STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1351

State of Minnesota,
Respondent,

vs.

Austin Thomas Whiteaker,
Appellant.

Filed August 21, 2017
Affirmed
Reilly, Judge

Ramsey County District Court
File No. 62-CR-15-3775

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

John J. Choi, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Renée Bergeron, Special Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Reilly, Judge; and Klaphake, Judge.[*]

[*] Retired judge of the Minnesota Court of Appeals, serving 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

REILLY, Judge

Appellant Austin Thomas Whiteaker challenges his convictions of first-degree assault, malicious punishment of a child, and third-degree assault, arguing that (1) the circumstantial evidence presented at trial was insufficient to prove beyond a reasonable doubt that appellant was the person who caused the infant great bodily injury and (2) the district court committed plain error by failing to give a specific instruction on unanimity. We affirm.

FACTS

In 2014, K.W. met appellant online; the couple communicated online for a period of about four months before agreeing to meet in person. In June 2014, K.W. traveled to North Dakota to meet appellant in person for the first time and to move appellant to Minnesota to live with her in her apartment in White Bear Lake.[1] Within several weeks of the couple cohabitating, K.W. and appellant conceived a child, and, on March 31, 2015, K.W. gave birth to a healthy baby boy at St. John's Hospital in Maplewood, Minnesota. After returning home from the hospital, K.W. and appellant provided the "day-to-day, minute-to-minute care" and did not allow family or friends to "provide any childcare." During the first three and a half weeks of the infant's life, K.W. acted as the primary caregiver, while appellant rarely cared for the infant by himself.

[1] Appellant and mother lived with mother's friend, L.R. (roommate).

On or around April 8, K.W. brought the infant back to St. John's for his "well-baby checkup," where a pediatrician performed a thorough examination and determined that "everything was normal." About a week later, K.W. and appellant returned to St. John's for the infant's second checkup, and his results again were normal.

On April 26, appellant suggested that K.W. and roommate go to lunch without him, and, around 2:00 p.m., K.W. and roommate drove to McDonalds. But, before leaving the apartment, K.W. helped appellant tie a cloth baby carrier and changed the infant's diaper, before appellant placed the infant in the cloth carrier. When K.W. changed the infant's diaper, she noticed that he had a "very light" bruise on his left thigh.

Twenty minutes later, K.W. and roommate returned to the apartment and as they approached the apartment door, appellant swung open the door and said "[t]here is something wrong" with the infant. As K.W. walked in to the apartment, she saw the infant lying on his back on the floor of the hallway—the infant did not have a pulse, he was bleeding from his right nostril, and his skin had started to turn a shade of blue. K.W. called 911 and waited for paramedics to arrive, while roommate, who is employed as a nursing assistant, performed CPR.

Upon arrival, paramedics performed CPR for several minutes before transporting the infant to the Children's Hospital. While the paramedics performed CPR, appellant spoke with one of the police officers and explained that he had left the infant in a Rock 'n Play—a cradle that allows an infant to sit at a 30-degree angle—while he cleaned the apartment. Appellant stated that he left the infant alone while he went to the bathroom and after he returned, he noticed the infant struggling to breathe. He told the officer that he

took the infant out of the cradle and lightly tapped him on the back in an effort to cause the infant to spit up. He reported that he was concerned that the infant may be choking because the infant had flu-like symptoms the day before.

At the hospital, K.W. noticed significant bruising and discolored skin on the infant's face, legs, and head. K.W. did not recall seeing a majority of these bruises on the infant before she left the apartment, but told medical personnel that the infant had previously bruised his head—after he lifted his head and hit it against the side of the bassinet—and had a bruise on his thigh from the buckle on his cradle. She also reported that the infant often scratched his face and repeatedly hit himself in the face with his hand. While at the hospital, appellant informed police that he tripped over the cradle while K.W. and roommate were at McDonalds, causing the cradle to tip while the infant was in it. He was unsure whether the infant "hit the floor" as a result.

