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**STATE OF MINNESOTA
IN COURT OF APPEALS
A06-1581**

State of Minnesota,
Respondent,

vs.

Lisa Marie Shane,
Appellant.

**Filed March 11, 2008
Affirmed
Stoneburner, Judge**

Nobles County District Court
File No. K205481

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Considered and decided by Peterson, Presiding Judge; Shumaker, Judge; and Stoneburner, Judge.

UNPUBLISHED OPINION

STONEBURNER, Judge

On appeal from conviction of felony murder-child neglect resulting from the death of her infant, appellant argues that (1) the evidence is insufficient to support her

conviction; (2) the district court abused its discretion in admitting evidence of the infant's prior injuries; (3) the jury instructions were insufficient; and (4) the district court erred by imposing an upward sentencing departure. We affirm.

FACTS

In October 2004, appellant Lisa Marie Shane was the 19-year-old single mother of four children aged four, two, one, and three months. Shane's one-year-old child was born prematurely and suffered from severe disabilities that required extensive care, including frequent feedings through a feeding tube. The infant, A.C., was also born prematurely, with a hole in her heart and respiratory problems. A.C. remained in the hospital from her birth on July 23, 2004, until October 1, 2004, when she was released with an apnea monitor to measure her breathing and heart rates. A loud alarm sounded if either dropped below certain levels. Shane received two days of training regarding the use of the apnea monitor and the importance of closely monitoring A.C.

At approximately 10:00 a.m. on October 28, 2004, home-health nurse Jeri Goodell visited the Shane residence in Adrian to give A.C. and the one year old shots to prevent pneumonia. She was at the house for about 30 to 45 minutes. She examined and assessed both children, gave each a shot, and waited 20 minutes to check for reactions. She noticed a small bruise above A.C.'s right eyebrow and a superficial scratch across the top of her right eyebrow, but otherwise thought A.C. was doing very well. A.C.'s monitor was in place, and Shane reported that the only alarms that had sounded were due to loose connections. Shane had no explanation for the bruise and scratch.

A record of A.C.'s apnea monitor shows that during the week before October 28, the alarm had not recorded any apnea or bradycardia episodes, but beginning at about 11:24 a.m. on October 28, A.C. had a number of long-apnea and dropping-heart-rate episodes reflecting cardiorespiratory instability. The apnea monitor reflects 84 "events" between 11:24 a.m. and 11:18 p.m., and testimony established that there would have been many more than 84 alarm blasts because the "beeping" would have continued until A.C. breathed or her heart rate corrected itself. The longest spell, which lasted 78 seconds, would have triggered 78 blasts. The monitor records and medical testimony established that between 5:11 p.m. and 11:30 p.m. A.C. was a very sick baby who "would have been gasping for air like a fish out of water" and whose skin color would have been an unhealthy grayish color such that any parent would know that the child needed urgent medical attention.

Shane and her mother took A.C. to the Worthington Hospital emergency room at approximately 11:10 p.m. on October 28. When she arrived at the hospital, A.C.'s skin was gray, she was flaccid and nonresponsive, and she was in severe respiratory distress. Shortly after arriving at the hospital A.C. stopped breathing and was put on a ventilator while the hospital arranged for a helicopter transfer to a hospital in Sioux Falls, South Dakota, that was better equipped to meet the emergency.

Shane told medical personnel at both hospitals that she had been the caretaker for A.C. during the day and that she had not noticed any problems with A.C. until about 4:00 p.m. Shane denied that she had dropped or otherwise injured A.C. and said that she did

not know what had happened to A.C. She denied seeing A.C.'s father, Jose Chavarria, on October 28, explaining that he had been in jail.

