

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 18, 2001

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 01-0472-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PATRICIA A. NICHOLS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Monroe County: STEVEN L. ABBOTT, Judge. *Affirmed.*

¶1 DYKMAN, J. Patricia Nichols appeals from a judgment of conviction on thirty-four counts of failure to provide adequate food and drink to confined animals under WIS. STAT. § 951.13(1) (1999-2000),¹ thirty-four counts

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

of providing improper shelter and sanitation for animals under WIS. STAT. § 951.14(4), and from a subsequent denial of her postconviction motion. She asserts: (1) her counsel was ineffective, and (2) the evidence was insufficient to convict her under WIS. STAT. § 951.13(1) on counts one through thirty-four.

¶2 Nichols argues that her trial counsel was constitutionally ineffective because he failed to call witnesses to refute the testimony of several veterinarians called by the State. Further, Nichols asserts that the evidence was insufficient to convict her because WIS. STAT. § 951.13(1) applies only when a defendant has failed to provide both food and drink to a confined animal. Because trial counsel's failure to call and examine witnesses at trial was not prejudicial to Nichols, and the evidence was sufficient to establish guilt, we affirm.

BACKGROUND

¶3 Patricia Nichols owned and managed a farm in Monroe County, Wisconsin, beginning in 1988. During the latter part of 1996 through 1997, Nichols cared for approximately three-dozen cows, which she housed on her property.² When some of Nichols's cows began exhibiting signs of illness, she contacted a local veterinarian to examine them. When the health of her cows did not improve, Nichols contacted other veterinarians in the area for assistance. A total of four veterinarians visited Nichols's farm in January and February 1997. Each incident involved a downed cow, meaning that the animal was too weak to stand on its own.

² Nichols had between thirty-four and thirty-nine cows on her property at the time of their seizure. The exact number is not known.

¶4 After several visits by veterinarians, a county humane officer received a complaint that Nichols had several dead animals on her property.³ After police investigated the complaint, a search warrant was issued for Nichols's property based on their observations of the premises. Representatives from a bank holding a lien on the animals accompanied authorities on their search, and decided to seize the cows on February 7, 2000.⁴ The State charged Nichols with thirty-four counts of failure to provide adequate food and water to confined animals under WIS. STAT. § 951.13(1), and thirty-four counts of providing improper shelter and sanitation for her animals under WIS. STAT. § 951.14(4). Nichols pleaded not guilty, and a jury trial ensued.

¶5 During the trial, the four veterinarians who visited Nichols's farm to treat the animals, Drs. Phyllis Burch, James Hartman, Sara Balzer and Brian Beck, testified as to the conditions they observed. Each of the four veterinarians noted that the cows appeared to be malnourished and weak. Dr. Balzer testified that in applying a one to five scale to score cows on size and appearance, each of the adult female cows owned by Nichols scored a "one," meaning that they were severely emaciated. Balzer stated "[the animals] needed proper nutrition and proper water immediately and under the supervision of a veterinarian." Dr. Hartman testified that the cows he observed at Nichols farm were "extremely thin." Dr. Beck observed conditions in Nichols's barn while caring for a downed cow, and stated that other cows in the area had poor body condition and were very thin.

³ The record is not clear regarding who made this complaint.

⁴ Two police officers accompanied the bank representatives for security purposes, as well as a county humane officer and two veterinarians.

¶6 In addition, each veterinarian agreed that lack of proper nutrition was the cause of the continued sickness among the cows. The State also called Simon Wells, a farmer who testified based on a photograph he viewed of her farm that in his opinion, the conditions at Nichols's property were sub-standard.⁵

¶7 Nichols testified that she discussed feeding practices as well as the health of her animals with one of the veterinarians who visited her farm. When asked about the amount of feed used in the time shortly before the seizure, Nichols said "I fed them the same way that I always fed them." Nichols stated she was confused as to why the animals seemed emaciated and weak. Nichols admitted that at the time of the seizure, her farm business was not "running smoothly," based on her continuing financial problems. Nichols's trial attorney did not call any witnesses other than Nichols herself. The jury returned a guilty verdict on all sixty-eight counts. The court sentenced Nichols to probation for eighteen months, with fifty hours of community service as a condition of probation.

