

No. 1-01-2300

**IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT**

PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of Cook County, Illinois.
Plaintiff-Appellee,)	
)	
-vs-)	No. 98 CR 9679.
)	
VERONICA LEE,)	Honorable
)	Diana Gordon Cannon,
Defendant-Appellant.)	Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLANT

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ORAL ARGUMENT REQUESTED

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NATURE OF THE CASE

Veronica Lee was convicted of aggravated battery after a bench trial and was sentenced to 12 years in prison.

This is a direct appeal from the judgment of the court below. An issue is raised challenging the charging instrument. Lee contends that the indictment charging her with aggravated battery of a child failed to sufficiently apprise her of the precise crime with which she was charged and denied her the ability to present a competent defense. *See* Argument VI.

ISSUES PRESENTED FOR REVIEW

1. Where lay-witness nurse Smith gave opinion evidence based on facts outside of her perception and impermissibly testified on the ultimate question of whether Christopher's injuries were intentionally caused, whether Lee was denied a fair trial.
2. Where the State's expert stipulation was based on false and unreliable evidence, whether Lee was denied a fair trial. Alternatively, whether defense counsel was ineffective for failing to object to the unreliable expert stipulation.
3. Whether Lee was proven guilty beyond a reasonable doubt of aggravated battery of a child where: (A) the State failed to show that Lee had exclusive control of the child when he was injured or was even present when the child was injured; and (B) the State failed to demonstrate that the injury was caused intentionally.
4. Whether Lee was denied a fair trial where the trial court erroneously concluded that Lee removed her child from an intravenous morphine drip and "abducted" her child from the hospital.
5. Whether Lee was denied a fair trial when the trial court shifted the burden of

proof to the defense by expecting Lee to explain how Christopher was burned.

6. Whether the trial court erred in denying Lee's Motion in Arrest of Judgment in violation of her federal and state constitutional rights to notice where Lee's indictment failed to apprise her of the precise offense charged with sufficient specificity to prepare a defense.

JURISDICTION

Veronica Lee appeals from a final judgment of conviction in a criminal case. She was sentenced on May 30, 2001. (R. I 23) Notice of appeal was timely filed on June 4, 2001. (C. 69) Jurisdiction therefore lies in this Court pursuant to Article VI, Section 6, of the Illinois Constitution, and Supreme Court Rules 603 and 606.

STATEMENT OF FACTS

The State charged Veronica Lee with aggravated battery of a child. (C. 15) The one-count indictment alleged that on or about March 19, 1998:

She, being eighteen years of age or older, intentionally or knowingly without legal justification, caused great bodily to Christopher Smith a child under the age of thirteen years. (C. 15)

After a bench trial before the Honorable Diane G. Cannon, Lee was convicted of aggravated battery of a child and sentenced to 12 years' imprisonment. This appeal followed.

Shortly after 2:00 p.m. on March 19, 1998, Veronica Lee carried her baby, Christopher, into Holy Cross Hospital, screaming, "My baby. Please help my baby." (R. E7) Christopher suffered burn injuries to both arms. (R. C 8) Lee spoke with a social worker at Holy Cross Hospital and falsely told the social worker that her name was Theresa Williams and that her son's name was Christopher Williams. (R. C 9) Lee also gave the social worker an incorrect address and date of birth for herself. (R. C 10) Lee then told the social worker that her son

sustained the burn injuries after falling into a pail of hot water. (C. 9-10) The social worker found Lee evasive and hostile and reported the incident to the Department of Children and Family Services ("DCFS"). (R. C 11)

At roughly 6:00 p.m., Christopher was transferred to Loyola Hospital Burn Center. (R. C 21) A registered nurse, Margaret Smith, treated Christopher when he arrived at Loyola. (R. C 21) Smith had been a registered nurse for six years and had worked in the burn unit at Loyola Hospital for a little over a year and a half. (R. C 18) Smith completed a three month training in advanced burn life support. (R. C 17-18) Smith was not qualified as an expert nor did the State make any effort to qualify her as an expert witness.

Nurse Smith testified that Christopher had incurred two immersion burns from his fingers up to just below his elbow and a small burn on his left foot. (R. C 22) Smith further testified that the burns were "second degree burns 24 to 72 hours progression to determine the total thickness of the burn." (C. 22) Smith explained that the burns to Christopher's forearms had lines of demarcation that were indicative of immersion burns. (R. C 23) Over defense counsel's objection, Smith was permitted to testify that an immersion burn could not happen by accident. (R. C 19-20)

Nurse Smith asked Lee how Christopher sustained the burns, and Lee responded that he had placed his hands in a bucket of water as she was mopping the floor. (R. C 25) Over defense counsel's objection, Smith testified that Lee's explanation for how Christopher incurred the burns was not consistent with his injury since the burns had a line of demarcation that indicated that Christopher had been held in that position for some time. (R. C 25) Again over defense counsel's objection, Smith testified that Christopher's burns were not consistent with him falling into a bathtub on his hands and knees. (R. C 29) Smith offered her opinion that if a child of

Christopher's age were to fall into a bathtub on his hands and knees, she would expect burns possibly to the side of his torso and legs or buttocks area. (R. C 32) Smith further opined that if Christopher had fallen into a bathtub with a sleeper on, she would expect some of the skin from the child's arms to be left in the sleeper. (R. C 32)

Smith testified that Lee became very upset with Smith when Smith went into Christopher's room to check and reapply the dressings on his wounds. (R. C 28) Lee requested another nurse and eventually another nurse was provided. (R. C 28)

The following afternoon, nurse Jeannie Leggett was assigned to treat Christopher. (R. D 5-6) At roughly 5:00 p.m., Leggett entered Christopher's room to assess his wound and to administer oral morphine to the child. (R. D 6) Lee asked Leggett whether she could take Christopher to the hospital's playroom and Leggett gave her permission to do so. (R. D 9) A few minutes later, Leggett tried to find Lee and her Christopher but could not. Leggett called security. (R. D 9)

Forty minutes later, Leggett received a phone call from Lee. (R. D 10) Lee told Leggett that she had left the hospital with Christopher because she was dissatisfied with the treatment at Loyola and wanted to take him to Cook County Hospital. (R. D 11; D 15; E 4) Leggett told Lee that she first needed to bring the child back to Loyola so that he could be properly discharged and transported to another hospital. (R. D 11) Christopher was returned to Loyola Hospital later that evening after Chicago Police officers found Christopher at Lee's sister's house. (R. C 51)

Expert Stipulation

The parties stipulated to the expert testimony of Dr. Barbara Latenser, a qualified expert in the field of medical diagnosis of burns. (R. E 3) Dr. Latenser reviewed both the medical records and photos of Christopher's injuries. The stipulation stated the following:

In addition to reviewing the medical records of Christopher Smith, Dr. Latenser was made aware that on March 20th of 1998, the patient's nurse contacted the social worker stating that the patient and his mother may have left the hospital. The patient's mother then telephoned the unit requesting the patient's records be transferred to Cook County Hospital. The mother was instructed to return the patient immediately to Loyola University Medical Center. On March 21st, of 1998, the child was returned to Loyola University Medical Center from a Chicago home via Mount Sinai Hospital by a report the child was left at a family member's home by the patient's mother. Relying on that information and relying on the medical record and relying on the photos that she observed, the doctor would testify that the photos show partial thickness burns to the bilateral upper extremities with sphering of the wrist creases in an African American child approximately thirteen months of age. The upper extremities indicated no splash marks. There is no record of other burns beside the one centimeter burn to the dorsum of the left foot. The pattern of the burn injuries, the behavior of the mother, including abduction of the child from Loyola University Medical Center with return of the patient from another family member, the mother's interactions with the nursing staff, and the developmental delays are consistent with prior neglect and current child abuse regarding the burns. This statement is made with a relative degree of medical certainty. (R. E 5)

Police Investigation

Officers Richard Rochowicz and James Funches investigated Christopher's burns after a hotline call was placed to DCFS. (R. C 48) According to officer Rochowicz, officer Funches spoke with Lee by telephone at 1:30 a.m. on March 20, 1998. (R. C 49) Funches arranged for Lee to come to Area 1 that day, but Lee failed to appear. (R. C 49)

On March 25, 1998, Lee accompanied by her boyfriend, Willie Smith, and her lawyer, Steve Pernick, met with the officers at Area 1. (R. C 52) Lee was read her constitutional rights pursuant to *Miranda* and agreed to speak to the officers. (R. C 54)

Officer Rochowicz asked Lee why she gave a false name and address to hospital personnel when she brought her son to the emergency room. (R. C 55) Lee explained that she was scared that DCFS would take her son. (R. C 55-56) Lee told Rochowicz that Christopher received the burn injuries to his arms when he fell into the bathtub. (R. C 56) Lee related that she was filling the bathtub with water and exited the bathroom. (R. C 56) She then heard

Christopher crying and returned to the bathroom where she found Christopher inside the bathtub in the water on his hands and knees. (R. C 57) Lee stated that she removed the child from the tub and removed his sleeping garment. She observed his skin move and immediately called 911. (R. C 57) Rochowicz asked Lee why she told hospital personnel that Christopher had fallen into a pail of water, and Lee explained that she gave that story out of fear of DCFS. (R. C 58)

Officers Rochowicz, Funches and an evidence technician accompanied Lee, her boyfriend and her lawyer to her house where Lee demonstrated how the accident occurred. (R. C 58) Lee began filling the bath tub with water and then exited the bathroom for approximately sixty seconds. Lee explained that after she heard Christopher cry she returned to the bathroom. The officers observed that in the time span that Lee was absent from the bathroom, the bath tub filled with only an inch of water and was draining from the tub at a rapid pace. (R. C 60-61) Lee explained that on the night of the incident, she used a wash cloth with the rubber flapper to keep the water in the tub. (R. C 60) Lee enacted the demonstration a second time, and this time, the officers noted that in Lee's absence, the bath tub only filled with an inch and a half of water. (R. C 62) Officer Rochowicz testified that he examined the sleeper that Christopher was wearing when he was burned and did not find any skin in the sleeper. (R. C 65)

Trial Court's Findings

The trial court accepted Lee's explanation for why she gave a bogus name and address to hospital personnel since DCFS carries a certain stigma and can invoke fear in parents. (R. E 18) However, the court concluded that Lee's contradictory explanations for how the child sustained the injuries was evidence of her guilt. Specifically, the court stated, "[t]he fact that she is switching stories in midstream here when she has a child burned lying in a hospital bed, I believe is evidence of guilt. She goes to another story. Her stories don't add up." (R. E 19) In finding

Lee guilty, the trial court stated:

Margaret Smith testified, not as an expert. She gave her opinion just as what she was, a registered nurse working in the Burn Unit experienced in advanced care of the Burn Unit of Loyola Hospital since 1996; and her opinion was taken for what it's worth. The defendant has no burden to prove this was accidental, but there is not one scintilla of evidence to show this 13-month old child accidentally received these burns. Once taken to Loyola you make have a disagreement with a nurse, you may not like the nursing care, move your child. You do not believe [sic] it's an abduction. I'm telling you when you take a child off a morphine drip, saying you're going to a play room, leave, go to your sister's home, leave the baby completely at your sister's home wrapped, not knowing when that morphine is going to again result in excruciating pain for a 13-month old, and just go on your merry way until the police track that baby down and have to return that child to Cook County Burn Unit, that is an abduction. (R. E 20)

The trial court found Lee guilty of aggravated battery of a child. (R. E 20)

Post-trial Motions and Sentencing

Defense counsel filed a Motion in Arrest of Judgment alleging that Lee's indictment was insufficient as a matter of law and deprived her of her rights to notice and to defend against the evidence. (C. 57) The trial court denied the motion. (R. H 6) Defense counsel also filed a motion for a new trial alleging that the State failed to prove Lee guilty beyond a reasonable doubt and the trial court erred by considering Margaret Smith's testimony as expert testimony when she was not qualified as an expert. (R. H 6-7) The State responded that Smith was properly qualified as an expert witness. (R. H 9-11)

The trial court denied Lee's motion for a new trial. The Court made the following findings:

You don't have to say anything when you go in a hospital – and the State just has to surmise or guess and they probably couldn't have met their burden. You went in and you gave different version of how this happened. The State didn't say we don't believe you. We don't like you. They went out and disproved one version. And with regard to the burned skin on the sleeper, th expert in this case never said if there is burned skin inside the sleeper these were not emersion [sic] burns. These were emersion burns whether that child had on a sleeper, a pamper or naked. She did say the skin would be attached to the sleeper. The fact that they

don't have the sleeper and just photographed it wouldn't disprove emersion burns. An emersion burn would not be created by a sleeper. An emersion burn may leave skin on a sleeper. So whether or not you had a sleeper on or off would not effect the emersion burns as testified to in this case.

The fact that you took a child off intravenous morphine when you were supposed to go or asked to go to a play room, took that child from a hospital, I am not finding aggravated battery. I am not finding the pain that may have been suffered to a child who was on a morphine drip who is no longer on a morphine drip because he is supposed to be at a play room in a hospital. So my aggravated battery findings were based on the testimony from the burn unit and the physical evidence, the photographs of the skin missing from a young child. And I find out again the State went above and beyond in this case. They reenacted out of your little scenarios with you there. And it didn't pan out. You were found guilty beyond a reasonable doubt. Your motion for a new trial is respectfully denied. (R. H 17-18)

After hearing evidence in aggravation and mitigation, the trial court sentenced Lee to 12 years' imprisonment in the Illinois Department of Corrections. (R. I 23)

ARGUMENT

I. WHERE LAY WITNESS NURSE SMITH GAVE OPINION EVIDENCE BASED ON FACTS OUTSIDE OF HER PERCEPTION AND IMPERMISSIBLY TESTIFIED ON THE ULTIMATE QUESTION OF WHETHER CHRISTOPHER'S INJURIES WERE INTENTIONALLY CAUSED, LEE WAS DENIED A FAIR TRIAL.

Nurse Margaret Smith testified for the State as a lay witness who treated Christopher's burns at Loyola Medical Center. The State never asked that Smith be qualified as an expert witness and the trial court never qualified Smith as an expert witness. However, the trial court permitted Smith to testify to her opinion that Christopher's burns were caused intentionally and to answer hypothetical questions on how the injuries could have occurred. In its findings, the trial court expressly relied on nurse Smith's testimony. Because Smith was not qualified to

render an expert opinion on the disputed fact of whether Christopher's injuries occurred intentionally or accidentally and was not qualified to comment on the feasibility of Lee's explanation for the injuries, Lee was denied a fair trial. U.S. Const. Amend. XIV; Ill. Const. 1970, art. I, sec. 2. Lee is entitled to a new trial where the trial court expressly stated that it had relied on Smith's testimony in finding Lee guilty of aggravated battery of a child.

