VERMONT SUPREME COURT
109 State Street
Montpelier VT 05609-0801
802-828-4774
www.vermontjudiciary.org

Case No. 23-AP-286

Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

JUNE TERM, 2024

State of Vermont v. Debra Densmore* } APPEALED FROM:
} Superior Court, Orange Unit,
} Criminal Division
} CASE NO. 22-CR-07244
Trial Judge: Elizabeth D. Mann

In the above-entitled cause, the Clerk will enter:

Defendant appeals from her conviction, following a jury trial, of six counts of animal cruelty in violation of 13 V.S.A. § 352(4). We affirm.

I. Proceedings Below

Defendant kept numerous horses on her property, including the horses named below. Following a complaint to the Humane Society, law enforcement visited the property in May and June 2022. Law enforcement obtained a search warrant for the second visit. Defendant was then charged with numerous counts of violating 13 V.S.A. § 352(4) relating to six horses. Section 352(4) provides that: "A person commits the crime of cruelty to animals if the person . . . [d]eprives an animal that a person owns, possesses, or acts as an agent for[,] of adequate food, water, shelter, rest, sanitation, or necessary medical attention." The jury found defendant guilty of: (1) failing to provide Zep, Myra, and Daisy with adequate shelter; (2) failing to provide Winky with adequate shelter and adequate food; and (3) failing to provide Midnight and Kashmir with adequate shelter and adequate medical care.

Before trial, defendant moved to suppress the evidence obtained by law enforcement during their visits to her property in May and June 2022. She argued that: (1) police unlawfully entered her property during the May visit and impermissibly used information obtained on that date to establish probable cause for the search warrant; (2) police impermissibly omitted material information pertaining to the investigation from the search warrant affidavit; (3) the affidavit failed to establish the credibility of the person who complained to the Humane Society; and (4) the observations of two veterinarians were insufficient to establish probable cause. The court denied defendant's motion. We address its decision below.

At the close of the State's case at trial, defendant moved for a judgment of acquittal. She argued in relevant part that "there was no testimony about what the standard for shelter is in Vermont from the witnesses." The court denied the motion, citing the testimony of three witnesses, each of whom described the existing shelter on the property as not large enough for all of the animals. A fourth witness testified that one of the horses had rain rot from exposure to the elements. In combination, the court concluded, this testimony could allow the jury to find that there was inadequate shelter for one or more of the horses. Defendant renewed her motion for a judgment of acquittal at the close of the case. The motion was denied.

During its deliberations, the jury asked what Vermont law was on "shelter for horses." The parties discussed an appropriate answer and they agreed to a response proposed by the court, which was then provided to the jury. The jury found defendant guilty of six counts of animal cruelty.

Defendant then moved for a mistrial and moved to set aside the verdicts because the court did not provide the jury the definitions of "adequate constructed shelter" and "adequate natural shelter" from 13 V.S.A. § 351. The court denied the motions. It found that defense counsel did not seek an instruction on the definition of shelter either before or during trial. When the jury posed a question about the "law on shelter for horses," the court reviewed the question with counsel and conferred with them regarding the appropriate response. The parties considered various definitions of shelter, including those set forth by statute. Ultimately, the parties agreed that the response to the jury would be: "you should rely on the law that's been given in the instructions to interpret the testimony and the evidence presented. As to shelter, we cannot provide a more detailed definition at this time." The court explained that the jury then continued their deliberations and ultimately returned a unanimous verdict that defendant had denied adequate shelter to each horse. The court added that there had been significant testimony on the issue of shelter, which was for the jury to evaluate. It held that a reasonable jury could conclude, based on the evidence presented at trial, that defendant failed to provide adequate shelter to the horses in her possession even without an express definition of the term shelter within the jury instructions. Defendant now appeals.

II. Arguments on Appeal

Defendant raises numerous arguments on appeal, which we address in turn.