The following month, appellant contacted the investigating police officer on two separate occasions, and, both times he spoke with the officer, he offered a different explanation for how the infant sustained the injuries on April 26. Appellant first told the officer that he had lied at the hospital when he reported that he tripped over the cradle, and, instead, reported that he tripped while carrying the infant in the cloth carrier, causing the infant to fall out of the carrier and onto the ground. He explained that he originally lied to the officer because he was worried about upsetting K.W. and her family. He later admitted that he "grabbed . . . and squeezed the infant's legs to try to get him to cry to see if he was performing CPR properly." The state charged appellant with one count of first-degree assault in violation of Minn. Stat. § 609.221, subd. 1 (2014), one count of malicious

punishment of a child in violation of Minn. Stat. § 609.377, subds. 1, 6 (2014), and third-degree assault in violation of Minn. Stat. § 609.223 (2014).

At appellant's jury trial, the physician who treated the infant while he was in the intensive care unit at the Children's Hospital testified that the injuries the infant sustained are indicative of abuse. The physician noted that the "kind of deep [bruising found] in [the infant's] ear . . . is exceptionally unusual and highly concerning" and explained that the bruises on the infant's chest, shoulder, and in his armpit usually occur "when skin gets pinched or folded as kids get grabbed." The physician also testified that the markings on the infant's leg are typically seen after "a child . . . is . . . squeezed around the leg" or the skin is "pinched between the fingers" while the infant is "squeezed violently around an extremity."

Contrary to K.W. and appellant's assertion that the infant hit himself in the head with his arms and hit his head against the bassinet, the physician testified that a three-week-old cannot "generate enough force" to cause the type of injuries observed, noting that "bruising in nonmobile infants is extremely uncommon" and that the infant "has bruises on multiple body surfaces suggesting more than one impact or site of trauma not consistent with a simple fall." The physician also testified that the infant had (1) "significant bleeding inside of his left eye," known as retinal hemorrhaging, which "is a marker of significant or severe trauma"; (2) multiple metaphyseal fractures, or fractures near the growth plates along the larger bones, which often occur "when extremities get pulled, jerked, [or] twisted"; and (3) a brain contusion; all of which are indicative of more than a single "trauma event." Because he was unable to date the bone injuries and the brain contusion, he

acknowledged that "there is a possibility that there was a brain injury on [the day before the incident occurred] . . . that led to the vomiting [that] improved on [the date of the incident] . . . [and] that he . . . had a second brain injury . . . shortly before presentation that made him have his cardiorespiratory arrest." The pediatric radiologist and pediatric neuroradiologist similarly testified that the blood found in the frontal lobes and the surrounding hemisphere was caused by a severe brain contusion that was between three and seven days old, four days after the date of the incident. At two years of age, the infant remains unable to eat without the assistance of a feeding tube, is unable to lift his own head or sit up without assistance, and experiences between four and five seizures a day.

Appellant's counsel called pediatric forensic pathologist Janice Ophoven to testify as an expert witness. The forensic pathologist testified that the retinal hemorrhaging may have occurred during childbirth. She also testified that "any symptoms of a head injury" identified on the date of the incident may be the result of two separate "impacts," which "together may have served to create the circumstances that we saw when the evaluation was done." Although she was unable to point to any intracranial damage to support her assertion that the infant sustained two separate head injuries, she testified that his frequent vomiting and irritability prior to the date of the incident suggests a prior head injury. She also explained that a prior head trauma may impact a "child's ability to react normally to a subsequent event," which may explain how a second short fall would cause serious brain damage in a three-week-old infant.

Because the expert witnesses testified "extensively about [a head trauma] that happened potentially on the 25th and [a second head trauma] that happened on the 26th,"

the district court expressed concerns that if the parties "submit either the definition of assault in the 1st-degree or the definition of malicious punishment of a child causing great bodily harm or substantial bodily injury . . . without a special interrogatory there is a potential" for "half the jury to believe [appellant] committed the injury on the 25th and not the 26th, or vice versa." Although the prosecution did not understand this issue to be problematic "[b]ecause the instruction would be on or about the 26th," the district court cautioned that the parties may "still have a problem of specific unanimity because that doesn't mean that [the jury is] unanimous as to causing the injury." The court explained that the state should not receive "the benefit of combining those two [dates] together in order to get a conviction," noting that "the jury still has to be convinced unanimously as to what actions constitute assault in the 1st-degree." As a result, the court amended the special interrogatories to omit any reference to the injuries the infant sustained on his legs and limited the special interrogatories to (1) whether appellant caused the injury to the infant's brain, (2) whether the brain injury caused the cardiac arrest, and (3) whether these injuries constitute great bodily harm.