Because there are no disputed issues of fact, this court should review this issue *de novo*. *People v. Kruegar*, 175 Ill.2d 60, 675 N.E.2d 604, 607 (1996). Although normally admission of opinion testimony is within the discretion of the trial court, a trial court has no discretion to allow a lay witness to testify to matters outside of her personal knowledge. *People v. Novak*, 163 Ill.2d 93, 102, 643 N.E.2d 762 (1994). Discretion permits a judge to review facts, if any are submitted, as well as the law, and to make one of two choices. If the facts and the law permit only conclusion, there is no discretion. *Gilbert Bros., Inc. v. Gilbert*, 258 Ill. App. 3d 395, 630 N.E.2d 189, 191 (4th Dist. 1994). Thus, *de novo* review is appropriate here.

Illinois has adopted Federal Rule of Evidence 701 for lay opinion testimony. *Altszykler v. Horizon House Cond. Assoc.*, 175 Ill. App. 3d 93, 100, 529 N.E.2d 704 (1st Dist. 1988). Rule 701 provides that if a witness is not testifying as an expert, his or her opinion testimony is limited to those opinions or inferences that are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue. *People v. Novak*, 163 Ill.2d 93, 102, 643 N.E.2d 762 (1994). A lay witness may not express an opinion or draw inferences from facts. *People v. Crump*, 319 Ill. App. 3d 538, 542, 745 N.E.2d 692 (3rd Dist. 2001). The limitation that lay witness opinion testimony be rationally based on the witness' perception reflects the general requirement that a witness must have personal knowledge of the matter to testify to it. *Novak*, 163 Ill.2d at 102. The testimony must

be based on concrete facts perceived from the witness' own senses. *Id.*

The purpose of this limitation is to insure that lay witnesses do not place unreliable evidence in front of the trier of fact. The limitation essentially requires that the fact finder receive the best evidence available – first-hand knowledge rather than second-hand knowledge. *Novak*, 163 Ill.2d at 103. Unlike expert opinions, lay opinions cannot be based on hearsay, hypothetical questions, or other inadmissible evidence where the opinion would not be based on first-hand personal knowledge. *Id.* An improper lay opinion is especially prejudicial when it goes to an ultimate question of fact. *Crump*, 319 Ill. App. 3d at 542 (holding that officer's opinion about whether the defendant committed the offense was improper lay witness testimony and especially prejudicial as it went to the ultimate disputed fact); *See also People v. McClellan*, 216 Ill. App. 3d 1007, 1013, 576 N.E.2d 481 (4th Dist. 1991) (where defendant was charged with criminal sexual assault, lay witness's opinion that the defendant used force during the sexual encounter was improper).

Nurse Smith's testimony exceeded the scope of proper lay opinion testimony where Smith rendered an opinion on the ultimate factual issue of whether the Christopher's burns were intentionally inflicted and responded to a series of hypothetical questions concerning how the injury occurred. Specifically, Smith testified that immersion burns, like the one incurred by Christopher could not occur accidentally. The prosecutor asked Smith the following questions on direct examination:

Q. Have you had an opportunity to learn what an immersion burn is?

A. Yes, I have.

Q. Can you explain that for us?

A. In an immersion burn the patient is placed into a hot substance, usually water, and held. And there are definite lines of demarcation on the patient's body.

Q. Have you had an opportunity to learn what a splash burn is?

A. Yes.

Q. Can you explain that for us?

A. A splash burn will occur if water is accidentally splashed on the patient. It will be spotty in nature to the skin.

Q. You indicated there is a definite line of demarcation in a (sic) immersion burn, is that correct?

A. Yes.

Q. Is that the type of burn that would happen by accident?

Mr. Arthur: Objection.

The Court: Overruled.

The Witness: No, it is not. (R. C 19-20).

First of all, Smith never testified that she had personal knowledge of what an immersion burn was or what a splash burn was. Rather, Smith testified that she had an opportunity to “learn” the differences between an immersion and splash burn. By Smith’s own testimony, her opinion on the distinction between an immersion and splash burn was based on what she “learned” from someone else. Smith’s testimony amounts to rank hearsay. As stated earlier, a lay opinion cannot be based on hearsay. *Novak*, 163 Ill.2d at 103. Accordingly Smith’s testimony concerning what she learned from some other person was inadmissible. *See also People v. Shelton*, 303 Ill. App. 3d 915, 708 N.E.2d 815 (5th Dist. 1999) (court found improper officer’s opinion testimony that defendant was under influence of drugs where in describing his experience with drug users as a police officer, he testified, “*We* had prior drug dealings with people on drugs” Court observed that officer’s use of word “we” could have meant others in his department).

Additionally, Smith was not qualified to render an opinion on whether immersion burns could happen accidentally or whether Christopher's injuries occurred accidentally or intentionally. Whether Christopher's injuries were inflicted intentionally was a disputed question of fact of which nurse Smith had no personal knowledge. Smith had experience treating burn injuries and had treated Christopher's burns. Thus, Smith was permitted to describe Christopher's injuries in medical terms. However, Smith was never qualified as an expert in burn injuries and was not permitted to proffer an opinion as to whether immersion burns can occur accidentally or whether Christopher's injuries were caused intentionally or accidentally.

In *People v. McClellan*, an instructive case, the State introduced the testimony of Sergeant Fillmore at the defendant's trial for criminal sexual assault. *People v. McClellan*, 216 Ill. App. 3d 1007, 1013 576 N.E.2d 481 (4th Dist. 1991). Fillmore had interviewed the defendant on the night of the incident and testified that after his interviews with the defendant, he concluded that he had forced the victim to have sex with him. *Id.* The appellate court found that Fillmore's testimony exceeded the scope of proper lay witness testimony as the officer had no first-hand knowledge about the incident. The appellate court found the error particularly prejudicial as it went directly to an ultimate question of fact to be decided by the jury. *Id.* at 1013-13. The court observed that whether the defendant used force was the only question for the jury to decide. Thus, Fillmore's opinion on this point was both improper and highly prejudicial.

Similarly in this case, Smith testified that it was her opinion that Christopher's injuries were intentionally inflicted because the burns had a clear line of demarcation. Because Smith had no personal knowledge of how the burns occurred and was not qualified as an expert in diagnosing burn injuries, it was highly improper for her to render an opinion on whether the burns were intentionally or accidentally caused. No dispute existed on the question of whether

Christopher sustained burn injuries to his arms, the only question was whether these injuries occurred intentionally or accidentally. This question was for the trier of fact to decide, and Smith's lay opinion on this ultimate question was both improper and exceedingly prejudicial.

Smith was also asked a series of hypothetical question concerning how the injuries could have occurred.

Q. Did you ask [Lee] how Christopher had received these burns?

A. She volunteered that information and said that he had placed his hands in a bucket of water as she was mopping the floor.

Q. Would that explanation be consistent with an immersion burn?

Mr. Arthur (defense counsel): Objection.

The Court: Overruled.

The Witness: The burns that were on him were, with the line of demarcation indicated, that the patient had been held in that position for some time.
(R. C 25-26).

* * *

Q. Now, you indicated that a child falling into a bucket of water with his hands would leave some type of splash marks, is that correct?

A. Yes.

Q. If his arms were on his own placed slowly into hot water would you expect to see burns for up to six inches?

Mr. Arthur: Objection.

The Court: Overruled.

The Witness: No, I would not. I would expect to see withdrawal from the heat.

(R. C27)

* * *

Q. Were the burns that you observed on Christopher be consistent with him being in a - - falling into a bathtub and being on all fours, meaning both his hand and his knees being in a bathtub?

Mr. Arthur: Same objection.

The Court: Overruled.

The Witness: No (R. C31)

* * *

Q. If a child of the age of Christopher Smith, approximately one year, were to fall into a bathtub would you expect him to land on his hands and keens?

Mr. Arthur: Objection

The Court: Overruled

The Witness: No.

Q. How would you expect him to land?

A. Because of the weight of his head I would expect that there would be burns possibly to the side of his torso and legs or buttocks area.

(R. C 32)

It was impermissible for Smith to testify to the feasibility of Lee's explanations for how the child was injured. Lay witnesses are not allowed to give opinions based on facts outside of their personal knowledge. *Novak*, 163 Ill.2d at 103. In *Novak*, the defendant was convicted of aggravated criminal sexual assault after the State presented evidence that the defendant, a 31-year old baseball coach, lured a 10-year old victim to his house under the pretense of improving the victim's baseball skills and then blindfolded the victim, tied the victim's hands behind his back, choked the victim, rubbed against the victim, and inserted his penis inside the victim's mouth. *Id.* at 97-98. The defense case was that the defendant only applied various sets of muscle strength and flexibility exercises on the victim's neck and shoulders. *Id.* at 98.

In its rebuttal case, the State presented the opinion testimony of two individuals who

according to the State possessed familiarity in the field of strength training and exercise. These witnesses testified that the exercises allegedly employed by the defendant in training the 10-year old boy would not be utilized in baseball training but were more appropriate in contact sports such as football. Both witnesses testified that they would never blindfold a child for training purposes and that neck muscle strength is not related to throwing a baseball. *Id.* at 100-101

The Illinois Supreme Court concluded that the witness' testimony was inadmissible as lay witness opinion testimony. *Id.* at 103. The Court held that because the witnesses did not see the defendant administer any of these exercises, their testimony went beyond the scope of proper lay witness opinion testimony. *Id.* The Court observed that the witnesses based their conclusions on second-hand knowledge that included the literature the defendant presented or their responses to hypothetical questions asked by the prosecutor who actually sought expert opinion on the subject of strength training. *Id.* As proper lay witness testimony, their opinions should have been confined to matters based on concrete facts that they perceived from their own senses. *Id.* Because their opinions were not based on concrete fact, their testimony amounted only to speculative conclusions. *Id.*

Similarly here, Smith's testimony was inadmissible as lay witness opinion testimony where her conclusions were based on second-hand knowledge in response to hypothetical questions asked by the prosecutor. Smith was not present when Christopher was injured and did not see the manner in which Christopher was injured. Accordingly, Smith possessed no first-hand knowledge that permitted her to opine the manner in which Christopher was injured. In reality, the State sought to present Smith as an expert witness, but because Smith lacked the qualifications to render an expert opinion, the State presented her testimony under the guise of lay opinion testimony. Because Smith's testimony was not based on concrete facts perceived

from her own senses, her opinions amounted to speculative conclusions and were improper.

Although at the hearing on Lee's motion for a new trial, the State suggested that Smith was properly qualified as an expert witness (R. H 9-11), the record unequivocally demonstrates that the State never asked that Smith be qualified as an expert, and the trial court never qualified Smith as an expert. The State presented evidence to the court that Smith was a registered nurse, had worked in the burn unit at Loyola Medical Center for less than a year and a half, and had a certification in advanced burn care. (R. C 16) The State presented no additional evidence concerning Smith's educational background, specialized training, membership in professional organizations or authored publications. The defense was never given an opportunity to voir dire Smith on her qualifications and the State never asked the court to qualify Smith as an expert.

In fact, when the State began questioning Smith on matters outside the scope of proper lay witness testimony, defense counsel objected, noting that Smith was not qualified to render an opinion in response to hypothetical questions. (R. C 27, 29, 32) The trial court responded stating, "[W]ith regard to her testimony I believe her qualification as a registered nurse, her training and years of experience as a registered nurse in any burn unit, one of the three burn units in the area enable her to give an opinion as to burns." (R. 29-30) On cross-examination, defense counsel attempted to cross examine Smith on her expertise to render such opinions, asking Smith how many times she had been qualified to testify as a forensic expert. (R. C 38) The trial court sustained the State's objection to the question and asked defense counsel "[H]ow is that relevant, counsel?" (R. C 38) The Court then noted that nurse Smith had merely testified to her opinion and observations as a registered nurse. At no point did the trial court find Smith qualified to render an expert opinion.

In fact, the trial court expressly stated that Smith did not testify as an expert. Prior to

finding Lee guilty, the trial court stated:

Margaret Smith testified, not as an expert. She gave her opinion just as what she was, a registered nurse working in the Burn Unit experienced in advanced burn care of the Burn Unit of Loyola Hospital since 1996; and her opinion was taken for what it's worth. (R. E 19-20)

Despite the State's assertion during post-trial motions that Smith was qualified as an expert, the record clearly shows that Smith was never qualified as an expert in any area, including diagnosing burn injuries. The burden of establishing the qualifications of an expert witness is on the proponent of the expert's testimony. *Novak*, 163 Ill.2d at 104. The State cannot now claim that Smith's testimony can be relied on as expert testimony where it never sought to qualify Smith as an expert, thereby foreclosing an opportunity for the defense to challenge her qualifications. Had Smith been expert qualified, defense counsel certainly would have been permitted to voir dire her on her qualifications, and the trial court would have abused her discretion in denying defense counsel an opportunity to question Smith about her expertise.

Notably, nurse Smith admitted that she was not an expert in diagnosing the cause of burn injuries. On cross-examination, defense asked Smith the following questions:

- Q. Before you rendered this opinion about what could and couldn't have caused this did you inquire of anybody what this little boy was wearing at the time that he was burned?
- A. I had no reason to. Mr reason was to treat the patient.
- Q. Whether it happened accidentally or some other way, would that changed the course of your treatment?
- A. No.
- Q. You're treating a physical injury that's in front of you looking prospectively, is that true?
- A. Correct.
- Q. That's your expertise, right?

A. Yes.

Q. That's what you're trained for is that correct?

A. Correct.

Q. You indicated that an evidence – one indication of an immersion burn in your opinion is that there is a clean – a clear line of demarcation, is that true?

A. Yes.

Q. Are you aware of any studies that have experimentally shown whether clothing can cause that same kind of demarcation? Are you aware of such studies?

A. Clothing such as a sleeve?

Q. Correct.

A. There are definite studies over what causes an immersion burn versus a splash burn.

Q. My question is are you aware of any studies that documents the difference of an immersion burn or burns when somebody is wearing an item of clothing?

A. I'm sure that there are. I cannot quote an article right now, no.

By Smith's own testimony, her training and expertise was in the field of treating burns, not diagnosing their causes. Significantly, Smith testified that she had no reason to consider what Christopher was wearing when he was burned since her job was merely to treat his injuries and her purpose would not change regardless of whether the burns were caused intentionally or accidentally.

It is not a mere technicality that Smith was prohibited from testifying on these specialized matters, rather sound and logical reasons exist for placing such a limitation on Smith's testimony, namely to insure that Smith did not place unreliable information before the trial court. Failure to limit the scope of Smith's testimony resulted in Smith placing unreliable evidence before the trial judge. In fact, even had Smith been properly qualified as an expert, ample authority exists to

refute the reliability of Smith's testimony.

