No. 123734

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- GERALD DRAKE Defendant-Appellee	)	Appeal from the Appellate Court of Illinois, No. 1-14-2882. There on appeal from the Circuit Court of Cook County, Illinois , No. 08 CR 23372; 11 C6 60174. Honorable Luciano Panici, Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLEE

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POINT AND AUTHORITIES **Page**

ISSUE PRESENTED FOR REVIEW

In analyzing whether the Double Jeopardy Clause barred Gerald Drake's retrial for aggravated battery, the appellate court listed and specifically considered *all* of the evidence presented at trial in the light most favorable to the State, including the inadmissible hearsay statement. In concert with the controlling Illinois law regarding double jeopardy announced in *People v. Olivera*, 164 Ill.2d 382, 393 (1995), the appellate court determined that the State's evidence was insufficient to prove Gerald's guilt beyond a reasonable doubt, and that the Double Jeopardy Clause barred retrial. Where remanding this cause for a new trial would unfairly afford the State a second chance to supply evidence it failed to produce in the first trial, should this Court affirm the appellate court's holding that the Double Jeopardy Clause forbids a second trial?

STATEMENT OF FACTS

Overview

Gerald Drake lived in a rented house in Chicago Heights with his wife, Evelina Hines, and nine children, including his six-year-old stepson JH. (R. UU54, 59) While Evelina was at work, Gerald took care of the children. (R. UU59, 67) Sometime on July 29, 2008, while Gerald was home with the children and Evelina was at work, JH sustained second- and third-degree burns to his feet and buttocks. The State's theory as to how JH sustained his injuries was that Gerald intentionally held JH under 160-degree bath water. (R. TT6) The defense theory was that JH was accidentally burned in the bathtub while Gerald was not present in the bathroom, as an investigation by the Department of Children and Family Services ("DCFS") confirmed that just a few days prior to the incident, a new hot water tank had been installed incorrectly, resulting in dangerously hot water coming out of the faucet and into the tub when the cold water spigot was turned. (R. TT9-10; UU75-80)

JH's Alleged Statement to Nurse Roxas

Prior to trial, the State filed a motion to introduce a statement JH allegedly made to Rosalina Roxas, a nurse at Stroger Hospital, on August 8, 2008, more than a week after JH had been admitted. (C. 44-45; R. MM24) Roxas indicated in her patient progress notes that after she changed JH's dressings, JH told her that his dad poured a cup of hot water on him while he was in the tub. (C. 46) The State initially sought to introduce the statement pursuant to 725 ILCS 5/115-10. (C. 44; R. MM8) Later, the State changed its position and argued the statement

should come in pursuant to 725 ILCS 5/115-13, a hearsay exception for statements made from a patient to a treating doctor for purposes of medical treatment and diagnosis. (R. MM8, 16) The trial court allowed the statement to come in as an exception to the hearsay rule pursuant to Illinois Rule of Evidence 803(4) because "this was an ongoing treatment, an ongoing diagnosis." (R. MM27)

Bench Trial

Rosalina Roxas is a registered nurse at Stroger Hospital in its Pediatric Intensive Care Unit. (R. TT13) JH was her patient. (R. TT14) Roxas was one of JH's primary nurses for the duration of his stay in the hospital. (R. TT15) According to Roxas, sometime during the afternoon of August 8, 2008, JH called her over and said he was going to tell her something. (R. TT15-16) Nobody else was present. (R. TT16) Roxas testified that JH told her that his dad was the one who poured hot water on his buttocks while he was in the tub. (R. TT16) Roxas asked JH if he did something wrong that had made his dad mad. (R. TT16-17) JH told her no. (R. TT17)

