

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2006).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0822**

State of Minnesota,
Respondent,

vs.

Leonel Zamora Olveda,
Appellant.

**Filed July 8, 2008
Affirmed
Peterson, Judge**

Steele County District Court
File No. K6-97-0543

Lori Swanson, Attorney General, Kimberly R. Parker, Assistant Attorney General, 1800
Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Douglas L. Ruth, Steele County Attorney, 303 South Cedar, Owatonna, MN 55060 (for
respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Sharon E. Jacks, Assistant
Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for
appellant)

Considered and decided by Kalitowski, Presiding Judge; Peterson, Judge; and
Harten, Judge.*

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

UNPUBLISHED OPINION

PETERSON, Judge

In this appeal from a conviction of first-degree aggravated robbery, appellant Leonel Zamora Olveda argues that (1) the evidence is insufficient to prove that the force he used against the victim was intended to overcome the victim's resistance to or compel the victim's acquiescence in the taking or carrying away of his wallet, and (2) the prosecutor committed prejudicial misconduct by misstating the law. We affirm.

FACTS

After spending the day drinking on July 2, 1997, appellant Leonel Zamora Olveda and his friend, Juan Ortega, traveled to Owatonna in the evening to visit Ortega's aunt, Desenia Ortega. At her apartment, the three drank several beers. They left the apartment between 10:30 and 11:00 p.m. to go to a bar.

At the bar, they played pool and continued to drink. They met Keith Neumann, who had come to the bar alone. Neumann was acquainted with Desenia Ortega and spent most of the evening talking with her. Neumann had little interaction with either appellant or Juan Ortega, who were playing pool.

They remained at the bar until closing, when Desenia Ortega invited the three men to her apartment to continue drinking. The four left in Desenia Ortega's car, and on the way to her apartment, they stopped at a convenience store near Dartts Park. A police officer pulled in behind them and after administering a sobriety test, arrested Desenia Ortega for driving while impaired. Appellant, Neumann, and Juan Ortega were allowed to leave, and Officer Thomas Munns saw them walk toward the park.

After the men left, Munns began inventorying the vehicle. A few minutes later, Neumann approached Munns from the direction of the park. Munns saw that Neumann had bleeding and swelling in his mouth and face and that his shirt was ripped. Neumann told Munns that he had been attacked and repeatedly kicked in the head by the men he was with, who accused him of “narcing off” Desenia Ortega. Munns called an ambulance and alerted other officers in the area about the suspects’ location. While interviewing Neumann, Munns received word that the suspects had been located, and he left to assist other officers. Munns later returned to the convenience store to continue interviewing Neumann, who was being treated in an ambulance.

Officer Jeffrey Okerberg arrested appellant and Ortega after chasing them on foot. While searching Ortega, Okerberg found Neumann’s chain-wallet in Ortega’s pocket and noticed blood on Ortega’s socks and hands. Okerberg also saw blood on the knees of appellant’s jeans.

Ortega and appellant were charged with first-degree aggravated robbery and fifth-degree assault. Minn. Stat. §§ 609.245, subd. 1, .224, subd. 1(2) (1996). Ortega pleaded guilty to the aggravated-robbery charge. Appellant failed to appear for a settlement conference on March 16, 1998, and a jury trial on March 30, 1998. An arrest warrant was issued, and appellant was apprehended on May 15, 2006, after a traffic stop.

At appellant’s trial on the robbery and assault charges, Neumann testified that appellant and Ortega jumped on him to force him to the ground and that while he was being beaten on the ground, appellant and Ortega asked him for money and said to one another that they should search him. Neumann testified that he passed out due to the

number and severity of the blows to his face and when he awoke, his wallet and shoes were missing. He testified that he spoke with appellant and Ortega in English earlier that evening and he could not recall them speaking to one another in any other language.

Munns testified that on the night of the offense, Neumann told him that the reason that appellant and Ortega jumped him was because they believed that he had “narced off” Desenia Ortega. Munns also testified that when he interviewed Neumann at the ambulance, Neumann said that during the assault, both appellant and Ortega asked him how much money he had, and when he detached the chain-wallet from his belt, they took it. Munns testified that he noticed blood on the knees of appellant’s jeans and that appellant spoke English while in custody.

Appellant testified that as the three men were walking away from the convenience store toward Dartts Park, Ortega and Neumann began to argue and then began to fight. Appellant pushed Neumann down, and he and Ortega kicked him several times. Appellant testified that he told Ortega that Neumann had been hit enough and began walking back toward Desenia Ortega’s apartment while Ortega continued to strike Neumann. Ortega caught up to appellant after a short time, and they did not talk about Neumann’s wallet or money.

The jury found appellant guilty of first-degree aggravated robbery and fifth-degree assault, and he was sentenced to the presumptive 44-month prison term. This appeal followed.

DECISION

I.

The simple robbery statute provides:

Whoever, having knowledge of not being entitled thereto, takes personal property from the person or in the presence of another and uses or threatens 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 is guilty of robbery
.....

Minn. Stat. § 609.24 (1996). A person who, “while committing a robbery, is armed with a dangerous weapon . . . or inflicts bodily harm upon another, is guilty of aggravated robbery in the first degree.” Minn. Stat. § 609.245, subd. 1 (1996).