Smith testified that the lines of demarcation on Christopher's arms indicated that the burns were immersion burns and that the burns were intentionally caused because immersion burns are never accidental. (R. C 19-20) Smith further opined that Christopher's burn was intentionally caused since the pattern of the injury indicated that the child had been held in the same position for a period of time. (R. C 25)

At the outset, Smith's opinion that an immersion burn can never have an accidental cause defies logic and both scientific and legal authority. Immersion burns occur when a person falls into or is placed into a container of hot liquid. Purdue, Gary F. M.D., John L. Hunt M.D., and Paul R. Prescott, M.D. *Child Abuse by Burning—An Index of Suspicion*, 28 J. of Trauma, Vol. 2 at 223 (1988). If a child accidentally falls into a hot liquid, he may suffer an immersion burn; however, the resulting burn was not caused intentionally. Contrary to nurse Smith's opinion, immersion burns are not *de facto* intentionally inflicted.

Furthermore, Smith had no basis for concluding that simply because Christopher's burns showed a distinct line of demarcation, Christopher must have been held in the same position for a period of time. Without knowing the temperature of the water, Smith had no basis to determine how long the child was exposed to the water.

In *In re P.P.*, this Court upheld a trial court's finding that the State failed to prove by a preponderance of the evidence that burn injuries to a child's hand were intentionally caused. *In re P.P.*, 261 Ill. App. 3d 598, 633 N.E.2d 965, 970 (1st Dist. 1994). DCFS filed a petition for adjudication of wardship of P.P. after P.P. suffered a scalding burn on her left hand serious enough to require hospitalization. *Id.* at 966. At the hearing on the issue of P.P.'s hand injury, the court heard medical testimony from two expert witnesses. *Id.* at 968.

Dr. Soter, a pediatrician at Cook County Children's Hospital, diagnosed P.P.'s burn as a second degree immersion burn. After learning that the water in the mother and child's residence was roughly 120 degrees Fahrenheit, Soter concluded that the burn was caused intentionally. *Id.* Soter explained that because it would take between 20 and 40 seconds of immersion to produce the type of burn that P.P. had suffered, and because a child would not willingly hold his hand in such hot water for that length of time, she believed that the injury was intentionally inflicted. *Id.* Upon cross-examination, Soter admitted that if the water temperature was 140 degrees Fahrenheit, the burn could occur in only one or two seconds of immersion. *Id.*

The second expert, Dr. Aleta Clark, agreed with Dr. Soter that P.P suffered from a second degree immersion burn; however Dr. Clark explained that the pattern of the injury did not answer the question of whether the burn was intentionally inflicted. *Id.* Clark observed that the mother's explanation that the child briefly placed her hand in hot water was feasible in light of the inconclusive evidence concerning the temperature of the water at the time of the incident. *Id.* at 969. Clark observed that depending on the temperature of the water, P.P could have dipped her hand in the water very briefly and sustained the injury which would be consistent with the mother's explanation for how the child was injured. *Id.* Clark opined that although the injury could have occurred intentionally, it could also have occurred accidentally. The trial court concluded that the public guardian failed to show by a preponderance of the evidence that the injury occurred intentionally, and this Court affirmed those findings. *Id.* at 970.

In re P.P. is instructive as it demonstrates that Smith's opinion testimony was wholly unreliable. Smith testified that Christopher's burns had a line of demarcation indicating an immersion burn and that all immersion burns are intentionally caused. *In re P.P.* demonstrates that although lines of demarcation can indicate an immersion burn, the pattern of the injury does

not by itself resolve the question of whether the injury occurred intentionally or accidentally. A critical fact that must be determined before a burn injury can be ruled accidental or intentional is the approximate temperature of the water. As both experts in *P.P.* agreed, if the water is at a high enough temperature, a child need only dip his hand in the water for a second or two for second degree immersion burns to result. Notably, in this case, the State presented absolutely no evidence concerning the approximate temperature of the water in Lee's home.

Smith also testified that because the child had not suffered any splash burns on his torso, she concluded that the burn was intentionally caused. At the outset, the record shows that Christopher did suffer a splash burn to his foot which is consistent with an accidental burn. (R. E 5) Moreover, Smith admitted on cross examination that she did not take into account what Christopher was wearing when he was injured. (R. C 40) Defense counsel asked nurse Smith, "Before you rendered this opinion about what could or couldn't have cause this did you inquire of anybody what this little boy was wearing at the time that he was burned?" to which the nurse replied, "I had no reason to. My reason was to treat the patient." (R. C 40) Smith later admitted that her expertise was in *treating* a physical injury. (R. C 41) Smith readily admitted that she was no expert in the field of diagnosing burn injuries. Smith's opinion that because Christopher's torso revealed no splash burns, his burns were caused by forced immersion is highly questionable in light of the fact that Smith admitted that she did not consider what the child was wearing in reaching this conclusion.

Smith's testimony also failed to take into account numerous other factors that an expert considers when determining whether a burn is a product of child abuse or an unfortunate accident. Of course, Smith's less than thorough opinion is not surprising in light of the fact that she had no specialized training in diagnosing burn injuries. Emergency room physicians are

instructed to consider the following factors when determining whether a burn is a product of child abuse: (1) multiple hematomas or scars in varying stages of healing; (2) concurrent injuries or evidence of neglect such as malnutrition; (3) history of prior hospitalizations for “accidental” trauma; (4) an inexplicable delay between the time of injury and the first attempt to obtain medical attention; (5) burns appearing older than the alleged day of the accident, similarly indicating ambivalence about seeking care and possible risking exposure of abuse; (6) an account of the incident not compatible with the age and ability of the patient e.g., a 6-month old child crawling into a bathtub filled with water; (7) the responsible adults allege that there was no witness to the “accident” and the child was merely discovered to be burned, thus hoping to discourage any further inquiry; (8) relatives other than the parents bring the injured child to the hospital; (9) the burn is attributed to the action of sibling or other child (although this does in fact occur); (10) the injured child is excessively withdrawn and submissive or overly polite, or does not cry during painful procedures; (11) scalds of the hands or feet, often symmetrical, appearing to be full-thickness in depth, suggesting that the extremities were forcibly immersed and held in the hot liquid; and (12) isolated burns of the buttocks which, in children, can hardly be produced by accidental means. Stone, Nelson .H. M.D., Ph.D., Lucille Rinaldo, B.S., Charles R. Humphrey, M.D., Rowine H. Brown, M.D., J.D., *Child Abuse by Burning*, 50 Surg. Clin. North. Am. 6 (Dec. 1970).

Notably, the great majority of the foregoing factors were not present in the instant case. First, no evidence suggested Christopher had any prior or concurrent injuries. This factor should weigh heavily against a finding of child abuse where one study suggests that 49 to 100 percent of burn-abused children have evidence of recent or old nonburn injuries. Renz, Barry M., M.D., Roger Sherman, M.D., *Abusive Scald Burns in Infants and Children: A Prospective Study*, 50

Amer. Surg. 5 (May 1993).

Second, nothing from the record suggests that Lee did not seek immediate medical attention for her son. Moreover, Lee herself brought her child to the emergency room, rather than having another family member bring the child. Undisputed testimony shows that Lee rushed her child to the emergency room screaming, “My baby, Please, help my baby.” (R. E 7) The State presented no evidence suggesting that Lee had delayed Christopher’s medical treatment.

Third, Lee’s explanation for how Christopher was injured was not inconsistent with his age. Although Christopher was only 13 months old, the State presented no evidence suggesting that Christopher was not developmentally able to climb into a bath tub. In fact, nurse Smith admitted on cross examination that Christopher was 28 inches in height and had been walking for over a month. (R.C 36-37) The State presented no testimony showing that the bathtub was too high for a child to fall into, or for example, that the child was unable to pull himself into a standing position.

Fourth, the record shows that Christopher’s behavior at the hospital was appropriate and that he became upset when medical personnel entered the room. Although nurse Smith testified that Lee became upset when Smith assessed and changed Christopher’s bandages, nurse Smith never testified that Lee’s actions toward her son were inappropriate. (R. C. 43)

Finally, the injuries themselves do not entirely suggest that the burns were caused by forced immersion. Although according to Smith, Christopher suffered second-degree burns that had a distinct line of demarcation, the State presented no testimony that the burns were full-thickness burns. In fact, the State’s expert stipulation shows that the burns were partial-thickness burns rather than full-thickness burns. (R. E 4) Again, this factor weighs against a finding that the burn was caused intentionally.

Diagnosing the cause of burn injuries requires the consideration and weighing of numerous factors. Child abuse burn experts generally hold medical degrees and have specialized training and experience in assessing child abuse and burn injuries. In contrast, nurse Smith was a registered nurse whose experience consisted of treating burn injuries for a year and a half. Her opinion testimony was not only inadmissible as it was not based on personal knowledge, but also highly unreliable where she failed to consider numerous factors critical to an accurate determination of whether a burn is a product of child abuse. This is not surprising in light of the fact that Smith was not an expert in diagnosing burn injuries. As nurse Smith herself admitted, her experience was in *treating* burn injuries, not diagnosing the cause of them.

In sum, the trial court erred when, over defense counsel's objection, it allowed nurse Smith to testify to her lay opinions on the ultimate factual question of whether Christopher's injuries were caused intentionally and whether Lee's explanations for how the injuries occurred were feasible. Although at the hearing on post-trial motions, the parties evinced some confusion on the question of whether Smith had testified as an expert, the record plainly and unequivocally shows that the State never sought to qualify Smith as an expert, the Court never ruled that Smith was an expert, and Smith herself admitted that she was not an expert in diagnosing the cause of burn injuries. Additionally, as set out above, Smith's testimony was also highly unreliable and served to put inaccurate and incomplete information before the trial.

Lee Is Entitled to a New Trial

Because the trial court expressly relied on Smith's inadmissible and highly unreliable testimony in finding Lee guilty, Lee is entitled to a new trial. Where opinion testimony is erroneously admitted, such error compels reversal, unless it can be affirmatively shown that the error was not prejudicial. *Freeding-Skokie Roll-Off Service, Inc. v. Hamilton*, 108 Ill.2d 217,

222, 483 N.E.2d 525 (1985). Allowing a lay witness to give an opinion on an ultimate fact is presumed to be prejudicial. *McClellan*, 216 Ill.App.3d at 1013.

In this case, the State cannot show that Smith's testimony was not prejudicial. Although a reviewing court presumes in a bench trial that only competent evidence is considered by the Court, this presumption is rebutted whenever there is a showing that the trial court actually used improper evidence in making its ruling. *People v. Conwell*, 64 Ill.App.3d 995, 1003, 382 N.E.2d 64 (1st Dist. 1978).

Smith's lay opinion was the State's primary evidence that the burns occurred intentionally. Although the State also presented an expert stipulation, the trial court never mentioned the expert stipulation in her findings of fact, focusing instead on nurse Smith's testimony. Specifically, the trial court stated that "the burns suffered by this child were not consistent with a child having fallen into a pail of hot water." (E19) Since Smith was the only witness to render an opinion on whether Christopher's injuries were consistent with falling into a pail of water, the trial court clearly relied on Smith's testimony to make this finding.

Moreover, in its denial of Lee's motion for a new trial, the trial court expressly referred to nurse Smith's testimony. In fact, the trial court referred to nurse Smith as an expert even though Smith had never been qualified as an expert. The court stated:

And with regards to the burned skin on sleeper, the expert in this case never said if there is burned skin inside the sleeper these were not emersion [sic] burns. These were emersion burns whether that child had on a sleeper, a pamper, or naked. She did say the skin would be attached to the sleeper. The fact that they don't have the sleeper and just photographed it wouldn't disprove emersion burns. An emersion burn would not be created by a sleeper. A emersion burn may leave skin on a sleeper. So whether or not you had a sleeper on or off would not effect the emersion burns as testified to in this case. (R. H 17)

Later, the trial court expressly stated that her aggravated battery findings were based on the

testimony from the burn unit (i.e. nurse Smith's testimony). (R. H 18)

These findings by the trial court demonstrate that it considered Smith's amateur lay opinion in deciding that Christopher's injuries occurred intentionally. Smith was the only witness to give her opinion that an immersion burn could not be created by a sleeper and that if Christopher was wearing a sleeper when he was burned, one would expect to see his skin in the sleeper. Thus, the trial court's comments were referring to Smith's testimony.

Alarming, the trial court relied on Smith's erroneous testimony that all immersion burns are inflicted intentionally. As addressed previously, Smith testified that immersion burns could not occur accidentally. (R. C 20) The trial court obviously credited this bogus testimony where it stated that whether Christopher was wearing a sleeper was irrelevant since his injuries indicated that he had suffered immersion burns which according to Smith means that the child was burned intentionally. (R. H 19)

As addressed above, this testimony was highly unreliable where ample medical and legal authority show that an immersion burn can occur accidentally. *See, e.g.*, Purdue, Gary F. M.D., John L. Hunt M.D., and Paul R. Prescott, M.D. *Child Abuse by Burning—An Index of Suspicion*, J. of Trauma, Vol. 28, No. 2 at 223 (1988); *In re P.P.*, 261 Ill. App. 3d 598, 633 N.E.2d 965 (1st Dist. 1994) (recognizing that a child could accidentally suffer an immersion burn).

Allowing Smith to proffer opinion testimony on an ultimate fact, to proffer testimony based on facts outside of her personal knowledge and to answer hypothetical questions were all reversible errors that prejudiced the defendant. *People v. Novak*, 163 Ill.2d at 102-103. The trial court's findings demonstrate that it relied on nurse Smith's testimony in determining whether Christopher's injuries were intentionally caused. In fact, the only evidence presented by the State concerning the cause of the injuries came from nurse Smith and the expert stipulation. The trial

court never referred to the expert stipulation and expressly referred to nurse Smith's testimony on numerous instances. Accordingly, the State cannot meet its burden of demonstrating that the error in permitting nurse Smith's testimony was not prejudicial, and Lee is entitled to a new trial.

II. WHERE THE STATE INTRODUCED INTO EVIDENCE AN EXPERT STIPULATION THAT WAS BASED ON FALSE AND UNRELIABLE EVIDENCE, LEE WAS DENIED A FAIR TRIAL. ALTERNATIVELY, DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE UNRELIABLE EXPERT STIPULATION.

