STATE OF MINNESOTA
IN COURT OF APPEALS
A11-584

State of Minnesota,
Respondent,

vs.

Zachary James Raffety,
Appellant.

Filed May 7, 2012
Affirmed
Kalitowski, Judge

Big Stone County District Court
File No. 06-CR-10-156

Lori Swanson, Attorney General, John B. Galus, Assistant Attorney General, St. Paul, Minnesota; and

William J. Watson, Big Stone County Attorney, Ortonville, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Kalitowski, Judge; and Schellhas, Judge.

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

KALITOWSKI, Judge

On appeal from his conviction of second-degree unintentional murder while committing the felony of assault against his three-month-old child, A.R., appellant Zachary James Raffety argues that the evidence is insufficient to convict him. We affirm.

D E C I S I O N

On Monday, October 26, 2009, at approximately 6:00 p.m., three-month-old A.R. arrived at the Ortonville hospital lifeless and in cardiopulmonary arrest. He was brought in by appellant and T.L., appellant's girlfriend who is A.R.'s mother. The parents told Dr. Stacy Longnecker, the attending physician, that they had both been home with A.R. earlier that evening and that A.R. had appeared happy and healthy at that time. At around 5:15 p.m., T.L. left the family's apartment to get money from an ATM and pick up supper at Subway. Appellant reported that after T.L. left, he was feeding A.R. when A.R. breathed in, choked, and then stopped breathing. When T.L. returned to the apartment at approximately 5:52 p.m., A.R. was unresponsive and barely breathing.

Nurses were able to resuscitate A.R., but Dr. Longnecker discovered that he had significant internal bleeding and his pupils were fixed and dilated, suggesting neurological injury. Based on her observations and the history appellant and T.L. provided, Dr. Longnecker suspected that A.R. had suffered head trauma, and she arranged for A.R. to be transported by helicopter to Sanford Children's Hospital in Sioux Falls, South Dakota. There, A.R. was treated by a team of specialists. They determined that A.R.'s intracranial pressure was well above normal and he had brain swelling. A

CAT scan confirmed that A.R. had suffered a large intracranial hemorrhage and a catastrophic brain injury. Doctors also observed retinal hemorrhages in A.R.'s left eye. The extent of A.R.'s injuries left him hovering just above brain death and required that he be connected to a mechanical ventilator.

Because they suspected abuse, hospital staff contacted law enforcement and officers conducted several interviews with appellant and T.L. Appellant told officers that after T.L. left the apartment, A.R. began choking, spit up, and stopped breathing. He stated that he started CPR after he realized A.R. was not breathing, but was unable to resuscitate A.R. According to appellant, he then searched his apartment building for means to call 911, but was unsuccessful and ultimately waited until T.L. returned home to seek help. Shortly after giving his first statement, appellant approached an investigating officer to say that he had forgotten to mention in his earlier statement that after he had placed A.R. on the bed to perform CPR, he moved A.R. to the living room and set him down on the living-room floor. In doing so, appellant believed A.R.'s head may have hit the ground.

In later interviews, appellant further explained that he may have accidentally "slammed [A.R.] down" on the living room floor after attempting CPR. But he clarified that the drop would have been at most six inches. He also stated that: (1) he was 97% sure A.R. hit his head on the floor when appellant put him down on the living-room floor; (2) he was shaking when he was holding A.R. after A.R. stopped breathing; (3) A.R.'s head may have bumped the arm of the chair he sat in with A.R. shortly after T.L. left; and (4) he "probably forced or put [A.R.] down with a little bit of force or something."

On the advice of A.R.'s doctors and her family, T.L. decided to remove A.R. from life support on October 30, 2009. He died minutes later. Appellant was arrested and charged with first-degree murder while committing domestic abuse, in violation of Minn. Stat. § 609.185(a)(6) (2008), first-degree murder while committing child abuse in violation of Minn. Stat. § 609.185(a)(5) (2008), and second-degree felony murder in violation of Minn. Stat. §§ 609.19, subd. 2(1) (2008) and 609.221, subd. 1 (2008).

After a bench trial, appellant was acquitted of the first-degree murder charges but was convicted of second-degree felony murder.

I.

Appellant argues that the evidence is insufficient to support his conviction of second-degree felony murder. 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 fact-finder "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).

