STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1370

State of Minnesota,
Respondent,

vs.

Clint Scott Bearce,
Appellant.

Filed August 21, 2017
Affirmed in part, reversed in part, and remanded
Bratvold, Judge

Mille Lacs County District Court
File No. 48-CR-14-731

Lori Swanson, Attorney General, Edwin W. Stockmeyer, III, Assistant Attorney General, St. Paul, Minnesota; and

Joe Walsh, Mille Lacs County Attorney, Milaca, Minnesota; (for respondent)

Clint Scott Bearce, Lino Lakes, MN (pro se appellant)

Considered and decided by Jesson, Presiding Judge; Rodenberg, Judge; and Bratvold, Judge.

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

BRATVOLD, Judge

Appellant challenges his convictions of first- and second-degree manslaughter for the death of his girlfriend's 14-month-old child. Appellant argues: (1) the district court

abused its discretion in its evidentiary rulings; (2) the jury's verdict is based on insufficient evidence; and (3) the district court abused its discretion by imposing an aggravated sentence. Because we conclude the district court's decision to limit defense expert testimony was harmless beyond a reasonable doubt, the circumstantial evidence is sufficient to convict appellant of first-degree manslaughter, and the district court did not abuse its discretion in sentencing appellant, we affirm in part. But because second-degree manslaughter is a lesser-included offense of first-degree manslaughter, we reverse in part and remand to the district court with instructions to vacate the formal adjudication of guilt on that count, but to leave the jury's guilty verdict in place.

FACTS

After an eight-day trial, a jury convicted appellant Clint Bearce of first- and second-degree manslaughter for the death of 14-month-old I.R., son of L.B. Bearce began dating L.B. in January 2014 and, by February, saw I.R. a couple of times each week and was often at L.B.'s home, where she lived with I.R., her father, and her two-year-old son. Before his death, I.R. was a "very happy baby," with "a good demeanor" and no known health issues or injuries.

On the morning of March 21, 2014, I.R. accompanied his mother, brother, and Bearce as they ran errands. When they finished, they arrived at Bearce's mother's house. L.B. set up a playpen in a bedroom for I.R.'s nap and unloaded groceries. Bearce carried I.R. into the bedroom "to change his diaper and lay him down."

I.R. was in the bedroom with Bearce for five to seven minutes, when Bearce called to L.B. and said something was "wrong." L.B. found Bearce holding I.R. in the living

room; I.R. was "limp" and "lethargic," his eyes were "glazed," and he was "gasping for breath." Bearce told L.B. that after he changed I.R.'s diaper, he began to lay him down in the playpen when I.R. "locked up and had a seizure." I.R. had never had "any seizure-type activity" before. L.B. asked Bearce to call 911.

Officers arrived in about five to seven minutes. The first responding officer described I.R. as "having severe difficulty breathing," his lips were turning a "grayish blue" color, his breaths were "raspy and gurgley," and he was coughing up "a lot" of "phlegm-type stuff." The officer held an oxygen mask over I.R.'s face, but his breaths were "sporadic."

About ten minutes later, two emergency medical technicians (EMT) arrived and found I.R. "in some real distress." One EMT could tell "instantly" that I.R.'s condition "was worse than what we had been paged"; he was "very pale, grayish," and "struggling to breathe." The same EMT observed two "yellowing spots" on each side of I.R.'s neck. Another EMT noticed "flushed-looking" bruises on I.R.'s neck indicating the bruising was recent rather than "a few days old," and it looked to her "like it was a thumb and two fingers." Bearce told the EMTs that "he was going to change the diaper and [I.R.] didn't really want the diaper changed." Bearce said that "once he did get [I.R.] laid down," his "eyes rolled back."

When I.R. arrived at the emergency room, he was "unresponsive," "critically ill," and "shutting down." Dr. Hook, the team leader for the emergency response team, "noticed bruises immediately under [I.R.'s] jaw line on both sides" and along his left ear. Over

Bearce's objection, Dr. Hook testified that she believed "non-accidental trauma" caused I.R.'s injuries because his bruising and symptoms ruled out other possible causes.