Lee was denied a fair trial when the prosecution introduced into evidence an unreliable stipulation that was based on false and misleading evidence. U.S. Const. Amend. XIV; Ill. Const. 1970, art. I sec. 2. The State's expert, Dr. Barbara Latenser, never treated Christopher but reviewed photographs of his injuries and his medical records. Dr. Latenser concluded that Christopher's injuries were consistent with child abuse based largely on: (1) Lee's behavior at the hospital; (2) the "abduction" of the child from Loyola Medical Center; (3) Lee's interactions with nursing staff; and (4) purported developmental delays of the child. (E. 4-5) Because Dr. Latenser's expert opinion lacked a proper foundation and was based on unfounded and unreliable facts not of the type generally relied on by experts in her field, Lee was denied a fair trial when the prosecution introduced this stipulation into evidence. Alternatively, Lee received ineffective assistance of counsel where her trial attorney stipulated to unreliable expert testimony that was based on false and misleading evidence. U.S. Const. Amends. VI, XIV; Ill. Const. 1970, art. I, sec. 8.

This error should be reviewed *de novo* since the court had no discretion to allow for the admission of expert testimony based on unreliable facts not typically relied on by experts in the

field. Discretion permits a judge to review facts, if any are submitted, as well as the law, and to make one of two choices. If the facts and the law permit only one conclusion, there is no discretion. *See Gilbert Bros., Inc. v. Gilbert*, 258 Ill. App. 3d 395, 630 N.E.2d 189, 191 (4th Dist. 1994).

The parties stipulated to the expert testimony of Dr. Barbara Latenser, a qualified expert in the field of medical diagnosis of burns. (R. E 3) Dr. Latenser reviewed both the medical records and photos of Christopher's injuries. The stipulation stated the following:

In addition to reviewing the medical records of Christopher Smith, Dr. Latenser was made aware that on March 20th of 1998, the patient's nurse contacted the social worker stating that the patient and his mother may have left the hospital. The patient's mother then telephoned the unit requesting the patient's records be transferred to Cook County Hospital. The mother was instructed to return the patient immediately to Loyola University Medical Center. On March 21st, of 1998, the child was returned to Loyola University Medical Center from a Chicago home via Mount Sinai Hospital by a report the child was left at a family member's home by the patient's mother. Relying on that information and relying on the medical record and relying on the photos that she observed, the doctor would testify that the photos show partial thickness burns to the bilateral upper extremities with sphering of the wrist creases in an African American child approximately thirteen months of age. The upper extremities indicated no splash marks. There is no record of other burns beside the one centimeter burn to the dorsum of the left foot. The pattern of the burn injuries, the behavior of the mother, including abduction of the child from Loyola University Medical Center with return of the patient from another family member, the mother's interactions with the nursing staff, and the developmental delays are consistent with prior neglect and current child abuse regarding the burns. This statement is made with a relative degree of medical certainty. (R. E 5)

The State's evidence failed to show that several of the factors on which the expert relied to conclude that Christopher's injuries were caused intentionally were of the type reasonably relied upon by experts in the field. In developing its opinion on a particular matter, an expert witness may rely on facts or data not personally observed by the expert nor entered into evidence at trial. However, those facts must be of the type reasonably relied upon by experts in the particular field. *Wilson v. Clark*, 84 Ill.2d 186, 193, 417 N.E.2d 1322 (1981) quoting Fed. R. Evid. 703.

The requirement that the facts or data be of a type reasonable relied upon by experts in the field provides a check on the trustworthiness of the opinion and its foundation. Cleary and Graham, *Handbook of Illinois Evidence*, §703.1 at 646 (7th ed. 1999). In determining whether reliance by the expert is reasonable, the court should be satisfied both that such items are of the type customarily relied upon by expert in the field, and that such items are sufficiently trustworthy to make such reliance reasonable. *Id. Bloome v. Wiseman, Shaikewitz et al.*, 270 Ill. App. 3d 469, 664 N.E.2d 1125 (1996).

When the State seeks to introduce expert testimony that is based on matters not introduced into evidence, the State must lay a proper foundation for the testimony by establishing that the factors relied on by the expert are the type reasonably relied on by experts in the field. *People v. Houser*, 305 Ill. App. 3d 384, 395, 712 N.E.2d 355 (4th Dist. 1999) (where in formulating an opinion, an expert relies on information not admitted into evidence, a proper foundation must be laid for that information and the State must present testimony that the information is of the type reasonably relied upon by experts in the field).

The State's expert stipulation established that in addition to the pattern of Christopher's injuries, Dr. Latenser concluded that Christopher's injuries were consistent with child abuse based in large part on the mother's behavior, including the "abduction" of the child from Loyola, the mother's interaction with the nursing staff, and the child's "developmental delays." The State failed to lay a proper foundation for this testimony where the stipulation fails to show that the mother's behavior, her interactions with nursing staff, and Christopher's supposed developmental delays are the type of factors generally relied upon by experts in this field. Because the expert stipulation fails to state that these factors are the type of data on which experts in the field of diagnosing burn injuries generally rely, the State's expert stipulation lacks

a proper foundation.

Additionally, these factors are highly subjective and of questionable reliability. First, Lee's conduct, including her interactions with the nursing staff is not sufficiently trustworthy to prove that she intentionally burned her son. Two of Christopher's nurses, nurse Smith and nurse Leggett, testified at trial concerning their interactions with Lee. Smith testified that Lee became upset with her when she entered Christopher's room to assess and treat his wounds and that Lee requested another nurse. Leggett testified that she had a normal conversations with Lee and recounted no negative confrontational incidents with Lee. Based on this testimony, it is unclear how Lee's interactions with the nursing staff suggests that she burned her son.

As stated earlier, an expert can rely on facts or data that are not presented into evidence if they are of the type typically relied on by expert in the given field. *Wilson*, 84 Ill.2d at 193. The touchstone in weighing an expert opinion is whether the information upon which the expert bases his opinion is reliable. *Id.*

Here, the record fails to demonstrate how Lee's seemingly benign interactions with the nursing staff suggested her guilt. Presumably, had Lee's interactions with the nursing staff been highly inappropriate and suggestive of her guilt, either nurse Smith or Leggett would have provided specific detail concerning those interactions.

Additionally, as the trial court observed, much of Lee's suspicious behavior was a result of her fear of DCFS. Lee expressed genuine concern about her child's well-being. Lee brought her child into the emergency room screaming for someone to help her baby, and nothing in the record suggests that Lee delayed medical treatment for her son. Although she gave false identifying information to the social worker, the trial court agreed that Lee did this out of fear of DCFS, not because she intentionally inflicted the child's wounds. Thus, Lee's interactions with

the nursing staff and her conduct at the hospital are ambiguous and unreliable, and cannot fairly serve as the data on which this expert concluded that Lee intentionally burned her son.

Likewise, Smith's act of removing her son from Loyola Medical Center cannot be classified as an abduction and is not sufficiently trustworthy evidence on which to conclude that Lee intentionally burned her son. Although the State obviously informed its expert that Lee "abducted" Christopher from the hospital, nothing in this record substantiates such an assertion. Pursuant to the Illinois Criminal Code, a person commits child abduction when she intentionally violates any terms of a valid court order granting sole or joint custody, care or possession to another, by concealing or detaining the child or removing the child from the jurisdiction of the court. 720 ILCS 5/10-5 (West 1999).

Nothing in this record indicates that Lee did not have sole legal custody of Christopher when she removed him from the hospital or that she was violating any court order. In fact, nothing in this record shows that at the time Lee removed Christopher from Loyola she was aware that a criminal investigation was ensuing. Leggett testified that at no time during the period when she cared for Christopher did the police come to speak with Lee. (R. D 12-13). Accordingly, it was wholly inappropriate to characterize Lee's removal of her son from the hospital as an abduction, and the expert's reliance on this factor renders her opinion unreliable.

Furthermore, the expert stipulation demonstrates that the information concerning the alleged "abduction" of the child and perhaps the information concerning Lee's behavior at the hospital and her interactions with the nursing staff came from the prosecutor. Certainly statements from prosecutors are not the type of data on which experts generally rely when drawing an expert opinion. The subjective interpretation of the defendant's actions by the prosecutor in this case is not sufficiently reliable data on which an expert may reach his expert

opinion.

In *People v. Murphy*, the defendant was charged with first degree murder and pled insanity and alternatively that the act was committed in self-defense. *People v. Murphy*, 157 Ill. App. 3d 115, 509 N.E.2d 1323 (1st Dist. 1987). At trial, the jury heard the contents of a report of defendant's social history prepared by the Cook County Psychiatric Institute shortly after the incident; that report contained statements from the defendant's mother indicating that he had argued with his family prior to the incident, and that she believed defendant's actions were in response to that argument, not a result of insanity or an attempt at self defense. *Id.*

The defendant contended that the mother's statements were inadmissible hearsay while the State argued that the mother's statements were admissible as facts on which the experts based their opinion concerning the defendant's sanity. *Id.* at 119. The appellate court observed that unlike hospital records, which are presumed to be routine, professional reports of objective data, the declarations of the defendant's mother were singular, subjective interpretations of defendant's actions and mental state. The appellate court held that the mother's statements were inherently unreliable evidence and did not qualify under the hearsay exception in *Wilson*.

In this case, it appears that much of the data of which the expert reached her opinion was inadmissible hearsay. The prosecutor informed the expert about the alleged "abduction." The second-hand interpretation of Lee's actions by the prosecutor, an interested party in the case, is inherently unreliable. Moreover, Lee's interactions with the nursing staff and her conduct at the hospital, whether relayed to the expert by the prosecutor or whether recorded in hospital records by the nursing staff is not objective data on which experts generally rely. Rather, these facts are a subjective interpretation by the nursing staff and perhaps even further qualified and described by the prosecutor. Unlike hospital records detailing the physical condition of a patient, which are

presumed to be routine, professional reports of objective data, the characterizations of the prosecution concerning the defendant's actions are subjective interpretations that are deemed inherently unreliable.

Lastly, Dr. Latenser's opinion that Christopher's injuries were consistent with child abuse because he suffered developmental delay is of questionable reliability where the record is devoid of any indication that Christopher was developmentally delayed. Outside of the passing reference in the expert stipulation, the State presented absolutely no evidence that Christopher suffered developmental delays. This reference came out of nowhere, and the expert stipulation fails to detail what objective data led to this purported diagnosis. Although it is possible that the medical records on which the expert relied contained an observation that Christopher was developmentally delayed, this evidence is belied by the record as a whole. Notably, Christopher was walking at the age of 12 months which weighs against a finding of developmental delay. Moreover, neither nurse Smith nor nurse Leggett testified to their observation that he was developmentally delayed.

This unexpected "developmental delay" finding is not the type of data on which burn experts can unequivocally conclude that an injury to the child was intentionally caused. The State's stipulation is devoid of any specific detail concerning Christopher's purported developmental delay and fails to explain how a finding of developmental delay indicates prior neglect and child abuse. While one could infer that developmental delay would be consistent with abuse or neglect, it is difficult to imagine how this finding combined with a single suspicious injury suggests child abuse, particularly where there was no other evidence of prior or concurrent injuries. The State presented no evidence suggesting that Christopher had been previously abused, and the common law record demonstrates that Lee had never previously been

accused of neglecting or abusing her child. (C. 25; 31) This “developmental delay” factor is unfounded and wholly unreliable with respect to determining whether Christopher’s injuries occurred accidentally as his mother claimed or intentionally as the State opined.

In sum, Lee was denied a fair trial when the prosecution failed to establish a proper foundation for its expert stipulation and the expert’s opinion was based on erroneous and ambiguous data, namely that Christopher was abducted from Loyola hospital, Lee’s interactions with the nursing staff and a supposed finding of “developmental delay.” Accordingly, Lee’s conviction must be reversed and the cause remanded for a new trial.

Ineffective Assistance of Counsel

Alternatively, Lee received ineffective assistance of counsel when her trial attorney stipulated to the unreliable expert testimony of Dr. Barbara Latenser. Under the standards enunciated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant receives ineffective assistance of counsel if his attorney’s performance fell beneath an objective standard of reasonableness, and but for this substandard performance, a reasonable probability exists that the outcome of proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the verdict. *Strickland*, 466 U.S. at. 694. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Id.* at 687. *See also People v. Perez*, 148 Ill.2d 168, 592 N.E.2d 984 (1992).

Where no reasonable trial strategy exists for stipulating to damaging evidence of questionable reliability, a defendant receives ineffective assistance of counsel. For example, in *Coleman*, defense counsel stipulated to positive results of a laboratory test for the presence of

heroin in a weight greater than that which was actually tested. *People v. Coleman*, 301 Ill. App. 3d 37, 45, 704 N.E.2d 690 (1st Dist. 1998). This Court found that defense counsel's actions constituted ineffective assistance of counsel where as a result of the stipulation, the defendant was convicted of possessing heroin in an amount greater than 15 grams even though only 7.02 grams had tested positive for the presence of heroin. *Id.* at 46-47.

Similarly, in this case, Lee received ineffective assistance of counsel when her trial attorney stipulated to the unreliable expert testimony of Dr. Latenser. No reasonable trial strategy exists for stipulating to expert testimony purporting to establish an ultimate issue of fact in the case where the stipulation was based on unreliable and false facts. As discussed in greater detail above, several factors considered by the expert in reaching her opinion that Christopher's burns were a product of child abuse were either false or unreliable, namely that: (1) Lee abducted her child from Loyola Medical Center; (2) Lee's interactions with the nursing staff; (3) Lee's behavior; and (4) alleged developmental delays in the child. A competent attorney would have attacked the credibility and reliability of this expert's testimony, particularly where significant evidence existed to refute her claims that the burns were intentionally inflicted. *See* Argument I, *supra*. Rather, than subject the witness's testimony to cross-examination, the trial attorney stipulated to this unreliable testimony. Accordingly, trial counsel's performance fell beneath an objective standard of reasonableness.

Lee was prejudiced by trial counsel's performance where no other evidence existed that Christopher's injuries were intentionally inflicted. Although nurse Smith rendered her lay opinion that the injuries were caused intentionally, as discussed previously in Argument I, *supra*, Smith was not qualified to render an opinion concerning the cause of Christopher's injuries. Without the expert stipulation of Dr. Latenser, the State would have been unable to satisfy its

burden of proof since other than the improper “expert” opinion testimony of nurse Smith, the only evidence that Lee caused these injuries intentionally to her son came from the stipulated testimony of Dr. Latenser.

In sum, the stipulated testimony of Dr. Latenser was the only evidence that had the potential to demonstrate that Christopher’s injuries were intentionally caused. However, Latenser’s stipulated testimony was wholly unreliable as it was based on false and misleading facts and data. As a result, Lee was denied a fair trial when the prosecution introduced Latenser’s stipulation into evidence. Alternatively, Lee received ineffective assistance of counsel where Lee has demonstrated that her trial attorney’s performance was substandard when he stipulated to the unreliable expert testimony of Dr. Latenser, and there can be no confidence in the trial court’s finding of guilt where without this expert stipulation, no admissible evidence existed that the injuries were intentionally caused. Accordingly, Lee’s conviction for aggravated battery to a child must be reversed and the cause remanded for a new trial.

