STATE OF MINNESOTA
IN COURT OF APPEALS
A06-1901

State of Minnesota,
Respondent,

vs.

Michael Ray Hansen,
Appellant.

Filed April 1, 2008
Affirmed
Hudson, Judge

Douglas County District Court
File No. KX-01-1222

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, Minnesota 55101; and

Christopher D. Karpan, Douglas County Attorney, 305 Eighth Avenue West, Alexandria, Minnesota 56308 (for respondent)

Melissa Sheridan, Assistant State Public Defender, 1380 Corporate Center Curve, Suite 320, Eagan, Minnesota 55121; and

Michael A. Bryant, Bradshaw & Bryant, PLLC, 1505 Division Street, Waite Park, Minnesota 56387 (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Randall, Judge; and Hudson, Judge.

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

HUDSON, Judge

On appeal from conviction of second-degree felony murder, appellant argues that (1) the evidence was insufficient to support the jury's finding of guilt; (2) the prosecutor committed prejudicial misconduct by intentionally violating the witness-sequestration order; (3) the district court abused its discretion by permitting the state to impeach him with his two prior felony convictions; and (4) there was insufficient evidence in the record to prove beyond a reasonable doubt that appellant intended to commit the crimes of which he was convicted. We affirm.

FACTS

Appellant Michael Hansen became romantically involved with Amanda Schulke in 2000. Although the couple never married, they had two daughters during their relationship: S.S. born January 1, 2001, and A.S. born January 5, 2004. At the time that A.S. was born, appellant and Schulke lived with appellant's parents in Blaine. A few months after A.S.'s birth, Schulke took the children and moved to Sebeka to live with her mother. Appellant was upset that Schulke had moved without consulting him, but he agreed to move to Alexandria and live with friends while he looked for employment in that area. The couple planned to rent an apartment in the area so that they could live together as a family.

In April 2004, appellant moved to Alexandria and began living with Jesse Fredrick and Stephanie Riedel, childhood friends of appellant's and Schulke's. Appellant slept on a futon in the basement of Fredrick and Riedel's townhouse. On the weekend of April 24

and 25, 2004, Schulke brought S.S. and A.S. to Alexandria to spend the weekend with appellant because Schulke had to work. This was the first time that appellant had cared for both girls overnight. On Monday of the following week, Schulke took the girls to Wal-Mart. While they were at the store, A.S.'s car seat fell off of the shopping cart and fell onto the pavement in the parking lot. Because the handle of the car seat was up, the handle hit the ground and the seat rolled onto its side. Schulke did not believe that A.S. had hit or scraped the pavement, or was injured in any way.

The following weekend, appellant was scheduled to care for S.S. and A.S. because Schulke had to work. On Saturday, May 1, 2004, appellant and Fredrick went fishing, while Riedel's sister babysat A.S. at her home for a few hours so that Riedel could clean. Appellant and Fredrick returned to the home sometime between 9:00 and 10:00 p.m., and appellant put A.S. down to bed at about 10:00 p.m. Throughout the remainder of the evening, appellant and Fredrick consumed alcohol and visited. During this time, appellant went downstairs to check on A.S. at least twice. Appellant and Fredrick finally went to bed at about 4:00 a.m.

At about 11:00 the next morning, appellant started yelling that something was wrong with A.S. Appellant was holding A.S. in his arms and directed Riedel to call 911. An ambulance arrived at the scene within minutes and transported A.S. to the hospital where she was pronounced dead. An autopsy was conducted by Dr. Spanbauer, the Douglas County medical examiner. The autopsy revealed that A.S. had suffered a "major skull fracture."

Officer Scott Kent of the Alexandria Police Department was assigned to investigate A.S.'s death. After discussing the autopsy results with Dr. Spanbauer, Officer Kent contacted Agent Ken McDonald of the Bureau of Criminal Apprehension and requested his assistance in investigating A.S.'s death. Agent McDonald advised Officer Kent to request a second autopsy by the Ramsey County medical examiner. Although A.S.'s body had already been embalmed in preparation for the funeral, a second autopsy was conducted by Ramsey County medical examiner Dr. Michael McGee. The results of the second autopsy revealed that A.S. had a fractured skull and died as a result of closed trauma to her head. Dr. McGee deemed A.S.'s death as a "probable homicide" and told Officer Kent to concentrate his investigation on the last 12 to 24 hours of A.S.'s life.

Appellant was eventually charged by indictment with three counts of second-degree felony murder in violation of Minn. Stat. § 609.19, subd. 2(1) (2002); one count of third-degree depraved-mind murder in violation of Minn. Stat. § 609.195(a) (2002); one count of first-degree manslaughter in violation of Minn. Stat. § 609.20(5) (2002); and one count of second-degree manslaughter in violation of Minn. Stat. § 609.205(5) (2002). Appellant pleaded not guilty, and the matter was set for jury trial, with the district court ordering that the witnesses be sequestered.

