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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1247**

State of Minnesota,
Respondent,

vs.

Lashun Theodits Witherspoon,
Appellant.

**Filed July 1, 2013
Reversed
Stauber, Judge**

Hennepin County District Court
File No. 27CR1128854

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

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hudson, Presiding Judge; Schellhas, Judge; and Stauber, Judge.

UNPUBLISHED OPINION

STAUBER, Judge

Appellant challenges his conviction of second-degree riot, arguing that there was insufficient evidence to convict him. We reverse.

FACTS

The events underlying this appeal occurred on the afternoon of September 13, 2011. Officer Joseph Schany and his partner, Officer Lisa Marks, were issuing a citation when they received a report that six shots had been fired at 2316 Lyndale Avenue North. A witness told the police that the shots had been fired out of the rear-passenger window of a silver Grand Prix, license-plate number RRM789. Officers Schany and Marks located and stopped the vehicle, which had three occupants. Among the occupants of the vehicle was appellant Leshun Witherspoon, who was sitting in the front-passenger seat. Officer Kyle Ruud arrived shortly after the stop. Officer Ruud searched the vehicle, and recovered two semi-automatic handguns and several bags of marijuana hidden under the console. The police then arrested all three occupants of the vehicle.

At the scene of the shooting, the police found three shell casings, and the Crime Lab later identified them as having been fired from one of the recovered handguns. The Crime Lab also identified Witherspoon's thumb print on the fired handgun. A video recovered from a traffic camera near the scene of the shooting shows a silver-colored vehicle with an arm extending from a rear-passenger window driving through the shooting scene. A witness told the police that she heard gunshots and saw a silver vehicle with the license-plate number RRM789 drive very quickly past her on Lyndale and turn the corner.

While at the Hennepin County Jail, Witherspoon placed a police-monitored call and told the recipient that he and another occupant of the vehicle had committed an assault earlier in the day while visiting a friend at a hospital who had recently been shot.

The other two occupants of the vehicle gave statements to the police but the parties agreed that they were inadmissible, and so the district court did not consider them.

Witherspoon was charged with second-degree riot for the benefit of a gang under Minn. Stat. § 609.71, subd. 2 (2010); Minn. Stat. § 609.05 (2010) and Minn. Stat. § 609.229, subds. 2, 3(a), (4) (2010); second-degree riot under Minn. Stat. § 609.71, subd. 2 (2010), and Minn. Stat. § 609.05; and carrying a weapon without a permit under Minn. Stat. § 624.714, subd. 1a (2010). Witherspoon moved to dismiss all charges for lack of probable cause, and the district court denied his motion. Witherspoon then consented to a stipulated-facts trial under Minn. R. Crim. P. 26.01, subd. 3, and stipulated that he did not have a permit to carry a handgun. At the stipulated-facts trial, the state dismissed the second-degree riot for the benefit of a gang charge, but proceeded on the remaining charges. The district court found Witherspoon guilty of second-degree riot under Minn. Stat. §§ 609.71, subd. 2, .05, and of carrying a weapon without a permit under Minn. Stat. § 624.714, subd. 1(a).

This appeal follows.

D E C I S I O N

On appeal, Witherspoon's sole argument is that the evidence is insufficient to establish his guilt of second-degree riot. When an appellate court "assess[es] the sufficiency of the evidence, [it] determines whether the legitimate inferences drawn from the facts in the record would reasonably support the jury's conclusion that the defendant was guilty beyond a reasonable doubt." *State v. Pratt*, 813 N.W.2d 868, 874 (Minn. 2012). The court must "give due regard to the defendant's presumption of innocence and

the State's burden of proof, and will uphold the verdict if the jury could reasonably have found the defendant guilty." *Id.* This court "review[s] criminal bench trials the same as jury trials when determining whether the evidence is sufficient to sustain convictions." *State v. Hough*, 585 N.W.2d 393, 396 (Minn. 1998).

But, appellate courts "apply heightened scrutiny when reviewing . . . verdicts based on circumstantial evidence." *Pratt*, 813 N.W.2d at 874. This heightened scrutiny requires that we

consider whether the reasonable inferences that can be drawn from the circumstances proved support a rational hypothesis other than guilt. The circumstances proved must be consistent with a hypothesis that the defendant is guilty and must be inconsistent with any other rational hypothesis. Circumstantial evidence must form a complete chain that, in view of the evidence as a whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt.

Id. (quotations and citations omitted).

To convict Witherspoon of second-degree riot, the state must prove that:

(1) Witherspoon was one of "three or more persons assembled"; (2) the assembly "disturb[ed] the public peace by an intentional act or threat of unlawful force or violence to person or property"; and (3) Witherspoon was a participant who either was armed with a dangerous weapon or knew that another participant was armed with a dangerous weapon. Minn. Stat. § 609.71, subd. 2.

