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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0977**

State of Minnesota,
Respondent,

vs.

Mohamud Hussein Ahmed,
Appellant.

**Filed April 1, 2019
Affirmed
Bjorkman, Judge**

Blue Earth County District Court
File No. 07-CR-15-3977

Keith Ellison, Attorney General, Edwin W. Stockmeyer, Assistant Attorney General,
St. Paul, Minnesota; and

Patrick R. McDermott, Blue Earth County Attorney, Mankato, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Connolly, Judge; and
Florey, Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

Appellant challenges his convictions of first-degree assault and malicious
punishment of his child, arguing that (1) insufficient evidence supports the convictions,

(2) the district court plainly erred by admitting mother's testimonial statement to police, and (3) the district court abused its discretion by imposing an aggravated sentence that unduly exaggerates the criminality of his conduct. We affirm.

FACTS

The afternoon of August 24, 2015, appellant Mohamud Ahmed cared for his two young children by himself for several hours. When their mother returned home, she learned that their two-month-old son, N.H., who had been healthy earlier in the day, was abnormally fussy and unwilling to take a bottle or nurse. Ahmed and mother brought the baby to the emergency room, where he exhibited "decreased muscle tone" and an inward deviation of the left eye but no external injuries or signs of cranial swelling. Concerned about a possible head injury, the treating physician ordered a CT scan and other tests. When notified of the tests, Ahmed became angry, indicated he "just wanted medications," and left with N.H. against medical advice.

Back at home, Ahmed and mother prayed over N.H. until approximately 2:00 or 2:30 a.m., when Ahmed went to sleep. Shortly after 3:30 a.m., mother became concerned about the baby's breathing and, without waking Ahmed, called 911. Emergency responders transported mother and N.H. back to the hospital. N.H. was moaning, moving spontaneously, and unresponsive to stimuli. A CT scan revealed brain swelling and a loss of oxygen to the brain. When asked how N.H. might have sustained such injuries, mother stated that he had recently tipped over in his car seat while she was driving but had not appeared injured.

Because of his serious condition, N.H. was airlifted to a Rochester hospital. Upon arrival, his pupils were fixed and dilated and his fontanelle was “full and bulging,” indicating that the brain swelling had worsened.¹ Doctors administered medication to reduce the swelling. CT scans revealed numerous serious injuries: a fractured left collarbone, recent and healing rib fractures, bleeding in the lungs, multiple areas of bleeding on the brain, and swelling throughout the brain. And N.H. exhibited extensive retinal hemorrhages in both eyes. Medical personnel recognized that these injuries suggest non-accidental trauma, such as smothering or shaking and squeezing “[v]ery hard.” In particular, the recent and healing rib fractures indicated multiple instances of substantial force, highly indicative of abuse. And the presence of pervasive internal injuries with no external injuries made an accidental cause unlikely.

Police and child-protection services learned of N.H.’s condition the morning of August 25. That afternoon, two detectives went to the family residence to interview Ahmed and check on the other child’s welfare. Two other detectives went with a child-protection worker to the hospital to interview mother.

Ahmed told the detectives that only he and mother cared for their children, and explained that N.H. had been injured when his car seat tipped over while mother was driving. During the interview, Ahmed received a phone call and conducted a conversation in Somali; the conversation was recorded as part of the interview. After the call, Ahmed offered a different explanation for the child’s injuries, stating that they must have happened

¹ Brain swelling typically peaks 48 to 72 hours after injury, but medication can disrupt that progress.

when the child fell while in the shower with mother. Upon further questioning, Ahmed became agitated and said, “[I]f you take my children away from me, I will end my life.” The detectives ended the interview and transported Ahmed to the hospital for a mental-health evaluation.

