A17-1119

STATE OF MINNESOTA

IN COURT OF APPEALS

State of Minnesota,

Respondent,

vs.

Muna Ibrihim Abikar, a.k.a. Hamde Khalif,

Appellant.

APPELLANT'S BRIEF

LORI SWANSON
State Attorney General
1800 Bremer Tower
445 Minnesota Street
St. Paul, MN 55101

MICHAEL O. FREEMAN
Hennepin County Attorney
Hennepin County Government Center
300 South 6th St.
Minneapolis, MN 55487

ATTORNEYS FOR RESPONDENT

OFFICE OF THE MINNESOTA APPELLATE PUBLIC DEFENDER

By: **MICHAEL MCLAUGHLIN**
Assistant State Public Defender
License No. 392748
540 Fairview Ave North, Suite 300
St. Paul, MN 55104
Telephone: (651) 201-6700

ATTORNEY FOR APPELLANT

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Muna Ibrihim Abikar, a.k.a. Hamde Khalif,

Appellant.

PROCEDURAL HISTORY

1. May 12, 2016 to May 18, 2016: Date range of alleged offense.
2. June 9, 2016: The state charged appellant Muna Abikar, a.k.a. Hamde Khalif, in Hennepin County with assault in the first degree.
3. January 12, 2017: A bench trial began before Judge William H. Koch, after Ms. Khalif waived her right to a jury trial. Before trial, the state amended the complaint to include a charge of assault in the third degree.
4. February 28, 2017: The court found Ms. Khalif guilty of assault in the first degree and assault in the third degree.
5. April 21, 2017: The court convicted Ms. Khalif of both charges and sentenced her to 43 months.

LEGAL ISSUES

1. Was the evidence legally insufficient to establish first-degree assault-harm because: a) Ms. Khalif did not commit a battery (the *actus reus* of assault harm); and b) healing rib fractures and bruises do not constitute great bodily harm, where the state offered no evidence that the injuries had long-term consequences?

Ruling Below: The district court found Ms. Khalif guilty of first degree assault (V. 1). Defense counsel made a timely motion for a verdict of acquittal (T. 105).[1]

Most Apposite Authority:

State v. Dorn, 887 N.W.2d 826 (Minn. 2016)

State v. Moore, 699 N.W. 733 (Minn. 2005)

State v. Dye, 871 N.W.2d 916 (Minn. App. 2015)

2. Did the state fail to meet its burden to prove by circumstantial evidence that Ms. Khalif assaulted Z.K., where it failed to disprove a rational hypothesis that the bone fractures occurred before Ms. Khalif assumed Z.K.'s care?

Ruling Below: The district court found Ms. Khalif guilty of assault in the first degree and assault in the third degree (V. 1).

Most Apposite Authority:

State v. Al-Naseer, 788 N.W.2d 469 (Minn. 2010)

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[1] The trial transcript is denoted by the letter "T." followed by the page number; the verdict transcript is denoted by the letter "V." followed by the page number; the sentencing hearing transcript is denoted by the letter "S." followed by the page number.

State v. McCormick, 835 N.W.2d 498 (Minn. App. 2013)

State v. Berndt, 392 N.W.2d 876 (Minn. 1986)

3. Did the state fail to meet its burden to prove each link of its circumstantial theory of guilt and to disprove the reasonable hypothesis that non-abusive trauma caused Z.K.'s injuries?

Ruling Below: The district court found Ms. Khalif guilty of assault in the first degree and assault in the third degree (V. 1).

Most Apposite Authority:

State v. Taylor, 650 N.W.2d 190 (Minn.2002)

State v. Zanter, 535 N.W.2d 624, 631 (Minn.1995)

McDonough v. Allina Health System, 685 N.W.2d 688 (Minn. App. 2004)

4. Must the conviction for assault in the third degree be vacated because it is a lesser included offense of assault in the first degree, of which Ms. Khalif was also convicted?

Ruling Below:

The district court convicted Ms. Khalif of both assault in the first degree and assault in the third degree (Warrant of Commitment).

Most Apposite Authority:

Minn. Stat. § 609.04.

State v. Hackler, 532 N.W.2d 559 (Minn. 1995)

STATEMENT OF THE CASE

The state charged appellant Hamde Khalif[2] in Hennepin County District Court with assault in the first degree (Minn. Stat. § 609.221). The complaint alleged that between May 12 and May 18, 2016, Ms. Khalif intentionally caused great bodily harm to her three-month-old son, Z.K. (Complaint, Doc ID# 1). The state amended the complaint to include a charge of assault in the third degree (T. 2, 8). The state asked to amend the complaint to add charges of felony child neglect and felony child endangerment, but it later withdrew this request (T. 3, 8).

On January 12, 2017, a bench trial began before Judge William H. Koch. The state's case rested on circumstantial evidence. The district court found Ms. Khalif guilty of first-degree assault and third degree assault. The court convicted her of both charges and sentenced her to 43 months.[3]

STATEMENT OF FACTS

A. Z.K.'s Initial Hospitalization

On February 7, 2016, appellant Hamde Khalif's son, Z.K., was born prematurely at a gestational age of 26 weeks (T. 19). At the time of his birth, his lungs were not fully developed (T. 33, Exhibit 2). The lack of oxygen in his blood caused intraventricular hemorrhaging in his brain, which worsened in the weeks after his birth (T. 49, 125).

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[2] This brief will refer to appellant as Hamde Khalif. The trial record shows that this is her correct legal name and her preferred name.

[3] This sentence was a downward durational departure. The court denied Ms. Khalif's motion for a downward dispositional departure.

Z.K. remained in the Neonatal Intensive Care Unit (NICU) at St. Paul Children's Hospital for the next 14 weeks (T. 19). For three of these weeks, he breathed through a ventilator attached to his face and ate through feeding tubes (Exhibit 2). Because he was born prematurely, Z.K.'s bones did not reach normal density in utero (T. 52). Some premature babies are released from the NICU with a diagnosis of osteopenia of prematurity, a condition characterized by fragile and demineralized bones (T. 37). Z.K. received occupational therapy while in the NICU to improve bone mineralization and to avoid a diagnosis of osteopenia of prematurity at the time of his release (T. 52-54). To be not diagnosed with osteopenia of prematurity, he needed to "tolerate the osteopenia protocol," and to display sufficient bone mineralization to execute age-related motor schemes in "50 percent of trials." (T. 52). He met these occupational therapy goals by his discharge on May 12 (T. 54). His discharge summary did not diagnose him with osteopenia of prematurity (T. 54).

While his bone mineralization may have improved by May 12, he continued to experience prematurity complications related to his respiratory system (T. 18). He was released with a diagnosis of apnea, a condition in which a child stops breathing for periods of time (T. 18). The blood does not receive adequate amounts of oxygen during apneic episodes (T. 122-23). Doctors released Z.K. with an apnea monitor to track his breathing and heart rate, and they prescribed caffeine to stimulate breathing (T. 18). Intraventricular hemorrhaging associated with reduced oxygen levels also continued after his release on May 12 (T. 29).

B. Z.K.'s Release to Ms. Khalif

Z.K. was released to his mother, Ms. Khalif, who had actively participated in his care during his 14 weeks in the NICU (T. 50). She attended at least nine classes that addressed Z.K.'s special needs (T. 62). She completed a training on how to administer CPR, how to monitor Z.K.'s apnea condition, and how to administer caffeine to encourage breathing (T. 50). Hospital records described her as "very attentive" and "very engaged," and said that she "did appear loving and interactive with baby." (T. 57-58).

On May 14, Ms. Khalif called the hospital in response to concerns about the sleep apnea monitor (Police Interview, Exhibit 10). Nurses went to Ms. Khalif's residence on May 15 to examine the apnea monitor and Z.K. condition (*Id.*). Records indicate that Z.K. may have also returned to the hospital on May 15 (Exhibit 2). The state offered no evidence that the nurses or any other medical professional found signs of physical abuse or maltreatment on May 15.

On May 18, Z.K.'s condition worsened (Exhibit 10). He threw up and displayed symptoms of severe constipation (*Id.*). "He started hysterically crying," Ms. Khalif said. "Throwing up, so I picked him up tried to shush him and he was pushing and pushing. Just pushing his face started turning colors." (*Id.*, p. 4). Ms. Khalif took steps to relieve the pressure Z.K. was experiencing (*Id.*, p. 31). First, she tried to hold his "feet straight out like tryin[g] [to] like stand[] on his own type of thing," but this "wasn't working." (*Id.*, p. 31). Next, she pressed on Z.K's chest to relieve the pressure. (*Id.*, p. 5, 31). "I just grabbed him like that" and "started patting him like that," while hanging on to him by the "[j]awline." (Exhibit 10, p. 31).

Ms. Khalif planned to take Z.K. to the home of a friend who also had young children. (*Id.*, p. 28) Z.K.'s father, Luis Chaparro-Vargas, drove Ms. Khalif and Z.K. to the friend's home (*Id.* p. 34). But on the way there, Z.K.'s condition got even worse. He briefly had diarrhea, but then started reshowing the previous constipation symptoms (*Id.*, pp. 34-36).

While in the car, Z.K.'s apnea monitor started to sound and he "stopped breathing." (*Id.*, 39). The state's expert, Dr. Alice Swenson, testified that apnea alarms typically go off when a patient "stop[s] breathing for more than a certain amount of time, say 10 or 15 seconds." (T. 15). Ms. Khalif "pressed on his chest." (Exhibit 10, pp. 39-40). Mr. Chaparro-Vargas said that Ms. Khalif performed CPR (T. 141). The district court did not credit this testimony because it believed that Mr. Chaparro-Vargas could not have observed this from his vantage point in the front seat. Ms. Khalif also referenced CPR during her police interview, but she did not use this term when describing the chest compressions she performed (Exhibit 10, p. 4; T. 91-92).

After Ms. Khalif administered the chest compressions, Z.K. started shaking and crying. (Exhibit 10, p. 67) His face became "red" and "swollen around . . . the temple and his forehead and cheeks." (*Id.*) Ms. Khalif told Mr. Chaparro-Vargas to rush them to North Memorial Hospital. "I was distraught. I was scared. I just ran in the hospital screaming," she said (*Id.*, p. 40). "I even left his machine, everything. Didn't even take my purse. I just took him." (*Id.*).

C. North Memorial Examination Diagnoses Z.K. With Apnea and Prematurity and Makes No Finding of Abuse

Medical records from North Memorial described that Z.K. was having a "breathing problem" and "multiple episodes of apnea." (Exhibit 2). North Memorial wrote that Z.K. "seems to stop breathing occasionally." (*Id.*) Doctors performed a "10 point R.O.S. [review of systems]" on Z.K. North Memorial found no evidence of abusive trauma on Z.K.'s face or chest (*Id.*). Doctors noted that Z.K.'s abdominal area was slightly "distended," but that Z.K. showed a "normal range of motion." (*Id.*). "There is no tenderness" in the abdominal area, report found (*Id.*). A chest X-ray performed by North Memorial on May 18 showed no rib fractures (*Id.*).

North Memorial's examination of Z.K.'s skin found "[d]iscoloration on left side of face." (*Id.*). North Memorial did not diagnose this discoloration as bruising, and it did not find that it resulted from abusive trauma (*Id.*). Instead, the reported associated the discoloration with previous medical interventions to treat Z.K.'s prematurity. "Of note, the patient was placed on ventilation and feeding tubes for three weeks while he was in the hospital after birth, the report noted." (*Id.*). According to Ms. Khalif, North Memorial staff also said the discoloration may have been caused by burst blood vessels related to Z.K.'s constipation (Exhibit 10, p. 8).[4]

Dr. Tracy R. Hartmann of North Memorial diagnosed Z.K. with "Apneic episodes" and "Prematurity." (Exhibit 2). Before reaching this diagnosis, "[p]ast medical

[4] In addition, a blood test by North Memorial showed low Hemoglobin levels, low hematocrit levels, high red blood cell distribution width (RDW), and high mean platelet volume (MPV) (*Id.*).

records were reviewed, and the patient was examined by myself." (*Id.*). North Memorial did not find that the discoloration was caused by physical abuse (*Id.*). Because North Memorial had no available bed space, it transferred Z.K. to St. Paul Children's Hospital (*Id.*).

D. Dr. Swenson's Diagnoses Child Abuse

St. Paul Children's Hospital reached a different diagnosis. Z.K. was examined by Dr. Alice Swenson, a pediatrician affiliated with Children's Hospital who specializes in child abuse diagnosis. She finds sufficient evidence of child abuse in 67% to 75% of the cases she examines (T. 17). Defense counsel noted in her closing argument that hospitals are legally bound to report suspected child abuse and face civil liability for failing to do so. *See* Defense Closing Argument, Doc ID# 33 (citing *Becker v. Mayo Found.*, 737 N.W.2d 200 (Minn. 2007)).