¶8 Nichols filed a postconviction motion asserting: (1) she was entitled to a new trial because of the ineffectiveness of her attorney; and (2) there was insufficient evidence to convict her under WIS. STAT. § 951.13(1) on counts one through thirty-four.

¶9 With regard to her first claim, Nichols asserted that her trial counsel was constitutionally ineffective because he failed to interview and call witnesses from a list that she provided. At the hearing, these witnesses testified regarding what they saw in the months leading up to the seizure of the animals.

⁵ The trial court recognized Simon Wells, an experienced farmer, as an expert.

¶10 Four of the eight witnesses called by Nichols testified that they had seen her hauling various amounts of hay on various dates leading up to the seizure. Gary Myers, a mechanic stationed near Nichols's farm, testified that he saw Nichols hauling hay in her truck several times a week past his shop. David Brueggeman, a logger who frequented the same roads as Nichols, testified that he saw her several times a week hauling hay as he passed her on the highway. Anthony Kelbel, an automobile salesman, recalled seeing Nichols hauling hay once a week. Paul Gibson saw Nichols "frequently" hauling hay.

¶11 Three witnesses, Francis Haines, James Karis, and Paul Gibson, were present in Nichols's barn at different times before the animals were seized. Haines observed that some of Nichols's animals looked thin, and suggested that lice might have been one cause of the emaciation. Karis was also in Nichols's barn, and stated that at the time, "everything looked good to me." Gibson had been in Nichols's barn but was never asked to describe the condition of the animals.

¶12 James Karis and Ralph Evans testified that they sold Nichols hay in the period before the cows were seized. Karis testified that he sold Nichols between forty-five and fifty bales of hay per day in the weeks shortly before the animals were removed. On cross-examination, he stated that Nichols's purchases of hay were frequent, but not on a daily basis. Evans testified that he sold Nichols forty bales of hay every other day.

¶13 With regard to her second claim, Nichols asserted that there was insufficient evidence to convict her under WIS. STAT. § 951.13(1). According to Nichols, § 951.13(1) requires proof that she denied *both* food and water to her animals. Although she conceded there was sufficient evidence that she failed to

provide her cows with an adequate supply of food, she asserted that the State had failed to offer sufficient evidence that she had also deprived the animals of adequate water. The trial court denied Nichols's motion and she appeals.

DECISION

A. Ineffective Assistance of Counsel

¶14 Nichols first contends that her counsel was constitutionally ineffective for failing to call several witnesses on her behalf during her trial. The State asserts that counsel for Nichols exercised sufficient professional judgment when he decided not to interview and call witnesses favorable to Nichols.

¶15 Under *Strickland v. Washington*, 466 U.S. 668, 687 (1984), a defendant seeking a new trial for ineffective assistance of counsel must show both that: (1) counsel was deficient in his performance; and (2) that deficiency prejudiced the defense's case. Both of these prongs must be satisfied in order to meet the threshold of an ineffective counsel claim. *Id.* The prongs of this standard involve mixed questions of law and fact. *State v. Moffett*, 147 Wis. 2d 343, 352, 433 N.W.2d 572 (1989). The trial court's findings of fact will not be overturned unless they are clearly erroneous, but the question whether counsel's performance was deficient and prejudicial is a question of law that we review *de novo*. *Id.* at 352-53. Because we conclude that Nichols has failed to satisfy the second prong of *Strickland*, we need not decide whether her trial counsel performed deficiently. 466 U.S. at 697.

