STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1874

State of Minnesota,
Respondent,

vs.

Robert Lee Heck, III,
Appellant.

Filed October 24, 2011
Affirmed
Larkin, Judge

Olmsted County District Court
File No. 55-CR-07-1948

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

Mark A. Ostrem, Olmsted County Attorney, Julie L. Germann, Assistant County Attorney, Rochester, Minnesota (for respondent)

Daniel S. Adkins, The Adkins Law Group, Chartered, Minneapolis, Minnesota; and

Mark J. Miller, Mark J. Miller, P.A., Minneapolis, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Bjorkman, Judge; and Collins, Judge.*

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

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

LARKIN, Judge

Appellant challenges his conviction of first-degree assault, arguing that the district court erred in admitting relationship evidence under Minn. Stat. § 634.20 (2006) and that the evidence is insufficient to sustain his conviction. Because the district court did not abuse its discretion in admitting relationship evidence and the evidence sustains the conviction, we affirm.

FACTS

On November 9, 2006, V.J. (mother) gave birth to conjoined twins, J.J. and Ja.J., at St. Mary's Hospital in Rochester. Appellant Robert Heck is the father of the twins. Appellant and mother are also the parents of Jy.J. Twins J.J. and Ja.J. were born two months prematurely and were surgically separated immediately after birth. J.J. was discharged to his parents on January 3, 2007. Ja.J. remained in the neonatal intensive care unit (NICU).

On January 4, mother brought J.J. to the Mayo Clinic for his well-baby check. Dr. Allison Hettinger, M.D., observed that J.J. was alert but not fussy and that he had no bruises or other noticeable injuries. J.J.'s examination results were normal, and Dr. Hettinger concluded that he was healthy. Following the exam, J.J. received four scheduled vaccinations, two in each leg. Mother and appellant took J.J. back to their home in Mankato on January 5. Mother worked at her job for a few hours on January 6, 7, and 8, leaving appellant to care for J.J. and Jy.J.

The family returned to Rochester on January 8 to visit Ja.J. in the NICU and stayed at the Ronald McDonald House. Appellant and mother took turns watching J.J. and Jy.J. at the Ronald McDonald House and visiting Ja.J. at the hospital. During their stay at the Ronald McDonald House, another resident, S.M., heard a small child whimpering in appellant's room and a male voice telling a child to "stop it" and "quit it." S.M. would later testify at appellant's criminal trial that the voice became increasingly frustrated and louder and that the angry response to the whimpering would last for hours. S.M. stated that it sounded like "somebody was losing control of themselves," and that she considered calling the front desk to report the behavior. Although S.M. did not see the occupants of the room, she identified the room by number, and it was the room that appellant and his family occupied.

On January 9, appellant visited Ja.J. in the NICU. During his visit, one of the nurses who had cared for J.J. asked about him. The nurse also asked appellant to bring J.J. to the NICU for a visit. Appellant told the nurse that he would bring J.J. to the NICU later that afternoon. Appellant also told the nurse that J.J. had bruising on his legs from his immunizations and that J.J. had scratches on his face from his fingernails. The nurse advised appellant to call the doctor. Appellant did not bring J.J. to the NICU as he said he would.

On January 10, appellant again visited Ja.J. in the NICU. During this visit, appellant again told a nurse that J.J. had bruising and pains in his legs. He asked the nurse whether J.J.'s pain could be from the immunizations provided at the well-baby

check or from a car-seat strap. The nurse told appellant that neither was a likely source of the reported leg pain.

On January 11, appellant and mother brought J.J. to the emergency room of St. Mary's Hospital. The parents told nurse L.S. that they were concerned because J.J.'s legs had been very swollen since he received his immunizations one week earlier. L.S. examined J.J. and noticed that his legs were extremely swollen and hard to the touch. L.S. also observed that J.J.'s thighs were a purplish color. Appellant and mother were unable to explain J.J.'s condition, although they admitted that either or both of them had been J.J.'s only caregiver since his discharge on January 3. Dr. Robin Lloyd, M.D., also examined J.J. The parents told Dr. Lloyd that J.J.'s discomfort was so significant that they "were pushing down the mattress of the bed underneath him to change the diaper, so slipping it under so as not to move him."

