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Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,
v.
Joshua Scott SUNDBLAD, Appellant.

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Filed June 11, 2018

Scott County District Court, File No. 70–CR–14–15709

Attorneys and Law Firms

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Considered and decided by Jesson, Presiding Judge; Reyes, Judge; and Kalitowski, Judge.*

UNPUBLISHED OPINION

JESSON, Judge

***1** Appellant Joshua Sundblad was home alone with his baby while mother was away at work. When mother returned home on a break, she noticed the baby was a shade of purple and not breathing. The baby could not be revived, and he passed away. After confessing to several incidents that may have led to injuries to the child, Sundblad was arrested. Following a two-week bench trial, Sundblad was convicted of two counts of first-degree assault, third-degree assault, and second-degree manslaughter. On appeal, Sundblad argues there was insufficient evidence to establish the great-bodily-harm element for the first-degree assault convictions and that he is entitled to resentencing because one of the first-degree assault convictions was part of the same behavioral incident as the second-degree manslaughter conviction. We affirm in part, reverse in part, and remand.

FACTS

On March 11, 2014, appellant Joshua Sundblad and his girlfriend became parents to a son. Following birth, the baby did not

have any medical complications, and everything indicated that he was a normal, healthy newborn. The baby was still healthy 23 days later when he had a routine examination. But soon after, his demeanor began to change for reasons unknown to mother. His mood changed from generally calm to frequently fussy, and he began to cry more often and spit up through his nose and mouth. Despite mother's best efforts, this new demeanor did not go away.

A month later, on May 9, 2014, Sundblad was home alone with the baby. This was a rare occurrence, as mother was the primary caretaker. Later that day, mother came home from work and found Sundblad in bed with their child, who was a shade of purple and not breathing. Mother called 9–1–1, and the Belle Plaine Police Department responded. Sundblad let the police enter the home and calmly directed the officers to the baby. Officers found the baby lying on his back not breathing and noticed that his skin was a dark shade of purple. The officer and a firefighter began chest compressions on the child, but could not get him to breathe. The baby was pronounced dead a few hours later. Sundblad told the officer that he went to bed with the baby and was awakened by mother's screams.

Dr. Mitchel Morey conducted an autopsy the following day. The autopsy revealed a skull fracture, a metaphyseal wrist fracture,[1] rib fractures, and hemorrhages in the back of the baby's head. The injuries were determined to be non-accidental. The autopsy further revealed a potential timeline for these four injuries. The skull fracture was recent with no evidence of healing, but the other three injuries exhibited signs of healing and were anywhere from a week to several weeks old. The autopsy report classified the cause of death as undetermined, and police officers began their investigation.

In a July 2014 interview with police, officers confronted Sundblad with the injuries discovered during the baby's autopsy. Though initially hesitant, and after several self-admitted fabrications, Sundblad ultimately confided several possible causes of harm. He told officers about an incident from approximately April 8, around the same time the baby's demeanor began to change, where he was bouncing the child on his knee. Sundblad explained he got frustrated with the baby's persistent crying, and as a result, he intentionally hit the child's head on his knee four consecutive times. Sundblad stated this caused the baby to lose consciousness and roll his eyes back into his head. Reacting to this, Sundblad squeezed the baby's chest hard to the point where he heard the ribs "pop" and he felt a deformity.

***2** Sundblad also told officers it was possible he harmed the baby's wrist during a diaper change that also occurred around April 8. He explained that while changing the baby's clothes, he aggressively pulled on the child's sleeve and wrist—causing the baby to immediately cry.

And on the day the baby died, Sundblad admitted that he was in a bad mood when he noticed the child needed to have his diaper changed. He picked up the baby, and aggressively put the child on the changing table. The baby's head hit the railing on the changing table, and he became quiet and his eyes rolled back into his head. The child then began crying. In an attempt to stop the crying, Sundblad wrapped the baby in a blanket tighter than normal and put him in bed. The record is unclear of the exact timing, but at some point after wrapping the baby in a blanket, but before mother came home, he noticed the baby was not breathing and then took a nap. Sundblad awoke to mother's screams, who immediately called 9–1–1. From the time Sundblad hit the baby on the changing table, to when mother arrived home, no more than an hour passed. At a separate meeting the following week with officers, Sundblad wavered back and forth between admitting and denying the incidents.

Sundblad was arrested and charged by way of a six-count indictment: (1) first-degree murder —past pattern of child abuse;[2] (2) first-degree assault—great bodily harm, for the skull fracture;[3] (3) first-degree assault—great bodily harm, for the brain hemorrhaging;[4] (4) second-degree manslaughter;[5] (5) third-degree assault—substantial bodily harm, for the rib fractures;[6] and (6) third-degree assault—substantial bodily harm, for the wrist fracture.[7] The case proceeded to a two-week bench trial in May 2016, where numerous family members, law enforcement, and medical experts testified.