We apply a two-step process to evaluate the sufficiency of circumstantial evidence to support a conviction. *State v. Andersen*, 784 N.W.2d 320, 329 (Minn. 2010). First, we identify the circumstances proved, and in doing so "we defer . . . to the jury's acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the [s]tate." *Id.* Second, we independently examine "the reasonableness of all inferences that might be drawn from the circumstances proved," including "inferences consistent with a hypothesis other than guilt." *Id.* We give no deference "to the fact finder's choice between reasonable inferences." *Id.* at 329-30.

> [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). But "[w]e will not overturn a conviction based on circumstantial evidence on the basis of mere

conjecture." *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010) (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." *State v. Stein*, 776 N.W.2d 709, 714 (Minn. 2010). And we do not consider the inferences that can be drawn from "every circumstance as to which there may be some testimony in the case, but only such circumstances as the jury finds proved by the evidence." *Id.* at 715.

A person is guilty of second-degree felony murder if he or she "causes the death of a human being, without intent to effect the death of any person, while committing or attempting to commit a felony offense." Minn. Stat. § 609.19, subd. 2(1). A person is guilty of the felony offense of first-degree assault if he or she "assaults another and inflicts great bodily harm." Minn. Stat. § 609.221, subd. 1. "Assault" means "the intentional infliction of or attempt to inflict bodily harm upon another." Minn. Stat. § 609.02, subd. 10(2) (2008). "Bodily harm" is defined as "physical pain or injury, illness, or any impairment of physical condition." *Id.*, subd. 7 (2008). "Great bodily harm" includes "bodily injury which creates a high probability of death." *Id.*, subd. 8 (2008).

The Minnesota Supreme Court recently clarified that assault-harm as defined by section 609.02, subdivision 10(2), is a general-intent crime. *State v. Fleck*, ___ N.W.2d ___, ___, 2012 WL 469848, at *5 (Minn. Feb. 15, 2012). As such, assault-harm requires the state to prove only "that the defendant intended to do the physical act," not that "the defendant meant to violate the law or cause a particular result." *Id.*

Here, the only element in dispute on appeal is the element of intent. Appellant contends that the evidence is insufficient to exclude the possibility that A.R.'s injuries were the result of an accident because "the [s]tate's expert witnesses . . . could not testify about how [A.R.] received [his] injuries." Appellant further contends that "[t]he evidence is as consistent with the theory that appellant accidentally inflicted the head injury while putting [A.R.] on the floor as with the speculation from the [s]tate's experts that the injury was 'non-accidental.'" We disagree.

The district court issued a thorough and well-reasoned order detailing the circumstances proved and explaining how those circumstances led it to infer that appellant intentionally inflicted bodily harm on A.R.

The district court found that "the immediate cause of [A.R.'s] death was the brain injury," and that A.R.'s extensive injuries were consistent with nonaccidental shaking, impact, or a combination of the two. A.R. presented with a large subdural hemorrhage across both hemispheres of the brain and a significant subarachnoid hemorrhage in the right posterior parietal region and suprasellar cistern, which is very uncommon and indicative of major trauma. An EEG revealed injury to both the brain and the brain stem, which is typically resistant to injury. The type of injuries and hemorrhages present "were consistent with rapid acceleration/deceleration (shaking) trauma and/or possible blunt trauma." Such forces cause shearing and tearing of the small bridging veins between the skull and brain, leading to diffuse hemorrhage across the brain. As a result of these injuries, Dr. Bonnie Bunch testified that A.R. was left with little, if any, neurological

functioning. Dr. Butch Huston, who performed the autopsy on A.R., concluded that the manner of death was homicide and the mechanism was traumatic head injury.

In addition to significant neurological injuries, the district court also found that A.R. had external injuries consistent with nonaccidental trauma. When he arrived at the Ortonville hospital, doctors noticed two bruises on his forehead and abrasions under his chin and on the back of his head. Dr. Nancy Free testified that such bruises are indicative of nonaccidental trauma because a three-month-old child is nonambulatory and is not strong enough to accidentally inflict bruises on himself. Dr. Huston's autopsy revealed additional bruising of the head that was not visible externally. In particular, Dr. Huston noted a large bruise on the underside of A.R.'s scalp above the left ear and a petechial hemorrhage on the left side of A.R.'s skull. Dr. Huston concluded that these bruises, as well as the visible bruises and abrasions, were caused by blunt force trauma. A.R. also had severe pre-retinal and intra-retinal hemorrhages in his left eye. Dr. Robert Cheatham testified that retinal hemorrhage is caused by rapid acceleration and deceleration forces and is rare in cases other than nonaccidental shaking.

