



## **Case Summary**

Appellant-Defendant Barbara Schrock appeals her conviction for Battery, as a Class B felony.<sup>1</sup> We affirm.

### **Issues**

Schrock raises two issues on appeal:

- I. Whether there was sufficient evidence to support her conviction for battery; and
- II. Whether the prosecutor committed prosecutorial misconduct rising to the level of fundamental error.

### **Facts and Procedural History**

Schrock and Brant Benson lived together and had two daughters, I.B. and N.B. When Schrock was pregnant with N.B., she expressed her unhappiness with the pregnancy. On April 23, 2005, Schrock gave birth to N.B. several weeks prematurely due to Schrock developing preeclampsia. Schrock was discharged from the hospital a couple days after giving birth but N.B. remained at the hospital for seventeen days. When N.B. was released from the hospital, she was healthy and in “excellent physical condition,” according to N.B.’s physician. Tr. 543.

Shortly after N.B. came home, Brant’s father passed away, causing Brant to be the sole individual to run his father’s business and to work six days a week from approximately 5 a.m. to 7 p.m. Brant did not have much interaction with N.B. due to his long work hours. Schrock was not employed and was the primary caregiver for their two children.

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<sup>1</sup> Ind. Code § 35-42-2-1(a)(4).

From the time N.B. was in the hospital, Schrock mentioned to Brant numerous times that she did not feel as bonded to N.B. as she felt with their older daughter. One time, Schrock said to Brant “to the effect that can’t we just get rid of her” and “[c]an we put her up for adoption.” Tr. 735. Brant asked Schrock if she felt like hurting N.B., and Schrock replied, “[O]h, God, no.” Tr. 736. While never diagnosed with the condition, Schrock told other people, including her mother, that she thought she had post-partum depression because she did not feel attached to N.B. and at times only felt inclined to feed, change, and bath N.B. and then place her in the bassinet. On June 7 and 27, N.B. was seen by her pediatrician for “well baby” exams. Both times, the pediatrician found N.B. overall to be healthy and developing normally.

Charlene and Gary Mullins, Brant’s mother and stepfather, had the girls for the Fourth of July weekend and attended a family cookout that Saturday. Due to the advice of N.B.’s doctor that N.B. stay at home for thirty days, this was the first time the Mullins took care of N.B. Schrock and Brant also attended the party. Schrock was upset with Brant for not helping with the children. While sitting by the pool, Schrock occasionally held N.B. When N.B. became fussy, Schrock repeatedly called N.B. an asshole and handled the newborn roughly. At the end of a party on July 2, 2005, the Mullins asked Schrock to help them secure the baby seat in their car. Schrock was in a foul mood and “kind of slammed [N.B.] in the seat.” Trial transcript at 681. Schrock also made the comment, “[N.B.], why do you have to \*\*\*\*\* cry all the time, why can’t you be more like your sister?” Id. The Mullins kept both of their granddaughters that night and returned them to Schrock and Brant on Sunday

evening. While the men took I.B. to the park, Charlene stayed with Schrock and N.B. During that time, Schrock was holding N.B. and suddenly “threw her up in the air,” causing N.B. to briefly leave Schrock’s hands. Tr. 684. Soon thereafter, Charlene left with her husband.

During that next week, Schrock asked Brant if he thought N.B.’s eyes looked different. Brant indicated that her eyes looked hazy. Schrock also mentioned that N.B. was not eating well and would projectile vomit. On July 24, 2005, Schrock took N.B. to visit with Brant’s family. Charlene discussed her observations of N.B. with Charlene’s sister once Schrock left. They agreed that something seemed wrong with N.B. due to the baby’s lethargy and how her eyes were shifted to the side. Charlene called Brant the next day to note her concern. Upon Brant raising the topic, Schrock became upset and replied, “oh, God, now what,” ending the conversation. Tr. at 744. The following day Schrock’s mother, a nurse, came to the house so that Schrock could go to a hair appointment. When she arrived, Schrock asked her mother to look at N.B. Schrock noted that N.B.’s eyes had a glazed look and she was drooling more than normal. They took N.B.’s temperature, which registered as ninety-three degrees, and then called the pediatrician. The doctor directed Schrock to make an appointment for the following day.

