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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0234**

State of Minnesota,
Respondent,

vs.

Jordan Lee Downwind,
Appellant.

**Filed March 4, 2013
Affirmed
Larkin, Judge**

Chippewa County District Court
File No. 12-CR-10-639

David W. Merchant, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, St. Paul, Minnesota; and

David Gilbertson, Chippewa County Attorney, Montevideo, Minnesota (for respondent)

Considered and decided by Halbrooks, Presiding Judge; Larkin, Judge; and
Huspeni, Judge.*

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

UNPUBLISHED OPINION

LARKIN, Judge

Appellant challenges the sufficiency of the evidence to sustain his conviction of first-degree burglary. We affirm.

FACTS

Respondent State of Minnesota charged appellant Jordan Lee Downwind with first-degree burglary, possession of stolen property, and fifth-degree possession of a controlled substance. Downwind waived his right to a trial by jury, and the case was tried to the district court, which made the following findings of fact.

P.T., a resident of Montevideo, called the police on the morning of July 28, 2010, after waking up and discovering that his wallet and two laptop computers were missing from his home. P.T. was home alone and had slept through the night. Montevideo Police Sergeant Ken Schule responded to P.T.'s call. Schule walked through the home with P.T. Items in the home had been disturbed, and drawers had been pulled open in the home and garage. In addition to his wallet and two computers, P.T. identified other missing items, including a Bose radio and CD player, a portable DVD player, and multiple children's DVDs. The police did not recover any fingerprints at the scene.

At the time of the burglary, Downwind was living with his grandfather, R.S., approximately one block away from P.T.'s residence. Montevideo police officers executed a search warrant at R.S.'s residence on October 12 and found P.T.'s Toshiba laptop computer on the coffee table in the living room, a wallet-sized photograph of P.T. and his wife in a wastebasket in Downwind's bedroom, and a bag containing 55.8 grams

of marijuana in a helmet hanging on the wall in Downwind's bedroom. On or about the same day, Downwind fled the Montevideo area.

Robert Olson, Director of Forensic Operations at Computer Forensic Associates, examined the hard drive from the Toshiba laptop computer. He learned that a file-sharing program was installed on the computer on July 30 and used to download 463 MP3 audio files. On August 2, Downwind received a message through Facebook on the computer. A photograph of Downwind was downloaded to the computer on August 3. R.S. had also used the computer.

Montevideo police obtained a search warrant to examine Downwind's Facebook accounts. Between October 12 and 13, Downwind sent the following chat messages to an acquaintance: (1) "hey cops are everywhere. sh-t went wrong lol ill call u sometime soon," (2) "trent got caught up wit the cops and the searched my place. found that," (3) "when u want to leave?" and (4) "hey u want to leave tonight? i need to get out of town asap. . . . get back at me and we should meet up."

Downwind testified that he was not involved with the burglary. He testified that he spent the summer on Red Lake Reservation and did not return to Montevideo until late July, early August 2010. Downwind further testified that he received the computer from an acquaintance, T.W., as a down payment or collateral for allowing T.W. to stay at R.S.'s apartment. Downwind denied knowledge of both the marijuana and the photograph found in his bedroom. The district court expressly found that Downwind's testimony was not credible.

R.S. also testified that T.W. provided the computer as a down payment or trade in exchange for allowing him to stay at the apartment and that T.W. stayed at the apartment on at least one occasion. Downwind's mother, P.S., testified that Downwind was on Red Lake Reservation at the time of the burglary. The district court specifically found that the testimony of neither R.S. nor P.S. was credible.

T.W. testified that he was not involved in the burglary and that he never possessed the Toshiba laptop. The district court found T.W.'s testimony "more credible" than that of Downwind and R.S.

The district court found Downwind guilty of all three offenses but subsequently dismissed the receiving-stolen-property charge. The court sentenced Downwind to serve 21 months in prison for the first-degree burglary and imposed a 19-month concurrent sentence for the controlled-substance offense. Downwind appeals his conviction of first-degree burglary.

D E C I S I O N

To convict Downwind of first-degree burglary, the state had to prove that (1) Downwind entered a dwelling without consent, (2) another person, not an accomplice, was present in the dwelling when Downwind entered or at any time while Downwind was in the dwelling, and (3) Downwind had intent to commit a crime or committed a crime while in the dwelling. *See* Minn. Stat. § 609.582, subd. 1(a) (2008) (defining burglary in the first degree). "'Dwelling' means a building used as a permanent or temporary residence." Minn. Stat. § 609.581, subd. 3 (2008). Downwind argues that his "burglary conviction must be reversed" because "the evidence, which was entirely circumstantial,

failed to establish that [he] entered [P.T.'s] dwelling and committed a theft on July 27-28, 2010.”

An appellate court assesses the sufficiency of the evidence supporting a conviction by determining whether the legitimate inferences drawn from the evidence on the record would permit a jury to conclude that the defendant was guilty beyond a reasonable doubt. *State v. Pratt*, 813 N.W.2d 868, 874 (Minn. 2012). This court’s review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach the verdict that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume “the jury believed the state’s witnesses and disbelieved any evidence to the contrary.” *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). This is especially true when determining guilt depends mainly on the resolution of conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). The reviewing court 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 the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004). “In reviewing the sufficiency of the evidence the court applies the same standard to bench and jury trials.” *In re Welfare of M.E.M.*, 674 N.W.2d 208, 215 (Minn. App. 2004).