The district court also found, based on the testimony of several medical expert witnesses for the state, that significant force would have been required to inflict A.R.'s injuries. Dr. Huston estimated that the force required to cause A.R.'s injuries is similar in magnitude to a car accident, and is significantly greater than shaking a baby back and forth one inch. Similarly, Dr. Geoffrey Tufty stated that A.R.'s severe retinal hemorrhages were indicative of nonaccidental trauma and would have required "a significant amount of force" or a "strong" shaking. Dr. Didima Mon-Sprehe testified that

the force required to cause A.R.'s brain injuries would have been comparable to a high-speed car accident or falling from a height of several stories.

The evidence also established that the fatal injury "occurred between 5:15 and 5:52 p.m. on October 26th," because expert testimony indicated that neurological injury like A.R.'s would have been apparent "within minutes of his injury." Dr. Huston stated that, based on the extent of the bleeding, A.R. would have had difficulty breathing, unresponsiveness, a change in eye reaction and contact, and an inability to suck or feed immediately after being injured. Dr. Susan Duffek concluded that A.R. would have shown signs of lost consciousness, apnea or shallow respirations, or spitting up or vomiting with no lucid interval following his injury. The district court found that when T.L. left the apartment at around 5:15 p.m., A.R. "appeared happy, healthy, and in no distress." By 5:52 p.m., when T.L. returned, A.R. "was in distress, having difficulty breathing." When A.R. arrived "at the [e]mergency [r]oom at 6:00 p.m. he was essentially dead, only to be revived by means of CPR." From this history, Dr. Adela Casas-Melley and Dr. Free were of the opinion that A.R.'s injury could only have occurred while T.L. was out of the apartment.

The district court further found that "only [appellant] was in a position to know and relate what happened to [A.R.] between 5:15 and 5:52 p.m.," and that appellant's "inconsistent statements and apparent inability to explain the situation calls into question his overall credibility." The court identified four different theories appellant had advanced to law enforcement: (1) A.R. spit up a small amount of liquid, choked, and then had difficulty breathing; (2) appellant accidentally dropped A.R. two to six inches

onto a carpeted floor, causing A.R. to bump his head; (3) appellant shook and jostled A.R. as he carried him around the apartment in a panicked state; and (4) appellant set A.R. down with force onto the living room floor, causing his head to slam on the floor.

Significantly, the district court found that, with the exception of the physicians called by appellant, "every physician who rendered an opinion relating to the cause of [A.R.'s] fatal injury indicated that none of the explanations put forth by [appellant] would have generated sufficient force to explain the severity of [A.R.'s] injuries." And the court further found that only appellant and T.L.'s five-year-old daughter, M.L., were present in the apartment with A.R. from 5:15 p.m. to 5:52 p.m. Because "a five[-] year[-] old child would be physically incapable of inflicting injuries as extensive as those received by [A.R.], . . . [t]he only remaining person with the ability to have caused [A.R.'s] fatal brain injury was [appellant]."

Moreover, the inference that A.R.'s injuries were intentionally inflicted is bolstered by other circumstantial evidence. In the weeks before A.R.'s death, appellant was frustrated with work, demonstrated a short temper, and was violent with T.L. on several occasions. And his demeanor shortly after A.R. stopped breathing is inconsistent with a parent responding to an accidental injury. Despite telling law enforcement that he was panicking and attempting to seek help by calling 911, appellant smiled to a neighbor just before T.L. arrived home and appeared calm and emotionless in the emergency room on October 26.

