STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2203

State of Minnesota,
Respondent,

vs.

Patrick Michael Mahony,
Appellant.

Filed February 3, 2009
Affirmed
Worke, Judge
Dissenting, Klaphake, Judge

Scott County District Court
File No. 70-CR-06-16295

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Michael J. Groh, Darren Borg, Assistant Scott County Attorneys, Justice Center, JC340, 200 Fourth Avenue West, Shakopee, MN 55379 (for respondent)

Tania K. M. Lex, Colich & Associates, 420 Lumber Exchange Building, 10 South Fifth Street, Minneapolis, MN 55402 (for appellant)

Considered and decided by Klaphake, Presiding Judge; Lansing, Judge; and Worke, Judge.

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

WORKE, Judge

Appellant Patrick Michael Mahoney appeals from his conviction of malicious punishment of a child, arguing that (1) the evidence is insufficient to support his conviction; (2) the district court erred by refusing to suppress appellant's statements to police; and (3) the prosecutor committed prejudicial misconduct in his closing argument. We affirm.

D E C I S I O N

Sufficiency of the Evidence

On a claim of insufficient evidence, this court reviews the record to determine whether the evidence, viewed in the light most favorable to the verdict, is sufficient to permit the jury to reach the verdict they did. *State v. Webb*, 440 N.W.2d 426, 430 (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 as charged. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004). A conviction may be based purely on circumstantial evidence if the evidence as a whole leads directly to the guilt of the defendant and is inconsistent with any reasonable inference other than guilt. *State v. Jones*, 516 N.W.2d 545, 549 (Minn. 1994).

Appellant was convicted of malicious punishment of a child resulting in substantial bodily harm. Minn. Stat. § 609.377, subds. 1, 5 (2006). To prove this offense, the state must show that a parent or caretaker did an intentional act or series of

acts to a child that involved unreasonable force or excessive discipline under the circumstances. *Id*. Appellant asserts that the evidence is insufficient to support the verdict, particularly the element that requires an intentional act.

Appellant first contends that the evidence is insufficient to show that he caused or was responsible for K.M.'s injuries. The evidence, viewed in the light most favorable to the verdict, establishes that: (1) medical records and x-rays showed at least 23 fractures to K.M. in various stages of healing; (2) K.M., at two months, was not mobile and no reported accidents were consistent with the injuries, other than one incident involving an infant swing; (3) two suspects, a relative and a neighbor, could be excluded because they had no contact with K.M. during the probable time of some of the injuries; (4) in appellant's statements to Detective Chris Olson and social worker Margaret Sodetani, he admitted that he could have accidentally caused the injuries; (5) appellant was unable to soothe the infant and expressed frustration with K.M.; (6) appellant made statements to his sister- and brother-in-law that pointed to his responsibility for the injuries; (7) appellant was the primary caretaker for the child during the period of time that the injuries occurred; and (8) medical experts concluded that K.M.'s injuries were consistent with nonaccidental trauma and were not caused by bone disease. Although all of the evidence is circumstantial, it is consistent with the state's theory that appellant caused the injuries and inconsistent with a reasonable inference of innocence. The narrower question is whether the state produced sufficient evidence of intent; appellant consistently maintained throughout his statements that he "may" have "accidentally" caused K.M.'s injuries.

Intent, a state of mind, is almost always proved by circumstantial evidence. *State v. Hardimon*, 310 N.W.2d 564, 566 (Minn. 1981). "'Intentionally' means that the actor either has a purpose to do the thing or cause the result specified or believes that the act performed . . . if successful, will cause the result." Minn. Stat. § 609.02, subd. 9(3) (2006); *see also id.*, subd. 9(4) (defining "with intent to"). "[A] jury may infer that a person intends the natural and probable consequences of his actions." *State v. Cooper*, 561 N.W.2d 175, 179 (Minn. 1997).

The circumstantial evidence demonstrates that: (1) appellant admitted that he caused the injuries, albeit accidentally; (2) appellant admitted that he was frustrated with K.M. and may have used too much force; (3) in K.M.'s short life, he suffered at least 23 broken bones, caused at different times; (4) although appellant was the primary caretaker for the older child, C.M., that child never had a broken bone, suggesting that appellant knew how to properly handle an infant; (5) appellant stated that he had "screwed up" and that sometimes he "scared [himself] at a point"; (6) appellant stated that the injuries probably occurred when he pulled on K.M.'s legs or arms too hard while changing or dressing him; (7) appellant noted "points or a point where [K.M.] would have been screaming louder" when an injury may have occurred; (8) appellant stated that the broken arm probably occurred while he was dressing K.M.; (9) appellant stated that the rib injuries could have occurred while he was dressing K.M. or by "picking him up in, in some unknowingly frustrated period of time"; and (10) the sheer number of fractures and the fact that they were in various stages of healing suggest that this was not an isolated

incident, which tends to refute appellant's claim that the injuries were solely accidental and not intentional.