It took approximately 45 minutes before I.R. was stable enough to be airlifted to Minneapolis Children's Hospital, where he was "completely comatose" upon arrival. Dr. Mon-Sprehe, I.R.'s treating physician, testified that I.R. "had significant bleeding in both eyes," which was "some of the most significant severe bleeding that [she had] seen in" her 17-year career. Dr. Mon-Sprehe also noticed "scattered bruising in very unusual places" for an infant, including along I.R.'s jawline and in his ear.

A CT scan revealed "massive brain swelling" and hemorrhaging around the brain and between the brain and upper neck. Dr. Mon-Sprehe and a pediatric radiologist testified that the only explanation for the CT scan results was head and neck trauma. They also testified that the results were inconsistent with an aneurysm. According to Dr. Mon-Sprehe, I.R. "suffered a traumatic brain injury," and his symptoms indicated that "something very acutely happened in those minutes that he was in the bedroom" with Bearce.

Dr. Hudson, a board-certified child abuse pediatrician, examined I.R. at Minneapolis Children's Hospital and testified that the severity of I.R.'s retinal hemorrhaging indicated that he suffered "abusive trauma," which means "[s]haking or impact to the head." According to Dr. Hudson, Bearce's account of what happened in the bedroom did not "explain the bleeding around his brain."

On March 23, 2014, I.R. passed away after being on life support for nearly two days. The autopsy report stated that the immediate cause of death was anoxic encephalopathy,

which is lack of oxygen to the brain. The medical examiner ruled out other causes of death, including aneurysm, and testified that there was no possibility of accidental trauma.

During the ensuing police investigation, Bearce admitted that, when he was in the bedroom, I.R. was "cranky," "crabby," and "throwing a fit," so he "lifted [I.R.] up in the air" three times and kissed him before laying him in the playpen. Bearce also said that he was "excited" when he was playing with I.R., and the "up and down movements" were "forceful." At the request of police, Bearce reenacted what happened in the bedroom with I.R. by using a doll. L.B. was present and later testified that Bearce demonstrated the "up-and-down motion" by "raising his arms" while "maintaining contact the entire time with the doll." The reenactment was not videotaped because the recorder malfunctioned.

The state charged Bearce with second-degree felony murder, first- and second-degree manslaughter, and first-degree assault. The state also noticed its intent to seek an aggravated sentence.

Both parties filed motions in limine seeking to limit expert testimony. Bearce sought an order prohibiting any medical testimony that "child abuse" is the "likely diagnosis." The state moved to limit only defense expert testimony about abuse, based on lack of witness qualifications. After a hearing, the district court issued a written order denying Bearce's motion and allowing both sides to offer expert testimony about "the mechanism of injury and likelihood of trauma." But the district court prohibited Bearce's experts from opining on "whether [I.R.'s] fatal injuries were or were not the result of child abuse." The district court also precluded Bearce's experts from testifying about case studies involving children

who died from aneurysms because they involved different facts and therefore were irrelevant.

During trial, Bearce called Dr. Plunkett and Dr. Scheller as expert witnesses. They each testified that, based on the CT images, I.R. did not suffer from head trauma but rather died naturally from a brain aneurysm. Additionally, Bearce's experts testified that the bruises on I.R.'s jawline were caused by the first responders as they provided oxygen. Dr. Scheller sought to show the jury "hundreds" of CT images "to illustrate his testimony." The state objected, and the district court restricted defense experts to using three images.

The jury returned two guilty verdicts and acquitted Bearce of second-degree felony murder and first-degree assault. After receiving the jury's responses on a *Blakely* verdict form, the state sought an upward durational departure from the presumptive 86-month sentence for first-degree manslaughter. The district court granted the state's request and sentenced Bearce to 180 months in prison for first-degree manslaughter, citing the victim's particular vulnerability, particular cruelty, and violation of a position of trust as aggravating factors. The warrant of commitment shows that the court adjudicated Bearce guilty of first- and second-degree manslaughter but did not sentence him on the second-degree charge. Bearce appeals.[1]

[1] Bearce was represented by counsel through the submission of his brief on appeal. Bearce is no longer represented by counsel.

