COURT OF APPEALS
DECISION
DATED AND FILED

April 22, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2318-CR **Cir. Ct. No. 01-CF-28**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DANIEL R. PARSLEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Door County: D.T. EHLERS, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Daniel Parsley appeals a judgment of conviction entered upon a jury's verdict finding him guilty of four counts of recklessly

causing bodily harm to a child, contrary to WIS. STAT. § 948.03(3)(b).[1] Parsley contends the State's evidence was insufficient to allow the jury to find him guilty beyond a reasonable doubt. We disagree and affirm the judgment.

Background

¶2 Parsley began living on and off with Samantha B. and her daughter Kamrie in August of 2000, shortly after Kamrie's birth on June 25. In November 2000, Kamrie was treated for an upper respiratory infection by her primary care physician, Dr. Charles Nelson. As part of treatment for the infection, the doctor x-rayed Kamrie's chest on November 30 and December 3. Neither Nelson nor the radiologist observed anything of note from the X rays, but Kamrie was hospitalized from December 6-12 to treat the infection.

¶3 On December 18, Samantha's sister noticed bruises on Kamrie. On December 21, when Samantha returned home from work, Parsley told her that the dog may have stepped on Kamrie. Samantha noticed only some redness to Kamrie's cheek, although multiple facial bruises were visible on December 22.

¶4 On December 23, Kamrie was with Louise Snow, a child care provider who routinely supervised Kamrie. Snow photographed Kamrie's bruises, concerned that she might have an abused child in her care. She additionally worried that she would be blamed for the bruises.

¶5 On December 27, Samantha noticed that Kamrie had a swollen lip. She examined Kamrie and observed "a small cut" inside her lip.

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶6 The bruises remained on December 28 when Samantha and Parsley took Kamrie to Nelson for a routine visit. Nelson noted the bruises and observed that the lip injury was a crushed frenulum, the small piece of skin that connects the lip to the gums. Concerned the bruises might be the result of abuse, Nelson notified social services of the situation as required by mandatory reporting laws, although he apparently did not believe Samantha was the cause of the injuries. Social services removed Kamrie from her home on December 29 and examined her on December 30.

¶7 Dr. David Gregg, a pediatric radiologist, reviewed the X rays taken when Kamrie was treated for the respiratory infection as well as X rays taken during the social services exam. He determined that the first X rays showed a healing fracture of Kamrie's left clavicle, which he estimated was one to two weeks old when the X rays were taken. The December 30 social services X ray showed a fracture of the right clavicle that Gregg estimated was no more than a week old. It also showed rib fractures that Gregg estimated were two weeks old.

¶8 Dr. Jordan Greenbaum, an anatomic pathologist, concluded that Kamrie had suffered physical abuse on multiple occasions and roughly concurred with Gregg's dates. Greenbaum determined the left clavicle injury had occurred in mid-November, the rib injuries in mid-December, and the right clavicle injury at the end of December.

¶9 On February 16, 2001, the State charged Parsley with three counts of recklessly causing great bodily harm to a child, contrary to WIS. STAT.

§ 948.03(3)(a), for the bone injuries, and one count of recklessly causing bodily harm to a child, contrary to WIS. STAT. § 948.03(3)(b), for the frenulum injury.[2]

¶10 The jury convicted Parsley of four counts of recklessly causing bodily harm to a child.[3] On appeal, as at trial, Parsley does not dispute that Kamrie's injuries fulfill the legal definition of "bodily harm," nor does he challenge Kamrie's status as a child under the statute. Rather, he contends that the evidence is insufficient to prove beyond a reasonable doubt that he caused the harm to Kamrie. We disagree and affirm the conviction.

Standard of Review

¶11 In a criminal prosecution, the State must prove each element of a crime beyond a reasonable doubt. ***State v. Johnson***, 135 Wis. 2d 453, 456, 400 N.W.2d 502 (Ct. App. 1986). Here, the only disputed element is whether Parsley caused the harm to Kamrie. When the defendant challenges the sufficiency of the evidence, our standard of review is whether the evidence adduced, believed and

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[2] WISCONSIN STAT. § 948.03(3) provides:

> Reckless causation of bodily harm.
>
> (a) Whoever recklessly causes great bodily harm to a child is guilty of a Class D felony.
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> (b) Whoever recklessly causes bodily harm to a child is guilty of a Class E felony.

"'Great bodily harm' means bodily injury which creates a substantial risk 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 injury." WIS. STAT. § 939.22(14). "'Bodily harm' means physical pain or injury, illness, or any impairment of physical condition." WIS. STAT. § 939.22(4).

