STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1518

State of Minnesota,
Respondent,

vs.

Mariel Alexandra Grimm,
Appellant.

Filed July 22, 2019
Affirmed
Bjorkman, Judge

Dakota County District Court
File No. 19HA-CR-17-1284

Keith Ellison, Attorney General, St. Paul, Minnesota; and

James C. Backstrom, Dakota County Attorney, Heather Pipenhagen, Assistant County Attorney, Hastings, Minnesota (for respondent)

Christa J. Groshek, Lucas J.M. Dawson, Kinda M.S. Szymanski, Groshek Law P.A., Minneapolis, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Bjorkman, Judge; and Reyes, Judge.

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

BJORKMAN, Judge

Appellant challenges her first-degree-assault conviction, arguing that (1) the evidence is insufficient to prove she intentionally caused great bodily harm to a young child

in her care, (2) the district court abused its discretion by admitting testimony and photographs regarding the child's injury and recovery, and (3) defense counsel was ineffective by failing to seek a *Frye-Mack* hearing or retain a biomechanical-engineer expert witness. We affirm.

FACTS

On September 21, 2016, 13-month-old W.M. had a cold but was otherwise healthy. He played at a park that day, using the swing. He was learning to walk, and he fell down at home, bumping the back of his head on the floor. He awoke a few times during the night and earlier than usual the next morning. His mother nursed him and brought him back to bed with father. While W.M. was crawling around and babbling, he bumped heads with father. W.M. later ate breakfast with father. Mother dropped W.M. off at the home daycare of appellant Mariel Alexandra Grimm about 7:15 a.m.

W.M. ate and played normally that morning. He slept more than usual, which sometimes happened on days he was sick or had not slept well. Grimm was the only adult with W.M. when he suddenly showed signs of physical distress in the early afternoon. According to Grimm, W.M. woke up crying from a nap. While she changed his diaper, his legs suddenly "got stiff," he closed his eyes, lost consciousness, and his right arm went up in the air. Grimm splashed water on W.M., then called mother and 911. When paramedics arrived, W.M. was unconscious, one of his pupils was "extremely dilated while the other one was extremely pinpointed," and he was breathing shallowly with very low respiration.

At the hospital, W.M. was unresponsive and his pupils were dilated and fixed. Although he had no external signs of injury, a computerized tomography (CT) scan

revealed a life-threatening brain injury. W.M. had a "fairly substantial" subdural hematoma on the left hemisphere of his brain and serious injury to that hemisphere, subarachnoid bleeding, and a shift of his brain to the right hemisphere, which was also injured. Due to pressure on his cerebral blood vessels from brain swelling, W.M. was taken immediately for surgery. A neurosurgeon performed a left-sided craniectomy to reduce pressure on W.M.'s brain; four days later, W.M. underwent a right-sided craniectomy.[1]

Grimm was charged with first-degree assault. The district court denied her pretrial motion to exclude medical evidence "regarding the nature and extent of [W.M.'s] injuries beyond that known after 5 days of treatment." Over Grimm's objection, mother was allowed to testify regarding W.M.'s current care needs and condition. And the district court admitted seven photographs of W.M. taken during his recovery.

Because of W.M.'s young age, the state had to prove circumstantially that Grimm inflicted his brain injury. The state's theory was that W.M. sustained abusive head trauma, sometimes referred to as shaken-baby syndrome, at Grimm's hands. Abusive head trauma is a differential or "rule out" diagnosis made after other causes of an injury are discarded. The state offered evidence from numerous medical personnel who participated in W.M.'s treatment, including a trauma surgeon, pediatric intensive-care doctor, pediatric neuroradiologist, pediatric neurosurgeon, and a child-abuse pediatrician. Collectively, their testimony and reports established that W.M. sustained a severe brain injury, his

[1] W.M. later underwent additional surgeries to replace bones removed during the craniectomies, remove a graft, install a drain and a shunt to divert spinal fluid, and install a feeding tube.

symptoms arose contemporaneously with the inflicted trauma, and the injury could not have been caused by other factors, such as the accidental bumps he experienced the previous day or a different traumatic event. To contest this evidence, Grimm called two pediatric neurologists. They offered evidence questioning the validity of the abusive-head-trauma diagnosis, and suggested that W.M.'s injury was caused by a stroke, other metabolic causes, or by a delayed reaction to earlier trauma. And they opined that evidence linking the injury to trauma was inconclusive.