There are two steps an appellate court performs when considering whether a conviction based on circumstantial evidence is sustained by sufficient evidence. First, the appellate court must "identify the circumstances proved." *State v. Hanson*, 800 N.W.2d

618, 622 (Minn. 2011). In doing so, this court defers to the fact-finder’s “acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the State.” *Pratt*, 813 N.W.2d at 874 (quotation omitted). Here, considering the evidence in the light most favorable to the verdict, the proven circumstances are: (1) Witherspoon was seated in the front seat of a vehicle, which had two other occupants; (2) one of the occupants fired a handgun out of the back seat of the vehicle while Witherspoon was in the vehicle; (3) the police recovered the handgun from a hiding place that was not easily accessible to the back-seat passenger; (4) Witherspoon’s thumbprint was found on the handgun that had been fired; and (5) Witherspoon and the driver of the vehicle committed an assault earlier in the same day.

The second step is to “examine independently the reasonableness of all inferences that might be drawn from the circumstances proved, including inferences consistent with a hypothesis other than guilt.” *Hanson*, 800 N.W.2d at 622 (quotation omitted). This court “give[s] no deference to the fact finder’s choice between reasonable inferences.” *Id.* (quotation omitted). “Circumstantial evidence must form a complete chain that, in view of the evidence as a whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt.” *Pratt*, 813 N.W.2d at 874 (quotation omitted).

Here, the first two elements of second-degree riot are satisfied. Witherspoon was one of three or more persons assembled, satisfying the first element. *See* Minn. Stat. § 609.71, subd. 2. Moreover, one of the people with whom Witherspoon assembled fired

a handgun from a vehicle in a public place, clearly disturbing the public peace by an intentional act. *See* Minn. Stat. § 609.71, subd. 2; *State v. Winkels*, 204 Minn. 466, 468, 283 N.W. 763, 764 (1939) (discussing appeal from riot conviction, stating that the “public peace means that tranquility enjoyed by a community when good order reigns amongst its members”).

Further, it is reasonable to infer that Witherspoon was a participant who either was armed with a dangerous weapon or knew that another participant was armed with a dangerous weapon. Minn. Stat. § 609.71, subd. 2. “In a prosecution for riot common purpose can be inferred from the circumstances and the acts committed.” *Winkel*, 204 Minn. at 469, 183 N.W. at 764. Similarly, “[k]nowledge, like intent, usually must be inferred from the evidence.” *State v. Mattson*, 359 N.W.2d 616, 617 (Minn. 1984) (discussing knowledge in context of possession of controlled substance case). The police found the handgun in a location that was difficult for the rear passenger to reach and was directly next to Witherspoon, and the handgun had Witherspoon’s thumbprint on it. It is reasonable to infer Witherspoon either helped hide or obtain the gun for the shooter—showing his participation in the act—and further that he had knowledge that the shooter possessed the gun. Thus, it is not unreasonable to infer that Witherspoon committed second-degree riot.

But under the heightened standard applied to circumstantial evidence cases, the state must prove more than that it is reasonable to infer from the evidence that the defendant is guilty. The state must prove that the circumstantial evidence is such that it is “inconsistent with *any other rational hypothesis*” other than that of the defendant’s guilt.

Pratt, 813 N.W.2d at 874 (emphasis added). The state has not done so. Here, it is not an unreasonable hypothesis that Witherspoon knew that the gun was in the vehicle, knew that the shooter intended to fire, and then assisted in hiding the gun after the fact. But it is also not an unreasonable hypothesis that Witherspoon was in the vehicle and the back-seat passenger unilaterally decided to fire the handgun. There is no evidence as to when Witherspoon's thumbprint got on the handgun, when or how the handgun got into the vehicle, whether Witherspoon even knew the people who the back-seat passenger shot at, or whether Witherspoon knew the gun was in the vehicle. Simply put, given that we do not defer to the district court's choice between reasonable inferences, the circumstantial evidence in this case does not "form a complete chain that, in view of the evidence as a whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt." *Id.* (quotation omitted). Therefore, the evidence is not sufficient to sustain Witherspoon's conviction of second-degree riot.

The state points to the fact that Witherspoon admitted to committing an assault with the driver of the vehicle earlier in the day as evidence that he participated in the shooting, arguing that the two incidents were related and that the shooting was in retaliation for the earlier assault. But there is no admissible evidence on the record indicating who Witherspoon and the driver assaulted, why Witherspoon and the driver committed the assault, or whether the assault was in any way linked with the later shooting. Therefore, the state's argument is unpersuasive.

Witherspoon also contends that the district court committed a legal error by misinterpreting the second-degree riot statute, and argues that we should reverse on that

basis. Because we conclude that the evidence is insufficient to sustain Witherspoon's conviction, we decline to reach Witherspoon's additional arguments.

Reversed.