



**No. 1-01-2300**

**IN THE**

**APPELLATE COURT OF ILLINOIS**

**FIRST DISTRICT**

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

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**REPLY BRIEF AND ARGUMENT FOR DEFENDANT-APPELLANT**

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**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.**

The State concedes that Nurse Smith was not qualified as an expert witness and did not offer expert testimony on the cause of Christopher Smith's burn injuries. (St. Br. 17) However, the State argues that Nurse Smith was permitted to give testimony testify regarding her lay opinion about Smith's burns injuries since she was a registered nurse with training and experience in the field of treating burn injuries. (St. Br. 17)

Simply put, no authority exists to support the State's argument. The State contends that Illinois law provides that expert or lay witnesses may provide an opinion on an ultimate issue in a case. (St. Br. 18) Appellant does not dispute this principle. However, contrary to the State's characterization of Appellant's argument, Appellant does not contend that Nurse Smith's lay testimony was improper because it embraced an ultimate issue in the case. Rather, Nurse Smith's lay testimony was improper as it was not based on personal knowledge. *People v. Novak*, 163 Ill.2d 93, 102, 643 N.E.2d 762 (1994); *People v. Crump*, 319 Ill. App. 3d 538, 542, 745 N.E.2d 692 (3d Dist. 2001).

Appellant agrees that if Nurse Smith had personal knowledge of Christopher's injuries, she would certainly have been permitted to testify as a lay witness to the ultimate question of how his injuries occurred. Moreover, if Nurse Smith had been qualified to render expert testimony, she would have been permitted to testify to the ultimate question of fact. However,

nurse Smith was not qualified as an expert and did not have personal knowledge concerning Christopher's injuries, therefore she was not permitted to render an opinion about whether the injuries occurred accidentally or intentionally. In short, Nurse Smith's testimony concerning Christopher's injuries was improper as it exceeded the scope of proper lay opinion testimony, not because it went to an ultimate question in the case. However, it is worth noting that the improper testimony *was* particularly prejudicial since it went to the ultimate question in the case. *Crump*, 319 Ill. App. 3d at 542.

While conceding that Smith was not qualified as an expert, the State repeatedly argues that because Smith had training and experience in treating burn injuries, her lay testimony on the question of whether Christopher's injuries occurred accidentally or intentionally was proper. (St. Br. 21-23) However, the State fails to understand that without personal knowledge Smith was not permitted to testify to her belief that Christopher's injuries occurred intentionally, regardless of her experience.

The State attempts to carve out a hybrid rule allowing lay witnesses to testify as experts on matters outside their personal knowledge. On one hand, the State concedes that Smith was not qualified as an expert, but nonetheless argues that Smith's knowledge and experience permitted her to give expert testimony as a lay witness. No authority exists to support the State's position. A witness may testify as either a lay witness with personal knowledge or an expert witness. If the witness is not qualified as an expert witness, as is the case here, her training and experience is irrelevant and the question for the court is whether the witness has personal knowledge of the matter to which she testifies.

The Illinois Supreme Court's decision in *Novak* is highly instructive on this issue. In

*Novak*, the defendant was convicted of aggravated criminal sexual assault after the State presented testimony 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. *Novak*, 163 Ill.2d at 97-98. The defense argued that the defendant only applied various sets of muscle strength and flexibility exercises on the victim's neck and shoulders. *Id.* at 98.

In rebuttal, the State presented the opinion testimony of two individuals who according to the State possessed familiarity in the field of strength and 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 held that the witnesses' testimony was inadmissible as lay opinion testimony because the witnesses did not see the defendant administer any of these exercises and their conclusion were based on second-hand knowledge. *Id.* at 103. The supreme court observed that proper lay witness testimony must be limited to matters based on concrete facts that are perceived by the witnesses own senses. *Id.*

This case is directly on point. Nurse Smith's testimony was inadmissible lay opinion testimony because Smith was not present when Christopher was injured and did not see the manner in which he was injured. Smith possessed no first-hand knowledge that permitted her to opine on the manner in which Christopher was injured.

