STATE OF MINNESOTA
IN COURT OF APPEALS
A10-649

State of Minnesota,
Respondent,

vs.

Harmony Shavon Newman,
Appellant.

Filed June 6, 2011
Affirmed
Peterson, Judge

Hennepin County District Court
File No. 27-CR-09-8498

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

Michael O. Freeman, Hennepin County Attorney, Cheri A. Townsend, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Peterson, Judge; and Harten, 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

PETERSON, Judge

In this appeal from two convictions of second-degree manslaughter, child neglect and child endangerment, resulting from the death of a 22-month-old child who was under appellant Harmony Shavon Newman's care at a daycare facility, appellant argues that (1) the evidence was insufficient to prove causation, (2) the jury instruction on causation was erroneous because it did not state that the jury had to find that appellant's act of neglect or endangerment was the direct or proximate cause of the child's death, and (3) the district court abused its discretion by denying her motion for a downward dispositional departure without deliberately considering the *Trog* factors and applying them to appellant's situation. We affirm.

FACTS

Appellant worked at a daycare facility owned and operated by Doris Meeks, appellant's mother and co-defendant. At 10:57 a.m. on August 28, 2008, police responded to a 911 call reporting that a child at the daycare was not breathing. The child, D.H., who was 22 months old, had been found in a car seat in a playpen with the car-seat strap buckled across his throat. D.H. did not have a pulse when police arrived, and he died two days later.

An autopsy showed that D.H. died from the deprivation of oxygen to the brain, attributed to chest compression from the car-seat strap. As part of the autopsy, the doctor placed D.H. in the car seat to determine how he fit in it with the strap buckled. The strap was extremely tight, and it took effort for the doctor to connect the buckle. When

connected, the buckle was so tight that D.H.'s flesh pushed forward slightly over the buckle.

A grand jury indicted appellant on three counts of second-degree manslaughter, child neglect in violation of Minn. Stat. §§ 609.205(5), .378, subd. 1(a)(1) (2008); child endangerment in violation of Minn. Stat. §§ 609.205(5), .378, subd. 1(b)(1) (2008); and culpable negligence in violation of Minn. Stat. § 609.205(1) (2008). The case was tried to a jury.

Meeks testified at trial that on August 28, appellant brought D.H. downstairs to a crib area in the basement for a nap at about 9:30 a.m. The crib area contained four playpens, one of which also contained a car seat. Meeks testified that she checked on D.H. at 10:00 or 10:20 a.m., and he was sleeping in a playpen. Meeks then left to do an errand. Meeks admitted that D.H. had climbed out of the playpens a couple of times in the months before his death. Meeks denied that D.H. took naps in the car seat, claiming that he sometimes sat in it without being strapped in while watching a movie or television.

Appellant's statements to police were consistent with Meeks's testimony. Appellant stated that she put D.H. down for a nap in a playpen in the basement at about 9:30 a.m., and when she checked on him at 10:55 a.m., she found him in another playpen, strapped into a car seat with the clip connected and the strap across his throat. Appellant admitted that D.H. had climbed out of one playpen and into another on previous occasions.

The testimony of J.A., a child who was at the daycare, conflicted with Meeks's and appellant's version of events. J.A. testified that Meeks told him to bring D.H. downstairs to the basement for a nap and buckle him into the car seat. J.A. was unable to buckle D.H. into the car seat but left him sitting in it. J.A. testified that at about 11:00 a.m., appellant told him and two other children to go and get the infants for lunch. The children found D.H. with the car-seat strap buckled underneath his neck, and he was drooling and would not wake up.

Including D.H., there were 23 children at the daycare on August 28. The daycare's license limited it to a maximum of 12 children when only one adult was present and 14 children when two adults were present. Daycare rules required a provider to be within sight or hearing of all infants and toddlers in the provider's care at all times. Audio or video monitoring equipment could be used to meet the requirement but was not in use at the daycare.

