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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0753**

State of Minnesota,
Respondent,

vs.

Douglas Lamont Gatlin Jr.,
Appellant.

**Filed May 7, 2018
Affirmed
Reilly, Judge**

Washington County District Court
File No. 82-CR-16-2637

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

Pete Orput, Washington County Attorney, Nicholas A. Hydukovich, Assistant County Attorney, Stillwater, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Adam Lozeau, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cleary, Chief Judge; Reilly, Judge; and Stauber, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

REILLY, Judge

Appellant challenges his convictions of robbery and receiving stolen property, arguing that there was insufficient evidence supporting his convictions and that the district court erred by declining to instruct the jury on lesser-included offenses. We affirm.

FACTS

In July 2016, appellant Douglas Gatlin, Jr. entered a Perkin's restaurant in Forest Lake and removed a cash drawer from behind the counter. As he tried to leave the building, restaurant employees and patrons physically stopped him. The state's witnesses testified that, during the struggle, appellant wrestled with and punched those trying to prevent his escape, and appellant also struck an employee with the cash drawer. Police arrived and arrested appellant.

Outside the restaurant, arresting officers discovered a stolen white Dodge Journey. Several vehicles in the parking lot had their windows smashed out. Items stolen from those vehicles were found inside the Dodge Journey, an SUV. Thirty minutes before the Perkin's incident, a man driving a white SUV removed an object from the SUV's trunk and smashed a car window in the parking lot of a Walmart near the Perkin's.

Appellant was charged with simple robbery (the cash drawer), receiving stolen property (the Dodge Journey), criminal damage to property (the smashed windows), and obstructing a peace officer from performing official duties.

At the close of trial, appellant requested that the jury be instructed on the lesser-included offenses of attempted robbery, theft, and attempted theft, which the court denied. The jury convicted appellant of all four offenses.

This appeal followed.

DECISION

I. Sufficient evidence supports the jury’s verdict that appellant used force to overcome another’s resistance to his taking away of property.

Appellant argues there was insufficient evidence to convict him of simple robbery, because the state did not prove that he overcame another’s resistance when he took the cash drawer and/or its contents. This court reviews the sufficiency of the evidence supporting a conviction to determine whether the facts in the record and legitimate inferences thereof are enough for a reasonable jury to find appellant guilty of the offense. *State v. McArthur*, 730 N.W.2d 44, 49 (Minn. 2007). We view the evidence in a light most favorable to the conviction. *State v. Moore*, 846 N.W.2d 83, 88 (Minn. 2014).

A person commits robbery when they “take[] personal property from the person or in the presence of another and use[] or threaten[] the imminent use of force against any person to overcome the person’s resistance or powers of resistance to, or to compel acquiescence in, the taking or carrying away of the property” Minn. Stat. § 609.24 (2016). A person’s “taking or carrying away” is complete, “once the [property is] in his hands” if only for a few seconds; “the fact that the control or dominion did not last long does not make any difference.” *State v. Solomon*, 359 N.W.2d 19, 21 (Minn. 1984).

A. Appellant used force against a person to overcome their resistance to his carrying away of property.

Appellant claims he cannot have used force against a person to overcome their resistance when he carried away the property, because he never actually overcame anyone's resistance. Appellant argues that the phrase "to overcome the person's resistance" unambiguously requires that a defendant *actually* overcome another's resistance in order to be convicted of robbery.

When interpreting statutes, "words and phrases are construed according to rules of grammar and according to their common and approved usage" Minn. Stat. § 645.08(1) (2016). Dictionary definitions can determine the plain meanings of words. *State v. Haywood*, 886 N.W.2d 485, 488 (Minn. 2016).

Reading the plain language of the statute, the phrase "use of force against any person to overcome the person's resistance" means any use of force *for the purpose of* overcoming their resistance. The language of the statute does not require that appellant actually overcome a person's resistance, only that he used force in the taking of personal property.