III. LEE WAS NOT PROVEN GUILTY BEYOND A REASONABLE DOUBT OF AGGRAVATED BATTERY OF A CHILD WHERE: (A) THE STATE FAILED TO SHOW THAT LEE HAD EXCLUSIVE CONTROL OF THE CHILD WHEN HE WAS INJURED; AND (B) THE STATE FAILED TO DEMONSTRATE THAT THE INJURY WAS CAUSED INTENTIONALLY.

The State’s evidence was insufficient as a matter of law to prove beyond a reasonable doubt that Veronica Lee was the person who burned her son Christopher, and that she burned her son intentionally. The State presented no evidence that Lee had exclusive control over Christopher when he was injured and at least two other adults resided in the home when Christopher was injured, including Lee’s boyfriend. Because the State presented no direct

evidence that Lee was responsible for burning her son and failed to show that no other adults in the household had the opportunity to commit the crime, Lee was not proven guilty beyond a reasonable doubt and her conviction must be reversed.

Moreover, Lee's conviction cannot stand where the State failed to demonstrate that she intentionally burned her son. The State's evidence that Christopher's injuries were intentionally inflicted consisted of the improper lay opinion testimony of a treating nurse, and an unreliable expert stipulation based on false and misleading facts. Because the State's evidence on the question of whether the burn occurred accidentally or intentionally was insufficient as a matter of law to sustain a finding of guilt, Lee's conviction must be reversed.

In order to obtain a conviction for an offense, the State must prove every element of the offense beyond a reasonable doubt. *In Re Winship*, 397 U.S. 358 (1970); *People v. Smith*, 185 Ill.2d 532, 541 (1999); U.S. Const. Amend. XIV; Ill. Const. 1970, art. I, sec. 2. The appropriate standard of review is whether, viewing the evidence in the light most favorable to the State, a rational trier of fact could have found all of the essential elements of the offense. *Jackson v. Virginia*, 443 U.S. 307 (1979); *Smith*, 185 Ill.2d at 541. However, where the facts are not in dispute, the defendant's guilt is a question of law which is reviewed *de novo*. *People v. Smith*, 191 Ill.2d 408, 411, 732 N.E.2d 513 (2000). Because Lee does not contest the State's evidence but contends that the State's evidence taken in its most favorable light failed to prove her guilt beyond a reasonable doubt, the appropriate standard of review is *de novo*. Additionally, a conviction should be reversed where the evidence is "not sufficient to create an abiding conviction that [defendant] is guilty of the crime charged." *People v. Ash*, 102 Ill.2d 485, 468 N.E.2d 1153, 1156 (1984). If, after careful examination of the evidence, a reviewing court is of the opinion that the evidence is insufficient to establish beyond a reasonable doubt that the

defendant is guilty, the conviction must be reversed. *Smith*, 185 Ill.2d at 541.

A. The State Failed To Prove Beyond a Reasonable Doubt that Lee was Responsible for Injuring her child.

Lee's conviction must be reversed where the State failed to show beyond a reasonable doubt that Lee was the person who actually injured her son, Christopher. Every criminal conviction requires proof beyond a reasonable doubt that the crime was committed by the person charged. *People v. Cloutier*, 156 Ill.2d 483, 503, 622 N.E.2d 774 (1993). Proof of mere presence and opportunity to commit a crime is insufficient to convict. *People v. Dowaliby*, 221 Ill. App. 3d 788, 797, 582 N.E.2d 1243 (1st Dist. 1991). *See also People v. Lovelace*, 221 Ill. App. 3d 20, 24 581 N.E.2d 735 (2d Dist. 1991). When this is the extent of the State's evidence, the burden is on the State to show that no one else had the opportunity to commit the crime. *Id.*

Although the State's case may rely entirely upon circumstantial evidence, the State must still prove beyond a reasonable doubt each element of the crime charged. *People v. Laubscher*, 183 Ill.2d 330, 335, 701 N.E.2d 489 (1998). A conviction based on circumstantial evidence must produce a "reasonable and moral certainty that the accused and no one else committed the crime." *People v. Dukes*, 146 Ill. App. 3d 790, 794, 497 N.E.2d 351 (1st Dist. 1986).

In a case that relies on circumstantial evidence, the reasonable inference must have a chain of factual evidentiary antecedents, otherwise the inferences are nothing more than mere speculation. *People v. Davis*, 278 Ill. App. 3d 532, 540, 663 N.E.2d 39 (1st Dist. 1996). In addition, a fact cannot be inferred when a contrary fact could be inferred with equal certainty from the same evidence. *People v. Steading*, 308 Ill. App. 3d 934, 940, 721 N.E.2d 789 (2d Dist. 1999). If two strong inferences exist from the same evidence, then relying on one inference or another is conjecture. *Leavitt v. Farwell Tower Ltd. Partnership*, 252 Ill. App. 3d 260, 268, 625

N.E.2d 48 (1st Dist. 1993). The State cannot rely on speculation or conjecture to prove an essential element of the crime. *Laubscher*, 183 Ill.2d at 336. Moreover, suspicious circumstances will not substitute for proof, and probabilities cannot, by themselves, lead to a conviction. *In re Whittenburg*, 37 Ill. App. 3d 793, 795, 347 N.E.2d 103 (3rd Dist. 1976).

The State failed to establish beyond a reasonable doubt that Lee was the person who burned her son, instead relying on speculation and conjecture to make its case. The State's case against Lee consisted of the following circumstantial evidence: (1) testimony that Lee gave two inconsistent exculpatory statements concerning how her child was injured; (2) lay witness testimony purporting to disprove Lee's explanations for how the child was injured; (3) testimony that Lee removed the child from Loyola Hospital; (4) a stipulation that an expert witness would testify that the burns were consistent with child abuse; and (5) photographic exhibits of the injuries. The State produced no evidence demonstrating how or when the injuries actually occurred or who was present when the child was injured. Critically, the State produced no evidence establishing that Lee had exclusive control over the child at the time he was injured or that the two other adults living in the house lacked the opportunity to commit the crime. Because the State failed to show that Lee had exclusive control over Christopher when the injuries occurred, the State's evidence was insufficient to establish that Lee was the person who injured her son.

Careful review of the State's circumstantial evidence demonstrates that the State failed to meet its burden of proof. First, the fact that Lee gave two false exculpatory statements to the police and hospital personnel is not definitive evidence that she burned her son or that she was only one present when the injuries occurred. False exculpatory statements have independent probative value as evidence of consciousness of guilt. *See, e.g., People v. Muhammad*, 257 Ill.

App. 3d 359, 368, 629 N.E.2d 106 (1st Dist. 1993), *People v. Seawright*, 228 Ill. App. 3d 939, 969, 593 N.E.2d 1003 (1st Dist. 1992). However, false exculpatory statements are not conclusive evidence of consciousness of guilt. *People v. Puente*, 98 Ill. App. 3d 936, 942, 424 N.E.2d 775 (1st Dist. 1981). This rule of law recognizes that false exculpatory statements can be given for a variety of reasons, including the desire to protect the actual perpetrator, or perhaps the desire to avoid charges of neglect from a social service agency.

Similarly, Lee's act of removing Christopher from the hospital is not conclusive evidence that she was responsible for injuring her son. At best, Lee's act of removing her child from Loyola hospital serves as evidence of consciousness of guilt, an inference the trial court made. *See* Argument IV, *infra*. However, this testimony does not conclusively establish that Lee was responsible for burning her child or that Lee was even present when the child was injured.

Arguably, the act of removing the child from the hospital is not even evidence of a guilty conscience since this conduct can be attributed to innocent explanations. When the factual evidence makes it as equally likely that an act can be attributed to an innocent cause, the trier of fact must attribute it to the innocent cause. *People v. Benson*, 19 Ill.2d 50, 61 166 N.E.2d 80 (1960). A fact cannot be inferred when a contrary fact could be inferred with equal certainty from the same evidence. *Steading*, 308 Ill. App. 3d at 940.

The State presented testimony that Lee was unhappy with the medical care that Christopher was receiving at Loyola Hospital. (R. C 28) Specifically, Lee was dissatisfied with nurse Margaret Smith. (R. C 28) After Christopher's wounds were checked and after he received an oral dosage of morphine, Lee removed Christopher from Loyola without gaining permission from hospital personnel. (R. D 9) Lee had not been charged with any crime at the time and had full legal responsibility of her child. (R. D 12) Lee called the medical unit within

45 minutes and spoke to nurse Leggett who had been treating Christopher. Lee explained that she was unhappy with Christopher's care and wanted to transfer him to another hospital. (R. D 11) Later that evening, investigating officers located Christopher at Lee's sister's home and arranged for him to be transported back to Loyola. (R. C 52)

There are several innocent explanations for why Lee removed her child from the hospital. Lee may truly have been dissatisfied with Christopher's treatment and wanted to have him admitted to another hospital. Or possibly, Lee was scared that DCFS would investigate the situation and remove Christopher from her care. In fact, Lee told the police that she originally gave the hospital bogus identifying information out of fear that DCFS would intervene and take her child. (R. C 55) In its findings, the trial court stated that it accepted Lee's explanation. (R. E 18) Similarly, Lee's fear of DCFS could have motivated her to remove Christopher from Loyola.

Critically, if Lee was attempting to avoid criminal responsibility for her actions, it is unlikely that she would have brought her child to the emergency room in the first instance. The State presented no evidence that Lee delayed medical treatment for her son and the record shows that Lee bursted into the emergency room screaming for someone to help her child. Had Lee been concerned with avoiding criminal responsibility for her actions, it is more likely that she would have avoided going to the hospital, thereby delaying the treatment for her son, or she would have sent someone else to the emergency room with her son. Simply put, there are multiple, equally plausible, explanations for why Lee removed her child from Loyola. It is improper to infer that Lee removed Christopher because she was responsible for injuring him when it is just as likely that she removed him either because she was dissatisfied with his care or was scared that DCFS would take him from her.

Even assuming that the trial court properly concluded that Lee's act of removing Christopher from Loyola constituted evidence of a guilty conscience, this evidence is not conclusive proof that Lee intentionally burned Christopher. In *Whittenburg*, the appellate court held that the defendant's suspicious activity, including flight from the scene of the crime, was not sufficient to convict him of burglary. *Whittenburg*, 27 Ill. App. 3d at 796. While the flight evidence raised a suspicion of involvement, the State failed to provide any evidence corroborating the suspicion generated by the defendant's prior actions. *Id.*

Similarly here, Lee's removal of her child from the hospital even in conjunction with her giving false identifying information and inconsistent exculpatory statements raises a suspicion of complicity in the crime. However, the record is devoid of any corroborating evidence that Lee was the perpetrator of the alleged criminal act. Without more, the evidence of Lee's guilty conscience cannot suffice as proof that she committed the crime, particularly where it is just as likely that Lee was acting suspiciously to protect another person or was attempting to avoid allegations of neglect by DCFS.

Even if the trial court was permitted to infer that Lee was present when Christopher was burned, the State offered no evidence that Lee had exclusive control over Christopher when he was injured. Proof of mere presence and opportunity to commit a crime is insufficient to sustain a conviction. *Dowaliby*, 221 Ill. App. 3d at 797. *Lovelace*, 221 Ill. App. 3d at 24. When this is the extent of the State's evidence, the burden is on the State to show that no one else had the opportunity to commit the crime. *Id.* To require the defendant to prove that someone else had the opportunity to commit the crime shifts the burden to the accused and is unconstitutional. *People v. Hess*, 24 Ill. App. 3d 299, 303, 320 N.E.2d 344 (5th Dist. 1974) (holding that criminal conviction cannot be based on defendant's failure to explain what happened, but must be based

on State's ability to establish each element of the offense beyond a reasonable doubt).

The only arguable evidence suggesting that Lee was present when the injuries occurred were Lee's inconsistent exculpatory statements. As discussed above, these out-of-court statements at most reflect a guilty conscience and cannot serve as conclusive proof that Lee burned her son or that no other adults in the house lacked the opportunity to commit the offense. Notably, the record demonstrates that at least two other adults resided in the home with Lee and her son at the time the injuries occurred, Lee's boyfriend and his adult daughter. (R. I 6) Moreover, Lee's boyfriend testified that he was living off of a settlement at the time Lee was arrested, thus, he was likely at home when this incident occurred. (R. I 12) As many as three adults may have been present when Christopher was injured. The State's evidence that Lee made inconsistent exculpatory statements demonstrates at most that she was present when the injuries occurred. Her exculpatory statements fail to show that no else in the household was responsible for burning the child. Because the State failed to establish that neither Lee's boyfriend nor boyfriend's daughter committed the offense, the trial court's guilty finding cannot be sustained.

In *Lovelace*, the defendant's first degree murder conviction was reversed when the appellate court concluded that the State had merely proven that the defendant had an opportunity to commit the murder, not that he had committed the murder. *Lovelace*, 221 Ill. App. 3d at 24. The State's evidence showed that on January 8, 1983, the victim and a man named Gary Kaya had been to the defendant's home and negotiated a drug deal with him. *Id.* at 21. They agreed to sell 41 grams of heroin to the defendant in exchange for \$41,000. *Id.* The victim returned to the defendant's house on the afternoon of January 10 and again later that night to consummate the deal. *Id.* at 22. Kaya called the defendant's house that night and the defendant told Kaya that the victim walked down the street and got into a car. *Id.* The victim was never seen alive again and

was found stuffed into a storage trunk in a heavily wooded lot over a month later. *Id.* Several witnesses testified that they saw a trunk in the defendant's home that was similar in appearance to the one in which the deceased's body was found. *Id.*

The appellate court observed that the State's evidence tying the defendant to the murder was scant. *Id.* at 23 At most, the State proved that the defendant had a motive to kill the deceased, that the victim was never seen alive after visiting the defendant and that the defendant had a trunk at least similar to the trunk in which the deceased's body was found. *Id.* Although suspicious, this evidence was insufficient to establish that the defendant was guilty. The court observed that the a conviction must rest on the strength of the State's case, not the weakness of the defendant's case. *Id.* at 24. The State must show more than a mere opportunity to commit the crime. Minimally, the State must show that no one else had the opportunity to commit the crime. *Id.*

In this case, the State's only evidence that Lee was present when Christopher was burned was her inconsistent exculpatory statements. The State presented no evidence concerning when the child was injured and failed to show that no other adults living in the household were present when the child was injured. Significantly, the trial court seemed to be waiting for Lee to prove that she was not the person who injured Christopher. The trial court commented that Lee's stories did not add up and that no evidence existed to show that Christopher's injuries were sustained accidentally. (R. E 18-19)

It is improper to require the defendant to prove that someone else had the opportunity to commit the crime. Such an expectation amounts to impermissible burden shifting. *Sullivan v. Louisiana*, 508 U.S. 275 (1993). See Argument V, *infra*. A criminal conviction cannot be based on the weakness of the defendant's case, nor the defendant's failure to explain what happened,

but must be based on the State's ability to establish each element of the crime beyond a reasonable doubt. *People v. Hess*, 24 Ill. App. 3d 299, 303 320 N.E.2d 344 (5th Dist. 1974). Because the State failed to prove beyond a reasonable doubt that Lee had the opportunity to commit the crime and nobody else had a similar opportunity, Lee's conviction for aggravated battery of child must be reversed.

