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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2161**

State of Minnesota,
Respondent,

vs.

James David Leach,
Appellant.

**Filed December 19, 2011
Affirmed
Stoneburner, Judge**

Clay County District Court
File No. 14CR092526

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

Brian J. Melton, Clay County Attorney, Heidi M. F. Davies, Chief Assistant County Attorney, Jenny M. Samarzja, Assistant County Attorney, Moorhead, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Worke, Judge; and Halbrooks, Judge.

UNPUBLISHED OPINION

STONEBURNER, Judge

Appellant challenges the sufficiency of the evidence to support his conviction of first-degree assault and argues that the district court (1) abused its discretion by ruling

that the state could introduce prior convictions of auto theft and burglary for impeachment purposes; (2) prevented him from presenting a defense by denying his request to instruct the jury on child-endangerment; and (3) abused its discretion by sentencing him to an upward durational departure. We affirm.

FACTS

While in the sole care of appellant James David Leach, M, the seven-month-old daughter of Leach's girlfriend, C. R., suffered a massive complex depressed skull fracture to the lower occipital bone near the base of her neck, with fracture lines radiating down to the hole in the bottom of the skull through which the brain stem passes and across her parietal bone, almost to the front of her skull. Leach gave several versions of how the injury occurred, all involving a backward fall from a laundry basket filled with wet clothes onto the tile floor of the laundry room.

After M was injured, Leach called the Ask-A-Nurse line and reported that he had fallen in the shower, had swelling and tenderness, and wanted to know the symptoms of concussion in adults. He then called C.R. at work and told her that M had fallen out of a laundry basket of clothes onto the tile floor and he had called the Ask-A-Nurse line to ask about signs of concussion in adults. At C.R.'s request, Leach called M's pediatric-care clinic and explained to nurse Tracy Lee that M had fallen when she climbed into a laundry basket and it tipped over and that she had cried and vomited but then calmed. Lee advised him to wake M and look to see if her pupils were reactive. Lee later testified that Leach mentioned being concerned about "abuse cases," which she thought was unusual.

Leach also called his mother, Muriel Leach, who came over to check on M. She reported to C.R. that M was tired, lethargic, and just wanted to sleep. Because it was close to M's nap time, C.R. was not concerned. C.R. got to Leach's house at 5:30 p.m. and found M "really tired and kind of out of it" with a large bump on the back of her head. M could not keep down the Tylenol and Pedialyte that C.R. tried to give her, and C.R. took M to the emergency room at Innovis Hospital in Fargo, Cass County, North Dakota.

Carissa Westring, R.N., examined M at 7 or 7:30 p.m. She summoned emergency-room physician Dr. Hunt who ordered a CT scan. The scan revealed a life-threatening skull fracture and hemorrhaging in the brain, necessitating immediate surgery. Dr. Marc Eichler performed surgery and later testified that M's injuries were not consistent with Leach's explanation of M's fall. Anne Hahne, R.N., cared for M during the seven hours after surgery. Leach told her that while he was doing laundry, M tried to climb up the dryer and fell backwards and hit her head on the tile floor. Westring reported suspected child abuse to the Cass County authorities.

An examination by ophthalmologist Dr. Hope Youngsmith two days after surgery revealed multi-layered retinal hemorrhages which Youngsmith later testified were usually caused in children by "Shaken Baby" and were not consistent with bleeding that would accompany a short fall or head trauma. Youngsmith testified that such bleeding could also be caused by diabetes or very rare metabolic disorders. There was no evidence presented at trial that M suffers from one of these conditions.

Pediatrician David Clutter began treating M three days after surgery. He later testified that M's injuries were not consistent with Leach's explanation. Clutter also testified that even a very advanced 8-month-old child would not be able to climb and it would be extremely difficult for such a child to stand up unassisted on top of a pile of clothes in a laundry basket.

Cass County Social Services contacted detective Paula Ternes of the Fargo, N.D. Crimes Against Children Unit. Ternes spoke to Leach who said that he sat M on top of clothes in the laundry basket and, when he looked over, saw her standing and then she fell straight back. Leach implied that he had asked the Ask-A-Nurse about concussions in infants. Ternes notified the Moorhead police department after learning that the incident occurred in Moorhead. Moorhead detective Thad Stafford interviewed Leach and conducted a warranted search of Leach's home, at which time Leach agreed to a videotaped reenactment of how the incident occurred.¹ Moorhead police officer Robert Porter, who met Leach and C.R. at Leach's home just before the search, noticed that Leach answered questions directed to C.R. before she could speak. In response to a question about how M was recovering from surgery, Leach said M had a bruise on her left eye from being shaken, but immediately said the shaking occurred when she hit the floor and bounced back up.