D E C I S I O N

I. The district court's evidentiary rulings do not require reversal.

Criminal defendants have a constitutional due-process right to offer expert witness testimony, subject to the limitations imposed by the rules of evidence. *State v. Mosley*, 853 N.W.2d 789, 798 (Minn. 2014). "Thus, even when a defendant alleges that his constitutional rights were violated, evidentiary questions are reviewed for abuse of discretion." *State v. Tovar*, 605 N.W.2d 717, 722 (Minn. 2000). We review a district court's erroneous exclusion of testimony in violation of a defendant's due-process right for harmless error and will not reverse a conviction if the verdict was "surely unattributable to the error." *State v. Quick*, 659 N.W.2d 701, 716 (Minn. 2003).

Expert testimony that does not involve a novel scientific theory is admissible if the witness is qualified, the opinion has foundational reliability, and the testimony is helpful to the jury. *State v. Obeta*, 796 N.W.2d 282, 289 (Minn. 2011). Whether a witness is qualified is left to a district court's discretion. *State v. Pirsig*, 670 N.W.2d 610, 616 (Minn. App. 2003), *review denied* (Minn. Jan. 20, 2004).

Bearce challenges the district court's evidentiary rulings limiting his expert witness testimony on four grounds. First, he maintains the district court's pretrial order limiting expert opinions was "patently unfair" because "it allowed the state to offer opinion evidence of child abuse as the cause of death, yet prevented the defense expert from testifying that child abuse was not the cause of death." Bearce argues that "[t]here is no way to reconcile this decision unless the expert credentials are so different as to permit one

side's experts to opine and not the other." Bearce asserts that his experts had "ample credentials to offer an opinion about child abuse."

In considering Bearce's argument, we recognize that the state did not charge him with first-degree murder involving child abuse. *See* Minn. Stat. § 609.185(5) (2012) (stating that a person who "causes the death of a minor while committing child abuse, when the perpetrator has engaged in a past pattern of child abuse," and "death occurs under circumstances manifesting an extreme indifference to human life," is guilty of first-degree murder). But we also note that Bearce did not argue on appeal that the state's experts should not have been allowed to testify whether I.R. was abused. Therefore, we focus only on whether the district court erred when it precluded defense experts from rebutting state expert opinions that I.R. was abused.

Assuming without deciding that the district court erred in limiting defense expert testimony, any error was harmless beyond a reasonable doubt. *See State v. Peltier*, 874 N.W.2d 792, 803 (Minn. 2016) (assuming without deciding that admission of expert testimony about "particularly vicious" punishment of a child was abuse of discretion in first-degree murder by child abuse case before analyzing whether error was harmless). Bearce's expert testimony contradicted state expert opinions that I.R. suffered a traumatic brain injury and opined that I.R. died from a brain aneurysm. Based on this testimony by defense experts, the jury could have concluded that an aneurysm caused I.R.'s injuries. In fact, during closing, defense counsel argued that Bearce should be acquitted because there was reasonable doubt as to the cause of death. On the other hand, only two state experts

used the word "abuse."[2] Over the course of an eight-day trial, multiple state experts testified that I.R.'s injuries were the result of non-accidental trauma and rejected aneurysm as a cause of death based on extensive medical findings and physical evidence. We conclude that the jury's verdict was surely unattributable to the district court's decision to limit defense expert testimony.

Second, Bearce challenges the district court's decision to exclude expert testimony regarding case studies. Bearce contends that the district court cited the wrong evidentiary rule and conflated "the weight of evidence with [its] admissibility." It is within a district court's "sound discretion" to determine the relevancy of the evidence. *State v. Horning*, 535 N.W.2d 296, 298 (Minn. 1995). The district court relied on Minn. R. Evid. 403, which governs the exclusion of *relevant* evidence. Here, the district court determined that the case studies were irrelevant, so rule 403 does not apply. But the district court's decision was well within its discretion. *See* Minn. R. Evid. 402 (stating that a district court may exclude irrelevant evidence); *see also State v. Beard*, 574 N.W.2d 87, 90–91 (Minn. App. 1998) (stating that, to be relevant and admissible, case study must "have had sufficient similarities to be helpful to the jury in assessing" victim's injuries), *review denied* (Minn. Apr. 14, 1998). Moreover, the district court allowed Dr. Plunkett to testify about one case study in

[2] State testimony on abuse was brief. Dr. Hudson testified that I.R.'s injuries were "indicative of abusive trauma," which he clarified means "[s]haking or impact to the head." Dr. Hook testified that, when I.R. arrived at the hospital, her first diagnosis was "abuse" based on I.R.'s condition and bruising. She also testified that she was unable to rule out "non-accidental trauma," which means "abuse" in "lay terms."

which an infant died suddenly from an aneurysm, so Bearce was able to support his alternate theory. *Beard*, 574 N.W.2d at 91.