With Sundblad's statements to police entered as evidence, the state's focus at trial was linking the baby's injuries to Sundblad's version of events. For count three's first-degree assault, corresponding with the brain hemorrhaging, evidence showed the injury was consistent with the knee-bouncing story, as was the timing. And a child-abuse pediatrician at Children's Hospitals and Clinics of Minnesota testified as to the potential reason for the baby's demeanor change around the time of this incident: after abusive head trauma, some babies become fussier and vomit more often. Similar testimony was given for the other injuries. The metaphyseal fracture to the baby's wrist was consistent with someone pulling too hard on the wrist while changing clothes. The fractured rib was consistent with someone squeezing a baby too hard. And the complex skull fracture was consistent with being thrown onto a changing table and having the head struck. Each incident's timing was also consistent with the stage of healing for each respective injury.

Medical experts also testified to the seriousness of the brain hemorrhaging and skull fracture. The brain hemorrhaging[8] included both a subdural and subarachnoid hemorrhage[9] toward the back of the baby's head. A medical expert testified that this type of injury is found in accidental cases involving "high speed motor vehicle collisions. Crush head injuries, so like if a

television, a big television, fell onto a baby's head or a dresser." And the expert testified that the injury changed the substance of the brain itself. The skull fracture was described as cruciform or cross-shaped instead of linear, and was classified as complex. Evidence at trial showed that this type of injury can lead to the victim experiencing a neurological deficit, in addition to head trauma symptoms such as difficulty eating, digestive issues, and pain.

***3** Sundblad had a forensic pathologist testify on his behalf. The expert testified that here, the baby was born premature, which can oftentimes lead to brittle bones. He explained that routine medical procedures or normal daily activities, like picking a baby up, can cause brittle bones to fracture. The expert also opined that there was no evidence-based literature to support the notion that either metaphyseal wrist fractures or cross-shaped skull fractures are indicative of abuse. Lastly, he explained that it was very likely that the baby suffered a subarachnoid hemorrhage during child birth.

The district court found that mother did not inflict any of the injuries at issue in the case. It credited the state's expert witness and did not give any weight or credibility to Sundblad's expert witness. The court determined that Sundblad was guilty of count two first-degree assault for the changing-table incident leading to the skull fracture; count three first-degree assault for the knee-bouncing incident leading to the brain hemorrhages; count four second-degree manslaughter as Sundblad's actions were the proximate cause of the baby's death; and count six third-degree assault for the diaper-changing incident leading to the wrist fracture. The court determined Sundblad was not guilty of count five third-degree assault because there was no evidence that Sundblad intentionally tried to harm the baby when he squeezed the child's chest and caused the rib fracture, and not guilty of count one first-degree murder as there was insufficient evidence Sundblad acted with extreme indifference to human life.

The district court imposed consecutive sentences of 103 months for count two, 153 months for count three, and 57 months for count four. Additionally the court sentenced Sundblad to 15 months for count six, to be served concurrently with the other counts. Sundblad appeals.

DECISION

On appeal, Sundblad argues the two convictions of first-degree assault—the knee-bouncing incident and the changing-table incident—should be reversed because there is insufficient evidence for the great-bodily-harm element. Sundblad also argues that if the first-degree assault conviction for the changing-table incident is upheld, then he is entitled to resentencing because it is a part of the same behavioral incident as the manslaughter charge.

I. Sufficient evidence supports the bodily-harm element for the two first-degree assault convictions.

Sundblad contends that the two first-degree assault convictions—the knee-bouncing incident and the changing-table incident—should be reversed because there is insufficient evidence to prove the element of great bodily harm. For sufficiency-of-the-evidence claims, this court reviews the record to determine if the evidence, when viewed in the light most favorable to the verdict, is sufficient to allow the jury to reach its verdict. *State v. Rodriguez*, 863 N.W.2d 424, 427 (Minn. App. 2015), *review denied* (Minn. July 21, 2015). And we will not disturb the verdict if, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, the fact-finder could reasonably conclude that the defendant was guilty. *Id.*

First-degree assault is defined as, "[w]hoever assaults another and inflicts great bodily harm." Minn. Stat. § 609.221, subd. 1 (2012). Great bodily harm is defined as "bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which 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 (2012). The district court found this definition of great bodily harm was satisfied because there was "permanent or protracted loss or impairment of the function of any bodily member or organ" and because there was "other serious bodily harm." We agree.

***4** Evidence at trial showed that the knee-bouncing incident resulted in brain hemorrhages that changed the substance of the brain itself, a loss of consciousness, and a change in the baby's demeanor. With respect to the changing-table incident, evidence established that it led to a complex skull fracture and could lead to a neurological deficit, in addition to head-trauma symptoms such as difficulty eating, digestive issues, and pain. This evidence supports the district court's determination that

both of these incidents led to great bodily harm—which requires permanent or protracted injuries. Minn. Stat. § 609.02, subd. 8.

