STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0218

State of Minnesota,
Respondent,

vs.

Antwan Mister Carpenter,
Appellant.

Filed September 24, 2018
Affirmed in part, reversed in part, and remanded
Hooten, Judge

Hennepin County District Court
File No. 27-CR-15-19547

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

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Ross, Judge; and Schellhas, Judge.

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

HOOTEN, Judge

Appellant challenges the district court's denial of his motion to sever the third-degree assault charge from the malicious punishment of a child and child neglect charges,

claiming that the charges were not part of a single behavioral incident and that his defenses to the third-degree assault charge and child neglect charges were compromised by his having to take inconsistent positions relative to a primary witness. Appellant also argues that the postconviction court erred by denying his claim that trial counsel provided ineffective assistance by failing to object to a trial exhibit as inadmissible and prejudicial. We affirm in part, reverse in part, and remand for a new trial on the assault charge.

FACTS

On Friday, April 3, 2015, Officers John Archer and Calvin Pham of the Minneapolis Park Police Department responded to a call that a young child, I.C., had gotten his hand caught in a door at Fairview Park in Minneapolis and his finger was bleeding. Ambulance personnel also responded and took I.C. to the hospital where he received stitches. The officers learned that an aunt was in charge of the children. Because I.C. was a toddler at the time and unable to explain what happened, Officer Archer spoke with aunt and I.C.'s seven-year-old brother, A.C.

According to Officer Archer, "[aunt] didn't appear to be very mentally kind of stable." She was "very upset," "was sucking on her thumb," was not "able to articulate full sentences" to the officers, and was not able to explain what happened with I.C. It was readily apparent to Officer Archer that she had some mental disabilities, and Officer Pham thought she was a vulnerable adult. Park staff recommended that Officer Archer talk with A.C. to learn what happened, and A.C. showed Officer Archer "exactly how [I.C.] had got his hand caught in the door of the building." A.C. also told Officer Pham that "he was

afraid he was going to get in trouble because they weren't supposed to be up at the park that day or in general."

Aunt was also watching the boys' infant sister, P.C. Officer Archer, as well as park staff, were concerned that aunt should not be watching over the three children, and Officer Archer contacted child protective services. Officer Archer also talked to the children's mother and later talked to the children's father, appellant Antwan Carpenter, when he came to the park and took charge of A.C. and P.C. During her conversation with Officer Archer, mother told him that while aunt is very smart, she is a vulnerable adult, and she is supposed to keep the children at the house when she is watching them alone.

Park staff were already familiar with aunt because she had been at the park before looking through the garbage. The park gives out dinners, so one park staff member asked aunt if she was hungry and gave her something to eat. It was obvious to that staff member that aunt had mental disabilities.

A few days later, on Tuesday, April 7, the same park staff member saw aunt at the park with A.C., I.C., and P.C. The staff member spoke with aunt and A.C., and A.C. began telling the staff member about his home life and that they were not supposed to be at the park because they were going to get in trouble. A.C. told the staff member that his father had hit I.C. and him with a bat. Aunt told the staff member that Carpenter "had hit her on the back with a bat." She was also very concerned that they were not supposed to be at the park and were supposed to be at home. The staff member indicated that she thought that aunt was not able to care for children of that age.

That same day, Officer Pham was patrolling the park and observed aunt and the three children at the park. He checked on I.C.'s finger, and the bandage was dirty and had crusted blood on it. Officer Pham thought it did not look like anything was done to care for the finger since I.C. was at the hospital, and he and several others cleaned and re-bandaged the finger. Officer Pham also observed that P.C. was crying most of the time they were at the park. Aunt did not have diapers or formula for P.C. and park staff pooled money together, bought diapers, and changed P.C. The other children appeared very dirty and were hungry.

