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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1119**

State of Minnesota,
Respondent,

vs.

Muna Ibrahim Abikar,
Appellant.

**Filed July 2, 2018
Affirmed in part, reversed in part, and remanded
Ross, Judge**

Hennepin County District Court
File No. 27-CR-16-15402

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

Michael O. Freeman, Hennepin County Attorney, Kelly O'Neill Moller, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Michael McLaughlin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Schellhas, Judge; and Hooten, Judge.

UNPUBLISHED OPINION

ROSS, Judge

Three months after Muna Abikar gave premature birth to an infant who tested positive for methamphetamine because of Abikar's prenatal drug use, Abikar took the

infant to the emergency room where hospital staff saw bruising on the child's face and soon discovered he had suffered nine fractured ribs. Expert trial testimony indicated that those injuries could have resulted only from squeezing the child's chest and striking his face. The district court found Abikar guilty after a bench trial and convicted her of first-degree assault (great bodily harm) and third-degree assault (substantial bodily harm). Because sufficient evidence showed that Abikar caused the child's injuries and the injuries constitute great bodily harm, we affirm the first-degree assault conviction, but we reverse the third-degree assault conviction because it is a lesser-included offense.

FACTS

Muna Abikar gave birth to Z.K. 14 weeks prematurely in February 2016, a day after Abikar used methamphetamine. Z.K. tested positive for drugs. He had an underdeveloped respiratory system and occasionally stopped breathing. Z.K. also suffered from intracranial bleeding. He spent his first 14 weeks out of the womb in the neonatal intensive care unit and received therapy for bone mineralization. Z.K. showed no signs of having demineralized bones or the associated condition of osteopenia of prematurity. Physicians released the child to Abikar's care on May 12, 2016, after three months in intensive care.

One week after Abikar took the child home, she took Z.K. to the emergency room because Z.K.'s apnea monitor was sounding its alarm. Hospital staff observed bruising on Z.K.'s face and became concerned about potential child abuse. They consulted with Dr. Alice Swenson of the Midwest Children's Resource Center for a child-abuse assessment. Dr. Swenson saw the bruising on Z.K.'s face and concluded that, as an immobile infant, he could not have injured himself. She also concluded from the linear

bruising pattern that Z.K.'s face had been struck. She ruled out bleeding disorders as the cause of the bruising. Dr. Swenson determined that the only reasonable cause for the bruising was abuse.

Dr. Swenson performed x-rays of Z.K.'s ribs on May 19, but they revealed no trauma. A CT scan raised some concern because it showed intracranial bleeding, but Dr. Swenson could not say that the bleeding indicated abusive head trauma. Dr. Swenson planned a follow-up skeletal survey, which would reveal any postfracture healing. The follow-up survey, performed two weeks later, showed callus formations indicating that Z.K. had previously suffered nine fractured ribs. Dr. Swenson concluded that this injury must have resulted from Z.K. being squeezed forcefully. She ruled out the condition of osteopenia of prematurity as the cause of the fractures. She could not identify the exact time that Z.K. was injured, but she opined that abuse is the only reasonable explanation for the injury.

The state charged Abikar with first-degree assault and third-degree assault. Abikar consented to a bench trial, where the district court heard the account just described.

Abikar relied on the expert testimony of forensic pathologist Thomas Young, and she also called Z.K.'s father, Luis Chaparro-Vargas, who had driven Abikar and Z.K. to the emergency room.

Dr. Young attempted to counter Dr. Swenson's testimony. Dr. Young opined that a prematurely born infant's rib fractures were insufficient to diagnose child abuse. He testified that performing CPR might cause rib fractures in a body as fragile as Z.K.'s. Chaparro-Vargas testified that Abikar gave CPR to Z.K. in the back seat of his minivan on

the way to the hospital. But the district court found Dr. Young’s testimony unpersuasive and Chaparro-Vargas’s testimony incredible. Abikar did not testify.

The district court found Abikar guilty of first-degree assault, reasoning that the possibility that Z.K. suffered the fractures while he was in the intensive care unit was unreasonable. It found that the injuries constituted great bodily harm due in large part to the number of ribs that had been broken and the unique vulnerability of the child in his fragile, premature condition. The district court convicted Abikar of first-degree assault and sentenced her to 43 months in prison. It also convicted her of third-degree assault and “combined” the sentence for both convictions.

Abikar appeals.

