STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0497

State of Minnesota,
Appellant,

vs.

Robert Lee Heck, III,
Respondent.

Filed September 16, 2008
Reversed and remanded
Stoneburner, Judge

Olmsted County District Court
File No. 55CR071948

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

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Considered and decided by Shumaker, Presiding Judge; Stoneburner, Judge; and Harten, Judge.*

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

U N P U B L I S H E D O P I N I O N

STONEBURNER, Judge

Appellant State of Minnesota challenges (1) exclusion of proffered relationship evidence and (2) dismissal of a first-degree assault charge against respondent for lack of probable cause. Because the state demonstrated that the decisions have a critical impact on the prosecution and because the district court's exclusion of the relationship evidence and dismissal of the first-degree assault charge were based on legal error, we reverse and remand for further proceedings.

FACTS

For purposes of this appeal, the following facts are relevant. Between January 3, 2007 and January 11, 2007, J.L.J., the newborn son of Valerie Jean James and respondent Robert Lee Heck, III, suffered egregious nonaccidental harm while in the exclusive care of his parents. There is no direct evidence of the exact date of the injuries and no evidence as to which parent inflicted the injuries or was present when the injuries were inflicted.

The record demonstrates that J.L.J. was not suffering from any fractures when J.L.J. was discharged on January 3 from St. Mary's Hospital at the Mayo Clinic into the care of his parents. But when he was taken to the St. Mary's emergency room on January 11, he had 25 fractures, including fractures to both legs, both arms, and numerous ribs on both sides of his body. Neither parent had an explanation for the injuries, but they questioned whether immunizations J.L.J. received on the day he was discharged or the use of the car seat could have caused or contributed to the injuries.

The bulk of the medical evidence in the record demonstrates that the fractures were nonaccidental, were not the result of the immunizations or any abnormality of J.L.J.'s bones, could not have been caused by the car seat, required a significant amount of force to inflict, and would have resulted in immediate noticeable pain and discomfort. There is evidence that J.L.J.'s discomfort and pain, as well as bruising and swelling in his legs, were increasingly apparent between January 4 and January 11. Evidence of healing in some of J.L.J.'s fractures indicates that harm was inflicted on two occasions, the first occurring approximately a week before the fractures were discovered and the second occurring some days after the first incident .

Both parents were charged with first-degree assault in violation of Minn. Stat. §§ 609.221, subd. 1, .05 (2006) (aiding and abetting) and with aiding an offender-obstructing investigation/prosecution in violation of Minn. Stat. §§ 609.221, subd. 1, .495 (2006). While Heck was incarcerated on the charges against him, his telephone calls to James were recorded, and his mail was examined. James's letters to Heck demonstrated her total devotion to him; she stated in a March 17, 2007 letter that: "if I have to wait 20 years to be with you then I will wait." During a March 23, 2007 telephone conversation, Heck, for the first time, told James about an incident that occurred when he fell asleep while feeding J.L.J. Heck said that J.L.J. "rolled right out of my arms just straight forward and he must have hit, like I don't know, if he rolled [] or not but he was faced down, it knocked the wind out of him." According to Heck, this incident occurred in Mankato between January 4 or 5 and January 8, while James was at work and Heck was caring for J.L.J. In the same telephone conversation, Heck told James that he could

understand why, if J.L.J.'s injuries occurred in this incident, his leg fractures but not his rib fractures showed some healing, referring to the fact that they held J.L.J. down (apparently with enough force to keep the rib fractures from healing) to change his ileostomy bag.[1] The state asserts that this conversation, which occurred months after J.L.J.'s injuries were discovered, is evidence of Heck's guilt and shows that Heck attempted to educate James about a defense to the charges.

On January 9 and 10, Heck, James, their 11-month old daughter, and J.L.J. were staying at the Ronald McDonald House in Rochester, where Heck and James took turns visiting J.L.J.'s twin, who remained hospitalized.[2] A witness who was also staying at the Ronald McDonald House on those dates stated that, on one of those dates, she heard a man's voice coming from the room where James and Heck and the children were staying. The witness said the man was somewhat out of control, yelling at or about a child to "stop" and "knock it off, I've had it" and that the yelling was interspersed with a child's whimpering. There is evidence that J.L.J. "was whimpering" on January 11 during the examination that revealed his fractures. The state contends that the witness may have been hearing Heck assaulting J.L.J..