A. Motion to Suppress—Probable Cause for Search Warrant

Defendant first challenges the denial of her motion to suppress. The record indicates the following. Before trial, defendant challenged the sufficiency of the warrant affidavit to establish probable cause through a motion to suppress. She raised numerous challenges, all of which the trial court rejected. Among other things, defendant complained about "the anonymous nature of the complaint" received by the Humane Society; the summary of prior complaints about her care of animals on her property; the troopers' observation of the conditions of the property and animals during their May 2022 visit; and information provided to police by two veterinarians who visited the property in May and June 2022. As to the final ground, defendant argued that the information obtained from the veterinarians failed to establish probable cause for a search warrant because the veterinarians "merely stated that some horses appeared thin and that [defendant's] property [was] in deplorable condition." Defendant asserted that "both vets had

recently provided treatment to the horses at [defendant's] property," but "neither vet contemporaneously reported criminal misconduct to law enforcement, and neither vet provided sufficient evidence to establish Animal Cruelty as defined by 13 V.S.A. § 352."

In considering these arguments, the trial court explained that defendant had the burden of proving that "evidence should be suppressed because a warrant was not supported by probable cause." State v. Sheperd, 2017 VT 39, ¶ 32, 204 Vt. 592. That is because, in issuing the warrant, a judge has already made "an independent determination on the issue of probable cause . . . , thereby giving rise to a presumption of legality." Id. ¶ 31 (quotation omitted). "As the proponent of the motion, defendant must rebut this presumption." Id.

The court applied our well-established standard for determining probable cause:

> Generally, probable cause exists when the affidavit sets forth such information that a judicial officer would reasonably conclude that a crime has been committed and that evidence of the crime will be found in the place to be searched. We examine the totality of the circumstances to determine whether there was substantial evidence supporting the warrant, keeping in mind that affidavits must be viewed in a common-sense manner and not be subjected to hypertechnical scrutiny.

State v. Cleland, 2016 VT 128, ¶ 5, 204 Vt. 23 (quotations and citations omitted); see also State v. Perley, 2015 VT 102, ¶ 20, 200 Vt. 84 (recognizing that "[p]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity," and "[b]y hypothesis, therefore, innocent behavior frequently will provide the basis for a showing of probable cause" (quotation omitted)).

As relevant here, the court rejected the argument that the warrant affidavit lacked specificity regarding information obtained from the veterinarians. It explained that the veterinarians were entitled to a presumption of credibility as experts in their field, particularly as both appeared to agree about the condition of defendant's property and the horses located there. It ultimately determined that the report of the volunteer who complained to the Humane Society, the history of complaints and investigations of defendant's treatment of the horses, the reports of two veterinarians who were recently with the animals, and the observation of trash and broken appliances in the yard when police went to speak with defendant justified a determination of probable cause and issuance of the search warrant.

Defendant argues on appeal that the court erred in finding that paragraph eight in the affidavit sufficed to support probable cause. That paragraph contains the information provided to law enforcement by the veterinarians who were recently at the property. It states:

> On 6/13/22 l spoke to veterinarian Kristen Glass and Samuel Scheu via telephone. Dr. Glass had responded to the residence in May and Dr. Scheu was on the property earlier that day. Both veterinarian[s] stated there w[]ere horses in very poor condition. Several of the horses and Llama [sic] very underweight and malnourished. Dr. Scheu stated he observed a small dog that was

> missing patches of hair and seemed to have a skin condition. Dr. Scheu stated he had to euthanize a chestnut because of its age and malnourishment. They walked the horse up to the hole that was mentioned earlier in the affidavit [which appeared to be a place to bury horses]. He even spoke to [defendant] about euthanizing a white horse on the property in the same condition but [she] did not want to do that at the time. Both veterinarians stated the property and horses are in deplorable condition and will be providing me with their notes and assessments.

Defendant complains that this paragraph consists of hearsay statements from the veterinarians and a state trooper's "own gloss of their observations." Defendant maintains that there were not enough specific statements attributable to eyewitnesses to establish probable cause.