The next morning July 27, 2005, Schrock woke Brant at 5 a.m. to tell him that N.B. was holding her breath. At Schrock’s direction, Brant called 9-1-1. The first responder noted that N.B. appeared very pale, had dilated pupils, was breathing slowly and irregularly and was not moving much. When N.B. arrived at the local hospital’s pediatric care unit, she

was unconscious with irregular breathing, indicating signs of a major head injury and had an abnormal CT brain scan.

Medical tests revealed that the three-month-old N.B. had sustained a skull fracture as well as a massive diffuse brain injury, affecting multiple areas of the brain and causing those portions of her brain to atrophy or die.<sup>2</sup> Based on the status of the injury, the treating neurosurgeon testified that the injury appeared to be between two to four weeks old. There was also acute bleeding in the brain, indicating a second head injury that was only one to two days old. According to the testimony of the treating neurosurgeon and physician, brain injuries of this severity in an infant are usually attributed to massive trauma, such as a car accident or a fall from a substantial height, or the baby being shaken or abused. However, the skull fracture would have been caused by an impact as opposed to an individual shaking the baby back and forth.

N.B. also had a detached retina and retinal hemorrhaging, which is an injury that is consistent with a diagnosis of shaken baby syndrome. Due to the absence of a massive trauma accident, the treating neurosurgeon concluded that N.B.'s brain injuries were most compatible with being non-accidental from shaken baby syndrome. This prompted more tests, which revealed that N.B. had a number of fractures to her ribs,<sup>3</sup> legs,<sup>4</sup> and wrist that were at different stages of healing. The treating physician concluded that the injuries were

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<sup>2</sup> The progression of N.B.'s injuries has left her with very little of her left brain except the brain stem and the cerebellum.

<sup>3</sup> There were fractures to the fifth, sixth and seventh right ribs, both close and away from the spine.

<sup>4</sup> The left tibia and right tibia and femur had fractures.

not compatible with the normal handling of a three-month-old baby.

On August 29, 2005, the State charged Schrock with Neglect of a Dependent, as a Class B felony,<sup>5</sup> and Battery, as a Class B felony. The first trial, held in September of 2007, resulted in a mistrial. After the charges were retried to another jury, Schrock was found guilty as charged. Due to double jeopardy concerns, the trial court did not enter judgment for the neglect charge. The trial court sentenced Schrock to eighteen years, suspending five years to probation.

Schrock now appeals.

## **Discussion and Decision**

### **I. Sufficiency of the Evidence**

First, Schrock contends that there is insufficient evidence that she was the individual who caused N.B.'s injuries. Our standard of review for insufficiency claims is as follows:

When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences *supporting* the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (citations and quotations

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<sup>5</sup> Ind. Code § 35-46-1-4(b)(2).

omitted)(emphasis in original).

Both parties agree that the evidence indicating that Schrock was the perpetrator is circumstantial. Schrock argues that this evidence is insufficient because individuals other than Schrock had access to N.B. during the timeframe of injuries. A criminal conviction may be supported solely on circumstantial evidence. Hampton v. State, 873 N.E.2d 1074, 1079 (Ind. Ct. App. 2007). Even in this situation, the evidence need not exclude every reasonable hypothesis of innocence. Id. “It is enough if an inference reasonably tending to support the verdict can be drawn from the circumstantial evidence.” Id.

The injuries to N.B. were extensive and numerous and were inflicted over a time period of four to six weeks. She suffered two separate brain injuries. The first, massive brain trauma was estimated to have occurred ten days to four weeks prior to July 27, 2005. The second brain injury, suggested by acute or fresh bleeding of the brain, likely occurred within twenty-four to forty-eight hours prior to N.B.’s admission to the emergency room. The majority of the rib fractures sustained by N.B. were close to the spine and were estimated to be three to six weeks old. These injuries, along with the retinal hemorrhaging and detached retina, are consistent with the diagnosis of shaken baby syndrome. N.B. also had three fractures to her legs. These fractures of both tibias and the right femur were two to three weeks old. Such fractures could be created by a person shaking the baby or forcefully pulling or twisting the leg. The radiologist testified that it was his opinion that the rib injuries occurred at a different time than the tibia and femur fractures. The radiologist also testified that the type of fractures that N.B. sustained could be particularly painful.

On June 27, 2005, N.B. was seen by her pediatrician for a wellness checkup, which included the doctor checking numerous reflexes of the child, such as tendon and stepping reflexes. After the checkup, the pediatrician concluded that N.B. was fine, physically and developmentally. This evidence combined with the testimony that N.B.'s fractures could be particularly painful leads to the reasonable inference that most if not all of her injuries occurred after her late June wellness checkup.