Third, the district court prevented Dr. Scheller from presenting "hundreds" of CT images because "only one previous image was provided pursuant to the discovery rules." As a discovery sanction, the district court limited Dr. Scheller to showing only the image disclosed during discovery. Bearce contends that the district court erred because the state possessed the images and therefore had "adequate notice" of them. We review a district court's decision whether to impose a sanction for a discovery violation for an abuse of discretion. *State v. Palubicki*, 700 N.W.2d 476, 489 (Minn. 2005). Under Minn. R. Crim. P. 9.02, subd. 1(2)(b), Dr. Scheller was required to provide a written summary of the subject matter of his testimony and the basis for his findings, opinions, and conclusions. His report stated that he reviewed "CT scans," but he only attached and referred to one image. Thus, the district court did not abuse its discretion when it determined that Bearce violated rule 9.02.

Bearce also contends that the district court abused its discretion because it "should have considered alternatives short of exclusion." Minnesota caselaw directs district courts to consider four factors before imposing discovery sanctions; one factor encompasses alternatives to exclusion. *State v. Lindsey*, 284 N.W.2d 368, 373 (Minn. 1979).[3] Without discussing the *Lindsey* factors, the district court concluded the state would be prejudiced if

[3] The four factors are: "(1) the reason why disclosure was not made; (2) the extent of prejudice to the opposing party; (3) the feasibility of rectifying that prejudice by a continuance; and (4) any other relevant factors." *Lindsey*, 284 N.W.2d at 373.

Dr. Scheller used the images that had not been disclosed in discovery. The district court abused its discretion by failing to apply the *Lindsey* factors to determine whether to impose a discovery sanction. *See State v. Sailee*, 792 N.W.2d 90, 95 (Minn. App. 2010) (holding that a district court's "failure to consider the *Lindsey* factors is an abuse of discretion"), *review denied* (Minn. Mar. 15, 2011). But the district court's failure to consider the *Lindsey* factors does not require reversal because it was harmless beyond a reasonable doubt. Bearce did not seek to admit each of the many CT images into evidence, but rather asked that Dr. Scheller be permitted "to illustrate his testimony." Thus, there is no apparent additional value to displaying the images because Dr. Scheller was permitted to testify about them.

Fourth, Bearce challenges the district court's decision to sustain the state's objection to Dr. Scheller's use of the phrase "spinal fluid" when he was describing the CT image. The state had objected as a discovery violation because Dr. Scheller's report did not mention "spinal fluid." Bearce argues that the district court erred because the discovery rules only require a summary of an expert's opinion, "not a word for word reproduction of testimony."[4] But Bearce has not pointed to any reason why this evidentiary ruling affected

[4] The state argues Bearce forfeited this issue because he did not make an offer of proof establishing what Dr. Scheller's testimony would have been. We disagree. It is apparent from the record that the substance of the testimony would have distinguished between blood and spinal fluid on a CT image. *See* Minn. R. Evid. 103(a)(2) (stating that a party may not assert error for a ruling that excludes evidence unless "the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked").

the outcome and should require reversal. Both defense experts were permitted to opine on the cause of death, and Dr. Scheller was permitted to testify in detail about the CT image.[5]

II. The circumstantial evidence was sufficient to convict Bearce of first-degree manslaughter.

When a conviction is based on circumstantial evidence, appellate courts apply a two-step standard of review. *State v. Harris*, 895 N.W.2d 592, 598–601 (Minn. 2017). First, we identify the circumstances proved "by resolving all questions of fact in favor of the jury's verdict." *Id.* at 600. We defer to the jury's "unique position to determine the credibility of the witnesses and weigh the evidence before it." *Id.* Second, we must determine whether "the reasonable inferences that can be drawn from the circumstances proved" are "consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis except that of guilt." *Id.* at 598 (quotation omitted). But a conviction based on circumstantial evidence will not be reversed "on the basis of mere conjecture." *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010).