Medical personnel from both hospitals testified extensively about their observations, care, and diagnosis of A.C. Ultimately, doctors discovered that A.C. had a skull fracture that took up the entire surface of the top of her skull. The fracture could only have been caused by direct impact to her head with the amount of force that would occur in a car accident at 29 to 45 mph, a fall from a three-story building, or being hit by a baseball bat. Her brain was severely injured. There was also evidence of healing bilateral rib fractures of the type that are only seen in child-abuse cases. The hospital notified law enforcement of possible child abuse.

A.C. was placed on life support. After five days, the doctors told Shane that A.C. was not likely to survive and that if she did survive, she would be “neurologically devastated” and would be in a vegetative state. Shane decided to withdraw life support and held A.C. in her arms for the three hours between withdrawal of life support and A.C.'s death.

Shane was interviewed by the Sioux Falls police. For the first two hours of the interview, Shane denied knowing how A.C. had been injured and did not mention that Chavarria had contact with A.C. on the day she was injured. After a detective suggested that Chavarria caused the injuries, Shane agreed and said that he had been at her home on October 28, and he pushed her, causing her to drop the baby.

Over time, Shane provided several different chronologies and details of the events of October 28. At trial, she testified that shortly after the home-health nurse left, she

heard a knock, and opened the door thinking that the home-health nurse had returned. Shane testified that Chavarria, who is also the father of her one-year-old child, was at the door wanting to see the “babies.” Chavarria had been in jail in Worthington on a domestic-abuse charge since September 19 and was released around 8:10 a.m. on October 28. Shane testified that she told Chavarria that he could hold A.C. while Shane showered. She testified that when she got out of the shower she heard A.C. crying and went to see why, but Chavarria said A.C. was fine. Shane testified that she took A.C. from him, they argued and he shoved her, causing her to fall against the futon bed and drop A.C. She testified that she heard the “thud” of A.C.’s head hitting the metal futon rail; but after crying for about 15 minutes, A.C. calmed down and Shane could not see any visible injury. Shane said Chavarria left after he pushed her.

Shane testified that she put all of the children in her car, took her oldest child to Headstart in Worthington, and then went to her mother’s house in Worthington, where she often spent the day. Shane testified that her sister Tess, who lived with their mother, was sleeping when she arrived but woke up and watched A.C. from approximately 2:45 to 3:15 p.m. while Shane picked up her oldest daughter and Tess’s son from school. When Shane returned, Tess told her that A.C. was fussy and seemed shaky.

Shane testified that she then took Tess to work and returned to her home in Adrian with her four children and Tess’s son. Shane testified that A.C. would not eat well at 4:00 p.m. and started being unresponsive and the monitor alarm started going off more frequently around 5:00 p.m. Shane admitted that, contrary to her previous statements, the monitor alarm went off a lot that day.

Shane testified that she returned to her mother's home in Worthington around 8:30 p.m. The apnea-monitor alarm continued to go off. Shane called her mother, a licensed practical nurse, at work at 9:00 and 10:30 p.m. Her mother could not leave work early but suggested that Shane call 911 or the number on the monitor or take A.C. to the hospital. When Shane's mother returned home from work after 11:00 p.m., she looked at A.C. and said they needed to take her to the hospital immediately.

Medical testimony established that A.C.'s brain injury was so severe that even if she had received immediate medical attention, she likely had only between a two and ten percent chance of survival. Delay in treatment reduced her chance of survival to zero. Medical personnel involved with A.C. unanimously testified that A.C.'s injuries could not have been caused by the events Shane described. And medical personnel ruled out the possibility that another child inflicted the injury.

Shane, who admitted that A.C. was primarily in her care from the time she came home from the hospital, had no explanation for the healing rib fractures revealed by A.C.'s autopsy, which, medical testimony established, occurred prior to the head injury. None of A.C.'s prior medical examinations had revealed any evidence of injury or abuse.

Shane was charged with second-degree unintentional felony murder while committing first-degree assault and second-degree unintentional felony murder while committing child neglect. The state's theory was that Shane intentionally inflicted the injury that caused A.C.'s death and that Shane's neglecting to seek immediate medical care for the severe injury played a substantial part in causing A.C.'s death. Alternatively the state argued that Shane's lack of appropriate supervision resulted in the injury.