Schrock argues that the evidence is insufficient as to her being the person who caused N.B.'s injuries because other individuals had access to N.B. during the timeframes when N.B. sustained her injuries. We disagree. Even according to the chart Schrock included in her brief, only Schrock and Brant had access to N.B. during the week when the leg fractures were estimated to have occurred. At that time, Brant was working long hours and spent little time with N.B. Furthermore, Schrock admitted to being the primary caretaker of N.B. but that she felt detached from and not bonded to N.B. Schrock told others that she felt she was experiencing postpartum depression during July of 2005 and did not feel like taking care of the baby. During this same month, Schrock's behavior towards N.B. included repeatedly calling her an "asshole" and other obscenities, roughly handling her to the point of "kind or slamm[ing] her" into her carseat, and asking Brant if they could just get rid of N.B. Tr. at 681. Finally, Schrock's demeanor after being informed of N.B.'s serious condition was flat and emotionless.

The totality of the evidence of N.B.'s injuries and the estimated times they were inflicted, Schrock being the primary caregiver of N.B., Schrock's admission of detachment

and exhibited treatment of N.B. and Schrock's flat and emotionless response to N.B.'s dire condition permits a reasonable inference to be drawn that Schrock committed battery on N.B. Therefore, the evidence is sufficient to support the conviction.

## II. Prosecutorial Misconduct

Second, Schrock contends that the prosecutor committed misconduct during closing argument by misrepresenting facts and inappropriately appealing to the sympathies and prejudices of the jury. Because Schrock did not lodge contemporaneous objections to the prosecutor's remarks, her argument is couched in terms of fundamental error. In reviewing a claim of prosecutorial misconduct, a court determines: (1) whether the prosecutor engaged in misconduct, and if so (2) whether the misconduct had a probable persuasive effect on the jury. Gregory v. State, 885 N.E.2d 697, 706 (Ind. Ct. App. 2008), trans. denied. "Though normally referred to as 'grave peril,' a claim of improper argument to the jury is measured by the probable persuasive effect of any misconduct on the jury's decision and whether there were repeated occurrences of misconduct, which would evidence a deliberate attempt to improperly prejudice the defendant." Id. For such a claim to rise to the level of fundamental error, the defendant must establish not only the grounds for prosecutorial misconduct but also that the misconduct made a fair trial impossible or constituted blatant violations of basic and elementary principles of due process and presented an undeniable and substantial potential for harm. Id.

The allegations involve the reference to Schrock suffering from postpartum depression and the emotional delivery of the argument, including the use of certain photos. In closing

argument, a prosecutor may argue both law and facts and propound conclusions but must confine the argument to comments based only upon the evidence presented in the record. Gasper v. State, 833 N.E.2d 1036, 1042-43 (Ind. Ct. App. 2005), trans. denied. The prosecutor complied with this requirement when he referred to the postpartum depression. The majority of the contested references are simply restatements of the evidence that Schrock told others that she believed she was suffering from the condition. The other references were reviewing the testimony of Schrock's expert that concluded that Schrock had experienced a general form of depression<sup>6</sup> as opposed to postpartum. The purpose of the prosecutor's comments was to challenge the credibility of the expert's testimony as he did not evaluate Schrock until after the State had filed charges. Therefore, the prosecutor did not commit misconduct by mentioning postpartum depression in his closing argument because his comments were based on evidence in the record.

Finally, Schrock contends that the use of certain photos and the dramatic delivery by the prosecutor during his closing argument constituted misconduct because the tactic appealed to the emotions of the jury. The best that can be discerned from the record is that a photo of N.B. was shown during the conclusion of the prosecutor's closing argument. This photo, along with others that Schrock alleges were displayed during the closing argument, was admitted as evidence without objection by Schrock. After reviewing the closing argument of the State, we conclude that the prosecutor made no substantial reference to matters outside the evidence and did not implore the jury to convict Schrock based upon

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<sup>6</sup> NOS (not otherwise specified) depression

reasons other than the evidence. Therefore, the prosecutor did not commit misconduct, let alone that which would rise to the level of fundamental error.

Affirmed.

VAIDIK, J., and BRADFORD, J., concur.