It is true that in *Novak*, the Illinois Supreme Court found that the witnesses' testimony, while not admissible lay opinion testimony, was admissible as expert testimony and nonetheless affirmed the defendant's conviction. However, unlike *Novak*, the record here does not support a finding on review that Nurse Smith was qualified to offer expert testimony on the cause and manner of Christopher's injuries. As pointed out in great detail in Appellant's opening brief, the State never offered Nurse Smith as an expert witness, the trial court agreed that she was not qualified as an expert, and Nurse Smith herself admitted that she was not an expert in diagnosing burn injuries but rather her training and expertise was in the field of *treating* burn injuries. (App. Br. 17-18) (R. E. 19-20)

As pointed out in Appellant's opening brief, the trial court's failure to limit the scope of Smith's testimony resulted in Smith placing unreliable evidence before the trial judge. Specifically, Appellant contends that Nurse Smith erroneously testified that immersion burns could never occur accidentally, a proposition that is directly rebutted by ample legal and scientific authority. *See* Purdue, Gary F. M.D., John L. Hunt M.D., and Paul R. Prescott, *Child Abuse by Burning - An Index of Suspicion*, 28 J. of Trauma, Vol.2 at 223 (1988). *In re P.P.*, 261 Ill. App. 3d 598, 633 N.E.2d 965, 970 (1st Dist. 1994)(recognizing that pattern of injury by itself does not resolve the question of whether the injury occurred intentionally or accidentally). In response the State contends that Appellant is mischaracterizing Nurse Smith's testimony and that Smith never said that immersion burns could not have an accidental cause.

The record speaks for itself. After testifying that an immersion burn would show a definite line of demarcation, the prosecutor asked Smith:

Q: You indicated there is a definite line of demarcation in an 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.

Despite the State's labored interpretation, this record shows that Smith offered testimony that burns that show definite lines of demarcation are immersion burns and that all immersion burns have intentional causes. The record also shows that the trial court relied on this dubious proposition in concluding that Christopher was intentionally burned by Veronica Lee.

The State faults Appellant for relying on medical articles to refute Nurse Smith's testimony instead of presenting live expert testimony at her trial. (St. Br. 25) In making this argument, the State underscores the prejudice suffered by the Appellant. Appellant may very well have attempted to present expert testimony to rebut Smith's testimony as she has been given notice that the State was planning on presenting "expert" testimony in the guise of lay person testimony. Furthermore, because Smith was never properly qualified as an expert and the trial court did not recognize Smith as an expert, it is unlikely that Lee would have been permitted to rebut Smith's testimony with expert testimony of her own. In fact, the court refused to allow defense counsel to voir dire Smith on her qualifications, noting that cross-examination as to her credentials was irrelevant since she was not testifying as an expert. Finally, Appellant would point out that she had no obligation to present evidence to refute Smith's testimony at trial. The State well knows that it bears the burden of proving beyond a reasonable doubt that Christopher's

injuries occurred intentionally.

As argued above and in Appellant's opening brief, Illinois law establishes that Smith's testimony concerning the cause of Christopher's injuries was improper since she was not qualified as an expert witness and possessed no personal knowledge about Christopher's injuries. Appellant draws this court's attention to several instructive medical articles to show that the court's failure to limit Smith's testimony resulted in Smith placing unreliable "expert" evidence before the judge. (Deft. Br. 19-23) *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*, 28 J of Trauma, Vol. 2 at 223 (1988) 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); 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).

Critically, the State makes no attempt to distinguish *People v. Crump*, 319 Ill. App. 3d 538, 745 N.E.2d 692 (3d Dist. 2001) and *People v. McClellan*, 216 Ill. App. 3d 1007, 576 N.E.2d 481 (4<sup>th</sup> Dist. 1991), both instructive cases on which Appellant relies in her opening brief. (Deft. Br. 9-10) Rather, the State refutes Appellant's argument that Smith's testimony is largely hearsay as it was not based on personal knowledge by arguing that "taking defendant's argument to its logical conclusion, lay opinion testimony would never be admissible since what a lay witness knows based on experience and education is inevitably learned from some other source." (St. Br. 21)

Again, evincing a fundamental misunderstanding of the law, the State suggests that lay witnesses may testify to matters outside their knowledge so long as their testimony is based on

their experience and education. The State seems to confuse the legal standard for the admission of expert testimony with the legal standard for the admission of lay person testimony. Contrary to the State's mistaken assumption, lay witnesses may not testify to matters outside their personal knowledge regardless of their education or experience. *Novak, supra*.