Based on this evidence, the jury could reasonably conclude that appellant acted with intent. The jury, which acquitted appellant of the assault charges, appears to have made a careful distinction between assault, which requires intent to cause bodily harm, *State v. Vance*, 734 N.W.2d 650, 657 (Minn. 2007), and malicious punishment of a child, which requires intentional acts to punish or discipline a child. Minn. Stat. § 609.377, subd. 1. We conclude that the evidence is sufficient to sustain the jury's verdict.

Suppression of Statements

Appellant challenges the use of his statements made to a police detective, arguing that the detective used coercive measures to elicit the statements. Use of a coerced or involuntary statement violates a defendant's constitutional right to due process of law. *State v. Blom*, 682 N.W.2d 578, 614 (Minn. 2004). The state has the burden of proving by a preponderance of the evidence that a defendant's confession was not coerced. *State v. Thaggard*, 527 N.W.2d 804, 807 (Minn. 1995). This court reviews de novo the district court's determination of whether or not a confession was voluntary. *Id.* The basic test for determining if a statement was coerced is whether the defendant's will was overborne by police conduct. *State v. Ritt*, 599 N.W.2d 802, 810 (Minn. 1999).

Courts use a totality-of-the-circumstances test to evaluate whether a confession was coerced or involuntary. *Blom*, 682 N.W.2d at 614. The court must consider the following factors: (1) the defendant's age, maturity, intelligence, education, experience, and ability to comprehend the proceedings; (2) whether the defendant received a *Miranda*

warning; (3) the length and the legality of the detention; (4) the nature of the interrogation; and (5) whether the defendant was deprived of physical needs or denied access to friends or family. *Id.*

The district court considered these factors, concluding that, at the time he was questioned, appellant was "41 years old, college educated and employed as a diving instructor, and clearly comprehended the situation." Appellant was not under arrest and was advised that his participation was voluntary, he did not have to speak with the detective, and he could leave. Appellant charges, however, that the detective engaged in coercive tactics by telling him that appellant's children would be removed from their home and placed in foster care unless someone confessed, and that the detective was not interested in criminal prosecution and would recommend that appellant not be charged criminally.

Again, relying on the totality of the circumstances, the court can suppress statements made in response to deceptive and stress-inducing interrogation practices. *State v. Jones*, 566 N.W.2d 317, 326 (Minn. 1997). But suppression is not required, even when police have used promises of leniency or lied about the existence of evidence, if, under the totality of the circumstances, the defendant's will was not overborne and the defendant was not induced by the deception or promises to confess. *See, e.g.*, *State v. Farnsworth*, 738 N.W.2d 364, 374 (Minn. 2007) (concluding that use of empathic approach does not alone make confession involuntary); *Jones*, 566 N.W.2d at 326; (refusing to suppress despite officer's lie about existence of incriminating videotape); *State v. Williams*, 535 N.W.2d 277, 288 (Minn. 1995) (refusing to suppress statements

despite officers' discussion theorizing and speculating about evidence); *Thaggard*, 527 N.W.2d at 810 (stating that use of trickery and deception is to be considered along with other factors and refusing to suppress statements after police falsely asserted that they had evidence implicating defendant); *State v. Slowinski*, 450 N.W.2d 107, 112 (Minn. 1990) (refusing to suppress statements despite police offer to argue for psychiatric help in lieu of prison).

Notably, the coercive suggestions to which appellant objects were made during his first interview in which he steadfastly denied injuring his son K.M. The following day, appellant discussed the situation with his wife and with his mother—who is a social worker—before he voluntarily sought out the detective in order to make the statement that was offered at trial. Moreover, the question of the placement of the child – whether in or outside the home – was raised by the social worker as well as the police officer and was clearly presented by the circumstances, not merely as an interrogation strategy. Under the totality of the circumstances, appellant's will was not overborne by police conduct and the district court did not err by concluding that his statement was voluntary and not coerced.

Prosecutorial Misconduct

We will reverse the district court's denial of a new trial motion based on prosecutorial misconduct only if the "misconduct, considered in the context of the trial as a whole, was so serious and prejudicial that the defendant's constitutional right to a fair trial was impaired." *State v. Johnson*, 616 N.W.2d 720, 727-28 (Minn. 2000). Specifically, a defendant will not be granted a new trial if the misconduct was harmless

beyond a reasonable doubt and the verdict was surely unattributable to the error. *State v. Mayhorn*, 720 N.W.2d 776, 785 (Minn. 2006).