X-rays revealed marked soft tissue swelling and multiple fractures in J.J.'s legs. Dr. Kristen Thomas, M.D. reviewed the x-rays and concluded that the fractures had occurred on two separate occasions, reasoning that some of the fractures were at later stages of healing. Dr. Thomas concluded that the findings were "highly suggestive of non-accidental trauma," and ordered a skeletal survey of J.J.'s entire body. A CT scan of J.J.'s chest revealed that some of the infant's ribs were broken and the presence of other fractures with bending of the bones. Additional x-rays revealed fractures in J.J.'s arms. A genetic consultation indicated that there was no evidence of a genetic disorder that would explain J.J.'s fractures.

When questioned at the hospital regarding J.J.'s injuries, appellant and mother did not offer any explanation, and they showed little emotional response when informed of the severity of his injuries. Both maintained that J.J. had not been dropped, and appellant suggested that J.J.'s car seat straps may have caused the injuries. But in a later telephone call to mother, appellant reported that on one occasion, J.J. rolled out of his arms and fell to the floor during a feeding. Dr. Anthony Stans, M.D., testified that J.J.'s multiple fractures in various stages of healing could not be explained by a single drop during feeding or by pressure from his car seat straps.

The state charged appellant with first-degree assault under Minn. Stat. §§ 609.221, subd. 1, .05 (2006) and aiding an offender (i.e., obstructing an investigation or prosecution) under Minn. Stat. §§ 609.221, subd. 1, .495 (2006). Prior to trial, the state moved for admission of prior-relationship evidence under Minn. Stat. § 634.20. The district court denied the state's motion and subsequently dismissed the charges for lack of probable cause. *State v. Heck*, No. A08-497, 2008 WL 4224751, at *2 (Minn. App. Sept. 16, 2008), *review denied* (Minn. Nov. 18, 2008). The state appealed the district court's pretrial ruling, and this court reversed, holding that the district court erred "by interpreting the relationship-evidence statute to permit only evidence of incidents against the current victim or current household and family members." *Id.* at *4. This court observed that "[i]t appears that all of the incidents except [one] involved family or household members as defined by the statute." *Id.* With regard to the element of "similar conduct," this court concluded that

> [m]uch of the relationship evidence that the state sought to introduce involved domestic abuse as defined by statute. The state relies on those incidents to argue that [appellant] is easily frustrated and that his behavior quickly escalates to threats of violence and actual violence that includes destruction of property and infliction of injury. This circumstantial evidence is relevant to the state's case to show that [appellant], rather than [mother], injured [J.J.]

Id. This court remanded the case to the district court, with instructions to reevaluate the admissibility of the evidence and to balance the probative value of the proffered evidence against any prejudicial effect. *Id.* at *4-5.

On remand, the district court heard arguments regarding the state's motion to admit the following relationship evidence: that appellant assaulted his ex-girlfriend, H.L.; that appellant threatened to kill his grandparents; and that appellant's ex-girlfriend A.A. alleged that appellant had abused her minor children, including evidence that A.A.'s three-month-old child had sustained purposeful burns to the hands and that her 16-month-old child had sustained an uncommon fracture. The state also moved to admit evidence of appellant's prior convictions, including a conviction of violation of an order for protection against his grandparents, a conviction of disorderly conduct against his grandparents, and a conviction of fifth-degree assault against his ex-girlfriend, H.L.