¶16 The second prong of the *Strickland* test requires that counsel's deficiency prejudiced Nichols case. *Id.* at 687. The Court in *Strickland* stated that the test for prejudice requires the party to show "reasonable probability" that

if not for counsel's mistakes, a different result would have been reached. *Id.* at 694. The Court further stated "a reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Here we must consider the entirety of the case presented at trial on behalf of Nichols and the State, as well as the testimony at Nichols's postconviction hearing. Because Nichols claims that her trial counsel's deficient performance entitles her to a new trial on all counts, we consider her conviction under both statutes.

1. Failure to provide food and water

¶17 To support its charge under WIS. STAT. § 951.13(1), the State called four veterinarians who had visited Nichols's farm to observe the downed animals. Each of these veterinarians agreed that the cows suffered from lack of proper nutrition. The testimony they provided was supported by detailed reports they had completed after visiting Nichols's farm, as well as photographs taken of the barn and animals. The testimony of these four doctors was unequivocal. Nichols failed to call any expert witnesses, either during trial or at her postconviction hearing, that refuted the conclusions of the veterinarians. In addition, the State called a local farmer who had extensive experience in caring for cows. The farmer viewed photographs of Nichols's barn, and testified that the conditions were poor.

¶18 Nichols asserts in her brief that "an experienced agriculture consultant provided a credible alternative explanation as to the causes of the problems the defendant's cows were experiencing." However, this assertion is refuted by the testimony at trial. Francis Haines testified that based on the fact that some of the cows "looked like they had been fed," and some "did not look very well," he concluded "it almost looks to me like you have got lice." However, he also admitted that he was not qualified to determine whether a cow had lice and

that it was up to a qualified medical professional to make such a diagnosis. Dr. Burch testified regarding her inspection of Nichols's cows and the presence of lice. Burch stated that lice were "not the main issue" contributing to the condition of the animals, and further explained that in her expert opinion, lack of nutrition was the cause of the cows' illness. In short, the veterinarians' conclusions were uncontested at the postconviction hearing and we are unpersuaded that Francis Haines's testimony would have influenced the jury to render a different verdict.

¶19 None of the remaining witnesses Nichols called at the postconviction hearing provided testimony that would undermine confidence in the outcome of the trial. *See Strickland*, 466 U.S. at 694. First, the trial court found that witnesses called at the postconviction hearing were unreliable because their testimony was vague and at times unclear about the frequency with which they saw Nichols transporting hay. We agree with the trial court that these witnesses' failure to remember accurately undermines their credibility.

¶20 Second, and more important, assuming that a jury would have found Nichols's postconviction witnesses credible, it would not have changed the outcome of the trial because none of the provided testimony contradicted the State's evidence. Although Nichols asserts that six witnesses called at her postconviction hearing testified that "the defendant was giving feed to her cows," the postconviction testimony contradicts this assertion. The witnesses who testified regarding Nichols's hauling practices never saw the hay reach her farm, and never saw Nichols feeding her animals using the hay she was transporting.

¶21 Four of these witnesses who saw her transporting hay were never present in her barn. Three witnesses who did visit Nichols's property could not recall details of conditions in the barn or of the animals. In addition, one of

Nichols's witnesses called at the postconviction hearing testified for the State during the trial. The witness did not add any information to his original testimony.⁶

¶22 The most that any of Nichols's witnesses could have contributed to her defense was to testify that they saw her hauling hay. Had Nichols produced witnesses who could have spoken to her daily feeding practices, counsel's failure to call them at trial might have been prejudicial. However, the witnesses that Nichols called could not explain her feeding practices or her conduct as a farmer. The witnesses were called simply to testify that they saw her frequently transporting hay. That issue is not in dispute; the State has not alleged that Nichols failed to feed her animals at all. The question for the jury was whether she kept them adequately fed to meet the requirements of WIS. STAT. § 951.13(1). Because none of Nichols's witnesses support her claim that she did, she has failed to satisfy the prejudice requirement under *Strickland*.