During closing argument, the prosecutor began by stating that he was the voice for K.M., "for the child with no voice." At the end of the argument, the prosecutor told the jury, "Like I said at the beginning, the state has been the voice. This child has had no voice. Our role is over. [K.M.'s] voice is now your voice." At this point, appellant objected. The court took a recess and discussed a mistrial and curative instructions. The court concluded that it would not grant a mistrial, but would sustain the objection and give an immediate curative instruction, which it did. The state has conceded that the prosecutor's statement was error, because it tended to ask the jurors to put themselves in the shoes of the victim and was an appeal to passion, but argues that the error was harmless.[1]

The prosecutor's erroneous comments were relatively short and isolated in the context of the entire argument, which covered 30 pages of transcript. *See State v. Swanson*, 707 N.W.2d 645, 658 (Minn. 2006) (refusing to grant new trial because prosecutorial misconduct limited to two pages of a 1200-page record); *State v. Powers*, 654 N.W.2d 667, 679 (Minn. 2003) (refusing to grant new trial when objectionable statements consisted of two sentences in a closing argument covering 20 pages in transcript); *but see Mayhorn*, 720 N.W.2d at 785 (granting new trial based on cumulative

[1] We note, however, that "it is proper for a prosecutor to talk about what the victim suffers and to talk about accountability, in order to help persuade the jury not to return a verdict based on sympathy for the defendant." *Nunn v. State*, 753 N.W.2d 657, 662 (Minn. 2008) (quotation omitted).

errors pervading trial). In addition, the district court gave an immediate curative instruction. *See State v. Ture*, 353 N.W.2d 502, 517 (Minn. 1984) (finding harmless error when court gave curative instruction, defense counsel stressed that prosecutor's argument was not evidence, comments were isolated, and evidence of defendant's guilt was more than adequate).

The misconduct here was isolated, the court gave an immediate curative instruction, and based on the split verdict, the jury was not inflamed with emotion. Appellant was not deprived of his right to a fair trial by the prosecutorial misconduct, which was harmless beyond a reasonable doubt.

Affirmed.

KLAPHAKE, Judge (dissenting)

I respectfully dissent. While I agree that the evidence is sufficient to sustain the verdict and that the prosecutorial misconduct was harmless beyond a reasonable doubt, I believe that the district court erred by refusing to suppress the statements that appellant made to the police.

It is a fundamental principle of our constitutional system that an accused cannot be forced to bear witness against himself. U.S. Const. amend. V; Minn. Const. art. I, sec. 7. This principle is the source of the prohibition against the use of coerced confessions, which operate to force an accused to bear witness against himself. A confession is coerced when "the defendant's will was overborne at the time he confessed. If so, the confession cannot be deemed the product of a rational intellect and a free will." *Lynumn v. Illinois*, 372 U.S. 528, 534, 83 S. Ct. 917, 920 (1963) (citations and quotations omitted).

Like appellant here, the accused in *Lynumn* was threatened by police with the loss of her children unless she confessed to selling marijuana and was told by police that they would intercede to make sure she did not go to jail, if she would make an inculpatory statement. *Id.* at 533, 83 S. Ct. at 920. Concluding that the only way she could remain with her children was to make such a statement, the accused in *Lynumn* confessed. *Id.*

The Minnesota Supreme Court has warned that "with respect to the use of trickery and deceit[,] police invite suppression of the [coerced] statement when they use promises, express or implied, in seeking to persuade a subject to confess to a crime." *State v. Thaggard*, 527 N.W.2d 804, 811 (Minn. 1995).

When viewed in light of the totality of the circumstances, appellant's confession was not voluntary. Appellant was the primary caregiver for his two sons, C.M. and K.M. Detective Olson told appellant that K.M. would not be returning home and that C.M. would very likely be removed from the home unless someone admitted culpability for K.M.'s injuries. Olson suggested that the consequences of making this admission would be slight: appellant would have to spend a couple of weeks out of the home before the whole family could be reunited. Olson also suggested that criminal charges would not have to be brought against appellant and that people do not serve jail time for this type of offense. Although appellant did not make a statement during this interview, Olson made the same comments to appellant's wife the next day and urged her to encourage appellant to confess to harming the child. As a consequence of these coercive tactics, appellant stated to Olson that he "may" have "accidentally" inflicted the injuries, parroting the language suggested by Olson during their interview.

We, as a society, have an interest in maintaining order and punishing malefactors, but the use of deceptive practices by those charged with enforcing the law "not only fosters cynicism in the public at large but a callousness in the officials themselves which it is hard then to contain within the bounds of the special need which is supposed to justify it." *Id.* at 809 (quoting Model Code of Pre-Arraignment Procedure, Commentary to § 140.4 at 355-57 (1975)).

Detective Olson crossed the boundary between empathic questioning and outright deceit when he implicitly promised appellant that there would be no criminal or familial consequences if only appellant confessed. I would reverse.