No. 123734

IN THE
SUPREME COURT OF ILLINOIS

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

REPLY BRIEF OF PLAINTIFF-APPELLANT
PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN
Attorney General of Illinois

DAVID L. FRANKLIN
Solicitor General

MICHAEL M. GLICK
Criminal Appeals Division Chief

ERIN M. O'CONNELL
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(312) 814-1235
eserve.criminalappeals@atg.state.il.us

Counsel for Plaintiff-Appellant
People of the State of Illinois

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 parties agree on the governing law. *See* Def. Br. 11.[1] The People may retry defendant so long as the trial evidence, which included the hearsay statement admitted in error and which must be 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." *People v. Lopez*, 229 Ill. 2d 322, 367-68 (2008); *see also Lockhart v. Nelson*, 488 U.S. 33, 40-41 (1988); *People v. Olivera*, 164 Ill. 2d 382, 393-94 (1995).

The parties disagree as to whether the appellate majority applied that principle. As the People explained, the appellate majority cited the appropriate case law but failed to adhere to it. Peo. Br. 11. Defendant's assertion that the appellate majority "considered the inadmissible hearsay statement in its double jeopardy analysis," Def. Br. 12, is inaccurate. The appellate majority mentioned the statement when it summarized the State's evidence, *see* A11-12, but referred to the statement in its analysis only to note that no *other* evidence placed defendant in the room at the time of J.H.'s injuries, A13. Faulting the State for establishing a fact solely through erroneously admitted testimony is precisely the practice that *Olivera* and *Lockhart* prohibit.

[1] "Peo. Br." refers to the People's opening brief, and "Def. Br." refers to defendant's appellee's brief.

Defendant focuses on defending the appellate majority's reasoning, but its reasoning — including the harmless error analysis that defendant discusses at length, *see* Def. Br. 12-15 — is ultimately beside the point because this Court reviews the sufficiency of the evidence de novo. Under a proper application of that standard, the People's evidence more than sufficed to permit retrial of defendant. Dr. Fujara testified that J.H.'s extensive burn injuries necessarily resulted from forcible immersion. And J.H.'s hearsay statement and circumstantial evidence demonstrated that defendant, the sole adult and caretaker present at the time of J.H.'s injuries, was the person who caused them.

Defendant's attempts to undermine Dr. Fujara's expert opinion and discount J.H.'s identification of defendant fail. First, defendant incorrectly claims that "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." Def. Br. 18. That was not her testimony. Rather, as Dr. Fujara explained, parts of J.H.'s body that contacted the surface of the bathtub were burned less severely than parts exposed to the water because the porcelain surface had a lower temperature. R.UU26. As the clearest example of this phenomenon, the bottoms of J.H.'s feet were burned less severely than the tops of his feet. *Id.* This same mechanism can produce a "doughnut pattern" on burned buttocks. R.UU37. Dr. Fujara testified on cross-examination:

> Q. And that would be because if an individual had their buttocks forced down on the

> porcelain of the tub, the area where the buttocks had actually touched the tub would be less burned than the area around it, right?
>
> A. Yes.
>
> Q. Now, with regard to the People's Exhibit — [J.H.'s] buttocks doesn't demonstrate [*sic*] that kind of pattern, does it?
>
> A. *I think it does*.
>
> Q. Where is the doughnut pattern?
>
> A. There is no — there is no — probably because the water was so hot there was no *absolute* sparing, but we can tell this area of the body is where his sits [*sic*] bones are. His ischial tuberosity are called your buttocks bones here, those are less burned . . . than the area of buttocks which would not be in contact with the tub. See this . . . has that yellow leathery appearance, and that would not have been in contact with the porcelain of the tub right here; but the area on the porcelain where he is sitting on the porcelain is less burned, so I do — I believe if the water temperature weren't as high, we might see that doughnut pattern of the slight sparing in the center.

R.UU37-38 (emphases added). Thus, Dr. Fujara testified that there was a discernible doughnut pattern on J.H.'s buttocks; the pattern was simply less pronounced than it would have been if the water temperature had been lower.

Nor is Dr. Fujara's opinion undermined by the absence of bruises on J.H.'s body. Defendant speculates that J.H. "[p]resumably" should have had

bruises on his arms and underarms. Def. Br. 19. He offers no support for this notion and failed to ask Dr. Fujara if that would be the case. In any event, in contradiction to this new theory, Dr. Fujara testified that J.H.'s burns occurred very quickly because the water was so hot, giving him little time to struggle with defendant. R.UU38.