Officer Pham also observed a lump on A.C.'s right leg. When questioned, A.C. told the officer that Carpenter had hit him with a bat and that whenever he or aunt or the other child get in trouble they get hit with a bat. Officer Pham had not seen the lump on A.C.'s leg on April 3, and upon questioning, A.C. told him that Carpenter had hit him sometime after April 3. Aunt also told Officer Pham that Carpenter hit her in the shoulder with a bat over the previous weekend. Every time someone touched her shoulder, she winced in pain. According to A.C., Carpenter had hit I.C. in the head with a plunger, and Officer Pham observed a visible mark on I.C.'s forehead. The children were all transported to St. Joseph's Hospital, a care facility for children. Aunt was taken to Hennepin County Medical Center for treatment.

On April 9, the children were examined by a child abuse pediatrician. I.C.'s finger was healing, and the doctor did not observe any other noteworthy injuries. A.C. had several linear marks that were noteworthy. The marks did not have a particular pattern so the doctor could not tell where they came from, but they could be consistent with being hit

with a belt. A.C. also had swelling on his shins which could be consistent with being hit with a bat.

During the examination, a nurse also conducted a recorded interview with A.C. A.C. told the nurse that Carpenter hits aunt with a baseball bat, on her head, shoulders, or foot, and he has seen her fall on the floor and sleep after being hit. She was hit with the bat for stealing ice cream. A.C. also told the nurse that he saw Carpenter hit I.C. a few days earlier and when he tried to call 911, Carpenter also hit him in the leg with the baseball bat.

At trial, A.C. denied that Carpenter hit him other than spanking, and said that he did not remember talking to the police at the park on April 3 or 7 or to the nurse on April 9.

In addition to the testimony of Officers Archer and Pham and a park staff member regarding their observations of aunt's mental limitations and her ability to care for the children, there were several other witnesses who testified. Aunt's legal guardian testified that she makes all of aunt's financial and medical decisions for her. The legal guardian stated that aunt does not have the ability to live on her own, was not able to use a stove safely, and even had to be reminded about taking care of her personal hygiene. The court order appointing a legal guardian for aunt was admitted as an exhibit, and this portion of the order was read into the record:

> [Aunt] is diagnosed with Developmental Delay . . . . [She] communicates verbally. She attended special education classes in school. She recently moved to Minnesota from Chicago, Illinois. [Aunt] is vulnerable to manipulation and exploitation by others. She needs help with understanding how to make and balance a budget. She does not understand the concept of signing contracts. [Aunt] requires a significant

> amount of supervision to ensure her safety in the community. She relies on others to schedule her doctor's appointments and to make informed medical and treatment decisions for her. She requires assistance with finding appropriate housing and applying for and maintaining governmental benefits and services.

The conclusions of law that aunt "is an incapacitated person" and that a guardian should be appointed for her were also read into the record. Aunt's legal guardian agreed that those statements were accurate.

Aunt's social worker testified that she determined that aunt was a vulnerable adult because she was exhibiting the behavior of a 7- to 9-year-old, noting specifically that she spoke like a child and sucked her thumb. The social worker testified that she thought it was "[v]ery appropriate" for aunt to have a legal guardian. She also said that aunt told her "quite a few times that she was hit with the bat" on her shoulder and toe by Carpenter.

At trial, aunt testified that during the period that she lived with Carpenter, his wife, and three children, she would babysit the children. She stated that when she was babysitting, she and the children sometimes would go to the park, even though mother did not like it when they went to the park. Aunt also testified that Carpenter would hit her with a bat on her shoulder, and that she remembered falling asleep after he hit her. Aunt explained that when she watched the children, she would prepare food for them, such as hot dogs, that she knew how to give P.C. a bottle, and that she knew how to use the phone to call for help.

Mother testified on Carpenter's behalf. She said aunt is her sister, who is a year younger than her. She explained that she was aware that aunt had a learning disability, but

that aunt babysat children when they were growing up. Carpenter, mother, the three children, and aunt moved into their house in February of 2015; before that they were homeless and living in hotels. Mother also said that aunt was able to cook, change a baby's diaper, and fix a baby's bottle. She also denied having ever seen Carpenter strike any of the children or aunt with objects, and said that she was present with Carpenter every time he was with aunt and the children from April 3 to April 7. Mother had pleaded guilty to neglect of the children for leaving them in the care of aunt.

