

Corrections to this opinion/decision not affecting the outcome, at the Court's discretion, can occur up to the time of publication with NM Compilation Commission. The Court will ensure that the electronic version of this opinion/decision is updated accordingly in Odyssey.

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

Court of Appeals of New Mexico
Filed 4/14/2025 12:20 PM

2 **STATE OF NEW MEXICO,**

3 Plaintiff-Appellee,



Stephanie Latimer Davis
Acting Chief Clerk

4 v.

No. A-1-CA-42376

5 **FRANKIE JONES,**

6 Defendant-Appellant.

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

8 **Curtis R. Gurley, District Court Judge**

9 Raúl Torrez, Attorney General

10 Santa Fe, NM

11 for Appellee

12 Bennett J. Baur, Chief Public Defender

13 Kathleen T. Baldrige, Assistant Appellate Defender

14 Santa Fe, NM

15 for Appellant

16 **MEMORANDUM OPINION**

17 **BACA, Judge.**

18 {1} This matter was submitted to the Court on the brief in chief pursuant to the

19 Administrative Order for Appeals in Criminal Cases from the Second, Eleventh, and

20 Twelfth Judicial District Courts in *In re Pilot Project for Criminal Appeals*, No.

21 2022-002, effective November 1, 2022. Having considered the brief in chief,

22 concluding the briefing submitted to the Court provides no possibility for reversal,

1 and determining that this case is appropriate for resolution on Track 1 as defined in
2 that order, we affirm for the following reasons.

3 {2} Defendant appeals the district court’s order revoking his probation and
4 committing him to prison, arguing that the evidence was inadequate to prove he
5 violated a condition of his probation by committing a battery. [BIC 10-13] Proof of
6 a probation violation “must be established with a reasonable certainty, such that a
7 reasonable and impartial mind would believe that the defendant violated the terms
8 of probation.” *State v. Green*, 2015-NMCA-007, ¶ 22, 341 P.3d 10. “The burden of
9 proving a violation with reasonable certainty lies with the State.” *Id.*

10 {3} On appeal, we “view[] the evidence in a light most favorable to the State and
11 indulg[e] all reasonable inferences in favor of the [district] court’s judgment.” *State*
12 *v. Erickson K.*, 2002-NMCA-058, ¶ 21, 132 N.M. 258, 46 P.3d 1258. “We review
13 [the] district court’s decision to revoke probation under an abuse of discretion
14 standard. To establish an abuse of discretion, it must appear the district court acted
15 unfairly or arbitrarily, or committed manifest error.” *Green*, 2015-NMCA-007, ¶ 22
16 (alterations, internal quotation marks, and citation omitted).

17 {4} In the present case, Defendant was accused of throwing an orange at his
18 brother, Jonathan Tsosie, that hit the back of Mr. Tsosie’s head. This was the
19 misdemeanor battery for which Defendant’s probation was revoked in two cases on
20 grounds that Defendant committed a new violation of law, pursuant to a zero

1 tolerance repeat offender plea and disposition agreement. [(417) RP 105-11; 154-56;
2 (470) RP 123-29, 168-70] Misdemeanor battery consists of “the unlawful,
3 intentional touching or application of force to the person of another, when done in a
4 rude, insolent or angry manner.” NMSA 1978, § 30-3-4 (1963).

5 {5} The evidence showed that Mr. Tsosie called police to report the alleged
6 battery. [BIC 6] The officer who responded to Mr. Tsosie’s call, Deputy Farley,
7 testified to the following at the probation revocation hearing. Mr. Tsosie told Deputy
8 Farley that he was asleep with his then-girlfriend, Ms. Yellowhair, in his camper
9 when he was awakened by Defendant, who had opened the camper door and was
10 yelling at him to clean up after his dog. [BIC 7] Mr. Tsosie responded that he would
11 get up and do it in a minute. Defendant said no and told Mr. Tsosie to clean it up
12 now, then threw an orange at Mr. Tsosie that struck him on the back of the head. [9-
13 5-24 CD 12:15:50-12:16:22; BIC 6] Deputy Farley noticed a wet or sticky spot on
14 the back of Mr. Tsosie’s head and remnants of an orange on his head, shoulders, and
15 back. [BIC 6] Mr. Tsosie told Deputy Farley that he wanted to pursue charges against
16 Defendant and would show up to court to testify. [Id.] When Deputy Farley
17 questioned Defendant, Defendant admitted he was angry at his brother and threw the
18 orange at him, but did not specifically say where he threw it. [BIC 6-7; 9-5-24 CD
19 12:16:24-12:16:36]

1 {6} Mr. Tsosie also testified at the probation violation hearing, where he changed
2 his statement of events. Mr. Tsosie testified that he was arguing back-and-forth with
3 his brother, who was calm and not yelling at him at all, but was “kind of mad.” [9-
4 5-24 CD 11:47:20-11:47:46 (1159_ segment)] Mr. Tsosie stated that Defendant told
5 him to clean up after his dog and Mr. Tsosie got up to put on his shoes. [Id. 11:47:46-
6 11:48:58] Mr. Tsosie testified that Defendant threw an orange at the tailgate. [BIC 7]
7 Mr. Tsosie also stated that, as he was putting on his shoes, his former girlfriend, Ms.
8 Yellowhair, got out of bed, left the camper, picked up a piece of the orange, and
9 threw it at the back of Mr. Tsosie’s head, “just to play a joke or something.” [BIC 7;
10 9-5-24 CD 3:19:53-3:21:13 (1204_ segment)]