[3] Recklessly causing bodily harm is a lesser-included offense of recklessly causing great bodily harm.

rationally considered by the jury was sufficient to prove a defendant's guilt beyond a reasonable doubt. ***Id.*** It is not necessary, however, for this court to be convinced of the defendant's guilt. ***Id.*** Rather, we need only be satisfied that a reasonably jury could be so convinced. ***Id.***

¶12 Thus, if any possibility exists that the jury *could* have drawn the appropriate inferences from the evidence to find the requisite guilt, we will not overturn a verdict even if we believe the jury *should* not have found guilt. ***Id.*** Indeed, we may not reverse a conviction unless the evidence, viewed most favorably to the verdict, is so lacking in probative value that no reasonable jury could have found guilt beyond a reasonable doubt. *See* ***State v. Block***, 222 Wis. 2d 586, 596, 587 N.W.2d 914 (Ct. App. 1998).

¶13 A conviction may be based in whole or in part upon circumstantial evidence. ***Johnson***, 135 Wis. 2d at 456. "The test for circumstantial evidence is whether it is strong enough to exclude every reasonable hypothesis of innocence." ***Id.*** The facts necessary to warrant a conviction on circumstantial evidence must be consistent with each other and with the main fact sought to be proved. ***State v. Charbarneau***, 82 Wis. 2d 644, 655, 264 N.W.2d 227 (1978). The circumstances taken together must be of a conclusive nature, leading on the whole to a satisfactory conclusion and producing, in effect, a reasonable and moral certainty that the accused and no other person committed the offense charged. ***Id.***

Discussion

¶14 Parsley contends, "The evidence was insufficient to permit a reasonable jury to find beyond a reasonable doubt that Parsley abused a child." He bases this argument primarily on the assertion that the State's case was flawed because the State "failed to identify every person who might have been in a

position to injure Kamrie." He argues that hospital workers, other adults who occasionally cared for Kamrie or were at Snow's home during day-care hours, and children in the adults' homes or Snow's care were not called to testify and therefore were not excluded as potential abusers.

¶15 We initially observe that no law requires the State to eliminate every theoretical perpetrator. It is self-evident that the State need not call every store clerk, bank teller, or short order cook that possibly saw Kamrie during the time period when she was injured. It is sufficient for the State to present evidence that convinces the jury, beyond a reasonable doubt, that Parsley was the abuser.

¶16 In any event, Parsley simply ignores the evidence from the trial. Gregg practices with a medical group that authored a book on dating fractures, and he testified as to the likely time frame for Kamrie's bone injuries. His testimony established her injuries could not have occurred when she was hospitalized.[4] Nelson testified that when he examined Kamrie on December 28, the frenulum injury was three to seven days old. Thus, if the jury accepted the doctors' testimony, no hospital worker could reasonably be considered an alternate suspect.

¶17 Parsley's arguments regarding other adults fail as well. Those who had contact with Kamrie testified and unequivocally denied engaging in any conduct that could have injured the child. The jury, as the ultimate arbiter of credibility, was entitled to believe these denials. *See* ***O'Donnell v. Schrader***, 145

[4] Parsley provides a table of potential dates when Kamrie's injuries could have occurred and argues that no reasonable juror could have accepted any one specific date based on Gregg's testimony, because his testimony provided only an age *range* for each injury. This argument, however, ignores the simple fact that the jury, exercising its proper function, could have accepted the ranges that placed Kamrie outside the hospital when she was injured and therefore eliminated various miscellaneous hospital staff from the list of potential suspects.

Wis. 2d 554, 557, 427 N.W.2d 152 (Ct. App. 1988). As for those adults who did not testify but whom Parsley attempts to implicate, he directs us to nothing in the record to suggest these adults had any contact with Kamrie when her injuries allegedly occurred. That they had seen her on previous occasions, absent more, does not reasonably make them suspects either.

¶18 Parsley's attempt to implicate children is equally unsuccessful. He contends that other children cared for in Snow's home could have injured Kamrie. Gregg testified that the only way a child could have caused the degree of injuries to Kamrie's clavicles would be if a child had jumped directly onto her from a table. Greenbaum opined that the only way a child could have caused the rib injuries was if an adolescent child had picked her up tightly around the chest. No child that Parsley attempts to implicate was an adolescent, some were not in Snow's home at the same time as Kamrie, and there was no evidence to suggest any of them had jumped on Kamrie. Moreover, Gregg discounted the possibility that Kamrie had injured herself by falling. Thus, there were no facts from which the jury could reasonably infer that any child could be suspected.

¶19 The State's case, however, was not premised solely on excluding all other potential suspects. It showed that Parsley had opportunity and motive to injure Kamrie.

¶20 Parsley essentially admitted that Kamrie's facial bruises occurred when she was in his exclusive care. He told the police, and later told relatives, that the family's labrador retriever had stepped on her, although he was not in the room with Kamrie when she started to cry. Nelson and Greenbaum discounted Parsley's claims, however, testifying that Kamrie's facial injuries were inconsistent with Parsley's explanation. They opined that had the dog stepped on

her, they should have observed scratches from the dog's nails and not just bruising. Greenbaum also stated that the dog might account for one bruise, but not the several that Kamrie had.

¶21 Crucial to child abuse cases "are the discrepancies between the adult's version of what happened to the child when the injuries occurred and the testimony of medical experts as to what could not have happened, or must have happened, to produce the injuries." ***Johnson***, 135 Wis. 2d at 458 (citation omitted). Such a discrepancy is present here; thus, the jury was not required to accept Parsley's factual recitation.