The special interrogatories read to the jury instructed that:

> If you find [appellant] guilty of [first-degree assault or malicious punishment of a child] you will have . . . four additional questions that are also on the form. [(1)] Did [appellant] cause injury to [the infant's] brain? And you will mark yes or no. You must unanimously, in other words all of you have to agree to the answers . . . . So you would mark yes or no if there is a unanimous decision. [(2)] Was the brain injury great bodily harm? Yes or no. [(3)] Did [appellant] cause [the infant's] cardiac arrest? Yes or no. [(4)] And was the cardiac arrest great bodily harm? And there is a place to mark yes and a place to mark no.

The district court further instructed the jury that if it also found appellant guilty of the charge of assault in the third-degree it must answer the additional special interrogatories: "Did [appellant] cause injury to [the infant's] eyes? . . . [Y]es or no. Did [appellant] cause multiple bruises on [the infant's] body? Yes or no." The jury found appellant guilty of all three charges and answered each of the special interrogatories affirmatively. The court sentenced appellant to 103 months in prison for the first-degree assault conviction; appellant now appeals.

D E C I S I O N

I. The circumstantial evidence presented at trial was sufficient to prove beyond a reasonable doubt that appellant was the person who caused the infant great bodily harm.

Appellant argues that the circumstantial evidence presented at trial was insufficient to prove beyond a reasonable doubt that he was the person who caused the infant great bodily harm because (1) K.W. provided conflicting statements to treating physicians and police, and (2) the medical evidence presented at trial indicated that the assault that caused the brain injury likely occurred before the date of the incident. For these reasons, appellant requests that this court reverse his conviction and dismiss the first-degree assault charge. Because the evidence in this case is sufficient to support a guilty verdict under the circumstantial-evidence standard, we affirm.

Before we may address the merits of appellant's argument we must decide whether to apply the two-step standard for circumstantial evidence or the traditional standard applied in instances where a disputed element is proven by direct evidence alone. *See State*

v. Horst, 880 N.W.2d 24, 40 (Minn. 2016) (noting that when appellate courts are presented with a situation in which both standards may conceivably apply, the direct evidence standard applies when a disputed element is proved by direct evidence alone). Although there is direct evidence of the infant's injuries in this case, this evidence does not prove who inflicted these injuries, how the injuries were sustained, and when these injuries were inflicted. We therefore review appellant's challenge under the two-step circumstantial-evidence standard.

Minnesota has long applied a separate standard of review to challenges to the sufficiency of circumstantial evidence, *State v. Johnson*, 173 Minn. 543, 545-46, 217 N.W. 683, 684 (1928), and the Minnesota Supreme Court recently reaffirmed this standard, *State v. Harris*, 895 N.W.2d 592, 600 (Minn. 2017) ("[W]e take this opportunity to reaffirm what we have already stated about the circumstantial-evidence standard of review."). Under the circumstantial-evidence standard, this court must first "identify the circumstances proved" and then "independently consider the reasonable inferences that can be drawn from those circumstances, when viewed as a whole." *Id.* at 598 (citation omitted). "To sustain a conviction based on circumstantial evidence, the reasonable inferences that can be drawn from the circumstances proved as a whole must be consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis except that of guilt." *Id.* (quoting *State v. Fox*, 868 N.W.2d 206, 223 (Minn. 2015)).

Under the first factor of the circumstantial-evidence standard, this court must "identify the circumstances proved." *State v. Andersen*, 784 N.W.2d 320, 329 (Minn. 2010) (citation omitted). When determining the circumstances proved, this court

disregards all evidence that is inconsistent with the jury's verdict. *Harris*, 895 N.W.2d at 601. The first factor requires appellate courts to resolve all questions of fact in favor of the jury's verdict because we recognize that the jury, as the fact-finder, "is in a unique position to determine the credibility of the witnesses and weigh the evidence before it." *Id.* at 600 (citation omitted). As the fact-finder, the jury "is free to accept part and reject part of witness's testimony." *Id.* (quotation omitted).