[1] J.L.J. was discharged from the hospital with an ileostomy, and Heck and James were trained to change J.L.J.'s ileostomy bag by Mayo Clinic nurses. Nonetheless, when Heck and James took J.L.J. to the emergency room on January 11, they reported for the first time that the bag did not fit properly and that they had had to replace the bag 15 times in one week, which was much more frequently than the once-weekly change while J.L.J. was in the hospital.

[2] J.L.J and his twin were conjoined at the abdomen at birth and were successfully separated at the Mayo Clinic.

The state moved to admit relationship evidence under Minn. Stat. § 634.20 (2006), consisting of prior instances of Heck's alleged threats, assaults, and harassment against his grandparents, half-brother, former girlfriends, and the children of a former girlfriend. The district court denied the state's motion to admit this evidence under section 634.20 but suggested that the state pursue admission of these incidents as *Spriegl* evidence. The state has not, to date, acted on this suggestion.

The record of the trial in Blue Earth County that resulted in termination of James's and Heck's parental rights (TPR) to all three children was introduced into evidence as the record on which probable cause would be decided. Heck objected only to admission of the portion of the record that relates to alleged incidents of prior domestic abuse and to use of the TPR record in the determination of his motion to dismiss the charges against him for lack of probable cause. The district court did not specifically rule on admission or use of the TPR record, but referred to that record in its order and memorandum granting Heck's motion to dismiss the count of first-degree assault. The state appeals exclusion of the relationship evidence and dismissal of the first-degree assault charge.[3]

D E C I S I O N

I. Critical Impact

Minn. R. Crim. P. 28.04, subd. 2(2), requires that the state's notice of appeal shall "include a summary statement by the prosecutor as to how the trial court's alleged error,

[3] Heck moved to dismiss the portion of the appeal challenging dismissal of the first-degree assault charge as precluded by Minn. R. Crim. P. 28.04, subd. 1(1) (stating that "an order is not appealable [] if it is based solely on a factual determination dismissing a complaint for lack of probable cause"). That motion was denied by order of this court on May 20, 2008.

unless reversed, will have a critical impact on the outcome of the trial . . . ." Critical impact must be established before this court determines whether the district court erred. *State v. Scott*, 584 N.W.2d 412, 416 (Minn. 1998). The standard for critical impact is that the district court's action "significantly reduces the likelihood of a successful prosecution." *State v. Kim*, 398 N.W.2d 544, 551 (Minn. 1987).

Heck argues that the state failed to include the required critical-impact information in its statement of the case or discuss critical impact in its appellate brief. We disagree. The state asserts in its statement of the case that "[t]he rulings of the district court resulted in the dismissal of the most serious charge of aiding and abetting Assault in the First Degree and thus had a critical impact on the outcome of the trial." The dismissal of a charge has been held to have a critical impact on the outcome of a trial. *See State v. Poupard*, 471 N.W.2d 686, 689 (Minn. App. 1991) (stating that "the dismissal of a charge clearly has a critical impact on the outcome of the trial").

"Critical impact has [also] been shown when the lack of the suppressed evidence significantly reduces the likelihood of a successful prosecution." *State v. Zanter*, 535 N.W.2d 624, 630 (Minn. 1995) (quotation omitted). "Whether suppression of a particular piece of evidence will significantly reduce the likelihood of a successful prosecution depends in large part on the nature of the state's evidence against the accused." *Id.*

In this case, exclusion of the relationship evidence critically impacted the probable-cause determination and thereby critically impacted the outcome of the prosecution. Exclusion of relationship evidence reduced the likelihood of a successful

prosecution. Having concluded that the state has shown critical impact, we turn to the merits of the state's appeal.

II. Denial of state's request to admit evidence of Heck's prior conduct under section 634.20.

To prevail in an appeal of a pretrial order, the state must "clearly and unequivocally" show that, in addition to critical impact, the order constituted error. *Id.* Because the relationship evidence is critical to the probable-cause analysis, we first address whether the district court "clearly and unequivocally" erred in excluding evidence of Heck's relationships.