Chavarria and several of his alibi witnesses testified at trial. He denied that he had visited Shane on October 28, and witnesses placed him elsewhere, although these witnesses were primarily family and friends. Several telephone calls placed by Shane after A.C. was hospitalized show that Shane was trying to locate Chavarria to tell him about A.C.'s condition and that she asked several people if he had been released from jail. A.C. was not in contact with any adults on October 28 other than Shane and possibly Chavarria between the time the home-health nurse left Shane's house and the time that the monitor alarm first started to indicate a problem.

The jury acquitted Shane of felony murder while committing assault but found her guilty of felony murder while committing child neglect. Shane waived her right to have a jury determine aggravating factors. The district court sentenced her to 180 months in prison, an upward-durational departure from the sentencing guidelines presumptive range of 144 to 156 months. The district court based the departure on the fact that A.C. was particularly vulnerable due to her age and prematurity. This appeal followed.

D E C I S I O N

I. Sufficiency of evidence

When considering the sufficiency of the evidence, we review the evidence in the light most favorable to the verdict to determine if it was sufficient to permit the jury, while acting with due regard for the need to overcome the presumption of innocence by proof beyond a reasonable doubt, to reach the verdict it did.

State v. Arrendondo, 531 N.W.2d 841, 844 (Minn. 1995). We 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).

a. Causation

Second-degree felony murder is committed by one who “causes the death of a human being, without intent to effect the death of any person, while committing . . . a felony.” Minn. Stat. § 609.19, subd. 2(1) (2004). Shane was convicted of causing A.C.’s death while committing felony-level child neglect, defined as willful deprivation of necessary “health care, or supervision appropriate to the child’s age, when the parent . . . is reasonably able to make the necessary provisions.” Minn. Stat. § 609.378, subd. 1(a)(1) (2004).

To prove that a defendant has committed felony murder, “the state must prove the defendant’s acts were a substantial causal factor in causing the child’s death.” *State v. Olson*, 435 N.W.2d 530, 534 (Minn. 1989) (quotation marks omitted). “The State need not prove the specific mechanism of death. The State must prove that [the defendant’s] acts contributed to the death.” *State v. Torkelson*, 404 N.W.2d 352, 357 (Minn. App. 1987), *review denied* (Minn. June 25, 1987).

Shane argues that her delay in seeking medical attention for A.C. was not a substantial cause of A.C.’s death because after A.C. was injured, she had, at most, only a ten percent chance of survival even with immediate medical attention. Shane’s argument presupposes that the jury considered only her delay in seeking medical attention for A.C.,

and not her failure to provide supervision that would have prevented the injury, to be the relevant act of child neglect. Even if this is true, we find no merit in Shane's argument.

In *State v. Southern*, Southern was convicted of negligent vehicular homicide for accelerating and leaving the scene after striking a child with her car. 304 N.W.2d 329, 330 (Minn. 1981). One of the two injuries that caused the child's death was most likely inflicted on impact and it could not be determined if the second injury was inflicted on impact or during the time the child was dragged as Southern left the scene. *Id.* Southern argued that her gross negligence in accelerating and leaving the scene was not proved to be a substantial factor causing the child's death. *Id.* The supreme court rejected this argument, stating:

[W]e are satisfied that the state's evidence sufficiently established [Southern's] gross negligence to be a substantial factor causing the child's death. The two main injuries which led to the child's death were a head injury which probably, but not necessarily, occurred at impact and a neck injury which may have occurred at impact or while the child was being dragged. But for defendant's gross negligence, the child may well have survived. Of course, we will never know this because defendant, by her gross negligence in failing to stop and in leaving the scene, made it impossible to determine this. Further, her conduct also had the effect of ensuring the child's death. We are satisfied after a careful review of the record that the evidence established defendant's grossly negligent driving to be a substantial causal factor in the child's death.