¹ In the video re-enactment, Leach demonstrates a laundry basket positioned directly in front of the dryer door filled with wet clothing that spilled out of the basket making a ramp of clothing from the floor to the top of the clothing in the basket. He demonstrates placing M in a seated position with her back to the dryer. He describes that when he next looked, M had managed to turn around so she was facing the dryer and stand up whereupon she fell backward onto the ramp of clothing but striking her head on the tile floor.

Dr. Arne Graf, a specialist in maltreatment care, conducted an assessment of M on the day after surgery. He interviewed Leach and C.R. as part of the assessment. Leach said he saw M stand up in the laundry basket, fall, and hit her head. C.R. said that M was not able to stand up on her own, though she could pull herself up. Graf did not find Leach's explanation to be consistent with M's developmental abilities and noted that her injury was not consistent with hitting a flat surface.

Detectives spoke with L.T. who lives in the other side of the duplex where Leach lives. L.T. and her husband's healthcare worker, A.G., were in L.T.'s living room on the morning of the incident. They reported that between 9 and 11:15 a.m. they heard what L.T. described as a "sudden rattling bang" and A.G. described as "three to five bangs." L.T. reported that about a month prior to the incident she had heard Leach angrily yell at M to "shut up." Leach later confirmed to L.T. that the incident occurred around the time that L.T. and A.G. heard the sounds they described and implied that he had yelled at M for defecating in the bathtub.

C.R. told the police that on two occasions before the incident, Leach had slapped M: once on the hand when M reached for something, and once across the face leaving a red mark when M, while trying to stand up, pulled the hair on Leach's leg as he napped on the couch. C.R. testified that she was upset about the face slap, and Leach promised not to do it again. During the investigation Leach told C.R. that "this is all [M's] fault. If she wouldn't have fallen, I wouldn't be in trouble."

Leach was charged with first-degree assault. Prior to trial, the state moved for an upward sentencing departure in the event of a conviction. Leach waived his right to have

a sentencing jury determine the existence of aggravating factors and agreed to submit that issue to the district court on the trial evidence. The district court ruled that evidence of Leach's prior felony convictions of forgery, burglary, and motor-vehicle theft would be admitted for impeachment purposes if Leach testified.

Leach did not testify at trial but presented the expert testimony of Dr. Janice Ophoven, a pediatrician specializing in pediatric pathology. Ophoven opined, contrary to the opinions of medical personnel who treated M, that M's injuries could have been caused by the fall described by Leach. In rebuttal, the state called Dr. Richard Kaplan, a child-abuse pediatric specialist, who testified that M's injuries are consistent with a high-force impact that could not have occurred from a short fall and that the fall as described by Leach could not have caused the large fracture at the base of the occiput because M could not have hit that part of her head if she fell as Leach described. Kaplan also testified that multi-layered retinal hemorrhages are typically seen only with rotational injury consistent with shaking and that M's injuries were consistent with abusive head injury.

The district court denied Leach's request that the jury be instructed on the offense of child-endangerment after concluding that it is not a lesser-included offense of first-degree assault. The jury found Leach guilty as charged. The district court sentenced Leach to 150 months in prison, an upward departure from the presumptive guidelines sentence of 98 months, based on its findings that M was particularly vulnerable, Leach was entrusted with M's care, and Leach acted with particular cruelty in failing to seek medical attention, fabricating a story to the nurse line, and misleading parties from whom

he sought advice resulting in a display of “self-preservation at great cost to the victim.” This appeal followed.

D E C I S I O N

I. The evidence was sufficient to support Leach’s conviction of first-degree assault.

When considering a claim of insufficient evidence, this court conducts “a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction,” is sufficient to allow the jurors to reach the verdict that they did. *State v. Caine*, 746 N.W.2d 339, 356 (Minn. 2008) (quotation omitted). We must assume that “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). “We will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and for the necessity of overcoming it by proof beyond a reasonable doubt, could reasonably conclude that a defendant was proven guilty of the offense charged.” *Bernhardt v. State*, 684 N.W.2d 465, 476–77 (Minn. 2004) (quoting *State v. McCullum*, 289 N.W.2d 89, 91 (Minn. 1979)).

