

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

MAR 28 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0127
)	DEPARTMENT B
)	
Appellee,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
DAMIAN REY MONTANO,)	the Supreme Court
)	
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20111745001

Honorable Michael Miller, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani, Joseph T. Maziarz, and
William Knight, a student certified
pursuant to Rule 38(d), Ariz. R. Sup. Ct.

Phoenix
Attorneys for Appellee

Lori J. Lefferts, Pima County Public Defender
By Eva A. Graham

Tucson
Attorneys for Appellant

ESPINOSA, Judge.

¶1 After a jury trial, appellant Damian Montano was convicted of reckless
cruel mistreatment of an animal and cruel neglect/abandonment of an animal. The trial

court suspended the imposition of sentence, placing him on probation for a period of three years. Montano appeals from the mistreatment conviction, arguing the state presented insufficient evidence to sustain it.¹ We affirm.

¶2 In reviewing a claim of insufficient evidence, we review the evidence “in the light most favorable to sustaining the conviction” and resolve all reasonable inferences against the defendant. *State v. Haas*, 138 Ariz. 413, 419, 675 P.2d 673, 679 (1983), quoting *State v. Tison*, 129 Ariz. 546, 552, 633 P.2d 355, 361 (1981). After Montano’s home was foreclosed on, a locksmith working at the home in August 2010 discovered Montano’s cat, Bass, dead inside a closed utility room. Montano’s second cat, Treble, was found alive, but in a state of severe starvation and dehydration.

¶3 When interviewed by a Pima County Deputy Sheriff and an officer from the Pima County Animal Care Center, Montano claimed he had been caring for the cats three times a week, but stated that the last time he had gone to the house was in July when he had found Bass dead and assumed Treble was dead as well and did not return. When the locksmith found Bass, however, the dead cat was blocking the door to the utility room and he had to push the cat aside to open the door. Additionally, Montano told the realtor handling the house during the foreclosure process that he had not been to the house “for a couple of months” and a neighbor who lived across the street from the

¹Montano also asserts the trial court erred in denying his motion for judgment of acquittal, *see* Ariz. R. Crim. P. 20, but that motion was based on the same claim of insufficient evidence. Accordingly, we need not address Montano’s claim in multiple contexts. *See State v. Neal*, 143 Ariz. 93, 98, 692 P.2d 272, 277 (1984) (“A Rule 20 motion is designed to test the sufficiency of the state’s evidence.”).

house told investigators she had not seen anyone at the house in the year it had been unoccupied.

¶4 A conviction must be supported by “substantial evidence,” Ariz. R. Crim. P. 20, which is “such proof that ‘reasonable persons could accept as adequate and sufficient to support a conclusion of defendant’s guilt beyond a reasonable doubt.’” *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990), quoting *State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980). We will reverse a conviction for insufficient evidence “only where there is a complete absence of probative facts to support the conviction.” *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996), quoting *State v. Scott*, 113 Ariz. 423, 424-25, 555 P.2d 1117, 1118-19 (1976). And, evidence remains sufficient to sustain a conviction even “if reasonable minds can differ on inferences to be drawn therefrom.” *State v. Landrigan*, 176 Ariz. 1, 4, 859 P.2d 111, 114 (1993).

¶5 “A person commits cruelty to animals if the person . . . [r]ecklessly subjects any animal to cruel mistreatment.” A.R.S. § 13-2910(A)(4). “‘Cruel mistreatment’ means to torture or otherwise inflict unnecessary serious physical injury on an animal or to kill an animal in a manner that causes protracted suffering to the animal.” § 13-2910(H)(2). A person acts recklessly if he or she “is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists.” A.R.S. § 13-105(10)(c). And “the risk must be of such nature and degree that disregard of such risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.” *Id.*

¶6 Montano argues that because the state did not present necropsy evidence or testimony about Bass’s cause of death, it did not establish he had inflicted unnecessary serious physical injury on Bass or killed him in a matter causing protracted suffering. Rather, he posits, the evidence showed he had regularly cared for the cats until he found Bass dead. But the state presented evidence that Bass was found alone in a closed room with no food or water available. The veterinarian who cared for Treble also testified that cats can only live about four to five days without water. Even according to Montano’s account, he had left the cats unattended for ten days. And, contrary to Montano’s argument on appeal that “there was no evidence offered to rule[] out death from a viral infection,” the veterinarian also testified in relation to Treble that it is unlikely there had been viruses in the environment because Treble had not shown any symptoms determined to have been caused by a virus.

¶7 Furthermore, based on the locksmith’s having found Bass’s body blocking the door, the jury could have rejected Montano’s account of when he had last been to the home, inferring that he could not have seen the cat dead without moving it away from the door first. *See State v. Clemons*, 110 Ariz. 555, 557, 521 P.2d 987, 989 (1974) (jury is not compelled to believe defendant’s testimony); *see also State v. Medrano*, 185 Ariz. 192, 194, 914 P.2d 225, 227 (1996) (“Because of the obvious motive to fabricate, . . . self-serving testimony is subject to skepticism . . .”). The jury therefore could have reasonably inferred, based on Treble’s emaciated condition, that the cats had been left alone much longer than Montano claimed, with Bass having no access to food or water

and in a home Montano knew had no electricity, and therefore no air conditioning, in the Tucson summer heat.

¶8 Based on this circumstantial evidence, we cannot say there was a complete absence of evidence from which the jury could find Montano had caused Bass to die in a manner causing protracted suffering. *State v. Webster*, 170 Ariz. 372, 374, 824 P.2d 768, 770 (App. 1991) (“Criminal convictions may rest solely on circumstantial proof[,]” which “has no less probative force than direct evidence.”) (citation omitted); *see also State v. Rowan*, 174 Ariz. 285, 289, 848 P.2d 864, 868 (App. 1992) (“The mere existence of an inference of innocence does not mandate a directed verdict of acquittal.”), *vacated in part on other grounds*, 176 Ariz. 114, 859 P.2d 737 (1993). In essence, Montano’s argument urges us to reweigh the evidence presented to the jury, which we will not do. *See State v. Lee*, 189 Ariz. 590, 603, 944 P.2d 1204, 1217 (1997).

¶9 Montano’s convictions and probationary terms are affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge