No. 123734

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court
	)	of Illinois, First District,
Plaintiff-Appellant,	)	No. 1-14-2882
	)	
	)	There on Appeal from the Circuit
	)	Court of Cook County, Illinois,
v.	)	Criminal Division,
	)	No. 08 CR 23372
	)	
GERALD DRAKE,	)	The Honorable
	)	Luciano Panici,
Defendant-Appellee.	)	Judge Presiding.

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT
PEOPLE OF THE STATE OF ILLINOIS

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POINT AND AUTHORITIES

NATURE OF THE CASE

Following a bench trial, defendant was convicted of aggravated battery of a child and other lesser charges and sentenced to twenty years in prison. The Illinois Appellate Court found that the circuit court improperly admitted an out-of-court statement of the victim, vacated defendant's convictions, and barred the State from retrying him. No question is raised on the charging instrument.

ISSUE PRESENTED FOR REVIEW

Whether the People may retry defendant because the trial evidence, including a statement by the victim identifying defendant as the cause of his burn injuries, sufficed for a rational fact-finder to convict him.

STANDARD OF REVIEW

Whether the Double Jeopardy Clause bars a retrial presents a question of law that this Court reviews *de novo*. *See People v. Bonila*, 2018 IL 122484, ¶ 10.

JURISDICTION

Appellate jurisdiction lies under Supreme Court Rules 315 and 612(b). The trial court entered judgment on August 6, 2014, and defendant filed a notice of appeal two days later. A21-22.[1] This Court granted the People's timely petition for leave to appeal (PLA) on September 26, 2018.

[1] "C_" refers to the common law record; "R_" refers to the reports of proceedings; and "A_" refers to the appendix to this brief.

STATEMENT OF FACTS

Defendant was charged with aggravated battery of a child, heinous battery, and aggravated domestic battery, on the theory that he forcibly immersed his six-year-old stepson, J.H., in hot water, causing great bodily harm. *See* C11-13.

The State moved *in limine* to admit an out-of-court statement by J.H. to treating nurse Rosaline Roxas, in which J.H. identified defendant as the cause of his injuries. C44-48; R.MM12-20. The trial court deemed the statement admissible pursuant to the hearsay exception for statements made for the purpose of medical treatment. R.MM25-27 (citing ILL. R. EVID. 803(4)). Based on this ruling, the State presented Roxas's testimony at the ensuing bench trial and did not call J.H. to testify.

At trial, Dr. Marjorie Fujara testified that J.H. was admitted to Stroger Hospital on July 30, 2008, with burns covering thirteen percent of his body. R.UU10-14.[2] J.H. had second-degree burns on the soles of his feet, buttocks, perineum, and scrotum, and he had third-degree burns that burned through the full thickness of the skin on the tops of his feet. R.UU14-15. Dr. Fujara testified that second-degree burns are extremely painful because "the

[2] Defendant was arraigned in December 2008, *see* R.A2-3, and his trial began in February 2014, *see* R.TT4-5. Part of the delay was due to defendant's failure to appear at a pretrial status hearing in November 2011. R.FF2. The court issued a "bond forfeiture warrant," *id.*, but defendant was not apprehended until he surrendered to police in February 2013, R.GG3. Proceedings on the aggravated battery case then resumed in April 2013. R.II2-3.

nerves are spared," and J.H. needed to receive intravenous morphine before his dressings were changed. R.UU15-16; *see also* R.TT18.

Dr. Fujara opined that the pattern of burns could only have been the result of forcible immersion in a bathtub of hot water. *See* R.UU27. She explained that the soles of J.H.'s feet and his buttocks were burned less severely than the tops of his feet because his feet and buttocks were in contact with the surface of the bathtub, which was cooler than the water. R.UU26. And she noted that the burns on J.H.'s feet showed a clear demarcation line at the ankles, with no splash marks extending upward. R.UU16-20.

Based on the pattern of burns, Dr. Fujara ruled out alternative, accidental scenarios. She testified that if J.H. had stepped into a bathtub of hot water of his own volition, he would have put one foot in the water, not both feet and his buttocks all at once. R.UU28. On contacting the hot water in this scenario, J.H. would have "reflexively" withdrawn his foot, causing splash marks. R.UU27-28. Alternatively, had J.H. been sitting in the bathtub when the hot water tap was turned on, he would have flailed on contact with the hot water, again resulting in splash marks. R.UU28.

Nurse Roxas testified that she treated J.H. while he was in the Pediatric Intensive Care Unit of Stroger Hospital. R.TT13-14. On the afternoon of August 8, 2008, J.H. called to Roxas and said, "I'm going to tell you something." R.TT15-16. When Roxas asked what it was, he said, in

summary, "[m]y dad was the one who poured hot water on my buttocks while I was in the tub." R.TT16.[3] Roxas did not press J.H. for more details. R.TT21-22. Before this conversation, J.H. had not divulged the cause of his injuries, and "[h]e just started crying if [medical staff tried] to ask him anything about the incident." R.TT17.

Thomas White investigated J.H.'s injuries on behalf of the Department of Children and Family Services (DCFS), interviewing defendant on August 3, 2008. R.UU53-54. Defendant told White that on July 29, 2008, he had been the sole caretaker of J.H. and seven other children, ranging in age from infant to twelve years old, while their mother was at work. R.UU58-59, R.UU67. Defendant told White that at some point that morning, J.H. and his brother, while tussling, had fallen into feces that had leaked from the infant's diaper. R.UU60. Defendant told them to go to the bathroom and clean up. R.UU60-61.

Defendant offered White no explanation as to when or how he became aware of J.H.'s injuries, or why he did not seek immediate medical care for J.H. R.UU61. During his investigation, White learned that two of the children noticed that J.H.'s "feet were peeling" and told their mother when she came home from work around 10:30 p.m. *Id.* "[I]mmediately upon learning of the child's injuries," their mother insisted on taking J.H. to the

[3] The precise mechanism described by J.H., in which defendant poured hot water from a cup onto his back, R.TT16; TT21, did not align with the medical testimony, R.UU43.

emergency room. *Id.* Defendant took J.H. inside, and he later admitted to White that he had falsely identified himself to hospital staff as "Joe Campbell," J.H.'s uncle, and falsely claimed that J.H. had sustained the burns while in the care of a babysitter. R.UU58; UU62.

As part of his investigation, White ascertained that a couple of days before the incident, a new water heater was installed at the residence. R.UU76. The water lines were reversed; therefore, hot water came out of the cold faucet and vice versa. R.UU76-79. The hot water emerged from the faucet at temperatures above 160 degrees, which was much higher than a typical hot water temperature of around 120 degrees. R.UU77.

The trial court convicted defendant of all charges, noting the unrebutted "scientific evidence" that J.H.'s burn injuries were the result of forcible immersion in water. A24. The judge emphasized that defendant was the sole caregiver when the injuries occurred and that he demonstrated his consciousness of guilt by giving false information at the hospital. A24-25.

Ultimately, the trial court sentenced defendant to twenty years in prison for aggravated battery of a child, A21; R.YY5, and held that the remaining counts merged, R.XX25.[4]

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[4] The record contains three judgments; the second is operative. The trial court first sentenced defendant to twenty-two years in prison at 50%. C122. The State petitioned for relief from that judgment, citing a statute that required defendant to serve 85% of his sentence. C126-27. On August 6, 2014, the trial court entered a second judgment sentencing defendant to twenty years at 85%. A21; *see also* R.YY5 (orally pronouncing twenty-year sentence). Defendant filed a notice of appeal two days later. A22. On

On appeal, defendant claimed that (1) the trial court erred in admitting J.H.'s hearsay statement to Nurse Roxas; (2) the evidence was insufficient; (3) the trial court should have held a post-trial hearing concerning defendant's allegations that his trial counsel was ineffective; and (4) his sentence was excessive. A7-8.

The appellate court agreed that the trial court erred in admitting the hearsay statement, reasoning that because J.H. had already been in the hospital for more than a week before making the statement, his identification of defendant as the source of his injuries "was not made to assist in his medical diagnosis or treatment." A9; *see also* A14. The appellate court further held that this error was not harmless because "J.H.'s statement to Nurse Roxas was the only evidence that placed defendant in the bathroom where the injury occurred." A9-10; *see also* A18.

The appellate court did not expressly rule on defendant's sufficiency claim. However, after finding that the hearsay statement was improperly admitted, the majority barred the State from retrying defendant based on its analysis of the sufficiency of the evidence. A10-13. The majority reiterated that "J.H.'s erroneously admitted hearsay statement was the only piece of evidence placing defendant in the bathroom where the injury occurred" and

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August 18, 2014, the trial court purported to enter a "corrected" judgment that sentenced defendant to twenty-two years at 85%. C140. Because the trial court lacked jurisdiction to modify defendant's sentence after he filed his notice of appeal, *e.g.*, *People v. McCray*, 2016 IL App 3d 140554, ¶¶ 23-25, this Court should disregard the third judgment.

emphasized that "[t]he State provided no other identification evidence." A13. For that reason, the majority concluded that the Double Jeopardy Clause barred a retrial. *Id.* Justice Gordon dissented from that holding, emphasizing that in deciding whether to grant a retrial, "we are required to consider the victim's statement that it was defendant who was in the room with the victim when the injury occurred." A18-19.

This Court granted the People's PLA, which challenged only that portion of the appellate court's judgment barring a retrial.

ARGUMENT

The People Are Entitled to Retry Defendant Because the Trial Evidence, Including the Victim's Statement Identifying Defendant as the Cause of His Burn Injuries, Sufficed for a Rational Factfinder to Convict Him.

The People proved at trial that defendant forcibly held six-year-old J.H. in extremely hot water long enough to produce second- and third-degree burns. Dr. Fujara testified that the burn pattern could only have resulted from forcible immersion; defendant admitted that he was the sole adult in the house when the injuries occurred and demonstrated his consciousness of guilt by failing to seek prompt medical attention and providing false information to hospital staff; and J.H. identified defendant in an out-of-court statement as the cause of his injuries. The appellate court erred in holding that defendant

may evade punishment for this offense simply because the trial court improperly admitted a hearsay statement.[5]

The ordinary remedy for a prejudicial trial error is to vacate a defendant's convictions and remand for a new trial. *See*, *e.g.*, *People v. Blue*, 189 Ill. 2d 99, 138-40 (2000); *People v. Nelson*, 18 Ill. 2d 313, 319-20 (1960). That should have been the result here.

As a general matter, the Double Jeopardy Clause does not bar the State from "retrying a defendant who succeeds in getting his first conviction set aside[ ] . . . because of some error in the proceedings leading to conviction." *Lockhart v. Nelson*, 488 U.S. 33, 38 (1988). Instead, that constitutional provision "prohibits retrial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to present in the first proceeding," and its prohibition applies if — and only if — the State failed to sustain its burden of proof the first time around. *People v. Lopez*, 229 Ill. 2d 322, 367 (2008); *see also People v. Hernandez*, 2017 IL App (1st) 150575, ¶ 141 ("[T]he purpose of the double jeopardy bar is to prevent the State from having a second bite at the apple[.]").

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[5] The People do not dispute that the trial court erred in admitting the statement pursuant to the hearsay exception for statements made for purposes of medical treatment, but the statement could nevertheless be admitted at a new trial if the court were to find, at a pretrial hearing, that it satisfied 725 ILCS 5/115-10 (hearsay exception for reliable out-of-court statements of child victims of physical abuse).

As the Supreme Court explained in *Lockhart*, this principle is not only true as a matter of "'well-established . . . constitutional jurisprudence,'" but it also serves important interests. *Lockhart*, 488 U.S. at 38 (quoting *United States v. Tateo*, 377 U.S. 463, 465 (1964)). A finding of trial error "'implies nothing with respect to the guilt or innocence of the defendant,' but is simply 'a determination that [he] has been convicted through a judicial *process* which is defective in some fundamental respect.'" *Lockhart*, 488 U.S. at 40 (quoting, with alteration and added emphasis, *Burks v. United States*, 437 U.S. 1, 15 (1978)). Retrying the defendant serves the societal interest in the sound administration of justice. *Lockhart*, 488 U.S. at 38. And the rule benefits defendants overall, because appellate courts might be less "'zealous . . . in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution.'" *Id.* at 39 (quoting *Tateo*, 377 U.S. at 466).

The rule also promotes judicial efficiency. As *Lockhart* noted, the prosecution may possess additional evidence that, in reliance on the court's evidentiary ruling, it did not present at trial. 488 U.S. at 42. If retrial were barred because the prosecution failed to present such evidence, then the State "would have to assume every ruling by the trial court on the evidence to be erroneous" and "offer every bit of relevant and competent evidence," no matter how cumulative. *State v. Wood*, 596 S.W.2d 394, 399 (Mo. 1980). This

case confirms the point: the People did not call J.H. to testify against his stepfather concerning this traumatic incident, relying instead on J.H.'s hearsay statement. If that statement were barred at a retrial, the People could instead present J.H.'s testimony to meet their burden of proof.

The State is entitled to retry defendant, consistent with the Double Jeopardy Clause, as long as the trial evidence, viewed in the light most favorable to the prosecution, sufficed for "any rational trier of fact [to find] the essential elements of the crime beyond a reasonable doubt." *Lopez*, 229 Ill. 2d at 367-68. This sufficiency analysis takes into account *all* of the trial evidence, including evidence admitted in error. *Id.* at 367; *see also Lockhart*, 488 U.S. at 40-41; *People v. Olivera*, 164 Ill. 2d 382, 393-94 (1995); *Hernandez*, 2017 IL App (1st) 150575, ¶ 150. Consequently, a "retrial is permitted even though evidence is insufficient to sustain a verdict once erroneously admitted evidence has been discounted." *Olivera*, 164 Ill. 2d at 393; *see also People v. Smith*, 2015 IL App (1st) 122306, ¶¶ 46-48; *People v. Howard*, 387 Ill. App. 3d 997, 1007-08 (2d Dist. 2009).