Carpenter's landlord also testified that on one occasion he had seen aunt alone with the children, playing with them, that she was boiling hot dogs for them to eat, and that he was not concerned about their safety. It was obvious to the landlord that aunt is developmentally delayed.

The state charged Carpenter with one count of third-degree assault for hitting aunt, Minn. Stat. § 609.223, subd. 1 (2014), one count of malicious punishment of a child with respect to A.C., Minn. Stat. § 609.377, subd. 1 (2014), and three counts of neglect of a child, Minn. Stat. § 609.378, subd. 1(a)(1) (2014), one count for each child. Prior to trial, Carpenter moved the district court to sever the third-degree assault charge from the other charges. The district court denied the motion.

At trial, the jury found Carpenter guilty on all five counts, and the district court sentenced him to a stayed 15-month sentence on the third-degree assault conviction, and to concurrent stayed 365-day sentences on the other four convictions, consecutive to the assault sentence.

After filing his direct appeal, Carpenter requested to stay the appeal to allow him to pursue postconviction relief, which we granted. After the district court denied Carpenter's postconviction petition, the appeal was reinstated.

D E C I S I O N

I. Severance of Offenses

Appellate courts review de novo a district court's decision on whether to sever offenses for trial. *State v. Fitch*, 884 N.W.2d 367, 378 (Minn. 2016); *State v. Kendell*, 723 N.W.2d 597, 607 (Minn. 2006) (addressing proper standard of review and holding "that de novo review is the appropriate standard for reviewing a district court's denial of a motion for severance of offenses under Minn. R. Crim. P. 17.03").[1] A district court must sever offenses if "the offenses or charges are not related" or if, "before trial, the court determines severance is appropriate to promote a fair determination of the defendant's guilt or innocence of each offense or charge." Minn. R. Crim. P. 17.03, subd. 3(1)(a)–(b).

"Offenses are 'related,' and severance is not required under rule 17.03, subd. 3(1)(a), if the offenses arose out of a single behavioral incident." *Kendell*, 723 N.W.2d at 607. To determine whether "offenses were part of a single behavioral incident, we look to the time and place of the offenses and whether the offenses were motivated by a single

[1] In *State v. Jackson*, the supreme court stated that abuse of discretion is the standard of review for severance of offenses. 770 N.W.2d 470, 485 (Minn. 2009). But *Jackson* relied on a pre-*Kendell* case without discussing *Kendell*. And *Jackson* simply stated the standard of review, while *Kendell* explicitly considered what standard of review is appropriate and held that it is de novo. Moreover, the supreme court's most recent decision on joinder of offenses again stated that the standard of review is de novo, citing *Kendell*. *See Fitch*, 884 N.W.2d at 378.

criminal objective." *Fitch*, 884 N.W.2d at 378–79. Whether offenses are related under rule 17.03 "involves the same inquiry used to decide whether multiple offenses arose from a single behavioral incident for purposes of Minn. Stat. § 609.035." *Kendell*, 723 N.W.2d at 607. Whether there was a single criminal objective depends on "whether all of the acts performed were necessary to or incidental to the commission of a single crime and motivated by an intent to commit that crime." *State v. Krampotich*, 163 N.W.2d 772, 776 (Minn. 1968).[2] "For example, when arson is the means by which the defendant commits a murder, the defendant may not be sentenced both for the murder and for the arson, because the time and place of the offenses coincide and because the defendant is motivated by an effort to obtain a single criminal objective." *State v. Bookwalter*, 541 N.W.2d 290, 294 (Minn. 1995).