Appellant argues that the state failed to present evidence that allowed the jury to reasonably conclude that he was guilty of aggravated robbery because under the robbery statute, “the defendant’s conduct in using force must concur with his or her state of mind in intending to steal the property,” which means “that the force must be used for the purpose of committing the theft.”

Citing Neumann’s statement to Munns on the night of the assault that appellant and Ortega jumped him to retaliate against him for “narcing off” Ortega’s aunt, appellant contends that he could not be guilty of aggravated robbery because his intent in assaulting Neumann was retaliation, rather than taking property from him.¹ Appellant argues that because the robbery statute expressly states that the force must be used for the purpose of committing the theft and he used force to retaliate, his conduct could not be a robbery and

¹ Appellant does not dispute that Neumann suffered bodily harm.

was, instead, an assault followed by a theft. Accordingly, appellant concludes that, at most, the record supports a finding that he committed an assault, and possibly aided and abetted the theft of Neumann's wallet.

The interpretation of a criminal statute is a legal matter subject to de novo review. *State v. Colvin*, 645 N.W.2d 449, 452 (Minn. 2002). This court rejected appellant's interpretation of the robbery statute in *State v. Anderson*, 391 N.W.2d 527 (Minn. App. 1986). In *Anderson*, the defendant participated with others in the robbery of two drug stores. 391 N.W.2d at 528-29. During one of the robberies, a woman and her eight-year-old daughter entered the drug store, and a man armed with a shotgun ordered them to "hit the floor." *Id.* at 529. As the robbers left the store, one of them grabbed the woman's purse, which lay on the floor next to her. *Id.*

At his jury trial, the defendant requested that a charge of theft from the person be submitted to the jury as a lesser included offense of the aggravated robbery involving the purse, arguing that there was a rational basis for finding that he did not use force or the threat of imminent force to overcome the woman's resistance and compel her acquiescence in the taking of her purse, but instead intentionally took her purse without her consent. *Id.* at 531. The district court denied the defendant's request. *Id.* This court determined that there was no dispute that the robbers used armed force in the robberies, which is the element that distinguishes aggravated robbery from theft from the person, and held "that the initial use of the shotgun to force [the woman] and her daughter to the floor carried over minutes later to the taking of [the woman's] purse." *Id.* at 531-32. Under *Anderson*, even if appellant and Ortega initially assaulted Neumann as retribution,

this use of force carried over minutes later to their taking Neumann's wallet, which made the offense robbery, rather than theft.

Furthermore, Neumann testified on direct examination that while he was being beaten, appellant and Ortega asked him for money and talked to one another about searching him. This is strong circumstantial evidence that appellant and Ortega used force to overcome Neumann's resistance to, or compel his acquiescence in, the taking of his wallet. "While it warrants stricter scrutiny, circumstantial evidence is entitled to the same weight as direct evidence." *State v. Bauer*, 598 N.W.2d 352, 370 (Minn. 1999).

Appellant argues that Neumann's credibility should be questioned because his testimony at trial years after the incident was very different from his statement to Munns on the night of the offense, when he said that appellant and Ortega assaulted him out of anger and when they later asked if he had any money, he gave them his wallet. Appellant also argues that Neumann's credibility must be questioned because, contrary to his statements to Munns on the night of the offense, Neumann testified at trial that he did not remember either appellant or Ortega saying anything that indicated that they were upset with him, but he did remember these two Spanish-speaking men talking in English about taking his money, which appellant claims is incredible. Appellant contends that because the state did not sufficiently corroborate Neumann's trial testimony that he was the victim of a robbery, which contradicted his earlier statement to Munns that he was assaulted out of anger and later had his wallet stolen, the state failed to prove beyond a reasonable doubt that appellant was guilty of aggravated robbery.

But Neumann's trial testimony was at least partly corroborated by Munns's trial testimony that when he spoke with Neumann in the ambulance on the night of the offense, Neumann said that during the assault, appellant and Ortega asked him how much money he had, and when he detached the chain on his wallet from his belt, they took it. In considering a claim of insufficient evidence, 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 support the verdict reached by the jury. *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 contrary evidence. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). This is especially true when resolution of the matter depends mainly on 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 that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004). Appellant has not established a reason for us to question Neumann's credibility and depart from our normal standard of review on the sufficiency of the evidence. *See State v. Foreman*, 680 N.W.2d 536, 539 (Minn. 2004) (discussing cases that involved sufficient reasons to question victim's credibility).

II.

Appellant argues that the prosecutor committed prejudicial misconduct by incorrectly informing the jurors that although appellant used force to retaliate against

Neumann, appellant still committed aggravated robbery by taking Neumann's wallet after the assault. But the prosecutor did not misstate the law. Appellant's prosecutorial-misconduct claim is based on his assertion that in order for him to be convicted of aggravated robbery the state must prove that he intended to commit robbery either before or while he used force against Neumann. As we have already explained, this assertion is incorrect. Consequently, appellant's prosecutorial-misconduct claim is without merit.

Affirmed.