Appellant and Meeks were both convicted of two counts of second-degree manslaughter, child neglect and child endangerment, and acquitted of one count of second-degree manslaughter, culpable negligence. Appellant was sentenced to an executed term of 48 months in prison. The district court denied appellant's and Meeks's motions for judgments of acquittal or a new trial. This appeal followed.[1]

[1] This court affirmed Meeks's conviction in *State v. Meeks*, No. A10-767 (Minn. App. May 9, 2011).

D E C I S I O N

I.

In 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 allow the jurors to reach the verdict that they reached. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume that the jury believed the state's witnesses and disbelieved any contrary evidence. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). Accordingly, we will not disturb the verdict if the jury, 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).

Minn. Stat. § 609.378, subd. 1 (2008), defines the crimes of child neglect and endangerment as follows:

> (a)(1) A parent, legal guardian, or caretaker who willfully deprives a child of necessary food, clothing, shelter, health care, or supervision appropriate to the child's age, when the parent, guardian, or caretaker is reasonably able to make the necessary provisions and the deprivation harms or is likely to substantially harm the child's physical, mental, or emotional health is guilty of neglect of a child . . . .
>
> (b) A parent, legal guardian, or caretaker who endangers the child's person or health by:
>
> (1) intentionally or recklessly causing or permitting a child to be placed in a situation likely to substantially harm the child's physical, mental, or emotional health or cause the child's death[.]

See also Minn. Stat. § 609.205(5) (stating that child neglect or endangerment that causes death is second-degree manslaughter).

In construing the intent element in Minn. Stat. § 609.378, subd. 1(a)(1), this court stated:

> The child-neglect statute criminalizes negligence. Our reading of the statute finds support in tort law, where the term willfully means an aggravated form of negligence. Willfully applies to conduct that is negligent, but that is so far from a proper state of mind that it is treated in many respects as if it were so intended. The most common meaning assigned to willfully in the tort context is that the actor has *intentionally* done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences.

State v. Cyrette, 636 N.W.2d 343, 348 (Minn. App. 2001) (quotations and citations omitted), *review denied*, (Minn. Feb. 19, 2002).

Appellant argues that the evidence was insufficient to support her convictions because J.A. testified that Meeks told him to put D.H. into the car seat and strap him in, and J.A.'s testimony does not implicate Newman. Regardless of who brought D.H. downstairs for a nap, appellant, as the only adult present at the daycare when he died, was responsible for his supervision. The regulations that limit the number of children at a daycare and require that infants and toddlers be within a provider's sight or hearing are designed to ensure the children's safety. By failing to adhere to those regulations, particularly when a 22-month-old child was known to have climbed out of playpens on previous occasions, appellant, as the only adult present at the time of D.H.'s death, acted

in an unreasonable manner in disregard of an obvious risk that was so great as to make it highly probable that harm would follow. We, therefore, conclude that the evidence was sufficient to prove the intent elements of child neglect and endangerment.

Appellant argues that the state failed to present evidence that the sleeping infants were not within appellant's hearing while she was upstairs. But J.A. testified that he brought D.H. downstairs to the basement for a nap and when he later discovered that he could not wake D.H., he went upstairs to tell appellant and found her in the living room watching television with the other kids. And a detective who searched the room where D.H. was found testified that there was no voice monitor or motion sensor or any other monitoring equipment in the room. This evidence is sufficient to permit the jury to conclude that the sleeping infants were not within appellant's hearing.