Sundblad argues that the district court's determination—that brain hemorrhages and a complex skull fracture to a baby constituted great bodily harm—was unsupported because there was no evidence specifically regarding the permanency or longevity of the harm. We are not persuaded. When we review sufficiency-of-the-evidence claims to determine if an element is supported by the record, we not only look to the facts in the record, but also to the "legitimate inferences that can be drawn from those facts" by the fact-finder. *State v. Barshaw*, 879 N.W.2d 356, 362 (Minn. 2016). And it was reasonable for the district court to infer the injuries the baby suffered, including brain hemorrhaging, a complex skull fracture, loss of consciousness, neurological changes, and head-trauma symptoms, would constitute permanent or protracted injuries. Sundblad counters with several unpublished cases where great bodily harm was supported when there was testimony directly about the permanency of the injury. But none of these cases supports the suggestion that the fact-finder would be unable to find great bodily harm without such testimony.

Lastly, Sundblad takes issue with the district court's finding that, had the baby survived, "he would have experienced protracted loss and impairment." He argues this was improper because the district court is relying on a hypothetical, namely that had the baby survived then he would experience the requirements of great bodily harm. We reject this argument. The court's "had [the baby] survived" language was not diving into hypotheticals, but rather stating that the reason the injuries did not lead to protracted harm was because the child's life was cut short by Sundblad's actions.[10]

In sum, we determine that there was sufficient evidence in the record to support the district court's determination that the first-degree assault incidents resulted in great bodily harm.

II. Resentencing is appropriate because Sundblad was improperly sentenced on two counts that arose from the same behavioral incident.

Sundblad argues that if there is sufficient evidence to convict him of first-degree assault for the changing-table incident, which we determine there is, then he is entitled to be resentenced. He reasons that the first-degree assault was part of the same behavioral incident as the manslaughter offense of wrapping the baby in a blanket too tightly and failing to notify authorities, and that imposing sentences for both counts is a violation of Minn. Stat. § 609.035 (2012).[11] When the facts are not in dispute, as is the case here, this court reviews de novo "whether multiple offenses form part of a single behavioral act." *State v. McCauley*, 820 N.W.2d 577, 591 (Minn. App. 2012), *review denied* (Minn. Oct. 24, 2012).

***5** In analyzing whether multiple offenses arise from a single behavioral incident, the Minnesota Supreme Court has put forth two separate tests depending on whether any of the crimes has an intent element. *State v. Bauer*, 792 N.W.2d 825, 827–28 (Minn. 2011). Both Sundblad and the state briefed the crimes of first-degree assault and second-degree manslaughter as intentional crimes and analyzed this issue using the intentional-crimes analysis. We therefore assume, without deciding, that these are intentional crimes for purposes of the single-behavioral-act analysis. *Id.* at 828 (applying the intentional-crime analysis when both parties briefed it in that manner). To determine whether two intentional crimes are part of the same behavioral incident, courts look at: (1) time and place and (2) whether the crimes were motivated by an effort to obtain a single criminal objective.[12] *State v. Williams*, 608 N.W.2d 837, 841 (Minn. 2000). The application of this test "depends heavily on the facts and circumstances" of the case. *Bauer*, 792 N.W.2d at 828. The state bears the burden of proving, by a preponderance of the evidence, that the offenses were not part of a single behavioral incident. *State v. Bakken*, 883 N.W.2d 264, 270 (Minn. 2016).

We first look at the time and place of the two charges. The Minnesota Supreme Court has stated the difference in time or place must be significant. *State v. Bertsch*, 707 N.W.2d 660, 666 (Minn. 2006). In *State v. Williams*, the appellant was charged with several crimes when he broke into a house, sexually assaulted a victim, tried to drag the victim to a different room but was only able to get her to the hallway because she resisted, and eventually choked her to the point of unconsciousness. 608 N.W.2d at 843. In determining that the crimes constituted a single behavioral incident, the court noted that merely being in a different room was not sufficient to justify a conclusion that the offenses were not part of a single behavioral incident. *Id.* at 842–43. Similarly, here the crimes of first-degree assault and second-degree manslaughter occurred in nearly the same place and nearly at the same time. Sundblad's actions all took place in the same house and within a short timespan—within approximately an hour. And while the state argues that these actions occurred in different rooms in the house, *Williams* instructs us that this alone is not sufficient. Because the first-degree assault and second-degree manslaughter occurred in close proximity, both in time and place, this factor weighs heavily toward determining they are part of a single behavioral incident.