**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.**

In her opening brief, appellant argued that the prosecution failed to lay a proper foundation for the admission of Dr. Latenser's stipulated testimony when it failed to establish that the factors relied on by the expert were of the type reasonably relied on by experts in the field. The State makes no attempt to dispute this point. Rather, the State contends that Appellant waived any attack on Dr. Latenser's testimony when she failed to object to the stipulation at the time of trial.

Appellant contends that this court should consider this claim of error as it affected her fundamental right to a fair trial and the evidence of guilt was closely balanced. Ill. Sup. Ct. R. 615(a). Other than the defective stipulation, the State presented no expert testimony demonstrating that Christopher's injuries were intentionally caused. Thus, the State cannot claim that overwhelming evidence existed to show that Christopher's injuries were intentionally caused. Because Dr. Latenser's expert opinion lacked a proper foundation and was based on unfounded or unreliable facts not of the type generally relied on by experts in her field, Lee was denied her substantial right to a fair trial. Accordingly, this error should be reviewed under the plain error doctrine despite the fact that defendant stipulated to Dr. Latenser's testimony.

Even if the State is correct that defense counsel waived a claim of error, Appellant contends that she received ineffective assistance of counsel when her trial attorney stipulated to

the unreliable expert testimony of Dr. Latenser. (Deft. Br. 34-36) Relying on *In re. D.M.*, 258 Ill. App. 3d 669, 631 N.E.2d 341 (1<sup>st</sup> Dist. 1994), the State contends that trial counsel was not ineffective merely for stipulating to Latenser's expert testimony. Appellant does not dispute this point. However, this case is radically different than *In re D.M.* where trial counsel did not merely stipulate to testimony but rather stipulated to expert testimony that lacked a proper foundation, was based on unreliable hearsay, and established an ultimate question of fact.

The State further contends that Appellant was not prejudiced by the expert stipulation since other evidence established that Appellant intentionally burned her son. The record fails to support the State's position. While it is true that nurse Smith testified that Christopher's injuries could not have occurred accidentally, as set forth in the previous argument, nurse Smith's testimony concerning the cause of Christopher's injuries was inadmissible since she lacked personal knowledge about the incident and was not qualified to testify as an expert that the injuries were intentionally inflicted.. *Argument I.* Although the trial judge did consider the photographs in the case along with the fact that the defendant gave conflicting explanations for how the injuries occurred, neither of these pieces of evidence established by proof beyond a reasonable doubt that the injuries were intentionally caused.

The photographs merely showed that Christopher may have suffered immersion burns; however, as established previously, this finding does not resolve the question of whether the burn occurred intentionally or accidentally. After all, a person can sustain an immersion burn accidentally. Moreover, the trial judge may have concluded that the defendant exhibited a guilty conscience by offering conflicting explanations for her son's injuries; however, it does not necessarily follow that she intentionally burned her son. As recognized by the trial judge, the

defendant may have acted suspiciously because she was scared that her child would be taken by DCFS or her behavior could have been the result of trying to protect a third party. At any rate, Lee's evasive behavior after the incident cannot in and of itself establish that she purposefully burned her son.

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. Accordingly, Lee was denied a fair trial when the prosecution offered Dr. Latenser's stipulated expert testimony to establish that Christopher's injuries were intentionally inflicted, and Lee was denied effective assistance of counsel when defense counsel stipulated to the unreliable expert testimony of Dr. Latenser.

