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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A08-0821**

State of Minnesota,  
Respondent,

vs.

Abdul Ahsan Khan,  
Appellant.

**Filed July 28, 2009  
Affirmed  
Toussaint, Chief Judge**

Olmsted County District Court  
File No. 55K605002509

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Mark A. Ostrem, Olmsted County Attorney, 151 Southeast Fourth Street, Rochester, MN 55904 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Renée J. Bergeron, Special Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Toussaint, Chief Judge; Halbrooks, Judge; and Muehlberg, Judge.\*

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\* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

## UNPUBLISHED OPINION

TOUSSAINT, Chief Judge

On appeal from his conviction of third-degree assault for causing substantial bodily harm to his 14-month-old son, appellant Abdul Ahsan Khan argues that the circumstantial evidence produced at trial was insufficient because it did not support the element of intent. Because appellant's conviction is supported by sufficient circumstantial evidence, we affirm.

## DECISION

In December 2004, while in appellant's care, his 14-month-old son sustained a spiral fracture of the femur, resulting from a forceful twisting motion, and a substantially bruised ear. Appellant claims that his son suffered the injuries after falling in the bathtub and that the broken leg did not become evident until he was attempting to change his son's diaper, pushed his son's legs apart, and heard a clicking sound. After a bench trial, appellant was convicted of third-degree assault and malicious punishment.<sup>1</sup>

On a claim of insufficient evidence, this court reviews the record to determine whether the evidence, viewed in the light most favorable to the verdict, is sufficient to permit the factfinder to reach the verdict it did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). Circumstantial evidence is entitled to no less weight than direct evidence. *Id.* We will not disturb the verdict if the factfinder, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could

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<sup>1</sup> Appellant does not appeal his malicious-punishment conviction because judgment has been reserved.

reasonably conclude that the defendant was guilty as charged. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004). A conviction may be based purely on circumstantial evidence if the evidence as a whole leads directly to the guilt of the defendant and is inconsistent with any reasonable inference other than guilt. *State v. Jones*, 516 N.W.2d 545, 549 (Minn. 1994). The factfinder is to weigh the credibility of evidence and thus determine which witnesses to believe and how much weight to give to their testimony. *State v. Daniels*, 361 N.W.2d 819, 826 (Minn. 1985). Inconsistencies in the state's case or possibilities of innocence do not require reversal of a verdict so long as the evidence taken as a whole makes other theories seem unreasonable. *State v. Ostrem*, 535 N.W.2d 916, 923 (Minn. 1995).

Appellant challenges the sufficiency of the circumstantial evidence supporting his conviction of third-degree assault for violating Minn. Stat. § 609.223, subd. 1 (2004) (providing that “[w]hoever assaults another and inflicts substantial bodily harm” commits third-degree assault). Assault, as applicable here, is the “intentional infliction of . . . bodily harm upon another.” Minn. Stat. § 609.02, subd. 10(2) (2004). “‘Intentionally’ means that the actor either has a purpose to do the thing or cause the result specified or believes that the act performed by the actor, if successful, will cause that result.” *Id.*, subd. 9(3) (2004). Substantial bodily harm “means bodily injury which involves a temporary but substantial disfigurement, or which causes 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.” *Id.*, subd. 7a (2004).

Appellant argues that the evidence was insufficient to establish that he *intentionally* caused his son substantial bodily harm, arguing that the state failed to prove beyond a reasonable doubt that his son was not injured accidentally, especially considering appellant's "history of loving care of his son." Appellant claims that his son "could have been trapped by a water faucet or handle when he fell or he could have been in a twisting position while standing in the tub and have fallen on his leg." Appellant contends that when he "used normal force to part [his son's] legs, the hairline fracture separated and became a more serious fracture."

But this case turns on the expert's testimony. We must defer to the district court's ability to weigh the credibility of the orthopedic surgeon, who opined that it was very unlikely for a toddler to sustain a spiral fracture of the femur, the largest and strongest bone in the body, after falling in the bathtub. The surgeon testified that it is probable that appellant's son did not suffer the spiral fracture accidentally because it is not likely that a 14-month-old child could sustain a spiral fracture to the femur due to a bathtub fall, in which not enough force is present. Appellant did not challenge the surgeon's testimony at trial by presenting additional expert testimony. The evidence as a whole leads directly to the conclusion that appellant intentionally applied enough twisting force to his son's leg to cause a spiral fracture of the femur and that his son did not break his leg in a bathtub fall.

Viewing the evidence in the light most favorable to the state, the evidence excludes any reasonable inference other than that appellant intentionally caused his son substantial bodily harm, specifically a bone fracture. *See State v. Wellman*, 341 N.W.2d

561, 564 (Minn. 1983) (affirming third-degree assault convictions when child victim suffered numerous injuries, including spiral fracture of tibia, but appellant caretaker asserted that injuries were sustained in falling accidents); *State v. Waino*, 611 N.W.2d 575, 579-80 (Minn. App. 2000) (affirming third-degree assault conviction when victim suffered broken ribs, but appellant asserted that injury was sustained in accidental fall, and deferring to fact-finder's credibility determinations); *State v. Danowit*, 497 N.W.2d 636, 640 (Minn. App. 1993) (affirming third-degree assault conviction when child victim suffered broken toe and scapula, but appellant caretaker asserted that injury was sustained in accidental bathtub fall), *review denied* (Minn. May 11, 1993).

**Affirmed.**