Following a nine-day trial, the jury found Grimm guilty. The district court granted Grimm's departure motion, imposing a stayed 86-month sentence. Grimm appealed. This court stayed the appeal while she sought postconviction relief on her claim that her attorney was ineffective because he did not seek a *Frye-Mack* hearing to challenge the validity of the abusive-head-trauma diagnosis, and did not retain a biomechanical engineering expert. After the district court denied her postconviction petition, we reinstated her appeal.

D E C I S I O N

I. Sufficient evidence supports Grimm's conviction.

In reviewing a claim of insufficient evidence, we defer to the jury's role as fact-finder by viewing the evidence in the light most favorable to the verdict "to determine whether the facts in the record and the legitimate inferences drawn from them would permit the jury to reasonably conclude that the defendant was guilty beyond a reasonable doubt." *State v. Hanson*, 800 N.W.2d 618, 621 (Minn. 2011) (quotations omitted). If the conviction rests upon circumstantial evidence, our analysis involves two steps: first, we identify the circumstances proved "by resolving all questions of fact in favor of the jury's verdict," and

second, we consider the reasonable inferences that can be drawn from these circumstances. *State v. Harris*, 895 N.W.2d 592, 600 (Minn. 2017). The whole of the circumstances proved must "be consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis except that of guilt." *State v. Fox*, 868 N.W.2d 206, 223 (Minn. 2015).

To convict Grimm of first-degree assault, the state was required to prove that she intentionally inflicted great bodily harm on W.M. Minn. Stat. § 609.221, subd. 1 (2016). Grimm does not dispute that W.M.'s severe brain injury constitutes great bodily harm. Rather, she contends the evidence is insufficient to prove that she caused the injury.

Grimm identifies two circumstances proved consistent with her guilt: W.M. suffered "severe head trauma" and Grimm was his sole caretaker when he became symptomatic. We rejected such a limited identification of the circumstances proved in *State v. Stewart*, a similar case involving abusive head trauma to a child victim. 923 N.W.2d 668, 674 (Minn. App. 2019), *review denied* (Minn. Apr. 16, 2019). And we do so again here. Grimm's limited assessment does not fully account for all of the evidence that supports the jury's guilty verdict. The state proved more than that W.M. suffered a traumatic brain injury that expressed itself during Grimm's care. Rather, the state provided evidence that the injury occurred *while* W.M. was in Grimm's care and was not caused by other external or metabolic causes. Accordingly, we identify the other circumstances proved.

First, W.M.'s traumatic brain injury occurred while he was in Grimm's sole care. Dr. Didima Mon-Sprehe, a pediatric intensive-care doctor who was one of the first to examine W.M., testified that the type of severe injury he sustained becomes symptomatic

"within minutes" of the traumatic event that caused it. Likewise, Dr. Mark Hudson, a child-abuse pediatrician, testified that W.M. was "symptomatic immediately or very close to immediately after sustaining" the trauma. He also rejected any notion that W.M.'s injury could have presented itself hours after the trauma occurred because it was undisputed W.M. behaved normally during the preceding hours, including eating, taking naps, and actively playing.

Second, the minor bumps and traumas W.M. experienced in the hours before he was in Grimm's care did not cause his injury. All of the state's medical experts testified that the minor head impacts that W.M. had experienced the day before, including falling and hitting his head on the floor, swinging, and bumping heads with his father, could not have caused W.M.'s severe brain injury. Indeed, Dr. Richard Patterson, a pediatric neuroradiologist, testified that in his 29 years of practice he had never seen minor head bumps like those mother described cause a subdural hematoma or W.M.'s level of brain swelling. He stated, "This is not the kind of finding that you see if a child falls off a changing table or tumbles down a flight of stairs or falls from their father's arms. This is substantial and life-threatening trauma." Even Dr. Donald Chadwick, Grimm's expert pediatric neurologist, agreed that the "number one" differential diagnosis for the severe brain injury W.M. experienced is child abuse.

