

DA 19-0442

IN THE SUPREME COURT OF THE STATE OF MONTANA

2020 MT 109N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

COTY CROSS,

Defendant and Appellant.

APPEAL FROM: District Court of the Sixth Judicial District,
In and For the County of Park, Cause No. DC 19-06
Honorable Brenda R. Gilbert, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Jami Rebsom, Jami Rebsom Law Office, P.L.L.C., Livingston, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Lindsey R. Simon, Assistant
Attorney General, Helena, Montana

Kendra K. Anderson, Park County Attorney, Livingston, Montana

Submitted on Briefs: April 22, 2020

Decided: May 5, 2020

Filed:


Clerk

Justice Jim Rice delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Coty Cross (Cross) appeals her conviction of owning a dog that "harasses, kills, wounds, or injures livestock" under § 81-7-401(6), MCA, after a bench trial before the Park County Justice Court, Hon. Linda Cantin, presiding, and the Justice Court's order pursuant to § 81-7-401(2), MCA, that the dog be euthanized. The Justice Court entered written findings of fact and conclusions of law. Upon appeal, the Sixth Judicial District Court, Hon. Brenda Gilbert, presiding, determined upon "thorough review of the audio and written record submitted to the Court, that the Justice Court made no errors of law in its decision," and affirmed the Justice Court's judgment.

¶3 Anna Allan is employed and resides on a ranch in Park County. She does not own or lease the residence but is permitted to live there pursuant to her employment. Allan kept her own steer calves and a single ewe sheep in a pen on the property. The Justice Court found that "[r]anch employees are frequently given a place to live in and to keep their own livestock or pets." The Justice Court described the fencing for the pen to be "about shoulder height," chained to a ranch building, and "designed to keep coyotes and other wild animals out."

¶4 The morning of March 21, 2018, as Allan was leaving the residence, she saw a dog in the pen, attacking her animals. Allan chased off the dog, which exited the pen by a metal gate panel that had been smashed in, and observed blood on the dog's face. Allan's ewe was dead, with "wounds to its face and neck consistent with dog bites," as noted by the Justice Court.

¶5 Allan recognized the dog as one under the supervision of Kevin Cowperthwait, the ranch manager, who also resided on the ranch. Allan spoke with Cowperthwait and asked that the dog be "put down." Cowperthwait told Allan he would speak with his step-daughter, Cross, about the dog. Allan contacted the Park County Sheriff's Office, and Deputy Joseph Brown responded to the ranch. Brown inspected the carcass, identified markings he believed to be consistent with a dog bite, and obtained permission from Cowperthwait to photograph the dog, which was then caged inside a ranch building. Brown testified to his belief the dog had been cleaned up by the time he observed it. Later that day, Allan spoke with Cross. Cross acknowledged her dog had killed Allan's ewe, but declined to put the dog down. Allan then contacted Brown to seek legal relief.

¶6 Cross was charged with violating § 81-7-401, MCA, and was represented by the Office of Public Defender. Following an omnibus hearing, the Justice Court ordered Cross to appear in person for all matters and warned that failure to appear in person would result in waiver of a jury trial. A later trial order reiterated this warning to Cross in writing. Cross failed to appear at a Confirmation of Jury Trial hearing, after which the Justice Court

entered an Order Waiving Jury Trial and scheduled the matter for a bench trial. Cross did not seek to justify her absence from the required hearing.

¶7 At trial, the State presented testimony from Allan and Deputy Brown. The defense called no witnesses. Photographs of the ewe and the dog were introduced. The Justice Court found that Cross's dog "was identified by photo [as] the one that was in the pen with the calves." Cross's counsel acknowledged the State had established the elements of criminal liability under § 81-7-401(6), MCA, but argued it had failed to carry its burden under § 81-7-401(2), MCA, for destruction of the dog. The Justice Court ordered post-trial briefing on that issue, after which the Justice Court entered its judgment, finding Cross guilty of a misdemeanor under § 81-7-401(6), MCA, and that the dog constituted a nuisance under § 81-7-401(2), MCA, requiring it to be euthanized.