B. The State Failed to Prove Beyond A Reasonable Doubt that Christopher's Injuries Were Caused Intentionally or Knowingly.

The State's evidence that the burn injuries sustained by Christopher were intentionally and knowingly caused was insufficient as a matter of law. To demonstrate that Christopher's injuries were intentionally inflicted, the State presented the following evidence: (1) lay opinion testimony of Margaret Smith, the nurse who treated Christopher at Loyola Hospital; and (2) the stipulated expert testimony of Dr. Barbara Latenser. Because Smith was not qualified to offer an expert opinion on the question of whether Christopher's injuries could have been caused accidentally, and in fact placed unreliable evidence before the trial judge, nurse Smith's testimony failed to show that Christopher's injuries were intentionally inflicted. Moreover, the State's expert stipulation failed to demonstrate that Christopher's injuries were caused intentionally where the expert merely concluded with a *relative* degree of medical certainty that Christopher's injuries were *consistent* with child abuse. The expert relied on unfounded and unreliable information not normally considered by experts in her field and failed to consider Lee's explanation for how the child was injured.

Lay-Opinion Testimony of Nurse Smith

Nurse Margaret Smith testified for the State as a lay witness who treated Christopher's burns at Loyola Medical Center. Smith testified that she had been a registered nurse for six years

and had worked in the burn unit of Loyola Medical Center for less than a year and a half. (C. 16; 18) In 1997, she received a certification in advanced burn life support. (R. C 17) The State never asked that Smith be qualified as an expert witness and the trial court never qualified Smith as an expert witness. Although at the hearing on Lee's motion for a new trial the State suggested that Smith was properly qualified as an expert, the record unequivocally shows that the State never tendered Lee as an expert and the trial court never found Lee qualified to testify as an expert.

As discussed in great detail in Argument I, *supra*, Smith gave extended testimony concerning her belief that Christopher's injuries were caused intentionally and that Lee's explanations for how Christopher was injured were implausible. *See* Argument I, *supra*, pp. 10-11, 13-14. Smith's testimony on these matters was inadmissible since Smith was not a qualified expert in burn injuries and had no personal knowledge concerning how Christopher's injuries occurred. *People v. Novak*, 163 Ill.2d 93, 102, 643 N.E.2d 762 (1994) (holding that a lay witness may not express an opinion or draw inferences from facts of which he has no personal knowledge and lay opinions cannot be based on hearsay or hypothetical questions). Although Smith was permitted to describe Christopher's injuries, it was highly improper for her to testify to her opinion on whether the burns were intentionally caused. Nor was Smith qualified to render an opinion on the feasibility of Lee's explanations for how the child was injured.

Critically, the record shows that Smith did not possess any specialized knowledge in diagnosing the cause of burn injuries. Smith was a registered nurse for six years and had worked in the burn unit at Loyola for a mere year and a half. (R. C 16) She had no specialized training other than a certification in treating burn injuries and the record is devoid of any expertise in the specialized areas of forensics and child abuse. (R. C 17) In fact, on cross-examination, Smith

admitted that her experience was in *treating* burn injuries, not diagnosing them. (R. C 41)

Thus, even if the State had sought to qualify as an expert, it is highly unlikely that she would have been qualified in the field of diagnosing burn injuries.

As discussed in greater detail in Argument I, *supra*, failure to limit the scope of Smith's testimony resulted in Smith placing unreliable evidence before the trial judge. In fact, even had Smith been properly qualified as an expert, ample authority exists to refute the reliability of Smith's testimony. Scientific authority refutes Smith's opinion that all immersion burns occur intentionally. Purdue, Gary F. M.D., John L. Hunt M.D., and Paul R. Prescott, M.D. *Child Abuse by Burning—An Index of Suspicion*, 28 J. of Trauma, Vol. 2 at 223 (1988) (recognizing that immersion burns can happen both intentionally and accidentally). Additionally, Smith had no basis for concluding that simply because Christopher's burns showed a distinct line of demarcation, Christopher must have been held in the same position for a period of time. Without knowing the temperature of the water, Smith had no basis to determine how long the child was exposed to the water. *In re P.P.*, 261 Ill. App. 3d 598, 633 N.E.2d 965, 968-69 (1st Dist. 1994). Furthermore, Smith's testimony was incomplete and unreliable as it failed take into account numerous other factors that an expert considers when determining whether a burn is a product of child abuse or an unfortunate accident. *See* Argument I, *supra*. A review of these factors suggest that Christopher's injuries occurred accidentally rather than intentionally. *See* Argument I, *supra*, pp. 21-23.

Nurse Smith was a registered nurse whose experience consisted of treating burn injuries for a year and a half. She did not hold a medical degree and had no specialized training and experience in assessing child abuse or burn injuries. Her opinion testimony is highly unreliable where she failed to consider numerous factors critical to an accurate determination of whether a

burn is a product of child abuse. Smith's less than thorough testimony is not surprising in light of the fact that Smith was not an expert in diagnosing burn injuries. As nurse Smith herself admitted, her experience was in *treating* burn injuries, not diagnosing the cause of them. In short, nurse Smith's testimony that all immersion burns are caused intentionally, and therefore Christopher's injuries were intentionally inflicted, and her testimony concerning the plausibility of Lee's explanation for the child's injuries was not only inadmissible but highly unreliable. Accordingly, Smith's testimony failed to establish the requisite element of the crime of aggravated battery of a child that the injuries were caused either intentionally or knowingly.

Expert Stipulation

The State also presented the stipulated testimony of Dr. Barbara Latenser, an expert in the field of medical diagnosis of burns. (R. E 4) The State's expert stipulation failed to demonstrate beyond a reasonable doubt that Lee's injuries occurred intentionally where the stipulated testimony: (1) merely stated that Christopher's injuries were *consistent* with child abuse and the expert only reached this conclusion with *relative* degree of medical certainty; (2) was based on unfounded and unreliable evidence; and (3) failed to address the feasibility of Lee's explanations for how the child was injured. Dr. Latenser's stipulated testimony read as follows:

In addition to reviewing the medical records of Christopher Smith, Dr. Latenser was made aware that on March 20th of 1998, the patient's nurse contacted the social worker stating that the patient and his mother may have left the hospital. The patient's mother then telephoned the unit requesting the patient's records be transferred to Cook County Hospital. The mother was instructed to return the patient immediately to Loyola University Medical Center. On March 21st, of 1998, the child was returned to Loyola University Medical Center from a Chicago home via Mount Sinai Hospital by a report the child was left at a family member's home by the patient's mother. Relying on that information and relying on the medical record and relying on the photos that she observed, the doctor would testify that the photos show partial thickness burns to the bilateral upper extremities with sphering of the wrist creases in an African American child approximately thirteen months of age. The upper extremities indicated no splash

marks. There is no record of other burns beside the one centimeter burn to the dorsum of the left foot. The pattern of the burn injuries, the behavior of the mother, including abduction of the child from Loyola University Medical Center with return of the patient from another family member, the mother's interactions with the nursing staff, and the developmental delays are *consistent* with prior neglect and current child abuse regarding the burns. This statement is made with a *relative* degree of medical certainty. (R. E 5) (emphasis added)

First, the State's expert stipulation tells the trier of fact only that Christopher's injuries *could have* occurred intentionally. When Latenser opined that the burn injuries in conjunction with the Lee's suspicious conduct were consistent with child abuse, she merely concluded that Christopher's injuries could have occurred intentionally, not that they did occur intentionally. *See People v. Linscott*, 142 Ill.2d 22, 34-35, 566 N.E.2d 1355 (1991) (observing that an expert's opinion that hair found on the victim was *consistent* with the defendant could not show that the hair belonged to the defendant, only that it could have come from the defendant). Common sense dictates that physical injuries to a child, including burn injuries, are always consistent with physical child abuse, but clearly not always caused by child abuse.

Critically, Dr. Latenser only reached this conclusion with a *relative* degree of medical certainty, rather than a *reasonable* degree of medical certainty. "Relative" is a term that is meaningful only in relationship to something else. *New World Dictionary* 1199 (2d ed. 1968). The expert stipulation fails to explain what Latenser's opinion is relative to, thus, it is impossible to determine at what level of certainty Latenser concluded that Christopher's injuries were consistent with child abuse. It is useful to note that if the question before this Court was whether Latenser's testimony proved by a preponderance of the evidence that Christopher's injuries were proximately caused by an intentional act, this Court would have to resolve that question against the proponent of the evidence since proximate cause must be established by expert testimony to a *reasonable* degree of medical certainty. *Simmons v. Garces*, 198 Ill.2d 541, 556, 763 N.E.2d 720

(2002). Accordingly, Dr. Latenser's opinion, made with only a relative degree of certainty, that Christopher's injuries were *consistent* with child abuse falls far short of establishing by proof beyond a reasonable doubt that Lee intentionally burned her son.

Moreover, the State's expert stipulation lacks a proper foundation and is based on unreliable and unsubstantiated facts. As discussed in great detail in Argument II, *supra*, an expert witness may rely on facts or data that were neither personally observed by the expert nor not entered in evidence at trial when developing an opinion on a particular matter. However, those facts must be of the type reasonably relied upon by experts in the particular field. *Wilson v. Clark*, 84 Ill.2d 186, 193, 417 N.E.2d 1322 (1981) *quoting* Fed. R. Evid. 703. Moreover, the State must establish through testimony that the factors relied on by the expert are of the type generally relied on by experts in the field. *People v. Houser*, 305 Ill. App. 3d 384, 395, 712 N.E.2d 355 (4th Dist. 1999).

As discussed in Argument II, *supra*, the State failed to show that several of the factors on which the expert relied to conclude that Christopher's injuries were caused intentionally were of the type reasonably relied upon by experts in the field. In addition to the pattern of Christopher's injuries, Dr. Latenser concluded that Christopher's injuries were consistent with child abuse based in large part on the mother's behavior, including the "abduction" of the child from Loyola, the mother's interaction with the nursing staff, and the child's "developmental delays." The State failed to lay a proper foundation for this testimony where the stipulation fails to show that the mother's behavior, her interactions with nursing staff, and Christopher's supposed developmental delays are the type of factors generally relied upon by experts in this field. Because the expert stipulation fails to state that these factors are the type of data on which experts in the field of diagnosing burn injuries generally rely, the State's expert stipulation lacks

a proper foundation and cannot suffice as proof beyond a reasonable doubt that the injuries were intentionally inflicted.

Moreover, as discussed in greater detail in Argument II, *supra*, there is strong evidence from this record that the factors on which the expert relied were false and unreliable. First, outside of the single reference contained in the stipulation, the record is devoid of any indication that Christopher was developmentally delayed. In fact, the record would suggest that the child was not developmentally delayed in light of the fact that he was walking at the age of 12 months. (R. C 37)

Second, Lee's conduct, including her interactions with the medical staff, and her removal of Christopher from Loyola is not sufficiently trustworthy to prove that she intentionally burned her son. Smith's act of removing her son from Loyola Medical Center cannot be classified as an "abduction" and is not sufficiently trustworthy evidence on which to conclude that Lee intentionally burned her son. *See* Argument II, *supra* pp. 31.

Third, the record is ambiguous on how Lee's interactions with the nursing staff suggested that she intentionally burned her son. The only testimony concerning Lee's interactions from the nursing staff came from nurse Smith and nurse Leggett. Leggett recounted no negative interactions with Lee, and Smith merely testified that Lee became upset with her when she entered Christopher's room to assess and re-dress his wounds and that Lee requested another nurse. The record fails to show how Lee's seemingly benign interactions with the nursing staff suggested her guilt.

Furthermore, as discussed in Argument II, the subjective interpretation of a defendant's actions are inherently unreliable. *See People v. Murphy*, 157 Ill. App. 3d 115, 119, 509 N.E.2d 1323 (1st Dist. 1987). Here, Dr. Latenser was was informed of Lee's behavior at the hospital via

the prosecutor. This second-hand interpretation of Lee's actions by an interested party does not have the reliability that qualifies as an exception to the hearsay rule under *Wilson*. Lee's interactions were not objective data, but rather subjective interpretations by the nursing staff and then further qualified and described by the prosecutor. Unlike hospital records, which are presumed to be routine, professional reports of objective data, the characterizations of the prosecution concerning the defendant's actions are subjective interpretations that are deemed inherently unreliable.

The expert's stipulation is unreliable not only because it was based on erroneous and misleading information but because the expert was never asked to consider Lee's explanations for how the child was injured and never considered the temperature of the water in rendering her opinion. As discussed in Argument I, in *In re P.P.*, the expert testified that before determining whether a burn was intentional or accidental, it was important to consider the mother's explanation for the injury and determine whether it was feasible. *In re P.P.*, 261 Ill. App. 3d 598, 603, 633 N.E.2d 965 (1st Dist. 1994). Additionally, both experts in *P.P.* agreed that the temperature of the water was a critical fact for determining whether the child had been held in the same position for a period of time.

Notably absent from the expert's stipulated testimony is any opinion regarding the feasibility of Lee's explanation for Christopher's injuries. The expert either was never asked to consider whether Christopher could have been burned accidentally by crawling into a bathtub with hot water or the State never offered her opinion on this point. In any event, as the expert in *P.P.* pointed out, without considering the feasibility of the mother's explanations for the injuries, it is impossible to determine whether the burns occurred accidentally or intentionally. Moreover, the expert was never informed of the temperature of the water in Lee's house. If the temperature

of the water was hot enough, Christopher could have fallen into the water for a mere second or two and incurred serious injuries. Thus, the expert's finding that the burn was intentionally caused is inherently unreliable where she failed to consider these critical factors.