Meanwhile, mother gave a statement to the detectives in Rochester. She also indicated that only she and Ahmed cared for their children. And she again stated that N.H. must have sustained his injuries when his car seat tipped over while she was driving. During the interview, mother requested a break to pump milk. Instead, she made a phone call. The detectives coordinated with their counterparts at the family residence and learned that the call was to Ahmed. When the interview resumed, mother’s “version of the events changed.” Mother stated that she had dropped N.H. while in the shower and had also done so two weeks earlier. At the end of the interview, the detectives seized mother’s phone.

A search of the phone revealed text messages in which Ahmed directed mother to “tell them that there is no swelling on his head and that he was born with the big head and it is birth defect.” And a translation of the call between mother and Ahmed revealed that Ahmed directed her to say that she dropped N.H. in the shower then drove him around and his car seat tipped over, and she agreed to do as he asked.

On August 29, mother contacted one of the detectives, stating it was “making her sick” lying about what happened and that “she wanted to come forward and tell the truth.” She told the detective that she did not know what happened to N.H. but that she had not injured him and his car seat had not tipped over while she was driving. Mother acknowledged changing her story during her earlier interview at Ahmed’s direction, and

said that she was afraid of Ahmed. After the interview, the detective took her to a domestic-abuse shelter.

N.H. remained in intensive care for a week and thereafter in the regular pediatric unit until late September. He was discharged from the hospital into mother's sole care.

Also in late September, Ahmed contacted police to provide another statement. He maintained that N.H.'s injuries must have resulted from his car seat tipping over and a fall in the shower. But he indicated that he, not mother, was the one driving and the one who dropped the child in the shower.

Ahmed was charged with first- and third-degree assault and three counts of malicious punishment of a child alleging various levels of bodily harm. At trial, medical experts agreed that N.H.'s injuries indicated non-accidental trauma, could not have been caused by a car seat tipping over or a fall in the shower, and have left N.H. "profoundly impaired" with severe cerebral palsy, unlikely ever to walk or be independent. The state was unable to locate mother to present her testimony, but the detectives who interviewed her testified about her statements.

The jury found Ahmed guilty, and the district court convicted him of malicious punishment of a child (great bodily harm) and first-degree assault. The district court sentenced Ahmed to 201 months in prison, an upward departure based on N.H.'s particular vulnerability.²

² By special verdict, the jury found that N.H. was unable to fight back, flee, or seek help because of his age; Ahmed knew or should have known N.H. was vulnerable due to his age; and Ahmed knew or should have known N.H. would be unable to communicate what happened to him due to his age and mental capacity.

DECISION

I. Sufficient evidence supports Ahmed's convictions.

When reviewing a claim of insufficient evidence, we carefully review the record “to determine whether the evidence and reasonable inferences drawn therefrom, viewed in a light most favorable to the verdict, were sufficient to allow the jury to reach its verdict.” *Lapenotiere v. State*, 916 N.W.2d 351, 360-61 (Minn. 2018) (quotation omitted). When the challenged conviction is based on circumstantial evidence, we apply a two-step analysis. *State v. Harris*, 895 N.W.2d 592, 598-601 (Minn. 2017). First, we identify the circumstances proved “by resolving all questions of fact in favor of the jury’s verdict,” in deference to the jury’s credibility determinations. *Id.* at 600. Second, we independently consider the “reasonable inferences that can be drawn from the circumstances proved.” *Id.* at 601. The circumstances proved must, as a whole, “be consistent with a reasonable inference that the accused is guilty and inconsistent with any rational hypothesis except that of guilt.” *Id.*

To convict Ahmed of first-degree assault, the state was required to prove that he intentionally inflicted great bodily harm upon N.H. Minn. Stat. § 609.221, subd. 1 (2014). A conviction of malicious punishment of a child similarly required proof that Ahmed committed an intentional act or set of acts against N.H. that caused him great bodily harm. Minn. Stat. § 609.377, subds. 1, 6 (2014). “Great bodily harm” is bodily injury that causes “a high probability of death” or “a permanent or protracted loss or impairment of the function of any bodily member or organ.” Minn. Stat. § 609.02, subd. 8 (2014). Ahmed does not dispute that N.H.’s injuries constitute great bodily harm. But he contends the

evidence is insufficient to establish that he intentionally caused them. Because both intent and causation are based on circumstantial evidence, we use the circumstantial-evidence standard.