Conviction of first-degree manslaughter requires proof that Bearce "cause[d] the death of another in committing or attempting to commit a violation of section 609.377 (malicious punishment of a child)." Minn. Stat. § 609.20(5) (2012). A "parent, legal guardian, or caretaker who, by an intentional act or a series of intentional acts with respect to a child, evidences unreasonable force or cruel discipline that is excessive under the

[5] Bearce also argues that Dr. Scheller "was not allowed to testify whether a burst aneurysm could cause retinal bleeding," but he misreads the record. During redirect examination, Bearce asked Dr. Scheller, "Have you seen retinal hemorrhage caused from an aneurysm bursting?" to which Dr. Scheller responded, "Absolutely."

circumstances is guilty of malicious punishment of a child." Minn. Stat. § 609.377, subd. 1 (2012). Together, these statutes required the state to prove: (a) Bearce was I.R.'s parent, legal guardian, or caretaker; (b) he caused I.R.'s death; (c) while intentionally using or attempting to use unreasonable force or cruel discipline; (d) that was excessive under the circumstances.

The parties agree that Bearce's conviction was based on circumstantial evidence. The circumstances proved include that: (1) on the morning of March 21, 2014, I.R. was a healthy 14-month-old with no preexisting conditions or injuries; (2) upon arriving at Bearce's mother's house, Bearce carried I.R. into a bedroom to change his diaper; (3) Bearce was alone with I.R. for five to seven minutes; (4) I.R. was crabby and cranky; (5) Bearce forcefully lifted I.R. up and down three times; (6) I.R. went limp while in Bearce's care and immediately had difficulty breathing; (7) I.R. was bruised along both sides of his jawline and on his left ear; (8) I.R. had massive brain swelling and hemorrhaging and "the worst" retinal hemorrhaging that his treating physician "had observed in her 17 years of practice"; (9) I.R. suffered a non-accidental traumatic brain injury; (10) I.R. incurred his injury while he was in the bedroom; (11) the injury caused I.R. to die from lack of oxygen to the brain; and (12) I.R.'s severe injury was inconsistent with Bearce's account of what happened in the bedroom.

Bearce maintains that the evidence was insufficient to establish that he engaged in "malicious punishment" based on two alternate theories. First, he argues that the evidence "cannot preclude the possibility that the child had been injured in the car and the symptoms appeared" later. This theory is speculation and unsupported by anything in the record so

we do not consider it. *See Al-Naseer*, 788 N.W.2d at 473 (stating that defendant cannot support a rational theory inconsistent with guilt based on speculation).

Second, Bearce argues that trauma "can happen by simple negligence or pure accident in the handling of the child." But we assume the jury believed the state's evidence that established I.R.'s injuries were non-accidental. *State v. Hayes*, 831 N.W.2d 546, 553–54 (Minn. 2013) (stating that appellate courts must assume the jury believed state expert testimony that injuries were non-accidental over contrary defense expert testimony). Moreover, the severe retinal bleeding and the location of I.R.'s bruises along his jawline and on his ear also support the intentional use of unreasonable or excessive force within a short period of time. Therefore, we conclude the record does not support Bearce's alternate theory.[6]

Bearce next argues that the jury's *Blakely* finding that his "actions towards I.R. [were not] violent in nature" was irreconcilable with a finding that he engaged in malicious punishment.[7] Bearce asks us to apply "inconsistent-verdict" caselaw, which provides that "[v]erdicts are legally inconsistent when proof of the elements of one offense negates a

[6] Bearce contends that a fact-finder "cannot infer intent from the examination of a body." But it is well established that a "jury may infer the requisite state of mind from a variety of facts," including the severity of a victim's injuries. *State v. Bahtuoh*, 840 N.W.2d 804, 810 (Minn. 2013); *see also State v. Sullivan*, 502 N.W.2d 200, 202 (Minn. 1993) (stating that "the number and severity of the wounds" established intent to commit murder).

