IN THE

SUPREME COURT OF VIRGINIA

RECORD NUMBER: __________

(Court of Appeals of Virginia Record No. 0795-10-4)

TRUDY ELIANA MUNOZ RUEDA

v.

COMMONWEALTH OF VIRGINIA

PETITION FOR APPEAL

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ASSIGNMENTS OF ERROR[1]

I. The Court of Appeals of Virginia and the trial Court erred in finding the evidence was sufficient to convict the defendant when the Commonwealth's medical expert Dr. Futterman admitted that in order for a baby's brain to be subject to shaken baby syndrome ("SBS") at the hands of the defendant, she had to shake the child sufficiently to generate a force of 50 to 500 times gravity, "50 to 500 Gs", wherein the defense's biomechanical engineer expert testified, without being impeached or controverted, he had conducted testing using infant crash test dummies which disclosed it was not possible for a woman like the defendant to subject a baby to anywhere near 50 Gs of force from shaking. (T3.25:10-93:23, 220:10-226-11, 227:12-274:3, T5.271:1-T6.4:1, and transcript citations listed in petition).[2]

II. The Court of Appeals of Virginia and the trial Court erred in allowing Commonwealth's medical experts to state opinion on the ultimate issue of guilt, namely that the injuries to the child were "inconsistent with

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[1] The Standard of Review applicable to each Assignment of Error is stated in the Argument section of this Petition below a reprint of each applicable heading.

[2] Hearing transcripts of January 11, 12, 13, 14, 21, and 22, are hereinafter referred to as "T1.", "T2.", "T3.", "T4.", "T5.", and "T6.", respectively.

accidental trauma." (T1.164:20-176:5, 188:18-189:10, T2.3:3-31:10, 3:4-16:2, 30:7-17, 100:13-101:3, 108:6-11 T3.220:10-226-11, T5.271:1-T6.4:1, and transcript citations listed in petition).

III. The Court of Appeals of Virginia erred in allowing, and the trial Court erred by instructing the jury the "willful act" element required to convict the defendant of child abuse and neglect could be committed in the absence of "bad purpose" and "grounds to believe the act was unlawful," so long as the defendant acted "without justifiable excuse," and further if the conduct was "voluntary" it need not be "knowing" and/or "intentional." (T3.220:10-226-11,T5.271:1-T6.18:10 and transcript citations listed in petition).

IV. The Court of Appeals of Virginia erred in allowing, and the trial Court erred by instructing the jury as to the "negligence" element required to convict defendant of cruelty or injury to the child, wherein the Court failed to instruct "criminal negligence" required the defendant either knew or should have known her actions would cause injury to the child. (T3.220:10-226-11,T5.271:1-T6.18:10 and transcript citations listed in petition).

STATEMENT OF THE NATURE OF THE CASE

On January 21, 2010, Trudy Munoz Rueda ("Rueda") was found guilty by a jury of child abuse or neglect in violation of § 40.1-103 and of willful or negligent cruelty or injury to a child in violation of § 18.2-371, of the Code of Virginia. The following day, the Jury fixed punishment for the two convictions at six years and six months and a fine of $12,500.00 for the first, and four years for the second. On April 9, 2010, the trial Court affirmed the jury verdict and sentenced the defendant in accordance therewith.

STATEMENT OF FACTS

The case at bar involved trial of the defendant, Rueda, on an allegation of causing Noah Whitmer, an infant, to sustain shaking leading to "Shaken Baby Syndrome" ("SBS"). SBS is a diagnosis wherein a child without any outward manifestations of injury, who sustains only brain bleeding, swelling and retinal hemorrhage, is alleged to have been injured as a result of shaking alone.

At trial, eight medical experts were called by the prosecution and three for the defense. First was Dr. Dawn Thornton, a pediatric emergency medicine physician. (T1.154:5-6). In her medical opinion, a child this age who has blood on the brain like Noah is typically an abuse case "until proven otherwise." (T1.184:16-17). Dr. Thornton was permitted, despite

objections to foundation, to give an opinion on the ultimate issue, namely to state Noah's injuries "were inconsistent with accidental trauma." (T1.164:20-176:5, T2.3:4-17:13, 30:17-20). No proper basis was offered for the opinion. (T2.30:18-31:11). Dr. Thornton did not know if the child's birth was normal. (T2.32:13). She observed his arms, legs, and torso and noted "no external abnormalities" or trauma. (T2.33:23, 34:4-10).

