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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0301**

State of Minnesota,
Respondent,

vs.

Mut Biel Gach,
Appellant.

**Filed February 3, 2020
Affirmed in part, reversed in part, and remanded
Jesson, Judge**

Nobles County District Court
File No. 53-CR-18-397

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Joseph M. Sanow, Nobles County Attorney, Worthington, Minnesota; and

Travis J. Smith, Special Assistant County Attorney, Slayton, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Jesson, Judge; and
Florey, Judge.

UNPUBLISHED OPINION

JESSON, Judge

Appellant Mut Biel Gach challenges his convictions stemming from a robbery, after
which the victim's stolen shoes were found in Gach's bag. Because it is supported by

sufficient evidence, we affirm Gach's first-degree aggravated robbery conviction. But because the district court erroneously convicted Gach of theft, a lesser-included offense, we reverse and remand for correction of the warrant of commitment.

FACTS

In April 2018, M.L. traveled to Worthington to try out for a position on the Minnesota West basketball team. I.D., who lived in the area and knew M.L., told him that he could stay with her during the try-out.

As M.L. was waking up the morning after workouts, three men with guns rushed into his room demanding his wallet and belongings. According to M.L., he could tell that the three men were African American, but one man was wearing a mask and the other two had hooded sweatshirts pulled tight around their faces. M.L. told the men his wallet was in his bag, and two of the men grabbed the bag and left. The other man, who M.L. described as "heavier-set," demanded M.L.'s phone. M.L. gave him the phone, and the man put a silver revolver to M.L.'s head and ordered him to provide the phone's passcode.¹ After M.L. provided the code, the man left. Throughout the robbery, the men yelled threats at both M.L. and I.D., including that they would shoot and kill them. The men took M.L.'s wallet, which contained about \$300 in cash and a plane ticket, his cell phone, a blue Under Armour bag, a pair of sweatpants, and two pairs of Jordans (higher-end basketball shoes)—one blue and one emerald green and white.²

¹ From trial testimony, it is clear that the heavier-set man with the silver revolver was not Gach.

² Two other individuals lived in the apartment where M.L. stayed with I.D. And M.L. thought someone living in the apartment set up the robbery. For instance, after the robbers

In an effort to recover the stolen items, M.L. and I.D. went to a different apartment complex where I.D. believed the robbers lived. After their efforts to retrieve M.L.'s things were unsuccessful, M.L. and I.D. reported the incident to police. Police then escorted M.L. and I.D. back to the apartment complex where I.D. thought the men lived. When police knocked on one apartment door, a teenager around 13 or 14 years old answered the door. I.D. identified him as one of the robbers. Police searched the apartment but did not find anything. And when I.D. took a closer look at the individual, she stated that he was not one of the men who robbed M.L.

Although he did not participate in the robbery, the teenager is the younger brother of one of the men I.D. thought robbed M.L. While the police were searching the apartment, the teenager called his mother, who decided to return to the apartment. When she arrived, she had three African American men in her vehicle, including appellant Mut Biel Gach (age 19 at the time). According to an officer at the scene, the three men got out of the vehicle and were yelling that they wanted to fight M.L. I.D. identified the three men as the people who robbed M.L., and police attempted to separate M.L. and I.D. from the three men.

Once things seemed calmer, an officer saw a blue Under Armour duffel bag in the mother's vehicle that matched M.L.'s description of his stolen bag. Police searched the vehicle, and inside the blue duffel bag, found a silver revolver.³ They also found a pair of

left, according to M.L., one of the other individuals in the apartment texted one of the robbers to return M.L.'s wallet and plane ticket, which they did. The \$300 in cash was not returned.

³ The mother gave police permission to search her vehicle.

blue Jordans and sweatpants. During the search, police further discovered a Calvin Klein duffel bag. Gach told police that the bag belonged to him, and inside the bag, police found a pair of emerald green and white Jordans and a small amount of marijuana. M.L. identified the items found in the car as his belongings, and police arrested Gach and the other two men. Subsequently, the state charged Gach with several criminal offenses related to the incident, including first-degree aggravated robbery, first-degree burglary, threats of violence, second-degree assault with a dangerous weapon, theft, and possession of a small amount of marijuana.

At trial, M.L. testified about the incident, as described above. But M.L. acknowledged that he never got a good look at the robbers' faces. Further, M.L. was unable to specifically testify about Gach's actions, generally explaining what "they" did and threats that "they" made. But M.L. identified photos of the items found in the vehicle as the items stolen from him, and he specifically identified the emerald green and white Jordans found in Gach's bag as his shoes.⁴

The state also presented testimony from a Redwood County Investigator about an incident Gach was involved in about one week before M.L. was robbed.⁵ According to the investigator, Gach admitted that he and the same two men involved in this case attempted

⁴ When questioned about whether any forensic evidence existed, an officer acknowledged that the emerald green and white Jordans were not tested for forensic evidence. And a forensic scientist from the Bureau of Criminal Apprehension testified that a DNA swab from the silver revolver contained a mixture of DNA from five or more individuals, making it insufficient for comparative purposes.