Prior to trial, Carpenter moved the district court to sever the third-degree assault charge from the other charges. Carpenter argued that the offenses were not part of the same behavioral incident because the victims were different, there is no evidence the crimes occurred at the same time, and they were not motivated by an effort to obtain a common criminal objective. Even if they were part of the same behavioral incidents, Carpenter argued that the charges should nevertheless be severed because it was necessary to promote a fair determination of his guilt or innocence. He explained that aunt is an essential prosecution witness on the assault charge, but on the child neglect charges, she is an important defense witness, and that his defenses to each charge would be undermined

[2] This case is also reported as *State v. Shevchuk*, 282 Minn. 182 (1968).

because vigorous cross-examination of the aunt on the assault charge, in an attempt to show that she is not credible, would undermine his defense on the neglect charge that she is a capable caregiver.

The district court denied the motion. The district court ruled that because Carpenter, the children, and the aunt lived together, and the same bat was used to strike both A.C. and aunt, the assault and malicious punishment were sufficiently related in time and geographic proximity and thus were motivated by a single criminal objective. On Carpenter's second argument, that his defense would be prejudiced by having to defend against the assault charge and child neglect charges in the same trial, the district court said it was not persuaded, that multiple trials would be duplicative and time consuming because the same evidence would be presented in each trial, and that the offenses were factually intertwined.

A. Same Behavioral Incident

In determining whether the assault of aunt and the malicious punishment of A.C. are part of a single behavioral incident, we first look to the time and place of the offenses and then we consider whether they arose from a single criminal objective. The record indicates that both occurred at the house where Carpenter and both victims lived, and they both occurred over the same three to four-day period between April 3 and April 7. While Carpenter punished them both within a short period of time, there was no evidence presented that aunt and A.C. got into trouble for the same conduct or at the same time. Rather, the testimony contradicts that the events happened at the same time or for the same reason. A.C. told the nurse in the interview that he was hit in the leg because he was trying

to call 911 after Carpenter hit I.C., but says aunt was hit because she was stealing ice cream—and the punishments did not occur because of similar actions by A.C. and aunt.

Additionally, the single criminal objective of punishing those in his care when they get in trouble and deterring them from getting in trouble is fairly broad, and Minnesota courts have rejected similarly broad criminal objectives. *See State v. Eaton*, 292 N.W.2d 260, 267 (Minn. 1980) (holding that a "plan to swindle as much as possible. . . . is too broad to be a single criminal goal within the meaning of section 609.035 where, as here, a defendant plans and executes the thefts of two different checks at two separate times"); *State v. Secrest*, 437 N.W.2d 683, 685 (Minn. App. 1989) (noting that being motivated by perverse sexual desires is too broad), *review denied* (Minn. May 24, 1989); *State v. Chidester*, 380 N.W.2d 595, 598 (Minn. App. 1986) (holding motivation of obtaining money to cover expenses by misappropriating money was too broad), *review denied* (Minn. March 21, 1986).

The neglect charges are even more dissimilar to the assault charge than the malicious punishment charge is to the assault charge. The malicious punishment happened at home, while the neglect charge primarily arose from the risks of aunt inadequately supervising the children at the park and the injury to I.C. Being at the park is not the reason provided by A.C. for why he or aunt was punished, making it a stretch to conclude that there is a common criminal objective between Carpenter failing to provide adequate supervision for his children and assaulting aunt for stealing ice cream. We therefore hold that the district court erred by denying Carpenter's motion to sever the charges.

B. Prejudice

But even if joined offenses are unrelated, the ultimate question on appeal is whether the defendant was prejudiced by the improper joinder. *State v. Profit*, 591 N.W.2d 451, 460 (Minn. 1999). "[J]oinder is not prejudicial if evidence of each offense would have been admissible *Spreigl* evidence in the trial of the other." *Fitch*, 884 N.W.2d at 379 (quotation omitted); *see also State v. Kates*, 610 N.W.2d 629, 631 (Minn. 2000) (rejecting this court's use of harmless error analysis and directing application of the *Spreigl* test). Evidence of other crimes, wrongs, or bad acts, also referred to as *Spreigl* evidence, is "not admissible to show the defendant's bad character." *State v. Ross*, 732 N.W.2d 274, 282 (Minn. 2007). But it "may be admissible to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *Id.* *Spreigl* evidence is inadmissible unless the court determines: "(1) that the evidence is clear and convincing that the defendant participated in the other offense; (2) that the *Spreigl* evidence is relevant and material to the state's case; and (3) that the probative value of the *Spreigl* evidence is not outweighed by its potential for unfair prejudice." *State v. Jackson*, 615 N.W.2d 391, 395 (Minn. App. 2000) (analyzing *Spreigl* elements for purpose of determining if improper joinder prejudiced defendant), *review denied* (Minn. Oct. 17, 2000).

