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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1766**

State of Minnesota,
Respondent,

vs.

Steven Ray Odenthal,
Appellant.

**Filed September 3, 2019
Affirmed
Larkin, Judge**

Hennepin County District Court
File No. 27-CR-17-20374

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

Michael O. Freeman, Hennepin County Attorney, Scott A. Hersey, Special Assistant
County Attorney, Minneapolis, Minnesota (for respondent)

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

Considered and decided by Larkin, Presiding Judge; Cochran, Judge; and
Kalitowski, 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UNPUBLISHED OPINION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 his conviction for theft by swindle of property valued at over \$35,000, arguing that the evidence was insufficient to prove that the amount of the theft exceeded \$35,000. We affirm.

FACTS

In July 2018, appellant Steven Ray Odenthal was convicted, following a jury trial, of theft by swindle of property valued at over \$35,000. The evidence presented at trial showed that in August 2013, a storm significantly damaged the roof of a school building owned by a church in Minnetonka. The school operating committee (the SOC), an unpaid volunteer board elected from the community, oversaw the operation of the school building. The SOC reported to the church's board, which ran the church's operations. Any school-building expense over \$2,000 required SOC approval. Odenthal was on the SOC at the time of the storm. Because Odenthal had experience in roofing, assessing damage, and working with insurance companies, he volunteered to be the SOC's point person for the roof repairs.

Odenthal's conviction was based on evidence showing that the church made payments of \$30,000, \$6,000, and \$6,000 for the roof repairs, and that Odenthal received \$30,000, \$5,000, and \$5,000 of those payments, without the SOC's or the church's knowledge.

The \$30,000 payment was made to a business called Storm Group Roofing. Odenthal does not dispute that he effectively funneled that \$30,000 payment through Storm Group to himself and thereby committed a theft by swindle.

As to the two \$6,000 payments, the evidence showed that the SOC chair informed the operations manager for the school building that Odenthal would give the operations manager a list of people who needed to be paid for the roof repairs. In January 2016, the operations manager issued a check for \$6,000 to N&R Contracting (N&R), based on Odenthal's representation that the payment was for "[r]oof fees/contractor." In February 2016, the operations manager issued a second check for \$6,000 to N&R, based on Odenthal's representation that the funds were "[p]ayments to people who helped us with the roof." Odenthal picked up each of the two \$6,000 checks from the operations manager. Odenthal gave the first \$6,000 check to N.H., the owner of N&R. A few days later, N&R executed a check to Odenthal in the amount of \$5,000. Approximately one month later, Odenthal gave N.H. the second \$6,000 check. Shortly after N.H. received the second \$6,000 check, N&R executed another check to Odenthal in the amount of \$5,000. Odenthal deposited both \$5,000 checks into his bank account.

Odenthal appeals, challenging the sufficiency of the evidence to sustain the jury's finding that the two \$6,000 payments constituted thefts by swindle.

DECISION

Odenthal was convicted of theft by swindle under Minn. Stat. § 609.52, subd. 2(a)(4) (2014), which provides that whoever "by swindling, whether by artifice, trick, device, or any other means, obtains property or services from another person" commits

“theft and may be sentenced as provided in subdivision 3.” That statute further provides that if a person commits theft by swindle and “the value of the property or services stolen is more than \$35,000,” the person may be sentenced “to imprisonment for not more than 20 years or to payment of a fine of not more than \$100,000.” Minn. Stat. § 609.52, subd. 3(1) (2014).

Odenthal contends that the evidence was insufficient to prove that he committed theft by swindle of property valued at over \$35,000. Specifically, Odenthal argues that the evidence was insufficient to prove that the two \$6,000 payments to N&R constituted a theft by swindle and that his conviction therefore must be reduced to reflect a theft by swindle of property valued at between \$5,001 and \$35,000. *See id.*, subd. 3(1)-(2) (2014) (stating that if a person commits theft and the value of the property stolen exceeds \$5,000 but does not exceed \$35,000, a person may be sentenced “to imprisonment for not more than ten years or to payment of a fine of not more than \$20,000, or both”); Minn. R. Crim. P. 28.02, subd. 12(c) (allowing appellate courts to reduce a conviction to “a lesser included offense or to an offense of lesser degree”).