At trial, Schulke testified that appellant found A.S.'s crying to be "irritating" and that appellant would sometimes curse and swear when A.S.'s crying woke him up. Schulke also testified that on one occasion, after he had cared for A.S. for a while, appellant told her, "I don't know how you do this. It's too much for me." According to

Schulke, appellant wanted her to find somebody else to watch A.S. while Schulke was at work.

Both Riedel and Fredrick testified on behalf of the state. Fredrick testified that after he and appellant went fishing, they purchased a 12-pack of beer and a bottle of root-beer schnapps. According to Fredrick, they each had about two or three shots of schnapps and, when they were done drinking for the night, there were about three or four beers remaining from the 12-pack. Fredrick also testified that a day or two after A.S.'s death, appellant asked him to lie to police about how much alcohol that the two had consumed and about the time that the two went to bed on the night A.S. died. Fredrick further testified that when confronted on the issue by police, he disclosed to them the correct information.

Riedel testified that on May 1, 2004, her sister babysat A.S. at her sister's home while Riedel cleaned the house and appellant and Fredrick went fishing. According to Riedel, A.S. became fussy while in her sister's care, so Reidel advised her sister to bring A.S. home. Riedel then gave A.S. a bath in the kitchen sink, at which time she did not notice anything unusual about A.S.'s appearance or behavior. Riedel testified that after appellant and Fredrick returned from fishing, they began drinking; she eventually hid the schnapps bottle because she believed that the men had consumed too much alcohol. Riedel testified further that appellant asked her to lie to police because he was afraid they would focus more on his drinking than on what had actually happened to A.S. As a result, Riedel initially told police that appellant and Fredrick had gone to bed around midnight and had not been drinking the night A.S. died.

Monica Stumpf, one of the paramedics who responded to Riedel's 911 call, testified that when she tried to obtain information about A.S. from appellant, he swore and yelled. According to Stumpf, appellant was "borderline" defensive, but also blamed himself, saying that he should never have laid the baby on her stomach. Officer Jeremy Olson testified that after the ambulance had taken A.S. to the emergency room and after he had driven appellant there, appellant was "loud, shouting, swearing, cursing," and "visibly angry and explosive at times." Officer Olson further testified that although he has seen people exhibit a variety of behavior when they were experiencing grief, he had "never seen anything exactly like this."

Dr. Mark Spanbauer, who performed the first autopsy of A.S., testified that when he initially examined A.S., the back of her head was swollen and he could feel the skull bones moving beneath the scalp. This led Dr. Spanbauer to conclude that A.S.'s skull was fractured, which was confirmed by an x-ray. Dr. Spanbauer recalled that the internal examination revealed "a fair amount" of fresh bleeding between the scalp and the skull and that the area of fractured skull was approximately 15 centimeters long.

Dr. McGee, who performed the second autopsy on A.S., testified that such a large skull fracture could only be caused by a great deal of force. According to Dr. McGee, "[t]he child will have to be accelerated into a hard surface to get this fracture." Dr. McGee opined that a fracture of this nature could not be caused by tripping and falling or by rolling off a sofa or table. Dr. McGee testified that although it is possible that an accidental drop by a parent while carrying the child could have caused a fractured skull, he believed that under such a scenario, "you're [not] going to get a skull fracture

like this." Dr. McGee stated that the fracture was just too big to be caused by any of those means.

Dr. McGee concluded that the cause of death was closed-head trauma caused by blunt trauma, which could have been caused by the child being accelerated into the bedrails, the floor, or the wall in the room where A.S. died. Dr. McGee further opined that A.S. did not die as a result of any head injury connected with the Wal-Mart incident. Dr. McGee stated that the manner in which the child was strapped into the car seat would have prevented the type of injury suffered by A.S. And he concluded it would not have been possible for a four-month-old who had sustained this type of injury to act normally over a period of six days.

The state also elicited the testimony of appellant's cellmate, David Ewing. Ewing testified that he started selling drugs when he was 14 and was convicted in 1994 for witness intimidation, twice in 1998 for selling methamphetamine, and once in 2000 for issuance of a dishonored check. Ewing also testified that he was in jail on charges of second-degree controlled-substance crime for selling methamphetamine and for tampering with a witness. Ewing further testified that if convicted, he was facing significant prison time in light of his criminal-history score.

Ewing testified that he met appellant in jail on October 16, 2004. Ewing claimed that appellant stated that he needed to talk about his case or he was "going to go crazy." According to Ewing, appellant admitted that A.S. was very colicky and that he could not tolerate her "colickiness." Ewing also testified that appellant told him that on the night A.S. died, he and Fredrick had been drinking root-beer barrels and "smoking weed."