Finally, the expert's physical findings do not strongly suggest that Christopher's burns occurred intentionally. With respect to the physical findings, the expert noted that the child: (1) incurred partial thickness burns to the bilateral upper extremities with sphering of the wrist creases; and (2) the upper extremities indicated no splash marks. This was the extent of the expert's physical findings. Critically, the expert makes no mention of strong lines of demarcation, and observed no other injuries consistent with child abuse. Moreover, the expert observed only partial-thickness burns on the child. As addressed above, where burns are caused intentionally, one is more likely to see full-thickness burns, rather than partial thickness burns. See Stone, Nelson .H. M.D., Ph.D., Lucille Rinaldo, B.S., Charles R. Humphrey, M.D., Rowine H. Brown, M.D., J.D., *Child Abuse by Burning*, 50 Surg. Clin. North. Am. 6 (Dec. 1970).

Accordingly, these physical observations by the alleged expert are insufficient to support her finding that the injuries were intentionally inflicted.

Conclusion

The State failed to prove Lee guilty beyond a reasonable doubt. The State's evidence consisted merely of conjecture and speculation. Rather than proving each element of the offense beyond a reasonable doubt, the State highlighted the suspicious conduct of Lee and focused the court on Lee's failure to explain how her son was injured. Because the State failed to show that Lee had exclusive control over Christopher when he was injured, the State has failed to demonstrate that Lee was the person who actually committed the offense. Furthermore, the State failed to show that Christopher's injuries occurred intentionally where nurse Smith's lay opinion

was both inadmissible as a matter of law and unreliable, and the stipulated expert testimony of Dr. Barbara Latenser proved only that Christopher's injuries could have occurred intentionally and was based on false and unreliable data. Accordingly, Lee's conviction must be reversed.

IV. WHERE THE TRIAL COURT ERRONEOUSLY CONCLUDED THAT LEE REMOVED HER CHILD FROM AN INTRAVENOUS MORPHINE DRIP AND "ABDUCTED" HER CHILD FROM THE HOSPITAL, LEE AS DENIED A FAIR TRIAL.

Lee was denied due process when the court relied on erroneous findings to support her judgment of guilt. U.S. Const. Amend. XIV; Ill. Const. 1970, art. I, § 2. The court based its guilty finding largely on the fact that Lee removed her child from an intravenous morphine drip and "abducted" him from Loyola Medical Center. However, the record shows that Lee never removed her son from an intravenous morphine drip or any other medical device. Moreover, Lee's removal of her son from Loyola Medical Center cannot be fairly described as an "abduction" where Lee had full legal custody over her child, and called the hospital 45 minutes after removing the child to inform the nurse that she was having her son transferred to another hospital. Thus, Lee was denied a fair trial when in entering judgment, the court erroneously concluded that Lee had removed her child from a morphine drip and unfairly found that Lee had "abducted" her child from the hospital. As a result, Lee is entitled to a new trial.

Because this issue does not involve credibility or factual determinations, the standard of review is *de novo*. *People v. \$1,124,905 U.S. Currency*, 177 Ill.2d 314, 685 N.E.2d 1370, 1380 (1997); *People v. Saunders*, 288 Ill. App. 3d 523, 680 N.E.2d 790, 791 (4th Dist. 1997).

Before finding Lee guilty of aggravated battery of child, the trial court stated:

The defendant has no burden to prove this was accidental, but there is not one scintilla of evidence to show this 13-month old child accidentally received these

burns. Once taken to Loyola you make have a disagreement with a nurse, you may not like the nursing care, move your child. You do not believe [sic] it's an abduction. I'm telling you when you take a child off a morphine drip, saying you're going to a play room, leave, go to your sister's home, leave the baby completely at your sister's home wrapped, not knowing when that morphine is going to again result in excruciating pain for a 13-month old, and just go on your merry way until the police track that baby down and have to return that child to Cook County Burn Unit, that is an abduction. (R. E 20)

In denying Lee's motion for a new trial, the trial court again referred to the morphine drip and the alleged "abduction."

The fact that you took a child off intravenous morphine when you were supposed to go or asked to go to a play room, took that child from a hospital, I am not finding aggravated battery. I am not finding the pain that may have been suffered to a child who was on a morphine drip who is no longer on a morphine drip because he is supposed to be at a play room in a hospital. (R. H 17-18)

Contrary to the trial court's findings, the record is devoid of any evidence that Christopher was ever on a morphine drip or that Lee removed him from a morphine drip. In fact, nurse Leggett testified that she was treating Christopher in the burn step down unit of Loyola Medical Center. (R. D 4) Leggett explained that the step down unit is the unit that treats burn patients but not those patients who require intensive care. (R. D 5)

Leggett further testified that she entered Christopher's room to complete an assessment and to give him a dose of oral morphine. (R. D 7) Leggett explained that after having a normal conversation with Lee, she gave Lee permission to take Christopher to the play room down the hall. (R. D 8) That was the last time Leggett saw Lee and Christopher until Christopher was returned to the hospital later that evening.

Leggett never testified that Christopher was receiving an I.V. morphine drip, and the record certainly does not show that Lee removed Christopher from a morphine drip before taking him from the hospital. Accordingly, the trial court was laboring under a gross misapprehension

of the evidence when she found that Lee removed Christopher from a morphine drip prior to taking him from the hospital.

Generally, in a bench trial of a criminal case, the trial judge will be presumed to have considered only competent evidence in arriving at its finding. *See People v. Cannon*, 150 Ill. App. 3d 1009, 1106, 502 N.E.2d 345, 349 (1st Dist. 1986). *See also People v. McGovern*, 126 Ill. App. 3d 393, 400, 261 N.E.2d 689, 692 (1st Dist. 1970). However, when the record affirmatively demonstrates that the trial judge did not correctly remember the testimony when entering judgment, a defendant is denied his right to a fair trial. *People v. Mitchell*, 152 Ill.2d 274, 323, 604 N.E.2d 877, 901 (1992). *See also People v. Bowie*, 36 Ill. App. 3d 177, 180, 343 N.E.2d 713, 715 (1st Dist. 1976).

In *Bowie*, the defendant was charged with battery, resisting arrest and criminal trespass. *Bowie*, 36 Ill. App. 3d at 178, 323 N.E.2d at 714. In closing argument, defense counsel commented on a conflict in the evidence pertaining to whether the defendant hit the officer first or the officer hit the defendant first. *Id.* at 179. The trial court struck the argument from the record asserting that no testimony suggested a conflict in the evidence. *Id.* at 180. However, the defendant had testified that the officer hit him in the head and that the blood began rushing down. *Id.* The appellate court reversed the defendant's conviction, finding that he was denied a fair trial, because the court had failed to remember the defendant's testimony which was the crux of the defense. *Id.* *See also Mitchell*, 152 Ill.2d at 322 (Illinois Supreme Court holds that because the trial court failed to recall and consider several relevant factors when ruling on the defendant's motion to suppress, the defendant was denied a fair hearing).

As in *Mitchell* and *Bowie*, the trial court incorrectly recalled the witness's testimony and concluded that Lee had removed her child from a morphine drip. The court's misapprehension

of the evidence greatly prejudiced Lee since the court concluded that Lee's act of removing her child from the morphine drip revealed her callous disregard for her child's pain. This erroneous finding led the court to conclude that Lee committed an aggravated battery against her child.

Additionally, Lee was denied a fair trial when the prosecution argued and the trial court unfairly concluded that Lee had "abducted" Christopher from the hospital. The prosecution argued in closing argument that Lee had abducted her child and the trial court expressly concluded that Lee had abducted her child. (R. E 17; E 20; H 18) The prosecution even informed the expert witness who gave stipulated testimony at trial that Lee had abducted the child from Loyola Medical Center. (R. E 19) However, the record fails to support that Lee abducted her child.

Child abduction is a criminal offense. 720 ILCS 5/10-5 (West 1999). Pursuant to the Illinois Criminal Code, a person commits child abduction when she intentionally violates any terms of a valid court order granting sole or joint custody, care or possession to another, by concealing or detaining the child or removing the child from the jurisdiction of the court. 720 ILCS 5/10-5(b)(1). A person can commit a child abduction in various other ways; however, all methods by which one commits a child abduction involve taking, detaining or concealing a child without legal authority to do so. 720 ILCS 5/10-5(b)(1-10).

Here, Lee had full legal authority to remove her child from the hospital, thus her actions cannot be fairly described as an abduction. To conclude that Lee "abducted" her child is to conclude that Lee committed an additional criminal act. However, no evidence exists that Lee committed the crime of "abduction." Thus, it was wholly improper for the trial judge to conclude that Lee committed the crime of child abduction.

By arguing that Lee abducted her child, the prosecution unfairly argued that Lee had

committed a separate crime for which no evidentiary support exists. Other crimes evidence is admissible if offered for a proper purpose. *People v. Hanson*, 313 Ill. App. 3d 491, 500, 729 N.E.2d 934 (1st Dist. 2000). However, even where a proper purpose exists, other crimes evidence may not be admitted unless the party offering it presents evidence that the other crime actually occurred and that the defendant participated in its commission. *Id.* These facts need not be established beyond a reasonable doubt but must be by more than a mere suspicion. *Id.*

In this case, the record is devoid of any evidence that Lee committed the criminal act of child abduction. The record shows that at the time Lee removed her child from Loyola Medical Center she had full legal authority over him. In fact, at the point Lee removed her child from Loyola, she had not even spoken with any police officer. Thus, Lee was not even aware that she was a suspect in a criminal investigation. Because no evidence supported the finding that Lee abducted her son from the hospital, it was highly improper for the prosecution to argue that Lee had committed this other criminal offense and Lee was denied a fair trial when the trial court agreed with the prosecutor's argument that Lee had abducted her son from the hospital.

Trial counsel failed to object to the prosecutor's argument and the trial court's reference to the "abduction," but raised the issue in a written post-trial motion. (C. 60-61) Trial counsel did not address the trial court's misapprehension concerning the morphine drip in a written post-trial motion but attempted to correct the trial court's mistake during Lee's sentencing hearing. (R. I 14)

If this Court concludes that trial counsel failed to adequately preserved this issue for review, this Court should nonetheless reach the merits of the issue. Where the basis of an objection is the conduct of the trial judge, the waiver rule is less rigidly applied in light of the fundamental importance of a fair trial and the practical difficulties involved in objecting to the

conduct of the trial judge. *People v. Woolley*, 2002 WL 254025 at *3 (Ill. February 22, 2002). *See also People v. Young*, 248 Ill. App. 3d 491, 497, 618 N.E.2d 1026 (1st Dist. 1993) (holding that waiver did not preclude court from considered defendant's claim that trial judge made improper remarks affecting his right to a fair and impartial trial).

Additionally, a reviewing court may address a waived issue as plain error where the evidence is closely balanced or where the error is of such magnitude that it denies the accused a fair and impartial trial. Ill. Sup. Ct. R. 615(a). For the reasons stated previously in *Argument III, supra*, the evidence here is very closely balanced, thus application of the plain error doctrine is wholly appropriate. Moreover, Lee's substantial right to a fair trial by an impartial trier of fact who considers only competent evidence was affected when the court grossly misapprehended the testimony and unfairly concluded that Lee had committed the separate crime of child abduction. Accordingly, despite trial counsel's failure to adequately preserve this issue for review, this Court should nonetheless consider this issue on the merits.

V. WHERE THE TRIAL COURT SHIFTED THE BURDEN OF PROOF TO THE DEFENSE BY EXPECTING LEE TO EXPLAIN HOW CHRISTOPHER WAS BURNED, LEE WAS DENIED A FAIR TRIAL.

Lee was denied a fair trial when the trial court shifted the burden of proof to Lee and convicted her because she failed to show that her son was burned accidentally rather than intentionally. U.S. Const. Amend, XIV. Ill. Const. art. I, sec. 2. 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). *See also People v. Weinstein*, 35 Ill.2d 467, 470, 220 N.E.2d 432 (1966). The burden of proof never shifts to the accused, but remains the responsibility of the prosecution throughout the

trial. *Sullivan v. Louisiana*, 508 U.S. 275 (1993). *Weinstein*, 35 Ill.2d at 470. Although the circuit court is presumed to know the law and properly apply it, when the record affirmatively shows the contrary, that presumption is rebutted. *People v. Virella*, 256 Ill. App. 3d 635, 638, 628 N.E.2d 268 (1st Dist. 1993).

Because this issue does not involve credibility or factual determinations, the standard of review is *de novo*. *People v. \$1,124,905 U.S. Currency*, 177 Ill.2d 314, 685 N.E.2d 1370, 1380 (1997); *People v. Saunders*, 288 Ill. App. 3d 523, 680 N.E.2d 790, 791 (4th Dist. 1997).

Here, the record affirmatively demonstrates that the trial judge expected Lee to show that her son was burned accidentally. In finding Lee guilty, the trial court stated that it would not draw an inference of guilt against Lee because she gave false identifying information to the hospital when she brought her son to the emergency room for treatment. (R. E 18) The court stated that she believed that Lee gave this false information out of fear of DCFS and not because she was avoiding criminal responsibility for burning her child. (R. E 18)

However, the court concluded that Lee was guilty because she gave two inconsistent exculpatory statements about how the child was injured. The court stated, “[T]he fact that she is switching stories in midstream here when she has a child burned lying in a hospital bed, I believe is evidence of guilty. She goes to another story. Her stories don’t add up.” (R. E 19) The court then stated the following:

The defendant has no burden to prove this was accidental, but there is not one scintilla of evidence to show this 13-month old child accidentally received these burns. Once taken to Loyola you may have a disagreement with a nurse, you may not like the nursing care, move your child. You do not believe that it’s an abduction. I’m telling you when you take a child off a morphine drip, saying you going to a play room, leave, go to your sister’s home, leave the baby completely at you sister’s home wrapped, not knowing when that morphine is going to again result in excruciating pain for a 13-month old, and just go on your merry way until the police track that baby down and have to return that child to Cook County Burn Unit, that is an abduction. (R. E 20)

While paying lip service to the standard of proof, the trial court convicted Lee because she failed to prove that her child was accidentally injured. The court observed that not one scintilla of evidence existed to show that the child accidentally received the burns. By making this observation, the court unfairly shifted the burden to Lee. It is not for the defendant to establish his innocence, but for the State to establish his guilt. *People v. Benson*, 19 Ill.2d 50, 61, 166 N.E.2d 80 (1960). Critically, the State would have no reason to introduce evidence that Christopher was accidentally burned. Thus, when the court observed that no evidence had been presented to show that the burn occurred accidentally, the court was clearly referring Lee's failure to present such evidence.

