STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1046

State of Minnesota,
Respondent,

vs.

Ramon Heriberto Oscar Martinez Salazar,
Appellant.

Filed October 4, 2021
Affirmed
Smith, John, Judge[*]

Lyon County District Court
File No. 42-CR-19-582

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

Richard R. Maes, Lyon County Attorney, Carlotta Navarrette, Assistant County Attorney, Marshall, Minnesota (for respondent)

Jason A. Nielson, Andy Low, Herbert A. Igbanugo, Igbanugo Partners Int'l Law Firm, Minneapolis, Minnesota (for appellant)

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

Smith, John, Judge.

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[*]Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

SMITH, JOHN, Judge

We affirm appellant's conviction for malicious punishment of a child because appellant's acquittal of misdemeanor domestic assault was not inconsistent with his conviction of malicious punishment of a child. We also reject appellant's claim that evidence undermining witness credibility should have been presented by his attorney at trial because this court cannot consider evidence outside of the record on appeal.

FACTS

Appellant Ramon Heriberto Oscar Martinez Salazar punished a child (the child) under his care on April 30, 2019, for attending a school talent show after Salazar told her she could not go. The child later told her school resource officer about the incident and she filed a report which was further investigated by a child-protection social worker and police officer. Salazar was charged with gross misdemeanor malicious punishment of a child and misdemeanor domestic assault. A jury heard Salazar's case, during which several witnesses described slightly varied versions of events.

At trial, the child testified that Salazar punished her for going to the talent show by making her squat on her tiptoes while holding a ladder above her head. She said he sat on his bed watching her, with a belt in his hands, and told her that every time she stood up straight, he would hit her with the belt on her back. She said that Salazar made her hold the position for thirty minutes, but she was unable to sustain the posture for that long and, when she stood up, he hit her with his belt on her back, cheek, and arm. She cried throughout the incident and asked Salazar to stop.

The school resource officer testified that on May 2, 2019, the child came to her office and reported that Salazar had forced her to hold a squat while on tiptoes with a stool above her head for an hour, and whenever she got tired, he hit her with a belt. The officer reported that the child did not show her any marks, and the officer did not observe any. The resource officer completed a police report and sent it to Southwest Health and Human Services (SHHS) to begin an investigation.

A child-protection social worker from SHHS testified that she conducted an interview with the child and then coordinated with law enforcement to interview Salazar. During the interview, Salazar confirmed that on April 30 he disciplined the child by "having her do chino," which is what he called the position of squatting while holding a step ladder above one's head. The social worker said that during the interview Salazar changed his description of how long he made the child hold the position. He said that typically he had her do it for ten to fifteen minutes, but sometimes he would tell her she had to do it for thirty to forty-five minutes, and on April 30 she was only able to do it for eight minutes. Salazar also told the social worker that he would "tap" the child with his belt when she tried to stand up. The social worker testified that Salazar told her he was frustrated with the child and didn't know why he had to care for her because she was not his blood relation.

The police officer who interviewed Salazar together with the social worker testified that Salazar described April 30 as a very hard day and told the officer that he had made the child "do chino" for fifteen minutes. The officer also testified that Salazar said that if the child tried to straighten her legs while doing the chino, he would "tap her with the belt"

and tell her to squat again. The state entered into evidence the belt that the officer testified Salazar said he had used to tap the child. On cross-examination, the officer clarified that Salazar said the child had stayed in the bent knee position for ten minutes and then later, an additional eight minutes.

Salazar's wife testified that when she returned home the night of April 30, the child was already in her room, and that she did not notice any visible marks on the child the next morning when she saw her. His wife said the child told her that morning that Salazar was upset with her and she was grounded, but the wife didn't remember the child reporting that Salazar made her do the chino.

Salazar testified that on the morning of April 30 he discovered the child's room was messy and told her to clean it after school. He said she yelled at him in response and so he directed her to come directly home after school. He said that when he returned home from work the child's room was still a mess and so he made her do the chino. He showed her how to do it because, he testified, he had done it before as a joke, but had never made her do it as punishment. Salazar said that when he told the child to do the chino, she didn't do the full chino position at first and was mocking him. Salazar said he had retrieved his belt, but only used it to motion and tap on the child to indicate that she needed to go into a deeper squat. He said he never hit the child with his belt. He said that she was mocking him for the first eight minutes that he had described to the officers, and not really doing the squat, and that she then only did the actual chino position for about three minutes. Salazar testified that he was upset while talking to the officer because he felt frustrated that he and his wife

were trying to help the child but that she had "a lot of problems" and other punishments had not worked.

The jury returned a verdict finding Salazar guilty of malicious punishment of a child but not guilty of domestic assault. Salazar now appeals, arguing that the district court erred by allowing the jury to find Salazar guilty of malicious punishment while also acquitting Salazar of domestic assault, and arguing that the district court should have considered extra-record evidence regarding the child's credibility.

DECISION

I. The district court did not err by allowing the jury to find Salazar guilty of malicious punishment of a child and acquitting Salazar of domestic assault.

Salazar argues that because the jury acquitted him of domestic assault, then it is legally impossible for the jury to have found him guilty of malicious punishment of a child. Salazar argues that (1) if the jury believed facts sufficient to convict him of malicious punishment, then he would have to have been convicted of misdemeanor domestic assault, and because he wasn't, the jury reached a legally inconsistent verdict; (2) because the jury acquitted Salazar of domestic assault, the jury must have believed his description of the punishment and therefore he should be acquitted because he did not inflict any bodily harm; and (3) to acquit Salazar of domestic assault, the jury must have believed Salazar's affirmative defense that he was exercising his lawful authority to restrain or correct the child.