Here, the People's evidence more than sufficed for a rational fact-finder to convict defendant. Dr. Fujara's unrebutted expert testimony established that J.H.'s injuries could only have resulted from forcible immersion. R.UU27-28. The appellate majority opined that the evidence "was not so overwhelming" because "the hot and cold water spigots were switched" and "the cold water spigot released water at a scalding temperature." A10. But

this evidence could have bolstered a theory of accidental injury only if it were consistent with the medical evidence, and Dr. Fujara rejected those alternative explanations. Nor was her opinion undermined by her failure to "speak[ ] with any of J.H.'s family members," *see* A10, because her testimony concerned the mechanism of injury as evidenced by the burns themselves, and did not purport to address the series of events that led up to them.

In light of the expert testimony, the question for the fact-finder was whether defendant or someone else forced J.H. into the water and held him down. Even without J.H.'s statement, the State's circumstantial evidence tended to show that defendant was that person: as the trial judge emphasized, defendant admitted to the DCFS investigator that he was the sole adult present when J.H. was burned, and his actions after the fact demonstrated his consciousness of guilt. A24-25. But the State did not need to rely on this indirect evidence alone, because J.H. expressly identified defendant as the culprit. R.TT16. Although the appellate majority acknowledged the rule that the court should consider "all the evidence at the first trial, including any improperly admitted evidence," A11, it plainly failed to adhere to that rule when it barred a retrial on the ground that "J.H.'s erroneously admitted hearsay statement was the only piece of evidence placing defendant in the bathroom where the injury occurred," A13. Because J.H.'s hearsay statement provided that proof, the State needed to present no additional evidence establishing the same point.

Because the State proved defendant's guilt at his first trial, retrying defendant to correct the trial court's evidentiary error does not violate the Double Jeopardy Clause. Accordingly, the appellate court's judgment barring a retrial should be reversed.

CONCLUSION

This Court should reverse the appellate court's judgment in part and remand the case to the Circuit Court of Cook County for a new trial.

October 31, 2018

Respectfully submitted,

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RULE 341(c) CERTIFICATE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is twelve pages.

/s/ Erin M. O'Connell
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Assistant Attorney General

APPENDIX

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2017 IL App (1st) 142882

FIFTH DIVISION
Filing Date: December 15, 2017

No. 1-14-2882

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
v.	)	No. 08 CR 23372 11 C6 60174
GERALD DRAKE,	)	
Defendant-Appellant.	)	Honorable Luciano Panici, Judge Presiding.

JUSTICE HALL delivered the judgment of the court, with opinion.
Justice Lampkin concurred in the judgment and opinion.
Justice Gordon partially concurred and partially dissented in the judgment and opinion.

OPINION

¶ 1 Following a bench trial in the Cook County circuit court, defendant Gerald Drake was convicted of the aggravated battery of his six-year old stepson, J.H., and sentenced to 20 years in the Illinois Department of Corrections (IDOC). On appeal, defendant contends that (1) the State failed to prove beyond a reasonable doubt that he intentionally immersed J.H. in hot water where no eyewitnesses testified and unrebutted evidence shows that the hot and cold water lines were reversed in the bathtub in which J.H. sustained his burns; (2) the trial court erred in allowing nurse Rosalina Roxas to testify to J.H.'s statement identifying him as the person who poured hot water on him where it was not pertinent to his medical diagnosis and treatment and, therefore,

inadmissible under the common-law exception to the hearsay rule; (3) this court should remand for a *Krankel* inquiry where he argued trial counsel's ineffectiveness for failing to put on evidence of J.H.'s mental disability and J.H.'s statement in which he did not implicate defendant, yet the trial court failed to investigate the claims; and (4) his 20-year sentence was excessive, and this court should impose a sentence closer to the minimum or, alternatively, remand for a new sentencing hearing.

¶ 2 For the following reasons, we reverse.

¶ 3 BACKGROUND

¶ 4 The State's evidence at trial established that defendant lived with his wife and their nine children, including J.H. While his wife was at work on July 29, 2008, defendant was home taking care of the children, who ranged in age from infancy to 12 years old. While defendant was at home with the children, J.H. sustained second- and third-degree burns on his buttocks, genital region, and both feet up to his ankles.

¶ 5 Retired registered nurse Rosalina Roxas testified on direct examination that she treated J.H. for his burns at John H. Stroger, Jr., Hospital (Stroger Hospital). She testified that on August 8, 2008, when she entered his room, J.H. said "nurse, I'm going to tell you something." J.H. then told her that defendant poured hot water on him while he was in the tub. J.H. indicated that he had not done anything to upset defendant. No one else was in the room. On cross-examination, she again confirmed that J.H. told her that his father poured a cup of hot water on his buttocks while he was in the tub, but she further testified that she never asked how large the cup was nor did she ever see or speak to anyone from J.H.'s family.

¶ 6 The State also presented the expert testimony of Dr. Marjorie Fujara, a specialist in child abuse pediatrics at Stroger Hospital. She examined J.H. on July 30, 2008, and stated that, in her

professional opinion, J.H.'s injuries were the result of forcible immersion, indicative of child abuse. She indicated that the injuries were not consistent with water being poured on J.H., contrary to the statement testified to by Nurse Roxas. Dr. Fujara also stated that her opinion would not change even if she knew that the hot and cold water knobs had been switched. She further stated that all of J.H.'s siblings were examined and none of them had burns or indications of abuse. Dr. Fujara also never spoke with any of J.H.'s family members.

¶ 7 Finally, retired Illinois Department of Children and Family Services (DCFS) investigator Thomas White, who investigated the case in 2008, testified that he interviewed defendant at the family home on August 3, 2008, and defendant denied that he injured the child. Defendant indicated that on the date of the injuries, his wife, J.H.'s mother, was at work and he was caring for their eight or nine children at home (White could not recall the exact number because so much time had passed), who ranged in age from infancy to 12 years old. Investigator White concluded that defendant was overwhelmed, although defendant himself never used that word. On the date J.H. sustained his injuries, the baby defecated in his diaper, some of which ended up on the floor, during which time J.H. and another sibling were wrestling and got into the feces on the floor. After seeing them with feces on themselves, defendant told them to go and take a bath. When his wife came home from work that evening, the other kids told her that J.H.'s feet were peeling. Defendant and his wife took J.H. to the hospital, with defendant carrying him inside. Defendant admitted to Investigator White that, once they arrived at the hospital, he used the name "Joe Campbell," stated that he was the child's uncle, and made up a story as to the child's location at the time of injury. When Investigator White interviewed the other children, he did not observe any signs or symptoms of abuse and they "[s]eemed appropriately adjusted."

¶ 8 On cross-examination, Investigator White testified that defendant indicated that he was not angered at the time he sent J.H. to take a bath. Defendant told him that a new water tank was installed by the landlord and that the hot and cold water lines were reversed. White checked the temperature coming out of the spigot when the cold water knob was turned on, and the temperature rose "rapidly" to 161 degrees. When White went to the basement to examine the water tank, he discovered that the hot and cold water pipes had been installed backwards on the new tank.

¶ 9 The defense rested without making a motion for directed finding or presenting any evidence.

