STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2102

State of Minnesota,
Respondent,

vs.

Sherrow Chris Harris,
Appellant.

Filed January 4, 2011
Affirmed
Wright, Judge

Ramsey County District Court
File No. 62-CR-08-176

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

Susan Gaertner, Ramsey County Attorney, Mark N. Lystig, Assistant County Attorney, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Wright, Presiding Judge; Larkin, Judge; and Stauber, Judge.

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

WRIGHT, Judge

Appellant challenges his conviction of malicious punishment of a child, arguing that the evidence presented at trial was insufficient to support the jury's guilty verdict and that the admission of the out-of-court statements of two witnesses, in violation of the Confrontation Clause of the Sixth Amendment to the United States Constitution and the Minnesota Rules of Evidence, was reversible error. We affirm.

FACTS

Appellant Sherrow Chris Harris regularly cared for K.W., the two-year-old daughter of his girlfriend Tiffany Bazewicz. Harris cared for K.W. Tuesday through Friday each week from approximately 8:50 a.m. until 7:00 p.m. while Bazewicz was working. K.W.'s biological father, Glenn Winston, usually cared for K.W. from Friday evening until Monday.

On Friday, April 11, 2008, Winston called Bazewicz regarding bruises he noticed on K.W.'s body while bathing her. When Bazewicz returned home from work, she was confronted by her mother, siblings, and Winston, who told her to take K.W. to the hospital. Bazewicz's mother, her siblings, and Harris met her at the hospital. Bazewicz spoke with a social worker and a police officer about K.W.'s bruising. Dr. Mark Hudson examined K.W. and concluded that her injuries appeared to be caused by abuse rather than by accident. He observed that the loop pattern of K.W.'s bruising was consistent with being hit with a belt or a cord. K.W.'s injuries also included small lacerations on the

bottom of her feet and bruises on her arms, flank, back, shoulder, calf, and thigh. K.W. was taken into protective custody immediately.

At the hospital, a police officer interviewed Bazewicz who reported that she did not physically discipline K.W. Rather, she used timeouts. She also reported that Harris toilet trained K.W. by making her sit on the toilet for extended periods. Bazewicz did not approve of this practice, which she considered discipline. For example, on one occasion, Harris fell asleep after placing K.W. on the toilet. As a result, K.W. remained on the toilet all night.

Several days after K.W. was taken into protective custody, Bazewicz told Roseville Police Officer Sithyvon Chau that she feared Harris and that she had lied to the police in her earlier interview to protect herself and Harris. Bazewicz admitted to Officer Chau that Harris could have caused K.W.'s injuries by holding or pushing K.W. down on the toilet seat during toilet training.

Officer Chau interviewed Harris separately. Harris admitted that, when toilet training K.W., he would hold and press her legs and thighs down to keep her on the toilet seat. Harris conceded that this manner of toilet training could have injured K.W. After Officer Chau showed Harris photographs of K.W.'s injuries, Harris admitted causing K.W.'s injuries. Officer Chau also observed that Harris's fingernails were unusually long and may have caused the lacerations on K.W.'s feet.

Officer Chau also interviewed Winston and K.W.'s grandfather, T.H. Neither Winston nor T.H. testified at trial. Officer Chau testified that Winston told him that he cared for K.W. on the weekends, noticed K.W.'s bruises while bathing her, and

confronted Bazewicz about the injuries. Officer Chau also testified that T.H. corroborated Winston's statements.

Harris was charged with malicious punishment of a child, a violation of Minn. Stat. § 609.377 subds. 1, 4 (2008). Following a jury trial, he was convicted of the charged offense. This appeal followed.

D E C I S I O N

I.

Harris argues that the evidence is insufficient to support his conviction of malicious punishment of a child. When reviewing a challenge to the sufficiency of the evidence, we conduct a thorough analysis to determine whether the jury reasonably could find the defendant guilty of the offense based on the facts in the record and the legitimate inferences that can be drawn from those facts. *State v. Chambers*, 589 N.W.2d 466, 477 (Minn. 1999). In doing so, we view the evidence in the light most favorable to the verdict and assume that the jury believed the evidence supporting the guilty verdict and disbelieved any evidence to the contrary. *Id.* 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, reasonably could conclude that the defendant is guilty of the charged offense. *State v. Alton*, 432 N.W.2d 754, 756 (Minn. 1988).

For a conviction of malicious punishment of a child, the state must prove beyond a reasonable doubt that the defendant, while acting as a caretaker, intentionally used unreasonable force or cruel discipline that was excessive under the circumstances. Minn.

Stat. § 609.377, subd. 1. Harris does not challenge the fact that K.W. was abused; rather, he challenges the jury's determination that he inflicted the injuries.

K.W. suffered foot lacerations and bruises on various parts of her body. When viewed in the light most favorable to the verdict, the evidence establishes that Harris cared for K.W. for approximately ten hours daily, on Tuesday through Friday; he toilet trained K.W. by requiring her to sit on the toilet for long periods while sometimes holding or pressing her down; and he admitted responsibility for K.W.'s injuries.

A defendant's admissions of facts tending to establish guilt, whether direct or implied, constitute substantive rather than circumstantial evidence. *State v. Weber*, 272 Minn. 243, 254, 137 N.W.2d 527, 535 (1965). Here, Officer Chau testified that Harris had admitted causing K.W.'s injuries. This testimony regarding Harris's admission was supported by Officer Chau's summary notes and conclusions reached after an interrogation of more than one hour. Viewing this evidence in the light most favorable to the guilty verdict, the jury was entitled to believe Officer Chau's testimony, notwithstanding Harris's attempts to cast doubt on this evidence through forceful cross-examination.