A district court's decision on the admission of evidence is reviewed for an abuse of discretion. *State v. Williams*, 586 N.W.2d 123, 126 (Minn. 1998). Absent a clear abuse of that discretion, the district court's evidentiary ruling will not be reversed. *Id.*

Minnesota law provides for the admission of:

> [e]vidence of similar conduct by the accused against the victim of domestic abuse, or against other family or household members . . . unless the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Minn. Stat. § 634.20. The rationale for admitting relationship evidence pursuant to section 634.20 is to illuminate the relationship between the defendant and the alleged victim and to put the alleged crime in the context of that relationship. *State v. McCoy*, 682 N.W.2d 153, 159 (Minn. 2004). Relationship evidence "assist[s] the jury by providing a context with which it [can] better judge the credibility of the principals in the

relationship." *Id.* at 161. Evidence under section 634.20 need not meet the heightened standard of clear and convincing evidence required for the admission of character or *Spriegl* evidence, but need only be more probative than prejudicial. *Id.* at 159. "[T]he admissibility of evidence under Minn. Stat. § 634.20 depends only on (1) whether the offered evidence is evidence of similar conduct; and (2) whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice." *Id.* at 158.

The state sought to admit the following 12 prior incidents: (1) a November 1999 assault by Heck of his then-girlfriend A.H.; (2) a July 2000 fight between Heck and his half-brother; (3) a January 2002 assault against Heck's then-girlfriend H.L.; (4) a May 2002 assault against his grandfather;[4] (5) a March 2004 alleged physical abuse of the daughter of his then-girlfriend, L.S.; (6) a May 2004 threat to kill his grandparents; (7) a May 2004 break-in at his grandparents' home; (8) recent allegations that in May 2004 he physically injured the children of his then-girlfriend A.A. while the children were in his care; (9) an August 2004 confrontation with James's brother; (10) a September 2004 domestic abuse of then-girlfriend L.S.; (11) an October 2004 assault against his grandfather; and (12) a December 2004 violation of an order for protection of his grandparents.

The district court concluded that the evidence was not admissible as relationship evidence because none of the incidents involved J.L.J., J.L.J's family members, or members of the household in which J.L.J. and Heck reside. But the district court's

[4] The record reflects that Heck was raised by his grandparents and considered them to be his "mother" and "father."

limitation is contrary to the plain language of the statute, which includes incidents against a broadly defined class of "other family or household members."

The statute defines "family or household members" as: "persons related by blood; . . . persons who are presently residing together or who have resided together in the past; . . . [and] persons involved in a significant romantic or sexual relationship." Minn. Stat. § 518B.01, subd. 2(b) (2006); *see* Minn. Stat. § 634.20 (stating that "'domestic abuse' and 'family or household members' have the meanings given under section 518B.01, subdivision 2"). The definition is plain and unambiguous, and does not limit "family or household members" to persons related to the victim or to persons who presently, or in the past, have resided with both the defendant and the victim. The district court erred by interpreting the relationship-evidence statute to permit only evidence of incidents against the current victim or current household and family members. It appears that all of the incidents except the assault against James's brother involved family or household members as defined by the statute. The incidents are therefore admissible if they involved "similar conduct" as defined by the statute and if the evidence is more probative than prejudicial.

The district court ruled that none of the incidents involved conduct similar to the conduct involved in the current charge. But the statute defines "similar conduct" as including, but not limited to, "evidence of domestic abuse, violation of an order for protection under section 518B.01; violation of a harassment restraining order under section 609.748; or violation of section 609.749 or 609.79, subdivision 1." Minn. Stat. § 634.20. "Domestic abuse" is defined as "the following, if committed by a family or

household member: (1) physical harm, bodily injury or assault; (2) the infliction of fear of imminent physical harm, bodily injury, or assault; or (3) terroristic threats, . . . criminal sexual conduct, . . . or interference with an emergency call . . . ." Minn. Stat. § 518B.01, subd. 2(a) (2006).