D E C I S I O N

Abikar argues that the evidence was insufficient to support her conviction of first-degree assault. Abikar also argues that we must reverse the third-degree conviction because it is a lesser-included offense of first-degree assault. We believe the evidence supports the conviction for first-degree assault but that the conviction for the lesser-included offense cannot stand.

I

Abikar makes four sufficiency arguments. First, she argues that the state could not prove that she assaulted Z.K. because it cannot, as a matter of law, establish that Z.K. did not consent to the touching that caused his injuries. Second, she argues that the evidence was insufficient to show that Z.K. suffered “great bodily harm” as defined in the statute. Third, she argues that the circumstantial evidence did not disprove the rational hypothesis

that Z.K.'s fractures occurred before he was released from the hospital's intensive care unit. Fourth, she argues that the circumstantial evidence supports the alternative, rational hypothesis that non-abusive trauma caused Z.K.'s injuries. We review claims of insufficient evidence to determine whether a fact-finder could reasonably find the defendant guilty in light of the facts and all reasonable inferences that arise from those facts. *State v. Merrill*, 274 N.W.2d 99, 111 (Minn. 1978). We assume that the fact-finder believed the state's evidence and disbelieved all contradictory evidence. *Id.* We will reverse a guilty verdict only if the fact-finder, giving due regard to the presumption of innocence and the state's burden of proof, could not have reasonably found the defendant guilty. *Id.* We apply greater scrutiny, as discussed below, when the evidence is circumstantial. None of the sufficiency arguments leads us to reverse.

The Unprovable-Element Theory

Abikar's first argument depends on a novel merging of several legal theories and her conclusion that a parent *cannot*, as a matter of law, *ever* be guilty of first-degree assault for harming her own child. As her counsel acknowledged, Abikar's theory would mean that a parent can be guilty of first-degree assault-harm for brutalizing *every* child *except* her own. Abikar's argument requires us to construe the assault-harm statute, a task we perform de novo. *State v. Koenig*, 666 N.W.2d 366, 372 (Minn. 2003). A person is guilty of first-degree assault-harm when she "assaults another and inflicts great bodily harm." Minn. Stat. § 609.221, subd. 1 (2014). Building on that statutory description, Abikar argues that the state supreme court's decision in *State v. Dorn* exculpates her because, there, the supreme court determined that the assault-harm provision requires that a defendant

“intentionally apply force to another person without his consent.” 887 N.W.2d 826, 831 (Minn. 2016). She stitches together the statutory element, the *Dorn* language, and the United States Supreme Court’s observation that children “are assumed to be subject to the control of their parents,” *Schall v. Martin*, 467 U.S. 253, 265, 104 S. Ct. 2403, 2410 (1984), to maintain that the state can never establish that a child has withheld consent to his parent’s battery, regardless of how sadistic the parent’s purpose or violent her conduct might be.

We flatly reject the argument. Nothing in the text of the statute supports it. Indeed, in describing one way to commit third-degree assault, the legislature plainly contemplated that a parent may be charged with assaulting her child when it provided, “*Whoever assaults a minor may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than \$10,000, or both, if the perpetrator has engaged in a past pattern of child abuse against the minor.*” Minn. Stat. § 609.223, subd. 2 (2014) (emphasis added). And the argument is unreasonable. It assumes that a parent’s natural right to make decisions regarding physical contact with her child includes the decision to intentionally and severely harm the child. Put differently, Abikar’s theory assumes that a parent’s physical authority over her child—authority that derives from the natural but rebuttable presumption that a parent acts in favor of her child’s wellbeing—becomes a source of immunity from prosecution even if the parent acts instead maliciously *against* her child’s wellbeing. The theory is legally unsupported and logically unsound.

The Great-Bodily-Harm Argument

Abikar next argues that the evidence was insufficient to prove that Z.K. suffered “great bodily harm,” which is an element of first-degree assault based on inflicting harm.

Again, a person is guilty of first-degree assault based on harm when she “assaults another and inflicts great bodily harm.” Minn. Stat. § 609.221, subd. 1. “‘Great bodily harm’ means bodily injury [that] creates a high probability of death, or [that] causes serious permanent disfigurement, or [that] causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily harm.” Minn. Stat. § 609.02, subd. 8 (2014). The parties agree that Z.K.’s injuries do not qualify under any of the specifically identified harms because Z.K. did not experience a high probability of death, permanent disfigurement, or the malfunctioning of any member or organ. The district court found that Z.K.’s injuries fit the generalized category of “other serious bodily harm.” We must decide if the evidence supports this finding.