Ewing further testified that, according to appellant, A.S. woke up at about 3:00 or 4:00 in the morning and began to cry. Ewing claimed that although appellant was difficult to understand because he was "crying so hard," appellant's statements indicated that he killed A.S. Ewing admitted that, as a result of his testimony, he did not serve any prison time for his current charges.

Appellant testified in his defense. Appellant testified that on May 1, 2004, he went fishing with Fredrick and that, after they were done fishing, they stopped at a liquor store and picked up a 12-pack of beer and a bottle of root-beer schnapps. According to appellant, he put A.S. to bed at about 10:15 p.m. and then went upstairs and drank three or four beers and no more than three root-beer barrels with Fredrick. Appellant testified that he was not drunk, but "was catching a buzz." Appellant claimed that between 4:00 and 5:00 a.m., A.S. woke up, at which time he gave her a bottle and helped her go back to sleep. He then went to bed shortly thereafter. Appellant testified that when he woke up later in the morning, he realized that A.S. was non-responsive. Appellant further testified he never talked to Ewing about his case, but he believed that police put Ewing in his cell to get him to confess.

Dr. Janice Ophoven, a forensic pathologist with special training in pediatric forensic pathology also testified on behalf of appellant. Dr. Ophoven testified that A.S. suffered a skull fracture that occurred about a week before her death. Dr. Ophoven based her opinion on her observation that there was substantial healing to the tissues of A.S.'s skull, which meant that the fracture could not have occurred on the night that she died. Dr. Ophoven believed to a reasonable degree of medical certainty that A.S. either died of

trauma to her brain caused by a fall or an injury that occurred about a week before her death, or, despite an incidental skull fracture, of an undetermined natural cause. Dr. Ophoven's ultimate conclusion was that the actual cause of A.S.'s death could not be determined, but she was certain that A.S.'s skull was not fractured on the night that A.S. died.

The jury found appellant guilty of all charged offenses. Appellant moved for a mistrial, or in the alternative, a new trial, based on the prosecutor's violation of the sequestration order. The district court found that the prosecutor violated the sequestration order, but denied appellant's motion because the misconduct was harmless beyond a reasonable doubt. The district court sentenced appellant to 174 months in prison. This appeal follows.

This appeal was originally scheduled for non-oral consideration on November 14, 2007. On or about November 9, 2007, this court was informed that appellant had retained new counsel. Appellant's new counsel served and filed a request for oral argument and a motion for additional letter briefing. On November 16, 2007, the state filed a memorandum opposing appellant's request and motion. In an order filed on November 29, 2007, this court denied appellant's request for oral argument, but granted appellant's motion for supplemental briefing. Supplemental briefing was complete on January 9, 2008.

D E C I S I O N

I

Appellant argues that the evidence was insufficient to sustain his conviction of second-degree murder because the state failed to prove beyond a reasonable doubt that appellant harmed A.S. In 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 a light most favorable to the conviction, [is] sufficient to allow the jurors to reach the verdict which they did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume that the jury believed the state's witnesses and disbelieved any contrary evidence. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). The reviewing court "will not disturb the verdict if the jury, acting with due regard for the presumption of innocence" and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense. *State v. Alton*, 432 N.W.2d 754, 756 (Minn. 1988).

Circumstantial evidence is entitled to as much weight as direct evidence. *State v. Moore*, 481 N.W.2d 355, 360 (Minn. 1992). For a defendant to be convicted based on circumstantial evidence alone, however, the circumstances proved must be "consistent with the hypothesis that the [defendant] is guilty and inconsistent with any rational hypothesis [other than] guilt." *State v. Bias*, 419 N.W.2d 480, 484 (Minn. 1988). Even with this strict standard, the fact-finder is in the best position to weigh the credibility of evidence and thus determines which witnesses to believe and how much weight to give to their testimony. *State v. Daniels*, 361 N.W.2d 819, 826–27 (Minn. 1985).

"Inconsistencies in the state's case or possibilities of innocence do not require reversal of a jury verdict so long as the evidence taken as a whole makes such theories seem unreasonable." *State v. Ostrem*, 535 N.W.2d 916, 923 (Minn. 1995).

Appellant was convicted of second-degree murder under Minn. Stat. § 609.19, subd. 2(1) (2002). This statute provides:

> Whoever does either of the following is guilty of unintentional murder in the second degree and may be sentenced to imprisonment for not more than 40 years:
>
> (1) 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 other than criminal sexual conduct in the first or second degree with force or violence or a drive-by shooting[.]

Minn. Stat. § 609.19, subd. 2(1).