⁵ Before trial, the district court determined this testimony could be admitted for the limited purposes of showing a common scheme or plan and identity. See Minn. R. Evid. 404(b).

to rob a house in Redwood County to steal drugs and money. But, the investigator explained, they went to the wrong house, encountered a large dog, and fired a shot into the main door of the house. Gach allegedly told the investigator that the silver revolver used to rob M.L. was the same gun used in the Redwood County robbery. But the investigator also testified that Gach stated he could not remember parts of the Redwood County robbery because he was so high.

Gach presented one witness, an investigator who explained that the emerald green and white Jordans were readily available from several online retailers. Gach also testified. According to him, he was at home playing video games the morning the robbery occurred, and his friend's mother picked him up around 1:30 or 2:00 that afternoon to drive to Omaha. Gach testified that they headed back to his friend's apartment when the mother got a phone call from his friend's little brother, and that when they arrived, he went straight into the apartment without yelling at M.L. And Gach explained that he did not really want police to search the vehicle because he had drugs in his bag. But, according to Gach, the shoes police found in his bag belonged to him, and he purchased them at a mall in Sioux Falls using cash that his parents gave him. And Gach testified that he did not threaten anyone or participate in the robbery in any way.

The jury found Gach not guilty of second-degree assault, but guilty of all other charges.⁶ Subsequently, the district court entered convictions for first-degree aggravated

⁶ Before the case was submitted to the jury, Gach moved for a directed verdict on several of the charges, but the district court denied his motion. After the verdict, Gach again moved for a judgment of acquittal on the first-degree aggravated robbery and first-degree burglary

robbery, threats of violence, theft, and possession of a small amount of marijuana. And the district court sentenced Gach to 41 months in prison for first-degree aggravated robbery. Gach appeals.

D E C I S I O N

Gach raises two arguments in this appeal. First, he contends that sufficient evidence does not support his convictions. Second, Gach claims that the district court erred by entering a conviction for theft because it is a lesser-included offense of first-degree aggravated robbery. We review each argument in turn.

I. Sufficient evidence supports Gach’s first-degree aggravated robbery conviction.

Gach alleges that insufficient evidence supports his conviction of first-degree aggravated robbery. To evaluate the sufficiency of the evidence, “courts carefully examine the record to determine whether the facts and the legitimate inferences drawn from them would permit the jury to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offense of which he was convicted.” *State v. Griffin*, 887 N.W.2d 257, 263 (Minn. 2016) (quotation omitted). And in doing so, we view the evidence “in the light most favorable to the verdict, and it must be assumed that the fact-finder disbelieved any evidence that conflicted with the verdict.” *Id.* If the jury reasonably could have found the defendant guilty of the charged crime, applying both the presumption of innocence and the state’s burden of proof beyond a reasonable doubt, we will not overturn the verdict. *Id.*

charges. In a written order, the district court granted Gach’s motion with respect to the first-degree burglary charge, but declined to acquit him of first-degree aggravated robbery.

Turning to Gach’s challenges to his first-degree aggravated robbery conviction, Gach asserts that the state did not prove beyond a reasonable doubt that he took property from M.L.⁷ Convictions based on circumstantial evidence are subject to “heightened scrutiny” from appellate courts. *State v. Porte*, 832 N.W.2d 303, 309 (Minn. App. 2013) (quotation omitted).

When reviewing the sufficiency of circumstantial evidence, we use a two-step analysis. *State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013). First, we identify the circumstances proved by the state. *State v. Bahtuoh*, 840 N.W.2d 804, 810 (Minn. 2013). In doing so, this court defers “to the jury’s acceptance of the [s]tate’s evidence and its rejection of any evidence in the record that is inconsistent with the circumstances proved by the [s]tate.” *Loving*, 891 N.W.2d at 643. Next, we “determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt.” *Silvernail*, 831 N.W.2d at 599 (quotations omitted). But when making this determination, “[w]e examine independently the reasonableness of all inferences that might be drawn from the circumstances proved; including the inferences consistent with a hypothesis other than guilt” and do not defer to the jury’s determination.

⁷ Gach urges this court to apply the standard of review we use when a conviction is supported by direct evidence. But caselaw is clear that “[w]hen the direct evidence of guilt on a particular element is not alone sufficient to sustain the verdict,” appellate courts apply the circumstantial-evidence standard of review. *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017). Because Gach’s conviction relies, at least in part, on circumstantial evidence—namely the shoes found in Gach’s bag and the testimony from the investigator about the prior robbery to establish identity and a common plan or scheme—we apply the circumstantial-evidence standard of review.

Id. (quotation omitted). “If a reasonable inference other than guilt exists, then [appellate courts] will reverse the conviction.” *Loving*, 891 N.W.2d at 643.