In a final attempt to undermine Dr. Fujara's opinion, defendant refers to a "handful of published Illinois cases involving a child's forced immersion burns," claiming that the facts here are "easily distinguishable." Def. Br. 16.[2] Because the sufficiency analysis turns on the evidence in *this* case, comparing it to evidence presented in other cases has limited, if any, utility. Nor do the cited cases help him. The expert testimony presented in those cases was nearly identical to Dr. Fujara's, further corroborating her opinion here. In *People v. Cooper*, 283 Ill. App. 3d 86, 89-90 (1st Dist. 1996), the expert relied on the "very sharp line of demarcation between the burned and unburned areas" and the absence of splash marks to opine that the burns resulted from forcible immersion. Similarly, in *People v. Negrete*, 258 Ill. App. 3d 27, 28 (1st Dist. 1994), the expert relied on the "clear, straight lines between burned and unburned skin" to conclude that the injuries were forcible, noting that

[2] Only two of the three cases cited by defendant involved forcible immersion. In *People v. Flores*, 168 Ill. App. 3d 284 (1st Dist. 1988) (cited at Def. Br. 17), the defendant held an infant under a stream of hot water, burning her chest and shoulders. The defendant claimed that she had immersed the infant in a bathtub of hot water, but an expert rejected that explanation, noting that the infant would have sustained burns to her legs (as J.H. did in this case) had she been immersed. *See id.* at 287.

"[t]he typical accidental hot water burn includes edges of burned area which are wavy as well as numerous splash marks." Similar demarcation lines and the same absence of splash marks led Dr. Fujara to conclude that J.H.'s burn injuries were likewise not accidental. R.UU16, R.UU19-20, R.UU27-28.

Defendant also asserts that the State's evidence did not suffice because "not a single live witness testified that [defendant] was even present in the bathroom at the time JH sustained his burns," and J.H.'s hearsay statement to Nurse Roxas was "utterly inconsistent with Dr. Fujara's opinion as to how JH was burned." Def. Br. 18. But the hearsay statement must be viewed, like all of the evidence, in the light most favorable to the State. *Lopez*, 229 Ill. 2d at 367-68. To be sure, J.H. claimed inaccurately that defendant poured a cup of hot water on his back, *see* R.TT21, but J.H. was six years old when he made his statement to Nurse Roxas and may not have fully understood the physics of how defendant burned him.[3] But J.H. was more than capable of identifying defendant as the person in the room when he was burned. His identification further supports the rationality of the trial judge's conclusion that defendant committed aggravated battery.

[3] Defendant cites evidence, offered in support of a post-trial motion, that J.H. "'thought slower' than other kids." Def. Br. 7 (citing C.130). The sufficiency analysis focuses solely on the evidence adduced at trial, but even if this evidence were taken into account, it would further explain J.H.'s failure to comprehend the manner in which he was burned.

Because the State's evidence sufficed, it is entitled to exercise its discretion to retry defendant. Accordingly, this Court should reverse that portion of the appellate court's judgment barring defendant's retrial.

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.

January 2, 2019

Respectfully submitted,

LISA MADIGAN
Attorney General of Illinois

DAVID L. FRANKLIN
Solicitor General

MICHAEL M. GLICK
Criminal Appeals Division Chief

ERIN M. O'CONNELL
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
Telephone: (312) 814-1235
Fax: (312) 814-1235
eserve.criminalappeals@atg.state.il.us

Counsel for Plaintiff-Appellant
People of the State of Illinois

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 six pages.

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

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 January 2, 2019, the foregoing **Reply Brief of Plaintiff-Appellant People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, which served notice on the e-mail addresses listed below:

Patricia G. Mysza
Deputy Defender
Brett Zeeb
Assistant Appellate Defender
Office of the State Appellate Defender,
First Judicial District
203 North LaSalle Avenue, 24th Floor
Chicago, Illinois 60601
1stdistrict.eserve@osad.state.il.us

Kimberly M. Foxx
State's Attorney of Cook County
Alan J. Spellberg
Supervisor, Criminal Appeals Division
2650 South California Avenue
Chicago, Illinois 60608
eserve.criminalappeals@cookcountyil.gov

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.

/s/ Erin M. O'Connell
ERIN M. O'CONNELL
Assistant Attorney General
eserve.criminalappeals@atg.state.il.us