To convict appellant of first-degree assault, the state was required to prove that appellant caused the infant great bodily harm. Minn. Stat. § 609.221, subd. 1. Assault is defined as "(1) an act done with intent to cause fear in another of immediate bodily harm or death; or (2) the intentional infliction of or attempt to inflict bodily harm upon another." Minn. Stat. § 609.02, subd. 10 (2014). The Minnesota Legislature defines "great bodily harm" as "bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily harm." Minn. Stat. § 609.02, subd. 8 (2014).

The state's theory at trial was that appellant intentionally assaulted the infant while the infant was in his care, causing the infant great bodily harm. The evidence presented at trial, when viewed in the light most favorable to the conviction, proves that: (1) K.W. and appellant were the primary caregivers and were the only individuals ever alone with the infant; (2) K.W. only saw one or two minor bruises on the infant before she left to go to McDonalds; (3) the infant was no longer exhibiting flu-like symptoms at the time K.W. left to go to lunch; (4) appellant was the only individual who had contact with the infant

while K.W. was at McDonalds; (5) when K.W. returned, the infant had extensive bruising on multiple areas of his body, retinal hemorrhaging, a severe brain injury, and numerous fractures; (6) the severe brain trauma caused the infant to go into cardiac arrest; (7) appellant lied on multiple occasions when asked how the infant became injured; (8) the types of injuries and markings the infant sustained while in the care of appellant are not consistent with a short fall, but are instead indicative of abuse; and (9) as a result of appellant's abuse, the infant is unable to eat without the assistance of a feeding tube, is unable to lift his own head or sit up without assistance at almost one year of age, and experiences between four and five seizures every day.

Having identified the circumstances proved, this court must next consider "whether a reasonable inference of guilt can be drawn from the circumstances proved, viewed as a whole, and whether a reasonable inference inconsistent with guilt can be drawn from the circumstances proved, again viewed as a whole." *Harris*, 895 N.W.2d at 600. As the supreme court recently clarified in *Harris*, the second step "does not encroach on the jury's credibility determinations because the act of inferring involves the drawing of permissible deductions, not actual fact finding by the jury." *Id.* at 600-01 (citing *State v. Jones*, 266 Minn. 526, 124 N.W.2d 729, 731 (1963)). Moreover, the second step ensures that there is no reasonable doubt as to a defendant's guilt because it requires appellate courts to consider whether a reasonable inference inconsistent with guilt may be drawn from the circumstances proved. *Id.* at 601.

Appellant contends that, when viewed as a whole, a reasonable inference inconsistent with guilt can be drawn from the circumstances proved. Specifically,

appellant argues that it is reasonable to infer from the circumstances proved that K.W. caused the brain injury that led to the infant's cardiac arrest, not appellant. When viewed as a whole, the circumstances proved preclude any reasonable inference inconsistent with guilt.

It is true that the infant was ill the day before appellant watched him, and that, according to K.W.'s testimony, the infant had one or two bruises before he was in appellant's care. But these facts do not undermine the jury's guilty verdicts, especially in light of the other circumstances proved by the state. The infant had recovered from the flu by the time K.W. left him in appellant's care, and no other person had access to the infant while appellant was caring for him. When K.W. returned, the infant had extensive bruising, multiple fractures, and was unconscious; and when asked about the infant's injuries, appellant repeatedly lied. The only reasonable inference from all of the circumstantial evidence presented by the state is that appellant assaulted the infant, causing the infant great bodily harm.

II. The district court did not err by failing to provide a specific unanimity instruction.

Appellant also argues that the district court committed plain error affecting his substantial rights by failing to give a specific unanimity instruction. At trial, appellant argued that the infant sustained at least two separate head injuries, one on April 25 and one on April 26; the state, however, only charged appellant with one count of first-degree assault. After hearing expert testimony from the state and appellant, the district court raised the issue of specific unanimity, noting its concern that half of the jury may convict appellant

for the assault that potentially occurred on April 25, while the other half of the jury may convict appellant for the assault that occurred on April 26. For these reasons, appellant argues that the lack of a specific unanimity instruction allowed the jury to convict him without agreeing on which traumatic event constituted the offense, violating his right to a unanimous verdict.