¶ 10 The State argued in closing that defendant intentionally held J.H. under hot bath water. Defense counsel argued that J.H. was accidentally burned in the tub while defendant was not present in the bathroom. Additionally, defense counsel argued that the State presented no evidence to support its theories besides the injuries themselves and that no witness, including any of the other children present in the house at the time, testified as to the events of the day.[1]

¶ 11 At the conclusion of the bench trial, the trial court found defendant guilty of aggravated battery, citing two grounds in particular. First, the trial court observed: "There is scientific evidence where a reasonable inference can be made that in fact the defendant, who was the caregiver or caretaker of these eight children while mother was at work, in charge caused these injuries." Second, the trial court found, after considering all the evidence: "It's consciousness of guilt because defendant took off, also the fictitious name that he used when he went to the

[1]The incident occurred in July 2008, and the trial occurred in 2014.

hospital ***." The trial court's finding referred to the fact that, on November 29, 2011, defendant failed to appear for a court date and a bench warrant was issued for his arrest.[2]

¶ 12 On May 21, 2014, several weeks after trial but prior to sentencing, defendant filed a *pro se* motion titled "Motion-To-Appeal-An-Unfair-Trial," in which he claimed that his trial counsel was ineffective. Defendant filed this *pro se* motion with the clerk of the Appellate Court, First District, who forwarded it to the circuit court clerk. On June 26, 2014, which was almost a month prior to sentencing, the trial court entered an order that denied defendant's *pro se* motion and treated it instead as an interlocutory notice of appeal.

¶ 13 On July 22, 2014, the trial court denied a posttrial motion for a new trial filed by defendant's counsel. In this posttrial motion, defendant reasserted a claim that the trial court had previously denied, namely, that this case was barred on *res judicata* grounds because in a prior abuse and neglect case filed by the State against defendant and his wife based on the same incident, the State had failed to prove its case by clear and convincing evidence. Defendant also claimed that the evidence was insufficient to prove him guilty of aggravated battery of a child and that the trial court erred by admitting the nurse's statement pursuant to the hearsay exception for medical statements.

¶ 14 After denying the posttrial motion, the trial court sentenced defendant to 22 years in the IDOC. A discussion ensued as to whether the sentence was to be served at 85% or 50%. The trial court then ordered, "22 years IDOC plus three years mandatory supervised release at 50 percent."

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[2]On February 28, 2013, defense counsel stated to the trial court that defendant "turned himself in to the police. *** He said that he wanted to get it over with. So, he told them about the warrant." However, the assistant State's Attorney argued during the State's closing at trial that "he didn't turn himself in." Defense counsel objected but was overruled. The State presented no evidence at trial concerning the circumstances of defendant's 2013 arrest.

¶ 15 After sentencing defendant on the aggravated battery charge, the trial court then proceeded to a sentencing hearing on another outstanding charge. Defendant had previously pleaded guilty to a charge of driving a motor vehicle while his license was suspended or revoked. The trial court sentenced him on this second charge to one year in the custody of the IDOC to be served consecutively to the aggravated battery sentence.

¶ 16 On July 24, 2014, the State filed a "Petition for Relief from Judgment," arguing that defendant's aggravated battery sentence was a void judgment because it had to be served at 85%, not at 50%, as the trial court ordered. At the hearing on the petition on August 6, 2014, the State requested that the trial court resentence defendant. The trial court stated: "I didn't make any specific findings on the record, I don't think, because I didn't write anything down, I just said 22 years." Defense counsel argued that defendant "would have essentially served 11 years" with the IDOC and, thus, the trial court should now sentence defendant to "14 years at 85 percent." The trial court responded, "My sentence was 22 years and I wasn't considering whether or not it was going to be 50 or 85 percent."[3] The court then ruled that it "will re-sentence the defendant to a term of 20 years I.D.O.C. plus 3 years MSR at 85 percent."

¶ 17 On August 8, 2014, defendant again filed his *pro se* motion titled "Motion-To-Appeal-An-Unfair-Trial-Factors-That-My-Attorney-Did not-Argue-in-Trial On-Defendant-Behalf." In this motion, defendant claimed that his attorney did not "do a good job" because he failed to argue that the victim had suffered from mental health issues since he was a toddler and had attended "mentally retarded schools all his life." Defendant claimed that all of J.H.'s teachers had stated on school reports that "he thinks slower than normal kids" and that J.H.'s mental issues played a large role in his injuries. Defendant argued that if it took only one or two seconds

[3]The State concedes in its appellate brief that on July 22, 2014, "the trial court determined that defendant's sentence would be served at 50-percent."

to become burned at 160 degrees, J.H.'s reaction time is a lot slower than a normal child and that was why it "took him longer than a normal kid *** to get out." Defendant also claimed that his attorney failed to present expert testimony by a plumber about the broken water tank. His attorney also failed to argue that J.H. spoke to a DCFS case worker, a physician, and a detective and never told any of them that defendant held him in the tub. Defendant further claimed that his attorney also failed to explain that defendant had a history of using fake names because he had an outstanding warrant for driving with a revoked license. Also, defendant did not want to initially turn himself in because his family had fallen behind on the rent and other bills and he wanted to pay off these bills first.

¶ 18 The trial court docketed this *pro se* motion as a notice of appeal, and no other notice of appeal was filed. This appeal followed.

¶ 19 ANALYSIS

¶ 20 As previously stated, defendant makes a number of arguments on appeal. Specifically, he contends that (1) the State failed to prove beyond a reasonable doubt that he intentionally immersed J.H. in hot water, where no eyewitnesses testified and unrebutted evidence shows that the hot and cold water lines were reversed in the bathtub in which J.H. sustained his burns; (2) the trial court erred in allowing Nurse Roxas to testify to J.H.'s statement identifying him as the person who poured hot water on him where it was not pertinent to his medical diagnosis and treatment and, therefore, inadmissible under the common-law exception to the hearsay rule; (3) this court should remand for a *Krankel* inquiry where defendant argued trial counsel's ineffectiveness for failing to put on evidence of J.H.'s mental disability and J.H.'s statement in which he did not implicate defendant, yet the trial court failed to investigate the claims; and

(4) his 20-year sentence was excessive and this court should impose a sentence closer to the minimum or alternatively, remand for a new sentencing hearing.

¶ 21 1. Hearsay Rule Violation

¶ 22 Defendant contends the trial court violated Illinois Rule of Evidence 803(4) (eff. Apr. 26, 2012) when the trial court admitted, as a statement "made for purposes of medical treatment," a hearsay statement by J.H. to Nurse Roxas concerning the identity of the alleged perpetrator.

¶ 23 The parties dispute the proper standard of review for this issue. The State argues that this issue should be considered under an abuse of discretion standard, while defendant contends that it is a question of law and should be reviewed *de novo*.

¶ 24 Illinois recognizes the common-law exception to the hearsay rule for statements made by a patient to medical personnel for the purpose of medical diagnosis and treatment. *People v. Oehrke*, 369 Ill. App. 3d 63, 68 (2006); *People v. Gant*, 58 Ill. 2d 178, 186 (1974). The exception covers " 'statements made to a physician concerning the cause or the external source of the condition to be treated.' " (Internal quotation marks omitted.) *People v. Coleman*, 222 Ill. App. 3d 614, 625 (1991) (quoting *Gant*, 58 Ill. 2d at 186). A trial court is vested with discretion to determine whether the statements made by the victim were " 'reasonably pertinent to [the victim's] diagnosis or treatment.' " (Internal quotation marks omitted.) *People v. Davis*, 337 Ill. App. 3d 977, 989-90 (2003) (quoting *People v. Williams*, 223 Ill. App. 3d 692, 700 (1992)). Statements identifying the offender, however, are beyond the scope of the exception. *Oehrke*, 369 Ill. App. 3d 68; *Davis*, 337 Ill. App. 3d at 990. Accordingly, we will review the trial court's decision for an abuse of discretion.