Dr. Marjorie Fujara testified as an expert in child abuse. (R. UU9) Fujara examined JH on July 30, 2008. (R. UU9) Fujara testified that JH's burns were on his buttocks, perineum, genital area, and feet. (R. UU13) JH had full thickness (3rd-degree) burns on the tops of his feet up to the ankle, and partial thickness (2nd-degree) burns to his buttocks, perineum, and soles of his feet. (R. UU14) Fujara testified that JH's eight siblings were examined, and none of them had any burns or indications of abuse. (R. UU26, 35)

According to Fujara, there were no splash marks to JH's upper legs, which

she would expect to see if JH had been moving around in the tub. (R. UU19) In Fujara's opinion, JH's burns were immersion burns because his burns were less severe on the bottoms of his feet and buttocks, areas that would come into contact with the porcelain tub. (R. UU26) Fujara concluded the burns were the result of forcible immersion in water and were therefore child abuse. (R. UU27) Fujara's opinion was based on the fact that there was not a history that explained the burns and there was a very specific pattern of injury that occurred. (R. UU27) According to Fujara, forcible immersion was the only way to explain the burns to JH's buttocks, and the burns could not have been caused by pouring hot water on JH. (R. UU28, 43)

On cross-examination, Fujara testified that someone on her medical team talked to Thomas White from DCFS about his investigation into how JH was injured. (R. UU38) Fujara learned that White discovered that the hot water and cold water taps on the bathtub had been switched, and that the water coming out was 160 degrees. This information did not change her opinion regarding forced immersion. (R. UU38, 47) Fujara testified she was familiar with "doughnut" burns, a common burn pattern seen on the buttocks where the center of the burn is less severe than the outside area of the burn. (R. UU36-37) According to Fujara, JH did not have a doughnut pattern on the burns to his buttocks, but if the water temperature had been lower, "we might see that doughnut pattern of the slight sparing in the center." (R. UU38) Fujara did not consider JH's height and weight when determining that he was forcibly immersed in the tub. (R. UU41) "Presumably," JH's knees were flexed at the point of immersion, so his feet and buttocks were in the water

at the same time. (R. UU43) Fujara did not review any statements that JH's siblings gave to the police or the State's Attorney. (R. UU46) Fujara did not have an opinion as to who caused the injuries to JH. (R. UU46)

Thomas White testified that he worked for DCFS as an investigator until September 2010, when he retired. (R. UU53) In August 2008, he was assigned to an investigation involving JH. (R. UU53) White interviewed Gerald Drake on August 3, 2008, at Gerald's house, and asked him about the events that occurred on July 29, 2008. (R. UU54, 58) Gerald told him he was the caretaker of 8 or 9 children ranging in age from less than a year to 12 years. (R. UU59, 67) On that day, in the morning, some feces from the baby's diaper got on the floor. (R. UU60) JH and his older brother Demontae had been wrestling, and they got some of the feces on themselves. (R. UU60) Gerald told JH and Demontae to go downstairs to the bathroom and clean themselves up in the bathtub. (R. UU61)

White further testified that Gerald did not tell him how he became aware of JH's injuries. (R. UU61) JH's mother, Evelina Hines, came home from work at about 10:30 or 11:30 p.m. (R. UU61) When Evelina learned of JH's injuries, she immediately took him to St. James Hospital. (R. UU61) Gerald told White that he told the people at the hospital he was JH's uncle and that JH had been at a babysitter's. (R. UU62) Gerald also used the name Joe Campbell when he identified himself at the hospital. (R. UU58)

On cross-examination, White testified that Gerald was not angry during their interview and did not indicate he had been angered on July 29, 2008. (R. UU68) White interviewed the other children who were home at the time of JH's

injuries and he interviewed other family members. (R. UU68) The first time White saw JH at the hospital, JH was sedated so he did not talk with him. (R. UU70-71) White saw JH a second time and talked to him for about a minute. (R. UU72) JH was happy and talkative, laughed and smiled, and did not seem withdrawn. (R. UU73) White prepared reports of his investigation in this case. (R. UU74)

While on his visit to Gerald's home, White looked at the bathtub area and the location of the water tank. (R. UU75) When White turned the cold water spigot, hot water came out. (R. UU76) He measured the water temperature and it rapidly went up to 161 degrees. (R. UU77) Gerald told him that a new water tank had been installed a couple days before the incident with JH. (R. UU76) White went to the basement to investigate, and the water tank appeared to be installed backwards, so the hot and cold water pipes were not connected properly to the hot water tank. (R. UU78-79) Gerald told White he had no plumbing experience, and White did not see any plumbing tools in the house. (R. UU80)

Gerald did not testify and the defense did not put on any witnesses.