The state proved the following circumstances. On August 25, 2015, N.H. presented to a hospital with extensive and permanent damage to his eyes and brain, as well as numerous rib and collarbone fractures inflicted on multiple occasions. This constellation of injuries, particularly in the absence of any external injuries, could only be caused by non-accidental trauma. They could not have been caused by a drop in the shower or tipping over in a car seat. Ahmed and mother were the child's sole caregivers. During the afternoon of August 24, Ahmed was alone with N.H. and his other child. When mother returned, N.H.—who was fine earlier that day—was abnormally fussy.

Ahmed did not seek medical care for N.H. until mother returned home, opposed medical testing to evaluate N.H.'s condition, and went to sleep instead of returning to the hospital as N.H.'s condition deteriorated. N.H.'s brain swelling became progressively more severe over the following day until he was medicated, consistent with being injured while in Ahmed's care on August 24. After initially telling police that N.H.'s car seat tipped over while mother was driving, Ahmed later said he was driving. And he repeatedly told mother what she should tell the investigating officers.

Ahmed points to inconsistencies in mother's statements to medical and police personnel and a consulting doctor's testimony that it was "hard to know" precisely what force caused N.H.'s injuries, to support a rational hypothesis other than guilt. We are not persuaded. The evidence on which Ahmed relies is not part of the circumstances proved.

These circumstances support only one rational hypothesis—Ahmed was the person who intentionally inflicted the harm upon N.H.

II. The district court did not plainly err by admitting evidence of mother’s second statement to police.

The Sixth Amendment guarantees the accused the right to confront the witnesses against him. U.S. Const. amend. VI. The right to confrontation means that “testimonial statements of a witness who did not appear at trial” generally are inadmissible unless the defendant had a prior opportunity to cross-examine the unavailable witness. *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 1365 (2004).

Where, as here, the appellant challenges the admission of unobjected-to out-of-court statements, we review for plain error. *State v. Tscheu*, 758 N.W.2d 849, 863 (Minn. 2008). In applying the plain-error test, we will reverse only if the appellant demonstrates that the district court (1) committed an error; (2) that was plain; (3) that affected his substantial rights; and (4) that seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id.*

Ahmed claims plain error in the admission of mother’s second statement to police, in which she denied any involvement in injuring the child and acknowledged that Ahmed had told her what to tell police. The state agrees that mother’s statement was testimonial and that Ahmed did not have a prior opportunity to cross-examine her. *See id.* at 864 (stating that a statement is testimonial if obtained by law enforcement for the purpose of providing evidence at trial). But the state persuasively identifies two reasons why the district court did not err by not sua sponte excluding the statement.

First, the statement is not categorically inadmissible. The confrontation right “is not absolute” but subject to certain exceptions and forfeitable by “wrongful actions.” *State v. Caulfield*, 722 N.W.2d 304, 311 (Minn. 2006). In particular, a defendant who procures or coerces a witness’s absence or silence thereby forfeits his right to confront the witness in court. *State v. Cox*, 779 N.W.2d 844, 851 (Minn. 2010) (applying *Giles v. California*, 554 U.S. 353, 128 S. Ct. 2678 (2008)). But when a defendant does not object to an out-of-court statement, the state has no opportunity to establish a basis for admitting the statement. *State v. Smith*, 825 N.W.2d 131, 138 (Minn. App. 2012) (discussing hearsay rule), *review denied* (Minn. Mar. 19, 2013). Because the record suggests Ahmed may have interfered with mother,³ forfeiture may be implicated.