We reject this argument. On review of a motion to suppress, we "review the court's legal conclusions without deference and its factual findings for clear error." State v. Ferguson, 2020 VT 39, ¶ 10, 212 Vt. 276. The court did not base its decision solely on the paragraph identified by defendant. Instead, it appropriately considered the totality of the circumstances, including the information referenced above as well as seven other paragraphs containing additional information. We agree with the trial court that the information provided by the veterinarians was adequately specific. See United States v. Ventresca, 380 U.S. 102, 108-09 (1965) (explaining that probable cause cannot "be made out by affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause exists without detailing any of the 'underlying circumstances' upon which that belief is based," and recognizing that "[r]ecital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police"). As set forth above, the veterinarians had recently visited the property and described the horses as underweight and malnourished and "in very poor condition." One horse had to be euthanized on the property as a result of malnourishment. Both veterinarians described both the property and the horses as "in deplorable condition."

Defendant fails to show that she raised her hearsay argument below. See In re S.B.L., 150 Vt. 294, 297 (1988) (appellant bears burden of demonstrating how trial court erred warranting reversal, and Supreme Court will not comb record searching for error); see also V.R.A.P. 28(a)(4) (appellant's brief should explain what issues are, how they were preserved, and what appellant's contentions are on appeal, with citations to authorities, statutes, and parts of record relied upon). In any event, we find this argument without merit. A probable cause finding must be "based upon substantial evidence, which may be hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing there is a factual basis for the information furnished." V.R.Cr.P. 41(d)(1). The court here found the veterinarians entitled to a presumption of credibility as experts in their field, particularly as both appeared to agree about the condition of defendant's property and the horses located there. As the court found and defendant acknowledged below, both veterinarians had recently been to the property at the time the affidavit was filed. Defendant's motion to suppress was properly denied.

B. Sufficiency of Evidence

At trial, and as relevant here, defendant challenged only the sufficiency of the evidence as to the shelter element of the animal-cruelty charges. Because this was a jury trial, defendant's challenge to the sufficiency of the evidence is limited to the arguments that she raised in her motion for judgment of acquittal. See State v. Bressette, 136 Vt. 315, 317 (1978) (recognizing different rule applicable to jury and nonjury trials where defendant challenges sufficiency of evidence); see also 2A C. Wright, et al. , Federal Practice and Procedure, § 469 (4th ed. 2024) (recognizing "seemingly well-settled doctrine" that, in criminal jury trial, party must challenge sufficiency of evidence through motion for judgment of acquittal and if "defendant has asserted specific grounds in the trial court as the basis for a motion for acquittal, he or she cannot assert other grounds on appeal"). Defendant does not offer any legal basis for having this Court review the sufficiency of her criminal convictions untethered from her motion for judgment of acquittal, nor does she show that she preserved these arguments. See In re S.B.L., 150 Vt. at 297. Our review is thus limited to the shelter issue, and we do not address defendant's arguments that there was insufficient evidence to support other aspects of these crimes, such as denial of access to adequate food or necessary medical care.

"The standard of review for denial of a V.R.Cr.P. 29 motion for judgment of acquittal is whether the evidence, when viewed in the light most favorable to the State and excluding any modifying evidence, fairly and reasonably tends to convince a reasonable trier of fact that the defendant is guilty beyond a reasonable doubt." State v. Delisle, 162 Vt. 293, 307 (1994) (quotation and alterations omitted). Applying this standard, we agree with the trial court that the evidence is sufficient to allow the jury to find that defendant deprived the horses in question of adequate shelter in violation of 13 V.S.A. § 352(4). As set forth above, three trial witnesses testified that the existing shelter on the property was not large enough for all of the animals. A fourth witness testified that one of the horses had rain rot from exposure to the elements. Based on this testimony, the jury could conclude that defendant failed to provide adequate shelter for the horses in question. Defendant essentially relies on modifying evidence in support of her argument, which we do not consider under our standard of review. The record shows that the jury was provided evidence regarding manmade and natural shelter and it was for the jury to assess the weight and credibility of the evidence presented. See State v. Bishop, 128 Vt. 221, 228 (1969) ("It is well recognized in this State that the jury, being the trier of facts, is the sole judge of the credibility of witnesses and of the weight of their testimony," and "[w]here there is some evidence tending to support the verdict, its construction and weight is for the jury" (citation omitted)).