A conviction based on circumstantial evidence receives “heightened scrutiny” from a reviewing court. *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010). The reviewing court applies a two-step test to evaluate the sufficiency of the circumstantial evidence supporting a conviction. *State v. Andersen*, 784 N.W.2d 320, 329–30 (Minn. 2010). First, the court identifies “the circumstances proved.” *Id.* at 329. At this first step, “we defer . . . to the jury’s acceptance of the proof of these circumstances and

rejection of evidence in the record that conflicted with the circumstances proved by the State.” *Id.* Second, the court independently examines “the reasonableness of all inferences that might be drawn from the circumstances proved[,]” including “inferences consistent with a hypothesis other than guilt.” *Id.* At the second step, no deference is given “to the factfinder’s choice between reasonable inferences.” *Id.* at 329–30 (quotation omitted). Circumstantial evidence supporting a conviction must be “consistent with guilt and inconsistent with any rational hypothesis except that of guilt.” *Id.* at 330. “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.” *Al-Naseer*, 788 N.W.2d at 473 (quotation omitted). “We will not overturn a conviction based on circumstantial evidence on the basis of mere conjecture.” *Andersen*, 784 N.W.2d at 330 (alteration and quotation omitted).

A person is guilty of first-degree assault if he intentionally causes another great bodily harm. Minn. Stat. § 609.221, subd. 1 (2009). Leach concedes that the state adequately proved the great-bodily-harm element but argues that the evidence is insufficient to prove that Leach intentionally inflicted the harm. “The intent element of a crime, because it involves a state of mind, is generally proved circumstantially....” *State v. Davis*, 656 N.W.2d 900, 905 (Minn. App. 2003).

Leach’s argument proceeds from the premise that the jury found his expert witness credible such that one of the circumstances proved was that the injury occurred as described by Leach. Leach recites reasons why the jury could have rejected the state’s

witness's testimony that the injury could not have occurred as Leach described. But we are required to defer to the jury's credibility determinations. *See Al-Naseer*, 788 N.W.2d at 473 (recognizing that the trier of fact is in the best position to determine credibility and weigh the evidence). Because the jury plainly rejected Leach's expert's testimony that M's injuries could have been caused as described by Leach, the circumstances proved in this case are that M suffered injuries that are consistent only with a nonaccidental high-force impact and shaking. From these circumstances, the only reasonable inference is that Leach, M's sole caretaker at the time of the injury, intentionally caused the injuries. The evidence is sufficient to prove the intent element of first-degree assault.

II. The district court did not abuse its discretion by holding that Leach's prior felony convictions were admissible for impeachment purposes.

A district court's ruling on the impeachment of a witness by prior conviction is reviewed under a clear abuse of discretion standard. *See State v. Ihnot*, 575 N.W.2d 581, 584 (Minn. 1998). A district court may admit evidence of a defendant's prior felony convictions on a determination that the crime either (1) was punishable by imprisonment of over one year and "the probative value of admitting this evidence outweighs its prejudicial effect" or (2) involves dishonesty or false statement. Minn. R. Evid. 609(a). In determining whether the probative value of the conviction outweighs its prejudicial effect, the district court considers

- (1) the impeachment value of the prior crime, (2) the date of the conviction and the defendant's subsequent history, (3) the similarity of the past crime with the charged crime (the greater the similarity, the greater the reason for not permitting use of the prior crime to impeach), (4) the importance of

defendant's testimony, and (5) the centrality of the credibility of the issue.

State v. Jones, 271 N.W.2d 534, 538 (Minn. 1978). The district court errs when it fails to demonstrate consideration of these factors, but “the error is harmless if the conviction could have been admitted after a proper application of the *Jones*-factor analysis.” *State v. Vanhouse*, 634 N.W.2d 715, 719 (Minn. App. 2001), *review denied* (Minn. Dec. 11, 2001). In this case, the district court did not conduct a detailed analysis of the *Jones* factors on the record but stated that it understood the need to balance the probative and prejudicial effect “and that whole analysis to be used,” which appears to reference the *Jones* factors.

An appellate court may conduct its own review of the *Jones* factors in determining whether this type of error is harmless. *See State v. Swanson*, 707 N.W.2d 645, 655–56 (Minn. 2006) (conducting review of *Jones* factors in absence of district court analysis and concluding that district court did not abuse its discretion under Minn. R. Evid. 609(a)(1)).

The district court held that Leach's convictions of forgery, burglary, and theft of motor vehicle were admissible for impeachment. On appeal, Leach concedes that the forgery conviction is proper impeachment evidence as a crime involving dishonesty and does not challenge the ruling that the forgery conviction could be admitted for impeachment purposes. But Leach argues that the *Jones* factors (1) and (4) weighed against admitting the prior burglary and theft of motor vehicle convictions because the impeachment value was minimal and Leach's testimony was critical. Both Leach and the State agree that factors (2), (3), and (5) weigh in favor of admitting the convictions.