Odenthal argues for relief under the traditional standard that applies when assessing the sufficiency of the evidence to support a conviction: whether the record evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jury to reach the verdict that it did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). When applying that standard, this court assumes that the jury “disbelieved any evidence that conflicted with the verdict.” *State v. Griffin*, 887 N.W.2d 257, 263 (Minn. 2016); *State v. Brocks*, 587 N.W.2d 37, 42 (Minn. 1998) (stating that appellate courts “assume that the jury

believed the state's witnesses and disbelieved contrary evidence"). This court will not disturb a guilty verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could have reasonably concluded that the state proved that the defendant was guilty of the offense charged. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004). "A defendant bears a heavy burden to overturn a jury verdict" based on insufficient evidence. *State v. Vick*, 632 N.W.2d 676, 690 (Minn. 2001).

Odenthal argues that "[n]o direct evidence showed a theft by swindle in regards to N&R." Specifically, Odenthal argues that "the transactions with N&R were legitimate" because a contract provided that "[N.H.] was to receive 25% of the profits for finding a contractor to complete the roof, an obligation he satisfied for ultimately less than the agreed-upon percentage." Odenthal argues that because the transactions with N&R were legitimate, the payments from the church "no longer belonged to the church, [they] belonged to [N.H.]." Odenthal further argues that N.H. "ultimately decided to offer [him] a personal loan" and that doing so did not "transform the money [N.H.] received from the church to stolen funds." In sum, Odenthal argues that because the two \$6,000 payments to N&R were legitimate, those payments and N&R's purported ensuing loans to Odenthal did not constitute a theft by swindle.

Odenthal presented that contract-and-loan theory to the jury at trial. For example, during cross-examination of N.H., defense counsel asked him whether the \$5,000 payments that N.H. made to Odenthal were "loan[s]," and N.H. replied that they were. Defense counsel asked N.H., "[Y]ou basically have a, for lack of a better term, unpaid debt of

\$10,000?” N.H. replied, “Correct.” However, the first check from N&R to Odenthal contained a notation indicating that it was for “Steve/Note 1st Com,” and its corresponding check stub noted that it was for “Com 5000.00 1000.00 Note.” The second check from N&R to Odenthal and its corresponding check stub contained notations indicating that the check was for “Draw #2 school.” N.H. testified that “Com” meant commission.

In addition, Odenthal testified that N.H.’s role in the roof-repair project was to find “a company or a solution to getting [the] roof replaced” and to provide “roofing guidance” and that N.H. did that work. Odenthal testified that N.H. requested earnest money in two separate payments and that Odenthal arranged the two \$6,000 payments in response to his request. Odenthal further testified that the two \$5,000 payments he received from N&R were “draw[s]” and “advance[s]” that he “[had] to pay back” and that they were therefore both loans.

Lastly, in Odenthal’s closing argument, he argued that the two \$6,000 checks to N&R were “earnest money,” that the two \$5,000 payments from N&R to Odenthal “came out of [N.H.’s] account,” and that the \$5,000 payments to Odenthal were “a loan.”

Again, this court views the evidence in a light most favorable to the verdict and assumes the jury believed the state’s evidence and rejected the defendant’s evidence. *See Griffin*, 887 N.W.2d at 263; *Brocks*, 587 N.W.2d at 42. Thus, we treat the contract-and-loan theory on which Odenthal relies as having been presented to and rejected by the jury, and we defer to the jury’s rejection of the evidence supporting that defense.

