This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0762

State of Minnesota,
Respondent,

vs.

Chase Michael Schwendeman,
Appellant.

Filed June 28, 2021
Affirmed in part, reversed in part, and remanded
Jesson, Judge

Morrison County District Court
File No. 49-CR-19-369

Keith Ellison, Attorney General, Peter Magnuson, Assistant Attorney General, St. Paul, Minnesota; and

Brian Middendorf, Morrison County Attorney, Little Falls, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jenna Yauch-Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Jesson, Presiding Judge; Smith, Tracy M., Judge; and Florey, Judge.

NONPRECEDENTIAL OPINION

JESSON, Judge

The state charged appellant Chase Schwendeman with two counts of third-degree assault, one count of domestic assault, and one count of malicious punishment of the eleven-month-old son of his girlfriend after the baby became unconscious, lethargic, and

covered with multiple mysterious bruises in locations atypical for his age. A jury found Schwendeman guilty of malicious punishment, but acquitted him of the third-degree assault and domestic abuse charges. Schwendeman contends his conviction was improper due to the lack of a unanimity instruction and that evidence was insufficient to prove malicious punishment. He also alleges, based on a letter from an anonymous juror claiming outside interference in jury deliberations, that the district court improperly denied his request for a *Schwartz* hearing.[1] Because the crime of malicious punishment does not require a unanimity instruction and the evidence was sufficient, we affirm in part. But because a juror raised an adequate showing of juror misconduct, we reverse in part and remand for an evidentiary hearing to determine if the juror-alleged misconduct was prejudicial.

FACTS

Appellant Chase Schwendeman and I.K. (mother) met and began dating in 2018. Each had a child from a previous relationship. At the time of the incident, Schwendeman had a daughter (daughter) who was nine years old and mother had a son (baby) who was eleven months old. Several months before the incident, Schwendeman moved in with mother, who lived with her parents, her sister, and her sister's two children. Due to overcrowding, Schwendeman and mother decided to move into the unfinished basement of the house.

[1] *Schwartz v. Minneapolis Suburban Bus Co.*, 104 N.W.2d 301 (Minn. 1960).

The basement had no walls and only plywood for flooring. Schwendeman and mother hung fabric to separate the basement into rooms. The basement was hot due to an exposed furnace and wood-burning stove, and despite having a kitchenette there was no oven or running water. They would go upstairs to bathe and sometimes to cook and eat. Daughter only stayed with the couple on weekends.

Schwendeman assumed primary caregiving responsibilities for baby starting in November 2018 when his seasonal tree-trimming job ended. Around this time, other adults in the home started to notice bruises on baby's body, primarily on his forehead. Mother attributed these bruises to baby's head butting the bars of his crib, as well as other minor isolated falls. During this period, baby also started to struggle with eating. Baby would vomit after eating and was gradually losing weight. This continued despite mother's different attempts of feeding, including shifting to solid foods and back to only formula.

The Incident

Schwendeman and mother agreed that baby was "his normal, happy-go-lucky self" the night before January 2, 2019. Schwendeman, suffering from a headache, went to bed early. According to mother, baby woke up several times in the night, where he was spotted standing in his crib, which was not unusual for him. In Schwendeman's recollection of the morning of January 2, Schwendeman woke up at about 6:00 a.m. and went outside for a cigarette. Mother—several months pregnant—stayed in bed due to morning sickness. Schwendeman came back inside and, after noticing that baby was awake, took him out of his crib, setting him on the floor. While Schwendeman was turned away from baby to feed the cats, he heard an "out of the ordinary" thud and turned back to baby. Baby was face

down on the floor—barely conscious yet hyperventilating. He was not crying, but instead was pale and limp, and had a bleeding lip. Schwendeman called to mother, and they quickly wrapped baby in a blanket and drove to the hospital.

Upon arrival at the hospital, the treating nurse performed emergency care. She noted that baby had a "really floppy tone." She also noticed bruises on his forehead, his bloody lip, and his lack of reacting to his surroundings, including when multiple nurses tried to insert an IV. When the nurse removed baby's clothing, she noticed additional bruises on the back of his head, on his inner arm, on his thigh, on the back of his left hand, and in his left ear. Concerned that baby's injuries, his falling heart rate, and low core body temperature were indicative of a head injury, a CT scan was ordered. But because the hospital's CT scanner was malfunctioning, baby was airlifted to Children's Minnesota Hospital.