The Commonwealth's third expert was Dr. William Wai Choy Young, a pediatric neurologist employed at Fairfax Hospital. (T2.87:10, 96:13). He admitted there were various causes for bleeding in the brain, with trauma always at the top of the list. A second reason for the condition could be broken blood vessels. (T2.99:11-15). Dr. Young was permitted to testify, despite objection, sub-falcine hemorrhages like Noah's can only be caused by shaking. He offered no proper basis for such conclusion. (T2.104:20-106:10). Despite his opinions on "shaking", Dr. Young admitted he did not know how much shaking is required to create injuries. (T2.110:22,112:15). He stated it would probably take "violent shaking" to cause the injuries. (T2.111:1). He conceded it would be more likely for neck injuries to occur in an infant who was shaken violently. (T2.111:8-9). He averred a four month old cannot hold his neck up for any length of time, yet, there was no damage whatsoever to the child's neck (T2.111:17,

112:23). Additionally, Dr. Young noted no grip marks, fingernail marks, bruising, or external evidence of shaking were found on Noah. (T2.116:18).

The Commonwealth's fifth and principal medical expert was Dr. Craig Futterman, a pediatric intensive care physician employed at Fairfax Hospital, and President of "The Shaken Baby Alliance." (T3.5:15, 45:18-20, 92:17-21). He stated the forces needed to cause the brain injury to the child from shaking are between 50-500 Gs, with 6.5 Gs being the force which would cause a jet pilot to blackout. (T3.71:18-72:6). The shaking would have to be "violent shaking" to cause the injuries observed in Noah. (T3.72:23, 73:4). He agreed at four months, a baby's head is too heavy for the neck to support. (T3.73:21). He stated he did not know whether Noah had neck injuries, but speculated there is a reasonable possibility there was no neck injury. (T3.74:4-5). He then admitted nothing in the medical records indicated Noah had a neck injury despite his rumination to the contrary. (T3.73:14-15). He conceded there was no bruising whatsoever found on Noah's body. (T3.80:6-7). The movement Rueda said she made when the baby was choking, as recounted by the police officer, would be insufficient to generate 50 Gs of acceleration/deceleration in Noah's brain. (T3.92:2-16).

The first expert to testify for the defense was Dr. Kirk Thibault, a biomechanical engineer. Dr. Thibault conducted a study wherein adults were asked to shake an infant crash dummy ("CRABI") as hard as they could in four sessions of ten seconds each. (T3.249:19-22). Data was gathered from heads, necks, and torsos of the CRABI dummies. (T3. 250:2-4). Use of the infant CRABI dummies was scientifically validated using cadaveric materials. (T3.278:1-2). Dr. Thibault concurred with Dr. Futterman 50 Gs of acceleration is a reasonable range for the onset of brain injury in this case. (T3.251:15-252:3). The G numbers from Dr. Thibault's study refer to the peak results of head acceleration, which is the greatest amount of acceleration generated by the subjects who shook the CRABIs. (T3.251:23). The experiment measured both linear and angular acceleration. (T3.256:14).

Injury assessment reference values ("IARV") are validated known thresholds for where various injuries begin to occur. (T3.250:6-14). The IARV for brain injury is 50 Gs (as Dr. Futterman corroborated). (T3.258:9-11). One of the onset thresholds for injury is 50 Gs of peak linear acceleration measured at the center of gravity of the head. (T3.259:1-3). The 50 G number is corroborated by research data generated by General Motors, which found a 5% risk of serious injury

based on acceleration of 50 Gs. (T3.258:15-19). In Dr. Thibault's experiment, the female group was able to generate a range of 4-8 Gs of peak linear acceleration when shaking the CRABI dummies. (T3.259:19-21). The highest peak G values one male was able to generate was 20 Gs. (T3.260-261:22-2). Dr. Thibault personally was not able to generate more than 16 Gs from shaking the CRABI. (T3.261:1-2). To a reasonable degree of biomechanical certainty, Dr. Thibault opined females can generate on the order of 8 Gs of force but not in great excess thereof, and certainly not anywhere near 50 Gs as was claimed Rueda must have been able to generate from the shaking imputed her in the Commonwealth's theory of the case. (T3.273:22-23).