The district court concluded that the proffered evidence was admissible under Minn. Stat. § 634.20. The district court reasoned that each of the incidents involved family members or household members and involved similar conduct. The district court also reasoned that the evidence was relevant to show that appellant, and not mother, injured J.J. Finally, the district court determined that the probative value of the evidence

outweighed any danger of unfair prejudice,[1] because the case would be tried to the bench instead of a jury.[2]

A court trial ensued, at which the district court heard five days of testimony. After hearing the evidence, the district court found appellant guilty of first-degree assault. The district court found that "the overwhelming credible medical evidence demonstrates that the fractures were non-accidental, were not the result of the immunizations or any abnormality of [J.J.'s] bones, could not have been caused by the car seat, [and] required a significant amount of force to inflict." The district court further found that J.J. sustained his injuries on two separate occasions between January 4 and January 11, while he was in appellant's care. The district court also made numerous supportive findings regarding the relationship evidence, appellant's indifference to J.J. during his hospital stay, appellant's failure to seek medical assistance for J.J., appellant's failure to show an appropriate emotional response when advised of the extent of J.J.'s injuries, the report of "a male that was out of control and yelling at or about a child" in appellant's room at the Ronald McDonald House, and appellant's temperament. At the sentencing hearing, the district court granted the state's motion for an upward sentencing departure and sentenced appellant to an executed prison sentence of 171 months. This appeal follows.

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[1] The district court actually stated that "the probative value of that evidence is outweighed by the danger of unfair prejudice." But given the context of this statement and the district court's ultimate ruling, it is clear that the district court misspoke and meant to say that the probative value was *not* outweighed by the danger of unfair prejudice.

[2] Appellant waived his right to a jury trial and his right to a jury determination on aggravating sentencing factors.

D E C I S I O N

I.

Appellant claims that the district court erred in admitting relationship evidence under Minn. Stat. § 634.20. We review the district court's evidentiary ruling for an abuse of discretion. *See State v. Matthews*, 779 N.W.2d 543, 553 (Minn. 2010).

Minn. Stat. § 634.20 provides that

> [e]vidence of similar conduct by the accused against the victim of domestic abuse, 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. "Similar conduct" includes, but is not limited to, evidence of domestic abuse . . . . "Domestic abuse" and "family or household members" have the meanings given under section 518B.01, subdivision 2.

Evidence of prior domestic abuse by the accused against the alleged victim "may be offered to illuminate the history of the relationship, that is, to put the crime charged in the context of the relationship between the two." *State v. McCoy*, 682 N.W.2d 153, 159 (Minn. 2004). Section 634.20 also permits the state to introduce evidence that the accused engaged in similar conduct against other family or household members. Such evidence puts the alleged offense in the context of the defendant's relationships with those family and household members. *See State v. Valentine*, 787 N.W.2d 630, 637 (Minn. App. 2010) ("Obviously, evidence showing how a defendant treats his family or household members . . . sheds light on how the defendant interacts with those close to him, which in turn suggests how the defendant may interact with the victim."), *review*

denied (Minn. Nov. 16, 2010). Relationship evidence is treated differently than other "collateral" *Spreigl* evidence partly because "[d]omestic abuse is unique in that it typically occurs in the privacy of the home, it frequently involves a pattern of activity that may escalate over time, and it is often underreported." *McCoy*, 682 N.W.2d at 161. Thus, the stringent procedural requirements of Minn. R. Evid. 404(b) do not apply to relationship evidence admitted under section 634.20. *State v. Meyer*, 749 N.W.2d 844, 849 (Minn. App. 2008).

Section 634.20 "specifically provides for the admission of evidence of 'similar conduct' by the accused unless it fails to meet a balancing test that considers whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice." *McCoy*, 682 N.W.2d at 159. Appellant argues that the district court failed to adequately assess whether the probative value of the relationship evidence was outweighed by the danger of unfair prejudice. We disagree. After stating that it would be able to compartmentalize the evidence and use the evidence only for its intended purpose, the district court concluded that the evidence was admissible. The district court explained that the probative value of the evidence was strong and that the evidence was "relevant to the State's case to show that [appellant], rather than [mother], injured [J.J.]." The district court further explained that the probative value of the evidence outweighed the danger of unfair prejudice, "particularly given that this is a court trial, and the Court will keep all of this prior conduct in its proper perspective."