Much of the relationship evidence that the state sought to introduce involved domestic abuse as defined by statute. The state relies on those incidents to argue that Heck is easily frustrated and that his behavior quickly escalates to threats of violence and actual violence that includes destruction of property and infliction of injury. This circumstantial evidence is relevant to the state's case to show that Heck, rather than James, injured J.L.J. The allegations that Heck hit and broke the bones of A.A.'s children while in Heck's care involve, as the district court acknowledged, similar conduct. On remand, the district court must consider the statutory definition of similar conduct, as well as the statutory definition of family and household members, to reevaluate the admissibility of the proffered relationship evidence.

The admission of relationship evidence also requires that the probative value of the evidence outweigh its prejudicial effect. *McCoy*, 682 N.W.2d at 158. Because the district court excluded the evidence on other grounds, it did not address whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. Evidence that Heck injured A.A.'s children is highly probative. On remand, the district court must address, as to any of the incidents that otherwise qualify for admission as relationship evidence, whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice.

III. Probable Cause.

The state argues that the district court erred in its application of the probable cause standard. In determining probable cause, the district court addresses the important question: "Given the facts disclosed by the record, is it fair and reasonable . . . to require the defendant to stand trial?" *State v. Florence*, 306 Minn. 442, 457, 239 N.W.2d 892, 902 (1976). To defeat a motion to dismiss for lack of probable cause, the state must show that it has "substantial evidence that will be admissible at trial and that would justify denial of a motion for a [judgment] of acquittal." *State v. Dunagan*, 521 N.W.2d 355, 356 (Minn. 1994) (quotation omitted). A motion for a judgment of acquittal will be granted "if the evidence is insufficient to sustain a conviction of [the charged] offense." Minn. R. Crim. P. 26.03, subd. 17(1) provides:

> When considering a [judgment of acquittal], the trial court must determine whether, as a matter of law, the evidence is sufficient to present a fact question for the jury's consideration. In making this decision, the court must view the credibility of the evidence, and every inference which may fairly be drawn therefrom, in favor of the adverse party.

State v. Trei, 624 N.W.2d 595, 598 (Minn. App. 2001) (quotation omitted), *review dismissed* (Minn. June 22, 2001).

Specifically, the state argues that the district court failed to view the credibility of the evidence and every inference to be fairly drawn from the evidence in the light most favorable to the state. We agree. Although the district court enunciated the proper standard, it failed to properly apply it; instead, the court viewed much of the evidence in the light most favorable to Heck and weighed the evidence to conclude that the state

lacked sufficient evidence to present a fact question for the jury's consideration on the first-degree assault charge.

As the district court correctly noted, the state need not prove that Heck actively participated in the intentional infliction of harm on J.L.J., but only that he "played a knowing role in the commission of the crime." *State v. Gates*, 615 N.W.2d 331, 337 (Minn. 2000), *overruled on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004). The district court also correctly noted that the necessary intent can be inferred from factors including: "defendant's presence at the scene of the crime, defendant's close association with the principal before and after the crime, defendant's lack of objection or surprise under the circumstances, and defendant's flight from the scene of the crime with the principal." *State v. Swanson*, 707 N.W.2d 645, 659 (Minn. 2006).

The district court started with the proposition that dismissal of first-degree assault charges against James[5] required the state to show evidence of Heck's guilt separate from the evidence that it had asserted against James in order to show probable cause for charging Heck with first-degree assault. Rather than examining *all* of the evidence that the state presented against Heck,[6] the district court analyzed only whether the state had

[5] A different judge of the district court earlier granted James's motion to dismiss for lack of probable cause the charges against her. An appeal (A07-1815) was filed from that order but dismissed based on the state's notice of voluntary dismissal.

[6] Evidence not considered by the district court includes (1) Heck's insinuations that J.L.J.'s car seat could have injured him; (2) Heck's lack of surprise when he learned the extent of J.L.J.'s injuries; (3) Heck's failure to come forward with the information that he had dropped J.L.J. until months after the injuries were discovered and the information was then presented to James in a manner designed to explain medical findings consistent

shown evidence against Heck different from the evidence asserted against James. And, having excluded the proffered relationship evidence concerning Heck, the district court concluded that "[t]he only additional evidence . . . that could possibly distinguish Heck's case from James's case includes [a Ronald McDonald House resident's] report to police that she had heard a frustrated male (and not a female) voice and Heck's statements that [J.L.J.] rolled out of his arms and fell on the floor while in his care."