Id. Like Southern's act of driving away, Shane's failure to seek prompt medical attention ensured A.C.'s death and made it impossible to know if A.C. would have survived the injury. The fact that A.C.'s chance of survival was significantly reduced by the

seriousness of her injury does not negate that failure to seek immediate medical attention was a substantial factor in causing her death.

Shane also argues that because any child neglect ended once she arrived at the hospital and A.C.'s death did not occur until five days later when doctors removed her from life support, A.C.'s death did not occur "while [Shane was] committing" child neglect. See Minn. Stat. § 609.19, subd. 2(1) (defining second-degree murder as causing death "while committing" a felony). But her argument fails because, as discussed above, Shane's neglecting to seek immediate medical attention caused A.C.'s death by depriving her of any chance of survival, even though death did not occur until after A.C. received medical care.

The state also argues that overwhelming evidence was presented at trial that Shane intentionally harmed A.C., and the fact that the jury acquitted her of causing A.C.'s death while committing an intentional assault does not rule out the possibility that the jury believed that Shane caused the injury. Logically inconsistent verdicts will be sustained on appeal so long as there is sufficient evidence to sustain the guilty verdict. *Nelson v. State*, 407 N.W.2d 729, 731 (Minn. App. 1987), *review denied* (Minn. Aug. 12, 1987). "This rule is based upon the power of leniency: the jury's ability to bring in a verdict of not guilty despite the law and the facts." *Aligah v. State*, 394 N.W.2d 201, 204 (Minn. App. 1986) (quotation omitted), *review denied* (Minn. Nov. 17, 1986).

We agree with the state that substantial evidence was presented at trial that Shane inflicted A.C.'s injury. All medical witnesses testified that A.C. could not have suffered such a severe head injury in the manner that Shane described and that another child could

not have inflicted such a severe injury. Chavarria testified that he had no transportation from Worthington to Adrian on the morning of October 28, and alibi witnesses placed him elsewhere. The home-health nurse and the postal worker testified that no cars were at or near Shane's house during the time Shane claims that Chavarria was there, which is the time that the apnea monitor demonstrated that the injury likely occurred. Shane's telephone calls trying to locate Chavarria after A.C. was taken to Sioux Falls infer that Shane did not know whether he had been released from jail before A.C. was hospitalized.

Medical testimony ruled out the possibility that the injury occurred as late as the afternoon when Tess was briefly alone with A.C. Given this evidence, Shane's repeated assertion that the jury acquitted Shane of inflicting the injury is a mischaracterization of the jury verdict. The jury acquitted Shane of causing A.C.'s head injury while intentionally assaulting her. The acquittal does not mean that the jury did not believe that Shane caused the injury in some manner that constituted lack of appropriate supervision consistent with child neglect or that Shane caused the injury unintentionally. Nor does acquittal of assault mean that the verdict was not merely the result of jury lenity.

b. Child neglect

Shane also argues that the evidence was insufficient to support her conviction of felony child neglect because (1) the evidence did not prove that she *willfully* deprived A.C. of necessary health care; and (2) the evidence did not prove that she *deprived* A.C. of health care, but only that she *delayed* providing health care; and (3) the evidence did not show that A.C. suffered substantial physical, mental, or emotional harm.

Black's Law Dictionary defines "willful" as "[v]oluntary and intentional, but not necessarily malicious." *Black's Law Dictionary* 1630 (8th ed. 2004). Because of the amount of force necessary to have inflicted A.C.'s injury, the evidence was overwhelming that any adult present would have been aware that A.C. suffered a serious head injury requiring immediate medical attention. Additionally, testimony established that A.C.'s apnea monitor emitted numerous blasts at 105 decibels between 11:24 a.m. and noon. We conclude that the evidence is more than sufficient to establish that any reasonable person would have been aware that A.C. required immediate medical attention. Shane's contention that "there was no evidence that A.C. was suffering from serious trauma" was obviously rejected by the jury. The suggestion that Shane's decision not to seek immediate medical attention was not willful is preposterous.

