

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK WILLIAM KRUTHOFF,

Defendant-Appellant.

UNPUBLISHED
December 16, 2003

No. 242739
Kent Circuit Court
LC No. 01-004874-FH

Before: Smolenski, P.J., and Sawyer and Borrello, JJ.

PER CURIAM.

Following a jury trial, defendant was found guilty of willfully and maliciously killing an animal, MCL 750.50b, and was sentenced to 18 months' to 6 years' imprisonment as a second-habitual offender, MCL 769.10. Defendant appeals as of right asserting that there is insufficient evidence to support his conviction or, in the alternative, the court erred in scoring his sentencing guidelines. We affirm defendant's conviction and sentence.

“[W]hen reviewing sufficiency of the evidence claims, courts should view all the evidence--whether direct or circumstantial--in a light most favorable to the prosecution to determine whether the prosecution sustained its burden. It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences.” *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Additionally, this Court reviews de novo questions of statutory interpretation. *People v Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998).

To sustain a conviction for this offense, the prosecution must prove that defendant (1) willfully, maliciously and without just cause or excuse (2) killed an animal. MCL 750.50b(2). There is no dispute that defendant willfully killed the dog. The only question in this case is whether the killing was malicious and without just cause or excuse. Defendant argues that no evidence was presented to show that defendant acted with malice towards the dog or that he did not act with just cause, i.e., was carrying out the family's decision to put the dog down.

Defendant contends that “maliciously” killing means that defendant had to demonstrate ill will towards the dog. The statute does not provide a definition of malice, nor was the jury provided with one. But the word has been defined in murder cases. The elements of murder, death of a human being, include a killing with malice and without justification or excuse. *People v Mendoza*, 468 Mich 527, 534-535; 664 NW2d 685 (2003). Because the elements of the murder

are analogous to the offense in this case, we find instructive case law defining malice in the context of a homicide. “Malice” is defined as either “the intent to kill *at the time* the act is committed” or “the absence of mitigating circumstances.” *Mendoza, supra* at 539-540 (emphasis in original). There need be no showing of ill will or hatred. Malice can be inferred from the fact that the defendant intentionally set in motion a force likely to cause death or great bodily harm. *People v Nowak*, 462 Mich 392, 401; 614 NW2d 78 (2000) (citations omitted). In this case, the parties do not dispute that defendant intentionally killed the dog. The prosecution did not need to prove that defendant did so with animus. The allegation that defendant only killed the dog because it needed to be put down relates not to malice, but to whether the killing was with or without just cause or excuse.

With regard to the element of just cause or excuse, defendant’s father and mother did testify that the dog was going to be put down. Defendant contends that this was a sufficient reason to excuse the killing and that the other circumstances surrounding the killing are irrelevant. We simply cannot agree. To adopt defendant’s interpretation would mean that as long as there was a legitimate reason to kill the family pet, the act could be committed in any manner. Taken to the extreme, killing an animal by drawing and quartering would be permissible if the animal was in an advanced state of failing health or a danger to others. However, such an interpretation would negate the statute’s purpose; namely, to ensure that animals are treated humanely. See MCL 750.49 *et seq.* To this extent, then, the manner in which the animal is killed must be considered because statutes should be construed reasonably, keeping in mind the purpose of the act. *People v Spann*, 250 Mich App 527, 530; NW2d (2001). We must look to “the object of the statute, the harm which it is designed to remedy, and apply a reasonable construction which best accomplishes the statute’s purpose.” *People v Russo*, 439 Mich 584, 595; 497 NW2d 698 (1992), quoting *In re Forfeiture of \$5,264*, 432 Mich 242, 248; 439 NW2d 246 (1989).

Here, most of the witnesses testified that defendant, who had been making feed at the farm, was angry when he arrived at his parent’s house. After striking the dog several times in full view of the house occupants, defendant put the dog on the hood of his ex-wife’s car. Evidence established that he had had a bitter divorce. Defendant’s sister-in-law and father testified that defendant spun gravel as he left the scene in his truck. Defendant then returned to the farm where his brother found him banging on the feed bins with the hammer, as is sometimes necessary to do.

While some witnesses testified that there had been discussion about putting the dog down, the jury was free to reject this explanation. Also, there was conflicting evidence as to the humaneness of “tonking” a dog, particularly in this case where the prosecution’s expert testified that the dog did not die quickly. Viewing this evidence in the light most favorable to the prosecution, even assuming the dog was going to be destroyed anyway, a jury could find beyond a reasonable doubt that defendant killed the dog at that time, at that place, and in the manner he did simply to release his anger at his ex-wife and that this did not constitute “just cause” for the manner in which the killing occurred. Therefore, we conclude that there was sufficient evidence to support defendant’s conviction.