¶ 25 In the case at bar, we find that the identification statement made by J.H. to Nurse Roxas was not made to assist in his medical diagnosis or treatment. The statement was made more than a week after J.H. had been admitted to the hospital, and treatment of his injuries had already commenced. While we are mindful that such statement would be cause for concern to a medical professional, this court has found that "concern never has been held by any Illinois court to support the medical diagnosis and/or treatment exception to the rule against hearsay." *Oehrke*, 369 Ill. App. 3d at 70. Therefore, we find the common-law exception to the hearsay rule did not apply to the identification portion of J.H.'s statement. The trial court abused its discretion in admitting the statements at trial.

¶ 26 This does not end our review, however. We must now address the question of whether the trial court's admission of J.H.'s statements to Nurse Roxas identifying defendant was harmless error. *Oehrke*, 369 Ill. App. 3d at 70-71. The admission of evidence is harmless error if there is no reasonable probability that the verdict would have been different had the hearsay been excluded. *Oehrke*, 369 Ill. App. 3d at 71; *People v. Bridgewater*, 259 Ill. App. 3d 344, 349 (1994). The remedy for the erroneous admission of hearsay is reversal unless the record clearly shows that the error was harmless. *People v. Littleton*, 2014 IL App (1st) 121950, ¶ 65.

¶ 27 Courts consider three factors in determining whether an error was harmless: (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 evidence. *Littleton*, 2014 IL App (1st) 121950, ¶ 66.

¶ 28 Here, J.H.'s statement to Nurse Roxas was the only evidence that placed defendant in the bathroom where the injury occurred. Thus, the statement was not cumulative of any other

evidence presented at trial. See *Littleton*, 2014 IL App (1st) 121950, ¶ 65. Additionally, the other evidence of defendant's guilt was not so overwhelming, particularly in light of the facts that the hot and cold water spigots were switched, the cold water spigot released water at a scalding temperature, and none of the medical personnel testified to speaking with any of J.H.'s family members. Since J.H.'s statement to the nurse that defendant was the perpetrator was the foundation of the State's case, we cannot see how the erroneous admission of his hearsay statement was harmless error.

¶ 29 Based on the record, we cannot say that " 'the properly admitted evidence was so overwhelming, without the erroneously admitted hearsay statements, that no fair-minded trier of fact could reasonably have acquitted the defendant.' " *Oehrke*, 369 Ill. App. 3d at 71 (quoting *Bridgewater*, 259 Ill. App. 3d at 349). We find the trial court's admission and use of J.H.'s hearsay statements was reversible error.

¶ 30 2. Sufficiency of the Evidence

¶ 31 A finding that the erroneous admission of hearsay evidence was reversible error does not end our inquiry, however, as defendant also challenges the sufficiency of the evidence. Specifically, defendant contends that the State failed to prove beyond a reasonable doubt that he intentionally immersed J.H. in hot water where no eyewitnesses testified and the unrebutted evidence shows that the hot and cold water lines were reversed in the bathtub in which J.H. sustained his burns.

¶ 32 In this case, because the trial court committed reversible error in admitting hearsay evidence as previously determined, the remedy would ordinarily be a remand for a new trial. See *Littleton*, 2014 IL App (1st) 121950, ¶ 65. However, in this case, because defendant has challenged the sufficiency of the evidence, double jeopardy is triggered, and we must consider

whether we may remand for a new trial. See *People v. Hernandez*, 2017 IL App (1st) 150575, ¶¶ 134-36.

¶ 33 The double jeopardy clause provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const., amends. V, XIV. The Illinois Constitution (Ill. Const. 1970, art. I, § 10) and Illinois statute (720 ILCS 5/3-4(a) (West 2012)) provide similar guarantees. *People v. Bellmyer*, 199 Ill. 2d 529, 536-37 (2002); *Hernandez*, 2017 IL App (1st) 150575, ¶ 135.

¶ 34 When the double jeopardy clause applies, a reviewing court must examine the sufficiency of the evidence prior to a remand for a new trial. *Hernandez*, 2017 IL App (1st) 150575, ¶ 136.

¶ 35 When reviewing a challenge to the sufficiency of the evidence, the relevant inquiry is whether, after viewing 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. *People v. Sutherland*, 155 Ill. 2d 1, 17 (1992); *People v. Brown*, 2017 IL App (1st) 142877, ¶ 39. To prove the offense of aggravated battery, the State was required to show that defendant intentionally or knowingly caused great bodily harm or permanent disability while committing a battery. 720 ILCS 5/12-4(a) (West 2008). Additionally, we may consider all the evidence at the first trial, including any improperly admitted evidence, when making this determination. See *Hernandez*, 2017 IL App (1st) 150575, ¶ 141; *Oehrke*, 369 Ill. App. 3d at 71; *People v. Johnson*, 296 Ill. App. 3d 53, 66 (1998).

¶ 36 Here, the State presented evidence that J.H. sustained second- and third-degree burns on his buttocks, genital region, and both feet up to his ankles. Nurse Roxas testified on direct examination that on August 8, 2008, J.H. told her that defendant poured hot water on him while

he was in the tub. On cross-examination, she testified that she never asked for any details nor did she ever see or speak to anyone from J.H.'s family.

¶ 37 The State also presented the expert testimony of Dr. Fujara, who examined J.H. on July 30, 2008, and stated that, in her professional opinion, J.H.'s injuries were the result of forcible immersion, indicative of child abuse. She indicated that the injuries were not consistent with water being poured on J.H., contrary to the statement testified to by Nurse Roxas. Dr. Fujara also never spoke with any of J.H.'s family members.

¶ 38 Additionally, retired DCFS investigator White testified that he interviewed defendant at the family home on August 3, 2008, and defendant denied that he injured the child. Defendant indicated that on the date of the injuries, his wife, J.H.'s mother, was at work and he was caring for all of the children at home, who ranged in age from infancy to 12 years old. On the date J.H. sustained his injuries, the baby defecated in his diaper, some of which ended up on the floor, during which time J.H. and another sibling were wrestling and got into the feces on the floor. After seeing them with feces on themselves, defendant told them to go and take a bath. When his wife came home from work that evening, the other kids told her that J.H.'s feet were peeling. Defendant and his wife took J.H. to the hospital, with defendant carrying him inside. Defendant admitted to Investigator White that, once they arrived at the hospital, he used the name "Joe Campbell," stated that he was the child's uncle, and made up a story as to the child's location at the time of injury.

¶ 39 On cross-examination, Investigator White testified that defendant indicated that he was not angered at the time he sent J.H. to take a bath. Defendant told him that there had been a new water tank installed by the landlord and that the hot and cold water lines were reversed.

Investigator White verified that the hot water tank's pipes were reversed, and he also learned that the water coming from the tank was 160 degrees as measured by his thermometer.

¶ 40 As previously stated, J.H.'s erroneously admitted hearsay statement was the only piece of evidence placing defendant in the bathroom where the injury occurred. The State provided no other identification evidence, and it is undisputed that there were other people present in the house.