Trial Court Verdict and Sentencing

The trial court found there was scientific evidence where "a reasonable inference can be made" that Gerald, who was a caregiver of the children while Evelina was at work, caused the injuries to JH. (R. UU96) The trial court further found that Gerald was conscious of his guilt because he "took off" prior to trial and used a fictitious name at the hospital. (R. UU96-97) The trial court found Gerald guilty of aggravated battery of a child, heinous battery, and aggravated domestic battery. (R. UU97)

At the July 22, 2014, sentencing hearing, the parties agreed that aggravated battery of a child and heinous battery were no longer offenses, and that the applicable offense was simply aggravated battery pursuant to 720 ILCS 5/12-3.05 (b)(1), a Class X felony. (R. XX11-15) The judge found in aggravation that serious harm was caused to JH, and that Gerald was in a position of supervision. (R. XX23-24) The judge found in mitigation that the offense was not likely to recur, and did not "believe he (Gerald) contemplated this type of action." (R. XX24) After the parties debated whether Gerald's aggravated battery sentence was an 85- or a 50-percent sentence, the judge sentenced Gerald to 22 years in prison, to be served at 50-percent time. (R. XX25; C. 122)

On July 24, 2014, the State filed a petition for relief from judgment pursuant to 735 ILCS 5/2-1401 and argued that Gerald must serve 85 percent of his sentence in light of 730 ILCS 5/3-6-3(ii). (C. 124-125) After a hearing, the judge re-sentenced Gerald to 20 years in prison at 85 percent. (R. YY5; C. 129)

Post-Sentencing Motion

On August 8, 2014, Gerald filed a *pro se* motion raising several ineffective assistance of counsel claims. Among other things, Gerald argued that his trial counsel failed to argue that JH had mental health issues since he was a toddler and "thought slower" than other kids. (C. 130) Gerald argued that JH's reaction time is slower than normal, and it took him longer than normal to get out of the tub when the water became too hot. (C. 130) Gerald further argued in his motion that his trial counsel failed to argue that JH spoke to a DCFS worker, a doctor, and a detective and never told them that Gerald held him in the tub. (C. 133)

Gerald also explained in his motion that he had a history of using fake names because he had an outstanding warrant for driving with a suspended/revoked license, and he did not want to turn himself in on the warrant until his family's financial situation had improved. (C. 132, 136)

The trial court did not investigate or rule on Gerald's ineffective assistance of counsel claims. Gerald's *pro se* motion was treated as a notice of appeal. (C. 193)

Direct Appeal

Gerald argued on direct appeal that (1) the State failed to prove beyond a reasonable doubt that he intentionally immersed JH in scalding water; (2) the trial court erred in allowing Roxas to testify to JH's alleged statement identifying him as the person who poured hot water on him; (3) the trial court failed to investigate his post-trial ineffective assistance of counsel claims so the case should be remanded for a *Krankel* hearing; and (4) his 20-year prison sentence was excessive. *People v. Drake,* 2017 IL App (1st) 142882, ¶1.

All three appellate court justices agreed that the identification statement made by JH to Roxas was not made to assist in his medical diagnosis or treatment, and therefore the trial court erred in admitting the statement at trial. *Id.* at ¶25, ¶49. All three justices also agreed the error was not harmless. *Id.* at ¶29, ¶58.