ARGUMENT[3]

I. The trial Court erred in finding the evidence was sufficient to convict the defendant when the Commonwealth's medical expert Dr. Futterman admitted that in order for a baby's brain to be subject to shaken baby syndrome ("SBS") at the hands of the defendant, she had to shake the child sufficiently to generate a force of 50 to 500 times gravity, "50 to 500 Gs", wherein the defense biomechanical engineer expert testified, without being impeached or controverted, that he had conducted testing using infant crash test dummies which disclosed it was not possible for a woman like

[3] As to any Assignment of Error and accompanying argument contained herein wherein this Court finds the issue not to be sufficiently preserved in the trial record, appellant specifically moves this Court invoke the Rule 5:25 good cause and ends of justice exception.

the defendant to subject a baby to anywhere near 50 Gs of force from shaking. (T3.25:10-93:23, 220:10-226-11, 227:12-274:3, T5.271: 1-T6.4:1, and transcript citations listed in petition).

A. Standard of Review

The Court should resolve any reasonable doubt as to the sufficiency of the evidence in the Commonwealth's favor and should reverse the case only “when it plainly appears that the trial court would be compelled to set aside any verdict found for the [Commonwealth] as being without evidence to support it.” *Avent v. Commonwealth,* 279 Va. 175, 198-199, 688 S.E.2d 244, 257 (2010) (citations omitted).

B. Argument

The Commonwealth, through its primary medical expert, Dr. Futterman, stated a fact binding on the Commonwealth: in order for the brain of a child to have been injured from “shaking”, it must have been subjected to a force of at least 50 times gravity (i.e. 50 Gs). (T3.71:18-72:6). In so stating a factual prerequisite for the guilt of the defendant, the Commonwealth, through its witness, in effect conceded Rueda could not be convicted of the crime charged on this record because to a reasonable degree of biomechanical certainty, defense expert Dr. Thibault opined females can generate on the order of 8 Gs of force but not

in great excess thereof, and certainly not anywhere near 50 Gs. (T3.273:22-23).

Dr. Thibault's testing and testimony went unchallenged and unrebutted by any other competent evidence. Commonwealth's expert Dr. Hauda also confirmed the 50 G threshold for injury was validated for adults in studies although he claimed ignorance as to what amount of force would be necessary to injure the brain of an infant, partially corroborating and not contradicting the opinions of Drs. Futterman and Thibault. (T3.157:5-10). He did not remember the details of the study he had read on the subject of G forces necessary to inflict brain injury. (T3.158:14-23). The remainder of the Commonwealth's experts either admitted no knowledge of the quantified force necessary to generate the injury, or did not treat the subject at all. In fact, most of their opinions were, in the final analysis, nothing more than statements of circular argumentation Noah suffered SBS without offering objective scientific evidence to validate their causative hypotheses. A medical degree should not empower physicians to state opinions which are mere product of unvalidated theory. Irrespective that their opinions were largely assumptions, speculations, and the product of limited scientific experimental horizon, none of their opinions in any way controverted the opinions of Drs. Futterman and Thibault on the issue of

the 50 G injury threshold. The unrebutted evidence from the combination of the testimony of Drs. Futterman and Thibault is Rueda was not physically capable of committing the crime as charged, namely injuring Noah through shaking alone, absent any external injury. The record in this cause thus requires reversal for insufficient evidence.

The defense biomechanical engineer, Dr. Thibault, built on the opinion of Dr. Futterman without contradiction. He conducted the already referenced study wherein adults were asked to shake a scientifically validated infant crash dummy ("CRABI") as hard as they could in four sessions of ten seconds each. (T3.249:19-22, 278:1-2). Dr. Thibault concurred with Dr. Futterman 50 Gs of acceleration is a reasonable range for the threshold for the onset of brain injury in this case. (T3.251:15-252:3). The G numbers from Dr. Thibault's study refer to the peak results of head acceleration, which is the greatest amount of acceleration generated by the subjects who shook the CRABIs. (T3.251:23). The experiment measured both linear and angular acceleration. (T3.256:14). Dr. Thibault explained the onset threshold for injury is 50 Gs of peak linear acceleration measured at the center of gravity of the head. (T3.259:1-3). The 50 G number confirmed by Dr. Futterman was validated by research data generated by General Motors, which found a 5% risk of serious injury