Defendant next alleges two scoring errors in the calculation of his sentence.¹ Because defendant objected to these scoring errors at sentencing, the issues are preserved for appeal. A trial court's decisions in calculating the sentencing guidelines must be upheld if there is any supporting evidence in the record. *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003). Applicability and construction of the sentencing guidelines are questions of law which this Court reviews de novo. *People v Libbett*, 251 Mich App 353, 365; 650 NW2d 407 (2002).

Defendant first argues that the court erred in scoring ten points for Offense Variable (OV) 4. Ten points are scored when a victim suffers a serious psychological injury requiring or which may require professional treatment. MCL 777.34. The fact that treatment has not been sought is not conclusive. MCL 777.34(2). At sentencing, the court found that ten points were warranted because defendant wanted "people to see what he was doing" and "people did see what he did." The court agreed with the prosecution, that unexpectedly seeing the family dog killed by repeated blows to the head would be a traumatic event for most people, implicating the possible need of psychological treatment.

Defendant argues that the only "victim" in this case was the dog, and thus, any effect on family members resulting from viewing the killing is irrelevant under OV 4. Defendant asserts that this interpretation is consistent with the court's determination pursuant to OV 9, MCL 777.39, that there was only one victim. Plaintiff counters that such a narrow interpretation would essentially nullify the applicability of OV 4 in sentencing for the offense of willfully and maliciously killing an animal because of the improbability of being able to prove serious psychological injury to an animal.

This issue requires us to determine who was a victim in this case as contemplated by the sentencing guidelines. OV 9 (number of victims) instructs that "each person who was placed in danger of injury or loss of life" is a victim. MCL 777.39(2)(a). Defendant asserts that the observers of the incident were not victims because none were physically hurt. But this definition is not limited to physical injury. In *People v Knowles*, 256 Mich App 53; 662 NW2d 824 (2003), the defendant was convicted of uttering and publishing. Regarding the scoring of OV 9, this Court held that the credit union at which the stolen check was cashed was a victim because it had been directly financially harmed, i.e., the credit union wrongly lost the use of its money for a time after paying it out. *Id.* at 62. Thus, the Court distinguished between those directly harmed by the offender's actions and those who are indirectly harmed such as a health insurer "paying for medical treatment resulting from a physical attack on an assault victim. *Id.* Similarly, in this case, the owners of the dog were directly harmed by the loss of their property, as opposed to the indirect harm suffered by those who observed the killing. Defendant's mother testified that the dog was "more her dog," but witness testimony indicated that it was a family pet taken in and cared for by both of defendant's parents. Thus, there were at least two victims in this case.

Next, we address whether the dog is a victim. Returning to the definition of a "victim" in OV 9, we find that the dog cannot be considered a victim within the meaning of the legislative

¹ The offense occurred on April 18, 2001; therefore, the legislative guidelines apply. MCL 769.34(2).

sentencing guidelines. A victim is “each *person* who” MCL 777.39(2)(a) (emphasis added). The legislative sentencing guidelines, MCL 777.1 *et seq.*, do not define “person.” But the animal cruelty statutes do, defining “person” as “an individual, partnership, limited liability company, corporation, association, governmental entity, or other legal entity.”² MCL 750.50(1)(g). “Animal” is also defined and means “[one] or more vertebrates other than a human being.” MCL 750.50(1)(b). Because a dog is legally an animal and not a person, it cannot be a victim within the meaning of the legislative sentencing guidelines. This conclusion is buttressed by the fact that willfully and maliciously killing an animal is classified as a property crime.

Therefore, we must recognize that the trial court erred in concluding that there was only one victim and scoring OV 9 at zero points. Under this variable, ten points should be scored if there were two to nine victims. MCL 777.39(1)(c). Because we concluded that defendant’s parents, as owners, were victims, OV 9 should have been scored at ten points. Although neither party appealed the accuracy of OV 9’s scoring, we take this opportunity to correct the error because the offense variable’s correct interpretation and scoring is critical to the proper resolution of defendant’s challenge to OV 4’s score.³

Turning to OV 4 (psychological injury to victim), neither of defendant’s parents testified as to any resultant psychological harm. Therefore, the trial court erred in scoring this variable at ten points, the correct score being zero points. However, this does not mean that the trial court could not consider defendant’s calculated actions and the resultant effect on the by-standers. In determining an offender’s appropriate sentence within the guidelines range, the court may take into consideration factors not embodied in the sentencing guidelines. See *People v Rice*, 235 Mich App 429, 445-446; 597 NW2d 843 (1999). Likewise, even though the dog is not a legal victim, its rights to humane treatment are statutorily protected and in sentencing, the court also could consider the fact that the dog was killed.