The type of trial—jury versus bench—is a proper consideration when determining the prejudicial effect of proffered evidence. *See State v. Caulfield*, 722 N.W.2d 304, 315

n.8 (Minn. 2006) ("We acknowledge that evidentiary errors may be less prejudicial in a bench trial than in a jury trial."); *Irwin v. State*, 400 N.W.2d 783, 786 (Minn. App. 1987) (affirming postconviction court's determination that the prejudicial effect of *Spreigl* evidence was reduced due to the nature of a bench trial). And the district court properly reasoned that the evidence was relevant. *See McCoy*, 682 N.W.2d at 159 ("The statute is unambiguous—evidence of similar conduct in domestic abuse trials is relevant and admissible unless it should be excluded for the reasons listed.").

Moreover, as the district court's detailed factual findings show, the relationship evidence was not the sole or primary reason that the district court concluded that appellant inflicted J.J.'s injuries. Although the district court cited the relationship evidence and appellant's history of violent behavior as support for that conclusion, it also relied on the following evidence: appellant's indifference to the emotional and physical needs of J.J., appellant's failure to seek medical attention for J.J.'s legs prior to January 11, appellant's lack of surprise or other emotional response when J.J.'s condition was revealed, appellant's statements during the investigation, and S.M.'s testimony regarding an angry male yelling at a child in appellant's room at the Ronald McDonald House. Thus, the relationship evidence was only a small portion of the evidence against appellant, which provided context for the evidence as a whole. On this record, the district court did not abuse its discretion in concluding that the probative value of the relationship evidence was not substantially outweighed by the danger of unfair prejudice. *See State v. Bell*, 719 N.W.2d 635, 641 (Minn. 2006) (explaining that for purposes of section 634.20, unfair prejudice "is not merely damaging evidence, [or] even severely damaging

evidence; rather, unfair prejudice is evidence that persuades by illegitimate means, giving one party an unfair advantage").

Appellant also contends that the district court admitted and utilized the relationship evidence for an improper purpose. That contention finds some support in the district court's comments, which might suggest that the evidence was used for an improper purpose. But the record as a whole demonstrates that the district court was on guard against improper use of the evidence and used the relationship evidence for only proper purposes. For example, during trial, the district court stated that

> the problem with this kind of evidence . . . is it tends to give the impression that this person acted in conformity with that behavioral trait or that personality trait that they have. As I indicated at the beginning of the trial, I'm able to compartmentalize that and kind of balance that, I believe, in an appropriate way with the other evidence that's coming in relative to the alleged abuse of the infant.

We also observe that relationship evidence is treated differently than other collateral *Spreigl* evidence partly because "domestic abusers often exert control over their victims, which undermines the ability of the criminal justice system to prosecute cases effectively." *McCoy*, 682 N.W.2d at 161. The difficulties that can arise in prosecuting domestic abuse crimes were illustrated in *McCoy*:

> The victim, respondent's wife, testified that she could not remember what she had told police regarding respondent's alleged assault. No one else was able to provide eyewitness testimony regarding the events that transpired. The district court's ruling allowing the admission of evidence of respondent's alleged prior assault of his wife allowed the state to present evidence that, if believed by the jury, could have assisted the jury by providing a context with which it could

> better judge the credibility of the principals in the relationship.

Id.

Similar proof problems were present in this case. The victim was an infant. There were no eyewitnesses to the events that caused the infant's injuries. Appellant testified that he did not inflict the injuries and could not account for the cause of the injuries. But the testimony was conflicting. Contrary to the observations of the medical staff at St. Mary's, who testified that appellant was distant toward J.J. and seemed frustrated with his children, appellant testified that he participated in J.J.'s care and that he did not become easily frustrated with his children. He also denied that he ever yelled at J.J. at the Ronald McDonald House, testifying that he "would never raise his voice." Finally, appellant denied ever handling J.J. in a manner that would cause his extensive injuries. The district court's ruling allowing admission of appellant's alleged and proven threatening and assaultive behavior towards other family or household members provided a context within which the court, as the fact-finder, could better judge appellant's credibility and reconcile conflicting testimony. This was a proper use of relationship evidence. *See id.*

In sum, the district court properly balanced the probative value of the relationship evidence against the danger of unfair prejudice and did not abuse its discretion in concluding that the evidence was admissible under section 634.20. And because the record reflects that the district court properly utilized the relationship evidence to provide

context for the state's circumstantial evidence, we find no abuse of discretion necessitating reversal.