[7] The state argues that Bearce has forfeited this issue by failing to raise it in the district court. But Bearce raised this issue in a post-trial motion to vacate the convictions. The district court denied the motion, concluding that violence is not an element of first- or second-degree manslaughter. We conclude Bearce properly preserved this issue for appellate review.

necessary element of another offense." *State v. Cole*, 542 N.W.2d 43, 50 (Minn. 1996). But "[w]hether a jury's verdicts are legally inconsistent is a different question than whether they are logically inconsistent." *Bahtuoh*, 840 N.W.2d at 820 (emphasis omitted).

Minnesota appellate courts have only reversed convictions based upon legal inconsistency "in cases involving multiple *guilty* verdicts that are inconsistent with one another, not in cases of alleged conflict between guilty and not-guilty verdicts." *Id.* at 821. We are unaware of any Minnesota precedent extending the inconsistent-verdict doctrine to alleged inconsistencies between guilty verdicts and *Blakely* findings. Bearce has not pointed to any authority, therefore, we reject his request to extend inconsistent-verdict caselaw to *Blakely* findings.

Moreover, Bearce does not cite any legal authority holding that a defendant must engage in conduct that is "violent in nature" to be convicted of first-degree manslaughter. The applicable statute references a finding of "unreasonable force" or "cruel discipline." Minn. Stat. § 609.377, subd. 1. The record includes ample evidence that Bearce used significant force to injure I.R. and was responding to I.R.'s "cranky" refusal to cooperate with naptime. The jury's *Blakely* findings are not legally inconsistent with the guilty verdict.

Bearce also asserts that the circumstances proved do not establish that I.R. died *while* Bearce was committing or attempting to commit malicious punishment.[8] Bearce

[8] Relying on an unpublished court of appeals decision, the state contends that Bearce forfeited this issue because he failed to raise it in the district court. We disagree and will consider this issue because it is integral to resolving Bearce's sufficiency challenge and the interests of justice warrant review. *See State v. Vasko*, 889 N.W.2d 551, 556 (Minn. 2017)

relies on the district court's jury instruction on the third element, which stated that a conviction requires a finding that "the *death* of [I.R.] occurred *while* the defendant was committing or attempting to commit the crime of malicious punishment." (Emphasis added.) This instruction mirrors the pattern first-degree manslaughter instruction. 10 *Minnesota Practice*, CRIMJIG 11.50 (2016). Bearce is correct that the circumstances proved do not establish that I.R. died while Bearce committed malicious punishment because I.R. died in hospital care two days after his last contact with Bearce.

We conclude that the pattern jury instruction is inconsistent with the statutory language, which requires the defendant to *cause* the victim's death while committing malicious punishment, not that the victim must die *while* the defendant commits malicious punishment. Minn. Stat. § 609.20(5). We are bound by the statutory language, not the pattern jury instruction. *State v. Taylor*, 869 N.W.2d 1, 15 (Minn. 2015); *State v. Gunderson*, 812 N.W.2d 156, 162 (Minn. App. 2012) (stating that pattern jury instructions are neither precedential nor binding). Because there is sufficient evidence to support the jury's finding that Bearce caused I.R.'s death while inflicting malicious punishment, we reject Bearce's argument.[9]

(considering statutory interpretation issue in the context of a sufficiency-of-the-evidence challenge because "it is the responsibility of appellate courts to decide cases in accordance with law." (quotation omitted)).

[9] Neither party challenged the jury instruction on appeal. In fact, the district court's jury instruction was more favorable to Bearce than what the statute required, and the state requested the pattern instruction in its pretrial filings. Because the erroneous instruction benefitted Bearce, we do not find grounds for reversal. While there is no challenge to the jury instruction currently before us and we decline to grant relief on that basis, we urge parties to carefully examine instructions before suggesting the court use them at trial.

For the reasons discussed, we conclude the reasonable inferences that can be drawn from the circumstances proved as a whole are consistent with guilt and inconsistent with any rational hypothesis other than guilt. Therefore, we affirm Bearce's first-degree manslaughter conviction.