2. Failure to provide shelter

¶23 Nichols also asserts a claim of ineffective counsel with regard to her conviction on thirty-four counts of failure to meet minimum standards of sanitation in her barn for the animals under WIS. STAT. § 951.14(4). During the trial, the four veterinarians who visited Nichols's farm testified regarding the conditions in the barn during their visits. Dr. Burch testified that the cows she observed were covered with manure, and felt that the barn was not adequately cleaned. Dr. Balzer testified that the conditions in the barn were "extremely

⁶ Ralph Evans was called by the State. Evans was a farmer who periodically sold Nichols hay in the months before her cows were seized.

poor,” and further stated that the barn contained almost twelve inches of manure in several areas. After viewing photographs of Nichols’s barn, Simon Wells stated that the condition of the barn “doesn’t look very good to me.”⁷ Nichols also admitted during trial that at the time shortly before the cows were seized, the barn was not clean, and admitted that the levels of manure in the barn were unacceptable.

¶24 At the postconviction hearing, the witnesses called by Nichols did not offer any testimony to refute the charges regarding unsanitary conditions under WIS. STAT. § 951.14(4). Of the eight witnesses who testified, only three had ever been in Nichols’s barn. James Karis testified that he had been in Nichols’s barn, and “everything looked good to me.” However, Karis could not specify at what point during the year he had visited Nichols’s farm, and was not asked to elaborate on the appearance of the barn. Francis Haines was never asked about his observations of the barn when he visited, and only testified regarding the condition of the animals. Paul Gibson also visited Nichols’s farm, but was never asked to discuss the conditions of the barn itself.

¶25 Based on the testimony offered by the veterinarians as well as Nichols’s own admission, we conclude that the testimony offered at the

⁷ From trial testimony:

Q: Could you give me your opinion on those conditions whether or not you believe that your 38 years of being in the farm industry, is that a sanitary or unsanitary condition for those cows ...?

A: It doesn’t look very good to me. I don’t think a milk inspector would allow milk to be sold from there.

postconviction hearing was not sufficient to undermine confidence in the outcome of the trial. *See Strickland*, 466 U.S. at 694.

B. Insufficiency of the Evidence

¶26 The second issue is whether there is sufficient evidence to convict Nichols on counts one through thirty-four, under WIS. STAT. § 951.13(1). Nichols asserts that for the statute to be applicable, a person must deny *both* adequate food and water to a confined animal. Nichols contends that she supplied adequate amounts of water to her animals, and did not violate the statute. The State asserts that the statute is neither vague nor ambiguous, and requires that both food and water be supplied in order to avoid a violation of WIS. STAT. § 951.13(1).

¶27 Statutory interpretation is a question of law, which we review *de novo*. *State v. Howell*, 141 Wis. 2d 58, 61, 414 N.W.2d 54 (Ct. App. 1987). We must first consider the plain language of the statute in an attempt give effect to the intent of the legislature. *See State v. Cardenas-Hernandez*, 219 Wis. 2d 516, 538, 579 N.W.2d 678 (1998). WISCONSIN STAT. § 951.13 states:

Providing proper food and drink to confined animals. No person owning or responsible for confining or impounding any animal may fail to supply the animal with a sufficient supply of food and water as prescribed in this section.

(1) FOOD. The food shall be sufficient to maintain all animals in good health.

(2) WATER. If potable water is not accessible to the animals at all times, it shall be provided daily and in sufficient quantity for the health of the animal.

As the State points out, the statute uses the conjunctive, “food *and* water,” not the disjunctive, “food *or* water.” Our reading of the statute is that it required Nichols

to supply her animals with both food and water, not that the State was required to prove she deprived her cows of both. The result that Nichols proposes would allow an individual to either starve animals so long as water was provided, or dehydrate animals, so long as food was provided. This would be an absurd result. We will not adopt statutory constructions that lead to an absurd result. *See Peters v. Menard, Inc.*, 224 Wis. 2d. 174, 189, 589 N.W.2d 395 (1999). We therefore conclude that denying either food or water to any confined animal is a violation of WIS. STAT. § 915.13, and that the evidence was sufficient to convict Nichols under that statute.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.