II.

Appellant argues that the evidence is insufficient to support his conviction of first-degree assault. When considering a claim of insufficient evidence, this court's review is "limited to a painstaking analysis of the record to determine whether the evidence, when viewed in [the] light most favorable to the conviction, [is] sufficient" to sustain the verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). This court must assume that "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). The reviewing court will not disturb the verdict if the fact-finder, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004). "We review criminal bench trials the same as jury trials when determining whether the evidence is sufficient to sustain convictions." *State v. Hough*, 585 N.W.2d 393, 396 (Minn. 1998).

"It has been recognized that it is difficult to establish the facts in a prosecution for assaulting an infant because of the natural lack of eyewitnesses. Hence, resort is properly made to circumstantial evidence." *State v. Rahier*, 389 N.W.2d 213, 215 (Minn. App. 1986), *review denied* (Minn. Aug. 20, 1986). "Convictions based on circumstantial evidence alone may be upheld . . . [but] convictions based on circumstantial evidence warrant particular scrutiny." *State v. Ferguson*, 581 N.W.2d 824, 836 (Minn. 1998)

(quotation omitted). "A conviction based on circumstantial evidence may stand only where the facts and circumstances disclosed by the circumstantial evidence form a complete chain which, in light of the evidence as a whole, leads so directly to the guilt of the accused as to exclude, beyond a reasonable doubt, any reasonable inference other than that of guilt." *State v. Jones*, 516 N.W.2d 545, 549 (Minn. 1994) (quotation omitted). "To successfully challenge a conviction based upon circumstantial evidence, a defendant must point to evidence in the record that is consistent with a rational theory other than his guilt. However, possibilities of innocence do not require reversal of a jury verdict so long as the evidence taken as a whole makes such theories seem unreasonable." *State v. Stein*, 776 N.W.2d 709, 714 (Minn. 2010) (quotation omitted).

To convict a defendant of first-degree assault, the state must prove that the defendant intentionally inflicted great bodily harm on another person. Minn. Stat. §§ 609.02, subd. 10(2); .221, subd. 1 (2006). Appellant argues that the circumstantial evidence is insufficient to prove that he is the one who inflicted J.J.'s injuries. But the circumstantial evidence shows that J.J. sustained his injuries at a time when appellant was one of his two caretakers. The state also introduced testimony that appellant was frustrated with his children while at the hospital, that he did not seek medical help for J.J. even though he was aware of J.J.'s leg injuries, that he asked medical staff—prior to seeking medical care—whether the immunizations or a car seat may have caused J.J.'s injuries, that he did not express surprise or shock when confronted regarding the extent of J.J.'s injuries, that he provided inconsistent statements regarding whether he had dropped J.J., and that a male was heard yelling at a child, to the point of losing control, from

within appellant's room at the Ronald McDonald House. The state also introduced relationship evidence that put the circumstantial evidence in the context of appellant's history of violence with other family or household members. Viewed in a light most favorable to the verdict, the evidence is sufficient to sustain the conviction.

Notably, appellant does not point to "evidence in the record that is consistent with a rational theory other than his guilt." *Stein*, 776 N.W.2d at 714. Appellant also fails to consider that the district court assessed his testimony at trial—including his denial that he inflicted J.J.'s injuries—and found the testimony to be "vague, deceptive and inconsistent." The district court specifically found that appellant's "denial of causing his son's injuries was not believable." This court defers to the fact-finder's assessment of credibility, including credibility determinations regarding claims of innocence. *See State v. Asfeld*, 662 N.W.2d 534, 546 (Minn. 2003) (affirming defendant's conviction based on circumstantial evidence after assuming that "the jury disbelieved [the defendant]'s claim that he did not murder [the child]," where the defendant argued that the circumstantial evidence was equally consistent with his guilt and the guilt of the mother, and he professed his innocence at trial under oath). The circumstantial evidence, in conjunction with the district court's rejection of appellant's testimony denying that he caused J.J.'s injuries, is sufficient to prove, beyond a reasonable doubt, that appellant inflicted J.J.'s injuries.