Appellant also argues that "the State did not introduce any evidence that [D.H.'s] placement in the basement while [appellant] was upstairs caused [D.H.'s] death because there is no evidence that if she had been nearer to him she would have heard him struggling to breathe and been able to intervene." The argument is not persuasive because appellant could neither see nor hear D.H. To sustain a second-degree-manslaughter conviction, the state must "prove beyond a reasonable doubt that defendant's acts were a proximate cause of the victim's death." *State v. Smith*, 264 Minn. 307, 318, 119 N.W.2d 838, 846 (1962) (quotation omitted). In the civil tort context, the supreme court has stated:

> [F]or a party's negligence to be the proximate cause of an injury the act must be one which the party ought, in the exercise of ordinary care, to have anticipated was likely to

> result in injury to others, . . . though he could not have anticipated the particular injury which did happen. There must also be a showing that the defendant's conduct was a substantial factor in bringing about the injury.

Lubbers v. Anderson, 539 N.W.2d 398, 401 (Minn. 1995) (quotations omitted); *see State v. Schaub*, 231 Minn. 512, 518-21, 44 N.W.2d 61, 64-66 (1950) (relying on civil cases addressing proximate cause in reviewing second-degree-manslaughter conviction).

Even though she could not have anticipated the specific harm that occurred, appellant, in the exercise of ordinary care, ought to have anticipated that leaving D.H. where she could not see or hear him was likely to result in injury. The jury could reasonably conclude that because appellant could neither see nor hear D.H., the intervention needed to prevent his death was delayed and that the delay was a substantial factor in causing D.H.'s death. The evidence was sufficient to support appellant's convictions.

II.

At trial, the state requested that the jury be instructed that "[c]ause means a substantial causal factor in bringing about the harm." Appellant's counsel objected, arguing that no instruction should be given because it would inappropriately incorporate the civil concept of causation, diluting the state's burden of proof. The district court found that causation was a legal concept, so a jury instruction would be appropriate. The instruction was given with all three counts of second-degree manslaughter. On appeal, appellant argues that the court's instruction was improper because it "did not convey the necessary causal link between the alleged neglect or endangerment and the death."

The state argues that appellant waived the issue of whether the causation instruction correctly stated the law because, at trial, appellant argued that no instruction should be given. But if a defendant challenges the jury instruction in a posttrial motion for a new trial claiming that "the instruction contains an error of fundamental law or controlling principle, a motion for a new trial adequately preserves the issue for appeal." *State v. Glowacki*, 630 N.W.2d 392, 398 (Minn. 2001) (quotation omitted). In that case, we determine whether the instructions were erroneous and, if so, whether the error was harmless. *Id.* at 402. Because the district court addressed whether the causation instruction correctly stated the law in denying appellant's motion for a new trial, the issue was adequately preserved for appeal.

"The district court has broad discretion in determining jury instructions and we will not reverse in the absence of abuse of discretion." *Hilligoss v. Cargill, Inc.*, 649 N.W.2d 142, 147 (Minn. 2002). A jury instruction that correctly states the law is not erroneous. *State v. Peou*, 579 N.W.2d 471, 476 (Minn. 1998).

To support the argument that the causation instruction was erroneous, appellant relies on *State v. Back*, 775 N.W.2d 866 (Minn. 2009). In *Back*, the defendant was convicted of second-degree culpable-negligence manslaughter when a third party shot the victim. 775 N.W.2d at 867-69. The supreme court concluded that the defendant had no duty to control the shooter or to protect the victim and reversed the conviction. *Id.* at 872. *Back* is not on point because it did not involve a caretaker relationship.

In *State v. Sutherlin*, 396 N.W.2d 238 (Minn. 1986), the defendant was convicted of first-degree murder and argued that he only intended to injure one of the victims but

that another individual wrestled the gun from him causing it to fire the bullets that killed the victims. 396 N.W.2d at 240. The supreme court upheld the conviction, finding that Sutherlin's premeditated conduct set in motion the events that led to the intervening conduct and that all that was required was that his initial shooting of a victim was a "'substantial causal factor' in the deaths." *Id.*; *see also State v. Olson*, 435 N.W.2d 530, 534 n.4 (Minn. 1989) (stating that "the state must prove beyond a reasonable doubt that defendant's acts had a substantial part in bringing about the child's death").