i. Clear and Convincing

If a jury finds the defendant guilty of a joined offense then the clear and convincing prong is met because guilt requires proof beyond a reasonable doubt. *See id.* Because Carpenter was convicted of all three offenses, the clear and convincing prong is met.

ii. Relevancy and Materiality

To determine the relevance and materiality of *Spreigl* evidence, courts consider "the issues in the case, the reasons and need for the evidence, and whether there is a sufficiently close relationship between the charged offense and the *Spreigl* offense in time, place or modus operandi." *State v. Kennedy*, 585 N.W.2d 385, 390 (Minn. 1998) (quotation omitted). "The closer the relationship, the greater the relevance or probative value of the evidence and the lesser the likelihood that the evidence will be used for an improper purpose. The ultimate issue is not the temporal relationship but relevance." *State v. Bolte*, 530 N.W.2d 191, 198 (Minn. 1995) (citation omitted).

Carpenter does not argue that the assault and malicious punishment offenses do not have a sufficiently close relationship to be relevant and material. Carpenter hit two individuals in his household with a bat as punishment for them getting in trouble and did so over the same three to four-day period. Evidence of the assault is relevant and material to the malicious punishment, and vice versa.

However, there is not a sufficiently close relationship between the evidence for the neglect charges and the assault charge. The state argues that the assault of aunt was motivated by an attempt to conceal the neglect of the children. But there is no evidence in the record which supports that claim, and that was not the state's theory at trial. The state points to part of Officer Pham's testimony about Carpenter's assault of A.C., where he stated: "And then also from what he was saying about he got in trouble and we assumed that that's what happened is that his father hit him with a bat because he got in trouble." But that part of the answer was stricken from the record. And even if that testimony had

been admitted, it does not show why Carpenter hit aunt. The only evidence in the record of why aunt was hit comes from A.C.'s interview with the nurse, where he said she was hit because she was stealing ice cream—which was the state's theory in its closing and the only motive it gave for Carpenter assaulting aunt. The state's motive argument that Carpenter assaulted aunt in relation to her caretaking responsibilities is contradicted rather than supported by the evidence and was not the motive provided at trial. The evidence of the neglect charge is not relevant or material to the assault charge, and evidence of the neglect would not have been admissible at a trial on the assault charge.[3]

The state also claims that "the offenses would have been admissible under Minn. Stat. § 634.20," but does not provide any analysis or further explanation. The statute says that:

> Evidence of domestic conduct by the accused against the victim of domestic conduct, or against other family or household members, is admissible 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. "Domestic conduct" includes, but is 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 [stalking] or 609.79, subdivision 1 [obscene or harassing telephone calls].

[3] The opposite is also true, that evidence of the assault charge involving aunt would not have been admissible in a trial on only the neglect charge. But, because evidence of the assault would be admissible on the malicious punishment charge and Carpenter's severance request would still have resulted in the malicious punishment and neglect charges being tried together, evidence of the assault would have been admissible at the trial on the neglect charge.

> "Domestic abuse" and "family or household members" have the meanings given under section 518B.01, subdivision 2.