An appellate court applies heightened scrutiny when reviewing a verdict based on circumstantial evidence. *Pratt*, 813 N.W.2d at 874. The circumstances proved must be consistent with guilt and inconsistent with any other rational hypothesis. *Id.* Minnesota

courts employ a two-step process when reviewing convictions based on circumstantial evidence. *State v. Andersen*, 784 N.W.2d 320, 329 (Minn. 2010). First, the reviewing court identifies the circumstances proved. *Id.* In doing so, the court views the evidence in the light most favorable to the verdict. *See Pratt*, 813 N.W.2d at 874 (stating that the supreme court had considered the evidence “in the light most favorable to the verdict” when determining the circumstances proved). The court defers to the fact-finder’s acceptance and rejection of proof and to its credibility determinations. *Andersen*, 784 N.W.2d at 329; *see also State v. Hughes*, 749 N.W.2d 307, 312 (Minn. 2008) (stating that juries are generally “in the best position to weigh the credibility of the evidence and thus determine which witnesses to believe and how much weight to give their testimony”).

Next, the reviewing court examines the reasonableness of the inferences that can be drawn from the circumstances proved, including inferences of innocence as well as guilt. *Andersen*, 784 N.W.2d at 329. All of the circumstances proved must be consistent with guilt and inconsistent with any other rational hypothesis negating guilt. *Id.* at 330. The reviewing court does not defer to the fact-finder’s choice between rational hypotheses. *Id.* at 329-30. But a rational hypothesis that negates guilt must be based on more than mere conjecture or speculation. *Id.* at 330. “[A] defendant is not relying on conjecture or speculation when the defendant . . . points to evidence in the record that is consistent with a rational theory other than guilt.” *State v. Al-Naseer*, 788 N.W.2d 469, 480 (Minn. 2010) (quotation omitted).

In this case, when considering the evidence in the light most favorable to the verdict, the circumstances proved are as follows. Someone entered P.T.’s residence on

the evening of July 27 or the early morning of July 28, while P.T. was at home sleeping, and stole two computers, P.T.'s wallet, a Bose radio and CD player, a portable DVD player, and multiple DVDs. At the time of the burglary, Downwind was living at R.S.'s residence, which was located approximately one block from P.T.'s residence. On October 12, the police found one of the stolen computers at R.S.'s residence. The police also found a wallet-sized photograph of P.T. and his wife in a wastebasket in Downwind's bedroom. The computer had been used on July 30, Downwind received a Facebook message on the computer on August 2, and someone downloaded a photograph of Downwind to the computer on August 3. At or about the time the police executed a search warrant at R.S.'s residence, Downwind fled the Montevideo area.

Downwind concedes that a "reasonable inference to be drawn from the circumstances proved may be that [he] participated in the burglary of [P.T.'s] residence." He argues, however, that the circumstances proved also permit a reasonable inference that is inconsistent with his guilt. Specifically, Downwind argues that because no eyewitnesses or forensic evidence "tied [him] to the scene of the burglary," "the circumstances proved permit the reasonable inference that [he] did not participate in the burglary of [P.T.'s] residence but merely took possession of some of the stolen items after the burglary."

Downwind argues that his case is like *State v. Scharmer*, in which "[t]he state presented evidence proving that two burglaries had been committed, but this evidence did not prove that [Scharmer] was one of the men who had committed the crimes." 501 N.W.2d 620, 622 (Minn. 1993). Downwind's reliance on *Scharmer* is misplaced. In

Scharmer, the police tracked two burglary suspects with a dog. *Id.* at 620-21. Witnesses described the two suspects as a “thin white man” and a “heavier set” man who was “darker complected, possibly Mexican, with a moustache.” *Id.* at 620. The witnesses testified that “[b]oth men were wearing t-shirts and jeans.” *Id.* at 620-21. The police canine led the police to a grain elevator, where they found Scharmer lying on the floor. *Id.* at 621. Scharmer is an American Indian, and he was wearing a gray tank top and dark pants. *Id.* He did not have a moustache. *Id.*

In reversing Scharmer’s conviction for insufficient evidence, the supreme court noted that “none of the physical evidence introduced by the state was ever linked to [Scharmer]” and reasoned that it could “not rule out the rational hypothesis that the suspect [the police canine was] trailing had passed by the elevator where [Scharmer] was sleeping and gone on to the north.” *Id.* at 622. Unlike Downwind’s hypothesis, the hypothesis that the supreme court relied on to reverse Scharmer’s conviction found support in the record: Scharmer’s appearance did not match the description of the suspects. *See id.* (stating that Scharmer “fit the description given by the eyewitnesses primarily because of the color of his skin”). *Scharmer* is also distinguishable because in this case, physical evidence from the burglary was linked to Downwind.

Downwind acknowledges that he cannot rely on his alibi defense or his claim that T.W. gave him the computer, because the district court rejected the evidence supporting those theories. But Downwind does not point to any other facts or circumstances that buttress his hypothesis that he “merely took possession of some of the stolen items after the burglary.” In sum, no evidence in the record supports Downwind’s hypothesis

negating guilt. Thus, the hypothesis is based on mere conjecture, and it does not provide a basis to reverse. *See State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998) (“We will not overturn a conviction based on circumstantial evidence on the basis of mere conjecture.”); *cf. Al-Naseer*, 788 N.W.2d at 480 (stating that “a defendant is not relying on conjecture or speculation when the defendant . . . points to evidence in the record that is consistent with a rational theory other than guilt” (quotation omitted)).

Because the district court, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that Downwind was guilty of first-degree burglary, we will not disturb the verdict.

Affirmed.