As discussed in Argument III, *supra*, the State cannot rely on speculation or conjecture to prove an essential element of the crime. *Laubscher*, 183 Ill.2d at 336. Moreover, suspicious circumstances will not substitute for proof, and probabilities cannot, by themselves, lead to a conviction. *In re Whittenburg*, 37 Ill. App. 3d 793, 795, 347 N.E.2d 103 (3rd Dist. 1976). A criminal conviction cannot be based on the weakness of the defendant's case, nor the defendant's failure to explain what happened, but must be based on the State's ability to establish each element of the crime beyond a reasonable doubt. *People v. Hess*, 24 Ill. App. 3d 299, 303, 320 N.E.2d 344 (5th Dist. 1974).

In this case, the State presented no direct evidence of Lee's guilt and relied entirely on Lee's suspicious activity at the hospital and her inconsistent exculpatory statements to demonstrate her guilt. In finding Lee guilty based on this evidence, the trial judge commented that Lee had failed to show that the Christopher's burns occurred accidentally. The trial court convicted Lee based on the weakness of her case and her failure to explain how Christopher was burned, rather than the State's ability to establish each element of the offense beyond a

reasonable doubt.

As argued in Argument III, Lee contends that her conviction must be reversed outright where the State failed to prove her guilty beyond a reasonable doubt. However, even if this Court declines to reverse Lee's conviction outright, the matter must be remanded for a new trial where the State's evidence is subjected to the proper burden of proof and Lee is not expected to present evidence of her innocence.

VI. THE TRIAL COURT ERRED IN DENYING LEE'S MOTION IN ARREST OF JUDGMENT IN VIOLATION OF HER SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO NOTICE UNDER THE FEDERAL CONSTITUTION AND ARTICLE I, SECTION 8 OF THE ILLINOIS CONSTITUTION WHERE LEE'S INDICTMENT FAILED TO APPRISE HER OF THE PRECISE OFFENSE CHARGED WITH SUFFICIENT SPECIFICITY TO PREPARE A DEFENSE.

Veronica Lee was denied her statutory and constitutional rights to notice where the State failed to specifically apprise her of the nature of the offense with which she was charged. U.S. Const. Amends. VI and XIV; Ill. Const. 1970, art. I, secs. 2 and 8. 725 ILCS 5/111-3 (West 1998). The State charged Veronica Lee with one count of aggravated battery of a child. The indictment read that on or about March 19, 1998:

Veronica Lee committed the offense of aggravated battery of a child in that she, being eighteen years of age or older, intentionally or knowingly and without legal justification, caused great bodily harm to Christopher Smith, a child under the age of thirteen years. (C. 15)

In its Bill of Particulars, the State alleged that the incident occurred at approximately 1:00 p.m. at or near 2637 W. 69th St. in Chicago, Illinois. (C. 19)

After Lee was convicted, trial counsel filed a Motion in Arrest of Judgment alleging that

the indictment was defective as it lacked specificity and deprived Lee of the opportunity to defend against the evidence and to potentially plead double jeopardy. (C. 57) The trial court denied Lee's Motion in Arrest of Judgment. (R. H 6)

Lee's indictment failed to adequately inform her of the nature of the offense with which she was charged. Our federal and state constitutions require that the accused be informed of the nature and cause of the criminal accusations made against him. U.S. Const. Amends.VI and XIV; Ill. Const. 1970, art. I, secs. 2 and 8. *In re Oliver*, 333 U.S. 257, 273 (1948); *People v. Nash*, 173 Ill.2d 423, 428, 672 N.E.2d 1166 (1996). In Illinois, this general right is given substance by section 111-3 of the Code of Criminal Procedure. 725 ILCS 5/111-3 (West 1998); *People v. Devine*, 295 Ill. App. 3d 537, 543, 692 N.E.2d 785 (1st Dist. 1998). Section 111-3 requires that the charging instrument set forth the nature and elements of the offense charged. 725 ILCS 5/111-3(a)(3) (West 1998). *Nash*, 173 Ill.2d at 429. Where the statute defining the offense specifies the type of conduct prohibited, this requirement is satisfied if the charging instrument states the offense in the language of the statute. *Id.* Where, however, the statute does not define or describe the act or acts constituting the offense, a charged couched in the language of the statute is insufficient, and the facts which constitute the crime must be specifically set forth. *Id.*

Where as here, a challenge to the charging instrument is made for the first time in a Motion in Arrest of Judgment after trial, a defendant must show that the charging instrument failed to adequately apprise the defendant of the precise offense charged with sufficient specificity to prepare his defense and allow pleading a resulting conviction as a bar to future prosecution out of the same conduct. 725 ILCS 5/116-2(c) (West 1998). The sufficiency of a charging instrument presents a question of law; therefore, a trial court's decision to deny a

defendant's Motion in Arrest of Judgment shall be reviewed *de novo*. See *People v. Swanson*, 308 Ill. App. 3d 708, 711, 721 N.E.2d 630 (2d Dist. 1999).

Here, Lee's charge for aggravated battery of a child was pled with insufficient detail to allow Lee to prepare a competent defense. Lee's indictment tracked the wording of the aggravated battery of a child statute. (C. 15) The indictment simply alleged that Lee intentionally caused great bodily harm to her child. (C. 15) However, the indictment failed to specify what serious bodily injury the child suffered and what conduct on the part of Lee caused the serious bodily injury. As a result, Lee was left to speculate as to the nature of the underlying offense and was denied the opportunity to prepare a competent defense.

Although a statute, by its words alone, may sufficiently apprise an accused of the criminal charge, the aggravated battery of a child offense is one that is only generally described by the statute. Therefore, the State is required to plead additional specific facts describing the particular conduct constituting the offense so as to apprise the accused of the nature and elements of the offense. See, e.g., *People v. Swanson*, 308 Ill. App. 3d 708, 712, 721 N.E.2d 630 (2d Dist. 1999) (holding that information charging the defendant with disorderly conduct was insufficient to apprise the defendant of the offense so that she could prepare a competent defense); *People v. Nash*, 173 Ill.2d 423, 672 N.E.2d 1166 (1996) (noting that the subsection (a)(2) of the mob action statute which prohibits the assembly of two or more person to do an unlawful act cannot be pled in general terms but the facts constituting the crime must be specifically set forth); *People v. Hayes*, 75 Ill. App. 3d 822, 825, 394 N.E.2d 80 (2d Dist. 1979) (holding that the reckless conduct statute is non-specific, thus the charging instrument must provide more specific detail of the alleged criminal conduct than those contained in the statute itself).

Lee's indictment which accused her merely of "causing great bodily harm" is generic

language and did not adequately apprise the defendant of the nature of the offense. The appellate court has previously held that the statutory language, “caused bodily harm” is generic language. *People v. Baugh*, 145 Ill. App. 3d 133, 137 495 N.E.2d 688 (4th Dist. 1986). In *Baugh*, the defendant was charged with the offense of aggravated battery in violation of section 12-4(b)(10) of the criminal code. *Id.* at 133. The defendant alleged that his indictment was defective as it did not specifically describe the acts which constituted the offense. *Id.* at 137. The defendant’s indictment read in pertinent part:

That Betty Lee Baugh * * * committed the offense of aggravated battery, in that the said defendant on numerous occasions knowingly, and without legal justification, caused bodily harm to the Louise B. Carli, a person over the age of sixty, in that the defendant struck, bruised, or burned Louise B. Carli about the body. *Id.* at 136.

The appellate court observed the indictment’s language that the defendant “caused bodily harm” are generic words from the statute. *Id.* at 137. However, the court found the indictment sufficient since the State added the particulars that the defendant “struck, bruised, or burned” the victim. *Id.*

In contrast, Lee’s indictment merely reads that she cause serious bodily harm ro Christopher Smith. The State failed to alleged any particulars concerning the manner in which the crime was carried out or even what injuries were suffered by Christopher. Because the indictment merely charged Lee with causing great bodily harm to Christopher and failed to set forth any of the specific acts that constituted the crime of aggravated battery of a child, Lee was denied the opportunity to prepare a competent defense.

In an analogous case, the defendant was charged with obstructing a peace officer. *People v. Hughes*, 229 Ill. App. 3d 469, 470, 592 N.E.2d 668 (4th Dist. 1992). The indictment read in pertinent part that defendant Larry Hughes, “knowing Inv. Jerry Davis, to be a peace officer did

knowingly obstruct said officer in the performance of an act with his official capacity, to wit: while trying to service an arrest notice to David Hughes.” *Id.* at 470-71. The appellate court held that the indictment did not sufficiently apprise the defendant of the precise nature of the offense with which he was charged and precluded him from preparing a competent defense.

Critically, the court observed that the statute defining the offense of obstructing a peace officer is in general terms as it does not particularize the offense and does not describe the acts which constitute the offense. *Id.* at 473. The court held that a conviction for resisting or obstructing a peace officer requires an act of physical resistance or obstruction; however, an indictment charging the defendant with resisting or obstructing a peace officer solely in the language of the statute is not sufficient. *Id.* Rather, the charge must contain language describing the acts alleged to have obstructed the officer. *Id.*

Similarly here, the statute defining the offense of aggravated battery of a child is in general terms as it does not particularize the offense and does not describe the act which constitutes the offense. Although a conviction for aggravated battery of a child requires an act that causes serious bodily harm, an indictment charging the defendant with aggravated battery solely in the language of the statute is insufficient. The charge must contain language describing the acts alleged to have caused the bodily harm. Because Lee’s indictment merely stated that Lee caused serious bodily harm to Christopher and failed to particularize the act that constituted the offense, Lee was not apprised of the precise offense with which she was charged in order to prepare a competent defense. Accordingly, the trial court erred in denying Lee’s Motion in Arrest of Judgment, and this Court should reverse Lee’s conviction for aggravated battery of a child.

VIII. LEE'S CONSECUTIVE SENTENCE IMPOSED UNDER 730 ILCS 5/5-8-4(h) MUST BE MODIFIED TO RUN CONCURRENTLY BECAUSE 5-8-4(h) WHICH MANDATES A TRIAL COURT TO IMPOSE A CONSECUTIVE SENTENCE WHERE THE DEFENDANT COMMITTED A FELONY WHILE ON PRE-TRIAL RELEASE IS UNCONSTITUTIONAL UNDER *APPRENDI V. NEW JERSEY*.

In *Apprendi v. New Jersey*, 530 U.S. 466, 147 L.Ed.2d 435 (2000), the United States Supreme Court held that the Constitution requires that any fact that increases the prescribed range of penalties for an offense, other than the fact of a prior conviction, must be submitted to the jury and proved beyond a reasonable doubt. Lee's sentence in this case, 98 CR 09679, was made to run consecutive to the sentences imposed in two separate narcotics cases, 96 CR 30630 and 96 CR 09179. (R. I 23). Although the trial court never expressly stated the reason for imposing the consecutive sentence, the trial court noted that the defendant was out on bond on the two narcotics cases when she was arrested for the aggravated battery of a child offense. (R. I 4) Thus, it seems clear that Lee's 12-year consecutive sentence was imposed pursuant to 730 ILCS 5/5-8-4(h) (West 1999), which mandates a consecutive sentence when a defendant is on pretrial release on one case and he was charged with committing another offense.

Because 5/5-8-4(h) allows the court to impose an increased penalty without the fact that defendant is on pretrial release being alleged in the indictment, submitted for a jury determination, and proved beyond a reasonable doubt, Section 5-8-4(h) is unconstitutional. Where Lee was denied her right to due process, notice, and trial by jury by this unconstitutional statute, her consecutive sentence should be modified to run concurrently to her other sentences. U.S. Const. Amends. VI, XIV.

The propriety of Lee's sentences is a matter of law; therefore, *de novo* review of the issue is appropriate. *People v. Fisher*, 184 Ill.2d 441, 704 N.E.2d 67, 71-72 (1998).

In *Apprendi*, the United States Supreme Court invalidated a New Jersey statute permitting a sentencing judge to enhance a defendant's sentence on a crime beyond the prescribed maximum if the judge found by a preponderance of the evidence that the crime was committed with a biased purpose. *Apprendi*, 147 L.Ed.2d at 441. The Court reasoned that, although sentencing judges do have discretion in imposing sentences, that discretion is limited to choosing a sentence within the range prescribed for the particular offense. *Apprendi*, 147 L.Ed.2d at 449. The Court held that, other than the fact of a prior conviction, any fact that increases the prescribed range of penalties for an offense must be submitted to the jury and proved beyond a reasonable doubt. *Apprendi*, 147 L.Ed.2d at 458-459.

Section (h) of 5/5-8-4 mandates that consecutive sentences be imposed based upon a factual finding that the defendant committed one offense while on pre-trial release for another offense. That finding is made by the sentencing court, without a jury, and based upon merely a finding by the preponderance of the evidence. Under *Apprendi*, Section 5-8-4(h) is unconstitutional in that it denies the defendant's rights to due process and a jury.

In *State v. Gross*, 31 P.3d 815 (Ariz. Ct. App. 2001) *review denied*, the Arizona Appellate Court held that a sentence enhancement based on defendant's commission of an offense while on pre-trial release for a separate felony violates *Apprendi*. The *Gross* Court ruled that a statute which gives a sentencing court authority to determine that defendant committed the offense while on pre-trial release runs afoul of *Apprendi* and is unconstitutional. The *Gross* Court asserted that *Apprendi*'s exception for "the fact of a prior conviction" did not extend to release status.

Defendant acknowledges the Illinois Supreme Court's decisions in *People v. Wagener*,

196 Ill. 2d 269, 752 N.E.2d 430 (2001), and *People v. Carney*, 196 Ill. 2d 518, 752 N.E.2d 1137 (2001), in which the Illinois Supreme Court rejected the argument that consecutive sentences implicate the concerns articulated in *Apprendi*. The Supreme Court held that consecutive sentences only affect the manner in which the defendant's sentences are served and do not extend a defendant's sentence beyond a prescribed penalty range. *Wagener*, 196 Ill. 2d at 287; *Carney*, 196 Ill. 2d at 531. However, as *Apprendi* makes clear, labels cannot protect a statute from attack under the due process clause when that statute operates in precisely the manner that has been held to violate a defendant's due process rights. *Apprendi* instructs that the relevant inquiry is one not of form, but of effect. *Apprendi*, 147 L.Ed.2d at 457. Accordingly, *Wagener's* and *Carney's* holding that 730 ILCS 5/5-8-4 is outside the purview of *Apprendi* rationale is anomalous.

Because 5/5-8-4(h) is unconstitutional as a result of its failure to require basic procedural safeguards to the accuracy of the process, Lee's consecutive sentence must be vacated and modified to run concurrently.

CONCLUSION

For the foregoing reasons, Veronica Lee, Defendant-Appellant, respectfully requests that this Court reverse her conviction, or in the alternative, reverse her conviction and remand for a new trial.

Respectfully submitted,

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