C. Jury Instructions

Finally, defendant argues that the court's jury instructions were deficient on the issue of shelter. The record reflects that during its deliberations, the jury asked, "What is Vermont law regarding shelter for horses?" In response, the parties agreed to inform the jury that it "should rely on the law that's been given in the instructions to interpret the testimony and the evidence as presented. As to shelter, we cannot provide a more detailed definition at this time." Counsel for both parties agreed to this language and agreed that this response was fair.

Defendant argues on appeal that the court erred by "refusing" to give the jury the statutory definition of "shelter" set forth in 13 V.S.A. § 365(a).[*] Defendant did not acknowledge in her opening brief that she agreed to the response provided to the jury and misstated the record below by omission. Defendant instead cited language from the parties' discussion that preceded their ultimate agreement on how to proceed.

This claim of error was not preserved, as defendant asserts. Whatever comments defense counsel may have made during the parties' discussion of an appropriate response, counsel ultimately agreed and did not object to the language used by the court. He described the response as "fair." We reject defendant's characterization of the record as counsel merely expressing his "[u]nderstanding that the court had made up its mind." We conclude that defendant waived this claim of error. As we have explained:

> Under the invited error doctrine, a branch of the doctrine of waiver, a party cannot induce an erroneous ruling and later seek to profit from the legal consequences of having the ruling set aside. There is no standard of review in such cases; the party who invites the error waives or intentionally relinquishes their right to challenge it on appeal.

State v. Morse, 2019 VT 58, ¶ 7, 211 Vt. 130 (quotations and alterations omitted) (citing cases). Having waived this argument, defendant could not then "preserve" it by raising it again in a postjudgment "motion for mistrial," as she asserts.

Even if this was not invited error, it would not rise to the level of plain error. Defendant did not seek an instruction on the definition of shelter either before or during trial. When the jury posed its question, the court discussed possible responses with the parties, including providing the statutory definition from 13 V.S.A. § 365. The court found that the statutory definition offered little additional clarity. See 13 V.S.A. § 365(a) ("All livestock and animals that are to be predominantly maintained in an outdoor area shall be provided with adequate natural shelter or adequate constructed shelter to prevent direct exposure to the elements."); id. § 365(b)(1) (stating that "livestock may be temporarily confined in a space sufficient for them to stand and turn about freely, provided that they are exercised in accordance with livestock and

[*] Defendant argues for the first time in her reply brief that the court should have provided different statutory definitions of adequate constructed and natural shelters. We do not address this argument, which was not raised below or in defendant's opening brief. See Gallipo v. City of Rutland, 2005 VT 83, ¶ 52, 178 Vt. 244 (stating that issues not raised in original brief may not be raised for first time in reply brief).

poultry husbandry practices and are provided sufficient food, water, shelter, and proper ventilation"). The court noted that the definition did not tell the jury anything it did not already know, i.e., that shelter should be provided to prevent direct exposure to the elements, and that the law did not define what an "adequate" natural or constructed shelter would be. When defendant questioned if the jury was aware that natural shelter could be considered, the court responded that the evidence and arguments had focused on both natural shelter available on the property, including trees, as well as a manmade shelter. The parties then agreed to the court's approach. See State v. West, 151 Vt. 140, 142 (1988) (recognizing that "[t]he necessity, extent and character of supplementary instructions requested by a jury are matters that are within the sound discretion of the trial court"). The jury was properly instructed on the elements required to establish defendant's guilt and the court did not commit plain error in responding to the jury's question. See State v. Erwin, 2011 VT 41, ¶ 15, 189 Vt. 502 ("As we have repeatedly emphasized, plain error exists only in exceptional circumstances where a failure to recognize error would result in a miscarriage of justice, or where there is glaring error so grave and serious that it strikes at the very heart of the defendant's constitutional rights." (quotation and alteration omitted)).

Affirmed.

BY THE COURT:

_____
Harold E. Eaton, Jr., Associate Justice

_____
Karen R. Carroll, Associate Justice

_____
Nancy J. Waples, Associate Justice