**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.**

At the outset, the State chides Appellant for asserting that the question of the defendant's guilt is a question of law to be reviewed *de novo*. (St. Br. 35) Contrary to the State's argument, Appellant agrees that the appropriate standard of review here is whether, viewing the evidence in the light most favorable to the State, a rational trier of fact could have found all the essential elements of the offense. *Jackson v. Virginia*, 443 U.S. 307 (1979) (Def. Br. 37) However, our Illinois Supreme Court has also held that where the defendant is not disputing the facts, the question of defendant's guilty 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 merely maintains that it failed to prove her guilt beyond a reasonable doubt, the appropriate standard of review is *de novo*.

**A. The State Failed to Prove Beyond a Reasonable Doubt that Lee was Responsible for Injuring her Child.**

Appellant argues in her opening brief that her conviction must be reversed where the State failed to establish that she was the person who actually injured her son. In response, the State contends that Lee never contested her identity as the perpetrator at trial, but rather, only contested whether the injury occurred intentionally. (St. Br. 37)

Contrary to the State's argument, Lee made no admissions demonstrating that she was the

person responsible for injuring the child. Moreover, her defense was not limited to the question of whether the burns occurred intentionally or accidentally. The fact that Lee's attorney argued that the State failed to show that the burns occurred intentionally does not amount to an admission that she was responsible for causing the injuries. Again, the State forgets that it bears the burden of establishing by proof beyond a reasonable doubt each and every element of the offense, including the identity of the perpetrator. The State failed to present sufficient evidence to establish this element of the offense.

The State suggests that it met its burden of establishing the identity of the shooter, because the record shows that the defendant alone brought her child to the hospital for medical care, and the defendant offered explanations for the injuries that involved her. (St. Br. 37-38) The State fails to explain how Lee's act of bringing her child to the hospital for medical care demonstrates that she was the person responsible for injuring the child. Arguably, the fact that she brought the child immediately to the hospital for medical care weighs against a finding that she was the person responsible for injuring the child. If Lee was responsible for burning her son, presumably she would have wanted to avoid scrutinizing questions from the hospital staff and would have delayed treatment for her son or arranged to have him brought to the hospital by another person. Critically, had Lee failed to bring her child to the hospital for immediate medical care or had someone else brought the child to the hospital, the State would argue that Lee's conduct demonstrated her guilty conscience. In short, no inference of guilt can be derived from Lee's act of bringing her child to the hospital. *People v. Steading*, 308 Ill. App. 3d 934, 940 (2d Dist. 1999) (holding that a fact cannot be inferred when a contrary fact could be inferred with equal certainty from the same evidence).

Furthermore, the fact that Lee gave two false exculpatory statements explaining how the injuries occurred is at most evidence of a guilty conscience which alone cannot establish by proof beyond a reasonable doubt that she was the person responsible for burning the child. The State argues that Lee's false exculpatory statements is "persuasive evidence of consciousness of guilt" and points out that the trial judge also found that Lee's false exculpatory statements were evidence of a guilty conscience. (St. Br. 41) Appellant does not fault the trial court for concluding that Lee's false exculpatory statements were evidence of a guilty conscience; however, as this Court held in *Puente*, false exculpatory statements are not conclusive evidence of guilt. The law recognizes that false exculpatory statements alone cannot establish that the defendant committed a crime, because they can be given for a variety of reasons, including a desire to protect the actual perpetrator, or in this case, possibly a desire to avoid charges of neglect from DCFS. *See People v. Puente*, 98 Ill. App. 3d 936, 942 (1<sup>st</sup> Dist. 1981).

Although the State devotes several pages to reviewing the evidence in this case, it fails to point to any evidence, other than Lee's false exculpatory statements, that shows that she was the actual perpetrator of the crime. The State contends that it was under no duty to prove that the other individuals living in the house were not responsible for the crime. The State points out that it is not required to rule out "every hypothesis of innocence." (St. Br. 38) Appellant agrees that the State is not required to rule out every hypothesis of innocence in order to convict the defendant; however, the State *is* required to demonstrate that the person charged actually committed the offense. Proof of mere presence and opportunity to commit a crime is insufficient to sustain a conviction. *People v. Dowaliby*, 221 Ill. App. 3d 788, 797 (1<sup>st</sup> 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.*

At the most, the State's evidence established that Lee was present when her son Christopher was injured. Lee made no admissions that she intentionally burned her son, and the State failed to show that she had exclusive control over the child when the injuries occurred. Because there were as many as three adults present when Christopher was injured, and Lee made no admissions that she intentionally burned her son, the State failed to show that Lee was the actual perpetrator of the crime.