III. The district court erred in entering an adjudication of guilt of second-degree manslaughter because it is a lesser-included offense of first-degree manslaughter.

Bearce contends the evidence was insufficient to convict him of second-degree manslaughter. Appellate courts only consider sufficiency challenges for offenses that have final judgments. *State v. Ashland*, 287 N.W.2d 649, 650 (Minn. 1979). A final judgment "occurs when the district court enters a judgment of conviction and imposes or stays a sentence." Minn. R. Crim. P. 28.02, subd. 2(1). Here, the warrant of commitment reflects that the district court entered a judgment of conviction on second-degree manslaughter but did not impose or stay a sentence for that count.[10] Therefore, we decline to consider whether the evidence was sufficient to convict Bearce of second-degree manslaughter.

Pattern jury instructions are only guides, and district courts must fashion jury instructions that contain accurate statements of law. *See Gunderson*, 812 N.W.2d at 162 ("When the plain language of the statute conflicts with the CRIMJIG, the district court is expected to depart from the CRIMJIG and properly instruct the jury regarding the elements of the crime.").

[10] The state incorrectly contends that the district court did not enter a judgment of conviction of second-degree manslaughter. Appellate courts look to "the official judgment of conviction" to determine a defendant's convictions, which here is the warrant of commitment formally adjudicating Bearce guilty of first- *and* second-degree manslaughter. *State v. Pflepsen*, 590 N.W.2d 759, 767 (Minn. 1999).

Bearce's sufficiency challenge, however, raises a lesser-included-offense issue. A person may only be convicted of "the crime charged or an included offense, but not both." Minn. Stat. § 609.04, subd. 1 (2016). Minnesota defines an "included offense" as a "lesser degree of the same crime." *Id.* Second-degree manslaughter is a lesser-included offense of first-degree manslaughter because it is a lesser degree of the same crime. *Cf. State v. Zumberge*, 888 N.W.2d 688, 697 (Minn. 2017) ("In Minnesota, every lesser degree of murder is an included offense."). Thus, the district court erred by entering judgments of conviction of both first- and second-degree manslaughter.

Bearce did not raise the lesser-included-offense issue in his appellate brief. *See State v. Grecinger*, 569 N.W.2d 189, 193 n.8 (Minn. 1997) (stating that "issues not argued in briefs are deemed waived on appeal."). But we conclude it is in the interests of justice to consider this issue because the error is "obvious on mere inspection." *Balder v. Haley*, 399 N.W.2d 77, 80 (Minn. 1987) (citing Minn. R. Civ. App. P. 103.04); *see also* Minn. R. Crim. P. 28.01, subd. 2 (adopting the civil rules of appellate procedure in criminal appeals). Therefore, we reverse Bearce's second-degree manslaughter conviction and remand to the district court with instructions to vacate the formal adjudication of guilt on that count, but to leave the jury's guilty verdict in place. *State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984).

IV. The district court did not abuse its discretion in sentencing Bearce to an upward durational departure.

The Minnesota Sentencing Guidelines establish sentencing ranges that are "presumed to be appropriate." *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014) (quotation

omitted). A district court may only depart from the sentencing guidelines if "identifiable, substantial, and compelling circumstances" exist. *State v. Rourke*, 773 N.W.2d 913, 919 (Minn. 2009). Conduct that constitutes proof of the criminal offense may not be used to justify an upward departure. *State v. Williams*, 608 N.W.2d 837, 840 (Minn. 2000). "We review a district court's decision to depart from the presumptive guidelines sentence for an abuse of discretion." *State v. Hicks*, 864 N.W.2d 153, 156 (Minn. 2015).

The district court based its decision to impose an upward durational departure on three aggravating factors: particular vulnerability, particular cruelty, and violation of a position of trust. Bearce argues that these factors were improper because they replicated elements of first-degree manslaughter. We address each factor in turn.