¶ 41 Viewing all of the evidence presented at the trial in the light most favorable to the State, we conclude that the State failed to prove defendant guilty of the essential elements of aggravated battery beyond a reasonable doubt. The double jeopardy clause forbids a second or successive trial for the purpose of affording the prosecution another opportunity to supply evidence it failed to muster in the first proceeding. *People v. Olivera*, 164 Ill. 2d 382, 393 (1995) (citing *Burks v. United States*, 437 U.S. 1, 11 (1978)). As such, defendant's conviction is reversed.

¶ 42 3. Defendant's Other Claims of Error

¶ 43 Since we are reversing defendant's conviction, we do not need to reach defendant's claims concerning a *Krankel* inquiry or sentencing error.

¶ 44 CONCLUSION

¶ 45 For the foregoing reasons, the judgment of the circuit court of Cook County is reversed.

¶ 46 Reversed.

¶ 47 JUSTICE GORDON, concurring in part and dissenting in part:

¶ 48 For the following reasons, I concur with the majority's finding that defendant's conviction must be reversed but dissent from the majority's finding that double jeopardy bars a

retrial. Thus, I would reverse and remand for further proceedings. In addition, I write separately to discuss arguments and case law not addressed by the majority.

¶ 49 I concur with the majority's finding that the trial court erred in allowing a nurse to testify about J.H.'s statement identifying defendant as the person who poured hot water on him, where it was not pertinent to J.H.'s medical diagnosis and treatment and, therefore, was not admissible under the medical diagnosis and/or treatment exception to the hearsay rule. Ill. R. Evid. 803(4) (eff. Apr. 26, 2012). I agree that the alleged identity of the perpetrator cannot be considered a statement made for the purposes of medical treatment in this particular case.

¶ 50 However, I must write separately on this issue because (1) I disagree with the standard of review applied by the majority and (2) we need to address an argument raised by the State and overlooked by the majority.

¶ 51 While there is no dispute between the parties that the issue was preserved for our review, the State and defendant do dispute the proper standard of review. The State argues, and the majority agrees, that we should apply an abuse-of-discretion standard of review, which normally applies to evidentiary questions. By contrast, defendant argues, and I agree, that whether the hearsay exception applies to the alleged identity of the perpetrator is solely a question of law, which we should review *de novo*.

¶ 52 While evidentiary rulings are generally within the sound discretion of the trial court, *de novo* review applies to an evidentiary question if that question concerns how to correctly interpret a " 'rule of law.' " *People v. Caffey*, 205 Ill. 2d 52, 89 (2001) (quoting *People v. Williams*, 188 Ill. 2d 365, 369 (1999)). An abuse of discretion occurs only where the trial court's ruling is arbitrary, fanciful, or unreasonable or where no reasonable person would take the view adopted by the trial court. *People v. Patrick*, 233 Ill. 2d 62, 68 (2009). By contrast, *de novo*

consideration means that we perform the same analysis that a trial judge would perform. *People v. Schlosser*, 2017 IL App (1st) 150355, ¶ 28.

¶ 53 The question of whether the hearsay exception includes the alleged identity of the perpetrator is solely a question of law, to which we apply *de novo* review. This court previously considered this issue and found that, while a trial court is vested with discretion in determining whether statements made by a victim were reasonably pertinent to the victim's diagnosis or treatment, any statements identifying the offender were "beyond the scope" of the trial court's discretion. *Oehrke*, 369 Ill. App. 3d at 68. "[W]here the credibility of the witnesses is not at issue, no relevant facts are in dispute, and the court's ruling is not related in any way to a balancing of [probative value] versus prejudice—in other words, when the considerations on which we typically defer to the trial court are not present—and the only issue for the reviewing court is the correctness of the trial court's legal interpretation, *de novo* review is appropriate." *People v. Risper*, 2015 IL App (1st) 130993, ¶ 33; see also *People v. Aguilar*, 265 Ill. App. 3d 105, 109 (1994) (*de novo* review applied to a trial court's evidentiary ruling where the case "involve[d] a legal issue and did not require the trial court to use its discretion regarding fact-finding or assessing the credibility of witnesses" (cited with approval in *Caffey*, 205 Ill. 2d at 89)).

¶ 54 The question before us is solely whether the alleged identity of a perpetrator can be considered a statement made for purposes of medical treatment, which is purely a legal question. In the statement at issue, a nurse testified that J.H. told her that "his dad was the one who poured hot water on his buttocks while he was in the tub." However, the admission of most of this statement is not at issue. Defendant does not contest the nurse's ability to testify that hot water was poured on J.H.'s buttocks while in the tub. *E.g.*, *People v. Spicer*, 379 Ill. App. 3d 441, 447,

451 (2007) (a victim's statement to an emergency room doctor about the incident, namely, that she had been " 'tied and raped,' " was admissible pursuant to the hearsay exception for medical diagnosis). The issue is only whether the nurse should have been allowed to testify as to the alleged identity of the perpetrator.

¶ 55 In support of its argument that we should apply an abuse-of-discretion standard of review to this question, the State cites only one case: *In re Jovan A.*, 2014 IL App (1st) 103835. In *Jovan A.*, the question was whether a police officer's testimony about the content of an online advertisement was properly admitted to show the course of the officer's investigation. *Jovan A.*, 2014 IL App (1st) 103835, ¶ 34. This court applied an abuse-of-discretion standard of review (*Jovan A.*, 2014 IL App (1st) 103835, ¶ 20) and found that the trial court erred by admitting the advertisement's content (*Jovan A.*, 2014 IL App (1st) 103835, ¶ 35). By contrast, the issue in the case at bar requires us to interpret the proper scope of a rule of evidence, namely, Illinois Rule of Evidence 803(4) (eff. Apr. 26, 2012). *Schlosser*, 2017 IL App (1st) 150355, ¶ 28 (issues of statutory interpretation are reviewed *de novo*). Thus, *de novo* review applies.

¶ 56 Next, we need to address an argument raised by the State and overlooked by the majority. The State argues that the outcome of this case is dictated by the Illinois Supreme Court's opinion in *People v. Falaster*, 173 Ill. 2d 220, 230 (1996), in which our supreme court found that a child victim's statements made to a nurse during a diagnostic examination fit within the scope of this hearsay exception.