Since Gerald challenged the sufficiency of the evidence, the appellate court analyzed whether the Double Jeopardy Clause was triggered. *Id.* at ¶¶32-32. Two of the justices considered all of the State's evidence, including JH's erroneously admitted hearsay statement, and concluded that, even in the light most favorable

to the State, the evidence was insufficient to prove Gerald guilty of aggravated battery beyond a reasonable doubt. *Drake,* 2017 IL App (1st) 142882, ¶¶35-41. Since the evidence was insufficient to prove Gerald's guilt, the majority found that double jeopardy forbid a second trial, and reversed Gerald's conviction. *Id.* at¶41

In a dissenting opinion, Justice Gordon opined that the majority found the improper admission of the hearsay evidence compelling enough to reverse, but then downplayed the same hearsay evidence in its double jeopardy analysis. *Id.* at¶60. In Justice Gordon's view, double jeopardy did not attach and the proper remedy was a new trial without the identification portion of JH's hearsay statement in evidence. *Id.* at¶60.

The State filed a petition for rehearing on January 4, 2018. On May 24, 2018, the majority of the appellate court denied the petition; Justice Gordon would have allowed it. This Court granted the State's petition for leave to appeal.

ARGUMENT

The Appellate Court Considered All of the State's Evidence – Including JH's Improperly Admitted Hearsay Statement – and Properly Determined that the Evidence was Insufficient to Convict Gerald Drake of Aggravated Battery Beyond a Reasonable Doubt.

In its Petition for Leave to Appeal, the State argued that the appellate court's decision in this case "directly contravenes" this Court's decision in *People v. Olivera*, 164 Ill.2d 382 (1995), "cannot be reconciled with" the U.S. Supreme Court's decision in *Lockhart v. Nelson*, 48 U.S. 33 (1988), "creates confusion" regarding the proper application of *Olivera*, and "usurped the executive function of determining whether a criminal prosecution will continue." (States PLA at 2-4) These claims have been totally abandoned in its brief before this Court and replaced with a garden-variety reasonable doubt claim: that the State's evidence, including the improperly admitted hearsay statement, sufficed for a rational fact-finder to convict Gerald. (St. Br. 10-11)

At trial, the court allowed the State to introduce a statement JH allegedly made to his nurse, Rosalina Roxas, who testified that JH told her that Gerald was the one who poured hot water on his buttocks while he was in the tub. (R. TT16) On direct appeal, the appellate court determined that the statement was inadmissible hearsay and reversible error. *People v. Gerald Drake*, 2017 IL App (1st) 142882, ¶¶25-29. Since Gerald challenged the sufficiency of the evidence on direct appeal, the appellate court analyzed whether the Double Jeopardy Clause prohibited a retrial. In concert with controlling Illinois law, the court explicitly

considered all of the State's evidence – including JH's erroneously admitted hearsay statement – and concluded that, even considered in the light most favorable to the State, the evidence was insufficient to prove Gerald guilty of aggravated battery beyond a reasonable doubt. *Drake*, 2017 IL App 142882 at ¶¶31-41. Since the State's evidence was insufficient to prove Gerald's guilt, the court found that the Double Jeopardy Clause forbade a second trial, and reversed Gerald's conviction outright. *Id.* at ¶41.

The State does not dispute that the trial court erred in admitting the hearsay statement, (St. Br. at 8, n.5) but argues that the appellate court should have reversed and remanded for a new trial instead of reversing Gerald's conviction outright because the State's evidence was sufficient to prove Gerald's guilt beyond a reasonable doubt. (St. Br. 10-11) This Court should affirm the appellate court's reversal of Gerald's conviction, as a successive trial would violate the Double Jeopardy Clause.