F.D., a Perkin's employee, testified that she noticed appellant behind the counter and came over to stop him. According to F.D., appellant jammed the corner of the cash drawer into her chest to resist her attempts to stop him. S.D., another Perkin's employee, testified that he saw F.D. grab appellant, which corroborates F.D.'s testimony. S.D. also testified that appellant wrestled with him and threw a punch at a patron while trying to escape the Perkin's. The video corroborates S.D.'s testimony that appellant was wrestling

with him, as it shows that there was some struggle in the vestibule before appellant was ultimately pinned down.¹

Based on the testimony of F.D. and S.D., appellant used force in an attempt to resist F.D.'s efforts to prevent his escape with the property. Whether or not appellant was actually successful in overcoming others' resistance to his taking personal property is not material. The fact that he used force to resist them at all is the element of the crime. On appeal, we view the evidence in a light most favorable to the conviction, and there is sufficient uncontroverted evidence for the jury to convict appellant.

B. Appellant “carried away” the cash drawer and/or its contents.

Appellant next argues that he cannot be convicted of robbery because he was not successful in “carrying away” the cash drawer and its contents. Under *Solomon*, a robber has “carried away” property once it is in his hands, if even for a moment. 359 N.W.2d at 21. Here, appellant completed the “carrying away” of the cash drawer and its contents by removing it from the cash register and moving around the counter to leave the building.

¹ Appellant claims that video evidence clearly rebuts the state's witnesses, and asks this court to disbelieve those witnesses in the face of obvious video evidence. See *Scott v. Harris*, 550 U.S. 372, 378, 127 S. Ct. 1769, 1775 (2007) (holding that a video that blatantly contradicts facts described by respondent's version of events so that no reasonable jury could believe it compels the court to not adopt the respondent's version of the facts for the purposes of ruling on a summary judgment motion). Appellant raised this argument for the first time in his reply brief. Issues not raised in an appellant's principal brief cannot be raised in a reply brief for the first time, and we may decline to consider those issues. *State v. Thompson*, 873 N.W.2d 873, 876 n.1 (Minn. App. 2015). Even if we elected to consider this issue, appellant's argument is without merit. The video in this case does not “blatantly contradict” the state's witnesses such that this court should disregard their testimony. The video has poor visual quality, and it is difficult to see the area of the Perkin's where F.D. testified she grabbed appellant's arm and hoodie.

The fact that he never got “away” from the building is not relevant to the analysis. There is sufficient evidence to show that he “carried away” personal property.

There is sufficient evidence in the record to show that appellant committed simple robbery.

II. There is sufficient evidence to prove that appellant took personal property.

Appellant argues his conviction for robbery should be overturned because there is insufficient evidence to show that appellant took personal property, because the cash drawer was owned by a Perkin’s restaurant, which is not a person.

In Minnesota, whoever takes “personal property . . . in the presence of another and uses . . . force against any person to overcome the person’s resistance . . . to . . . the taking or carrying away of the property” is guilty of robbery. Minn. Stat. § 609.24. Recently, this court held that personal property in the context of the robbery statute “means all property that is not real property,” whether owned by a person or a business entity. *State v. Bowen*, A17-0331, 2018 WL 1569778, at *7 (Minn. App. Apr. 2, 2018).

Consistent with our recent ruling in *Bowen*, we conclude that the cash drawer and its contents are personal property as a matter of law, and there is sufficient evidence to prove appellant took personal property.

III. The district court did not direct the jury’s verdict on the element of personal property.

Appellant argues the district court’s jury instructions improperly directed a verdict² on the factual question of whether the cash drawer and its contents are personal property.

The district court gave the following jury instruction for simple robbery and the element involving personal property:

First of all, as to simple robbery. The statutes of Minnesota provide that whoever, knowing he is not entitled to do so, takes personal property from another, either from the person or in the presence of the person. And uses force or the threat of imminent force against any person to overcome resistance or compel acquiescence in the taking or carrying away of property is guilty of a crime.