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

The State contends that Nurse Smith's testimony concerning Christopher's injuries and the stipulated testimony of Dr. Latenser were sufficient to establish that Christopher's injuries were intentionally inflicted. As set forth in great detail in Appellant's opening brief, nurse Smith's testimony failed to establish that Christopher's injuries were intentionally inflicted because Smith had no personal knowledge about the incident, and she was not qualified to give an expert opinion on the question of whether Christopher's injuries were intentionally inflicted or the product of an accident. *See Argument I and III.*

Moreover, Dr. Latenser's stipulated testimony failed to establish the *mens rea* requirement as she: (1) merely concluded that Christopher's injuries were consistent with child abuse to a relative degree of medical certainty; (2) based her testimony on unfounded evidence; and (3) failed to address the feasibility of Lee's explanations for the injuries. (Def't. Br. 48-53) Rather than address Lee's arguments, the State accuses appellant of "splitting hairs," claiming that the stipulation "says what it says," and if appellant intended to dissect each and every word

of the stipulation, she should have done so a trial. (St. Br. 44)

Appellant does not intend to “dissect” each word of Dr. Latenser’s stipulated testimony. She merely contends that viewing the stipulation in the light most favorable to the State, it fails to establish that Christopher’s injuries were intentionally inflicted. Contrary to the State’s argument, appellant is permitted to advance this argument on appeal despite the fact that she did not contest the stipulation at trial. The State overlooks the fundamental principle on which our criminal justice system is based, that is, the State is required to prove each and every element of the offense by proof beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970).

Stipulations do not relieve that State of its burden. Although Lee stipulated to Dr. Latenser’s testimony, she did not stipulate that the testimony established that she purposefully burned her son. Rather, Lee maintains that the stipulation, viewed in the light most favorable to the State, fails to establish that Christopher’s injuries were intentionally inflicted. (Def’t. Br. 48-53)

**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 WAS DENIED A FAIR TRIAL.**

The State does not dispute that the trial judge mistakenly concluded that Lee removed her child from an intravenous morphine drip before removing him from the hospital. (St. Br. 50) However, the State contends that the trial judge’s misstatement of the evidence is of “little consequence”. (St. Br. 47) As set out more fully in Lee’s opening brief, the Illinois Supreme Court and this Court have held that 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. *See People v. Mitchell*, 152 Ill.2d 274, 323 (1992); *People v. Bowie*, 36 Ill. App. 3d 177, 180 (1<sup>st</sup> Dist. 1976).

The State contends that this case is distinguishable from *Bowie*, because in *Bowie*. the record reflected that the trial judge failed to remember evidence critical to the defendant’s claim of self-defense, while in this case, the trial judge merely incorrectly recalled that the child had been removed from an intravenous morphine drip rather than oral morphine treatment. The State implies that this distinction is inconsequential and did not impair Lee’s right to a fair trial.

Lee would agree with the State’s proposition if the record failed to reflect that the trial judge’s misapprehension of the record did not contribute to her guilty finding. Instead, the record shows that the trial judge commented more than once on Lee’s act of removing her child from the intravenous morphine drip. The judge apparently found this act reprehensible and concluded that as a result of this conduct, she probably burned her son. Because the record fails to support

the court's factual finding, and the trial court clearly relied on the mistaken fact in finding Lee guilty, Lee was denied a fair trial.

The State would like to defend each of the trial judge's comments in isolation; however, a review of the trial judge's comments as a whole show that she convicted Lee based largely on Lee's conduct at the hospital. (R. E 20; H 17-18) Critically, the entire tenor of the trial judge's comments show that she was offended by Lee's conduct at the hospital and concluded that based on Lee's off-putting behavior, she must be guilty of burning the child. Lee maintains that this conclusion was unreasonable in light of the fact that Lee did not actually remove her child from an intravenous morphine drip, nor did she "abduct" her child from the hospital.