Here, Gach only challenges one element of his first-degree aggravated robbery conviction: that the state failed to prove that he took any property from M.L. See Minn. Stat. § 609.24 (2016) (explaining that robbery requires the taking of property). Accordingly, with Gach’s argument in mind, we first identify the circumstances proved by the state with respect to this element.

The state proved the following circumstances: three African American men entered the room where M.L. was staying; each man had a gun; the men demanded M.L.’s belongings; the robbers took a blue Under Armour duffel bag, M.L.’s cell phone, his wallet containing cash and a plane ticket, two pairs of Jordans—one blue and one emerald green and white—and a pair of sweatpants; when Gach arrived at his friend’s apartment with two other men, I.D. told police those were the men who robbed M.L.; police found several of M.L.’s items and a silver revolver during a search of that vehicle; police discovered a Calvin Klein bag in the vehicle; Gach told police that the bag belonged to him; Gach’s bag contained a pair of emerald green and white Jordans; M.L. identified the recovered items as the ones stolen from him; and evidence admitted to establish identity and a common plan showed that Gach and the same two men attempted to rob a home using the silver revolver roughly one week before M.L. was robbed.

Having established the circumstances proved by the state, our analysis next turns to “whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt.” *Silvernail*, 831 N.W.2d at 599 (quotations

omitted). Certainly, these circumstances proved are consistent with guilt. Although M.L. did not identify Gach as one of the three men who robbed him, he was very clear that three men participated in the robbery. And Gach and two other men arrived at Gach's friend's apartment in a vehicle containing the stolen items. Further, a pair of M.L.'s shoes were found inside the bag Gach admitted belonged to him. *See generally State v. Moen*, 192 N.W. 936, 936 (Minn. 1923) (stating that "the unexplained possession and control of personal property shown to have been recently stolen is presumptive evidence of the guilt of the person so in possession"). Finally, to establish identity and a common plan, the state presented evidence to the jury demonstrating that Gach and the same two men attempted to rob a different home shortly before this robbery. This evidence is inconsistent with any hypothesis other than Gach's guilt, and no rational hypothesis exists that Gach did not take property from M.L.

Still, Gach contends that a separate rational inference from the evidence is that Gach did not participate in the robbery and was given the shoes by someone who did. But this inference is not rational based on the evidence presented to the jury. M.L. clearly testified that three men robbed him, and Gach was in a vehicle with two other men and the items stolen from M.L. And Gach admitted to an investigator that he attempted a prior robbery with *the same two men*. Based on the circumstances proved, it is not a rational inference that Gach was given M.L.'s stolen shoes without participating in the robbery. *See State v. Andersen*, 784 N.W.2d 320, 330 (Minn. 2010) (stating that appellate courts "will not overturn a conviction based on circumstantial evidence on the basis of mere conjecture" and noting that "[t]he [s]tate does not have the burden of removing all doubt, but of

removing all reasonable doubt”). Accordingly, we affirm Gach’s conviction of first-degree aggravated robbery.⁸

II. The district court erroneously entered a conviction for theft because it is a lesser-included offense of first-degree aggravated robbery.

Gach also argues—and the state agrees—that the district court erroneously entered a conviction for theft, which he contends is a lesser-included offense of first-degree aggravated robbery. Whether theft is a lesser-included offense of first-degree aggravated robbery is a legal question which we review de novo. *See State v. Cox*, 820 N.W.2d 540, 552 (Minn. 2012).

Under Minnesota law, a criminal defendant “may be convicted of either the crime charged or an included offense, but not both.” Minn. Stat. § 609.04, subd. 1 (2016). And this court has previously determined that “theft is a lesser-included offense of aggravated robbery.” *State v. McClenton*, 781 N.W.2d 181, 187 (Minn. App. 2010), *review denied* (Minn. June 29, 2010); *see also State v. Nunn*, 351 N.W.2d 16, 19 (Minn. App. 1984). Here, the warrant of commitment reflects that the district court entered convictions for both first-degree aggravated robbery and theft. Because caselaw is clear that theft is a lesser-

⁸ In his brief, Gach states “[i]f this [c]ourt reverses Gach’s first-degree aggravated robbery conviction for insufficient evidence, it should address whether the evidence was sufficient for the threats of violence conviction.” Because we do not reverse Gach’s conviction of first-degree aggravated robbery—the only conviction for which he was sentenced—we decline to fully address Gach’s argument regarding his threats of violence conviction. But we note that based on trial testimony, we are satisfied that sufficient evidence supports that conviction as well. *See generally State v. Ashland*, 287 N.W.2d 649, 650 (Minn. 1979) (stating that this court does not have to consider sufficiency-of-the-evidence claims on unadjudicated—and unsentenced—counts).

included offense of first-degree aggravated robbery, we reverse Gach's theft conviction and remand to the district court for correction of the warrant of commitment.

Affirmed in part, reversed in part, and remanded.