COURT OF APPEALS
DECISION
DATED AND FILED

July 5, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP357-CR **Cir. Ct. No. 2014CF34**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ERIC J. PEVAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dunn County: JON M. THEISEN, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Eric Pevan appeals a judgment of conviction for one count of felony mistreatment of an animal, resulting in the animal's death, as party to a crime. He argues the evidence presented at trial was insufficient to support his conviction. We disagree and affirm.

BACKGROUND

¶2 Pevan was charged as party to a crime with violating WIS. STAT. § 951.02 (2015-16), in connection with the death of a dog named "Moose."[1] The case proceeded to a jury trial, at which the following evidence was presented.

¶3 On March 22, 2013, S.C., who was Moose's owner, received a telephone call from Pevan. S.C.'s live-in girlfriend, L.H., overheard the call because the phone was on speakerphone.[2] S.C. had known Pevan for several years, and S.C. and L.H. lived in front of a house rented by Pevan's now ex-girlfriend, with whom Pevan lived at the time. S.C. and L.H. testified Pevan was "upset," "screaming," and frequently swearing during the phone call. Pevan informed S.C. that one of S.C.'s dogs had wandered onto his yard and that Pevan would kill the dog if it did so again. S.C. told Pevan that his dogs were on his own

[1] WISCONSIN STAT. § 951.02 states in relevant part: "No person may treat any animal, whether belonging to the person or another, in a cruel manner." Furthermore, if a person "intentionally violates s. 951.02, resulting in the mutilation, disfigurement or death of an animal," that person is guilty of a Class I felony. WIS. STAT. § 951.18(1). On appeal, because of Moose's death, Pevan raises no issues regarding the applicability of § 951.18(1).

All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] Pevan refers to S.C. and L.H. by name in his brief in chief. Although Moose bore the brunt of the harm here, S.C. and L.H. are also victims of a crime and must be identified by one or more initials or pseudonyms in Pevan's briefing pursuant to WIS. STAT. RULES 809.19(1)(g) and 809.86(4). Pevan does not make this error in his reply brief.

property but that he had earlier seen Moose eating venison left in Pevan's garbage. S.C. explained to Pevan that his dogs otherwise never left his yard, and he stated he would be willing to put his dogs on a leash if they again entered Pevan's property. At the end of the call, Pevan reiterated that if S.C. could not keep the dog off Pevan's yard, he was "going to kill it."

¶4 About a day and a half after Pevan's call, Moose died. S.C. observed that Moose appeared weak at midday on the day of his death before the dog's physical condition rapidly deteriorated during the afternoon and evening. S.C. reported Moose's death to law enforcement. A veterinary pathologist performed a necropsy and discovered a large amount of unclotted blood in Moose's abdominal cavity. Based upon that observation and the results of toxicology, viral and bacterial reports, the pathologist opined that Moose's cause of death was internal bleeding brought upon by high levels of an anticoagulant in Moose's system. The pathologist further opined the anticoagulant discovered in Moose was commonly found in most modern rat poisons and, if ingested, would cause an animal to seem lame or lethargic before death.

¶5 Several weeks after Moose's death, S.C. met with Pevan, who had by then moved out of the property located behind S.C.'s home. S.C. testified Pevan initially told S.C. that his ex-girlfriend poisoned Moose because Moose was entering their yard and that "they did it to watch and see how long it would take to kill the dog." Pevan also told S.C. that the rat poison used to poison Moose was located in a cupboard above a refrigerator in his former house, from which his ex-girlfriend also recently moved. Pevan later provided a written statement to law enforcement that he wrote while at S.C.'s residence, in which he stated that he saw his ex-girlfriend mix rat poison with ground beef and venison before leaving it on their back porch for S.C.'s dogs to eat. A sheriff's deputy later questioned Pevan,

and Pevan's responses were consistent with his written statement, with Pevan adding that, before Moose's death, he and his ex-girlfriend had joked about the amount of poison necessary to kill a dog. With the assistance of Pevan's former landlord, S.C. recovered one-half of a container of rat poison from a cupboard above the refrigerator in Pevan's former home. S.C. provided the recovered rat poison to law enforcement.

¶6 Pevan was arrested and charged in connection with Moose's death. Pevan's ex-girlfriend, who was not charged, testified at trial, denying any knowledge or involvement in leaving poisoned meat on her property. She further denied that either she or Pevan ever placed venison in their garbage or that she knew Pevan made statements in which he accused her of poisoning the dog. She did testify that she knew Pevan was upset over S.C.'s dogs entering their yard. The landlord testified that as Pevan's ex-girlfriend was moving out, she told the landlord that she watched Pevan poison some meat and place it on the property. The landlord also testified that when he spoke to Pevan about this statement, Pevan leveled the same accusations against his ex-girlfriend and denied he was involved.

¶7 At the close of the State's case, the circuit court denied Pevan's motion to dismiss based upon claimed insufficiency of the evidence to convict. Pevan presented no witnesses. The jury found him guilty of mistreating an animal as party to a crime. Pevan now appeals.

DISCUSSION

¶8 "The test for sufficiency of the evidence to convict is highly deferential." ***State v. Klingelhoets***, 2012 WI App 55, ¶10, 341 Wis. 2d 432, 814 N.W.2d 885. We may not substitute our judgment for that of the trier of fact

unless the evidence, viewed in the light most favorable to the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). We shall not overturn a verdict if there is any possibility that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt. ***Klingelhoets***, 341 Wis. 2d 432, ¶10.

