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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0295**

State of Minnesota,
Respondent,

vs.

Mykhailo Starodubtsev,
Appellant.

**Filed November 20, 2017
Affirmed
Johnson, Judge**

Ramsey County District Court
File No. 62SU-CR-16-2356

Lori Swanson, Attorney General, St. Paul, Minnesota;

Melissa K. Loonan, Roseville City Attorney, Erickson, Bell, Beckman & Quinn, P.A.,
Roseville, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara J. Euteneuer, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Johnson, Judge; and Bratvold,
Judge.

UNPUBLISHED OPINION

JOHNSON, Judge

The Ramsey County District Court found Mykhailo Starodubtsev guilty of
misdemeanor theft based on evidence that he walked out of a Walmart store without paying

for two items. We conclude that the evidence is sufficient to support the conviction and, therefore, affirm.

FACTS

On June 18, 2016, Starodubtsev visited a Walmart store in Roseville. A Walmart asset-protection associate monitored him closely after observing suspicious behavior through the store's surveillance cameras. While shopping, Starodubtsev put several items into his shopping cart, including a box containing a small, indoor, electric, counter-top grill and a box containing a knife set with a counter-top butcher block for storage. Starodubtsev left the store without paying for the grill or the knife set. He was apprehended at the exit and arrested.

The state charged Starodubtsev with one count of misdemeanor theft, in violation of Minn. Stat. § 609.52, subd. 2(a)(1) (2014); one count of misdemeanor theft by swindle, in violation of Minn. Stat. § 609.52, subd. 2(a)(4); and one count of misdemeanor receiving stolen property, in violation of Minn. Stat. § 609.53, subd. 1 (2014). Before trial, the state dismissed the second and third charges.

The misdemeanor-theft charge was tried to the district court on two days in January 2017. The state called two witnesses: Joseph Lockwood, an asset-protection associate at the Walmart store, and a police officer who responded to the incident. Lockwood testified that, while using the store's surveillance system, he saw Starodubtsev put his hands deep into a shelf in the clearance aisle, which Lockwood found suspicious because it is typical in shoplifting incidents. Lockwood testified that Starodubtsev selected a single plate from the clearance shelf, picked at the price sticker on the back of the plate, appeared to place a

price sticker on the box containing the knife set, and returned the plate to the clearance shelf. Based on his training and experience, Lockwood believed that Starodubtsev had moved a clearance price tag from the plate to the knife set. Lockwood testified that Starodubtsev also appeared to place a price sticker on the box containing the grill. Lockwood testified that this is somewhat of a common practice: “people peel clearance labels from items in the clearance aisle, and place [them] on other items to attempt to get it for a lower price.”

Lockwood also testified about his observations of Starodubtsev while Starodubtsev was in the store’s self-service check-out area, and the state played a video-recording of Starodubtsev using the self-service check-out register. The evidence shows that Starodubtsev passed all of the items in his shopping cart in front of the self-service scanner and placed them in the nearby bagging area. But when he attempted to scan three items, including the grill and the knife set, the check-out register signaled an error, which Lockwood described as an “alert.” In response to two of the alerts, Starodubtsev moved the items to the floor and continued by scanning other items. After the third alert, a Walmart employee assisted Starodubtsev, which allowed him to continue scanning items in his shopping cart.

Lockwood further testified that, after Starodubtsev had scanned all items in his cart, he paid and walked toward the exit. Two police officers and a store employee stopped him at the exit. Starodubtsev’s receipt showed that he had not paid for the grill or the knife set. A police officer testified that, in a search incident to arrest, he found two Target clearance price stickers inside Starodubtsev’s wallet.

Starodubtsev represented himself at trial and was the only defense witness. He testified that he did not intend to steal any of the items in his shopping cart or to pay less than the proper price. He testified that he selected the knife set from the clearance aisle. He also testified that after the Walmart employee resolved one of the alerts, he believed that the grill had been properly scanned and, thus, had been paid for.

The district court issued a three-page order in which it found Starodubtsev guilty. The district court found that, when Starodubtsev scanned both the grill and the knife set, the self-service check-out register “indicat[ed] that the item . . . placed in the . . . bagging area did not match the sticker that had been scanned” and that Starodubtsev made no further attempts to pay for those items. The district court concluded that Starodubtsev knowingly and intentionally did not pay for the grill and the knife set before leaving the store. The district court imposed a sentence of 30 days of jail time with 29 days stayed, 10 hours of community service, and a \$300 fine. Starodubtsev appeals.

D E C I S I O N

Starodubtsev argues that the evidence is insufficient to support his conviction of misdemeanor theft. A person commits the offense of misdemeanor theft if he “intentionally and without claim of right takes, uses, transfers, conceals or retains possession of movable property of another without the other’s consent and with intent to deprive the owner permanently of possession of the property.” Minn. Stat. § 609.52, subds. 2(a)(1), 3(4).

When determining whether there is sufficient evidence to support a conviction, this court undertakes a “painstaking analysis of the record to determine whether the evidence,

when viewed in the light most favorable to the conviction, was sufficient” to support the conviction. *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012) (quotation omitted). We assume that “the jury believed the state’s witnesses and disbelieved any evidence to the contrary.” *State v. Caldwell*, 803 N.W.2d 373, 384 (Minn. 2011) (quotation omitted). We “will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense.” *Ortega*, 813 N.W.2d at 100.