We next look at whether the same criminal objective permeated the conduct in question. *See State v. Spears*, 560 N.W.2d 723, 727 (Minn. App. 1997), *review denied* (Minn. May 28, 1997). The state argues that the motives for the two crimes are sufficiently distinct from one another. It points out that the changing-table incident leading to the first-degree assault conviction came from a place of anger and aggression, while the events leading to the manslaughter conviction—the subsequent wrapping of the baby and not notifying authorities—were done to silence the crying baby. We are not persuaded. Our fact intensive review of the series of events shows that Sundblad assaulted the baby, causing him to cry. And then Sundblad's subsequent behavior attempted to cover the consequences of his assault: to keep the baby from crying, Sundblad tightly wrapped the baby up in a blanket and declined to notify medical authorities.

When addressing a second crime committed to cover or conceal the first crime, the avoidance-of-apprehension doctrine instructs us that, generally, both crimes are part of a single behavioral incident when committed substantially contemporaneously. *See State v. Gibson*, 478 N.W.2d 496, 497 (Minn. 1991) ("In a series of decisions—the avoidance-of-apprehension cases—we have held that multiple sentences may not be used for two offenses if the defendant, substantially contemporaneously committed the second offense in order to avoid apprehension for the first offense."). In *State v. Hicks*, the Minnesota Supreme Court determined that concealing a body after a homicide was part of the same behavioral incident as the homicide itself. 864 N.W.2d 153, 160 (Minn. 2015). The court explained that Minnesota has "long recognized that a defendant's conduct in concealing a crime is part of the same behavioral incident as the underlying offense." *Id.* Here the facts closely align with this doctrine and caselaw. Sundblad's actions of wrapping the baby up and not alerting authorities were done substantially contemporaneously with—and as a direct result of—the assault, and were done for purposes of concealment. In light of this caselaw, in addition to the conduct occurring close in time and place, the state did not meet its burden in establishing that they are not part of a single behavioral incident.

***6** Because the district court sentenced Sundblad on both the first-degree assault and second-degree manslaughter convictions, despite the conduct being part of a single behavioral incident, we reverse and remand for the district court to resentence Sundblad on his convictions.[13] We note that during resentencing, the district court may exercise its broad discretion on sentencing issues to determine the most appropriate new sentence. *See State v. Law*, 620 N.W.2d 562, 564 (Minn. App. 2000) (stating district courts have broad discretion in sentencing decisions), *review denied* (Minn. Dec. 20. 2000).

Affirmed in part, reversed in part, and remanded.

All Citations

Not Reported in N.W. Rptr., 2018 WL 2770381

Footnotes

*	Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.
1	A metaphyseal fracture is a fracture near the end of a bone.
2	In violation of Minn. Stat. § 609.185(a)(5) (2012).
3	In violation of Minn. Stat. § 609.221, subd. 1 (2012).
4	In violation of Minn. Stat. § 609.221, subd. 1.
5	In violation of Minn. Stat. § 609.205(4) (2012).
6	In violation of Minn. Stat. § 609.223, subd. 1 (2012).

7	In violation of Minn. Stat. § 609.223, subd. 1.
8	A brain hemorrhage involves the tearing of vessels or veins that lead to bleeding in the subdural subarachnoid spaces in the head. Medical testimony described the hemorrhage here as "significant."
9	A subdural hemorrhage is located towards the outer portion of the brain, while a subarachnoid hemorrhage is located closer to the center.
10	For both the first-degree assault charges, the district court also stated that they resulted in great bodily harm because they contributed to the collection of all of the injuries. Sundblad contends that it would be improper to let this serve as the basis, because while all of the injuries taken together may constitute great bodily harm, each incident was charged separately, and therefore each incident needs to result in great bodily harm. Because we determine that there was sufficient evidence to support the determination that each incident resulted in great bodily harm, we do not reach this argument.
11	The state argues that Sundblad waived this issue by not raising it in the district court. But this is not accurate, as a defendant can raise issues involving an illegal sentence at any time. *See State v. Maurstad*, 733 N.W.2d 141, 147 (Minn. 2007).
12	When one of the crimes does not contain an intentional component, the proper test is whether the offenses "(1) occurred at substantially the same time and place and (2) arose from 'a continuing and uninterrupted course of conduct, manifesting an indivisible state of mind or coincident errors of judgment.' " *State v. Bauer*, 776 N.W.2d 462, 478 (Minn. App. 2009) (citing *State v. Gibson*, 478 N.W.2d 496, 497 (Minn.1991)), *aff'd*, 792 N.W.2d 825 (Minn. 2011).
13	Minnesota Statutes section 609.035 "contemplates that a defendant will be punished for the 'most serious' of the offenses arising out of a single behavioral incident." *State v. Kebaso*, 713 N.W.2d 317, 322 (Minn. 2006) (quotation omitted). On remand, the district court should therefore only impose a sentence on the more serious of the two convictions.