A. The appellate court properly applied the *Lockhart-Olivera* rule.

Gerald does not dispute that the rule announced in *Lockhart v. Nelson*, 488 U.S. 33, 40-41 (1988), and followed by this Court in *People v. Olivera*, 164 Ill.2d 382, 393 (1995), controls this case: a reviewing court must consider all of the evidence admitted by the trial court, even erroneously admitted evidence, in deciding whether retrial is permissible under the Double Jeopardy Clause. (St. Br. 8-10)

The State's abandonment of its argument that the appellate court failed to consider all of the evidence in its double jeopardy analysis is understandable

in light of the fact that the majority specifically listed and analyzed all of the evidence it considered, including JH's erroneously admitted hearsay statement, in deciding to reverse outright. *People v. Drake*, 2017 IL App (1st) 142882, ¶¶36-40. The State acknowledges that the appellate court considered the inadmissible hearsay statement in its double jeopardy analysis, but argues that the court did not give it sufficient weight. (St. Br. 11) A mindful reading of the majority opinion indicates otherwise.

The State, echoing Justice Gordon's dissenting opinion, argues that the majority's determination that the admission of JH's hearsay statement was reversible error and its subsequent determination that the State's evidence, including the inadmissible statement, was insufficient to prove Gerald's guilt beyond a reasonable doubt, shows that the majority did not give adequate weight to JH's statement in its double jeopardy analysis. (St. Br. 11); *Drake*, 2017 IL App (1st) 142882, ¶¶ 60-61. However, there is no contradiction between the majority's harmless error analysis and its sufficiency of the evidence analysis, as those involve separate legal questions and standards, and the State's lack of evidence to prove Gerald's guilt was at the heart of each determination.

As noted in the appellate court's opinion, in a harmless error analysis, a reviewing court determines whether there is a reasonable probability that the verdict would have been different had the hearsay been excluded. *Drake*, 2017 IL App (1st) 142882, ¶26. In its harmless error analysis, the appellate court considered the following factors as outlined in *People v. Littleton*, 2014 IL App (1st) 121950, ¶66: (1) whether the error contributed to the conviction; (2) whether

the other evidence in the case overwhelmingly supported the conviction; and (3) whether the improperly admitted evidence was cumulative or duplicative of the properly admitted statement. *Drake*, 2017 IL App (1st) 142882, ¶27.

The court found the hearsay statement was not cumulative of any other evidence presented at trial because it was the only evidence that placed Gerald in the bathroom when the injury occurred. *Drake*, 2017 IL App (1st) 142882 at ¶28. As to the second factor, the court determined that the State's remaining evidence was not overwhelming, "particularly in light of" the fact that scalding water came out of the cold water spigot, and that none of the medical personnel testified to ever speaking with any of JH's family members. *Id.* Finally, the court found that since JH's statement to Roxas that Gerald was the perpetrator "was the foundation of the State's case," it could not see how the erroneous admission of the statement did not contribute to the trial court's guilty finding. *Id.* at ¶29. In light of the above, the court found the trial court's admission and use of JH's hearsay statement was reversible error. *Id.*

After finding the erroneous admission of the statement was reversible error, the court analyzed the sufficiency of the evidence. The court, citing *People v. Sutherland*, 155 Ill.2d 1, 17 (1992), noted that when reviewing a challenge to the sufficiency of the evidence the relevant inquiry is whether, after considering the evidence in the light most favorable to the State, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Drake*, 2017 IL App (1st) 142882 at ¶35. In its sufficiency of the evidence analysis, the appellate court considered all of the State's evidence: that JH sustained burns

to his buttocks, genital region, and both feet up to his ankles; JH's hearsay statement that Gerald poured hot water on him when he was in the tub; Dr. Fujara's testimony that JH's injuries were the result of forcible immersion; and Thomas White's testimony that Gerald admitted to him that he used a fake name when he brought JH to the hospital. *Drake*, 2017 IL App (1st) 142882 at ¶¶36-38.