The State argues that trial judge's comments regarding the alleged abduction were merely in response to defense counsel's argument. Specifically, the State contends that defense counsel stipulated to Dr. Latenser's testimony, which contained a reference to the child's abduction from Loyola Medical Center, and then argued in closing arguments that Lee's conduct did not amount to an abduction of the child. (R. E 5)

Lee fails to understand the logic of the State's argument. Although Lee stipulated to the testimony of Dr. Latenser, she did not admit to its truth. *See People v. Ortega*, 83 Ill.App.2d 49, 226 N.E.2d 426 (1<sup>st</sup> Dist. 1967) (finding that stipulated testimony of expert witness that substance was found to be a controlled substance did not mean that substance was in fact a controlled substance or that defendant admitted that it was a controlled substance). In other words, the stipulated testimony of Latenser did not amount to an admission on Lee's part that she "abducted" the child from the hospital. Moreover, in response to the stipulated testimony of Dr. Latenser, defense counsel argued that Lee's conduct of removing her child from the hospital was

not an abduction. Such an argument was wholly proper in light of the fact that the stipulated testimony of Dr. Latenser showed that Latenser was informed, presumably by the prosecution, that Lee “abducted” the child from the hospital. (R. E 5)

Despite any evidence that Lee “abducted” her child from the hospital, the trial court concluded that Lee had committed this additional criminal act, and that in light of Lee’s conduct, it was reasonable to infer that she was responsible for burning the child. (R. E 20; H 17-18) Although the State maintains that the trial judge did not consider this a “child abduction” case, and did not conclude that Lee had committed an additional criminal act when she removed the child from the hospital, the record speaks for itself. (St. Br. 51) The trial judge expressly stated that Lee “abducted” her child from the hospital. Whether one chooses to apply a lay or legal definition to the word “abducted,” the implication is the same, namely that Lee unlawfully took her child from the hospital. Contrary to the State’s position, it was improper for the trial judge to conclude that Lee “abducted” her son from the hospital when the evidence simply did not support such a conclusion. While the trial judge may have concluded that Lee showed bad judgment by taking Christopher from the hospital before he was properly discharged, Lee was not guilty of any crime as she had full legal authority over her son.

Moreover, it was improper for the judge to conclude that Lee was responsible for burning her son, the crime for which she was charged, because she removed him from an intravenous morphine drip and then took him out of Loyola Hospital. As stated above, this conclusion was improper as it was based on a misapprehension of the record, namely that Christopher had been removed from an intravenous morphine drip, and an unfounded conclusion that Lee had committed wrongdoing by removing Christopher from the hospital.

The State faults appellant for making much of the trial judge's comments; however, the trial judge's comments were not merely passing references to the evidence that had no bearing on her findings. Rather, the record shows that the trial judge was greatly influenced by her belief that Lee had removed Christopher from an I.V. morphine drip and then "abducted" him from the hospital. The court's comments demonstrate that Lee was convicted largely on the basis that the trial judge disapproved of her conduct at the hospital. Appellant maintains that it was unreasonable for the judge to conclude that she burned her son merely because she took him from the hospital before having him properly discharged.

**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.**

Relying on several cases, the State contends that the trial judge's remark that "there is not one scintilla of evidence to show this 13-month old child accidentally received these burns," did not amount to impermissible burden shifting but was merely a permissible comment that the State's evidence was un rebutted. The State's argument might be persuasive if the State had actually presented evidence demonstrating how the child was burned.

The State's evidence showed only that Christopher suffered an immersion burn. As stated numerous times before, immersion burns can occur accidentally or intentionally. Thus, the mere fact that Christopher suffered an immersion burn does not resolve the question of whether the injury occurred accidentally or not. The State presented no theory explaining how Christopher was burned. Moreover, the State failed to present any expert testimony demonstrating that Lee's explanations for Christopher's injuries were implausible.