Here, testimony was presented that appellant found caring for A.S. to be frustrating and that he wanted Schulke to find somebody else to watch A.S. the weekend on which she died. A.S. was in appellant's care the night that she died, and testimony indicated that A.S. appeared to be perfectly normal when appellant put her to bed at about 10:00 p.m. But two medical examiners testified that A.S. died as the result of a "major" skull fracture. Dr. Spanbauer testified that when he initially examined A.S. he could feel the skull bones moving beneath her scalp and that further examination revealed "a fair amount" of fresh bleeding between the scalp and the skull. In addition, Dr. McGee testified that:

> The child will have to be accelerated into a hard surface to get this fracture. I don't think the child can get this from just simply falling, in a trivial type accident like tripping

> and falling and hitting her head at home, rolling off a sofa, or even rolling off a table. The fracture is too large for that.

In addition, appellant's cell mate, Ewing, testified:

> [Appellant] came to me and says, "I just need, I need to talk to someone about this or I'm going to go crazy," the exact words that came out of his mouth. . . .
>
> . . . .
>
> He told me, ah, particular up to that night, that he said it was approximately 3:00 in the morning that he went ahead—um, there was I believe a girl named [Riedel] that was with him and his friend [Fredrick]. [Riedel] went to bed; and [Fredrick], him and [Fredrick], stayed up drinking root beer barrels.
>
> Um, he went ahead and told me that approximately some time between three and four in the morning that [A.S.] started crying. He went downstairs, I believe it was downstairs he went to, um, to give her a bottle. And he said she wouldn't take the bottle at first. So he went back upstairs where—to make another bottle. He figured he made the formula too strong he told me, and she still would not go ahead and take the bottle. She was very—she was crying very hard.
>
> Um, and he, then at that approximate time is when he started getting teary-eyed and he started crying about it. And he told me he didn't know what to do, all he could do was keep holding her, holding her, and holding her. And then he went to the part of something about a bed, and at the same time he was crying to where I couldn't understand him, but he was saying something about a bed and stairs. Now, I don't know what the two meant, I don't know, but that's what he was—because he was crying so hard.

Appellant argues that Ewing's testimony is incredible in light of his criminal history and the plea agreement that he arranged for his testimony. But the jury was aware of Ewing's history and his plea agreement. The jury apparently believed Ewing's

testimony and disregarded appellant's testimony that Ewing was pressing him for information on the case and then concocted the story of appellant telling Ewing what happened to A.S. *See State v. Laine*, 715 N.W.2d 425, 431 (Minn. 2006) (stating that this court defers to the jury on the weight and credibility of the evidence and "will continue to assume [that] the jury believed the state's witnesses and disbelieved the defendant's witnesses."). Moreover, as the state points out, the reliability of Ewing's testimony is bolstered by the fact that only appellant, Riedel, and Fredrick knew that appellant and Fredrick were drinking root-beer barrels on the night in question. It was only after Ewing spoke with police that law enforcement became aware of this information and confronted Riedel and Fredrick about appellant's drinking on the night that A.S. died. And it was also only after appellant talked to Ewing that law enforcement discovered that appellant told Riedel and Fredrick to lie to authorities regarding how much alcohol appellant consumed on the night that A.S. died.

Testimony was also presented demonstrating that appellant seemed very defensive when questioned about A.S.'s death. Officer Olson testified that after he had driven appellant to the emergency room, appellant was "loud, shouting, swearing, cursing," and "visibly angry and explosive at times." Likewise, the responding paramedic testified that when she tried to obtain information about A.S. from appellant, he was defensive and swore and yelled. Finally, Schulke testified that she observed a video-taped interview between appellant and law enforcement. Schulke testified that she had observed appellant denying things that he actually did and that his behavior on those occasions was

consistent with his "in-your-face" behavior that he exhibited during the videotaped police interview. Considered together, this evidence and testimony supports a finding of guilt.

In his supplemental brief, appellant expanded his insufficiency-of-the-evidence argument, claiming that the state's failure to present any evidence or testimony impeaching Dr. Ophoven's testimony broke the state's chain of circumstantial evidence. At trial, Dr. Ophoven acknowledged that A.S. suffered a skull fracture, but she opined that A.S.'s skull was not fractured on the night that she died. Dr. Ophoven based her opinion on her analysis of tissue samples taken from the area of the injury and exposing them to "iron staining." Dr. Ophoven testified that her analysis of the tissue samples revealed "loads of iron." According to Dr. Ophoven, the amount of iron contained in the tissue samples demonstrated that the injury "[a]bsolutely [could] not [have occurred] within 24, 48, or 72 hours of the infant's death." Dr. Ophoven concluded that "[i]n my opinion, based on additional considerations in this case, [the slides containing the iron staining were] consistent with the fractures occurring a week, a week or more before the death."