Third, W.M.'s severe brain injury was not caused by a stroke or other metabolic condition. Dr. Mon-Sprehe testified that it was not possible for W.M. to have suffered a stroke because he showed no stroke symptoms before arriving at the hospital. Dr. Peter Kim, a pediatric neurosurgeon who conducted W.M.'s first surgery, stated that W.M.'s

symptoms were inconsistent with a stroke diagnosis. According to Dr. Kim, stroke symptoms are obvious, rarely occur in children, very rarely affect a whole brain hemisphere, and do not occur in conjunction with subdural hematomas. And Dr. Kim testified that W.M.'s vascular structure was inconsistent with a stroke. Dr. Patterson agreed, stating that W.M.'s injury could not have been caused by an arterial event that led to a stroke because W.M.'s arteries were "spared." The state's experts also ruled out other metabolic brain-trauma causes such as an aneurism or spontaneous hemorrhage.

Grimm argues that two reasonable inferences can be drawn from the circumstances proved that are inconsistent with her guilt: (1) something other than abusive head trauma caused W.M.'s injury and (2) W.M. was injured outside of the time he was in Grimm's care. But neither inference reasonably flows from the circumstances proved. As noted above, Grimm's two medical experts disputed the state's evidence. Their collective testimony suggested that W.M.'s injury was not caused by blunt force trauma or shaking, could have another metabolic cause, and could have occurred earlier but led to a stroke while he was in Grimm's care.

"[W]hen a jury is presented with conflicting medical testimony about the nature of injuries and their possible causes, we assume the jury believed the expert testimony that is most consistent with its verdict." *Stewart*, 923 N.W.2d at 674. Because the state offered evidence that only inflicted trauma could have caused W.M.'s injury and that W.M. became symptomatic immediately after its infliction, the jury necessarily rejected Grimm's evidence that supported an inference inconsistent with the verdict. *See State v. Rhodes*, 657 N.W.2d 823, 841 (Minn. 2003) (relying on doctor's testimony as to cause of victim's

injuries that conflicted with another doctor's testimony to affirm conviction). Viewing the evidence in the light most favorable to the verdict, the only reasonable inference from the circumstances proved is that Grimm intentionally inflicted great bodily harm on W.M. As set forth above, any other circumstances that could have explained W.M.'s injuries are contrary to the jury's verdict.[2]

II. The district court did not abuse its discretion by admitting testimony and photographs regarding W.M.'s recovery.

Relevant evidence is generally admissible unless its probative value is outweighed by its prejudicial impact. Minn. R. Evid. 401, 403. The admission of evidence is within the district court's discretion. *State v. Martinez*, 725 N.W.2d 733, 737 (Minn. 2007). And "[r]ulings on the admissibility of photographs as evidence are in the broad discretion of the district court and will not be reversed on appeal absent a showing of a clear abuse of discretion." *State v. Dame*, 670 N.W.2d 261, 264 (Minn. 2003).

Grimm challenges the admission of mother's testimony about W.M.'s status and care needs, and of seven photographs. Mother gave limited testimony about W.M.'s post-operative and current condition, and his care needs. She described how his gastric feeding tube functions and the therapeutic exercises W.M. does to improve his vision and to bear

[2] Grimm also asserts that the evidence is insufficient to show that she had a motive to commit the crime. Motive is not an element of this offense. But evidence of motive can "help[] form inferences from the circumstantial evidence" that supports the state's case. *State v. Webb*, 440 N.W.2d 426, 431 (Minn. 1989). That is the situation here. On the day in question, Grimm was caring for six children, three of whom she was home schooling. She acknowledged that just before his injury manifested, W.M. was off-schedule, crying, and possibly hungry while the other children were sleeping, and she was pressed for time to get the children to swim lessons. This evidence suggests Grimm became stressed and frustrated with W.M. to the point that she injured him.

weight. And she testified about seven photographs, including those depicting W.M.'s head after his last craniectomy, W.M. using his standing board, and his feeding tube. The evidence is relevant to show that W.M. suffered great bodily harm, an element of the charged offense. *See* Minn. Stat. § 609.02, subd. 8 (2016) (defining "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"); *see also State v. Schulz*, 691 N.W.2d 474, 478 (Minn. 2005) (defining evidence as probative "when it, in some degree, advances the inquiry"). Because mother's testimony was relevant and limited, we discern no abuse of discretion by the district court in admitting it.