The elements of simple robbery—the elements of simple robbery are:

First, the Defendant took a Perkin’s cash drawer and/or its contents in the presence of one or more Perkin’s employees knowing that the Defendant was not entitled to take that property.

The district court must provide instructions that “fairly and adequately explain the law of the case” and must not “materially misstate[] the applicable law.” *State v. Koppi*, 798 N.W.2d 358, 362 (Minn. 2011). Still, we “give district courts broad discretion and considerable latitude in choosing the language of jury instructions” and will not reverse a district court’s decision on jury instructions absent an abuse of discretion. *State v. Milton*, 821 N.W.2d 789, 805 (Minn. 2012) (quotations and citations omitted).

² A district court may issue a directed verdict where there is insufficient evidence to present a fact question to the jury. *See State v. Poupard*, 471 N.W.2d 686, 690 (Minn. App. 1991).

The district court did not direct the verdict on the element of whether appellant took personal property, because the cash drawer and its contents are personal property as a matter of law. *Bowen*, 2018 WL 1569778, at *7. Inserting the words “Perkin’s cash drawer and/or its contents” instead of the words “personal property” did not direct the verdict, because the question of whether something is personal property is not a jury question. *See id.*

Here, the district court did not direct the verdict as to whether appellant took personal property, and its instructions are proper.

IV. The district court did not abuse its discretion when it denied appellant’s request to instruct the jury on lesser-included offenses.

Appellant requested that the district court also instruct the jury on the offenses of attempted robbery and theft, lesser-included offenses to the state’s charged offense of robbery.

This court “review[s] the denial of a requested lesser-included-offense instruction for an abuse of discretion.” *State v. Zumberge*, 888 N.W.2d 688, 697 (Minn. 2017). “In doing so, [the court] view[s] the evidence in the light most favorable to the party requesting the instruction.” *Id.* A district court is required to include lesser-included-offense instructions when: (1) the lesser offense is included in the charged offense; (2) the evidence provides a rational basis for acquitting the defendant of the offense charged; and (3) the evidence provides a rational basis for convicting the defendant of the lesser-included offense. *Id.* Reversal is only proper if the defendant can show prejudice, which is “when

the jury may have convicted the defendant of only the lesser offense had the lesser-included-offense instruction been given.” *Id.* (quotations and citations omitted).

A lesser-included offense can be “[a]n attempt to commit the crime charged” or “[a] crime necessarily proved if the crime charged were proved.” Minn. Stat. § 609.04, subd. 1(2), (4) (2016). Attempted robbery is therefore a lesser-included offense of robbery. Theft involves the taking of another’s property, and robbery involves the taking of another’s property with the additional element of the threat or use of force. *Compare* Minn. Stat. § 609.52 subd. 2(a)(1) (2016), *with* Minn. Stat. § 609.24. Likewise, the offense of theft is a lesser-included offense of robbery. *State v. Nunn*, 351 N.W.2d 16, 19 (Minn. App. 1984).

The parties agree that theft and attempted robbery are lesser-included offenses of robbery. A jury has a rational basis to acquit on the greater offense and convict on the lesser offense if proof of the elements that “differentiate the two crimes [is] sufficiently in dispute so that a jury may make this distinction.” *Bellcourt v. State*, 390 N.W.2d 269, 273 (Minn. 1986). Here, the evidence, viewed in a light most favorable to appellant, is that appellant fought with Perkin’s employees and Perkin’s customers who tried to stop him from leaving the restaurant with stolen property. There is no evidence in the record that contradicts this evidence. And, on appeal, appellant concedes that he continued to struggle and kick as the Perkin’s employees and customers prevented him from leaving. Physically struggling and kicking are uses of force that prove robbery. Once again, appellant argues that he cannot be found guilty of robbery because he did not succeed in overcoming their resistance. As discussed earlier, appellant’s reading of the statute is too narrow. The

evidence does not provide a rational basis for a jury to acquit appellant of robbery and convict him of either lesser-included offense. The district court did not abuse its discretion when it declined to instruct the jury on lesser-included offenses.