1. Facial markings

The record does not disclose what about the facial markings led Dr. Swenson to conclude that they were bruises, rather than some other type of discoloration. Significantly, North Memorial found no tenderness or evidence of trauma during its 10-point review of systems examination of Z.K (Exhibit 2). Dr. Swenson found other discolorations on Z.K.'s body, including near his hands or wrists and his back (T. 68). During Ms. Khalif's police interview, her interrogator quoted Swenson's medical report as stating that it is "unclear . . . what caused the markings on [Z.K.]'s hands. They may be bruising or [may] represent other skin changes." (Exhibit 2). But at trial Dr. Swenson testified that she thought the non-facial discolorations on Z.K.'s body were "Mongolian

spots." (T. 68). The record does not reveal what led her to diagnose the facial markings as bruises, while giving the other markings a non-bruise diagnosis.

Once Dr. Swenson determined that the facial markings were bruises, she found child abuse to be the likeliest explanation. "[B]abies who aren't yet independently mobile, who are not yet pulling to stand and cruising long furniture just don't get bruises," she said. (T. 25). The location of the facial markings on a "non-bony prominence" reduced the likelihood of accidental injury (T. 25). Further, she found the markings had a "linear" pattern consistent with the face having been "struck with something." (T. 23).

Despite these indications of physical abuse, Dr. Swenson recognized other explanations for the markings. She considered whether there was evidence to "suggest a bleeding disorder" that could cause Z.K. to bruise more easily (T. 26). She ruled out a bleeding disorder for several reasons. First, she found that the lack of bruising elsewhere on Z.K.'s body was inconsistent with a bleeding disorder (T. 26). She believed that if he bruised easily, other parts of his body would show bruising from non-abusive handling (T. 26). Dr. Swenson did not consider whether the discolorations on Z.K.'s hands and back may have been bruising.

Dr. Swenson also concluded that the blood tests showed no evidence of a bleeding disorder, specifically citing high "Factor 8" levels that ruled out hemophilia (T. 27). Dr. Swenson discounted the North Memorial blood test that found low hemoglobin and hematocrit levels, and high red blood cell distribution width (RDW) mean platelet volume (MPV) (T. 65). She claimed that these levels were actually normal for a three

month old baby, and that North Memorial had found the results to be irregular because they compared them to adult ranges (T. 65). Dr. Swenson also recognized that Z.K. exhibited intraventricular hemorrhaging and subdural hemorrhaging, which involves irregular bleeding in the brain and skull (T. 29). Yet she did not cite this as a "bleeding disorder" that could have contributed to the facial discoloration.

Dr. Swenson also testified that the facial markings could have resulted from non-abusive "trauma." (T. 27). But she rejected this explanation because there was "no history of trauma reported when this baby came to North Memorial." (T. 34). There is no indication that Dr. Swenson interviewed Ms. Khalif about her physical contact with Z.K. during medical interventions that occurred before his arrival at North Memorial. The evidence does not show that Dr. Swenson interviewed Dr. Hartman at North Memorial about the possibility of non-abusive trauma. Notably, Dr. Hartman suggested a connection between the facial markings and Z.K. having been placed on a ventilator and feeding tubes for three weeks while in the NICU (Exhibit 2).

Dr. Swenson could not date the bruises based on the markings themselves (T. 40). But she determined that, due to the lack of bruising noted at Z.K.'s initial release on May 12, the bruises likely occurred sometime between May 12 and May 18 (T. 40).

2. Bone Callouses

Children's Hospital performed a skeletal survey on May 18. This survey, like the chest x-ray performed by North Memorial, revealed no bone fractures (T. 30). But a follow-up skeletal survey conducted on June 2 revealed nine "callouses along the ribs." (T. 33). "Callous formation[s]" form during the healing process following a previous

bone fracture (T. 31). Dr. Swenson said that infant rib fractures cause a "very thin line" on the bone that "can be very difficult to see" in an X-ray because premature babies typically have a lot of "lung markings." (T. 31). The callous formations – which are increased cartilage and bone deposits repairing the previous fracture site – are easier to see (T. 33). Based on the callous formations on the June 2 X-ray, Dr. Swenson determined that Z.K. previously had nine rib fractures (T. 33).

Dr. Swenson noted that "babies' ribs are very pliable." (T. 34). An "ex-premie has very platicky ribs so there . . . there's a lot of cartilage in them," she said. "So babies are actually not really very mineralized in the rib area" (T. 34-35). The callouses showed that Z.K.'s fractures had closed and were healing (T. 33). The state introduced no evidence that Z.K. experienced any further symptoms or complications related to the rib fractures. There is no evidence that he had internal bleeding, bruising, or pain associated with the fractures. To the contrary, North Memorial specifically found no trauma in the rib area during its examination on May 18 (Exhibit 2).

The callous formations did not reveal when the past fractures occurred (T. 39). "Now, radiographic timing of injuries is really difficult," Dr. Swenson said. "Those callouses potentially could have occurred in the NICU but it would be unlikely. I would say it would be difficult to date it." (T. 39). She said it "would be hard for me to say" that the fractures occurred during the "six days" from May 12 to May 18 (T. 40).

Despite this lack of evidence that the fractures occurred between May 12 and May 18, when Ms. Khalif was caring for Z.K., Dr. Swenson diagnosed the fractures as resulting from physical abuse (T. 34). She stated that "rib fractures are highly specific

for child physical abuse" in non-mobile infants (T. 34). She recognized that infant rib fractures may be caused by non-abusive trauma or by a bone condition that makes the child more susceptible to fracture (T. 34-35). But she nonetheless determined that physical abuse best fit all of Z.K.'s symptoms, including the facial markings and the rib fractures (T. 33).

Dr. Swenson gave some consideration to the possibility that Z.K. had a condition called "osteopenia of prematurity," in which his bones were not sufficiently mineralized and more susceptible to fracture from non-abusive handling (T. 35-36). She recognized that the bones of premature babies are not fully mineralized at the time of birth (T. 36). She further acknowledged that, due to his prematurity, Z.K. received occupational therapy in the NICU to mineralize his bones and to avoid a diagnosis of osteopenia of prematurity at the time of discharge on May 12 (T. 51-52). But she contended that the medical records showed that the medical intervention succeeded and Z.K. did not have osteopenia of prematurity at the time of his discharge on May 12 (T. 52). To support this conclusion, she pointed to the lack of diagnosis for osteopenia of prematurity at discharge, and X-rays taken before discharge that showed normal bone mineralization (T 36, 52).[5]

Dr. Swenson did not address the possibility that the fractures may have occurred in the NICU before occupational therapy achieved its goal of normal bone mineralization.

[5] Dr. Swenson also said that the fact that Z.K.'s "intact parathyroid hormone was normal" on May 18 provided no evidence of osteopenia of prematurity (T. 38). There is no evidence that Z.K. had a normal intact parathyroid hormone during his previous stay in the NICU.

Since she could not date when the fractures occurred, the evidence did not exclude the possibility that the fractures occurred during this earlier period of bone fragility. Notably, North Memorial did not find any trauma in Z.K.'s abdomen or rib area on May 18 (Exhibit 2).

Dr. Swenson said that the lack of fractures elsewhere in the body suggested that Z.K. did not have osteopenia of prematurity. If his bones were especially fragile, Dr. Swenson contended, normal handling would have produced fractures in other locations (T. 37). Notably, the bone survey did reveal a "mild periosteal . . . reaction . . . along the femurs and tibias." (T. 45). Yet Dr. Swenson determined that this bone reaction – which is characterized by irregular bone "thickening" – was "likely physiologic." (T. 45). She did not address whether the bone reaction could have indicated previous fractures. Further, Dr. Swenson did not consider the possibility that the rib fractures occurred at different times, through different non-abusive handling. Since the rib fractures could not be dated, the evidence does not exclude this possibility.

Dr. Swenson also rejected the possibility of non-abusive trauma because no such trauma was noted in the written medical reports (T. 34). She believed the fractures likely resulted from a front-to-back pressure, which she found inconsistent with many types of non-abusive trauma (T. 68). But there is no evidence that she interviewed Ms. Khalif about non-abusive medical interventions that she performed on Z.K. during her period of care. There is no evidence that Dr. Swenson spoke to the NICU about medical interventions that could have caused trauma to the rib area.

To justify her child abuse diagnosis, Dr. Swenson relied on a familiar principle.

"There's an expression Occam's razor, when there's one explanation that explains all the findings that's the most likely explanation," she said. "And so in this case child physical abuse explains all the findings that there's bruising on the face and multiple broken bones. So in this case this was the clinical picture of an abused infant." (T. 41).

3. Dr. Young's Opinion

Defense expert Dr. Thomas Young, a former professor and Chief Medical Examiner in Kansas City, Missouri, criticized the lack of scientific method underlying Dr. Swenson's child abuse diagnosis. "Because there are numerous situations and complications and a variety of situations that can occur, it's not proper here to just basically invent a story, to invent a story of child abuse in this kind of situation and then claim that it is highly specific for it." (T. 125). He said that before determining that an injury resulted from child abuse, a doctor should rule out other reasonable possibilities (T. 118). This process involves conducting an investigation, talking to witnesses, and "constructing a timeline of events as to how that child was handled, what happened, what took place." (T. 118). He opined that Dr. Swenson made a premature diagnose without further investigation to exclude other explanations. She "doesn't have any kind of basis in science for concluding" that the injuries resulted from abuse, he said (T. 120) "There may be numerous reasons for a child to have rib fractures, and what is important to do in a case is to look at the particular circumstances as witnesses saw them to make that comparison. To simply make a blanket statement that if you see rib fractures in an infant that means that it's got to be child abuse, that's not scientific." (T. 120).

Dr. Young further testified that the evidence supported a reasonable conclusion

that Z.K.'s injuries resulted from his prematurity, apnea, and associated non-abusive trauma (T. 124-125). Dr. Young found a common symptom connecting the hemorrhaging, apnea, and the facial markings: lack of oxygen in the blood (T. 125-126). Where a child, like Z.K., has "already had problems with intraventricular hemorrhage, if this child develops problems with a lack of oxygen, perhaps from . . . apnea . . . a similar kind of complication can basically occur, you can have rebleeding into those ventricles." (T. 126). Because apneic episodes reduce oxygen levels in blood, they increase a child's susceptibility to bruising. "During an apnea spell blood vessels and platelets are not functioning optimally because of a lack of oxygen, and so even a maneuver, for instance, such as checking the child's airway if the child were to need CPR could form bruises readily – relatively easy if the child is undergoing a state where he's not getting enough oxygen," he said (T. 123).

Dr. Young further stated that the rib fractures may have resulted from lack of bone density due to Z.K.'s prematurity, and non-abusive trauma related to medical treatment (T. 121). "The development of the child's skeleton is delayed when . . . the child is removed from the mother's womb and is not allowed to exercise, per se, move around in the womb and develop stronger bones," he said. A "neonatal intensive care unit [is] not quite the optimal situation for good skeletal bone development." (T. 121). Medical interventions that place sufficient "strain on already weak bones . . . can explain fractures," he said (T. 122).

"In this situation there is not only another plausible explanation, there is a better explanation for these findings and it is not child abuse," he said. Dr. Young said that

better explanation is "[c]omplications of prematurity." (T. 125).

4. Motion for Verdict of Acquittal

After the prosecution rested, defense counsel moved for a judgment of acquittal on both charges (T. 105). She argued that "under the circumstantial evidence test," there was "not sufficient evidence to sustain a conviction because there are reasonable, rational inferences that exist that are inconsistent with guilt." (T. 105). Specifically, she contended that the injuries could have occurred in the hospital because Dr. Swenson could not date them; that the injuries were consistent with previous medical conditions; and that the injuries could have resulted from non-abusive medical interventions (T. 105).

Defense counsel also moved for a judgment of acquittal on the first-degree assault charge because the healing rib fractures did not establish "great bodily harm." (T. 105). The district court took the motion under advisement (T. 108).

E. Verdict and Sentence

The district court found Ms. Khalif guilty of first-degree assault and third-degree assault (V. 1). The court credited Dr. Swenson's testimony and found Dr. Young's hypotheses to be unreliable (District Court's Findings of Fact and Conclusions of Law, Doc ID# 43). Applying the legal sufficiency test for circumstantial evidence, the district court found that the state proved first-degree assault and third-degree assault beyond a reasonable doubt (*Id.*)

The court found that the evidence established that Z.K. suffered "great bodily harm," an essential element of first-degree assault (*Id*). "A newborn who suffers nine broken ribs has suffered serious bodily harm," the court wrote (*Id.*). The court said this

finding was driven by "Z.K.'s age and vulnerability at the time of the assault, as well as the extent of the broken ribs." *Id.* The court said it was "clear from the evidence" that Z.K. "suffered acute discomfort and pain – he was vomiting, lost his appetite, and had trouble breathing." *Id.* The court did not cite any evidence connecting these symptoms to the fractured ribs or the facial bruises.