Shane's argument that the state did not prove that she *deprived* A.C. of necessary health care is equally absurd. "Deprive" is defined as "[t]o take something away from" or "[t]o keep from possessing or enjoying." *The American Heritage Dictionary* 503 (3d ed. 1992). Shane's delay in getting medical care for A.C. took away from (deprived) A.C. the only medical care that could have resulted in her survival.

The jury was instructed that, to find that Shane had committed child neglect, it must find that A.C. suffered "substantial harm to [her] physical, mental, or emotional health." See Minn. Stat. § 609.378, subd. 1(a) (defining child neglect as a willful deprivation of health care or supervision that "harms or is likely to substantially harm the child's physical, mental, or emotional health). Shane argues that there is insufficient evidence that her delay in seeking medical attention harmed or was likely to substantially

harm A.C.'s physical, mental or emotional health. "Substantial physical harm" was described in the jury instructions as "bodily harm that involves a temporary but substantial disfigurement, causes a temporary but substantial loss of the function of any bodily member or organ or causes a fracture of any bodily member." In this case, the injury was a fractured skull and the apnea-monitor alarms establish that A.C. stopped breathing and had heartbeat irregularities sufficient to establish that A.C. suffered many episodes of loss of her heart and lung function that could have been avoided with prompt medical attention. Additionally, although according to Shane's testimony A.C.'s behavior was normal until late in the day, by the time she got to the emergency room A.C. was unresponsive and essentially reduced to a vegetative state. We find Shane's argument that the delay in seeking medical attention did not cause the requisite harm to support her conviction of child neglect to be without merit.

II. The jury instructions were adequate

Shane argues that the district court committed plain error by failing to define the term "willfully" for the jury. Generally, this court reviews the adequacy of jury instructions for an abuse of discretion. *State v. Peou*, 579 N.W.2d 471, 475 (Minn. 1998). But because Shane did not object to the jury instruction at trial and did not request an instruction defining "willfully," this court reviews this issue on appeal only for plain error affecting substantial rights. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). Shane must establish that "the error was prejudicial and affected the outcome of the case." *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998).

District courts are allowed “considerable latitude” in the selection of language for jury instructions. *Baird*, 654 N.W.2d at 113. This court reviews jury instructions “in their entirety to determine whether they fairly and adequately explain the law of the case.” *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988). “An instruction is in error if it materially misstates the law.” *State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001). A district court should explain elements of the offense and not merely read the statute. *State v. Carlson*, 268 N.W.2d 553, 561 (Minn. 1978). But the district court need not provide detailed definitions of all elements of the offense if the jury instructions do not mislead the jury or “allow it to speculate over the meaning of the elements.” *Peterson v. State*, 282 N.W.2d 878, 881 (Minn. 1979) (finding district court did not err in failing to define “great bodily harm” in jury instructions); *see also State v. Clobes*, 417 N.W.2d 735, 738 (Minn. App. 1988) (finding district court did not err in failing to define “specific intent” in assault case when the “jury instructions, viewed in their entirety, explained the law of the case fairly and accurately”), *rev’d on other grounds*, 422 N.W.2d 252 (Minn. 1988).

In this case, the district court did not materially misstate the law. The district court provided the following instruction for felony child neglect:

[T]he elements of neglect of a child by willfully depriving the child of necessary health care or supervision are: First, the Defendant willfully deprived [A.C.] of necessary health care or supervision appropriate to the child’s age when the Defendant was reasonably able to make the necessary provisions. Second, such neglect resulted in harm or was likely to cause substantial harm to [A.C.]’s physical, mental or emotional health. . . . Third, the Defendant’s relationship to [A.C.] was that of a parent, guardian or caretaker. . . . Fourth,

[A.C.] was a child who had not reached her eighteenth birthday at the time of the Defendant's act. Fifth, that Defendant's act took place on or about October 28, 2004 in Nobles County.