Appellant argues that the state failed to demonstrate that Dr. Ophoven's testimony concerning the iron findings was improbable or inconsistent. Accordingly, other reasonable inferences about the cause of A.S.'s skull fracture could have plausibly been made, and, therefore, the record evidence was sufficient to create a reasonable doubt concerning appellant's guilt. We disagree. Although the state did not rebut Dr. Ophoven's testimony regarding the amount of iron contained in the tissue samples, the state did offer expert testimony establishing the time of A.S.'s death. Specifically,

Dr. McGee testified that for a fracture this large, A.S. would likely have been knocked unconscious right away. Dr. McGee further testified that even if a baby with this type of injury did not lose consciousness right away, and even if a caretaker might not know that the baby had suffered a skull fracture, the caretaker would know that something was not normal because the baby would start out being very fussy, have great difficulty in eating and behaving normally, and then become more and more quiet and eventually lose consciousness. According to Dr. McGee, if the baby did not lose consciousness right away, the baby would start to show symptoms within an hour or two, and once the symptoms appeared, the baby's condition would deteriorate rapidly and the baby would soon die. Thus, Dr. McGee concluded that the injury must have occurred within a few hours of A.S.'s death.

This case ultimately rests on the credibility of witness testimony, including the credibility of the expert witnesses. *See State v. Triplett*, 435 N.W.2d 38, 44 (Minn. 1989) ("Weighing the credibility of witnesses, including expert witnesses, is the exclusive function of the jury."). We defer to the jury's credibility determinations, and we must assume that the jury here believed the state's witnesses and disbelieved any evidence and testimony to the contrary. We conclude that the evidence presented at trial was sufficient for the jury to reasonably conclude that appellant was guilty of the charged offenses.

II

Appellant argues that he is entitled to a new trial because the prosecutor committed prejudicial misconduct by intentionally violating the witness-sequestration order. "Whether a new trial should be granted because of misconduct of the prosecuting

attorney is governed by no fixed rules but rests within the discretion of the trial judge, who is in the best position to appraise its effect." *State v. Ashby*, 567 N.W.2d 21, 27 (Minn. 1997).

Before trial, the district court ordered that the witnesses be sequestered and that "witnesses do not talk to somebody who has testified before, don't share what goes on in here." During trial, the prosecutor acknowledged that he violated the district court's sequestration order. In the direct questioning of Ewing, the prosecutor stated that he told Ewing the evening before Ewing testified that other witnesses had testified that appellant and Fredricks had split a 12-pack of beer. When counsel approached the bench, the prosecutor was asked about his conduct, to which the prosecutor replied, "I can tell my witnesses whatever I want." Appellant moved for a mistrial, or, in the alternative, a new trial based on the prosecutor's misconduct. The district court found that the prosecutor had violated the sequestration order but denied appellant's motion because the misconduct was harmless beyond a reasonable doubt.

In *State v. Wren*, 738 N.W.2d 378, 389–90 (Minn. 2007), the Minnesota Supreme Court recently addressed the appropriate test to be applied to prosecutorial misconduct. The court stated that "[f]or unobjected-to prosecutorial misconduct, we apply a modified plain error test. For objected-to prosecutorial misconduct, we have utilized a harmless error test, the application of which varies based on the severity of the misconduct." *Id.* at 389 (citation omitted); *see State v. Ramey*, 721 N.W.2d 294, 299 n.4 (Minn. 2006) (discussing two-tiered approach articulated in *State v. Caron*, 300 Minn. 123, 127–28, 218 N.W.2d 197, 200 (1974), and "leav[ing] for another day the question of whether the

Caron two-tiered approach should continue to apply to cases involving objected-to prosecutorial misconduct"). The court noted that *Caron* sets out the two-tiered test as follows:

> [I]n cases involving unusually serious prosecutorial misconduct this court has required certainty beyond a reasonable doubt that the misconduct was harmless before affirming. . . . On the other hand, in cases involving less serious prosecutorial misconduct this court has applied the test of whether the misconduct likely played a substantial part in influencing the jury to convict.

Wren, 738 N.W.2d at 390 n.8 (quoting *Caron*, 300 Minn. at 127–28, 218 N.W.2d at 200).

The state argues that the second tier of the *Caron* two-tiered standard applies here because this case involves less-serious prosecutorial misconduct. Whether this case involves less-serious prosecutorial misconduct is debatable. But even if we were to agree with the state's characterization, it is unclear if the two-tiered test set forth in *Caron* is still applicable. In *Wren*, the supreme court stated that:

> As we noted in *Ramey*, "[o]ur jurisprudence has not been completely consistent on the standard applicable" to our review of prosecutorial misconduct. 721 N.W.2d at 298. For example, even though *Ramey* suggests that the applicability of the two-tiered approach of *Caron* to issues of objected-to misconduct was an open question, we did not apply this approach in *State v. Mayhorn*, 720 N.W.2d 776, 785 (Minn. 2006). Instead, in *Mayhorn*, which was issued before *Ramey*, we applied the higher harmless beyond a reasonable doubt standard without reference to the seriousness of the misconduct. Our application of the higher standard in *Mayhorn* was based on *State v. Swanson*, 707 N.W.2d 645 (Minn. 2006). There we said that a defendant who shows prosecutorial misconduct "will not be granted a new trial if the misconduct is harmless beyond a reasonable doubt." *Id.* at 658. Because the misconduct in *Swanson* did not meet the higher harmless beyond a reasonable doubt standard, we did

> not need to discuss whether the misconduct would have warranted a new trial under the lower standard. As discussed below, we apply the same default analysis in this case.