First, a victim may be "particularly vulnerable due to age" if the offender knew or should have known of this vulnerability." Minn. Sent. Guidelines 2.D.3.b.(1) (2012). The first-degree manslaughter statute requires the victim to be a "child," which is defined as any person under age 18. Minn. Stat. § 609.377, subd. 1; Minn. Stat. § 609.376, subd. 2 (2012). Bearce argues that the legislature already accounted for a victim's vulnerability due to age in the first-degree manslaughter statute and, therefore, it may not be used as an aggravating sentencing factor. We disagree.

In *State v. Mohamed*, we explained that, "given the broad spectrum of physical development captured in [the statute's] 18–year time span, the legislature's recognition does not preclude consideration of the victim's infancy as an aggravating factor." 779 N.W.2d 93, 98 (Minn. App. 2010), *review denied* (Minn. May 18, 2010). Particular vulnerability was a proper aggravating factor in *Mohamed* because the victim was four

months old, at an "early stage of development," and "incapable of perceiving danger, fleeing or shielding himself from harm, seeking help, or reporting the abuse." *Id.*

Similarly, here, the jury specifically found post-verdict that I.R. was 14 months old, had limited mental and physical capacity, and Bearce knew that I.R. would be "unable to defend himself" or "to communicate what had happened to him." Bearce does not contest these findings on appeal. Thus, we conclude particular vulnerability was a proper aggravating factor.

Second, particular cruelty is an appropriate aggravating factor if the cruelty is "of a kind not usually associated with the commission of the offense in question." *Tucker v. State*, 799 N.W.2d 583, 587 (Minn. 2011) (quotation omitted). Bearce argues that particular cruelty is already included in the statutory requirement that he engage in malicious punishment. But particular cruelty may be a valid aggravating factor, even when the underlying offense "undoubtedly involve[s] some degree of cruelty." *Id.*

Bearce also contends that particular cruelty was improper because the jury did not find that his actions were "violent in nature." But the jury specifically found post-verdict that Bearce caused "I.R. to have a significant brain injury" and "severe retinal hemorrhaging," and the district court also noted that Dr. Mon-Sprehe testified that I.R.'s "retinal hemorrhaging was the worst she had observed in her 17 years of practice." *See State v. Turrubiates*, 830 N.W.2d 173, 180 (Minn. App. 2013) (affirming upward durational departure for second-degree unintentional felony murder (child endangerment) based on particular cruelty where victim suffered a skull fracture and "multiple

hemorrhages"), *review denied* (Minn. July 16, 2013). Therefore, we conclude that particular cruelty was a proper aggravating factor.

The third and final factor is violation of a position of trust. *Mohamed* held that "[b]ecause only a person in a position of trust—a parent, legal guardian, or caretaker—can commit the offense of malicious punishment of a child, departing based on this trust relationship improperly relies on an element of the offense." 779 N.W.2d at 99 (citation omitted); *see* Minn. Stat. § 609.377, subd. 1 (defining "malicious punishment"). Therefore, we conclude that the district court erred in relying on violation of a position of trust as an aggravating factor.[11]

Because the district court relied on proper and improper aggravating factors, the next issue is whether to affirm the durational departure or to remand for resentencing. *State v. Stanke*, 764 N.W.2d 824, 828 (Minn. 2009). Affirmance is appropriate only if this court determines that "the district court would have imposed the same sentence absent reliance upon the improper aggravating factor." *Id.* To make this determination, we must "consider the weight given to the invalid factor and whether any remaining factors found by the court independently justify the departure." *Id.* A single aggravating factor is sufficient to affirm. *Solberg*, 882 N.W.2d at 624.

[11] Bearce also argues that the district court improperly relied on his lack of remorse as an aggravating factor. *See State v. Solberg*, 882 N.W.2d 618, 625–26 (Minn. 2016) (discussing lack of remorse as aggravating factor). The district court noted "that there has been no signs of any remorse through any of these proceedings." We conclude the district court merely noted its observation and did not rely on lack of remorse to support an upward durational departure.

The record reflects that the district court likely would have imposed the same sentence based on either one of two proper aggravating factors. The district court stated that it did not need three aggravating factors to support its departure, "but there are three in place here." Moreover, the district court focused its attention on particular vulnerability and particular cruelty and made scant mention of position of trust when it pronounced Bearce's sentence. On this record, we affirm the upward durational departure.

Affirmed in part, reversed in part, and remanded.