Starodubtsev contends that the evidence is insufficient to prove beyond a reasonable doubt that he knew that he had not paid for the grill and the knife set and that he intended to deprive Walmart of that property. A defendant’s intent typically is proved with circumstantial evidence. See *State v. Ali*, 775 N.W.2d 914, 919 (Minn. App. 2009), *review denied* (Minn. Feb. 16, 2010). When reviewing a conviction based on circumstantial evidence, this court applies a two-step analysis to determine the sufficiency of the evidence. *State v. Moore*, 846 N.W.2d 83, 88 (Minn. 2014). First, we “identify the circumstances proved.” *Id.* (citing *State v. Andersen*, 784 N.W.2d 320, 329 (Minn. 2010)). “In identifying the circumstances proved, we assume that the jury resolved any factual disputes in a manner that is consistent with the jury’s verdict.” *Id.* (citing *Andersen*, 784 N.W.2d at 329). Second, we “examine independently [the] reasonableness of the inferences that might be drawn from the circumstances proved” and “determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt.” *Id.* (alteration in original) (quotations omitted). We must consider the evidence

as a whole and need not examine each piece of evidence in isolation. *State v. Palmer*, 803 N.W.2d 727, 733 (Minn. 2011). This analysis applies in an appeal from a court trial in the same manner as it applies in an appeal from a jury trial. *See id.* at 732.

At the first step of the circumstantial-evidence analysis, we must identify the circumstances that the state proved that might be relevant to whether Starodubtsev knew that he had not paid for the grill or the knife set and, thus, knew that he did not have a claim of right to those items. The following circumstances are relevant: Starodubtsev selected several items from the store's shelves, including a grill and a knife set, and placed them in his cart. Starodubtsev placed his hands deep in a clearance shelf for ten to fifteen seconds, which is common in shoplifting incidents. Starodubtsev peeled a price sticker off a plate that had been on a clearance shelf and placed price stickers on the boxes containing the grill and the knife set. When Starodubtsev scanned the boxes containing the grill and the knife set in the self-service check-out area, the self-service register alerted him that there was an error in scanning the items. Starodubtsev removed the grill and the knife set from the bagging area and placed them on the floor. Those two items did not appear on Starodubtsev's printed receipt. Starodubtsev attempted to leave the store without paying for those two items. A police officer found two Target clearance price stickers inside Starodubtsev's wallet.

At the second step of the circumstantial-evidence analysis, we “examine independently [the] reasonableness of the inferences that might be drawn from the circumstances proved” and “determine whether the circumstances proved are consistent with guilt.” *Moore*, 846 N.W.2d at 88 (alteration in original) (quotations omitted). The

state contends that the circumstances proved support an inference that Starodubtsev knew that he had not paid for the grill and the knife set and, thus, did not have a right to carry them out of the Walmart store. We agree that such an inference is reasonable and that the inference is consistent with a finding of guilt.

At the second step of the circumstantial-evidence analysis, we also must determine whether the circumstances proved are “inconsistent with any rational hypothesis except that of guilt.” *Moore*, 846 N.W.2d at 88 (quotation omitted). Starodubtsev contends that the circumstances proved are consistent with the inference that he believed that he had paid for the grill and the knife set because he believed that he had properly scanned those items. Such an inference might be reasonable if the state’s evidence consisted only of Starodubtsev’s actions in the self-service check-out area and if the self-service check-out equipment had not alerted him that certain items had not been successfully scanned. But the state’s evidence was more extensive. The state proved additional circumstances. Starodubtsev behaved suspiciously while in and near the clearance aisle. When Starodubtsev scanned the boxes containing the grill and the knife set at the self-service check-out area, the self-service register alerted him that the items had not been properly scanned, and he stopped at least one of the alerts by removing an item from the bagging area and placing it on the floor. The grill and the knife set did not appear on Starodubtsev’s printed receipt. A police officer found two Target clearance price stickers inside Starodubtsev’s wallet when he was arrested. These additional circumstances strengthen the inference that Starodubtsev intended to avoid paying the correct price for the grill and the knife set. Furthermore, the additional circumstances make any hypothesis of innocence

irrational. The circumstances proved are consistent with only one rational hypothesis: that Starodubtsev knew that he had not paid for the grill and the knife set and, thus, knew that he did not have a right to carry them out of the Walmart store.

Starodubtsev argues in a *pro se* supplemental reply brief that the evidence is insufficient because, he asserts, Lockwood's testimony was not credible. This court does not consider arguments that are made for the first time in a reply brief. *See State v. Yang*, 774 N.W.2d 539, 558 (Minn. 2009). In any event, Starodubtsev's argument is inconsistent with this court's standard of review. We do not attempt to determine whether any particular trial witness was credible or not credible, and we do not attempt to reweigh the evidence. *See State v. Franks*, 765 N.W.2d 68, 73, 77 (Minn. 2009). Rather, we defer to the factfinder's assessments of witness credibility. *State v. Pendleton*, 759 N.W.2d 900, 909 (Minn. 2009). We "view the evidence in the light most favorable to the verdict and assume that the factfinder disbelieved any testimony conflicting with that verdict." *State v. Dorn*, 887 N.W.2d 826, 830 (Minn. 2016) (quotation omitted). Given the nature of our appellate review, the state's evidence is not insufficient based on Starodubtsev's assertion that Lockwood's testimony was not credible.

Thus, the state's evidence is sufficient to support Starodubtsev's conviction of misdemeanor theft.

Affirmed.