Id. at 390 n.9. The supreme court in *Wren* went on to discuss the objected-to instances of misconduct under the higher harmless-error standard.[1] *Id.* at 393–94.

Just as the supreme court in *Wren* applied the higher standard, we, too, apply the higher standard here. The following factors are relevant to such an analysis: (1) how the improper evidence was presented; (2) whether the state emphasized it during trial; (3) whether the evidence was highly persuasive or circumstantial; (4) whether the defendant countered it; and (5) the strength of the evidence. *Id.* at 394. We now discuss each factor in turn.

A. Presentation of improper evidence

The testimony admitted as a result of the prosecutor's misconduct consisted of testimony from Ewing that appellant and Fredrick split a 12-pack of beer the night of A.S.'s death. In terms of presentation, the testimony submitted as a result of the violation of the sequestration order was brief.

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[1] In declining to address whether the two-tiered test set forth in *Caron* still applies, the supreme court noted:

> The parties did not address whether the *Caron* two-tiered standard should be applied or whether the misconduct was more serious or less serious under that standard. Because . . . Wren is not entitled to a new trial under the higher beyond a reasonable doubt harmless error standard, we need not decide whether the *Caron* test retains viability.

Wren, 738 N.W.2d at 394 n.13.

B. Degree of emphasis of improper evidence

Not only was the presentation of the evidence brief, the prosecutor did not emphasize Ewing's testimony pertaining to the number of beers appellant consumed. The prosecutor violated the sequestration order to ensure that Ewing's testimony regarding the number of beers consumed the night of the murder was consistent with the state's other witnesses who testified on the subject. No further emphasis pertaining to the exact number of beers appellant consumed was made by the prosecutor.

C. Degree of persuasiveness of the evidence

In light of the evidence presented, Ewing's testimony relating to the number of beers consumed was not highly persuasive. The number of beers that appellant consumed the night that A.S. died has little relevance to the ultimate issue of guilt. Although the level of intoxication may indicate that appellant was more likely to have committed the charged offense, it is not a defense. If the jury concluded that appellant killed his daughter, he is guilty of the crime regardless of whether he split a case, a 12-pack, or a 6-pack of beer. Moreover, the prosecutor violated the sequestration order in an effort to make Ewing's testimony more credible by making it more consistent with the state's other witnesses. But the record reflects that the prosecutor's misconduct effectively made Ewing's testimony appear less credible in light of how the situation was handled in front of the jury.

D. Improper evidence countered by defense

Appellant testified at trial and essentially corroborated Ewing's testimony that he split a 12-pack of beer with Fredrick. As noted above, appellant's corroboration of

Ewing's testimony actually damaged Ewing's credibility because the jury was aware that the prosecutor violated the sequestration order in order to ensure that Ewing's testimony pertaining to the number of beers consumed was consistent with the other witnesses.

E. Strength of the evidence

Although circumstantial, the evidence against appellant was strong. A number of witnesses testified on behalf of the state, and their testimony, if believed, was consistent with the hypothesis that appellant is guilty and inconsistent with any rational hypothesis other than guilt. Accordingly, our analysis of the relevant factors leads us to conclude that the jury's verdict was surely unattributable to the objected-to misconduct. Like the *Wren* court, we conclude that because appellant is not entitled to a new trial under the higher beyond-a-reasonable-doubt harmless-error standard, we need not address whether the *Caron* test is still applicable.

Finally, we feel compelled to note that even though the prosecutor's misconduct was harmless, we do not condone the prosecutor's complete disregard of the district court's sequestration order. And his comment—"I can tell my witnesses whatever I want"—was particularly offensive and disrespectful to the district court. The government's right to charge its citizens with crimes, put them on trial, and, if convicted, seek harsh punishment, only comes through a judicial system that in both reality and appearance is balanced, fair, and respectful of individual rights. Absent that perception, in particular, the government suffers a loss of credibility with its citizens. Here, the prosecutor belittled the very process that afforded him the right to proceed with this trial in the first place.

III

At trial, the state requested that it be allowed to impeach appellant with three prior convictions: (1) a January 8, 1997, misdemeanor conviction for giving false information to a police officer; (2) a December 5, 1997, felony conviction for fleeing a police officer; and (3) a December 26, 2000, felony conviction for receiving stolen property. Appellant did not object to the admission of the misdemeanor conviction of giving false information, but he did object to the use of the two felony convictions. The district court ruled that the state could use all three convictions for impeachment if appellant testified.