Minn. Stat. § 634.20 (2016). The evidence of neglect in this case does not meet the definition of domestic abuse, and neglect is not part of any of the statutes cited in the statute as satisfying the definition of domestic conduct. *See* Minn. Stat. § 518B.01, subd. 2 (2016) ("'Domestic abuse' means the following, if committed against a family or household member 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, within the meaning of section 609.713, subdivision 1; criminal sexual conduct, within the meaning of section 609.342, 609.343, 609.344, 609.345, or 609.3451; or interference with an emergency call within the meaning of section 609.78, subdivision 2."). Minn. Stat. § 634.20 does not support the admission of the neglect charges at a trial on the assault charge, and vice versa.

iii. Probative Value versus Unfair Prejudice

Even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Minn. R. Evid. 403. Because there would not be a legitimate purpose for admission of the evidence for the neglect charge at a trial on the assault charge, the potential for unfair prejudice outweighs the probative value because there is no probative value of the evidence from the neglect charge in proving the assault charge. The evidence of the neglect charge would not have been admissible as *Spreigl* evidence in the trial on the assault charge, Carpenter was prejudiced by the improper joinder, and a new trial on the assault charge is required.

We note that Carpenter was further prejudiced because the improper joinder confounded his defense to the assault charge. *See* Minn. R. Crim. P. 17.03, subd. 3(1)(b) (requiring the district court to sever offenses if "before trial, the court determines severance is appropriate to promote a fair determination of the defendant's guilt or innocence of each offense or charge"); *see also Cross v. United States*, 335 F.2d 987, 989 (D.C. Cir. 1964) (recognizing that prejudice may arise from joinder if it impedes "or confounds an accused in making his defense"). Carpenter's defense to the child neglect charges was that aunt was capable of caring for the children, which required convincing the jury that aunt was an adequate caregiver. But his defense on the assault charge was that there was insufficient evidence on the substantial bodily harm element because aunt never told anyone that she was hit on the head.

"A defendant has the constitutional right to present a complete defense." *State v. Atkinson*, 774 N.W.2d 584, 589 (Minn. 2009). While "[c]ourts may limit the scope of a defendant's arguments to ensure that the defendant does not confuse the jury with misleading inferences," defendants have "the right to make all legitimate arguments on the evidence, to explain the evidence, and to present all proper inferences to be drawn therefrom." *Id.* (quotation omitted). By not severing the charges, the district court prevented Carpenter from questioning aunt about her failure to report the severity of her injury, attacking her credibility, or cross-examining her with any of the evidence of her inability to care for herself or remember events, because doing so would have undermined his defense on the neglect charge that aunt was a capable caregiver. The improper joinder prejudiced Carpenter by preventing him from advancing his best defense on the assault

charge that aunt was never hit in the head and knocked unconscious, and therefore that the state failed to prove the substantial bodily harm element of the assault charge. Thus, even if the evidence supporting the neglect charge was admissible in a trial on the assault charge, the improper joinder prejudiced Carpenter by preventing him from using that evidence to cross-examine aunt and attempt to undermine her credibility because to do so would undermine his defense on the neglect charges.

II. Ineffective Assistance of Counsel

Carpenter argues that counsel's failure to object to the admission of the court order appointing a legal guardian for aunt constituted ineffective assistance of counsel on the neglect charge because the order contained inadmissible hearsay and was unfairly prejudicial. Because "ineffective assistance of counsel claims involve mixed questions of law and fact, our standard of review is de novo." *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003) (addressing standard of review in case where ineffective assistance of counsel claim was considered after direct appeal was stayed to allow appellant to pursue postconviction relief for ineffective assistance of counsel). Ineffective assistance of counsel claims are analyzed under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). "To prevail on such a claim, an appellant must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that a reasonable probability exists that the outcome would have been different but for counsel's errors." *Rhodes*, 657 N.W.2d at 842 (quotation omitted). Appellate courts "need not address both prongs if one is determinative." *Hawes v. State*, 826 N.W.2d 775, 783 (Minn. 2013).

"In Minnesota, the standard for attorney competence is representation by an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances." *State v. Gassler*, 505 N.W.2d 62, 70 (Minn. 1993) (quotation omitted). "There is a strong presumption that counsel's performance was reasonable, and we give particular deference to trial strategy." *Carney v. State*, 692 N.W.2d 888, 892 (Minn. 2005) (citation omitted). But merely labeling a decision as a tactic does not provide a blanket justification for a decision if no reason is or can be given for the tactic. *See Rhodes*, 657 N.W.2d at 843.

