglect and abuse cases. Nybakken testified that he used the Henneke method "all the time on horses." He then explained that the method had attained general acceptance in veterinary practice, and that

the underlying scientific premise of the method is based on the known pattern of fat accumulation in horses. Scores for animals range from “one” (emaciated) to “nine” (extremely overweight), with a score of “five” being ideal.

Based on his observation of Dumpling’s body in late December, approximately two weeks after Dumpling died, Nybakken testified that the horse’s body appeared “very emaciated,” and he believed that the horse “had probably starved to death.” When he applied the Henneke method to Dumpling’s body, he scored the body at “about a point 8.” In other words, Dumpling’s score was “less than a one,” which meant that the horse was “emaciated.”

Nybakken went on to explain that his opinion concerning Dumpling’s cause of death was based not only on the score he derived from the Henneke assessment, but also on how long the horse had been dead and the conditions in which Nybakken found the body. These conditions included the conditions of the pen where the horse had died, the fact there was no water and no food — not even the remains of any hay that had been carried into the pen — and the conditions of the other, still living, animals.

Nybakken also explained that Dumpling’s emaciated condition was not the result of decomposition following her death. Because it was cold out — the temperature had been below zero — Dumpling’s corpse had frozen soon after she died, and her body was still fairly well preserved at the time Nybakken examined the body.

Nybakken conceded that even though the Henneke method was the “accepted standard in the equine world as to the condition of the animal,” this method would not, standing alone, specifically diagnose *why* a horse was emaciated or had died, unless there were also “obvious external signs.” But Nybakken testified that experts use the Henneke method — in addition to viewing the animal and its surroundings — when determining a horse’s cause of death.

After hearing this testimony, the district court ruled that Nybakken was qualified to provide expert testimony as to the cause of the horse's death based on his background, training, and experience as a doctor of veterinary medicine and as a large-animal practitioner. The court also ruled that the Henneke method was scientifically valid under the *Daubert/Coon* criteria, and that, under the circumstances of this case, the Henneke method could be used to score the condition of the deceased horse.

On appeal, Mollet does not challenge the court's finding that the Henneke method is scientifically valid under the *Daubert/Coon* criteria. Mollet does, however, repeat his pre-hearing argument that Nybakken could not reliably determine Dumpling's cause of death without a necropsy or other scientific testing of tissue samples.

To the extent that Mollet is arguing that a trial court can never allow an expert to provide an opinion on the cause of an animal's death that is not based on scientific testing, we reject that argument. As a general rule, a trial judge has wide latitude in deciding whether to admit the testimony of an expert witness.⁴ Clearly, there are circumstances where an expert (or even a non-expert) would be able to provide a reliable opinion that is not based on scientific testing regarding an animal's cause of death. For instance, the cause of death would be obvious even to a non-expert witness if the animal had been accidentally decapitated or had suffered some other type of serious traumatic amputation, or the animal was struck by a speeding vehicle.

Nybakken acknowledged that a necropsy was the gold standard for determining an animal's cause of death. But both Nybakken and the district court concluded that, given the facts of Mollet's case, Nybakken could reach a valid evaluation of Dumpling's cause of death, even without a necropsy. We note that Mollet's attorney

⁴ See *City of Hooper Bay v. Bunyan*, 359 P.3d 972, 980 (Alaska 2015) (quotation marks omitted) (citing *Barton v. N. Slope Borough Sch. Dist.*, 268 P.3d 346, 350 (Alaska 2012)).

extensively cross-examined Nybakken on the limitations of his investigation, and the fact that he did not conduct a necropsy.

The record supports the district court's ruling, and we therefore conclude that the district court did not abuse its discretion in admitting Nybakken's testimony.

The prosecutor did not mislead the jury regarding the applicable law during his closing argument

Because Mollet was the owner of Dumpling and the other animals, there was no dispute that he had a duty to care for the animals. Instead, the central contested issue at trial was whether Mollet, acting with at least criminal negligence, had breached this duty of care.

Mollet testified that he traveled quite often for work, so he could not personally fulfill his responsibility to care for his animals. Accordingly, Mollet supplied the money for the animals' food, shelter, and water, but he contracted with other people to perform the day-to-day tasks of caring for the animals. In particular, Mollet testified that he hired his stepson, his son-in-law, and another man to care for the animals in his absence. Mollet testified that he provided the men with a feeding schedule, and he expected them to follow it.

Mollet declared that he was home at various times during the months prior to Dumpling's death, and that during these times he checked on the animals and made additional suggestions for their care. Mollet acknowledged that, after Dumpling died, Dr. Nybakken contacted him and expressed his concern about the health of the other animals. But Mollet claimed that he had responded to the veterinarian's concerns by taking steps to ensure that the animals received more food.

In the defense summation to the jury, Mollet's attorney acknowledged that Mollet had a responsibility to care for the animals because he was their owner. But the

defense attorney contended that Mollet had fulfilled this responsibility by delegating the day-to-day care of the animals to other people. Mollet's attorney argued that the State had not proved that Mollet had negligently failed to care for his animals.

During the State's summation, the prosecutor addressed the question of whether Mollet had negligently failed to care for the animals. The prosecutor argued that Mollet had been criminally negligent because, even though Mollet had contracted with other people to perform the day-to-day care of the animals, Mollet had failed to take "affirmative steps" to remedy the problems after he received affirmative indications that his contractors were not properly caring for the animals.

On appeal, Mollet contends that it was improper for the prosecutor to use the phrase "affirmative steps." He argues that this wording improperly suggested that, even if Mollet had no indication that there was anything wrong, he nevertheless had an obligation to inquire about the welfare of the animals just to "ensure that no situation he could not immediately perceive existed."

But when we assess whether the jury might have interpreted the prosecutor's argument in this fashion, we must consider the context in which the prosecutor made this argument. Here, the trial testimony showed that Mollet *was* placed on notice that his animals were not getting enough food.

Kelly Jeffreys and her husband talked to Mollet about their concerns that Dumpling was starving. They even asked Mollet to let them take Dumpling so that they could nurse the horse back to health. And Mollet acknowledged that Nybakken had contacted him and expressed his concern about the health of the other animals.

In this context, when the prosecutor argued that Mollet was required to take "affirmative steps" to ensure that the animals were receiving sufficient food, water, and shelter, this was simply another way of saying that Mollet was criminally negligent because he failed to act even after he was affirmatively put on notice that the animals

were not being cared for properly. Thus, the prosecutor's closing argument did not misstate the law. Nor is there any reasonable possibility that the prosecutor's argument misled the jury. We therefore find no error.

Conclusion

The judgment of the district court is AFFIRMED.