¶9 To convict Pevan of felony mistreatment of an animal under WIS. STAT. § 951.02, the State was required to prove beyond a reasonable doubt that: (1) Pevan treated an animal in a cruel manner; (2) Pevan did so intentionally; and (3) Pevan's intentionally cruel treatment of the animal resulted in its death. *See* WIS JI—CRIMINAL 1980 (2013). Regarding party to a crime liability under WIS. STAT. § 939.05(2), the jury could find Pevan guilty of mistreating an animal if he directly committed the crime, intentionally aided or abetted its commission, or conspired with another to commit it. *See* WIS JI—CRIMINAL 402 (2005). Consistent with WIS. STAT. §§ 951.01(2) and 939.23(3), the circuit court instructed the jury that "'cruel' means causing unjustifiable injury or death" and that "'intentionally' requires that the defendant acted with the mental purpose to treat the animal in a cruel manner or was aware that the conduct was practically certain to cause that result."

¶10 We conclude the evidence presented at trial was sufficient for the jury to find beyond a reasonable doubt that Pevan, either directly or as party to a crime, intentionally treated Moose in a cruel manner and caused the dog's death. The jury could reasonably find, based upon the pathologist's testimony, that Moose died from ingesting rat poison. Further, the jury could reasonably infer that Pevan or his ex-girlfriend poisoned Moose, as they possessed the means used

to do so. The evidence showed a used rat poison container was recovered from Pevan and his ex-girlfriend's former residence. Finally, the evidence clearly showed Pevan had threatened during his phone call with S.C. to kill S.C.'s dogs, and that Pevan and his ex-girlfriend had accused each other of intentionally baiting Moose onto their property with poisoned meat.

¶11 Pevan generally argues no physical evidence tied him to the crime, that the jury could have inferred Moose ingested rat poison from another property, and that S.C. was "patently unbelievable" due to several inconsistencies within his testimony and a general lack of credibility. His arguments ignore our standard of review. While little direct evidence was presented in this case, "a finding of guilt may rest upon evidence that is entirely circumstantial." ***Poellinger***, 153 Wis. 2d at 501. Furthermore, it is the jury's role, not ours, "to decide which evidence is credible and which is not and how conflicts in the evidence are to be resolved." ***Id.*** at 503.

¶12 Pevan argues that the mere act of placing rat poison on his property does not, as a matter of law, constitute "cruel and unjustified" treatment of an animal as defined under WIS. STAT. § 951.01(2). Pevan asserts either he or his ex-girlfriend were entitled to place rodenticides on their property, and they were under no duty to refrain from this common practice even after they became aware S.C.'s dogs were entering their yard. In reality, Pevan's argument goes to whether he had intent to treat Moose in a cruel manner. However, the evidence readily supported the jury's finding that Pevan possessed such intent. A reasonable factfinder could conclude from the evidence that Pevan was aware the placement of poisoned meat was practically certain to cause Moose's death. As noted, the jury heard testimony establishing Pevan's knowledge of and intent to kill not rats but trespassing dogs. Indeed, in Pevan's repeated statements to S.C., the landlord,

and law enforcement, he expressly asserted his ex-girlfriend placed the poisoned meat in response to Moose entering their yard, and that was consistent with their "joke" to see how much poison it would take to kill a dog.

¶13 Pevan also argues there is no evidence showing that he was a party to Moose's demise. Pevan asserts the evidence showed he was at most a bystander in his ex-girlfriend's plot to poison Moose. The record belies his argument. The jury could have reasonably inferred that Pevan acted alone in poisoning Moose based upon the testimony of his ex-girlfriend and that his denials of involvement were not credible in light of the landlord's testimony. *See* ***Poellinger***, 153 Wis. 2d at 503. Alternatively, the jury could have reasonably inferred Pevan and his ex-girlfriend acted in concert upon Pevan's stated intent to kill S.C.'s dogs and his admitted knowledge of rat poison kept in the residence. *See* WIS. STAT. § 939.05(2). Either theory supports a finding that Pevan mistreated an animal as a party to a crime.

¶14 Pevan also appears to assert that even if the evidence showed Moose died from ingesting rat poison placed on his property, regardless of intent, Moose was not treated in a "cruel" manner because the dog was only poisoned, not "tortured … caged or starved." He misconstrues the statutory standard. Under WIS. STAT. § 951.01(2), "cruel" treatment results when a person causes "unnecessary and excessive pain or suffering *or* unjustifiable injury or death" of

an animal.[3] (Emphasis added.) The evidence allowed the jury to reasonably find Pevan treated Moose cruelly by feeding Moose rat poison, which caused the dog's drawn-out death. Accordingly, when viewed in a light most favorable to the conviction, the evidence was sufficient for the jury to find Pevan guilty of mistreatment of an animal as party to that crime.

¶15 Finally, Pevan argues that WIS. STAT. § 951.02 is unconstitutionally vague and that the veterinary pathologist's testimony regarding Moose's toxicology report was inadmissible at trial. We do not address either issue, however, because Pevan raises them for the first time in his reply brief. *See* ***State v. Lock***, 2013 WI App 80, ¶38 n.6, 348 Wis. 2d 334, 833 N.W.2d 189. Furthermore, Pevan concedes he never advanced his "vagueness" argument in the circuit court. We shall not consider issues raised for the first time on appeal. *See* ***Apex Elecs. Corp. v. Gee***, 217 Wis. 2d 378, 384, 577 N.W.2d 23 (1998).

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[3] Prior to instructing the jury on the elements of WIS. STAT. § 951.02, the circuit court read to the jury an amended Information which alleged Pevan "as party to a crime, did intentionally treat an animal, a dog, in a cruel manner, resulting in the animal's death, to-wit: poisoned the animal, contrary to Wisconsin law." Pevan suggests that by reading the Information to the jury, the court erroneously provided an instruction that "poisoning an animal is contrary to Wisconsin law." However, Pevan does not develop an argument on this point, and we shall not consider it further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).