After baby arrived at Children's Minnesota Hospital, staff sought a consultation from a pediatrician with expertise in abuse and trauma. Some of the bruises were considered normal for a child but, according to the pediatrician, others were concerning, including the bruises on baby's scalp, shoulder, under the armpit, surrounding his eyes and ears, and on the front and back of his arms.[2] The hospital also requested a gastroenterology consult after unusual findings on baby's CT scan. The gastroenterologist discovered that

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[2] An X-ray showed that baby had a wrist fracture that was healing, but the pediatrician said this type of injury was normal for mobile children, heals quickly, and is often difficult for a caretaker to notice.

baby had a rare duodenal webbing, a congenital defect that prevented food from being fully digested, and was the likely explanation for baby's vomiting and trouble eating.

The Investigation

After returning home from the hospital the following week, two investigators—one from Morrison County Social Services and one from the sheriff's office—interviewed Schwendeman and mother. They asked questions about Schwendeman's knowledge of the bruises and his views on corporal punishment. Later, Schwendeman and mother went to the sheriff's office after remembering a fall at a friend's house to explain that it was likely the source of baby's wrist injury. Throughout the interviews, mother maintained that Schwendeman was not abusive to baby.

Investigators also interviewed daughter. In that interview, daughter said that Schwendeman would slap baby on the "butt and the lips" and make baby cry. She explained that the lip slaps were the reason why "his lips are always numb," and that she witnessed Schwendeman slap baby's lips "five or seven" times. Daughter also noted slaps from Schwendeman to baby's cheek and forehead. According to daughter, the slaps would happen when Schwendeman was angry or frustrated, either because baby was not learning how to walk or stand properly or when baby woke up in the middle of the night. Daughter also heard Schwendeman say that he needed a break from baby or wished baby "could go away."

The state charged Schwendeman with third-degree assault (past pattern of child abuse), third-degree assault (victim under four), domestic abuse, and malicious punishment of a child. Minn. Stat. §§ 609.223, subds. 2- 3, .2242, subd. 4, .377, subds. 1-4 (2018).

The Trial

A six-day jury trial was held in December 2019. Witnesses included mother, daughter, Schwendeman, the pediatrician, and the gastroenterologist.

Mother testified that she did not agree with some of Schwendeman's parenting styles, particularly how he would "discipline" baby. She explained that Schwendeman would "tap" baby's hand as a way to redirect him from going places he should not, or if baby was reaching for something like a cell phone. But, she noted that she sometimes participated, and baby did not cry when his hand was "tapped." According to mother, Schwendeman also "tapped" baby on the lips to get his attention once that was hard enough to open up a healing wound and start bleeding. She described both the actions on the lips and hands as lighter than a slap. Less than a month before the incident, mother heard Schwendeman spank baby—which was loud enough to be heard upstairs by her parents—and asked him not to spank baby again. She described Schwendeman as someone who would get "frustrated," not only when baby would not listen, but also when hearing noises from the rest of the house. His remedy was to go outside and have a cigarette.

At trial, daughter's testimony was more reserved compared to her recorded interview, which was introduced at trial. In testimony, she explained that she watched Schwendeman "tap" baby on the cheek to teach him "how to act normal." Daughter said that Schwendeman would yell when he was angry and say things "he doesn't mean," like "I hate you," directed at baby. When asked if Schwendeman "likes babies," she answered that he did "a little bit but not too much," because he would get frustrated with them.

Schwendeman also testified. He explained that once baby was large enough to pull himself up to furniture, he would frequently fall on his head. He also referred to other instances where baby had been noticeably, but not majorly, hurt: being strapped in too hard in a friend's spare bassinet, falling down the stairs at a friend's house that likely explained the fractured wrist, and tumbling after daughter pulled a blanket from under baby. Schwendeman agreed that he used corporal punishment for his daughter, but reiterated that other than the one spank and "lip tap," there were no other concerning incidents with his treatment of baby. As for daughter's comments that he "hates babies," he testified that children sometimes "overdramatize" situations. Schwendeman maintained that on the morning of January 2, he was looking away and feeding the cats when he heard a thud and saw baby had fallen.