¶8 On appeal, Cross challenges the sufficiency of the evidence to convict her of the misdemeanor offense under § 81-7-401(6), MCA. "We review questions on the sufficiency of the evidence in a criminal case to determine whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Polak*, 2018 MT 174, ¶ 34, 392 Mont. 90, 422 P.3d 112. Our review is *de novo*. *Polak*, ¶ 14. Section 81-7-401, MCA, provides, in pertinent part:

(2) A dog, whether licensed or not, that, while off premises owned or under control of its owner and on property owned, leased, or controlled by the livestock owner, harasses, kills, wounds, or injures livestock not belonging to the owner of the dog is considered a public nuisance and:

(a) may be killed . . .

(6) The owner of a dog that harasses, kills, wounds, or injures livestock is guilty of a misdemeanor and upon conviction shall be fined not more than \$500.

¶9 First, Cross conceded at trial that the State had proven the elements of the offense and that criminal liability had been established, including that she owned the dog. Further, in light of Cross’s claim of ineffective assistance of her trial counsel (IAC), we also conclude that the evidence introduced by the State was sufficient to prove the charge, regardless of the defense’s concession. Cross’s argument that the evidence was insufficient largely ignores the testimony presented and the permissible inferences from the testimony. She argues, for example, that “the State did not have evidence” of blood on the dog, but Allan testified to the contrary. She argues that “[n]o one witnessed the sheep get killed,” but there was clear circumstantial evidence of the act, as the Justice Court found:

The dog was positively identified as the one in the pen with the dead sheep and jumping and biting at the calves in the pen. The dog had blood on it leading one to believe beyond a reasonable doubt the dog was responsible for the sheep’s death.

¶10 Regarding the requirements of § 81-7-401(2), MCA, for nuisance, Cross argues as part of her IAC claim that her trial counsel failed to contest that Cross was in control of the dog, because it was Cowperthwait who was actually in control of the dog. However, while Cowperthwait exercised initial control over the dog and the ranch property at large, the uncontested evidence was that he deferred to Cross on questions about the dog, and Cross

exercised ultimate authority over the dog, including whether to put down the dog. And, in any event, it was proven alternatively under the statute that the dog was off the premises controlled by Cowperthwait at the time of the attack and was on premises controlled by Allan, as determined by the Justice Court:

For the dog to be euthanized the state has to show that the dog was on premises owned, leased or under the control of the livestock owner. In this case the Owner Ms. Allan lived at the premises and had a pen that she kept her livestock in. These premises, even though she did not own or lease them were under her control. It would be unreasonable for the ranch manager or the owner of the ranch to come on the property, walk into the house or into the livestock pen without being invited.

¶11 Cross also argues that her trial counsel was ineffective for waiving a jury trial, but the trial was waived upon Cross's failure to personally attend a hearing after notice. *City of Missoula v. Cox*, 2008 MT 364, ¶ 15, 346 Mont. 422, 196 P.3d 452. Whether Cross's failure to attend was related to the advice or representation of counsel is not evident from the record, nor are other aspects of her IAC claim, such as her challenge to trial counsel's lack of objections or failure to call an expert witness.

¶12 At trial, upon the close of evidence, Cross moved for dismissal of the complaint because it alleged the offense had occurred "on or about March 23," instead of the correct date of March 21. The Justice Court denied the motion, and on appeal Cross argues the State's trial position constituted a substantive amendment to the complaint, in violation of § 46-11-205, MCA, and this Court's holding in *State v. Hardground*, 2019 MT 14, 394 Mont. 104, 433 P.3d 711, which determined the State's trial amendment to the date alleged in the information was improper in that case. However, the discrepancy in the alleged date

here was a minor amendment that did not impact the trial, and was not of substance. We held in *Hardground* that the incorrect date used in the information was significant because there it was an element of the offense, but explained that the date may not be significant in other cases, *Hardground*, ¶ 17, as here.

¶13 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. This appeal presents no constitutional issues, no issues of first impression, and does not establish new precedent or modify existing precedent. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review.

¶14 Affirmed.

/S/ JIM RICE

We concur:

/S/ LAURIE McKINNON
/S/ BETH BAKER
/S/ DIRK M. SANDEFUR
/S/ INGRID GUSTAFSON