The district court then weighed this evidence. The district court found the Ronald McDonald House resident's report "problematic" because the evidence suggested that the child who was heard whimpering was more likely to have been J.L.J.'s 11-month-old sibling and not J.L.J. The district court did not consider the evidence in conjunction with evidence that J.L.J. was "whimpering" when he was examined the next day and also ignored the probative value of this evidence to indicate that an obviously frustrated Heck was yelling at a baby in his care and doing something to make that baby whimper. The district court also discounted the state's evidence because the state failed to establish that an assault occurred on the night of January 9 or 10, and suggested, against the bulk of the medical evidence in the record, that J.L.J could have been assaulted "prior to the discharge [from the Mayo Clinic] on January 3, 2007."

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with non-intentional injury; (4) the fact that Heck had the exclusive care of J.L.J. for much more extended periods than James, coupled with evidence that the fact of injury would have been noticeable near the time of injury; (5) James's statements to Heck that the children "made him lose it" and that she would wait 20 years, if necessary, to be with him; and (6) Heck's failure to seek medical attention for J.L.J. knowing that J.L.J. had "fallen" while in his care and was obviously experiencing progressively severe symptoms after that event.

The only inference that the district court drew from Heck's late admission to having dropped J.L.J. was that "[a]t most, Heck's statement reflects his guilty knowledge that he dropped [J.L.J.] causing the marks on his face and implies that the drop was accidental." The district court rejected the state's argument that a jury could examine the timing and nature of this statement to infer that Heck, having assaulted or aided in the assault of J.L.J., was attempting to construct an "accidental injury" explanation and instruct James on this theory.

The district court also cited expert testimony favorable to Heck from the TPR trial that J.L.J. suffered from a sudden onset of scurvy/vitamin C depletion as a result of the immunizations administered just prior to his discharge which contributed to the fractures that occurred with ordinary care. This evidence was rejected as not credible in the TPR decision and plainly was not considered by the district court in the light most favorable to the state.

On this record, we conclude that the district court misapplied the probable cause standard and that, considering the record in the light most favorable to the state, the state established probable cause to charge Heck with first-degree assault.

We also conclude that the district court's reliance on *People v. Wong*, 619 N.E.2d 377 (N.Y. 1993), as being "[s]imilar to the present case" is misplaced. In *Wong*, the New York Court of Appeals reversed the convictions of husband and wife codefendants for manslaughter and child endangerment in the shaking death of a three-month-old baby in their care. 619 N.E.2d at 378-79. The prosecutor's theory was that each defendant was guilty "because one of them had shaken the baby while the other had stood by and failed

to intervene." *Id.* at 380. The New York Court of Appeals concluded that because there was no evidence that the passive party knew that abuse had occurred, the convictions could not stand. *Id.* at 382-83. But the baby involved in *Wong* had no externally visible injuries, and death occurred within a few hours of the shaking incident. *Id.* at 380.

By contrast, the evidence in this case is that, whatever trauma caused J.L.J.'s injuries, it would have been immediately apparent to any caretaker that he was injured. James and Heck stated that they could not move J.L.J.'s legs without causing him to scream when they changed his diapers but they did not seek medical attention for J.L.J. when this occurred. There is medical evidence that J.L.J. would have been in noticeable distress from his injuries, and there is evidence that the parties were told on January 7 that immunizations administered on January 3 would not have caused the bruising and swelling James described to a Mayo Clinic nurse. And, despite being encouraged to do so, neither parent sought medical attention for J.L.J. until January 11. Accordingly, contrary to the evidence in *Wong*, there is evidence here that even if one of the parents was a "passive party" each parent would have been aware that J.L.J. had suffered traumatic injury long before either sought medical attention. Given the facts in this record, with due regard for the fact that, at trial, much of the evidence could be viewed in a light favorable to Heck, we conclude that it is fair and reasonable to require Heck to stand trial on the assault charge.

Reversed and remanded.