The district court sentenced Ms. Khalif to 43 months (S. 20). This appeal follows.

ARGUMENT

I. The evidence is legally insufficient to establish first-degree assault-harm because: a) Ms. Khalif did not commit a battery (the *actus reus* of assault harm); and b) healing rib fractures and bruises do not constitute great bodily harm, where the state offered no evidence that the injuries had long-term consequences.

A. Standard of Review

"The due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). If the fact finder, when viewing the evidence in a light most favorable to the prosecution, could not have rationally found that the state proved each element beyond a reasonable doubt, the conviction must be reversed. *See Jackson v. Virginia*, 443 U.S. 307, 313-14 (1979); *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reasonable doubt standard and legal sufficiency review "provide[] concrete substance" for the presumption of innocence. *In re Winship*, 397 U.S. at 363.

B. The evidence is legally insufficient to establish the *actus reus* element of assault.

Ms. Khalif is convicted of first-degree assault for intentionally causing great bodily harm. Assault-harm is a general intent crime that prohibits a person from "intentionally engaging in the prohibited conduct." *State v. Fleck*, 810 N.W.2d 303 (Minn. 2012). The "prohibited physical act" is "committing a battery." *Id.* (quoting *State v. Lindahl*, 309 N.W.2d 763, 764 (Minn. 1981)).

Assault-harm "does not impose strict liability" for any non-accidental touching. *State v. Dorn*, 887 N.W.2d 826, 831 (Minn. 2016). Instead, the "actus reus element of assault-harm requires that this act constitute a battery." *Id.* To commit "assault-harm, a defendant must intend the act that makes her conduct a battery; in other words, she must intentionally apply force to another person without his consent." *Id.*

Because assault-harm is a consent-based crime, it is ill-suited to govern physical contact between a parent and child. Minnesota law imposes duties "on the parent by the parent-child relationship" to provide for the child's "health care" and other "care and control necessary for the child's physical . . . well-being." Minn. Stat. § 257C.01. Duties of care may require the parent to apply forceful physical contact, such as by burping the child to relieve stomach pain or by grabbing the child to avoid an external danger. Such lawful applications of force do not require the child's consent; indeed, a young child is incapable of giving valid consent. *See generally Matter of Welfare of D.D.G.*, 558 N.W.2d 481, 484 (Minn. 1997) (finding consent valid where "consent was knowing and voluntary"). Instead, a parent must act on a child's behalf by protecting the child from

harm, and by consenting to helpful medical interventions. *See Parham v. J.R.*, 442 U.S. 584, 603-04 (1979) ("Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments."); *see also Schall v. Martin*, 467 U.S. 253, 265 (1984) ("Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents.").

Of course, this parental authority does not authorize child abuse. The criminal law correctly imposes harsh punishment on parents who use unreasonable force against their children. *See* Minn. Stat. § 609.377 ("A parent, legal guardian, or caretaker who, by an intentional act or a series of intentional acts with respect to a child, evidences unreasonable force or cruel discipline that is excessive under the circumstances is guilty of malicious punishment."). But consent cannot logically demarcate criminality, since a young child is incapable of giving or withholding it. Criminality instead depends on whether the parent's physical contact was reasonable. *See id.*

Reasonableness, not consent, distinguishes acts that protect from acts that abuse. Performing the Heimlich Maneuver on a choking baby is every parent's protective duty. Forcefully squeezing a baby's stomach as punishment is child abuse. The child does not consent to either forcible squeezing. What makes one act protective and the other criminal is the reasonableness of the force.

Here, the state alleged that Ms. Khalif's forcibly touched Z.K. in a manner that caused facial bruising and fractured ribs. While this conduct may have been criminal, it was not an assault. Ms. Khalif had parental authority to forcibly touch Z.K., and Z.K.

could not give or withhold his consent to her actions. Because assault-harm requires non-consensual physical contact, it does not apply to the force used by Ms. Khalif on her infant son.

The law provides a ready means to prosecute Ms. Khalif for the alleged conduct: the crime of malicious punishment. Minn. Stat. § 609.377. If Z.K.'s injuries resulted from Ms. Khalif's use of "unreasonable force" that was "excessive under the circumstances," she could have faced up to 10 years in prison for this crime. *Id.* The state considered adding this charge to the complaint, but ultimately declined to prosecute it (T. 3, 8). The state instead prosecuted the ill-suited charge of first-degree assault, with its increased maximum penalty and higher presumptive sentencing range. Since the conviction being appealed is assault-harm, this Court must evaluate the legal sufficiency of the evidence to support this crime. Due to Z.K.'s inability to withhold or provide consent, Ms. Khalif did not engage in the conduct prohibited by the assault-harm statute. The conviction must be reversed.

C. The first-degree assault conviction must be reversed because the evidence is legally insufficient to show "great bodily harm."

Even if this Court determines that Ms. Khalif's physical contact with her child constitutes an assault, the evidence is still legally insufficient to establish a first degree crime. To commit first-degree assault, and the defendant's conduct must have caused the victim "great bodily harm." Minn. Stat. § 609.221. "'Great bodily harm' means 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. When evaluating great bodily harm, a court must "focus on the injury to the victim rather than the actions of the assailant." *State v. Gerald*, 486 N.W.2d 799, 802 (Minn. App. 1992).

Although the statute does not specifically define "other serious bodily harm," the phrase "should be taken in the context of the other three alternative definitions." *State v. Moore,* 699 N.W. 733, 738 (Minn. 2005). Under the doctrine of *ejusdem generis*, "general words are construed to be restricted in their meaning by preceding particular words." Minn. Stat. § 645.08(2). The general phrase "other serious bodily harm" is therefore "confined to the class" of injuries specifically enumerated in the statute. *Moore,* 699 N.W. at 738 (citing *Cleveland v. United States*, 329 U.S. 14, 16 (1946)); *State v. Dye*, 871 N.W.2d 916, 922 (Minn. App. 2015) ("Other serious bodily harm" is not defined by statute, and it "should be taken in the context of the other three alternative definitions.") (citing *Moore*, 699 N.W. at 738).

The district court found that Z.K.'s injuries constituted "other serious bodily harm." To evaluate the district court's conclusion, this Court should examine whether the injuries should be classified with ones that create a high probability of death, serious permanent disfigurement, or long-term loss or impaired function of a body part.

The evidence showed that Z.K. had bruising on his face and nine healing fractures on his ribs. These injuries, while substantial, cannot be reasonably classified with ones that create a high probability of death. Z.K. did not require any medical intervention in

response to the injuries. Instead, the fractured ribs healed on their own before they were even detected. *See Gerald*, 486 N.W.2d at 802 (finding no "other serious bodily harm" where one cut was closed with two stitches and the other "was allowed to heal naturally"). There is no evidence that Z.K. underwent any treatment for his bruising, or even that the bruising caused him pain. Likewise, there is no indication that Z.K. suffered any disfigurement. The injuries did not involve require surgery or stitches, so there was no possibility of scarring.

The only plausible theory for "other serious bodily harm" is that the rib fractures should be classified with injuries that cause protracted loss or impaired function of a body part. To establish this type of bodily harm, the state must offer evidence to show the long-term consequences of the injury. *See Dye*, 871 N.W.2d at 922 ("Although this type of injury could leave a permanent lump and causes persistent pain, because E.G. did not testify, the extent of her pain and whether she has any permanent scarring are unknown. Therefore, the evidence does not support a finding that E.G. suffered other serious bodily injury within the meaning of the statute."); *cf. State. V. Barner*, 510 N.W.2d 202 (Minn. 1993) (finding "other serious bodily harm," where the head injuries and stab wounds made it "difficult for him to eat for three days" and left "multiple scars"); *State v. Jones*, 266 N.W.2d 706 (Minn. 1978) (finding other serious bodily harm following a head injury where the victim "did not regain consciousness until the following day," "remained hospitalized for a week," experienced numbness for "several weeks," and had "dizziness and headaches until just before trial"); *State v. Anderson*, 370 N.W. 2d 703 (Minn. App. 1985) (finding serious bodily harm, where lacerations to victim's liver required

"emergency lifesaving surgery," and the victim "remained in the hospital a week, and suffered numbness, dizziness and headaches" and was left with "a long scar running the length of her upper body").

Absent long-term consequences, a fractured or functionally-impaired body part is only substantial bodily harm. Minn. Stat. § 609.02, subd. 7a ("'Substantial bodily harm' means bodily injury which involves . . . a temporary but substantial loss or impairment of the function of any bodily member or organ, or which causes a fracture of any bodily member.") Numerous cases have found that fractured bones, without more, constitute substantial bodily harm. *See State v. Waino*, 611 N.W.2d 575 (Minn. App. 2000) ("The rib fractures suffered by H.L. in this case meet the statutory definition of substantial bodily harm."); *State v. Wellman*, 341 N.W.2d 561 (Minn. 1983) (Fracture of nose and "spiral fracture" of tibia was substantial bodily harm). When fractures have been found to constitute great bodily harm, the state has offered additional evidence of long-term impairment or protracted recovery. *See, e.g., State v. Leonard*, 400 N.W.2d 206 (1987) (finding great bodily harm where the evidence showed multiples fractures to arms, legs, shoulder and ribs, and the "left leg needed traction and subsequent treatment."); *State v. Polchow*, 2016 WL 3884484 (Minn. App. Sept. 28, 2016) (finding sufficient evidence of great bodily harm based on broken jaw, where "plates were required on both sides of his jaw to repair it, one side of his jaw was very infected," and the victim was "expected to remain hospitalized for at least two weeks" during treatment); *State v. Jones*, 2004 WL 1925062 (Minn. App. Aug. 31, 2004) (finding that "broken facial bones" cause at least "substantial bodily harm," but because the "evidence shows that the victim suffered

protracted and possibly permanent loss or impairment of his facial nerves," the injuries constituted great bodily harm).

Here, the state offered no evidence that Z.K. suffered any long-term consequences following the rib fractures. To the contrary, Dr. Swenson testified that the fractures had closed before they were discovered on the June 2, 2016, X-ray. Given the lack of evidence of adverse long-term consequences, the fractures to Z.K.'s ribs did not qualify as great bodily harm.

The district court's memorandum suggests that its great bodily harm finding was partly based on the wrongfulness of the act of abusing a helpless child. The district court's focus was misguided. Instead, the court should have considered only the severity of the injury caused by the abuse. *See Gerald*, 486 N.W.2d at 802. The evidence suggested that rib fractures may actually do less harm to infants due to the plasticity of their bones. Notably, Z.K.'s fractures closed quickly and were not accompanied by any bruising or internal bleeding. Further, the district court should not have considered Z.K.'s apnea and digestive issues when evaluating great bodily harm, since these conditions had no connection to the physical abuse.

Because the fractured bones constituted only substantial bodily harm, and the state offered no evidence of prolonged impairment that could elevate the injury to great bodily harm, the first-degree assault conviction must be reversed.

II. The state did not meet its burden to prove by circumstantial evidence that Ms. Khalif assaulted Z.K., where it failed to disprove a rational hypothesis that the bone fractures occurred before Ms. Khalif assumed Z.K.'s care.

There is no dispute that the state relies on circumstantial evidence to establish that Ms. Khalif caused Z.K.'s injuries. No one witnessed Ms. Khalif abuse Z.K. or display any behavior indicative of maltreatment. The state's case rests solely on the injuries appearing after Z.K. left the hospital, and the state's assertion that the surrounding circumstances prove beyond a reasonable doubt that the injuries were caused by Ms. Khalif's physical abuse.

A. Standard of Review

"A conviction based on circumstantial evidence . . . warrants heightened scrutiny." *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010). The circumstances proved must "be consistent with the hypothesis that the accused is guilty and inconsistent with any other rational hypothesis except that of guilt." *State v. Bias*, 419 N.W.2d 480, 484 (1988). The state has the burden of disproving each reasonable innocent hypothesis. *State v. Hughes*, 749 N.W.2d 307, 313 (Minn.2008).