The difficulty here is that the legislature has not defined the term “serious bodily harm,” and the definition of “great bodily harm” is somewhat circular because “great bodily harm” essentially means any injury that causes “serious bodily harm.” The word “other” in the phrase “other serious bodily harm” indicates that the legislature treats the listed, specific harms merely as examples of the kind of harm that supports a first-degree assault conviction. The definition of first-degree assault-harm might be rephrased this way: great bodily harm is any injury that constitutes serious bodily harm, including but not limited to injuries that cause a high probability of death, cause permanent disfigurement, or cause the sustained malfunctioning of any bodily member or organ. And we can merge the operative provisions to say that a person is guilty of first-degree assault-harm when she assaults another and inflicts any bodily injury that results in serious bodily harm.

Abikar reads the statute as requiring proof that Z.K. suffered a long-term injury because all of the statutory examples are permanent or long-term injuries. Because all of the statutory examples are permanent or long-term injuries, she contends, under the doctrine of *ejusdem generis* (of the same kind or class) we must limit the entire serious-bodily-harm class to long-term injuries. She understates the statute. Although two of the listed injuries that constitute serious bodily harm are permanent or long-term harms, the other one—a high probability of death—is not necessarily permanent or sustained. A violent blow to the head, for example, might in some situations cause serious brain trauma that creates a short-lived but very high probability of death, with no lingering signs or symptoms after a full recovery. The statutory list of examples does not imply that only a long-term harm constitutes a serious bodily harm.

The cases that Abikar cites also do not support her contention that only a long-term harm constitutes a serious bodily harm. *State v. Moore* does not hold that “serious bodily harm” requires a long-term injury; rather, *Moore* held that a jury instruction on great bodily harm must include all of the examples from the statutory definition. 699 N.W.2d 733, 739 (Minn. 2005). And *State v. Dye* simply echoes *Moore*, stating that “other serious bodily harm” should be taken in the context of the three examples provided in the definition. 871 N.W.2d 916, 922 (Minn. App. 2015). Neither case specifies that “great bodily harm” requires a long-term injury.

Abikar next argues that Z.K.’s fractured bones and bruising can constitute only *substantial* bodily harm but not *great* bodily harm. “‘Substantial bodily harm’ means bodily injury [that] involves a temporary but substantial disfigurement, or [that] causes a

temporary but substantial loss or impairment of the function of any bodily member or organ, or [that] causes a fracture of any bodily member.” Minn. Stat. § 609.02, subd. 7a (2014). Although the statute includes “a fracture” as substantial bodily harm, we do not believe that the district court erred either as a matter of law or in its role as fact-finder when it reasoned that Z.K.’s many fractures constitute great bodily harm. The statute attempts to guide fact-finders to distinguish between degrees of harm and it provides examples rather than a formula. We have said that even a single fractured finger of a grown man in a fight in which “[t]he two men’s fingers interlocked” causing the break “was more than sufficient” to support a finding of substantial bodily harm. *State v. Witucki*, 420 N.W.2d 217, 219, 221 (Minn. App. 1988), *review denied* (Minn. Apr. 15, 1988). Inasmuch as even a single, inconsequential fracture in an adult constitutes merely “substantial” harm, a fact-finder is not precluded from treating the fracturing of nine of an infant child’s ribs as categorically “serious” by comparison. And we see no error in the district court’s also considering that the victim was a premature infant who suffered from severe breathing problems and was—from a physiological development perspective—akin to a one-week-old when his mother broke his ribs.

The ICU-Cause Argument

Abikar also argues that the circumstantial evidence showing that she assaulted Z.K. was insufficient to support the guilty verdict because the evidence does not exclude the hypothesis that Z.K.’s injuries were caused in the neonatal intensive care unit before she took the child home. Abikar is correct that the conviction can stand only if the evidence proves that she assaulted Z.K. sometime after May 12, 2016, when the hospital released

Z.K. into her care, and before May 18, 2016, when Abikar took Z.K. to the emergency room. Even under the stricter review for convictions based on circumstantial evidence, *see State v. Harris*, 895 N.W.2d 592, 600–01 (Minn. 2017), it is clear that the facts belie Abikar’s argument.