Odenthal also points to his actions in the Storm Group transaction in support of his sufficiency challenge, noting that he “essentially” confessed that “he was taking money for

his work on the roof project in the form of a \$30,000 check that he was giving to Storm Group for it to pay back to him.” Odenthal argues that the payments to N&R were “not accompanied by a similar confession,” and that “[w]ithout more, like a statement by [him] that he was taking the money from [the church] for himself, the evidence is insufficient to prove beyond a reasonable doubt that the money [he] gave to N&R was part of a theft.” We are not persuaded. The jury was made aware of the circumstances surrounding the payments to Storm Group and N&R. When viewed in a light most favorable to the conviction, the evidence was sufficient to permit the jury to reach its verdict, despite the absence of an incriminating statement by Odenthal regarding the N&R payments.

We observe that Odenthal focuses on the lack of direct evidence showing that the payments to N&R constituted a theft by swindle. But there was circumstantial evidence of Odenthal’s guilt. Circumstantial evidence is “evidence from which the factfinder can infer whether the facts in dispute existed or did not exist.” *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (quotation omitted). When a conviction is based on circumstantial evidence, this court applies a heightened standard of review. *Id.* at 598, 601. The circumstantial-evidence standard “applies to any disputed element of [a] conviction that is based on circumstantial evidence.” *State v. Al-Naseer*, 788 N.W.2d 469, 471 (Minn. 2010).

Under the circumstantial-evidence standard, an appellate court first determines the circumstances proved. *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017). When evaluating the circumstances proved, the appellate court “disregard[s] evidence that is inconsistent with the jury’s verdict.” *Harris*, 895 N.W.2d at 601. Next, the court determines whether the circumstances proved are consistent with guilt and inconsistent

with any rational hypothesis other than guilt. *Loving*, 891 N.W.2d at 643. An appellate court will reverse a conviction based on circumstantial evidence only if there is a reasonable inference other than guilt. *Id.*

The following circumstances were proved in this case. Odenthal told the operations manager for the school building that the payments to N&R were for work that had been completed on the roof repair when, in fact, N&R had not completed any work at the time of the payments. Odenthal contacted N.H. a few days after personally delivering each of the \$6,000 checks to him and asked him to return \$5,000 of the proceeds to Odenthal. When Odenthal received the first \$5,000, his checking account had a negative balance. Odenthal spent most of the money he received from N&R on expenses including rent. When Odenthal received the second \$5,000, his checking-account balance was down to \$320.49.

In addition, in committing the unchallenged portion of the theft by swindle based on the \$30,000 payment to Storm Group, Odenthal similarly represented to the operations manager that the \$30,000 payment was for “roof repair fees” even though Storm Group had not completed any work on the roof-repair project. Odenthal similarly arranged for the owner of Storm Group to return \$20,000 of the payment to him immediately and \$10,000 to him over time.

Lastly, Odenthal did not ask the SOC or the church to be compensated for his work on the roof-repair project. In appreciation of his purported volunteer service on the project, the SOC forgave \$3,668.01 of Odenthal’s tuition debt and gave him a \$300 gift card. Yet,

Odenthal never told the SOC or the church that he received commissions or other compensation for his work on the roof-repair project.

Odenthal mentions some of the proven circumstances in his briefing, arguing that they are not direct evidence of guilt. However, Odenthal does not argue that those circumstances are inconsistent with guilt. Nor does he argue that his contract-and-loan theory is a rational hypothesis of innocence justifying reversal under the circumstantial-evidence standard of review. In sum, although circumstantial evidence likely contributed to the jury's guilty verdict, Odenthal does not argue that it was insufficient.

Because Odenthal has not met his heavy burden to overturn the jury's verdict based on insufficient evidence, we affirm.¹

Affirmed.

¹ The state argues that Odenthal “also obtained a split of the profits from the [roof-repair] project of approximately \$6,800 which he did not disclose to the church or the school” and that the taking of this profit was “a part of the theft by swindle.” Odenthal counters that the \$6,800 profit split was not part of the charged theft by swindle. We have not relied on that profit split in reaching our decision.