On appeal, Carpenter argues that the exhibit was inadmissible hearsay because it was an out of court statement offered to prove that aunt was not competent to care for the children. The state does not challenge this argument or argue that a hearsay exception applies, and there is ample support in federal law that judicial findings are inadmissible hearsay if offered to prove the truth of the matter asserted. *See United States v. Sine*, 493 F.3d 1021, 1036 (9th Cir. 2007) ("We therefore agree with the Fourth, Tenth, and Eleventh Circuits that judicial findings of facts are hearsay, inadmissible to prove the truth of the findings unless a specific hearsay exception exists."). There is also a risk that the jury might give the judicial order greater weight than other evidence, both because of its official nature, and because it was signed by the same judge who presided over Carpenter's trial.[4]

[4] The district court judge put on the record that she did not actually preside over aunt's guardianship hearing, but that a court referee conducted the hearing. Although, the judge later cosigned the referee's order, the judge did not advise the jury of that fact.

Carpenter's trial counsel submitted an affidavit to the postconviction court stating that he did not recognize the inadmissible nature of the order, his failure to object to admission of the order was an oversight, it was not a tactic or strategy, and it was contrary to his strategy at trial, which was that Carpenter, prior to the time that he was charged with neglect, was not aware that aunt was incapable of caring for his children. While the state does not seriously dispute that the guardianship order was inadmissible hearsay under the facts of the case, and Carpenter's defense counsel concedes that his failure to object to the order as inadmissible hearsay was not part of his trial strategy, the parties contest whether there was a reasonable probability that the outcome of the trial relative to the neglect charge would have been different but for counsel's error.

Carpenter argues that were it not for defense counsel's error in failing to object to the inadmissible hearsay, there was a reasonable probability that the jury would have acquitted him of the neglect charge. "A 'reasonable probability' means a probability sufficient to undermine confidence in the outcome." *Rhodes*, 657 N.W.2d at 842 (quotation omitted). Appellant has the burden to show that "counsel's errors 'actually' had an adverse effect in that but for the errors the result of the proceeding probably would have been different. In determining whether the defendant has made the requisite showing, the court must consider the totality of the evidence before the judge or jury." *Gates v. State*, 398 N.W.2d 558, 562 (Minn. 1987) (citation omitted).

In considering the totality of the evidence regarding whether Carpenter knew that aunt was not capable of caring for the children, we conclude that there is no reasonable probability that the "outcome would have been different but for counsel's errors." *See*

Rhodes, 657 N.W.2d at 842. Although admission of evidence regarding the guardianship order may have been damaging to defense counsel's theory of the case that Carpenter was unaware that aunt was incapable of caring for his children, it was not the only evidence supporting the state's theory that he was aware of aunt's inability to care for the children. The state presented evidence from two police officers, a park staff member, aunt's legal guardian, and aunt's social worker that she was not capable of caring for the children, and cross-examined mother's claims of aunt's capabilities with the fact that mother had pleaded guilty to neglect for leaving the children in aunt's care.

Aunt's social worker testified that she determined that aunt was a vulnerable adult and that she exhibited the same speech and behavior as a 7- to 9-year-old. Aunt's legal guardian testified that it was not safe for aunt to cook and that she had to be reminded to take care of her personal hygiene. Officer Archer testified that aunt was unable to describe how I.C.'s injuries at the park occurred while seven-year-old A.C. could. Although defense counsel was able to present evidence contesting the state's theory by showing that aunt could change a diaper, fix a bottle and feed P.C., do some limited cooking, and telephone for help if necessary, the totality of the evidence strongly supported the state's theory that Carpenter knew that aunt was incapable of safely caring for the children. In light of all of this other evidence supporting the state's theory, it is not reasonably probable that Carpenter would have been acquitted of the neglect charges had evidence of the guardianship order not been admitted.

In summary, we affirm the malicious punishment of a child and the child neglect convictions, reverse the third-degree assault conviction, and remand for a new trial on the third-degree assault charge.

Affirmed in part, reversed in part, and remanded.