Because appellant did not object to the lack of a specific unanimity instruction in district court, this court may review only for plain error. *State v. Milton*, 821 N.W.2d 789, 805 (Minn. 2012). Under the plain error test, this court must consider whether the district court's jury instructions contained (1) an error, (2) that is plain, and (3) that affected appellant's substantial rights. *Id.* If this court determines that all three of these prongs are satisfied, this court must determine whether the plain error must be addressed in order to ensure the fairness and the integrity of the judicial proceedings. *Id.* Because the district court did not err in its instruction to the jury, we need not address the remaining prongs.

A jury's verdict must be unanimous in all criminal cases. Minn. R. Crim. P. 26.01, subd. 1(5). If the act itself is an element of the crime, as it is in first-degree assault, the jury must unanimously agree on which act the defendant committed. *See State v. Stempf*, 627 N.W.2d 352, 358-59 (Minn. App. 2001) (holding unanimity requirement violated when state introduced evidence of two acts of drug possession and argued that the jury could convict defendant without agreement as to which possession occurred, but only charged defendant with one count of drug possession). Jury instructions therefore violate a defendant's right to a unanimous verdict when the instructions "allow for possible

significant disagreement among jurors as to what [criminal] acts the defendant committed." *Id.* at 354.

In this case, the state did not argue that appellant assaulted the infant on two separate occasions. In the prosecutor's opening statement, he specifically limited the assault to the date of the incident, April 26, stating "you're going to hear from th[e] doctor who did the well-baby checkup, . . . [that the infant] seemed just fine. There were no bruises on him, certainly nothing that cause[d] concern. That changed, and it changed very dramatically on April 26th, of 2015." Although the prosecutor discussed appellant's defense—that the infant suffered a traumatic brain injury on April 25 that caused his cardiac arrest on April 26—during his closing statement, the prosecutor clearly argued that the evidence suggested only one act of first-degree assault:

> The testimony really from everybody, including the statements that the defendant gave the investigator, was that [the infant was] really fine at the time that [K.W.] and [roommate] left. Now, he had been acting kind of irritable earlier in that day and to some degree the day before, but he didn't—nobody testified that he had significant bruises on him. There was some discussion about possibly some small bruises on his face, and we'll talk about that more later, but in terms of the extensive bruising that he ended up having, the testimony [is] undisputed that it wasn't there.
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> . . . .
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> Now let's talk about the head injury. And there was, you know, discussion from both [the state's expert witness] and [the defense's expert witness] . . . [that] maybe we're talking about two head injuries here. Really the only evidence that was cited for the possibility of a head injury the day before was [the infant's] behavior. He was irritable, he was vomiting, the parents—or [K.W.] said that, well, she thought he was maybe sick. But he was feeling better by the time they went to McDonald's.

> She also told investigators that, well, he had a bruise on his head. And that bruise is part of what the doctors cited as, well, maybe he had a head injury the day before. Think about that, though. The bruise that she said that she saw on his head was from supposedly [the infant] rolling into the side of his—of his bassinet. And even [the defense's expert witness] said that simply would not cause a head injury. And, frankly, you don't have to be a doctor to know that one. A three-, almost four-week-old child can't even roll over on their own, certainly not with enough force to cause a head injury. . . . The only reasonable interpretation of the evidence is that [the infant] was vomiting the day before because kids vomit sometimes. And he was kind of irritable because sometimes babies are irritable. The evidence just doesn't support the idea that there was a previous head injury. But frankly . . . even if it does, it doesn't change the final result.
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> So the only reasonable explanation for all of this is that something very . . . bad happened. Something deliberate happened on the 26th and it caused extensive injuries on [the infant].

Additionally, the district court addressed the issue with counsel, revised the special interrogatories to specify that the brain injury and cardiac arrest constituted the only "great bodily injury," and gave a general unanimity instruction. The district court instructed the jury that:

> [w]hen you reach each verdict, each must be agreed upon by all of you. In other words, your verdicts must be unanimous. . . . You must unanimously, in other words all of you have to agree to the answers to the questions that . . . we call special interrogatories. So you would mark yes or no if there is a unanimous decision.

Because the state did not introduce evidence of two separate incidents of assault and the state did not argue that either incident could satisfy the one first-degree assault charge, and because the district court nevertheless provided a sufficient unanimity instruction and

revised the special interrogatories accordingly, the failure to provide a specific unanimity instruction was not plain error.

Affirmed.