Second, Ahmed may have had tactical reasons for not objecting. *See State v. Washington*, 693 N.W.2d 195, 205 (Minn. 2005) (recognizing that a defendant may have strategic reasons for not objecting to certain evidence and cautioning that a district court risks interfering with such strategy by acting sua sponte). Ahmed initially listed mother as a defense witness, so he may have viewed her statements collectively as exculpatory. Or he may have sought to avoid an inquiry into why she was unavailable. Or he may have recognized that the statement duplicated other admissible evidence—mother’s first statement to police, Ahmed’s recorded phone conversation with her, and his text messages

³ When the state encountered difficulties contacting mother shortly before trial, it advised the district court that Ahmed had apparently been in contact with mother despite a no-contact order and had another child with her in summer 2017.

to her—such that it was not worth an objection. Any of these explanations is consistent with his decision to take the alternate route of excluding specific and plausibly more prejudicial evidence of the related child-protection proceeding. Had the district court intervened to exclude the statement sua sponte, it may have disrupted Ahmed’s trial strategy.

Moreover, Ahmed has not demonstrated any prejudice from the statement’s admission. An error cannot be said to have affected the defendant’s substantial rights if “the verdict was surely unattributable to th[e] error.” *Tscheu*, 758 N.W.2d at 864. One consideration is whether the challenged testimony is cumulative of properly admitted testimony. *Id.* at 865. Such is the case here. As noted above, the statement that Ahmed now challenges is substantially cumulative of other evidence to which he raises no challenge. That evidence, together with testimony as to Ahmed’s own actions and the timing of the child’s non-accidental injuries, so thoroughly established Ahmed’s guilt that the verdict was surely unattributable to the admission of mother’s second statement.

III. Ahmed’s aggravated sentence does not impermissibly exaggerate the criminality of his conduct.

A district court must sentence within the presumptive range unless “substantial and compelling” circumstances justify a departure. Minn. Sent. Guidelines 2.D.1 (2018). “Substantial and compelling” aggravating circumstances are those that show the defendant’s conduct was significantly more serious than that typically involved in the commission of the offense in question. *State v. Edwards*, 774 N.W.2d 596, 601 (Minn. 2009). An aggravated sentence must be commensurate with the “criminality of the

defendant's conduct.” *Id.* We review a district court's decision to depart from the sentencing guidelines for an abuse of discretion. *State v. Mohamed*, 779 N.W.2d 93, 96 (Minn. App. 2010), *review denied* (Minn. May 18, 2010). And we generally will not reverse an upward durational departure so long as it is no more than “double the presumptive sentence length.” *State v. Evans*, 311 N.W.2d 481, 483 (Minn. 1981).

Ahmed argues that the district court abused its discretion by imposing an aggravated sentence of 201 months in prison, a substantial but not quite double upward departure from the 103-month maximum presumptive sentence for first-degree assault. Minn. Sent. Guidelines 4.A (Supp. 2015). Ahmed acknowledges that the departure ground—the victim's particular vulnerability—is valid. *See* Minn. Sent. Guidelines 2.D.3.b(1) (2018). But he contends the extensive departure unfairly exaggerates the criminality of his conduct. This argument is unavailing.

Ahmed identifies no authority for the proposition that a 201-month sentence exaggerates the criminality of his assault. And we discern none. To the contrary, a nearly double upward departure is consistent with the types of sentences imposed for first-degree assaults against victims who are not merely vulnerable but entirely defenseless due to infirmity or infancy. *See Dillon v. State*, 781 N.W.2d 588, 602 (Minn. App. 2010) (collecting cases upholding sentences for first-degree assault that were greater than double the presumptive length), *review denied* (Minn. July 20, 2010). Ahmed's sentence reflects the fact that he inflicted the most severe level of survivable bodily harm upon the most vulnerable possible victim—his own two-month-old son. The district court did not abuse

its discretion by determining that a sentence of 201 months' imprisonment is commensurate with that conduct.

Affirmed.