Appellant argues that the district court abused its discretion by permitting the state to impeach him with his two felony convictions. This court reviews a district court's decision to admit evidence of a defendant's prior convictions for an abuse of discretion. *State v. Gassler*, 505 N.W.2d 62, 67 (Minn. 1993).

Evidence of a witness's prior felony convictions may be admitted if "the court determines that the probative value of admitting this evidence outweighs its prejudicial effect." Minn. R. Evid. 609(a)(1). In order to determine the probative value of past convictions, the court is to consider the five factors set forth in *Jones*:

> (1) the impeachment value of the prior crime, (2) the date of the conviction and the defendant's subsequent history, (3) the similarity of the past crime with the charged crime (the greater the similarity, the greater the reason for not permitting use of the prior crime to impeach), (4) the importance of defendant's testimony, and (5) the centrality of the credibility issue.

State v. Jones, 271 N.W.2d 534, 538 (Minn. 1978).

A. Impeachment value of the prior crime

The supreme court has stated that "impeachment by prior crime aids the jury by allowing it to see the whole person and thus to judge better the truth of his testimony." *State v. Brouillette*, 286 N.W.2d 702, 707 (Minn. 1979) (quotation omitted). Although theft crimes do not directly involve dishonesty, Minnesota courts have recognized that prior convictions of theft crimes have impeachment value. *See, e.g., State v. Ross*, 491 N.W.2d 658, 659–60 (Minn. 1992) (concluding that burglary conviction was admissible under rule 609(a)(1)); *State v. Yates*, 392 N.W.2d 30, 32 (Minn. App. 1986), *review denied* (Minn. Sept. 22, 1986); *see also Gassler*, 505 N.W.2d at 67 ("[T]he fact that a prior conviction did not directly involve truth or falsity does not mean it has no impeachment value.").

Appellant argues that *Brouillette* and its progeny should be overruled. Appellant makes a compelling argument, but *Brouillette* remains good law in Minnesota. Because appellant's fleeing-a-police-officer and receiving-stolen-property convictions contributed to the jury's view of the whole person in assessing the truthfulness of appellant's testimony, the convictions had impeachment value.

B. Date of convictions and subsequent history

Appellant was convicted of receiving stolen property in 2000, approximately three and one-half years before the alleged murder here. Appellant's conviction of fleeing a police officer was approximately six and one-half years before the alleged murder. Under Minn. R. Evid. 609(b), evidence of a conviction is not admissible if more than ten years have elapsed since the date of conviction. Convictions that have occurred within

the ten-year period are presumptively not stale. *Gassler*, 505 N.W.2d at 67. Accordingly, this factor weighs in favor of admission.

C. Similarity of the crimes

"[I]f the prior conviction is similar to the charged crime, there is a heightened danger that the jury will use the evidence not only for impeachment purposes, but also substantively." *Id.* Here, appellant concedes that this factor weighs in favor of admission because appellant's prior crimes are not similar to the charged offenses.

D. Importance of appellant's testimony

If the admission of a defendant's prior conviction would cause him to refrain from testifying, the importance of having the jury hear the defendant's version of the case might weigh in favor of excluding the prior conviction. *State v. Bettin*, 295 N.W.2d 542, 546 (Minn. 1980). But here, the impending introduction of the prior convictions did not discourage appellant from testifying. Consequently, this factor does not weigh in favor of excluding the past convictions.

E. Centrality of credibility issue

Finally, if a defendant's credibility is central to the determination of the case, "a greater case can be made for admitting the impeachment evidence, because the need for the evidence is greater." *State v. Ihnot*, 575 N.W.2d 581, 587 (Minn. 1998) (quoting *Bettin*, 295 N.W.2d at 546). Here, appellant's credibility was central to the determination of the case because A.S. was in his care the night she died and appellant's testimony contradicted the evidence and testimony presented by the state. Based on consideration of the five *Jones* factors, we conclude that the district court did not err in determining that

the probative value of appellant's prior convictions outweighed the prejudicial effect. The district court did not abuse its discretion by admitting the prior convictions for impeachment purposes.

IV

Appellant contends that the first five counts of the indictment are specific-intent crimes[2] and argues that because there is no evidence in the record that he had the specific intent to commit the acts of which he was convicted, his conviction should be reversed. The state, on the other hand, argues that all of the crimes of which appellant was convicted are general-intent crimes and, therefore, appellant's arguments regarding specific intent are without merit. After a careful review of the applicable law, we conclude that the crimes at issue here are specific-intent crimes but that the state nevertheless satisfied the requisite burden of proof.