Grimm argues that the photographs were offered merely to "invoke emotion in the jurors." We disagree. As with mother's testimony, they are relevant to the substantial nature of W.M.'s injuries. *See State v. Stewart*, 514 N.W.2d 559, 565 (Minn. 1994) (stating that photographs can be relevant to "allow the jury to better visualize . . . the extent and type of harm to the victim"). Moreover, photographs "are not rendered inadmissible merely because they incidentally tend to arouse passion or prejudice." *Schulz*, 691 N.W.2d at 478 (quotation omitted). While the seven photographs are compelling, we note they were not taken during surgery and are not graphic. And even if the district court abused its discretion by admitting the photographs, any such error is harmless in light of the state's strong case against Grimm, including the substantial evidence that W.M.'s injury was severe. *See State v. Holliday*, 745 N.W.2d 556, 568 (Minn. 2008) ("The [e]rroneous admission of evidence that does not have constitutional implications is harmless if there is

no reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." (alteration in original) (quotations omitted)).[3]

III. The postconviction court did not err by rejecting Grimm's ineffective-assistance-of-counsel claim.

To obtain relief based on ineffective assistance of counsel, a party must establish that her "counsel's performance fell below an objective standard of reasonableness and . . . there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Pearson v. State*, 891 N.W.2d 590, 598 (Minn. 2017); *see Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984) (first articulating the two-prong test). A strong presumption exists that counsel's performance was within "the wide range of reasonable professional assistance." *Wilson v. State*, 582 N.W.2d 882, 885 (Minn. 1998) (quotation omitted). And we generally do not review ineffective-assistance claims that are based on matters of trial strategy. *Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013). Because ineffective-assistance claims involve questions of law and fact, we review the postconviction court's decision de novo. *Johnson v. State*, 673 N.W.2d 144, 148 (Minn. 2004).

[3] We also reject Grimm's argument that the district court erroneously denied her motion to exclude the evidence on the ground that it would tend to show that the injuries were intentionally inflicted. The ruling was preliminary, and the challenged evidence is probative of the type of harm inflicted, an element of the offense. *See State v. Farah*, 855 N.W.2d 317, 320 (Minn. App. 2014) (allowing district court to definitively rule on admission of evidence either before or at trial), *review denied* (Minn. Dec. 30, 2014).

Grimm argues that she was denied effective trial counsel because (1) her attorney did not request a *Frye-Mack* hearing to challenge the abusive-head-trauma diagnosis[4] and (2) did not retain a biomechanical engineer. We consider each argument in turn.

Grimm first asserts that her trial attorney was ineffective because shifting opinion in the medical community has challenged the validity of the abusive-head-trauma diagnosis.[5] According to Grimm, the medical community is beginning to recognize that children suffering from a serious brain injury may experience a lucid interval between the trauma and when they become symptomatic.

We reject this argument primarily because Grimm has not shown that this diagnosis is novel. "A *Frye-Mack* hearing is only necessary when the evidence at issue was obtained using a technique that is both scientific and novel." *State v. Edstrom*, 792 N.W.2d 105, 109 (Minn. App. 2010). Grimm does not dispute that this diagnosis—and its predecessor, shaken-baby syndrome—are not new. This court noted this fact in *Stewart*, 923 N.W.2d at 676. Grimm's argument essentially challenges the weight, not the admissibility, of the abusive-head-trauma evidence. *See State v. Jones*, 678 N.W.2d 1, 15 (Minn. 2004)

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[4] The two-prong test for admitting new scientific evidence is derived from *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923), and *State v. Mack*, 292 N.W.2d 764, 768 (Minn. 1980).