V. Circumstantial evidence is sufficient to prove that appellant knew or had reason to know that the Dodge Journey was stolen.

There is no direct evidence appellant knew or had reason to know that the Dodge Journey was stolen. Appellant argues there was insufficient circumstantial evidence to support his conviction of possession of stolen property.

Though a conviction based on circumstantial evidence merits higher scrutiny, “circumstantial evidence is entitled to the same weight as direct evidence.” *State v. Bauer*, 598 N.W.2d 352, 370 (Minn. 1999). The circumstantial-evidence standard requires a two-step analysis. *State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013). First, this court must “identify the circumstances proved,” “defer to the jury’s acceptance of the proof of these circumstances” and reject evidence conflicting with the circumstances proved by the state. *Id.* at 598-99 (quotations omitted). Next, this court must “determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt.” *Id.* at 599 (quotations omitted).

A person is guilty of receiving stolen property if the person “possesses . . . any stolen property . . . , knowing or having reason to know the property was stolen” Minn. Stat. § 609.53 subd. 1 (2016). Appellant claims that the state failed to prove that he knew or had reason to know the property was stolen.

First, we identify the circumstances proved. *Silvernail*, 831 N.W.2d at 598-99. The circumstances proved by the state relevant to appellant's conduct include: (1) the Dodge Journey was stolen from the driveway of K.S.'s parents' house between the evening of June 19th and the morning of June 20th; (2) a set of golf clubs was also stolen from the house; (3) on July 2, a man drove a white SUV to a Walmart a half-mile from the Perkin's and smashed a car's window; (4) someone drove the white Dodge Journey to the Perkin's,³ and other cars at the Perkin's had their windows smashed; (5) three sets of golf clubs were found inside the Dodge Journey; (6) there was a broken golf club lying next to the Dodge Journey; (7) a different broken golf club was found inside the Dodge Journey; (8) items taken from the vehicles at the Perkin's were found inside the Dodge Journey; (9) the Dodge Journey did not have license plates; (10) a 21-day temporary sticker and repair invoice made under a name other than appellant's name were found inside the car; (11) appellant robbed the Perkin's after arriving in the Dodge Journey; (12) no customers complained about their cars being vandalized before appellant robbed the Perkin's.

These circumstances demonstrate appellant knew or should have known the Dodge Journey was stolen. First, the car had no license plates. The lack of license plates signals that a car might be stolen, because thieves often remove a car's license plates to hinder identification of the stolen vehicle. Second, there was a repair invoice inside the car made out to the true owner, who was a person unknown to appellant. Third, there were a number of items that did not belong in the vehicle and should have raised appellant's suspicion that

³ Appellant does not contend that the state failed to prove that he drove the vehicle.

the vehicle was stolen. There were three sets of golf clubs, a 21-day permit for a person living in Brooklyn Park, and a number of belongings taken from the cars in the Walmart and Perkin's parking lots.

Appellant argues that he could have borrowed the car from someone so that he would have no way of knowing that it was stolen. Given the circumstances proved, we cannot agree. We cannot draw a rational alternative conclusion from these circumstances other than that appellant knew or should have known the Dodge Journey was stolen when he drove it. *State v. Schnagel*, 907 N.W.2d 188, 197 (Minn. App. 2017) (speculation is not enough to support a proposed alternative hypothesis).

The jury heard the evidence and weighed the credibility of the evidence as is its role. *See State v. Moore*, 481 N.W.2d 355, 360 (Minn. 1992) (noting that the jury is in the best position to determine credibility and weigh the evidence). "We will not overturn a conviction based on circumstantial evidence on the basis of mere conjecture." *State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998). Because the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt, the evidence is sufficient to support appellant's conviction of possession of stolen property.

Affirmed.