When reviewing the sufficiency of circumstantial evidence, this Court first identifies the circumstances proved. *See Al-Naseer*, 788 N.W.2d at 473. This Court defers to the fact-finder's "acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the State." *State v. Andersen*, 784 N.W.2d 320 (Minn.2010). This Court examines independently all the reasonable inferences that may be drawn from the circumstances, including

reasonable inferences consistent with rational hypotheses other than guilt. *Id.* This Court gives "no deference to the fact finder's choice between reasonable inferences.' " *Al-Naseer*, 788 N.W.2d at 474 (citation omitted). If "any one or more circumstances found proved are inconsistent with guilt, or consistent with innocence, then a reasonable doubt as to guilt arises.' " *Id.* (citation omitted).

B. The circumstances support a rational inference that the bone fractures occurred before Z.K. entered Ms. Khalif's care.

To prove Ms. Khalif's guilt, the state had to establish that the injuries occurred between May 12 and May 18, 2016, while Z.K. was in the care of Ms. Khalif. *See* District Court's Findings of Fact and Conclusions of Law, Doc. ID# 43. The evidence established the following circumstances relating to the bone fractures:

- Z.K. was born prematurely at a gestation age of 26 weeks;
- Z.K. was in the NICU from the time of his birth on February 2, 2016, until his discharge on May 12, 2016;
- The bones of premature babies do not have normal density at the time of birth;
- A bone condition called osteopenia of prematurity, which results from reduced bone density, is common in premature babies;
- Reduced bone density makes a baby more susceptible to bone fractures;
- Z.K. received occupational therapy in the NICU to improve bone density and allow him to avoid a diagnosis of osteopenia of prematurity when discharged;
- Z.K. underwent invasive medical treatment in the NICU, including being on a ventilator and feeding tubes for three weeks;
- Z.K. was not diagnosed with osteopenia of prematurity at the time of discharge on May 12, 2016;

- X-rays taken before his discharge on May 12, 2016, did not support a diagnosis of osteopenia of prematurity;
- If a baby has normal bone density, fractures will not occur from normal care;
- The state's expert found that the fractures were caused by front and back pressure;
- No one observed Ms. Khalif physically abuse Z.K.;
- Ms. Khalif denied physically abusing Z.K.;
- Ms. Khalif attended numerous medical appointments with Z.K., promptly called when he had complications after this release, and rushed him to the hospital on May 18;
- There was no evidence that Ms. Khalif physically abused her other infant child;
- Z.K. had facial markings when he arrived at the hospital on May 18, 2016, which the state's expert diagnosed as being caused by physical abuse;
- Z.K. did not have any bruising or trauma on his abdomen when Ms. Khalif returned him to the hospital on May 18, 2016;
- X-rays taken on June 2, 2016, showed a "mild periosteal . . . reaction . . . along the femurs and tibias. The state's expert, Dr. Swenson, found this irregular bone "thickening" to be "likely physiologic." (T. 45).
- X-rays taken on June 2, 2016, showed nine closed and healing rib fractures, evidenced by callouses that had formed on the bones; and
- The medical expert could not determine when the fractures occurred.

The state asserted that these circumstances supported a reasonable inference Ms. Khalif caused the rib fractures by physically abusing Z.K. during her period of care between May 12 and May 18. The state relied on evidence that Z.K. had normal bone mineralization at the time of discharge, which meant that the injuries could not have been caused by normal care during this period. The state contended that the rib fractures

reasonably occurred from Ms. Khalif applying an excessive squeezing force that was greater than required for normal care. The state suggested that she squeezed Z.K. to make Z.K. stop crying by causing him pain (State's Closing Argument, Doc ID# 34). The district court accepted the state's hypothesis and found Ms. Khalif guilty of first-degree assault.

While the state's hypothesis is reasonable, the circumstances supported another inference. The bone fractures may have occurred before May 12, 2016, when Z.K. was still undergoing treatment to increase bone density. During this period, his bones were more susceptible to fracture from non-abusive touching. The evidence showed that Z.K. underwent major medical interventions while in the NICU, including being placed on a ventilator. Further, the state did not offer medical records to disprove the rational hypothesis that these medical interventions required pressure to be placed on Z.K.'s abdomen. *State v. McCormick*, 835 N.W.2d 498, 508 (Minn. App. 2013) ("[W]e hold that the state has not met its burden of demonstrating that there are no reasonable inferences from the record evidence that are inconsistent with appellant's guilt.")

In addition, this reasonable innocent hypothesis better explains several of the factual circumstances. First, the lack of trauma or bruising evident on May 18, 2016, suggests that the rib injury did not occur in close proximity to this date. If Ms. Khalif had applied excessive squeezing force to the point of fracture, her action would have reasonably left some external markings. The lack of external trauma suggests the injury occurred at some earlier date, and possibly through a lesser exertion of force.

Second, Ms. Khalif's conduct was consistent with the rib fractures having some

non-abusive cause. The evidence showed that she was an attentive and responsive parent, who was diligently learning to meet her son's special needs. No evidence of abuse was found during a medical examination of Z.K.'s sister on May 18. As the state's expert acknowledged, these circumstances are not consistent with an abusive parent.

Third, the lack of plausible motive undermines the claim of abuse. *See State v. Berndt*, 392 N.W.2d 876, 880 (Minn. 1986) (reversing conviction based on circumstantial evidence, and noting that the "state's theory with respect to the alleged motive for [the] killing . . . appears to be without rational basis"). It is unreasonable that Ms. Khalif caused her child pain to stop him from crying. Pain would have the opposite effect.

Finally, the mild periosteal reaction on Z.K.'s leg bones is consistent with the rib fractures occurring while Z.K.'s bones were less mineralized before his release from the NICU. Periosteal reaction may result from healing fractures.[6] While Dr. Swenson found the reaction to be most likely physiological, she did not exclude the possibility that the bone thickening had an external cause. The circumstances suggest that medical interventions during a period of reduced bone density may have caused both the fractures to Z.K.'s ribs and the bone irregularities on Z.K.'s legs. *See Berndt*, 392 N.W.2d at 880 (reversing conviction based on circumstantial evidence where certain medical evidence was "more consistent with appellant's theory than with that of the state").

Because the circumstances support a reasonable hypothesis that the bone fractures occurred before Z.K.'s discharge on May 12, the evidence is legally insufficient to

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[6] *See Islam, Omar et al.,* "Development and Duration of Radiographic Signs of Bone Healing in Children," 175 American Journal of Roentgenology 75-78 (2000)

support Ms. Khalif's assault conviction. *See McCormick*, 835 N.W.2d at 508 (finding circumstantial evidence legally insufficient, where the "record evidence supports inferences that are inconsistent with all of J.B.'s injuries having occurred in the morning when appellant toppled the deer stand," and including that "J.B. may have [later] fallen from a second deer stand"); *State v. Brown*, 796 N.W.2d 169 (Minn. App. 2011) (finding circumstantial evidence legally insufficient, where the shooting may have reasonably occurred a time period inconsistent with guilt); *State v. Reisgraf*, 2011 WL 891118 (Minn. App. Mar. 15, 2011) (finding circumstantial evidence insufficient, where the "evidence offered by respondent did not include a temporal link between appellant's driving and his being under the influence of alcohol.")

III. The state failed to meet its burden to prove each link of its circumstantial theory of guilt and to disprove the reasonable hypothesis that non-abusive trauma caused Z.K.'s injuries.

"Circumstantial evidence must form a complete chain that, in view of the evidence as a whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt." *State v. Taylor*, 650 N.W.2d 190, 206 (Minn.2002). The state bears the burden of establishing a chain of reliable evidence that excludes all reasonable hypotheses inconsistent with guilt. *See State v. Sam*, 859 N.W.2d 825, 835 (Minn. App. 2015) (holding that the state failed to meet its circumstantial evidentiary burden where the "record contains no evidence to negate either [an innocent] inference or its reasonableness."). The "loss of one link may prevent the state from meeting its evidentiary burden." *State v. Zanter*, 535 N.W.2d 624, 631 (Minn.1995).

The state's case rested almost exclusively on Dr. Swenson's testimony that Z.K.'s injuries were caused by physical abuse. Dr. Swenson recognized that the rib and facial injuries reasonably could have been caused by non-abusive trauma. Dr. Swenson's abuse diagnosis, and the state's circumstantial theory of the case, therefore required evidence that the injuries did not result from non-abusive trauma.

The state failed to meet its burden to prove this essential link of its case and to disprove the reasonable inference that non-abusive trauma caused the injuries. Dr. Swenson testified that she excluded non-abusive trauma based solely on the lack of affirmative evidence of that trauma in the written medical reports. She did not conduct any further investigation into non-abusive trauma by interviewing Ms. Khalif or previous medical providers.

Dr. Swenson's failure to investigate the possible diagnosis non-abusive trauma rendered her testimony unreliable as a matter of law. Dr. Swenson testified that her medical conclusions were based on a differential diagnosis. "In performing a differential diagnosis, a physician begins by ruling in all scientifically plausible causes of the patient's injury. The physician then rules out the least plausible causes of injury until the most likely cause remains." *McDonough v. Allina Health System*, 685 N.W.2d 688, 695 n. 3 (Minn. App. 2004). Dr. Swenson's lack of investigation prevented her from ruling out non-abusive trauma to medical certainty. Because her diagnosis "did not rule out" the hypothesis of non-abusive trauma, "her differential diagnosis is not sufficiently reliable to be used for the purpose of proving causation." *Id.* at 695.

Dr. Swenson's testimony suggests that instead of conducting a rigorous

differential diagnosis, she applied the familiar principle of "Occam's razor." She testified that because physical abuse was the simplest explanation that fit all the injuries, it became her diagnosis. Occam's razor, while a useful background principle, does not form the basis for a scientifically valid differential diagnosis. Dr. Swenson instead needed to test each reasonable hypothesis until she could exclude it to a level of scientific certainty. She failed to follow this process for non-abusive trauma. As a result, her testimony that no non-abusive trauma occurred is not reliable. Due to the state's failure to prove that no non-abusive trauma occurred, the conviction rests on legally insufficient circumstantial evidence. *Taylor*, 650 N.W.2d at 206; *Zanter*, 535 N.W.2d at 631.

IV. The conviction for assault in the third degree must be vacated because it is a lesser included offense of assault in the first degree, of which Ms. Khalif was also convicted.

"A conviction . . . of a crime is a bar to further prosecution of any included offense, or other degree of the same crime." Minn. Stat. § 609.04. Here, the district court convicted Ms. Khalif for first-degree assault and the lesser included offense of third-degree assault. Under Minn. Stat. § 609.04, the third-degree assault conviction must be vacated. *State v. Hackler*, 532 N.W.2d 559 (Minn. 1995) ("vacating petitioner's conviction of assault in the second degree on the ground that it is a lesser included offense of the offense of assault in the first degree, of which petitioner was convicted on the basis of the same conduct").

CONCLUSION

For the foregoing reasons, Ms. Khalif respectfully asks that the convictions be reversed.

Dated: December 29, 2017

Respectfully submitted,

OFFICE OF THE MINNESOTA
APPELLATE PUBLIC DEFENDER

By: MICHAEL MCLAUGHLIN
Assistant State Public Defender
License No. 392748

540 Fairview Ave. N, Suite 300
St. Paul, MN 55104
(651) 201-6700

ATTORNEY FOR APPELLANT

NO ADDENDUM

Pursuant to Rule 130.02(a) of the Minnesota Rules of Civil Appellate Procedure, Appellant's Brief does not include an addendum because there are no documents that fit the criteria of Rule 130.02(a)(1-3).

A17-1119

STATE OF MINNESOTA

IN COURT OF APPEALS

STATE OF MINNESOTA,

Respondent,

vs.

MUNAIBRIHIM ABIKAR, A.K.A. HAMDE KHALIF,

Appellant.

RESPONDENT'S BRIEF

OFFICE OF THE MINNESOTA
APPELLATE PUBLIC DEFENDER

MICHAEL MCLAUGHLIN
Assistant State Public Defender
Atty. License No: 3927438
540 Fairview Ave. N.
Suite 300
St. Paul, MN 55104

ATTORNEYS FOR APPELLANT

HENNEPIN COUNTY
ATTORNEY'S OFFICE

MICHAEL O. FREEMAN
Hennepin County Attorney

By: KELLY O'NEILL MOLLER
Assistant County Attorney
Atty. License No: 284075
Phone: (612) 348-3434
FAX: (612) 348-6028
C-2000 Government Center
Minneapolis, MN 55487

ATTORNEYS FOR RESPONDENT

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The district court credited the testimony of the State's expert witness and determined that Appellant was guilty of abusing Z.K. and causing great bodily harm.

State v. Danowit, 497 N.W.2d 636 (Minn. Ct. App. 1993)
State v. Bolstad, 686 N.W.2d 531 (Minn. 2004)

II. Should Appellant be formally adjudicated on one count?

Respondent agrees that a conviction should only be entered for first-degree assault.