The pediatrician testified that the cause of baby's injuries as described by Schwendeman did not explain baby's bruises. He noted that the bruises near his scalp and eyes were rare in babies because it is not often how they fall. He was particularly concerned with the injuries around baby's ears, describing them as "a very unusual place for injury," and an area "where injury tends to be inflicted." Another unusual injury was a torn frenulum, which is the soft tissue that runs between the lips and the gums. The frenulum, he testified, was not torn by teething. He added that the bruising around baby's belly, arms, and armpits were also atypical injuries. The pediatrician summed up baby as being "a child who has a lot of bruises in a lot of concerning areas."

The gastroenterologist explained that baby's rare congenital abnormality, which was effectively blocking his intestine to the size of a pinhole, meant that the contents in his

stomach were unable to exit the stomach and intestine properly. In turn, this would create a buildup of solid food in his stomach, cause him to vomit and, over time, lose weight from malnutrition. The gastroenterologist was also asked about other possible side effects of malnutrition caused by the abnormality, including a loss of energy, but she did not testify to whether baby's defect caused him to fall or explained the bruising on his body.

In closing arguments, both parties agreed that baby experienced a neurological event on January 2, but disagreed on whether it was attributed to Schwendeman. The state emphasized that Schwendeman was the only person present and the only witness to baby's injuries that day. The state also highlighted statements from the pediatrician about the atypical and unusual bruising and injuries that did not fit Schwendeman's explanation of the morning. And the prosecutor detailed acts that occurred before January 2, like spanks, slaps, and strikes, to explain the elements of the domestic abuse and third-degree assault charges. Schwendeman countered by arguing that the pediatrician insufficiently diagnosed baby, including how he missed the rare stomach disorder and did not have an explanation for baby's neurological event. Schwendeman further emphasized that baby had trouble digesting and was experiencing severe weight loss, and that the evidence neither sufficiently explained baby's neurological event nor supported the domestic abuse, third-degree assault, and malicious punishment charges.

Jury Deliberations

Jury deliberations began on the morning of December 23, 2019. Less than an hour later, the jury sent a note to the judge asking for clarification of Schwendeman's testimony.

The judge stated that the answer would be provided to the jury by the "jury bailiff."[3] The judge told the parties that the court would verbally direct the jury bailiff to "tell them they need to refer back to the jury instructions."

Later that afternoon, the jury sent a second note stating, "We feel we are at an impasse." Without guidance on what the jury was asking, the parties and the judge agreed that the proper course was to instruct them to continue deliberating. The judge directed the jury to "feel free to communicate with the bailiff as you have previously done."

An hour and a half later, the jury sent a third note, stating, "Your Honor, we have a 'hold-out.' We have gone over the rules, reviewed the evidence, placed emotions 'off the table,' made charts, diagrams, etc. It is [sic] gotten very heated. Advice?" Schwendeman then moved for a mistrial. The prosecutor did not object. The court and the parties agreed it would be proper to call in the jury and ask the foreperson if "further deliberations would be beneficial or productive." If the foreperson said no, the court said it would grant the motion for a mistrial. The jury bailiff left the room, and upon return stated that the foreperson asked for "a few more minutes."

Shortly after that, the jury acquitted Schwendeman of the domestic abuse and two third-degree assault charges, and returned a guilty verdict for malicious punishment.

Three days later, a juror sent a written note to the district court. The note stated: "I have some concerns about the jury deliberations in the Schwendeman trial. I wanted to do

[3] The official title of this individual is "deputy administrator."

you the courtesy of talking to you about it first." The court notified the parties of the juror's note, and Schwendeman moved for a new trial and a *Schwartz* hearing.

On January 15, 2020, the court heard arguments on Schwendeman's motions. The state opposed a *Schwartz* hearing. The court denied Schwendeman's motions, finding that there were "no allegations of jury misconduct," and that the concerns were otherwise vague and speculative.

But the juror once again contacted the court in February, this time describing the jury deliberations in greater detail. According to his letter, the instructions from the judge through the bailiff were only relayed to the foreperson, who then told the rest of the room. In response to the third question to the judge, the bailiff allegedly told the foreperson that the instruction from the judge was one word: "compromise." The word was written on the whiteboard, and the juror who wrote the letter—the last holdout on the malicious punishment charge—was repeatedly asked to compromise and change his vote so they could be done. The letter noted that the jury deliberations were the day before Christmas Eve, and that "nobody wanted to take this home with them over Christmas." In light of this letter, Schwendeman again argued for a *Schwartz* hearing, but the district court denied the request.

