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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 **STATE OF NEW MEXICO,**

3 Plaintiff-Appellee,

4 v.

No. 34,682

5 **JEREMIAH BRIAN SHELBY,**

6 Defendant-Appellant.

7 **APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY**

8 **Karen L. Townsend, District Judge**

9 Hector H. Balderas, Attorney General

10 Santa Fe, NM

11 Steven Johnston, Assistant Attorney General

12 Albuquerque, NM

13 for Appellee

14 Jorge A. Alvarado, Chief Public Defender

15 Kathleen T. Baldridge, Assistant Appellate Defender

16 Santa Fe, NM

17 for Appellant

18 **MEMORANDUM OPINION**

19 **VIGIL, Chief Judge.**

1 {1} Defendant appeals from the district court’s judgment and sentence, convicting
2 him for breaking and entering, and acquitting him for larceny over \$500 and criminal
3 damage to property. Unpersuaded that Defendant demonstrated error, we issued a
4 notice of proposed summary disposition, proposing to affirm. Defendant has
5 responded to our notice with a memorandum in opposition. We have considered
6 Defendant’s response and remain unpersuaded. We affirm Defendant’s convictions.

7 {2} On appeal, Defendant argues that the evidence was insufficient to establish that
8 he knowingly entered Ms. Lucero’s home without permission, an essential element
9 of breaking and entering. [MIO 3-7] We do not repeat the analysis contained in our
10 notice; rather we address only those arguments Defendant asserts in response to our
11 proposed analysis. In response to our notice, Defendant disagrees with our reliance on
12 *State v. Rubio*, 1999-NMCA-018, 126 N.M. 579, 973 P.2d 256, in proposing summary
13 affirmance. Defendant contends that *Rubio* is not controlling because the defendant
14 in that case, Rubio, was not directly challenging the sufficiency of the evidence, he
15 was challenging the breaking and entering instruction. [MIO 6] *See id.* ¶¶ 4-5. We
16 agree with Defendant’s characterization of Rubio’s argument, but this Court’s opinion
17 did assess the sufficiency of the evidence to support the conclusion that Rubio entered
18 the dwelling without authority to do so. *See id.* ¶ 9. (“The testimony below evidences
19 nothing more than that Defendant was a frequent visitor at Reynolds’ apartment and

1 that he was there with Reynolds’ permission. In sum, we believe that the evidence
2 overwhelmingly supports the conclusion that Defendant did not have blanket authority
3 to enter the apartment, or that whatever authority he may have had was freely
4 revocable by Reynolds.”). *Id.* ¶ 9. As a result, we find guidance in the Court’s
5 application of law to fact in *Rubio*.

6 {3} Also in response to our notice, Defendant distinguishes the facts in *Rubio* on
7 the grounds that Rubio’s girlfriend expressly denied him permission to enter her
8 apartment; whereas, in the current case, Ms. Lucero did not expressly deny or grant
9 Defendant permission to enter her home. [MIO 7] We are not persuaded that this
10 distinction renders the State’s evidence insufficient. The breaking and entering statute
11 does not require a showing that the victim expressly denied the defendant
12 authorization to enter his or her home in order for the entry to be unauthorized. *See*
13 NMSA 1978, § 30-14-8(A) (1981) (“Breaking and entering consists of the
14 unauthorized entry of any . . . dwelling . . . , where entry is obtained by fraud or
15 deception, or by the breaking or dismantling of any part of the . . . dwelling . . . , or by
16 the breaking or dismantling of any device used to secure the . . . dwelling . . . [.]”); UJI
17 14-1410 NMRA (stating that the jury must find that the defendant entered the property
18 without permission). We note that our proposed analysis did not rely on the fact that
19 Rubio was expressly denied permission, because the Court’s opinion emphasized that

1 despite Rubio’s close relationship and shared parental responsibilities with his
2 girlfriend, Rubio nevertheless had a separate dwelling and did not have “blanket
3 permission” to enter his girlfriend’s house. *See Rubio*, 1999-NMCA-018, ¶¶ 2-3, 9.
4 In the current case, Defendant did not have the same type of relationship and shared
5 responsibilities with Ms. Lucero that might give rise to a “blanket permission” to enter
6 Ms. Lucero’s home. In Defendant’s situation, they had an “on again, off again”
7 relationship; [DS 2] and they were just friends at the time Ms. Lucero left town. [RP
8 75] Ms. Lucero testified that even when she and Defendant were dating, they were
9 permitted to go into each other’s homes, but only when they gave each other notice.
10 [RP 82] There is no question that Defendant did not have authority to enter Ms.
11 Lucero’s home. As we stated in our notice, Ms. Lucero’s express permission to enter
12 her home was required for Defendant to enter it, and Ms. Lucero testified that she had
13 not given Defendant permission to enter her house or take her things or her dog, as
14 Defendant did. [RP 75] As a result, we hold that Defendant’s argument that the
15 evidence was insufficient as a matter of law fails.

16 {4} We also note that Defendant’s argument ignores the reasonable inferences the
17 jury could draw from the evidence of Defendant’s conduct in gaining entry into Ms.
18 Lucero’s home and thereafter. *See State v. Riley*, 2010-NMSC-005, ¶ 12, 147 N.M.
19 557, 226 P.3d 656 (reviewing both direct and circumstantial evidence for their

1 sufficiency in supporting the conviction); *State v. Cunningham*, 2000-NMSC-009, ¶
2 26, 128 N.M. 711, 998 P.2d 176 (observing that the reviewing court “view[s] the
3 evidence in the light most favorable to the guilty verdict, indulging all reasonable
4 inferences and resolving all conflicts in the evidence in favor of the verdict”). Viewing
5 the evidence consistently with our standard of review, we believe that the State
6 presented sufficient evidence that Defendant’s entry into Ms. Lucero’s home by
7 damaging her back door was an unauthorized entry within the meaning of the offense
8 of breaking and entering. [RP 117]

9 **CONCLUSION**

10 {5} For the reasons stated in this opinion and in our notice, we affirm the district
11 court’s judgment and sentence.

12 {6} **IT IS SO ORDERED.**

13
14

MICHAEL E. VIGIL, Chief Judge

15 **WE CONCUR:**

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17

JAMES J. WECHSLER, Judge

1 **LINDA M. VANZI, Judge**