State v. LaTourelle, 343 N.W.2d 277 (Minn. 1984)

STATEMENT OF THE CASE AND FACTS

For assaulting her infant son, Appellant Muna Ibrahim Abikar was charged by complaint filed in Hennepin County District Court with one count of first-degree assault in violation of Minn. Stat. § 609.221, subd. 1 (great bodily harm).[1] Before trial, the State also added third-degree assault as a lesser-included offense (T. 2-9).[2] Appellant waived a jury trial and a court trial was held before the Honorable William H. Koch (1/9/17 Waiver).

Z.K. was born at 26 weeks on February 7, 2016 (T. 18; V.T. 2).[3] Appellant used methamphetamine the night before he was born, and Z.K. tested positive for controlled substances at birth (V.T. 12-13, 54). Z.K. was discharged from the NICU on May 12, 2016 (T. 94). Because Z.K. had apnea, which is very common in premature infants, he was placed on an apnea monitor; it would make a sound if Z.K. stopped breathing for a period of time (T. 18).

On May 18, 2016, Appellant took Z.K. to North Memorial Hospital (Ex. 2).[4] Appellant reported that she was concerned about Z.K.'s apnea alarm sounding (Ex. 2). She said he began vomiting and had a loss of appetite the night before, that he seemed to stop breathing occasionally, and that he had some recent discoloration of

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[1] The amended complaint reflected Appellant's true name and date of birth.
[2] "T." refers to the trial transcript.
[3] "V.T." refers to the transcript of Appellant's videotaped statement that was introduced into evidence along with the video recording ("Video").
[4] "Ex. 2" refers to the North Memorial Hospital records that were received as an exhibit at trial.

his face (Ex. 2). Due to lack of bed space, North Memorial staff recommended that Z.K. be transferred to Children's Hospital in St. Paul (Ex. 2).

Dr. Alice Swenson first treated Z.K. on May 19, 2016, after he was transferred from North Memorial Hospital to the Neonatal Intensive Care Unit (NICU) at Children's Hospital; because the NICU had concerns about child maltreatment, Dr. Swenson was called in to consult (T. 17).

Dr. Swenson is a child abuse pediatrician at Midwest Children's Resource Center at Children's Hospital (T. 11), and her other qualifications are as follows: board certified in general pediatrics; board certified in child abuse pediatrics; a member of multiple professional societies related to child abuse; and one of four child abuse pediatric specialists in the Twin Cities (T. 12-14). Dr. Swenson has seen child abuse even when a parent is loving and involved (T. 72). Dr. Swenson's determinations about abuse are based on medicine and science (T. 72). In approximately one-fourth to one-third of her cases, she determines that there is either not abuse or insufficient evidence to make that finding (T. 16-17). Dr. Swenson was, however, able to make a finding of abuse in this case.

Dr. Swenson had reviewed Z.K.'s past medical history and extensive medical records from Children's Hospital, and she also spoke with his prior providers (T. 21-23). When Dr. Swenson examined Z.K., she first noticed bruising on his face (T. 22). The bruising was on one side of the face (Ex. 3-5), and had a linear pattern (T. 24). The pattern was indicative of being struck by an object (T. 24). Dr. Swenson considered possible sources for such bruising and noted that non-mobile infants

typically do not get bruises on their own (T. 23-25). She explained, "So this was a baby with no history of trauma reported, with patterned injury over a non-bony prominence who was not mobile. And that raises really significant concern and usually indicative of child physical abuse" (T. 25). Based on the linear injury, she noted that "[t]his is a highly-specific finding for abuse" (T. 27). Dr. Swenson ruled out, to a reasonable degree of scientific certainty, any bleeding disorder or other reasonable cause that would have caused Z.K.'s bruising (T. 26-28).

Dr. Swenson ordered an X-ray of Z.K.'s ribs; at that time the ribs appeared normal, but in accordance with routine practice, Dr. Swenson ordered a follow-up to be conducted two weeks later (T. 30). She explained:

> A: Because acute fractures, especially the kind of fractures that you're looking for when you're concerned about abuse can be very difficult to see, because what you're looking for is a line and there is a lot going on in an X-ray. It's a good tool but it's not a perfect tool. There's lots of lung markings around the ribs which is where you – where abusive fractures are commonly seen.
>
> And so when you do a follow-up skeletal survey 14 days later you can see callous formation, and callous formation is much easier to see. So that's why we repeat the skeletal survey two weeks later so that we can see that callous formation if there were fractures. It takes about 10 to 14 days for callouses to form.

(T. 30-31).

The follow-up x-ray on June 2nd revealed numerous rib fractures (T. 32). The fractures were located on nine ribs, occurring on both sides of the body and located to the front and side (T. 32-34; Ex. 6-7). Z.K.'s bones had normal bone-mineral

density, but callouses along the ribs indicated areas that had been fractured and were healing (T. 32-33). Dr. Swenson testified that rib fractures are "highly specific for child abuse" (T. 34). She explained that a non-mobile infant would not cause the injury to himself and that no history of trauma was reported when Appellant took Z.K. to North Memorial Hospital (T. 34).[5]

Dr. Swenson definitively ruled a condition called "osteopenia of prematurity" as a cause of the fractures (T. 37, 54). In both the x-rays taken at the time Z.K. was in the NICU after delivery and the ones taken upon his readmission to the NICU, Z.K.'s bones were "normal looking" and "normally mineralized" (T. 35). Dr. Swenson said that osteopenia of prematurity "very rarely" is associated with fractures, and when fractures do occur, the infant has "radically demineralized" bones (T. 37-38).[6] Z.K. had no fractures after 14 weeks in the NICU after birth, his April 2016 x-ray showed normally mineralized bones, and he did not leave the NICU with a diagnosis of osteopenia of prematurity (T. 38, 54-55, 68). In addition, Dr. Swenson tested Z.K.'s "parathyroid hormone," and the normal results indicated that Z.K.'s bones were not demineralized (T. 38). At the time Z.K. was discharged to Appellant's care, his bones were healthy and normal (T. 55).

[5] Appellant had reportedly taken Z.K. to the hospital because the apnea machine was alerting (T. 34).

[6] In those infants that do have osteopenia of prematurity, only about 1% have fractures and about only half of those are rib fractures (T. 39). Dr. Swenson had treated patients who had osteopenia of prematurity (T. 36).

Dr. Swenson had seen Z.K.'s type of rib fracture before in hundreds of child abuse cases (T. 35-36). She said the type of force required is a front-to-back squeezing (T. 35).[7] While Dr. Swenson could not offer an opinion on the timing of the rib injuries, she did testify that the bruising would have occurred when Z.K. was in his mother's care (T. 39-40).

Z.K. also had bleeding on his brain, consisting of both increased intraventricular hemorrhage and a subdural hemorrhage (T. 29). While the intraventricular hemorrhage is not uncommon in premature infants and is not typically associated with abuse, the subdural bleeding did raise concerns about abuse (T. 29-30, 69). However, given Z.K.'s complex medical history, Dr. Swenson did not associate any of the brain bleeding with abuse (T. 30, 69).

Dr. Swenson testified that "overall the clinical picture of a baby with multiple rib fractures, normal-appearing bones, a slapped injury to the face, no history of trauma, that's the clinical picture of an abused infant to me" (T. 39). Dr. Swenson explained:

> A Because in medicine you need to look at a patient as a whole and so there -- There's an expression Occam's razor, when there's one explanation that explains all the findings that's the most likely explanation. And so in this case child physical abuse explains all the findings that there's bruising on the face and multiple broken

[7] Dr. Swenson testified that the fractures required both front and back force and most likely were not caused by someone pressing down against Z.K. with a hard surface behind him (T. 68). She also ruled out CPR as an explanation for the rib fractures, saying such fractures caused by CPR are "extraordinarily unusual" and "very unlikely" (T. 68).

> bones. So in this case this was the clinical picture of an abused infant.
>
> Q And is that your conclusion to a reasonable degree of medical certainty?
>
> A Yes.
>
> Q And is that to the same for the bruising and the ribs?
>
> A Yes.

(T. 41). She had no reasonable explanation for the injuries to Z.K.'s face and ribs other than abuse (T. 41-42).

Law enforcement interviewed Appellant on May 20, 2016 (T. 93).[8] Sergeant Palmer testified that Appellant appeared to be under the influence of a narcotic based on her pupils, slurred speech, and unclear responses (T. 83-84). During most of the interview, which took place inside, Appellant wore sunglasses (V.T. 3; Video). Appellant claimed she last used narcotics while pregnant with Z.K., did not know she was pregnant until she gave birth, and that she used methamphetamine the day before she delivered him; she also used opioids without a prescription (V.T. 12, 21-22, 46, 56, 63).

Appellant said that after she brought Z.K. home from the NICU, his apnea machine was buzzing in the middle of the night, so she talked to nurses, who told her to keep an eye on him (V.T. 4, 20). Appellant claimed that Z.K. continued crying "non-stop" and "hysterically," his face was red, and he was constipated and

[8] At that time Z.K.'s rib fractures had not yet been discovered (T. 89).

throwing up (V.T. 4, 28-29, 34). She added, "He's fine – you know CPR [inaudible] that's OK, and then, all of sudden, we was leaving. Put him in the car seat" (V.T. 4). Appellant added that Z.K. was "hysterically crying," pushing from gas, and his face "started turning colors" (V.T. 4). She said "his face started swelling up" and he made a sound "HEE, stopped. I gave him a push to his chest" (V.T. 5).[9]

Appellant said she had contacted L.V. to take her and Z.K. to the house of her friend (V.T. 5-6, 32-33).[10] Appellant put Z.K.'s car seat in the back seat of the minivan (V.T. 38; T. 142, 145). She said Z.K. was screaming so she turned around and tried to give him a bottle (V.T. 34). When he did not take the bottle, she said they stopped on the side of the road, where she held him and tried to calm him down (V.T. 35). Appellant said V.K. passed gas and had diarrhea (V.T. 35).

Appellant claimed the apnea monitor was sounding (V.T. 36). She said the machine indicated at first that Z.K.'s heart was fast but then indicated there was a loose lead, so she unplugged it (V.T. 37). She said the monitor was loud and Z.K. was already fussy, so the noise made him distraught (V.T. 38).

After Appellant calmed Z.K. down, she put him in the car seat in the back while she sat in the front passenger seat (V.T. 38). She claimed that Z.K. stopped breathing and made a noise (V.T. 39). Appellant said Z.K. was then shaking and

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[9] She demonstrated how she pressed twice on Z.K.'s center, upper sternum while he was in his car seat (T. 86-87; V.T. 39; Video). As Sergeant Palmer testified, Appellant's description of events is unclear at times (84); therefore, it is difficult to reconstruct her timeline of events.

[10] Sergeant Palmer tried to locate L.V. but was unsuccessful (T. 85).

crying, while his face turned "poofy" and red, swelling around on one side of his face (V.T. 39, 67).[11]

They decided to go to the hospital (V.T. 6, 39).[12] Appellant claimed that North Memorial staff told her Z.K.'s face was discolored due to his "pushing too hard" (V.T. 6, 13, 43).[13] Throughout the interview, Appellant maintained that the bruise on Z.K.'s face was because "his vessels popped" (V.T. 60). She denied physically abusing him or shaking him (V.T. 43-45, 66). She acknowledged struggling to raise both of her children by herself (V.T. 48, 62). Appellant admitted that she was the only one who cared for Z.K. since he was discharged from the NICU and that he was never apart from her (V.T. 68).

Appellant said the NICU was to blame for discharging Z.K. too early (V.T. 19, 48). She suggested that law enforcement or child protection had something to gain financially from removing her children (V.T. 48).

L.V., who was Z.K.'s father, testified on behalf of the defense (T. 139).[14] He claimed Appellant performed CPR on Z.K. in the car on the way to the hospital because Z.K. was not breathing (T. 141-42). He claimed he could see the backseat while he was driving (T. 142). He said he saw Appellant using the CPR method

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[11] Appellant said she first saw the redness turn into bruising at the hospital (V.T. 67).

[12] Previously Appellant said they decided to go to the hospital that day because the apnea machine was sounding (V.T. 3-4).

[13] The records from North Memorial Hospital do not indicate this (Ex. 2). The records also indicated that there was nothing abnormal about Z.K.'s bowels (*See* Ex. 2).

[14] L.V. described his prior convictions (T. 145-46).

they were taught in the hospital (T. 144). He acknowledged the infant seat was rear-facing (T. 145). Upon questioning by the court L.V. said he could not focus exactly on how Appellant was performing CPR because he was driving, "but I know she was doing ow the doctor told us how to do it" (T. 148). When asked if Appellant performed mouth-to-mouth resuscitation, he agreed and then said she did compressions with two hands (T. 148-49).