In its analysis of the State's evidence, the court noted that on cross-examination, White testified that he verified that the hot and cold water lines were reversed and that the water coming from the tank into the tub was 160 degrees. *Id.* at ¶39. The court further noted that Roxas did not ask JH for further details, Roxas never saw or spoke to anyone from JH's family, and that the statement was contradicted by Dr. Fujara, who testified that JH's injuries were not consistent with water being poured on JH. *Id.* at ¶¶36-37. Finally, in finding that the State's evidence failed to prove Gerald guilty beyond a reasonable doubt of aggravated battery, the court noted that JH's statement was the only evidence placing Gerald in the bathroom where the injury occurred, that no other identification evidence was presented, and it "is undisputed that there were other people present in the house." ¶¶40-41.

There is no contradiction between the majority's harmless error analysis and its sufficiency of the evidence determination. Given the overall weakness of the State's case, the court could not conclude that the admission and use of JH's hearsay statement – the only evidence that placed Gerald in the bathroom at the time of the incident – did not prompt the trial court's finding of guilt, so the admission of the statement was not harmless. Given the overall weakness of the

State's case, and in particular that JH's undetailed hearsay statement was inconsistent with Dr. Fujara's testimony, the court concluded that *no* reasonable finder of fact could have found that the evidence the State presented at trial proved Gerald's guilt beyond a reasonable doubt. The two determinations are consistent with each other, the evidence, and controlling law. Accordingly, this Court should not accept the State's invitation to view the majority's harmless error and sufficiency of the evidence determinations as inconsistent or contradictory.

B. The appellate court correctly found the State's evidence failed to prove Gerald guilty of aggravated battery beyond a reasonable doubt.

Not only did the appellate court majority follow the controlling Illinois Double Jeopardy Clause law by considering all of the State's evidence, it also correctly determined that all of the evidence failed to prove beyond a reasonable doubt that Gerald forcibly immersed JH in scalding water. Not a single live witness – not JH, not either of JH's two older brothers who were in the bathroom with JH at the time of the incident, not Gerald, and not any of JH's other siblings home at the time the incident occurred – testified that Gerald was even present in the bathroom when 6-year-old JH sustained his burns. In addition, the burns to JH's buttocks did not have a "doughnut pattern," a pattern indicative of forced immersion, and JH exhibited no other signs of physical abuse. (R. UU38) Finally, unrebutted evidence from a DCFS investigator showed that, due to a recent, faulty water tank installation, the hot and cold water lines were reversed to the bathtub where JH allegedly sustained his burns, so when the cold water spigot was turned on, scalding hot water came out of the tap.

The State's evidence does not even come close to proving beyond a reasonable

doubt that Gerald intentionally immersed JH in hot water.

There are a handful of published Illinois cases involving a child's forced immersion burns, but Gerald's case is easily distinguishable. In *People v. Negrete*, 258 Ill.App.3d 27, 30 (1st Dist. 1994), for example, the appellate court affirmed a heinous battery conviction for the defendant's scalding of her 17-month-old son. The defendant claimed that her son was accidentally burned by hot water while receiving a bath in the kitchen sink. *Negrete*, 258 Ill.App.3d at 28. The defendant testified she left her son in the sink with the hot and cold water taps open, resulting in a lukewarm flow, and then left him alone while she went to make the bed. *Id.* at 29. About six minutes later, the defendant heard her son screaming. The defendant testified she believed her son was strong enough to turn off the cold water. *Id.*

A pediatrician testified that the infant suffered second- and third-degree burns on more than 60 percent of his body, and was malnourished to the point of starvation. *Id.* at 28. The pediatrician further testified that due to the infant's level of mental and physical development, he was not capable of turning the sink's spigot. *Id.* The pediatrician concluded that the infant's burns were caused by someone holding him in a lateral position under a non-forceful flow of extremely hot water. *Negrete*, 258 Ill.App.3d at 28.

