

STATE V. COMMERS

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**STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
TODD COMMERS,
Defendant-Appellant,**

NO. 34,658

COURT OF APPEALS OF NEW MEXICO

December 8, 2015

APPEAL FROM THE DISTRICT COURT OF OTERO COUNTY, Angie K. Schneider,
District Judge

COUNSEL

Hector H. Balderas, Attorney General, Santa Fe, NM, for Appellee

S. Thomas Overstreet, P.C., S. Thomas Overstreet, Alamogordo, NM, for Appellant

JUDGES

M. MONICA ZAMORA, Judge. WE CONCUR: LINDA M. VANZI, Judge, J. MILES HANISEE, Judge

AUTHOR: M. MONICA ZAMORA

MEMORANDUM OPINION

ZAMORA, Judge.

{1} Defendant appeals from a jury verdict finding him guilty of extreme cruelty to animals. [RP 279] This Court issued a calendar notice proposing to affirm. Defendant has filed a memorandum opposing this Court's proposed disposition. Having given due consideration to Defendant's arguments in opposition, we affirm.

Sufficiency of the Evidence

{2} Defendant continues to argue that insufficient evidence was presented to support his conviction. [MIO 2-4] Our notice detailed the evidence presented in support of Defendant's conviction. [CN 3-5] In response, Defendant argues that "[i]t is conjecture and speculation that Defendant maliciously killed the dog as opposed to negligently, accidentally, or firing to scare the dog and accidentally hitting the dog or the bullet ricocheting and hitting the dog, or other similar scenarios." [MIO 3] Defendant further claims that "[t]he record in this case does not contain evidence to conclude Defendant's conduct amounted to reckless, willful and wanton disregard of consequences." [DS 4] However, Defendant has not provided this Court with any additional factual background or additional evidence to provide support for his contention. See *In re Ernesto M., Jr.*, 1996-NMCA-039, ¶ 15, 121 N.M. 562, 915 P.2d 318 (explaining that the question on appeal is whether the [trial] court's "decision is supported by substantial evidence, not whether the trial court could have reached a different conclusion"). Defendant merely suggests that the State's case was based primarily on circumstantial evidence, [MIO 3] which the State was permitted to do. See *State v. Kent*, 2006-NMCA-134, ¶ 10, 140 N.M. 606, 145 P.3d 86 ("Substantial evidence review requires analysis of whether direct or circumstantial substantial evidence exists and supports a verdict of guilt beyond a reasonable doubt with respect to every element essential for conviction. (emphasis added)). Based on the evidence presented that Defendant fired two shots, one of which struck and killed the dog, [MIO 3] the jury was entitled to infer that Defendant intentionally shot and killed the dog. *State v. Hoeffel*, 1991-NMCA-070, ¶ 14, 112 N.M. 358, 815 P.2d 654 ("Intent can be proved by circumstantial evidence.").

{3} Finally, to the extent Defendant's memorandum in opposition asks this Court to reweigh the evidence presented or reevaluate the credibility of any witnesses, [MIO 3-4] we decline to do so, as that would be contrary to the established principle that an appellate court does not reweigh the evidence or second-guess the jury's decision regarding the credibility of witnesses. See *State v. Garcia*, 2011-NMSC-003, ¶ 5, 149 N.M. 185, 246 P.3d 1057; see also *State v. Foxen*, 2001-NMCA-061, ¶ 17, 130 N.M. 670, 29 P.3d 1071 (providing that conflicts in the evidence, including conflicts in the testimony of witnesses, are to be resolved by the fact-finder; stating that the fact-finder is free to reject the defendant's version of events). Accordingly, for the reasons stated here and detailed in our notice, we conclude that there was sufficient evidence to uphold Defendant's conviction.

Jury Instructions

{4} Defendant continues to contend that the district court erred in refusing to instruct the jury on his requested jury instruction with respect to legal justification [RP 179] and instead giving the State's requested instructions. [MIO 4; RP 172, 174] The instruction given provides that "[D]efendant maliciously killed or intentionally injured an animal." [RP 172] Our notice explained that because it was factually undisputed at trial that the dog was killed, and not just injured by a gunshot, the "intentionally injured" alternative was factually inadequate and the jury could not have relied upon it. See, e.g., *State v.*

Olguin, 1995-NMSC-077, ¶ 2, 120 N.M. 740, 906 P.2d 731 (holding that “a conviction under a general verdict must be reversed if one of the alternative bases of conviction is legally inadequate, but . . . due process does not require a guilty verdict to be set aside if an alternative basis of conviction is only factually inadequate to support a conviction” (citations omitted)). As such, we proposed that we could presume the jury based its verdict on the “maliciously killed” alternative. Additionally, we noted that given the undisputed fact that the dog was killed, any injury caused to the dog by the gunshot was necessarily subsumed within the killing.

{5} In response, Defendant merely reiterates his contention that “a jury instruction that simply says jurors can find the defendant guilty of a felony if they find the defendant ‘intentionally injured an animal’ without any other motivational evidence is legally insufficient.” [MIO 4] We remain unpersuaded. As discussed above and in our notice, a legally sufficient alternative was presented in the instruction, which we can presume the jury relied upon.

{6} Defendant further contends that even though NMSA 1978, Section 30-18-1(E) (2007) (defining the offense of extreme cruelty to animals), does not make the absence of legal justification an element of the offense of extreme cruelty to animals, *Black’s Law Dictionary* defines “malicious act” to include an act performed “without legal justification.” [MIO 4] However, Defendant received a jury instruction stating that “[a] malicious killing is an intentional killing without legal justification or excuse.” [RP 173] As such, the jury was instructed in accordance with the *Black’s Law Dictionary* definition. To the extent Defendant argues that the district court should have given his requested instruction, which states that “[t]he constitution of New Mexico provides a person has an inherent right of possessing and protecting property,” [MIO 4; RP 179] we remain unpersuaded. Defendant’s memorandum in opposition explains that there was no evidence presented at trial that the dog crawled onto Defendant’s property. [MIO 1] Accordingly, where there was no evidence that the dog entered Defendant’s property, there was no factual basis for a jury instruction premised on the right of protecting one’s property. See *State v. Nieto*, 2000-NMSC-031, ¶ 15, 129 N.M. 688, 12 P.3d 442 (“A defendant is entitled to have the jury instructed on his theory of the case if that theory is supported by the evidence.”). We therefore affirm.

{7} For the reasons stated above and in this Court’s notice of proposed disposition, we affirm Defendant’s conviction.

{8} **IT IS SO ORDERED.**

M. MONICA ZAMORA, Judge

WE CONCUR:

LINDA M. VANZI, Judge

J. MILES HANISEE, Judge