In this case, the jury was well aware of Leach's versions of the incident and his actions following the incident through Leach's videotaped re-enactment and the testimony of medical providers, police officers, C.R., and other witnesses. The state highlighted the inconsistencies in Leach's accounts. And, had he testified, Leach now concedes that his conviction of forgery would have been properly admitted to impeach his testimony. Under these circumstances, the probative value of the burglary and auto-theft convictions appears to be slight and would weigh against admissibility, but the importance of Leach's testimony is also slight because the jury had an opportunity to view Leach as he described the incident in the videotaped reenactment and heard what he told others about the incident, so this factor would not weigh against admissibility. On this record, we conclude that the district court did not abuse its discretion by ruling that the burglary and auto-theft convictions were admissible for impeachment purposes.

III. The district court did not abuse its discretion by refusing to instruct the jury on a lesser, non-included defense.

At trial, Leach requested a jury instruction on child endangerment as a lesser-included defense. Concluding that child endangerment is not a lesser-included offense of first-degree assault, the district court refused to give the requested instruction. On appeal, Leach no longer asserts that child endangerment is a lesser-included offense of first-degree assault and argues, for the first time, that the refusal to instruct on the lesser, non-included child-endangerment offense precluded Leach from presenting a defense. Because this issue was not raised in the district court, we decline to address it on appeal. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). We note, however, that Leach

relies on federal case law not adopted by the Minnesota Supreme Court, and the controlling case law in Minnesota precludes a district court from exercising its discretion to instruct on a lesser, non-included offense. *See State v. Gisege*, 561 N.W.2d 152, 157 (Minn. 1997) (holding that the trial court had no discretion to grant defendant’s request for a jury instruction on a lesser but non-included offense).

IV. The district court did not abuse its discretion in imposing an upward sentencing departure.

A district court must order the presumptive sentence specified in the sentencing guidelines unless there are “identifiable, substantial, and compelling circumstances” to warrant an upward departure from the presumptive sentence. Minn. Sent. Guidelines II.D.1 (2011). “‘Substantial and compelling’ circumstances are those showing that the defendant’s conduct was significantly more or less serious than that typically involved in the commission of the offense in question.” *State v. Edwards*, 774 N.W.2d 596, 601 (Minn. 2009). Whether a particular reason for an upward departure is permissible is a question of law, which is subject to de novo review. *Dillon v. State*, 781 N.W.2d 588, 595 (Minn. App. 2010), *review denied* (Minn. July 20, 2010). A district court’s decision to depart from the sentencing guidelines based on permissible grounds is reviewed for an abuse of discretion. *State v. Reece*, 625 N.W.2d 822, 824 (Minn. 2001); *Dillon*, 781 N.W.2d at 595–96.

The sentencing guidelines set forth a nonexclusive list of aggravating factors that the sentencing court can consider when departing from the presumptive sentence. Minn. Sent. Guidelines II.D.2.b. (1), (2) (2010). Although factors may be considered together

to justify a departure, one factor on its own may be sufficient to justify a departure. *See, e.g., State v. Losh*, 721 N.W.2d 886, 897 (Minn. 2006) (holding two aggravating factors provided sufficient evidence justifying departure); *State v. O'Brien*, 369 N.W.2d 525, 527 (Minn. 1985) (stating departure justified when only one aggravating factor is present).

The district court granted the state's request for an upward-durational departure, based on its findings that (1) M was particularly vulnerable; (2) Leach was entrusted with the care of M; and (3) Leach acted with particular cruelty in failing to seek medical attention, fabricating a story to the nurse line and misleading the parties from whom he sought advice resulting in a display of "self-preservation at great cost to the victim". On appeal, Leach challenges only the finding that he acted with particular cruelty, arguing that this finding amounts to punishing him for the uncharged crime of neglect or endangerment under Minn. Stat. § 609.378, subd. 1 (2009).² And Leach cites *Tucker v. State* for the proposition that the basis of failure to render medical aid is not by itself sufficient to support an upward departure. 799 N.W.2d 583, 587 (Minn. 2011). The supreme court in *Tucker* states that, "although the failure to aid is relevant to whether a person convicted of a crime has acted in a particularly cruel manner, we have never affirmed a departure for particular cruelty based solely on the failure to render medical aid." *Id.*

² Minn. Stat. § 609.378, subd. 1, provides, in relevant part, that a caretaker who willfully deprives a child of necessary health care when the caretaker is reasonably able to make the necessary provisions and the deprivation harms or is likely to substantially harm the child's physical, mental, or emotional health is guilty of neglect of a child.

Because the departure in this case was not based solely on Leach's failure to seek appropriate medical attention when M was injured and because Leach does not challenge the validity of the factors of vulnerability and abuse of trust to support the departure, we conclude that the district court did not abuse its discretion in imposing the upward departure.

Affirmed.