The record demonstrates that the trial judge found Lee guilty based on the mere fact that she gave false exculpatory statements concerning how the child was injured. In making her findings, the court commented that no evidence existed to show that the burn occurred accidentally. This comment was tantamount to stating that Lee was guilty, because she failed to prove that the child's injuries occurred accidentally. In sum, the trial court convicted Lee based on her failure to explain how Christopher was injured, rather than the State's ability to establish by proof beyond a reasonable doubt that Lee intentionally burned her son.

**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.**

The State does not dispute that the indictment charging Lee with aggravated battery of a child failed to specify what act constituted the offense. However, the State contends that the trial judge properly denied Lee’s Motion in Arrest of Judgment, because Lee failed to show that she was prejudiced in the preparation of her defense. (St. Br. 63) Specifically, the State points out that the preliminary complaint, and the documents tendered in discovery demonstrate that Lee was not prejudiced in the preparation of her defense as a result of the indictment. (St. Br. 63)

At the outset, the State failed to specify what pre-trial discovery documents demonstrate that Lee was adequately apprised of the charges against her so as to prepare a competent defense. Although Lee’s attorney was presumably provided with photographs of Christopher’s injuries and reviewed medical reports describing Christopher’s injuries, these documents fail to indicate the State’s theory of how the injuries occurred. Although the preliminary complaint indicates that the Lee allegedly “caused the victim to be immersed in scalding water,” this language was not repeated in the indictment. Arguably, by failing to repeat this detail in the language of the indictment, the State was indicating that it was not proceeding under the theory that the child had been immersed in scalding water.

The State's reliance on *People v. Harvey*, 53 Ill.2d 585 (1973), is unavailing. In *Harvey*, the defendant claimed that his indictment for aggravated battery was insufficient because it failed to include the language that the offense was committed "without legal justification." *Id.* at 589. The defendant never complained that the indictment was insufficient for failure to specify what conduct constituted the offense. Thus, the court never considered the question. Because Lee argues that the indictment was defective for failing to adequately apprise her of the conduct that constituted her offense, an argument never raised or considered in *Harvey*, *Harvey* is wholly distinguishable from the case at bar and fails to support the State's argument.

The State's reliance on *People v. Pisani*, 180 Ill. App. 3d 812 (2d Dist. 1989), is equally unavailing. In *Pisani*, the defendant was convicted of the offense of telephone harassment. On appeal, the defendant argued that the trial court erred in denying her Motion in Arrest of Judgment because the indictment was defective for failing to particularize the criminal conduct involved. The appellate court affirmed the trial court's denial of the defendant's Motion In Arrest of Judgment finding that the in light of the extensive pre-trial discovery, the defendant was apprised of the charges against her. Specifically, the appellate court noted that the trial court concluded that the defense counsel "was fully aware of the alleged statements made by the defendant and of the number of witnesses called." *Id.* at 816.

In contrast, nothing in the indictment or the record shows that Lee was informed of the specific criminal conduct with which she was charged. Although the discovery indicated that Christopher suffered immersion burns, the State never informed Lee of its theory of how the injuries occurred, where they occurred, or what substance caused the injuries. Significantly, the State never even advanced a cogent theory at trial, instead relying on Lee's failure to explain the

injuries. Accordingly, *Pisani* is distinguishable from the case at bar.

The indictment charging Lee with aggravated battery of a child failed to describe the act which constituted the alleged offense. An indictment charging the defendant with aggravated battery solely in the language of the statute is insufficient. *People v. Baugh*, 145 Ill. app. 3d 133 (4th Dist. 1986). The charge must contain language describing the act alleged to have caused the bodily harm. Because Lee's indictment merely stated that Lee caused serious bodily injury 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 and was denied the opportunity to prepare a competent defense. Accordingly, the trial court erred in denying Lee's Motion in Arrest of Judgement.

**VII. 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*.**

Appellant relies on the arguments presented in her opening brief with respect to this issue.

## **CONCLUSION**

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

Respectfully submitted,

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