The district court entered the conviction for malicious punishment, stayed the imposition of the sentence, and placed Schwendeman on supervised probation for five years, including 60 days in jail.

Schwendeman appeals.

DECISION

I. A specific-unanimity instruction was not required.

First, Schwendeman argues that the district court failed to give a specific-unanimity instruction to the jury for the crime of malicious punishment. Because Schwendeman did not request a specific-unanimity instruction at trial, we review the jury instructions for plain error. *State v. Crowsbreast*, 629 N.W.2d 433, 438 (Minn. 2001). Under the plain-error test, we examine the instructions to determine whether there was (1) an error; (2) that was plain; and (3) that affected appellant's substantial rights. *State v. Gunderson*, 812 N.W.2d 156, 159 (Minn. App. 2012). If any requirement of the plain-error test is not satisfied, we do not need to address the others. *State v. Lilienthal*, 889 N.W.2d 780, 785 (Minn. 2017). Appellants bear a heavy burden to show that an error affected their substantial rights, which is satisfied if the error was prejudicial and affected the outcome of the case. *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998).

We begin our plain-error analysis by examining the law governing the unanimity requirement. A jury's verdict must be unanimous in all criminal cases, meaning the jury must agree that the state proved each element of the offense. Minn. R. Crim. P. 26.01, subd. 1(5); *State v. Pendleton*, 725 N.W.2d 717, 730-31 (Minn. 2007). But, while "the jury must unanimously agree on which acts the defendant committed if each act itself constitutes an element of the crime," the jury is not required to unanimously agree on "alternative means or ways in which the crime can be committed." *State v. Stempf*, 627 N.W.2d 352, 354-55 (Minn. App. 2001) (quotation omitted).

Error

With that legal background in mind, we consider whether the district court plainly erred when it instructed the jury. An error is plain if it "contravenes case law, a rule, or a standard of conduct." *State v. Webster*, 894 N.W.2d 782, 787 (Minn. 2017) (quotation omitted). An alleged error does not contravene caselaw unless the issue is "conclusively resolved." *State v. Jones*, 753 N.W.2d 677, 689 (Minn. 2008). When reviewing jury instructions, we recognize that "district courts are entitled to considerable latitude when selecting language for jury instructions." *State v. Carridine*, 812 N.W.2d 130, 144 (Minn. 2012). But a jury instruction cannot materially misstate the law. *Id.*

Looking next at the statute, the crime of malicious punishment of a child is defined as "an intentional act or a series of intentional acts with respect to a child," committed by "a parent, legal guardian, or caretaker," that "evidences unreasonable force or cruel discipline that is excessive under the circumstances." Minn. Stat. § 609.377, subd. 1 (2018). Malicious punishment is either a gross misdemeanor or a felony, depending upon the offender's record of prior offenses, the nature and extent of any injury inflicted, and the age of the child. *Id.*, subds. 2–6 (2018). When the victim is under the age of four and the malicious punishment causes bodily harm to the head, eyes, or neck, or otherwise causes multiple bruises to the body, the offense is a felony. *Id.*, subd. 4.

Here, the district court instructed the jury that in order to convict Schwendeman of felony malicious punishment of a child, they would have to find beyond a reasonable doubt that:

- Schwendeman "intentionally committed an act or series of acts," on or about January 2, 2019, that involved "unreasonable force or cruel discipline that is excessive under the circumstances";
- Schwendeman was baby's caretaker; and
- Baby was a minor.

The court also stated that each juror had to agree on the guilty verdicts and that they had to be unanimous. These instructions align with the crime of malicious punishment under state statute. *Id.*

To convince us otherwise, Schwendeman argues that the jury had to—and should have been instructed to—unanimously determine which *specific acts* caused the malicious punishment. He asserts that the jury needed to decide which specific act presented—either the spank loud enough to be heard upstairs, or the "lip tap" that caused bleeding—pointed to malicious punishment. But this argument misinterprets the basis of the malicious punishment charge. Those separate acts were presented to prove an element of third-degree assault, but the malicious punishment charge was about an act or acts *committed on the morning of January 2*. Neither the spank nor the "lip tap" witnessed by baby's family members occurred on January 2.