¶ 57 While there is a general bar to admitting statements of identification as statements made for the purposes of medical diagnosis or treatment,[4] our supreme court in *Falaster*, 173 Ill. 2d at

[4]See *Oehrke*, 369 Ill. App. 3d at 68; *People v. Davis*, 337 Ill. App. 3d 977, 990 (2003) ("identification of the offender is outside the scope of the exception"); *People v. Cassell*, 283 Ill. App. 3d 112, 125 (1996) ("the part of C.G.'s statement referring to her ex-boyfriend as the perpetrator was not

230, carved out a limited exception to this bar for a child victim's identification of a family member in cases of sexual abuse. The supreme court explained that "a victim's identification of a family member as the offender is closely related to the victim's diagnosis and treatment in cases involving allegations of sexual abuse." *Falaster*, 173 Ill. 2d at 230; see also *People v. Morgan*, 259 Ill. App. 3d 770, 781 (1994) (a child's statement to doctors identifying his stepfather "as the person who sexually abused him was reasonably pertinent to diagnosis and treatment"). In essence, the State in the case at bar asks us to extend *Falaster* to cases not involving sexual abuse, but the State does not cite a single case in the 20 years since *Falaster* was decided that has done so. *Oehrke*, 369 Ill. App. 3d at 70 ("In *Falaster* and *Morgan*, the courts recognized intrafamily sexual abuse of a child creates unique psychological harm that requires special treatment."); see also *People v. Stull*, 2014 IL App (4th) 120704, ¶¶ 75-81 (the appellate court discussed *Falaster* to find no error in admitting a six-year-old child's statement to a doctor identifying her father as the person who had sexually assaulted her); *People v. Simpkins*, 297 Ill. App. 3d 668, 679-80 (1998) (discussing *Falaster* as precedent in a case of alleged criminal sexual assault by defendant of his five-year-old daughter). Thus, I would expressly decline the

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admissible under this exception since the identity of the person who attacked her was not necessary to her receiving proper medical treatment"); *People v. Hall*, 235 Ill. App. 3d 418, 435 (1992) ("Although medical personnel may testify as to statements made by a sexual assault victim to medical diagnosis or treatment, they may not identify the alleged perpetrator."); *People v. Perkins*, 216 Ill. App. 3d 389, 397-98 (1991) ("While there is no question that Margaret's statement that she had been sexually assaulted was admissible as a 'statement[ ] pertinent to medical diagnosis and treatment' [citations], that part of her statement identifying Perkins as the perpetrator was not admissible under this exception to the hearsay rule."); *People v. Hudson*, 198 Ill. App. 3d 915, 922 (1990) ("identification of the offender is outside the scope of this hearsay exception"); *People v. Sommerville*, 193 Ill. App. 3d 161, 175-76 (1990) (the victim's description of "the perpetrator as 'a black man' " was "a statement which should have been excluded as descriptive testimony unnecessary for medical diagnosis and treatment"); *People v. Taylor*, 153 Ill. App. 3d 710, 721 (1987) ("We are unaware of any criminal case where a physician has been permitted, under the physician-patient exception to the hearsay rule, to repeat a statement made by the patient identifying the assailant."); *c.f. Spicer*, 379 Ill. App. 3d at 447, 451 (an adult victim's statement to an emergency room doctor about *how* the incident occurred, namely, that she had been " 'tied and raped,' " was admissible pursuant to the hearsay exception for medical diagnosis).

State's invitation to extend *Falaster*'s holding. See *Oehrke*, 369 Ill. App. 3d at 70 ("We decline to broaden the terms of the medical diagnosis and treatment exception by judicial fiat, 'lest the exception swallow a rule that has served so well for so long.' [Citation.]").

¶ 58 I do concur with the majority's finding that this error was not harmless. *People v. Thompson*, 238 Ill. 2d 598, 611 (2010) (when a defendant has preserved an issue for appellate review, the reviewing court will conduct a harmless error analysis). J.H.'s statement to the nurse was the only evidence placing defendant in the bathroom where the injury occurred. Thus, the statement was material and not cumulative of any other evidence in the record, and I agree that we must reverse defendant's conviction. See *Caffey*, 205 Ill. 2d at 92 ("[e]rror in the exclusion of hearsay testimony is harmless where the excluded evidence is merely cumulative"); *People v. Sims*, 192 Ill. 2d 592, 629 (2000) (admission of hearsay testimony was harmless where "the evidence of defendant's guilt was overwhelming").

¶ 59 However, I find that a retrial of defendant does not violate the bar against double jeopardy. See *Oehrke*, 369 Ill. App. 3d at 71; *People v. Johnson*, 296 Ill. App. 3d 53, 66 (1998). In reaching its conclusion, the majority overlooks the significance of evidence that the trial court specifically mentioned was pivotal to its own verdict in this bench trial. The trial court observed (1) that it was defendant who was "the caregiver or caretaker of these eight children while [the] mother was at work" and (2) that defendant exhibited "consciousness of guilt" (a) when he used "fictitious names *** when he went to the hospital" with the victim on the night of the offense and (b) when defendant "took off" for over a year prior to the trial in this case.

¶ 60 In addition, the majority minimizes the significance of the excluded evidence in its double jeopardy analysis. On the one hand, the majority agrees that this evidence is so compelling that its admission, by itself, is enough to reverse. On the other hand, the majority

downplays this evidence of guilt in its double jeopardy analysis. Our supreme court has held: "If the evidence presented at the first trial, *including the improperly admitted evidence*, would have been sufficient for any rational trier of fact to find the essential elements of the crime proven beyond a reasonable doubt, retrial is the proper remedy." (Emphasis added.) *People v. McKown*, 236 Ill. 2d 278, 311 (2010). Thus, we are required to consider the victim's statement that it was defendant who was in the room with the victim when the injury occurred. For all the reasons that we found this statement to be far from harmless, I believe that we must also find it material to a double jeopardy analysis. In a double jeopardy analysis, we review *all* the evidence presented at the first trial and then determine whether "any rational trier of fact" could have found defendant guilty. *McKown*, 236 Ill. 2d at 311. In sum, after considering the reasons that the trial judge specifically gave for his verdict and the highly material and now excluded identification evidence, as well as all the other evidence at trial, I find that this trial judge was not irrational. *People v. Williams*, 2013 IL App (1st) 111116, ¶ 102 (after a bench trial, we presume that the trial court considered all the evidence). Thus, I would remand for a new trial without the identification portion of J.H.'s hearsay statement in evidence.

¶ 61 Since I would remand for a new trial and the trial court may permit the same attorney to represent defendant, I believe we must address defendant's *Krankel* claim, which the majority does not discuss. While I recognize the advantages of permitting the same counsel who is already thoroughly familiar with the case to continue with it, I would hold the trial court must first conduct a *Krankel* inquiry, for the reasons and in the manner set forth by our supreme court in *People v. Ayres*, 2017 IL 120071, ¶¶ 9, 15, 20-22 (a defendant's allegation of ineffective assistance of counsel even without any factual support is sufficient to trigger a *Krankel* inquiry,

and a remand is necessary to allow the trial court and defendant "an opportunity to flesh out his claim").

¶ 62 On this appeal, defendant asked this court to remand for a *Krankel* inquiry, on the ground that he had filed a *pro se* posttrial motion that argued that his trial counsel was ineffective for failing to introduce (1) evidence of J.H.'s mental disability and (2) statements by J.H. in which he did not implicate defendant. There is no dispute among the parties that the trial court failed to investigate defendant's claims and failed to conduct any inquiry. Thus, I would remand for a *Krankel* inquiry, to be conducted before any further proceedings.

¶ 63 For the foregoing reasons, I concur only with the finding that defendant's conviction must be reversed. However, I must dissent because I find that double jeopardy poses no bar to a retrial. Thus, I would remand for further proceedings including, first, a *Krankel* inquiry.