Appellant also contends that the state failed to prove that he intentionally caused J.J.'s injuries. "'Intentionally' means that the actor either has a purpose to do the thing or cause the result specified or believes that the act performed by the actor, if successful,

will cause that result." Minn. Stat. § 609.02, subd. 9(3) (2006). The testimony at trial showed that J.J. suffered multiple fractures between January 4 and January 12. Dr. Thomas testified that the injuries occurred on two separate occasions, basing the opinion on the difference in healing progression among the fractures. Dr. Thomas testified that J.J.'s injuries were "highly suggestive of non-accidental trauma," and Dr. Stans testified that the extent of J.J.'s injuries indicated that a fall or other accidental cause was highly unlikely. Additional testimony suggested that J.J.'s femur fracture would require "significant force" such as a car accident or "someone yanking with real force and snapping the bone," and that his rib fractures would require "extreme squeezing of the chest for all of the ribs to break." Appellant acknowledges that the evidence is devoid of any suggestion that J.J.'s injuries were accidentally inflicted. In sum, the evidence shows, beyond a reasonable doubt, that J.J.'s injuries were intentionally inflicted.

Lastly, appellant argues that the state failed to prove the specific date of J.J.'s injuries, as well as the county in which the injuries occurred. "[T]he precise date is an essential element of the crime only where the act done is unlawful during certain seasons, on certain days or at certain hours of the day[.]" *State v. Becker*, 351 N.W.2d 923, 927 (Minn. 1984). The date of the offense is not an essential element of first-degree assault. *See* Minn. Stat. § 609.221, subd. 1. Therefore, the state was not required to prove that J.J.'s assault occurred on a specific date in order for appellant to be convicted of first-degree assault. But we observe that the evidence shows that the injuries were inflicted during the time period alleged in the criminal complaint, January 4 and January 12. The

trial testimony showed that J.J. was healthy when he left the hospital following his well-baby check on January 4 and that he had multiple fractures when appellant and mother brought him into the emergency room on January 11.

But "the state must prove beyond a reasonable doubt that the charged offense was committed in the county where the case is being tried." *State v. Pierce*, 792 N.W.2d 83, 85 (Minn. App. 2010). Because a criminal defendant has a constitutional right to be prosecuted in the county where the crime was committed, the venue of an offense has been "codified" as an essential element of each crime. *Id.* (citing Minn. Const. art. I, § 6). In cases involving child abuse, the crime may be prosecuted in either "the county where the alleged abuse occurred or the county where the child was found." Minn. Stat. § 627.15 (2010); *see* Minn. R. Crim. P. 24.01 ("The case must be tried in the county where the offense was committed unless these rules direct otherwise."); Minn. R. Crim. P. 24.02, subd. 18 (providing an exception to rule 24.01 in cases of child abuse); *see also State v. Krejci*, 458 N.W.2d 407, 412 (Minn. 1990) (holding that the special venue statute is consistent with Minn. Const. art. I, § 6).

The state proved beyond a reasonable doubt that J.J.'s injuries were discovered in Rochester, which is located in Olmsted County where the case was tried. The location where a child's abuse is discovered by authorities is the location where the child is "found" under the venue statute. *See Krejci*, 458 N.W.2d at 410 (stating that the child was "found" in Hennepin County because that is where authorities discovered the child's abuse when the child was brought to a hospital, even though the abuse occurred in a different county). Because the evidence shows, beyond a reasonable doubt, that J.J.'s

abuse was discovered at St. Mary's Hospital in Olmsted County, appellant's argument that the state failed to prove venue of the offense is without merit.

In conclusion, because the district court, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably have concluded that appellant was guilty of first-degree assault, we will not disturb the verdict.

Affirmed.

Dated:

Judge Michelle A. Larkin