"Specific intent means that the defendant acted with the intent to produce a specific result . . . ." *State v. Vance*, 734 N.W.2d 650, 656 (Minn. 2007). "[G]eneral intent means only that the defendant intentionally engaged in prohibited conduct." *Id.* Here, the indictment charging appellant lists the underlying felonies for the first two counts of second-degree murder as assault in the third degree. Specifically, the underlying felonies are: Count I, third-degree assault in violation of Minn. Stat. § 609.223, subd. 1 (2002); and Count II, third-degree assault, causing bodily harm in a victim under four years old in violation of Minn. Stat. § 609.223, subd. 3 (2002). Minn.

[2] Appellant acknowledges that his sixth conviction, second-degree manslaughter in violation of Minn. Stat. § 609.205(5) (2002), requires only that the defendant commit an act in a negligent or reckless manner.

Stat. § 609.02, subd. 10 (2002), defines "assault" as: "(1) An act done with intent to cause fear in another of immediate bodily harm or death; or (2) The intentional infliction of or attempt to inflict bodily harm upon another."

In Minnesota, assaults have been classified into specific-intent assaults and general-intent assaults. *See State v. Fortman*, 474 N.W.2d 401, 403–04 (Minn. App. 1991). In the first category, in which intent to cause fear is sufficient and no physical touching of the victim is required, intent is an "abstract mental element," or a specific intent. *State v. Lindahl*, 309 N.W.2d 763, 767 (Minn. 1981). But "an assault involving infliction of injury of some sort requires no abstract intent to do something further, only an intent to do the prohibited physical act of committing a battery." *Id.*

In 1998, however, the supreme court, stated that "[a]ssault is a specific intent crime. The prosecutor must prove beyond a reasonable doubt that the defendant either (1) acted with intent to cause fear in another of immediate bodily harm or death; or (2) intentionally inflicted or attempted to inflict bodily harm on another." *State v. Edrozo*, 578 N.W.2d 719, 723 (Minn. 1998) (citing Minn. Stat. § 609.02, subd. 10 (1996)). More recently, the supreme court in *Vance* quoted *Edrozo* to iterate that assault is a specific-intent crime. 734 N.W.2d at 656. But the court elaborated, stating that:

> to prove assault, "[t]he prosecutor must prove beyond a reasonable doubt that the defendant . . . intentionally inflicted or attempted to inflict bodily harm on another." While the various degrees of assault require proof of different levels of actual harm, the assault statutes do not require a finding by the jury that a defendant intended to cause a specific level of harm. Thus, while the state did not have to prove that [the defendant] intentionally inflicted *substantial bodily harm*, the

> state did have to prove that he intentionally inflicted *bodily harm*.

Id. (quoting *Edrozo*, 578 N.W.2d at 723) (citation omitted). The court went on to hold that the district court committed plain error by failing to instruct the jury that intentional infliction of bodily harm on another is an essential element of assault under Minn. Stat. § 609.02, subd. 10(2) (2002). *Id.* at 656, 661–62 (finding plain error that affected substantial rights when the element of intent was contested and evidence of intent was not overwhelming).

Before *Vance*, an assault in which actual bodily injury occurred was a general-intent crime. *See Lindahl*, 309 N.W.2d at 767. In *Vance*, however, the supreme court specifically stated that in assault cases when actual bodily injury occurs, the "state [does] have to prove that [the defendant] intentionally inflicted bodily harm." 734 N.W.2d at 656. Because *Vance* does not specifically overrule *Lindahl* and *Fortman*, there is some inconsistency on this issue. But based on the unambiguous language in *Vance*, we conclude that assault is a specific-intent crime.

Because assault is a specific-intent crime, there must be sufficient evidence to prove beyond a reasonable doubt that appellant intended to inflict bodily harm on A.S. to sustain appellant's convictions on the first two counts of the indictment. As discussed above, there is sufficient evidence supporting the jury's determination of guilt. This evidence includes testimony that A.S. was in appellant's care the night she died and that the fatal injury occurred within a few hours of her death. It also includes evidence and testimony that A.S. suffered a massive skull fracture that Dr. McGee testified could only

be caused by a great deal of force. Moreover, the record shows that appellant found caring for A.S. to be frustrating, and Ewing's testimony indicates that appellant fractured A.S.'s skull. We conclude that this evidence and testimony support a finding that appellant intended to commit bodily harm when he committed the assault that caused A.S.'s death.

Appellant further argues that Counts III, IV, and V of the indictment are specific-intent crimes. Appellant contends that because there was insufficient evidence in the record to show that he specifically intended to commit those crimes, his conviction must be reversed. But appellant was convicted and sentenced under only Count I, second-degree felony murder, with the underlying felony being assault in the third degree. Consequently, the fact that he was found guilty of the other charged offenses does not require us to analyze the sufficiency of the evidence to support those verdicts because no convictions were adjudicated on them.

Affirmed.