The district court instructed the jury, "Cause means that the conduct was a substantial causal factor in bringing about the harm." Under *Sutherlin* and *Olson*, the instruction correctly stated the law and was not erroneous.

III.

The district court must order the presumptive sentence provided in the sentencing guidelines unless "substantial and compelling circumstances" warrant a departure. *State v. Cameron*, 370 N.W.2d 486, 487 (Minn. App. 1985), *review denied* (Minn. Aug. 29, 1985); *see also* Minn. Sent. Guidelines II.D (2008) (stating that court has discretion to depart from presumptive sentence only when "substantial and compelling circumstances" are present). Whether to depart from the sentencing guidelines rests within the district court's discretion, and the district court will not be reversed absent an abuse of that discretion. *State v. Spain*, 590 N.W.2d 85, 88 (Minn. 1999). Only in a rare case will a reviewing court reverse the imposition of a presumptive sentence. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

In *State v. Trog*, the supreme court stated that "the defendant's age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family" are all factors that are relevant to a determination whether a dispositional departure is justified. 323 N.W.2d 28, 31 (Minn. 1982). Appellant argues that because the issue of a dispositional departure was before the district court, the district court should have considered all relevant departure factors, and because the district court denied the request for a departure without specifically addressing all of the *Trog* factors, the "district court abused its discretion by failing to properly exercise its discretion." This court recently rejected that argument, stating:

> Appellant's argument blurs the distinction between a district court's failure to exercise its discretion to depart from a presumptive sentence and a district court's abuse of its discretion when determining whether to depart from a presumptive sentence. If the district court has discretion to depart from a presumptive sentence, it must exercise that discretion by deliberately considering circumstances for and against departure. When the record demonstrates that an exercise of discretion has not occurred, the case must be remanded for a hearing on sentencing and for consideration of the departure issue. But the mere fact that a mitigating factor is present in a particular case does not obligate the court to place defendant on probation or impose a shorter term than the presumptive term.
>
> Appellant accurately asserts that the district court did not discuss all of the *Trog* factors before it imposed the presumptive sentence. But there is no requirement that the district court must do so. Also, the record demonstrates that the district court deliberately considered circumstances for and against departure and exercised its discretion.

State v. Pengel, 795 N.W. 2d 251, 253-54 (Minn. App. 2011) (quotations and citations omitted).

Before imposing appellant's sentence, the district court stated:

> This is a tragedy that should never have happened, yet both of you have referred to it as an accident, your supporters refer to it as an accident, and neither of you accept responsibility for it. You have shown no remorse and people have commented on that over and over.
>
> The law recognizes that you did not intend to kill [D.H.] The law also recognizes that you have no criminal history. This is reflected in the presumptive sentence . . . . But there are no compelling circumstances supporting probation rather than a prison sentence.
>
> . . . .
>
> And the Court did believe the testimony of J.A., that three children, aged nine and 10, carried the babies down the steep stairs, put them down for their nap without adult supervision, and that they were instructed to buckle [D.H.] into a car seat. The rules say that children under the age of 13 cannot even be helpers with children and that children over the age of 13 must be supervised at all times.
>
> The Court does not find the statement of [appellant] credible, that a 22-month-old . . . toddler climbed from one play pen to another and buckled himself into a car seat. Rather, the Court believes that the babies were warehoused in a darkened basement room with a TV on while [appellant] remained upstairs with a large number of older children.
>
> The Court agrees with the probation report which states, "Of course the death was accidental, but [appellant] wants to dismiss the fact that the accident was preventable. Whether the children strapped the baby in, as seems likely, or whether he strapped himself in, which is not, the circumstance need never have arisen. A known crawler, left alone and unattended on a different level of the home would seem to pose an overly obvious possibility for problems. Not only was the death preventable, it was in [appellant's] power to prevent it."

The district court's comments show that it considered the relevant factors and properly exercised its discretion in denying appellant's motion for a dispositional departure.

Affirmed.