¶22 Parsley also told police that he called Kamrie's mother Samantha at work when the alleged dog injury occurred and that Samantha came home early. However, phone records for the residence as well as Parsley's cell phone indicate he made no such call, and Samantha's work records indicate she did not leave work early. Thus, Parsley's credibility was challenged through evidence suggesting he lied to the police.

¶23 Finally, Nelson testified that during two visits, Parsley expressed frustration and agitation because Kamrie would not take a bottle from him. Indeed, the manner in which Parsley expressed his frustration so concerned Nelson—"It didn't sit well with [him]"—that Nelson thought it appropriate to note the agitation in his clinical notes for the second visit. Nelson testified that the size and position of the bruises on Kamrie's face were consistent with someone grabbing her jaw and trying to force-feed her a bottle. Moreover, the injury to

Kamrie's frenulum was consistent with attempts to force-feed the child a bottle.[5] Thus, the State challenged Parsley's assertion that he did nothing to injure Kamrie. Evidently the jury disbelieved his claim.

¶24 It is the jury's function, not the reviewing court's, to decide which evidence is credible and which is not. ***Block***, 222 Wis. 2d at 596. From the lack of any other plausible suspects;[6] from unrefuted evidence that Kamrie was in Parsley's exclusive care when some injuries occurred; from evidence refuting Parsley's account of the cause of certain of Kamrie's injuries; from evidence impugning Parsley's credibility; and from evidence about Parsley's frustration with Kamrie's feeding, a reasonable jury had more than adequate information from which to conclude beyond a reasonable doubt that Parsley caused all of Kamrie's injuries.

¶25 Parsley additionally challenges the State's prosecutorial strategy. He declined to testify and claims the State "argue[d] that no witness has contradicted the State's evidence and [Parsley] is the only witness who would be likely to contradict the State's evidence …." This, he complains, means a jury would

[5] Parsley contends that Snow could also have caused this injury. Indeed, Samantha had called her to inquire about the injury once she discovered it. Snow suggested Kamrie had simply sucked too hard on a pacifier, although Nelson stated that would not be the cause. However, there was no evidence that Snow had any difficulty feeding Kamrie or experienced any undue frustration. Moreover, Snow denied she had done anything to injure the child. Evidently, the jury accepted her testimony.

[6] Parsley also argues that the same evidence against him supports an inference that Samantha caused the injuries and therefore mandates a reversal. Samantha, however, did not admit to having exclusive control of Kamrie when she was injured, was not caught in a lie, and did not report difficulty or frustration with Kamrie's feedings. Nelson also testified that Samantha was conscientious about her prenatal care as well as Kamrie's "well baby" checkups. We therefore disagree that the evidence equally supported Samantha as the abuser and indeed the jury implicitly rejected such a contention.

"naturally and necessarily" believe the State was commenting on Parsley's exercise of his right to remain silent, and such commentary therefore violated his Fifth Amendment right not to testify.

¶26 The State contends it simply argued the evidence to its logical conclusion, urging the jury to believe the denials of witnesses who testified because such denials made sense and to reject Parsley's denial because it did not make sense. The State also argues that no reasonable reading of the prosecutor's closing or rebuttal arguments results in a determination of impropriety and that Parsley failed to timely object to preserve the issue for appeal.[7]

¶27 It is the license and duty of an attorney, including the State's attorney, to say what the evidence tends to prove, that it convinces him or her, and that it should convince the jury as well, as long as the attorney does not depart from the evidence on record. ***Embry v. State***, 46 Wis. 2d 151, 161, 174 N.W.2d 521 (1970). Parsley fails to provide us with the record cite for any alleged improper commentary or actions by the State he would like us to review. WISCONSIN STAT. RULE § 809.19(1)(a) requires parties to provide us with appropriate record citations and, as such, when no citation exists to support a claim, we decline to sift the record for the facts necessary to sustain the claim. *See* ***Grothe v. Valley Coatings***, 2000 WI App 240, ¶6, 239 Wis. 2d 406, 620 N.W.2d 463. Thus, we conclude that the State argued within the limits of ***Embry*** and

[7] Parsley does not dispute the State's claim that he failed to preserve the argument. Thus, that part of the State's argument may be deemed admitted. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). As such, we could also dispose of this issue for Parsley's failure to preserve it for appeal. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980).

reject Parsley's contention that the State improperly commented on his decision not to testify.

¶28 The evidence in this case is sufficient to allow a reasonable jury to conclude beyond a reasonable doubt that Parsley recklessly injured Kamrie. The evidence established that only Parsley admitted that certain injuries occurred while he was in exclusive control of Kamrie, only Parsley was caught lying to the police, and only Parsley was notably frustrated by Kamrie's feeding habits. We cannot conclude the jury erroneously convicted Parsley of all four counts of recklessly causing bodily harm to a child.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.