[5] In her reply brief, Grimm argues that the use of this term "abusive head trauma" prejudiced her. We disagree. The word "abusive" is used only to delineate that the injury was caused by child abuse, and it was a term used by the medical witnesses throughout the trial. Introduction of the argument in Grimm's appellate reply brief also exceeded the scope of that brief. *See* Minn. R. Civ. App. P. 128.02, subd. 3 (limiting the scope of reply brief to "new matter raised in the brief of the respondent").

(rejecting challenge to forensic testing procedures for DNA that did not undermine their foundational reliability).

Grimm's argument also fails because the decision not to seek a *Frye-Mack* hearing is quintessentially strategic. *See Schneider v. State*, 725 N.W.2d 516, 521 (Minn. 2007) (rejecting contention that "trial counsel's decision to forgo a *Frye-Mack* hearing was anything but a strategic and tactical decision"). While Grimm's attorney avers in his affidavit that his failure to seek a *Frye-Mack* hearing was not strategic, the record shows otherwise.[6] Grimm's attorney did request a *Frye-Mack* hearing seeking to admit Grimm's polygraph test results. Deciding whether to seek a *Frye-Mack* hearing on both abusive-head-trauma diagnosis and admission of polygraph evidence involved considerations of which motion was more likely to be granted and more likely to bolster the defense. The record shows Grimm's attorney opted to discredit the abusive-head-trauma diagnosis through examination and cross-examination of the numerous medical witnesses, a strategic decision. And the record shows her attorney was effective—he both offered alternative explanations for W.M.'s injury and challenged the validity of the diagnosis. The postconviction court did not err by concluding that Grimm's attorney's failure to seek a

[6] The affidavit states that Grimm's attorney did not request a *Frye-Mack* hearing on the abusive-head-trauma diagnosis because he intended to retain a biomechanical engineer expert, whose "testimony would be crucial to meaningfully presenting such a motion" and his "entire theory of the case was based on the State's experts being unable to prove beyond a reasonable degree of doubt, or state with scientific certainty the exact etiology of the child's injuries." These statements themselves demonstrate the strategic nature of the attorney's decision.

Frye-Mack hearing did not satisfy either the performance or prejudice prongs of the *Strickland* test.

Grimm next argues that her attorney was ineffective because he did not retain a biomechanical engineer. What evidence to present to the jury, including which witnesses to call, is also a tactical decision that "lies within the proper discretion of trial counsel" that we "do not review for competency." *State v. Doppler*, 590 N.W.2d 627, 633 (Minn. 1999); *accord State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986). The state did not call a biomechanical engineer to explain the mechanics of W.M.'s brain injury. Instead, the state offered evidence from numerous medical experts, including neurologists, to establish that W.M.'s injury was caused by intentionally inflicted trauma that could have occurred only when W.M. was in Grimm's care. Grimm's attorney chose to counter the state's evidence with his own neurologists. We are not persuaded this decision was unreasonable or reflects ineffective assistance of counsel. *Cf. Stewart*, 923 N.W.2d at 675 (reasoning that guilty verdict reflects jury's rejection of expert testimony inconsistent with the verdict, such as a biomechanical engineer's testimony that shaking could not have created sufficient force to cause abusive head trauma). We discern no error by the postconviction court in concluding that Grimm's attorney's decision not to call a biomechanical engineer was strategic and not subject to a claim of ineffective assistance of counsel.[7]

[7] Grimm cites *Commonwealth v. Epps*, 53 N.E.3d 1247 (Mass. 2016), for the proposition that the failure to call an expert witness in a shaken-baby case constitutes ineffective assistance of counsel. The *Epps* court did not conclude counsel was ineffective. 53 N.E.3d at 1266. Rather, the court noted counsel's failure to do so, and commented that there was "evolving scientific research" suggesting that it is possible for a child to suffer a traumatic brain injury from an accidental fall and vacated the defendant's conviction because there

Because sufficient evidence supports the jury's verdict, the district court did not commit prejudicial evidentiary error, and the court did not err in denying Grimm's postconviction petition, we affirm.

Affirmed.

was "a substantial risk of a miscarriage of justice." *Id*. at 1266, 1268. *Epps* is neither apposite nor persuasive.