The instruction explained the elements of the crime fairly and accurately.

A lack of definition does not automatically constitute error if a commonly understood meaning of the term can convey the essentials of the element to the jury. *Peterson*, 282 N.W.2d at 881. Shane contends that absent a definition of "willfully," the jury likely applied only an ordinary-negligence standard. But Shane contradicts her own argument by pointing out numerous definitions of willfully, nearly all of which require some form of purposeful action, demonstrating that purposeful action would be commonly understood. Shane relies on *State v. Cyrette*, 636 N.W.2d 343, 348 (Minn. App. 2001), *review denied* (Minn. Feb. 19, 2002), to argue that the district court should have defined "willfully" as it was defined in that case. But in *Cyrette*, this court did not mandate that jury instructions must include a definition of "willfully"; it merely found that the district court's definition of "willfully" was not plain error in that case. *Id.* We conclude that the district court did not abuse its discretion in permitting the jury to assess the meaning of "willfully" as it is commonly understood; therefore there was no error, and the plain-error analysis ends.

III. The district court did not abuse its discretion by admitting evidence of A.C.'s prior injuries as relationship evidence under Minn. Stat. § 634.20

Shane argues that the district court erred by admitting testimony about A.C.'s healing rib fractures and the possibility of prior brain injury, both consistent with abuse by shaking, as relationship evidence under Minn. Stat. § 634.20 (2004), because the state

did not connect Shane to those injuries. We review admission of similar incidents of domestic abuse under Minn. Stat. § 634.20 for an abuse of discretion. *State v. McCoy*, 682 N.W.2d 153, 161 (Minn. 2004).

Evidence under section 634.20 need not meet the heightened standard of clear and convincing evidence required for the admission of character or *Spreigl* evidence, but need only be more probative than prejudicial. *McCoy*, 682 N.W.2d at 159. Therefore, “the admissibility of evidence under Minn. Stat. § 634.20 depends only on (1) whether the offered evidence is evidence of similar conduct; and (2) whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice.” *Id.* at 158.

Shane’s testimony that she was A.C.’s primary caretaker during the period when the prior injuries could have occurred provided circumstantial evidence that Shane either caused the prior injuries or failed to provide appropriate supervision or medical care in connection with the injuries, probative of Shane’s relationship with A.C. Shane relies on *State v. Sanchez-Diaz*, 683 N.W.2d 824, 832 (Minn. 2004), to argue that because no direct evidence connects her to the prior injuries, the evidence is inadmissible. But *Sanchez-Diaz* is distinguishable. In *Sanchez-Diaz*, the victim was an adult woman; neither she nor any other witnesses could testify that the defendant caused the victim’s bruises, therefore the bruising could not support a past pattern of abuse. *Sanchez-Diaz*, 683 N.W.2d at 832. In contrast, Shane was responsible for the care, supervision, and health care of A.C., who was a helpless infant, and the injuries occurred while A.C. was in Shane’s primary care. Evidence of Shane’s connection to the prior injuries was sufficient to permit admission of this evidence.

Shane argues that the evidence should have been excluded because it was unfairly prejudicial. Deciding whether the probative value of relationship evidence outweighs its prejudicial effect is a matter best left to the discretion of the trial court. *See State v. Bauer*, 598 N.W.2d 352, 362 (Minn. 1999) (holding that rulings on evidentiary matters are best left to the trial court’s discretion). “When balancing the probative value against the potential prejudice, unfair prejudice is not merely damaging evidence, even severely damaging evidence; rather, unfair prejudice is evidence that persuades by illegitimate means, giving one party an unfair advantage.” *State v. Bell*, 719 N.W.2d 635, 641 (Minn. 2006) (quotation omitted). “Evidence that helps to establish the relationship between the victim and the defendant or which places the event in context bolsters its probative value.” *State v. Kennedy*, 585 N.W.2d 385, 392 (Minn. 1998). We conclude that the district court did not abuse its discretion by concluding that in this case the probative value of the evidence outweighed its prejudice.