Salazar argues that the statutes establishing each crime are sufficiently similar that it is impossible for the jury to have convicted appellant of one and not the other. This court

reviews questions of law, and specifically questions of statutory interpretation, de novo. *State v. Defatte*, 928 N.W.2d 338, 340 (Minn. 2019); *State v. Dorn*, 887 N.W.2d 826, 830 (Minn. 2016). "If a jury renders legally inconsistent verdicts, reversal is warranted." *State v. Crowsbreast*, 629 N.W.2d 433, 440 (Minn. 2001). "Verdicts are legally inconsistent if proof of the elements of one offense negates a necessary element of another offense." *Id.* However, the Minnesota Supreme Court has held that "a defendant is not entitled to a new trial if the verdicts returned are logically inconsistent" when the defendant has been convicted of one offense and acquitted of another. *State v. Leake*, 699 N.W.2d 312, 326 (Minn. 2005). Even if there are some "logical inconsistencies . . . between a verdict" of acquittal on one count and a verdict of guilty on another count, we will not find that the verdicts are legally inconsistent and the defendant is not entitled to a new trial. *Id.*

Salazar was convicted of a gross misdemeanor for the malicious punishment of a child under Minn. Stat. § 609.377 (2018), which states:

> Subdivision 1. Malicious punishment. 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 circumstances is guilty of malicious punishment of a child and may be sentenced as provided in subdivisions 2 to 6.
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> Subd. 2. Gross misdemeanor. If the punishment results in less than substantial bodily harm, the person may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than $3,000, or both.

Thus, to be convicted of gross misdemeanor malicious punishment, the defendant must be (1) a parent, legal guardian or caretaker who (2) by intentional act (3) evidences

(a) unreasonable force *or* (b) cruel discipline that is excessive under the circumstances. Such a punishment is a gross misdemeanor if it results in less than substantial bodily harm. "'Substantial bodily harm' means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or which causes a fracture of any bodily member." Minn. Stat. § 609.02, subd. 7a (2018). We have interpreted "cruel" in Minn. Stat. § 609.377 to mean "causing or characterized by severe pain, suffering, or distress." *State v. Broten*, 836 N.W.2d 573, 575 (Minn. App. 2013), *rev. denied* (Minn. Nov. 12, 2013). In other words, we have held that malicious punishment of a child that involves cruel discipline causing only emotional harm will fall under the malicious punishment statute as a gross misdemeanor. *Id.* at 577.

The jury acquitted Salazar of misdemeanor domestic assault, under Minn. Stat. § 609.2242, subd. 1 (2018), which states:

> Whoever does any of the following against a family or household member as defined in section 518B.01, subdivision 2, commits an assault and is guilty of a misdemeanor: (1) commits an act with intent to cause fear in another of immediate bodily harm or death; or (2) intentionally inflicts or attempts to inflict bodily harm upon another.

To be guilty of misdemeanor domestic assault the defendant must (1)(a) commit an act with intent, (b) to cause fear in another of immediate bodily harm or death, *or* (2)(a) intentionally inflict or attempt to inflict (b) bodily harm upon another. In contrast to the malicious punishment statute, misdemeanor domestic assault *requires* the defendant to either have caused fear of immediate bodily harm or death, *or* the infliction or attempt to

inflict bodily harm. In other words, bodily harm or the fear of bodily harm are necessary for a conviction of misdemeanor domestic assault.

Salazar essentially argues that the jury had to have either believed his version of the story, that the punishment was brief, harmless, and there was no bodily injury, or the state's version, that the punishment was lengthy, emotionally cruel, and the child sustained injury. We do not agree that there are logical inconsistencies between the two verdicts, and even if we did, Salazar fails to establish anything beyond logical inconsistencies, and he is therefore not entitled to a new trial under *Leake*. 699 N.W.2d at 326.

II. Salazar may not raise extra-record evidence to undermine a witness's credibility before this court.

Salazar contends that evidence of the child's credibility was not presented at trial. Salazar has presented extra-record information, including emails allegedly detailing the child's troubled behavior, to our court.[1] This is patently outside the scope of our review, as the record on appeal consists only of "[t]he documents filed in the trial court, the exhibits, and the transcript of the proceedings, if any." Minn. R. Civ. App. P. 110.01. The

[1] Salazar's argument in his reply brief that the district court did not permit his counsel at trial "to fully investigate the credibility of the alleged victim's claims" is not supported by legal authority on appeal. *See State v. Andersen*, 871 N.W.2d 910, 915 (Minn. 2015) ("An assignment of error based on mere assertion and not supported by any argument or authorities in appellant's brief is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection" (quotation omitted)); *see also Schoepke v. Alexander Smith & Sons Carpet Co.*, 187 N.W.2d 133, 135 (Minn. 1971). Further, issues raised for the first time in an appellant's reply brief in a criminal appeal, having not been raised in the respondent's brief, are "not proper subject matter for [the] appellant's reply brief," and they may be deemed "waived" and be "stricken" by an appellate court. *State v. Yang*, 774 N.W.2d 539, 558 (Minn. 2009) (applying Minn. R. Civ. App. P. 128.02, subd. 3).

extra-record evidence that Salazar has submitted to this court was not considered in the disposition of this appeal and must be stricken. *Mitterhauser v. Mitterhauser*, 399 N.W.2d 664, 667 (Minn. App. 1987).

Affirmed.