Next, Schwendeman contends that *Stempf* stands for the proposition that a jury must unanimously agree on *which* acts Schwendeman committed if each act itself constitutes an

element of the crime. 627 N.W.2d at 355. *Stempf* involved a case where the state presented two different factual scenarios as alternatives that the jury needed to decide but in error failed to determine, triggering a retrial. *Id.* at 357, 359. This is not an analogous situation. Here, the state presented only one factual scenario—that Schwendeman maliciously punished baby through an unwitnessed act in the early morning of January 2.

Therefore, because the malicious punishment charge was based on Schwendeman's actions the morning of January 2, not the previous episodes of "discipline," the court did not contravene law or commit legal error when it instructed the jury on the elements of malicious punishment. And because the district court did not err, we need not address Schwendeman's argument that the error was plain or affected his substantial rights. *Lilienthal*, 889 N.W.2d at 785.

II. Sufficient evidence supports the malicious punishment conviction.

Schwendeman further asserts that the evidence at trial was not sufficient to prove malicious punishment beyond a reasonable doubt. Specifically, he contends that the circumstances proved support a reasonable inference that baby's rare gastrointestinal condition caused him to fall on January 2.

To evaluate the sufficiency of the evidence, appellate courts "carefully examine the record to determine whether the facts and the legitimate inferences drawn from them" would allow the jury to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the convicted offense. *State v. Waiters*, 929 N.W.2d 895, 900 (Minn. 2019) (quotation omitted). But we review the evidence in the light most favorable

to the conviction and must assume the jury disbelieved any evidence contrary to the verdict. *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012).

When the state relies entirely on circumstantial evidence—as it does here—we apply a two-step test to evaluate the sufficiency of the evidence.[4] *State v. Moore*, 846 N.W.2d 83, 88 (Minn. 2014). First, we identify the circumstances proved, and disregard any evidence inconsistent with the verdict. *State v. Harris*, 895 N.W.2d 592, 600 (Minn. 2017). Second, we examine reasonable inferences that might be drawn from the circumstances proved. *State v. Bahtuoh*, 840 N.W.2d 804, 810-11 (Minn. 2013). We will not overturn a conviction based on circumstantial evidence on the basis of mere conjecture. *State v. Tscheu*, 758 N.W.2d 849, 859 (Minn. 2008).

We accordingly begin the analysis by identifying the circumstances that the state proved:

- Baby was in normal health when he went to bed;
- Schwendeman had a history of being frustrated with baby, including when baby would wake him up;
- Baby woke up several times in the night but appeared normal;

[4] We apply a heightened standard of review when the state's evidence on one or more elements of a charged offense consists solely of circumstantial evidence. *State v. Porte*, 832 N.W.2d 303, 309 (Minn. App. 2013). Circumstantial evidence is "evidence from which the factfinder can infer whether the facts in dispute existed or did not exist." *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (quotation omitted). Direct evidence, by contrast, is evidence that is "based on personal knowledge or observation and that, if true, proves a fact without inference or presumption." *Id.* (quotation omitted).

- Several family members witnessed Schwendeman spanking and striking baby on multiple parts of his body, including his lip and forehead, before the incident;
- Schwendeman woke up at around 6:00 a.m. on the morning of January 2;
- Schwendeman was the only person present after taking baby out of the crib that morning;
- Baby became limp and unresponsive shortly thereafter;
- The treating nurses and the pediatrician noted baby bleeding from his lip, multiple bruises on his forehead and other parts of his body; and
- The treating nurse and the pediatrician separately agreed that Schwendeman's story of baby falling on the morning of January 2 did not account for all of baby's injuries incurred on that day.

Having identified the circumstances proved, we next determine whether, when viewed as a whole, they permit a reasonable inference of guilt and are inconsistent with any rational hypothesis other than guilt. *Bahtuoh*, 840 N.W.2d at 810. Here, the reasonable inference from the circumstances proven is that Schwendeman, who had a history of punishment and frustration toward baby, committed some act that caused baby's unconsciousness. And, baby's sustained injuries, including abnormal bruising, were not due to a fall or sudden unconsciousness connected to his rare congenital digestion issue.