The state’s expert informed the district court that, although fractures in infant bones may be too small to be detected by x-ray, about 10 to 14 days after a fracture has occurred an x-ray can reveal observable callus formations resulting from the healing process. The evidence establishes that, the day after Abikar took Z.K. to the hospital on May 18, x-rays revealed no fractures or callus formations. But the follow-up x-rays two weeks later, on June 2, revealed callus formations on Z.K.’s ribs. This places the time of Z.K.’s rib injury almost certainly during the period after the hospital released him into Abikar’s care; had the child’s ribs been broken in February, March, or April while he was in the hospital’s care, the callus formations would have been observable in the May 19 x-rays. The evidence also establishes that Z.K. began vomiting and having difficulty breathing the night before Abikar took him to the hospital on May 18, and the jury could infer that these symptoms are consistent with a recent injury. Although the x-ray data does not absolutely rule out the possibility that the fractures occurred during the last week Z.K. was in the hospital’s care before his release to Abikar on May 12, nothing in the record suggests that he showed any symptoms of injury during that period or at any time before May 17.

Abikar essentially asks us to speculate that Z.K.’s injuries were caused in the neonatal intensive care unit before she took him home because Z.K. was born prematurely and was therefore at risk of having reduced bone density. But the district court expressly

credited the testimony of Dr. Swenson and rejected the testimony of Dr. Young regarding Z.K.'s condition and the causes of his injuries. And Dr. Swenson testified that Z.K. did not suffer from reduced bone density, did not have osteopenia of prematurity, and he did not suffer a rib fracture at any time before the end of April 2016. Although we can say that the gap in the x-ray record might allow for the possible inference that the child was harmed in the few days before he was released into Abikar's care, the inference is not reasonable in the face of all the circumstances proved. *See State v. Hanson*, 800 N.W.2d 618, 622 (Minn. 2011) (requiring conviction to be affirmed despite a possible innocent explanation if, under the circumstances proved, "there are no other reasonable, rational inferences that are inconsistent with guilt").

The CPR-Cause Argument

Abikar maintains that the evidence cannot rule out the possibility that Z.K.'s injuries resulted from non-abusive trauma, asserting that the injuries may have occurred while she administered CPR to Z.K. on the way to the hospital. But the fact that Abikar performed CPR on Z.K. was not a circumstance proved. Nothing in the record suggests that Abikar informed the emergency room staff that Z.K. had needed CPR or that she ever administered CPR. The assertion that Abikar performed CPR on Z.K. appears only in Chaparro-Vargas's testimony, which the district court found incredible. Because we defer to that credibility finding, we do not treat Abikar's performing CPR as a circumstance proved or a basis from which we might consider an inference inconsistent with guilt.

The Insufficient-Medical-Investigation Argument

Abikar takes issue with Dr. Swenson's testimony, maintaining that she was required to investigate the possibility of some other cause of Z.K.'s injuries. She cites a footnote in a medical malpractice case, *McDonough v. Allina Health System*, 685 N.W.2d 688, 695 n.3 (Minn. App. 2004). The *McDonough* case is not relevant here. In *McDonough*, we noted that, "In performing a differential diagnosis, a physician begins by 'ruling in' all scientifically plausible causes of the [patient's] injury. The physician then 'rules out' the least plausible causes of injury until the most likely cause remains." *Id.* (quotation omitted). We were not describing a circumstantial evidence standard. And Abikar cites no authority suggesting that a criminal conviction must be reversed if the record fails to show that a doctor followed this process. We add that, even if such a requirement existed, Dr. Swenson testified that she did "look at a differential diagnosis" for Z.K.'s injuries and concluded that only child abuse could explain them.

II

Abikar argues last that she was improperly convicted of third-degree assault-harm, a lesser-included offense of first-degree assault-harm. A person "may be convicted of either the crime charged or an included offense, but not both. An included offense may be . . . [a] lesser degree of the same crime." Minn. Stat. § 609.04, subd. 1(1) (2014). The state initially charged only first-degree assault, but the prosecutor asked the district court also to consider third-degree assault. The district court found Abikar guilty of both and convicted her of both. The district court's findings of fact and conclusions of law do not suggest that it contemplated more than one incident in convicting her. It sentenced Abikar to 43 months

in prison for first-degree assault and noted in its warrant of commitment that the sentence for third-degree assault is “combined with count 1.” We recently clarified that “[a] ‘merged’ or ‘combined’ conviction or sentence is not a permissible disposition under Minnesota law.” *State v. Walker*, __ N.W.2d. __, __, 2018 WL 2187036, *1 (Minn. App. May 14, 2018). We do not disturb the findings of guilt but reverse Abikar’s third-degree assault conviction. We remand for corrections to the sentence consistent with this opinion.

Affirmed in part, reversed in part, and remanded.