11 {7} The district court judge had follow-up questions for Mr. Tsosie. The judge
12 asked Mr. Tsosie why he told the officer that Defendant threw the orange at him and
13 asked Mr. Tsosie if he was lying then or if he was lying now. [BIC 7] Mr. Tsosie
14 stated that he was not lying at all; he thought Defendant threw the orange at him,
15 but, a few days later, Ms. Yellowhair admitted that she had done it. [Id.] The district
16 court asked Mr. Tsosie why he did not contact Deputy Farley to correct his story,
17 and Mr. Tsosie had no explanation. [BIC 7]

18 {8} The district court, sitting as factfinder, specifically stated that it “did not find
19 Mr. Tsosie’s testimony to be credible on any level.” [9-5-24 CD 9:50:31-9:50:40
20 (1219_ segment); BIC 9] The district court agreed with the defense that the evidence

1 would not meet the standard for a criminal conviction, but ruled that the evidence
2 met the standard for proving a probation violation. [9-5-24 CD 9:50:20-9:50:51
3 (1219_ segment)]

4 {9} Before assessing the adequacy of the State’s evidence to establish a probation
5 violation, we observe that the Rules of Evidence do not strictly apply to probation
6 violation hearings. *See* Rule 11-1101(D)(3)(d) NMRA (providing that, other than
7 the rules on privilege, the Rules of Evidence do not apply to probation revocation
8 proceedings). We also note there was no objection to Deputy Farley’s testimony
9 about Mr. Tsosie’s prior inconsistent statements in district court or on appeal. In
10 addition, Mr. Tsosie provided live testimony about his prior inconsistent statements
11 and did not deny making those statements, which were probative of material facts.
12 *See State v. Vigil*, 1982-NMCA-058, ¶¶ 16, 18-20, 97 N.M. 749, 643 P.2d 618
13 (stating that in probation revocation proceedings strict observance to the rules of law
14 and procedure is not required, certain probative hearsay may be competent, and
15 inadmissibility or incompetence may be waived by the failure to object to evidence,
16 in which case, it may be considered if it is probative); *cf. State v. Guthrie*, 2011-
17 NMSC-014, ¶¶ 2, 10-12, 40-41, 150 N.M. 84, 257 P.3d 904 (providing and
18 evaluating the flexible due process requirements for probation revocation
19 proceedings where there is a lack of live testimony on a hearsay statement and a
20 potential need for confrontation). Thus, in our assessment of the sufficiency of the

1 evidence, we consider Mr. Tsosie’s prior inconsistent statement as substantive
2 evidence that Defendant threw the orange at his head out of anger at Mr. Tsosie for
3 not cleaning up after his dog when Defendant told him to do so.

4 {10} Supporting Mr. Tsosie’s original version of events are Defendant’s
5 admissions to Deputy Farley that he was angry with Mr. Tsosie and threw the orange
6 at him. In addition, Deputy Farley’s testimony describing the orange splatter and
7 remnants he observed on Mr. Tsosie’s head, shoulders, and back could be viewed as
8 inconsistent with Mr. Tsosie’s testimony that Ms. Yellowhair hit him with a piece
9 of the orange that Defendant had previously splattered on Mr. Tsosie’s tailgate. Also,
10 Mr. Tsosie’s testimony about Defendant’s reaction and Ms. Yellowhair’s actions
11 could reasonably be viewed as internally inconsistent and unrealistic. Indeed, the
12 district court found Mr. Tsosie’s testimony to be not credible at all. Where
13 conflicting evidence is presented, we defer to the fact-finder to resolve such conflicts
14 and determine where the weight and credibility lie. *See State v. Salas*, 1999-NMCA-
15 099, ¶ 13, 127 N.M. 686, 986 P.2d 482; *see also State v. Sutphin*, 1988-NMSC-031,
16 ¶ 23, 107 N.M. 126, 753 P.2d 1314 (“A reviewing court may neither reweigh the
17 evidence nor substitute its judgment for that of the [fact-finder].”). We are not
18 persuaded that Mr. Tsosie’s more recent version of events provided at the hearing
19 constitutes grounds for reversal because the district court was free to reject his
20 changed story. *See State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d

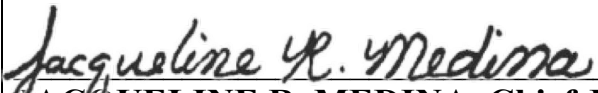
1 829 (“Contrary evidence supporting acquittal does not provide a basis for reversal
2 because the [fact-finder] is free to reject [the defense’s] version of the facts.”).

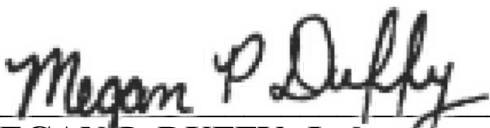
3 {11 Viewing all the evidence in the light most favorable to the district court’s
4 conclusion, we hold that a reasonable mind could determine that Defendant
5 committed a battery by throwing an orange at Mr. Tsosie’s head in anger. *See Green*,
6 2015-NMCA-007, ¶ 22; *Erickson K.*, 2002-NMCA-058, ¶ 21; *see* § 30-3-4. Thus,
7 we affirm the district court’s order revoking Defendant’s probation.

8 {12} **IT IS SO ORDERED.**

9 
10 GERALD E. BACA, Judge

11 **WE CONCUR:**

12 
13 JACQUELINE R. MEDINA, Chief Judge

14 
15 MEGAN P. DUFFY, Judge