Dr. Thomas Young, a forensic pathologist who is not a pediatrician nor a child abuse pediatrician, was hired by the defense (T. 113-14, 128). He last treated children during medical school 30 years ago (T. 128). He never reviewed the NICU records from Z.K.'s hospital admission after birth (T. 119, 129).

Dr. Young testified that an infant who has osteopathy of prematurity can receive rib fractures from CPR (T. 122).[15] He did not, however, offer an opinion that Z.K. had osteopathy of prematurity (T. 133). He claimed that Z.K.'s rib injuries were consistent with CPR (T. 126). Dr. Young opined that "complications of prematurity" accounted for Z.K.'s injuries (T. 125). He said there could be "numerous" non-abusive causes for the injuries but did not elaborate on any others (T. 127). On cross-examination, Dr. Young explained that bruising can occur from a coagulation problem; he acknowledged, however, that Z.K. did not have indications of a coagulation problem because test results for that condition from

[15] He never treated a child with this condition (T. 132-33).

May 18, 2016, were normal (T. 131-32).[16] He never examined any photographs of Z.K. (T. 134).

The district court found Appellant guilty (Verdict 2). The district court credited the testimony of Dr. Swenson and rejected Dr. Young's and L.V.'s testimony. The court's findings are addressed in the argument section, below. Although the presumptive sentence was 86 months, the district court departed and imposed a sentence of 43 months. This direct appeal followed.

[16] He later claimed that an apnea-induced coagulation could only be medically ruled out if testing happened during the apnea event (T. 135).

ARGUMENT

I. THE EVIDENCE IS MORE THAN SUFFICIENT TO SUPPORT APPELLANT'S CONVICTION.

Appellant raises a number of different arguments challenging the sufficiency of the evidence to support her conviction. Essentially Appellant wants this Court to reject credibility determinations made by Judge Koch, who credited the testimony of the State's expert witness and rejected the testimony of the defense expert. Appellant has offered no valid reasons for overturning the district court's credibility determinations.

A. Standard of Review

In reviewing the sufficiency of the evidence to support a conviction, the evidence must be construed in the light most favorable to the verdict. *State v. Franks*, 765 N.W.2d 68, 73 (Minn. 2009). The reviewing court assumes that the fact finder believed the State's witnesses and disbelieved any contrary evidence. *E.g., State v. McDonough*, 631 N.W.2d 373, 390 (Minn. 2001). "[A]ll inconsistencies in the evidence are also resolved in favor of the State." *State v. Bergeron*, 452 N.W.2d 918, 924 (Minn. 1990). "A defendant bears a heavy burden to overturn a jury verdict." *State v. Vick*, 632 N.W.2d 676, 690 (Minn. 2001).

This Court reviews de novo the construction of a criminal statute. *State v. Koenig*, 666 N.W.2d 366, 372 (Minn. 2003). The purpose of statutory interpretation is to effectuate the legislature's intent. *Id.* Statutes are to be construed according to their plain meaning. *Id.* When the statute's language is ambiguous, the legislature's

intent controls. *Id.* When reviewing a statute, this Court assumes that the legislature does not intend absurd or unreasonable results. *Id.*; Minn. Stat. § 645.17. "Moreover, courts should give a reasonable and sensible construction to criminal statutes." *State v. Murphy*, 545 N.W.2d 909, 916 (Minn. 1996).

B. Appellant's Novel Argument That A Parent Cannot Be Guilty Of Assault For Abusing Their Minor Infant Is Utterly Meritless.

Appellant argues for the first time on appeal that she cannot be guilty of first-degree assault because she "had parental authority to forcibly touch Z.K., and Z.K. could not give or withhold his consent to her actions" (App. Br. 20). Appellant essentially wants this Court to write a child-abuse exception into the first-degree assault statute.

Appellant's argument is contrary to the plain language of the first-degree assault statute. A person who "assaults another and inflicts great bodily harm" is guilty of first-degree assault. Minn. Stat. Ann. § 609.221. An assault can be committed if one intends to cause fear of harm ("assault-fear") or if one inflicts or attempts to inflict harm ("assault-harm"). *See* Minn. Stat. Ann. § 609.02, subd. 10. Because this case involves "assault-harm," the State was required to prove "the intentional infliction of or attempt to inflict bodily harm upon another." Minn. Stat. Ann. § 609.02, subd. 10(2); 10 Minn. Prac., Jury Instr. Guides—Criminal, CRIMJIG 13.02 (6th ed.).

Appellant appears to argue that the State must prove that the assault was non-consensual. This argument, however, is contrary to the plain language of the statute,

which does not contain such an element. The defendant's intent is what distinguishes child abuse in the context of assault and appropriate physical contact between parent and child. Using Appellant's example, a parent performing the Heimlich maneuver on a choking baby is not intentionally inflicting bodily harm upon a baby, unlike a parent who forcefully squeezes a baby's stomach. A child's inability to consent has nothing to do with the defendant's intent in causing harm.[17]

In this case, acting as the fact finder, the district court determined that the State proved all of the elements of first-degree assault beyond a reasonable doubt. With respect to the intentional-infliction-of-bodily-harm element, the court credited Dr. Swenson's testimony and found that the bruising on Z.K.'s face occurred as a result of an intentional act that was consistent with a slap or strike to Z.K.'s face by Appellant (FOF 8-9).[18] The court credited Dr. Swenson's testimony and found that Z.K.'s rib injuries were the result of "the intentional squeezing or compressing of [Z.K.'s] rib cage" by Appellant (FOF 8-9). The court determined that there was no evidence indicating that routine care of Z.K. led to the rib fractures (FOF 8-9). Contrary to Appellant's claim, her actions constituted assault, and her "parental authority" did not give her the right to harm Z.K.

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[17] Even if the State must show that a defendant's act is nonconsensual, there is no question that Z.K. did not consent to being struck in the face and squeezed so forcefully that nine ribs fractured.

[18] "FOF" refers to the court's Findings of Fact, Conclusions of Law, and Order. Citations are to the corresponding page number.

Appellant also seems to suggest that because Minnesota has a separate crime of malicious punishment of a child, she should not have been charged with first-degree assault. A similar argument was made by the defendant and rejected by this Court in *State v. Danowit,* 497 N.W.2d 636, 640-41 (Minn. Ct. App. 1993). The jury in that case found the defendant guilty of numerous crimes, including first-degree assault and malicious punishment of a child, as a result of his abuse of the three-year-old victim. *Id.* at 637-38. On appeal, the defendant argued that he was erroneously charged with first-degree assault because the malicious-punishment statute, which carried a lower penalty, was more specific and thus controlling. *Id.* at 640.

In rejecting that argument, this Court noted that a specific provision controls over a general one only when the two have an irreconcilable conflict. *Id.* at 641 (citation omitted). This Court held that first-degree assault and malicious punishment of a child do not irreconcilably conflict:

> Here, the elements of the two crimes are different. The elements of assault in the first degree are that the actor intentionally inflicts bodily harm and great bodily harm results. *See* Minn. Stat. §§ 609.221 and 609.02, subd. 10(1). The elements of malicious punishment of a child resulting in great bodily injury are that the actor, who is a caretaker, by an intentional act with respect to a child, uses unreasonable force or cruel discipline under the circumstances and great bodily harm results. *See* Minn. Stat. § 609.377.

Danowit, 497 N.W.2d at 641.

This Court continued, "Because the two crimes are not irreconcilable, 'there is no reason to believe that the legislature intended to limit the prosecutor's discretion to prosecute the alleged conduct.'" *Id.* (quoting *State v. Chryst,* 320 N.W.2d 721, 723 (Minn. 1982)). Accordingly, the defendant was properly prosecuted for both first-degree assault and malicious punishment of a child. *Id.* Similarly, in this case, the fact that Appellant's conduct may have also fit the uncharged offense of malicious punishment does not mean that she was improperly charged with first-degree assault.

Finally, in asserting that there is a child-abuse exception to the assault statutes, Appellant ignores the other statutes that equate child abuse with assault. For example, first-degree murder of a child during the commission of child abuse, and involving a past pattern of child abuse, defines "child abuse" as including both assault and malicious punishment of a child. Minn. Stat. § 609.185 (a)(5) & (d); *See also* Minn. Stat. § 260C.007 (defining assault crimes and malicious punishment of a child as "child abuse" for child protection purposes). These statutes indicate that the legislature has considered many different ways for a person to commit child abuse, and that assaulting a child is one of those ways.

In sum, Appellant's desire to create a child-abuse exception to first-degree assault is contrary to the plain language of the statute, this Court's decision in *Danowit*, and the legislature's intent.

C. The Evidence Is More Than Sufficient To Establish That Z.K.'S Ten Injuries Constituted Great Bodily Harm.

Appellant next challenges the district court's finding that Z.K.'s injuries constituted great bodily harm. The question of whether an injury constitutes great bodily harm is a question for the fact finder. *State v. Moore*, 699 N.W.2d 733, 737 (Minn. 2005).

"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. The four clauses in the definition of "great bodily harm" are independent from each other. *State v. Currie*, 400 N.W.2d 361, 366 (Minn. Ct. App. 1987). The clause related to "other serious bodily harm," however, "should be taken in the context of the other three alternative definitions." *Moore*, 699 N.W.2d at 739; *State v. Anderson*, 370 N.W.2d 703, 706 (Minn. 1985). Courts must consider the totality of the victim's injuries when determining whether they constitute "other serious bodily harm." *State v. Dye,* 871 N.W.2d 916, 922 (Minn. Ct. App. 2015).

Acting as the fact finder, the district court in this case determined that the totality of Z.K.'s injuries constituted great bodily harm (FOF 9-10):

> [Appellant's] assault on Z.K. caused a bruise to the left side of his face and nine fractures to his rib cage. It is clear from the evidence of the events leading to Z.K.'s admission in the hospital on May 18, he suffered acute discomfort and pain – he was vomiting, lost his appetite, and had trouble breathing. One rib fracture would constitute substantial bodily harm in this case. And while this Court does not rest its analysis wholly on a comparison to the requirements of a lesser-included

> charge, this Court finds it is worthwhile to note how sufficiently the circumstances in this case support a finding of substantial bodily harm. What drives this Court's finding of great bodily harm, however, is Z.K.'s age and vulnerability at the time of the assault as well as the extent of the broken ribs. Z.K. was an immobile, physiologically newborn infant. Though his rib fractures were healing when they were discovered, they constituted a serious bodily injury that, as borne out by the evidence, weakened his already unstable health. Thus, this Court finds the State proved beyond a reasonable doubt [Appellant's] assault on Z.K. caused him great bodily harm.

(FOF 10). The court noted that *one* rib fracture satisfied the definition of "substantial bodily harm" for purposes of a lesser charge. "Substantial bodily harm" occurs when there is a fracture of any bodily member. Minn. Stat. § 609.02, subd. 7a.

Z.K. suffered ten injuries as a result of Appellant's abuse. In addition to the number of injuries, the district court properly considered the evidence that suggested Z.K. was suffering as a result of these injuries; the evidence established that he was not eating, was fussy, and was vomiting.[19] The district court did not clearly err in determining that Z.K.'s nine fractured ribs and bruised face satisfied the definition of "great bodily harm."

A conclusion that the evidence is sufficient in this case is consistent with other cases where a defendant's assault caused great bodily harm. *See, e.g., State v.*

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[19] Appellant erroneously claims that Z.K. did not require any medical intervention in response to his injuries (App. Br. 22-23). But, Appellant rushed Z.K. to the hospital because she was so concerned with his behavior; the district court correctly inferred that Appellant's abuse caused this behavior.

Bridgeforth, 357 N.W.2d 393, 394 (Minn. Ct. App. 1984), *rev. denied* (Minn. Feb. 6, 1985) (concluding that the loss of a tooth from an assault fit the definition of "great bodily harm"); *Currie*, 400 N.W.2d at 366 (holding that the child victims suffered great bodily harm because they had permanent scars on their backs from the defendant's beating).