Defendant also argues that the trial court erred in scoring ten points for OV 16 (property obtained, damaged, lost, or destroyed) because there was no evidence that the dog held “significant” sentimental value to defendant’s mother. Plaintiff argues that one could infer from defendant’s parents testimony that the dog had significant sentimental value to them and, at the very least, had significant sentimental value to the former owner who could no longer care for the dog.

OV 16 provides that ten points should be scored if the property had “significant historical, social, or sentimental value” and no points should be scored if the property was valued at less than \$200. MCL 777.46. The primary purpose in construing a statute is to give effect to the Legislature’s intent as expressed by the plain language of the statute. *Libbett, supra* at 335.

² This definition is substantially similar to the definition of “person” used throughout Michigan’s statutes. See, e.g., MCL 24.205; MCL 37.2103; MCL 123.508; MCL 208.6; MCL 338.3415a; MCL 445.271; MCL 445.371; MCL 449.2; MCL 450.792; and MCL 450.2108.

³ Pursuant to MCR 7.216(A), this Court has discretionary powers to address additional issues and direct appropriate relief.

In determining the plain meaning of statutory language, the fair and natural import of the terms used governs. *Id.* at 366. And, to the extent possible, effect should be given to every word and phrase. *Id.*

As an initial matter, we reject plaintiff's contention that the former owner's feelings for the dog should be considered. When a person sells or gives away property, he loses all rights in the property to the new owner. 20 Mich Civ Jur § 7 (2003). By allowing for points to be scored for historical and social value, the Legislature recognized that some property may have value to persons beyond the current owner. We believe that this distinction indicates that sentimental value needs to be in relation to the current property owner. Had the former owner sold a family heirloom to a stranger, and the heirloom was subsequently maliciously destroyed, the sentimental value to the former owner would be irrelevant. The same is true in this case. The former owner's feelings regarding the dog are irrelevant for purposes of scoring OV 16. Harsh as it may be, the family pet is considered personal property in the eyes of the law, save for the protection afforded by the animal cruelty statutes.

The next question is whether the evidence supported a finding that the dog had significant sentimental value to its owners, defendant's parents. "Significant" is not defined in the statute, but in its common usage the word means "important; of consequence."⁴ Random House Webster's College Dictionary, 2nd ed (1997), p 1202.

Certainly in this case the evidence established that the dog had sentimental value to the family. And one would imagine that even having owned the dog for only a year, the sentimental value of the family pet would be significant. However, we recognize that individual pet owners do not all form the same level of attachment to their pets. After reviewing the testimony, we conclude that there was evidence to support finding the dog held "significant" sentimental value to defendant's parents.

Contrary to defendant's position, the fact that defendant's parents had not owned the dog for a long time and had decided to put the dog to sleep are not indicative of insignificant feelings towards the dog. Defendant's mother testified that she liked and cared for the dog, but the men of the family decided that it had to be destroyed. When pressed, however, she stated that she had not "grown that attached to this dog." Defendant's father testified that although the dog needed to be put to sleep, he "personally did not want to destroy [the dog]" because he'd "got[ten] to the point where I liked [the dog]." Defendant's father further testified that it was a hard decision whether to put the dog down. Evidence of the parents' level of caring was also demonstrated by their vigilance in finding the dog if he got lost and concern for its life when the dog crossed the busy street between their house and the farm. And, perhaps most indicative of their feelings, arrangements had been made for defendant to take the dog to a veterinarian to be put to sleep the day before the incident. This did not occur because defendant worked late.

⁴ When a statute does not define its terms, this Court may consult dictionary definitions. *People v Stone*, 463 Mich 558, 563; 621 NW2d 702 (2001).

Based on the above testimony, we conclude that there was record evidence to support the court's conclusion that the dog had significant sentimental value, i.e., the dog was important to the family. Furthermore, the sentencing court had an opportunity to observe these witnesses at trial and judge their credibility to determine if their testimony was affected by their desire to help their son.

Accordingly, we find that the trial court did not err in scoring OV 16 at ten points. We also hold that the court erred in scoring OV 4 at ten points, instead of zero points, and further erred in scoring OV 9 at zero points, instead of ten points. As a result, defendant's collective offense variable score does not change, and, therefore, any errors were harmless. *People v Johnson*, 202 Mich App 281, 290; 508 NW2d 509 (1993). Additionally, despite the court's errors, a remand for resentencing is unnecessary because, based on the court's comments at sentencing, we find that the court would have imposed the same sentence.

Affirmed.

/s/ Michael R. Smolenski

/s/ David H. Sawyer

/s/ Stephen L. Borrello