To convince us otherwise, Schwendeman points to his own theory based on the inference of what was proved. Schwendeman contends that the baby's rare gastrointestinal condition, undiagnosed until after the events of January 2, caused him to fall and become

unconscious. But this is only a reasonable inference if one ignores several proved facts. The medical experts determined that a simple fall would not explain baby's injuries, and that the unconsciousness he suffered on January 2 was due to a neurological injury, not gastrointestinal issues. The gastroenterologist did not come close to concluding in her testimony that baby's congenital issue could have led to a neurological issue or even a fall. The gastroenterologist only testified that the congenital issue explained baby's weight loss. Nor did the state try to prove that baby's weight loss and eating issues were caused by abuse. Without testimony tying the congenital defect to the explanation of the previous atypical bruises or the injuries incurred the morning of January 2, this theory does not rise above the level of conjecture.

Therefore, because the state's inference is consistent with the elements of malicious punishment, and there is no other rational explanation in light of the circumstances proved, the evidence was sufficient to support a conviction of malicious punishment.

III. The district court erred in denying a *Schwartz* hearing due to juror misconduct.

Finally, Schwendeman argues that this panel should remand for the district court to hold a *Schwartz* hearing in light of evidence from a juror of improper contact with the jury.

Where there is evidence of jury misconduct, the district court may, in its discretion, order a hearing. *State v. Church*, 577 N.W.2d 715, 721 (Minn. 1998); *Schwartz,* 104 N.W.2d at 303. Traditionally, jurors may not testify to any matters or statements occurring during deliberations or to their effect upon the jurors' minds or emotions in reaching a verdict. Minn. R. Evid. 606(b); *State v. Kelley*, 517 N.W.2d 905, 910 (Minn. 1994). However, jurors may testify to whether (1) extraneous prejudicial

information was improperly brought to their attention; (2) any outside influence was improperly brought to bear upon any juror; or (3) any threats of violence or violent acts were brought to bear on jurors, from any source, to reach a verdict. Minn. R. Evid. 606(b). A juror's second thoughts about a verdict after trial ordinarily do not allow a new trial. *State v. Fitzgerald*, 382 N.W.2d 892, 896 (Minn. App. 1986), *review denied* (Minn. Apr. 24, 1986).

Before a *Schwartz* hearing must be ordered, the defendant must establish a prima facie case of jury misconduct, evidence which "standing alone and unchallenged would warrant the conclusion of jury misconduct." *State v. Starkey*, 516 N.W.2d 918, 928 (Minn. 1994) (quotation omitted). It is not an abuse of discretion to deny a *Schwartz* hearing where the basis for seeking the hearing is "wholly speculative" and would intrude on the jury's deliberative process. *State v. Martin*, 614 N.W.2d 214, 226 (Minn. 2000). The moving party has the burden of demonstrating sufficient facts suggesting jury misconduct to justify a hearing. *Kelley*, 517 N.W.2d at 910.

Here, in the second letter from the juror, the accusations of juror misconduct are apparent. Not only is there a question of where the "compromise" jury instruction even came from—considering the court did not use the word "compromise" on the record—it is also clear from the letter that the "compromise" instruction may have affected the results of the vote. "Compromise" was written on the jury room whiteboard, the letter stated, and the remaining hold-out juror was repeatedly asked to change his vote. These facts were not "wholly speculative." If someone other than the court is giving instructions to the jury,

particularly if it is meant to speed up proceedings the day before Christmas Eve, that is a prima facie showing worthy of a *Schwartz* hearing.

Because Schwendeman established a prima facie showing of juror misconduct based on the juror's letter, the district court erred in not holding a *Schwartz* hearing. *Starkey*, 516 N.W.2d at 928.

In sum, because the district court's jury instructions did not require a unanimity instruction, and there is no other rational explanation for baby's unconsciousness and injuries in light of the circumstances proved, we affirm in part. But, because the district court erred in not holding a *Schwartz* hearing, we remand for the limited purpose of conducting a *Schwartz* hearing to determine what was said to the jury by whom, and if so, whether the instruction to compromise was prejudicial.

Affirmed in part, reversed in part, and remanded.