In *State v. Merritt*, No. A12-0189, 2013 WL 141637, *4 (Minn. Ct. App. Jan. 14, 2013), *rev. denied* (Minn. Mar. 27, 2013), the victim's injuries included two scalp lacerations on the back of his head, bruising around and hemorrhaging on one eye, a nasal fracture, a rib fracture, and pain in the back and on the hand. The victim was admitted to the hospital, in part due to his intoxication, and released the next day; he only continued to suffer from numbness on one side of the head. *Id.* Nevertheless, this Court held that these injuries constituted "other serious bodily harm" under the great-bodily-harm definition. *Id.* (distinguishing *State v. Gerald,* 486 N.W.2d 799 (Minn. Ct. App. 1992), where that victim suffered only two small cuts). In this case, Z.K. suffered ten injuries. The number of and type of injuries he had makes this case more similar to *Merritt* than *Gerald.*[20]

Appellant cites two cases where the victim had fractures and the defendant was convicted of assault causing "substantial bodily harm." *See State v. Waino,* 611

[20] Furthermore, contrary to Appellant's suggestion, the injuries do not have to be ones that actually fall into one of the other three categories of "great bodily harm." While these other classifications must be considered for context, they are still distinct from "other serious bodily harm." If "other serious bodily harm" had to mean one of the other categories, then there would have been no purpose for the legislature to include that catch-all classification.

N.W.2d 575 (Minn. Ct. App. 2000), and *State v. Wellman,* 341 N.W.2d 561 (Minn. 1983). Those cases are inapplicable, however, because neither case involved assault causing "great bodily harm." In addition, the injuries in those cases were not as severe as Z.K.'s here.[21] Nor does *State v. Leonard,* 400 N.W.2d 206 (Minn. 1987) – which is not a sufficiency case – support Appellant's argument. The numerous injuries in that case supported a triple, upward durational departure.[22] That case says nothing about the number of injuries that are required to be considered great bodily harm.

The district court did not err in determining that Z.K.'s ten injuries constituted great bodily harm.

D. The Evidence Was More Than Sufficient To Support The District Court's Credibility Determinations And Findings Of Fact.

Appellant argues that the State failed to prove that she caused Z.K.'s injuries (App. Br. 26-33). Appellant's argument rests on the assertions that Z.K.'s rib injuries could have occurred before he was released from the NICU and that Dr. Swenson's testimony was unreliable. Appellant's claim can only prevail if this Court rejects the trial court's credibility determinations. Appellant's argument is contrary to well-established precedent.

1. Sufficiency-of-the-evidence standard in a circumstantial case

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[21] One of the victims had two fractured ribs, while the other victim had three injuries. Z.K., on the other hand, had ten injuries.

[22] In this case, the district court imposed a sentence that was half of the presumptive sentence, considering that Appellant's abuse was not planned, Appellant sought medical attention, and Z.K. would not have recollection or lasting injury from the assault (S. 20).

It is well-established that assessing a witness' credibility is the fact-finder's function. *State v. Bolstad*, 686 N.W.2d 531, 540 (Minn. 2004). The fact-finder has the exclusive role of resolving conflicting testimony because it has the opportunity to observe the demeanor of witnesses and weigh their credibility. *State v. Lloyd*, 345 N.W.2d 240, 245 (Minn. 1984) (rejecting defendant's challenge to the sufficiency of the identification testimony). The "reviewing court must recognize that all inconsistencies in the evidence are resolved in favor of the State." *State v. Budreau*, 641 N.W.2d 919, 929 (Minn. 2002) (citation omitted); *accord Bolstad*, 686 N.W.2d at 540.

Appellate courts apply "the same standard of review for bench trials and jury trials when determining whether the evidence was sufficient to support a conviction." *State v. Slaughter*, 691 N.W.2d 70, 73 n.3 (Minn. 2005) (citing *Davis v. State*, 595 N.W.2d 520, 525 (Minn. 1999)). If a district court "'omits a finding on any issue of fact essential to sustain the general finding, it shall be deemed to have made a finding consistent with the general finding.'" *See Slaughter*, 691 N.W.2d. at 77 (quoting Minn. R. Crim. P. 26.01, subd. 2); *accord State v. Oanes*, 543 N.W.2d 658, 663 (Minn. Ct. App. 1996).

Under the two-part test for circumstantial-evidence cases, this Court first identifies the circumstances proved and then examines the reasonableness of all inferences that might be drawn from the circumstances proved. *State v. Anderson,* 789 N.W.2d 227, 241-42 (Minn. 2010). In identifying the circumstances proved,

the appellate court defers to the credibility determinations made by the fact finder. *State v. Andersen*, 784 N.W.2d 320, 329 (Minn. 2010). The circumstances proved must be consistent with the theory that the accused is guilty and inconsistent with any rational hypothesis except that of guilt. *Id.* at 329. The State does not have the burden to remove all doubt, but only to remove all reasonable doubt. *State v. Hughes*, 749 N.W.2d 307, 313 (Minn. 2008). Possibilities of innocence do not require reversal as long as the evidence as a whole makes such theories seem unreasonable. *Id.* (citation omitted); *Andersen*, 784 N.W.2d at 332 (noting that the circumstances are not viewed in isolation).

2. The district court's relevant findings of fact

The district court found Dr. Swenson's testimony credible regarding the bruising on Z.K.'s face and the cause being consistent with a slap or strike to Z.K.'s face (FOF 8). The district court rejected Dr. Young's theories about the cause of the bruise (FOF 8).

With respect to the rib fractures, the district court found "Dr. Swenson's testimony regarding the cause of Z.K.'s rib fractures credible, including her conclusion that the rib fractures were the result of compression" (FOF 8). The court continued, "the evidence proves beyond a reasonable doubt that Z.K.'s injuries were the result of abuse" and that they were caused by the intentional squeezing or compressing of his rib cage (FOF 8).

The district court made the following findings regarding the defense evidence about the rib injuries:

> The Court does not find Dr. Young's testimony credible on this central issue of whether the fractures were the product of child abuse. Dr. Young's testimony is vague and generalized, and based on an incomplete review of relevant records to be helpful in any way. Dr. Young attributed the rib fractures to osteopenia of prematurity. But the fact he did not review Z.K.'s medical records from Children's Hospital post-birth meant he was without information showing how the hospital properly and fully addressed the brittle bone concerns inherent in a newborn child, or that Z.K. did not have this condition upon release. Dr. Young has also never treated a patient with this condition, whereas Dr. Swenson has treated several patients with osteopenia of prematurity and testified Z.K.'s X-rays showed normally mineralized bones.

(FOF 8).[23]

The district court concluded that it was unreasonable to believe that the rib fractures occurred while Z.K. was in the NICU (FOF 9). The court found that there was "no evidence" to support the suggestion that procedures in the NICU caused the rib fractures (FOF 9). The court further considered that Z.K.'s behavior that prompted Appellant to bring him to the hospital – irritability, vomiting, and refusal to eat – was logically explained by his broken ribs (FOF 9).

3. Appellant's arguments are inconsistent with the evidence and contradict the court's credibility determinations

Appellant does not dispute that the evidence supports the court's determination that Appellant abused Z.K. Rather, she claims that there is another

[23] The district court also found that L.V.'s testimony that Appellant performed CPR in the car was not credible; the court said there was no evidence Z.K. stopped breathing in the car (FOF 3).

reasonable hypothesis other than guilt: she argues that Z.K.'s rib fractures could have occurred while he was admitted to the NICU after birth (App. Br. 29). This claim is directly contradicted by Dr. Swenson's testimony, which the district court credited. Dr. Swenson definitively ruled out "osteopenia of prematurity" as a cause of the fractures and explained the medical evidence to support that conclusion (T. 35-38, 54-55, 68). Dr. Swenson concluded, to a reasonable degree of medical certainty, that only child abuse explained all of Z.K.'s injuries (T. 39-41).[24]

Appellant's argument contradicts Dr. Swenson's testimony, which the district court credited, and is also not supported by other evidence in the record. For example, she claims that while Z.K. was hospitalized, "his bones were more susceptible to fracture from non-abusive touching" (App. Br. 34). Appellant does not cite the record in support of this claim. The court credited Dr. Swenson's testimony and rejected Dr. Young's testimony about osteopenia of prematurity -- a condition that Z.K. did not have -- that can lead to fractured bones. Appellant claims that the lack of injury on the external torso "suggests the injury occurred at some

[24] In criticizing Dr. Swenson for describing the theory of "Occam's razor," Appellant fails to acknowledge that Dr. Swenson then immediately testified that her conclusion of abuse was based on a reasonable degree of medical certainty (App. Br. 33). Appellant also erroneously states, without citing the record, that Dr. Swenson "recognized that the rib and facial injuries reasonably could have been caused by non-abusive trauma" (App. Br. 32). Dr. Swenson testified that there was no reasonable explanation for his injuries other than abuse (T. 41-42). Appellant further incorrectly states that Dr. Swenson did not interview previous medical providers (App. Br. 32). Dr. Swenson both reviewed Z.K.'s prior hospital records and spoke to his prior providers (T. 21).

earlier date, and possibly through a lesser exertion of force" (App. Br. 29). Again, Appellant does not cite the record in support of this claim.

Appellant argues that "mild periosteal reaction" on Z.K.'s leg bones was consistent with rib fractures occurring in the NICU (App. Br. 30). Appellant does not cite the record, which does not support this claim, and instead relies on a medical journal that was not introduced into evidence. As Dr. Swenson testified, this is a normal condition for infants under six months (T. 45-46).

Based on the evidence introduced at trial and the district court's credibility determinations, the circumstances proved are consistent with Appellant's guilt and inconsistent with any other rational hypothesis.

II. APPELLANT SHOULD BE FORMALLY ADJUDICATED ON ONE COUNT.

Appellant correctly relies on Minn. Stat. § 609.04, in arguing that a person may not be formally convicted on more than one charge for a single criminal act. In this case, the district court's statement at sentencing indicates that the court intended to enter a conviction and sentence on count one, first-degree assault; the court said that there was a guilty verdict on count two but no sentence would be entered "because it would merge" (S. 20). As reflected in the Register of Actions, however, the disposition for both charges is "convicted," although the minutes make clear that only one sentence was pronounced.

As the Minnesota Supreme Court has explained:

> We hold that the proper procedure to be followed by the trial court when the defendant is convicted on more than one charge for the same act is for the court to adjudicate formally and impose sentence on one count only. The remaining conviction(s) should not be formally adjudicated at this time. If the adjudicated conviction is later vacated for a reason not relevant to the remaining unadjudicated conviction(s), one of the remaining unadjudicated convictions can then be formally adjudicated and sentence imposed, with credit, of course, given for time already served on the vacated sentence.

State v. LaTourelle, 343 N.W.2d 277, 284 (Minn. 1984).

Although it appears convictions were entered on both counts, the court clearly only sentenced Appellant on one count. The court's entry in MNCIS was likely an attempt to reflect the guilty verdict with respect to both charges. If this Court determines that convictions were improperly entered on both, a remand would

be appropriate for the district court to clarify that a conviction has only been formally entered on one count.

CONCLUSION

Respondent respectfully requests that this Court affirm Appellant's conviction.

DATED: February 12, 2018

Respectfully submitted,

MICHAEL O. FREEMAN
Hennepin County Attorney

s/Kelly O'Neill Moller
By: KELLY O'NEILL MOLLER
Assistant County Attorney
Attorney License No. 284075
C-2000 Government Center
Minneapolis, MN 55487
Telephone: (612) 348-3434
FAX: (612) 348-6028

A17-1119

STATE OF MINNESOTA

IN COURT OF APPEALS

State of Minnesota,

Respondent,

vs.

Muna Ibrihim Abikar, a.k.a. Hamde Khalif,

Appellant.

APPELLANT'S REPLY BRIEF

LORI SWANSON
State Attorney General
1800 Bremer Tower
445 Minnesota Street
St. Paul, MN 55101

MICHAEL O. FREEMAN
Hennepin County Attorney
KELLY O'NEILL MOLLER
Assistant County Attorney
Hennepin County Government Center
300 South 6th St.
Minneapolis, MN 55487

ATTORNEYS FOR RESPONDENT

OFFICE OF THE MINNESOTA
APPELLATE PUBLIC DEFENDER

By: **MICHAEL MCLAUGHLIN**
Assistant State Public Defender
License No. 392748
540 Fairview Ave North, Suite 300
St. Paul, MN 55104
Telephone: (651) 201-6700

ATTORNEY FOR APPELLANT

A17-1119

STATE OF MINNESOTA

IN COURT OF APPEALS

State of Minnesota,

Respondent,

vs. **APPELLANT'S REPLY BRIEF**

Muna Ibrihim Abikar, a.k.a. Hamde Khalif,

Appellant.

INTRODUCTION

This brief is submitted in reply to the respondent's brief filed and served upon defense counsel via U.S. Mail on February 13, 2017. It is offered in further support of Ms. Khalif's appeal from a judgment of the district court, dated April 21, 2017, convicting her of first-degree assault and third-degree assault. The facts and procedural history are fully discussed in Ms. Khalif's previous brief.

ARGUMENT

I. The evidence is legally insufficient to establish first-degree assault because the alleged conduct does not constitute "assault-harm" under Minn. Stat. § 609.02, subd. 10(2), according to the Minnesota Supreme Court's authoritative construction of that term (Replying to Resp. Br., Pt. B).