The appellate court, in finding the State's evidence was sufficient to prove the defendant guilty beyond a reasonable doubt, noted that the State's two medical experts reached their conclusion that the infant's injuries were not self-inflicted after considering not only the infant's burns, but also his general physical condition,

his level of physical and mental development, and the defendant's explanation of the injuries. *Id.* at 29. See also *People v. Flores*, 168 Ill.App.3d 284 (4th Dist. 1988) (evidence sufficient to prove defendant knowingly caused bodily harm to her six-week-old daughter where defendant admitted she administered the bath that caused her daughter's burns and daughter had 13 fractures throughout her body in different stages of healing); and *People v. Cooper*, 283 Ill.App.3d 86, 89 (1st Dist. 1986) (defendant convicted of heinous battery and aggravated battery of a child where the evidence showed that he dunked his girlfriend's baby in a bathtub with hot water, and where baby was also malnourished, had a peculiar rash, suffered from a serious ear infection, and had been exposed to tuberculosis).

The above cases have much in common: they involve infants incapable of getting into a bath by themselves and turning the spigots on or off; they involve defendants who admitted they either left the infant unattended in the bath/sink or actually administered the bath; they involve infants who, in addition to being burned, also exhibited other significant signs of physical abuse (malnourishment, multiple broken bones, rashes, infections); and they involve defendants who did not provide credible, unrebutted evidence that the burns were accidental.

Here, in marked contrast to the above cases, JH was six years old at the time of the incident, not a baby incapable of getting into the tub on his own and turning the spigots on or off. The State presented no evidence that JH had any physical limitations or was otherwise unable to take a bath on his own.[1]

[1]See http://halls.md/chart-boys-height-w/ The median body weight of a six-year-old boy is 45 pounds. The only indication in the record regarding JH's general physical condition, or his level of physical and mental development,

Furthermore, not a single live witness testified that Gerald was even present in the bathroom at the time JH sustained his burns. Instead, the evidence shows that Gerald told JH and two older siblings (Demontae and another unnamed sibling) to go downstairs to take a bath and clean themselves up. (R. UU60-61) Neither JH nor his two older siblings testified at trial. The record contains no evidence that Victim Sensitive Interviews were conducted with JH or either of his two older siblings. The appellate court emphasized that it was undisputed that there were other people present in the house at the time of incident. *People v. Drake*, 2017 IL App (1st)142882,¶40.

The only evidence the State presented that placed Gerald in the bathroom came from Roxas, who testified that JH told her that Gerald poured hot water on his buttocks while he was in the tub. (R. TT16) However, JH's hearsay statement is utterly inconsistent with Dr. Fujara's opinion as to how JH was burned. The State's theory was that Gerald intentionally held JH under 160-degree bath water. (R. TT6) According to Fujara, forcible immersion was the only way to explain the burns to JH's buttocks, and the burns could not have been caused by pouring hot water on JH. (R. UU28, 43) The appellate court emphasized this contradiction in its analysis. *Drake*, at ¶37.

Additionally, Dr. Fujara acknowledged on cross-examination that the burns to JH's buttocks did not have a "doughnut pattern," a pattern indicative of forced immersion. (R. UU38) *See Burn Injuries in Child Abuse*, U.S. Department of Justice,

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came from Gerald's *pro se* post-trial motion, where he argued that his trial counsel failed to argue that JH had suffered mental health issues since he was a toddler and "thought slower" than other kids. (C. 130)

1997, p. 7 ("When a child is held in scalding hot bath water, the buttocks are pressed against the bottom of the tub so forcibly that the water will not come into contact with the center of the buttocks, sparing this part of the buttocks and causing the burn injury to have a doughnut pattern."); *see also Cooper*, 283 Ill.App.3d at 89 (medical expert testifying that a "ring sign" results when a child is held in hot water in a bathtub with his buttock resting on the bathtub's surface, because the burn is less severe where the buttock actually touches the porcelain on the tub). If Gerald had forcibly immersed JH into the tub of scalding water as Dr. Fujara theorized, JH should have exhibited burns with a doughnut pattern or ring sign on his buttocks.