This direct evidence is bolstered by circumstantial evidence of Harris's guilt, which warrants stricter scrutiny but is entitled to the same weight as direct evidence. *See State v. Bauer*, 598 N.W.2d 352, 370 (Minn. 1999). K.W. was in Harris's care four days each week, including the day on which K.W.'s injuries were discovered and she was placed in protective custody. The jury also was free to determine that Harris's toilet-training methods were a form of excessive physical discipline.

Although the state's evidence did not establish precisely when K.W. received the injuries, and some of K.W.'s injuries appeared to be inflicted with a belt or a cord that was never linked to Harris, these evidentiary deficiencies are not sufficient to defeat the direct and circumstantial evidence supporting the guilty verdict when the evidence is viewed in its totality in the light most favorable to the verdict. *See State v. Taylor*, 650 N.W.2d 190, 206 (Minn. 2002) (upholding conviction based on circumstantial evidence when, viewed as a whole, the evidence led directly to guilt). Accordingly, this challenge to Harris's conviction fails.

II.

For the first time on appeal, Harris argues that his Confrontation Clause rights were violated when the district court admitted hearsay statements of Winston and T.H. through Officer Chau's testimony. The Confrontation Clause of the Sixth Amendment to the United States Constitution prohibits the use in a criminal prosecution of a testimonial out-of-court statement that was not subject to cross-examination if the declarant is not available to testify at trial. *Crawford v. Washington*, 541 U.S. 36, 53-54, 59, 124 S. Ct. 1354, 1365, 1368 (2004). A testimonial statement is any statement "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *See Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2531 (2009) (quotation omitted). Certain statements made to a government agent, such as responses to formal police interrogation, are by their nature testimonial. *Crawford*, 541 U.S. at 52, 124 S. Ct. at 1364.

Officer Chau interviewed Winston and T.H. during his investigation. Thus, any out-of-court statements that they made were testimonial. But Officer Chau's testimony did not include T.H.'s out-of-court statements. Rather, he characterized the information he gathered from T.H.'s interview as corroborative of "Mr. Winston's story." This testimony does not implicate the Confrontation Clause.

Officer Chau's testimony regarding Winston's interview contained Winston's out-of-court statements, namely, that Winston said he cared for K.W. on the weekends, that he noticed unusual bruises and marks on K.W., and that he confronted Bazewicz about those injuries. Winston's statements are testimonial, and the Sixth Amendment affords Harris the right to be confronted by Winston. *See Melendez-Diaz*, 129 S. Ct. at 2532; *Crawford*, 541 U.S. at 57, 124 S. Ct. at 1368. Contrary to the state's argument, "the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court." *Melendez-Diaz*, 129 S. Ct. at 2540.

"A constitutional error does not mandate reversal and a new trial if . . . the error was harmless beyond a reasonable doubt." *State v. Caulfield*, 722 N.W.2d 304, 314 (Minn. 2006); *see also State v. Swaney*, 787 N.W.2d 541, 555 (Minn. 2010) (applying harmless-error analysis to Confrontation Clause violation.). But when a defendant fails to object to a Confrontation Clause violation at trial, we review the admission of the evidence for plain error. *State v. Tscheu*, 758 N.W.2d 849, 863 (Minn. 2008); *State v. McClenton*, 781 N.W.2d 181, 192-93 (Minn. App. 2010). Under this standard, we consider (1) whether there is an error, (2) whether such error is plain, and (3) whether it

affects the defendant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). An error is plain if it is "clear" or "obvious," *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002), or if it "contravenes case law, a rule, or a standard of conduct," *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). If the three plain-error factors are established, we then consider whether the error seriously affected the fairness and integrity of the judicial proceedings. *See Griller*, 583 N.W.2d at 740, 742 (explaining that district court may exercise discretion to correct plain error only if such error seriously affected fairness, integrity, or public reputation of judicial proceedings).

Under the third *Griller* prong, however, the Confrontation Clause violation in the instant case did not affect Harris's substantial rights. The evidence was presented in a relatively brief manner—comprising approximately three transcript pages of a much lengthier direct examination during a three-day trial. The state did not emphasize or dwell on the hearsay testimony. The hearsay statements at issue here were cumulative of testimony that had already been given by other witnesses, which also weighs in favor of concluding that the error did not affect the outcome of the case. Officer Chau's hearsay testimony merely corroborated other evidence that Winston discovered the bruises and denied responsibility. Harris's counsel challenged this evidence during Officer Chau's cross-examination, using inconsistencies in Winston's and T.H.'s statements in an attempt to discredit them, Officer Chau, and Officer's Chau's investigation. Moreover, Harris's counsel referred to this evidence in her closing argument, while the state refrained from doing so. Even without considering the erroneously admitted evidence, there is more than ample evidence to support the guilty verdict. And although the jury

posed questions during its deliberations, those questions did not express any doubt as to Harris's guilt. Rather, they indicated the jury's belief that Harris and others caused K.W.'s injuries.

Accordingly, the Confrontation Clause violation does not entitle Harris to reversal of his conviction and a new trial.

Affirmed.