IN THE CIRCUIT COURT OF COOK COUNTY

PEOPLE OF THE STATE OF ILLINOIS)
V.)
[redacted]RALD DRAKE)
Defendant

CASE NUMBER 08CR2337201
DATE OF BIRTH 01/08/69
DATE OF ARREST 11/15/08
IR NUMBER 1741004 SID NUMBER 027266700

ORDER OF COMMITMENT AND SENTENCE TO ILLINOIS DEPARTMENT OF CORRECTIONS

The above named defendant having been adjudged guilty of the offense(s) enumerated below is hereby sentenced to the Illinois Department of Corrections as follows:

Count	Statutory Citation	Offense	Sentence	Class
001	720-5/12-4.3(a)	AGG BATTERY OF A CHILD	YRS. 020 MOS.00	X
	and said sentence shall run concurrent with count(s) ___ ___ ___ ___			
___	_____	_____	YRS. ___ MOS. ___	___
	and said sentence shall run (concurrent with)(consecutive to) the sentence imposed on:			
___	_____	_____	YRS. ___ MOS. ___	___
	and said sentence shall run (concurrent with)(consecutive to) the sentence imposed on:			
___	_____	_____	YRS. ___ MOS. ___	___
	and said sentence shall run (concurrent with)(consecutive to) the sentence imposed on:			
[redacted]	_____	_____	YRS. ___ MOS. ___	___
	and said sentence shall run (concurrent with)(consecutive to) the sentence imposed on:			

On Count ___ defendant having been convicted of a class _ offense is sentenced as a class x offender pursuant TO 730 ILCS 5/5-5-3(C)(8).

On Count ___ defendant is sentenced to an extended term pursuant to 730 ILCS 5/5-8-2.

The Court finds that the defendant is entitled to receive credit for time actually served in custody for a total credit of 0650 days as of the date of this order

IT IS FURTHER ORDERED that the above sentence(s) be concurrent with the sentence imposed in case number(s) _____
AND: consecutive to the sentence imposed under case number(s) _____

ENTERED
Sixth Municipal District
Circuit Court of Cook County
AUG 06 2014

IT IS FURTHER ORDERED THAT SERVE AT 85% 3 YEARS MSR _____

Associate Judge Luciano Panici - 1830

IT IS FURTHER ORDERED that the Clerk provide the Sheriff of Cook County with a copy of this Order and that the Sheriff take the defendant into custody and deliver him/her to the Illinois Department of Corrections and that the Department take him/her into custody and confine him/her in a manner provided by law until the above sentence is fulfilled.

[redacted]ATED AUGUST 06, 2014
ERTIFIED BY L RICE
DEPUTY CLERK

VERIFIED BY _____

ENTER: 08/06/14

JUDGE: PANICI LUCIANO 1830

JNP308/06/14 11:39:13

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12DRAKE 46517 stateville

MoTioN-To-APPeaL-AN-UNFair-Trial-FACTors-That-MY-ATTorney-DiDnoT-ARguE-iN-TriaL ON-DeFeNdaNT-BEhalF-

08CR23372
case No 11c6601740
Judge PANICI
Room 105 Markham
IL District 6

~~Please stamp and put on court File~~ and mail me A copy

FooTnoTes I have been convicted of 3 counts. OF batterys charges when victim and The Nine Kids in house Stated To DCFS-worker That i Never touch or harm No one.

3 counts of Aggr Heinous Domestic Batterys with no victim. Evidence OF case

FooTNoTes Judge PANici sentence me 22 years. with no evidence of harm or holding

FooTNoTes My attorney didnot argue that the victim have mentally issue since he was A toddler he have been going to mentally retarded schools all his life ALL his Teachers from past schools stated on school reports that do to his mental issue he thinks slower than normal kids his mental issue play A big role in his injure.

This is For The APPellaTe courT FiLe

FooTnoTes ATTorney didnoT argue the Facts that in ExperT Plummer wrote statemenT receipT stated how broken the hot water heater was he said the tem OF the hot water was 160° degrees would take only one thi two second to burn skin off body with his mental issue of beening on the boardAline of retarded victim mental Ability of reacting is A lot slow than normal kids I think he panic when he stated to nurse that he Turn the wrong knob on hot that whats took him longer than a normal kids to get out A22 he stated ST. James hospital

Turn To back Page

STATE OF ILLINOIS)
) SS:
COUNTY OF C O O K)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff,

vs. No. 08 CR 23372

GERALD DRAKE, Defendant.

REPORT OF PROCEEDINGS had at the hearing of the above-entitled cause, before the Honorable LUCIANO PANICI, Judge of said Court, Friday the 18th day of April, 2014.

PRESENT:

HON. ANITA ALVAREZ,
State's Attorney of Cook County, by:
ASA REGINA MESCALL,
ASA TERRI GLEASON and
ASA DEBBIE LAWLER,
On behalf of the People;

MR. STEVEN POTTS,
On behalf of the Defendant.

PATRICIA J. THOMPSON, CSR.
Official Court Reporter
6th District - Markham
(708) 232-4410
CSR # 084-003183

in his anger. He grabbed this child, and he held this child down. Nobody over ten years that was present in this house could have done that but for him, but then again his explanation and lack thereof and his actions subsequent to this crime support that he did it.

The defense wants to now say that the child's statement is unreliable because he is drug induced. Yeah he is drug induced because these changes are so horribly painful that the boy needs morphine. Imagine your balls getting burned, your perineum horrifically injured in this case. There is no doubt. Convict this defendant, Judge.

THE COURT: All right, I heard the evidence, observed the photographs, which indicate this defendant held down the victim. We have scientific evidence from a doctor. The doctor -- un-waiving in her testimony testified that these are emersion burns, emersion burns, forcibly emersed into water, and she explained scientifically for example if water had been thrown on the child there would have been splash burns, but that's not here. There is no evidence of that, no direct evidence. There is scientific evidence where a reasonable inference can be made that in fact the defendant, who was the caregiver or caretaker of these eight children while mother was at work, in charge caused these injuries.

It's consciousness of guilt because defendant took

off, also the fictitious name that he used when he went to the hospital -- all of these reasonable inferences lead me to believe that in fact the defendant committed a crime, so finding of guilt on all three charges.

MS. MESCALL: We ask bond be revoked.

THE COURT: Bond is revoked. PSI ordered.

What date?

MR. POTTS: How long will it take, Judge.

THE COURT: Thirty days.

MR. POTTS: Is the 13th of May too early?

THE COURT: That's fine. By agreement, 5/13 for post-trial motions and/or sentencing.

Prepare a PSI order.

(Whereupon, the above-entitled cause was continued to 5/13/14.)

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Michael Dwyer	EE-5			
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Dr. Marjorie Fujara	UU-3	UU-28	UU-46	UU-49
Thomas White	UU-52	UU-63	UU-85	

CERTIFICATE OF FILING AND SERVICE

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 October 31, 2018, the foregoing **Brief and Appendix of Plaintiff-Appellant People of the State of Illinois** was (1) filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system; and (2) served on counsel in this case electronically by transmitting a copy from my e-mail address to counsel's e-mail addresses, listed below:

Patricia G. Mysza
Deputy Defender
Office of the State Appellate Defender,
First Judicial District
203 North LaSalle Avenue, 24th Floor
Chicago, Illinois 60601
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Additionally, upon its acceptance by the court's electronic filing system, the undersigned will mail an original and twelve copies of the brief to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois, 62701.

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