Furthermore, JH showed no other signs of abuse – he had no bruising and no fractures, and no other evidence was presented indicating a history of abuse. (R. TT23) Presumably, had Gerald in fact forcibly immersed JH into a tub of hot water, he would have put his hands under JH's armpits or at his sides. The lack of bruising or marks to JH in those areas is telling. The appellate court also emphasized that Dr. Fujara never spoke to any of JH's family members. *Drake*, 2017 IL App (1st) 142882, ¶37.

Finally, and most importantly, unrebutted evidence showed that, due to a recent, faulty water tank installation, the hot and cold water lines were reversed to the bathtub where JH allegedly sustained his burns. (R. UU75-80) Investigator White testified that he checked the temperature of the water coming out of the hot water tank with a thermometer, and it "rapidly went up to about 161," and then started to slow down. (R. UU77) According to White, normally the water

temperature should not exceed 119 degrees to be safe. (R. UU77) Again, the appellate court emphasized in its sufficiency of the evidence analysis that the hot water tank's pipes were reversed, and that the water coming from the tank was 160 degrees. *Drake*, 2017 IL App (1st) 142882, ¶39.

The above evidence is nowhere close to proof beyond a reasonable doubt that Gerald intentionally immersed JH in hot water, or that Gerald was consciously aware that his conduct (telling JH and JH's two older siblings to go downstairs and take a bath) was practically certain to cause great bodily harm. *People v. Steele*, 2014 IL App (1st) 121452, ¶23.

The State argues that the appellate court overlooked the State's circumstantial evidence, including that Gerald was the sole adult present when JH was burned, and his actions after the incident – using a fake name at the hospital – demonstrated his consciousness of guilt.[2] (St. Br. 11) But it would be reasonable for Gerald to have a consciousness of guilt, even if he was merely negligent; it does not show that he intentionally immersed JH in scalding bath water. Similarly, the trial court's finding that Gerald had a consciousness of guilt because he "took off"[3] while he was on bond for this case is not compelling evidence that he intentionally immersed JH in scalding bath water. (R. UU96-97) Further, as the

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[2]Gerald explained in his post-trial motion that he had a history of using fake names because he had an outstanding warrant for driving with a suspended/revoked license, and he did not want to turn himself in on the warrant until his family's financial situation had improved. (C. 132, 136)

[3]At the February 28, 2013, bond hearing, Gerald's counsel told the court that Gerald had not come back to court because he was homeless and having family problems. (R. GG3)

appellate court observed, the State presented no evidence at trial concerning the circumstances of Gerald's 2013 arrest. *Drake*, 2017 IL App (1st) 142882, ¶11, n. 2.

When a child suffers serious and painful burns, it is natural that we, as a society, want to hold someone accountable. In this case, however, the evidence falls far short of proving beyond a reasonable doubt that Gerald intentionally immersed JH in a tub of hot water. This Court should affirm the appellate court's finding that the State's evidence, including the inadmissible hearsay statement, failed to prove Gerald guilty beyond a reasonable doubt of aggravated battery.

CONCLUSION

For the foregoing reasons, Gerald Drake, defendant-appellee, respectfully requests that this Court affirm the decision of the appellate court and hold that the Double Jeopardy Clause bars retrial in this case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Brett C. Zeeb, certify that this brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this brief, excluding pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 22 pages.

/s/Brett C. Zeeb
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IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- GERALD DRAKE Defendant-Appellee	)	Appeal from the Appellate Court of Illinois, No. 1-14-2882. There on appeal from the Circuit Court of Cook County, Illinois , No. 08 CR 23372; 11 C6 60174. Honorable Luciano Panici, Judge Presiding.

NOTICE AND PROOF OF SERVICE

Ms. Lisa Madigan, Attorney General, 100 W. Randolph St., Chicago, IL 60601, eserve.criminalappeals@atg.state.il.us;

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On December 4, 2018, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellant in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

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