The Minnesota Supreme Court has defined the mens rea element and the actus reus element of assault-harm. *See State v. Dorn*, 887 N.W.2d 826, 831 (Minn. 2016) (construing the meaning of assault-harm under Minn Stat. § 609.02, subd. 10(2)); *State v.*

Fleck, 810 N.W.2d 303, 309 (Minn. 2012) (same). The mens rea of assault-harm is general intent, which means the defendant "must intentionally engag[e] in the prohibited conduct." *Fleck*, 810 N.W.2d at 309. Assault-harm's mens rea is not intent to cause harm; this contrasts with assault-fear, which requires an intent to cause a particular result. *Id.* at 309-10.

The "actus reus element of assault-harm requires that [the defendant's] act constitute a battery." *Dorn*, 887 N.W.2d at 831; *Fleck*, 810 N.W. at 310 (An "an assault . . . requires no abstract intent to do something further, only an intent to do the prohibited physical act of committing a battery.") (citing *State v. Lindahl*, 309 N.W.2d 763, 764 (Minn. 1981)). A battery is a non-consensual, intentional touching. *Dorn*, 887 N.W.2d at 831.

Without any reference to *Dorn* or *Fleck*, respondent contends that the "defendant's intent" is what distinguishes assault-harm from lawful physical contact. (Resp. Br., at 13-14). Respondent further claims that the "plain language" of Minn. Stat. § 609.02, subd. 10(2), does not require proof that an assault was "non-consensual." *Id.* Respondent argues that this Court therefore should not consider the issue of consent. *Id.* Respondent contends that this Court should only consider evidence regarding specific intent to harm. *Id.*

In *Fleck* and *Dorn*, the Minnesota Supreme Court provided a detailed construction of the assault-harm statute. "Once [the Minnesota Supreme Court] has construed a statute, that interpretation is as much a part of the statutory text as if it had been written into the statute originally." *Wynkoop v. Carpenter*, 574 N.W.2d 422, 425 (Minn. 1998).

Notably, the Minnesota Legislature has declined to amend the statutory definition of assault-harm following *Dorn* and *Fleck*. *See* Minn. Stat. § 609.02, subd. 10(2); *State v. Schmid*, 859 N.W.2d 816 (Minn. 2015) ("We see no reason to change our interpretation of the term when the Legislature has also declined to do so."). When evaluating whether the evidence against Ms. Khalif is legally sufficient to prove assault-harm, this Court is bound by the Minnesota Supreme Court's construction of the assault-harm statute in *Fleck* and *Dorn*.

Fleck and *Dorn* held that assault-harm requires an actus reus of battery – that is, a non-consensual, intentional touching. *Fleck* and *Dorn* further held that the defendant's specific intent does not distinguish assault-harm from intentional lawful physical contact; instead, the actus reus of battery demarcates criminality. Respondent ignores *Fleck* and *Dorn* without even trying to distinguish them. Though respondent would prefer otherwise, *Fleck* and *Dorn* have equal legal force to the specific words of Minn. Stat. § 609.02, subd. 10(2). *Wynkoop*, 574 N.W.2d at 425. Because respondent's argument cannot be reconciled with *Fleck* and *Dorn*, this Court must reject it.

Under *Fleck* and *Dorn*, the state must prove the actus reus of assault-harm – that the physical contact was non-consensual. As fully argued in Ms. Khalif's main brief, the state could not prove assault-harm because the infant Z.K. was incapable of withholding or providing consent. Because the evidence could not show that Ms. Khalif committed a non-consensual battery, the actus reus of assault-harm, the conviction must be reversed.

This application of *Fleck* and *Dorn* does not create an anomalous result. Minnesota law generally does not define criminal child abuse based on intent. Minn.

Stat. § 609.06, subd. 1(6), provides that "reasonable force may be used upon or toward another without the other's consent . . . when used by a parent . . . in exercise of lawful authority, to restrain or correct such child." It is a crime to intend to "correct" a child and use unreasonable force; it is not a crime to intend to "correct" a child and use reasonable force. This Court should thus reject respondent's contention that the "defendant's intent" is what distinguishes assault-harm from lawful physical contact. Reasonableness of force is what matters.

As Ms. Khalif noted in her previous briefs, individuals properly receive severe punishment for child abuse that results in serious physical harm. For instance, the crime of malicious punishment provides for a prison sentence of up to 10 years. *See* Minn. Stat. § 609.377. Malicious punishment, unlike assault-harm, turns on questions of reasonableness rather than consent. *Id.* The reasonableness inquiry gives proper consideration to the competing interests of state protection and parental autonomy. *See generally Parham v. J.R.*, 442 U.S. 584, 603-04 (1979). This makes malicious punishment well-tailored to prosecuting physical abuse against a child.[1]

In addition, even after *Fleck* and *Dorn*, a parent could be convicted of assault-fear upon proof of specific intent. But *Fleck* and *Dorn* foreclose using assault-harm to

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[1] Contrary to respondent's contention, Ms. Khalif does not argue that the conviction must be reversed because she could have been prosecuted for malicious punishment. She simply argues that the evidence does not prove assault-harm because Ms. Khalif did not commit a battery, since her infant son was incapable of withholding consent. She discussed the malicious punishment statute to show that the law provides a better means to prosecute child abuse, and that this Court's proper application of *Fleck* and *Dorn* would not allow abusive parents to evade severe criminal punishment.

prosecute child abuse against an infant, due to the incapacity of the child to give or withhold consent. While the state has other ready means to prosecute child abuse, an assault-harm conviction cannot be upheld following *Fleck* and *Dorn* if the state cannot prove that the defendant committed a battery. Because the evidence was legally insufficient to prove first-degree assault, this Court must reverse the conviction.

II. The evidence is legally insufficient to establish great bodily harm (Replying to Resp. Br., Pt. C).

For this Court to uphold the first-degree assault conviction, the state must have proved that Z.K. suffered "great bodily harm." Great bodily harm means "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. The scope of the "other serious bodily harm" catch-all is limited by the three specific categories that precede it. *State v. Moore,* 699 N.W. 733, 738 (Minn. 2005). "Other serious bodily harm" is an injury of analogous severity to one that creates a high probability of death, or an injury of analogous quality and duration to one that causes permanent disfigurement or long-term bodily impairment. Minn. Stat. § 645.08(2); *Moore,* 699 N.W. at 738; *State v. Dye*, 871 N.W.2d 916, 922 (Minn. App. 2015).

The state here asserted that Z.K. suffered "other serious bodily harm." As the state implicitly concedes, there is no evidence that Z.K.'s injuries were of analogous severity to ones that cause a high probability of death. The sole issue is whether his

injuries were of analogous quality and duration to ones that cause permanent disfigurement or long-term bodily impairment.

As Ms. Khalif stated in her prior brief, the evidence did not establish "other serious bodily harm" on this basis because the state did not offer any evidence regarding the injuries' long-term consequences. Fractured bones, without more, are substantial bodily harm. Minn. Stat. § 609.02, subd. 7a ("'Substantial bodily harm' means bodily injury which involves . . . a temporary but substantial loss or impairment of the function of any bodily member or organ, or which causes a fracture of any bodily member."); ."); *State v. Wellman*, 341 N.W.2d 561 (Minn. 1983); *State v. Waino*, 611 N.W.2d 575 (Minn. App. 2000). For the injuries to be elevated to great bodily harm, the state must show protracted consequences. *See Dye*, 871 N.W.2d at 922 ("[B]ecause E.G. did not testify, the extent of her pain and whether she has any permanent scarring are unknown. Therefore, the evidence does not support a finding that E.G. suffered other serious bodily injury within the meaning of the statute."). The state made no such showing here. To the contrary, the evidence showed that the fractures had closed before they were detected on an x-ray. Because the evidence does not establish great bodily harm, Ms. Khalif's first-degree assault conviction must be reversed.

III. The evidence is legally insufficient to prove first-degree assault based on circumstantial evidence (Replying to Resp. Br., Pt. D).

As the allegations against Ms. Khalif rested on circumstantial evidence, the state needed to prove that the circumstances were "consistent with the hypothesis that the accused is guilty and inconsistent with any other rational hypothesis except that of guilt."

State v. Bias, 419 N.W.2d 480, 484 (Minn. 1988). The "loss of one link" in the inferential chain supporting guilt "may prevent the state from meeting its evidentiary burden." *State v. Zanter*, 535 N.W.2d 624, 631 (Minn.1995). If "any one or more circumstances" proved at trial "are inconsistent with guilt, or consistent with innocence, then a reasonable doubt as to guilt arises.'" Although this Court defers to the factfinder's acceptance of the proof of the circumstances proved at trial, it gives "no deference to the fact finder's choice between reasonable inferences'" arising from the circumstances. *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010) (citation omitted).

Accepting the circumstances proved at trial, Ms. Khalif's conviction must be reversed because these circumstances are consistent with a reasonable hypothesis that the bone fractures occurred before Z.K. was placed in her care. The state's expert, Dr. Swenson, testified that Z.K. received treatment in the hospital to improve bone density and bone mineralization before he was released to Ms. Khalif's care (T. 56). She further stated that reduced bone mineralization or density makes infants more susceptible to bone fracture (T. 35). Her testimony supports a reasonable inference that Z.K. had a period of reduced bone density, during which he was more susceptible to fracture.

Dr. Swenson further testified that x-rays did not reveal when the bone fractures occurred (T. 39-40). The state did not dispute medical records showing no evidence of chest trauma when Z.K. arrived at the hospital with Ms. Khalif on May 18, 2016 (North Memorial Records, Exhibit 2). Undisputed evidence also showed that Z.K. was in intensive care for three months, during which he received invasive medical treatments, including ventilation and feeding tubes for three weeks (Exhibit 2). These circumstances,

which the state and court accepted at trial, support a reasonable inference that Z.K.'s bone fracture occurred before he was released to Ms. Khalif, when he received intrusive medical treatment and his bones were more prone to fracture.

Respondent contends that Ms. Khalif's argument does not give proper deference to the factfinder's evaluation of the evidence. This is not accurate. Ms. Khalif's relies on circumstances established by the state's expert or by unimpeached medical records.[2] She argues that these circumstances support a reasonable inference consistent with innocence. Although the district court looked at these circumstances and drew an inference of guilt, this Court owes no deference to this choice. Because the circumstances support a reasonable inconsistent with guilt, the evidence is legally insufficient to support the conviction.

In addition, the state failed to prove its circumstantial case because a link in the state's inferential chain lacks a reliable basis. To prove guilt from the circumstances, the state must infer that there is no reasonable, non-abusive explanation for Z.K.'s injuries. This inference requires reliable evidence excluding potential causes of injury not involving child abuse.

Dr. Swenson testified that non-abusive trauma is a potential cause of bruising and rib fractures (T. 27, 34). To exclude this potential cause, she needed to conduct a reasonable investigation into whether non-abusive trauma occurred. There is no evidence that she interviewed Ms. Khalif or the medical providers at North Memorial, who had the

[2] She does not rely on the testimony of the defense expert, Dr. Young, in proper deference to the district court's evaluation of the evidence.

most recent and relevant information on whether any non-abusive trauma occurred (T. 21).[3] Due to this lack of investigation, there is no reliable evidence to exclude non-abusive trauma as a cause of injury. Because the state has failed to prove this link in its inferential chain, the circumstantial evidence is legally insufficient to support a conviction. *See State v. Taylor*, 650 N.W.2d 190, 206 (Minn.2002) ("Circumstantial evidence must form a complete chain that, in view of the evidence as a whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt."); *Zanter*, 535 N.W.2d at 631.

[3] Respondent correctly notes that Dr. Swenson spoke to medical providers who treated Z.K. at Children's Hospital before his release on May 12, 2016. But Dr. Swenson still failed to conduct a reasonable investigation into trauma by not speaking to the medical team at North Memorial or to Ms. Khalif.

CONCLUSION

For the foregoing reasons, and those stated in the previous brief,[4] Ms. Khalif respectfully asks that the convictions be reversed.

Dated: February 27, 2017

Respectfully submitted,

OFFICE OF THE MINNESOTA
APPELLATE PUBLIC DEFENDER

/s/ *Michael McLaughlin*

By: MICHAEL MCLAUGHLIN
Assistant State Public Defender
License No. 392748

540 Fairview Ave. N, Suite 300
St. Paul, MN 55104
(651) 201-6700

ATTORNEY FOR APPELLANT

[4] Ms. Khalif stands on her prior brief with regard to her argument that the third-degree assault conviction must be vacated because it is a lesser-included offense of first-degree assault.