Shane also asserts that the district court erred by not providing a limiting instruction to the jury about the use of this evidence. But the pre-trial record demonstrates that Shane’s counsel was hesitant to request a limiting instruction because such an instruction might have highlighted this evidence. Failure to request such an instruction was part of Shane’s trial strategy, and the district court’s failure to sua sponte give a limiting instruction that would have interfered with that strategy was not plain error.

IV. The district court did not abuse its discretion in sentencing

Shane argues that the district court's finding that A.C. was particularly vulnerable due to her age and prematurity is not a valid basis for an upward sentencing departure in this case. The district court must order the presumptive sentence unless there are substantial and compelling circumstances that warrant departure. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). When considering an upward departure, the fact-finder "must decide whether the defendant's conduct was significantly more or less serious than that typically involved in the commission of the crime in question." *State v. Sanchez-Sanchez*, 654 N.W.2d 690, 693-94 (Minn. App. 2002) (quotation omitted). Absent an abuse of discretion, a departure from a presumptive sentence will not be overturned. *State v. Spain*, 590 N.W.2d 85, 88 (Minn. 1999). Shane agreed to have the district court make findings on aggravating factors.

In this case, the evidence demonstrates that by October 28, A.C. was "on target" in all assessments for a child of her age and therefore had overcome any particular vulnerability that might have existed as a result of her prematurity. Therefore, we agree with Shane that A.C.'s prematurity was not a valid basis for departure in this case. But a victim may be "particularly vulnerable due to age, infirmity, or reduced physical or mental capacity, which was known or should have been known to the offender." Minn. Sent. Guidelines II.D.2.b.(1).

Generally, a court may not depart upward from the sentencing guidelines for factors that are an element of the offense. *State v. Brusven*, 327 N.W.2d 591, 593 (Minn.1982). In *State v. Partlow*, the supreme court found that even though age was an

element of the offense, the departure was not an abuse of discretion because of the “absolute vulnerability” of the two-year, ten-month-old victim. 321 N.W.2d 886, 887 n.1 (Minn.1982). But in *Taylor v. State*, the supreme court found that a departure based on vulnerability due to the age of the three-year-old victim was improper. 670 N.W.2d 584, 588-89 (Minn. 2003). In distinguishing *Partlow*, the court focused on the change in sentence duration for criminal-sexual-conduct offenses since it decided *Partlow* and determined that the increased sentence durations already reflected the legislature’s consideration of the greater vulnerability of a young victim of sexual assault; therefore, any additional departure was improper. *Id.* at 589; *see also State v. Hodges*, 384 N.W.2d 175, 183 (Minn. App. 1986) (stating that departure based on vulnerability due to age, which was not an element of the offense of felony murder while committing burglary, was a proper ground for departure because it was not a factor the legislature used to distinguish felony murder from other degrees of homicide) *aff’d as modified*, 386 N.W.2d 709 (Minn. 1986).

Appellant correctly argues that age is an element of the underlying felony of child neglect, but unlike the offense in *Taylor*, the absolute vulnerability of a three-month-old baby has not been factored into the presumptive sentence for the crime of child neglect. For purpose of the crime of child neglect, a “child” is defined as anyone under the age of 18. Minn. Stat. § 609.376, subd. 2 (2004). Unlike an older child who could communicate injury, pain, and other distress, A.C. was entirely helpless and dependent on Shane to provide her with necessary care. We conclude that the district court did not

abuse its discretion in sentencing Shane to an upward departure based on A.C.'s particular vulnerability due to her extremely young age.

Affirmed.