Perhaps most significant is that the bruises visible on A.R.'s body when he arrived in the hospital on October 26 were just the latest in a series of mysterious bruises that

began appearing in the weeks before his death. According to Dr. Longnecker, lab tests showed no evidence that A.R. suffered from a blood disorder that could have caused the bruising. As a result, she suspected abuse and reported her concerns to Big Stone County Family Services just days before A.R. was fatally injured. No evidence directly linked appellant to A.R.'s bruises, but the record indicates that A.R.'s forehead bruises and the abrasion on the back of his head appeared early on October 25, the morning after appellant had been up alone with A.R. during the night and woke T.L. up in an agitated state because A.R. was crying uncontrollably.

Both appellant and T.L. reacted suspiciously when confronted with the possibility that appellant was harming A.R. Days before A.R.'s death, Dr. Longnecker asked T.L. whether appellant could be responsible for A.R.'s bruising, and T.L. hesitated before responding that although appellant frequently got angry with her, she did not think he would harm the child. When T.L. in turn asked appellant whether he might have caused the bruises, appellant became agitated with T.L. and responded that it was "pathetic of [her] to remotely think that he would hurt his own son." He was similarly agitated when law-enforcement officers raised his history of abuse toward T.L.

In addition to excluding accidental trauma, the state's evidence also excludes the possibility that A.R.'s death was caused by natural processes. Appellant's witness, Dr. John Plunkett, introduced the possibility that A.R. died from cardiopulmonary arrest caused by a cortical vein thrombosis. But several of the state's witnesses ruled out this possibility. Dr. Cheatham, Dr. Bunch, Dr. Free, and Dr. Huston each testified that A.R.'s injuries were not consistent with thrombosis, because thrombosis would not have caused

such diffuse bleeding or injury and would have caused symptoms before A.R.'s sudden collapse on October 26. And the state introduced testimony that a chronic hemorrhage is inconsistent with A.R.'s sudden drop in hemoglobin.

In light of these circumstances proved, we conclude that no fact-finder could reasonably infer that A.R.'s injuries were caused by an accidental or nonvolitional act. The state presented overwhelming evidence that the force necessary was of a magnitude much greater than the force generated by an accidental bump or fall from a height of six inches or less, as appellant suggested. And there is no evidence in the record of any other potential accidental or natural causes that is consistent with the circumstances proved. *See Stein*, 776 N.W.2d at 714 ("[A] defendant must point to evidence in the record that is consistent with a rational theory other than his guilt."). Therefore, we conclude that the evidence supports appellant's conviction.

II.

Appellant advances several additional claims in his pro se supplemental brief that he argues require reversal. We disagree.

First he argues that the district court's findings of fact contain inconsistent findings with respect to Dr. Longnecker's testimony. He fails to identify which specific facts are contradictory, and there are no conflicting findings on the pages of the district court's order that he cites. Second, he points out that the Chief Medical Examiner of Ramsey County, Dr. Michael McGee, is under investigation for allegedly providing questionable testimony in another case. But because Dr. McGee did not conduct A.R.'s autopsy and was not a witness in this case, his credibility is irrelevant here.

Third, appellant argues that no consideration was given to the possibility that T.L. inflicted A.R.'s injuries before she left the apartment on October 26. But both T.L. and appellant consistently stated that A.R. was awake, alert, and able to swallow a significant amount of Pedialyte shortly before T.L. left the apartment. Several expert witnesses testified that an infant suffering from significant neurological trauma would not present this way and could not suck and swallow. Thus, the evidence demonstrates that A.R.'s injuries must have been inflicted after T.L. left the apartment.

Finally, appellant argues that medical experts involved in this case failed to look at all of A.R.'s medical records, and that this case should have been reviewed by a team of experts rather than a single expert. But the record indicates that A.R.'s medical records were made available to the trauma physicians who treated him in Sioux Falls, to Dr. Huston who performed the autopsy, and to appellant's expert witness, Dr. Plunkett. The nine medical professionals who treated or autopsied A.R. on or after October 26, 2009, all reached the conclusion that he was the victim of nonaccidental abusive head trauma. The district court credited their opinions and found that A.R.'s brain injury "was caused by non-accidental inflicted trauma" and that the onset of his symptoms "would have occurred within minutes of his injury." We defer to the fact-finder's determination of witness credibility. *State v. Johnson*, 568 N.W.2d 426, 435 (Minn. 1997). Thus, as concluded above, the evidence was sufficient to support appellant's conviction.

Affirmed.