based on acceleration of 50 Gs. (T3.258:15-19). In Dr. Thibault's experiment, the female group was only able to generate a range of 4-8 Gs of peak linear acceleration when shaking the CRABI dummies. (T3.259: 19-21). His test data led Dr. Thibault to conclude to a reasonable degree of biomechanical certainty, females can generate on the order of 8 Gs of force but not in great excess thereof, and certainly not anywhere near 50 Gs as was claimed Rueda must have been able to generate from the shaking imputed her in the Commonwealth's theory of the case. (T3.273:22-23). His opinion, validated by his scientifically unchallenged experiment, showed the Commonwealth failed to prove beyond a reasonable doubt, at least on the record in this case, Rueda was physically capable of shaking the child with the force required to generate the injury mechanism of which she was accused.

"To satisfy the due process requirements of the Federal Constitution, the prosecution must bear the burden of proving all elements of the offense beyond a reasonable doubt. *In Re Winship*, 397 U.S. 358, 363 (1970)." *Stokes v. Warden,* 226 Va. 111, 117, 306 S.E.2d 882, 885 (1983). In this case, the Commonwealth did not meet that burden, the verdict being the likely product of supposition, speculation and emotion.

The Commonwealth failed to prove beyond a reasonable doubt Rueda committed the crime because the testimony of their own expert, Dr. Futterman, coupled with the uncontroverted biomechanical testing results of Dr. Thibault, showed the crime was unproven, at least on this record. It was not proven beyond a reasonable doubt shaking alone, in the absence of external physical findings or impact of the child's head, can produce the brain bleed observed in Noah.

The Commonwealth may respond the trier of fact was free to disregard Dr. Thibault's testing, but would be wrong in such assertion. If the assertion were right, it would mean there would be no limitation on a jury's ability to disregard testimony. In past cases, the Supreme Court of Virginia has noted significant limits. Before engaging in such analysis, it should be noted nowhere in the record is there trace of any evidence Dr. Thibault was other than professional in the manner of his testimony, or in any way demonstrated any demeanor problem which the jury could infer as troubling. Additionally, the Court qualified Dr. Thibault as an expert in the field of biomechanics without Commonwealth objection. (T3.247:4-9).

Returning to the central question of the assignment of error, could the jury ignore Drs. Futterman and Thibault in their opinion 50 Gs is the marker for the onset of injury, and the fact testing revealed Rueda could

not possibly have generated that force to injure the child? The weight of authority holds the jury was not free to disregard uncontroverted fact and testimony in favor of leaps of faith opinion Rueda injured the child through shaking. Appellate courts of Virginia have long applied the doctrine judges and juries may not "arbitrarily disregard uncontradicted evidence of unimpeached witnesses which is not inherently incredible and not inconsistent with the facts appearing in the record, even though such witnesses are interested in the outcome of the case." *Street v. Street*, 25 Va. App. 380, 390, 488 S.E.2d 655, 670 (1997). This doctrine applies equally to both lay and expert witnesses. *See McLane v. Commonwealth*, 202 Va. 197, 206, 116 S.E.2d 274, 281 (1960). As recently as 2008, the Commonwealth itself invoked this doctrine. *Commonwealth v. Jackson*, 276 Va. 184, 661 S.E.2d 810 (2008). In *Jackson*, the Commonwealth argued because the testimony of its expert was uncontradicted the circuit court was required to accept such uncontroverted evidence. *Id*. at 196, 661 S.E.2d at 816. In response, the Supreme Court applied its decision in *Cheatham v. Gregory*, 227 Va. 1, 313 S.E.2d 368 (1984) which held "[a] trier of fact must determine the weight of the testimony and the credibility of witnesses, but may not arbitrarily disregard uncontradicted evidence of unimpeached witnesses which is not inherently incredible and not

inconsistent with facts in the record, even though such witnesses are interested in the outcome of the case," and found the Commonwealth's expert had been impeached on cross-examination. *Commonwealth v. Jackson*, 276 Va. at 196, 661 S.E.2d at 816 (*citing Cheatham*, 227 Va. at 4-5, 313 S.E.2d at 370). A survey of decisions dating back to 1930 revealed no instances wherein the Supreme Court ever speculated a jury discredited the findings of an expert solely based on demeanor, and this Court should not do so for the first time in this case, particularly in the absence of any facts supporting such a fanciful hypothesis.

Uncontradicted testimony may only be disregarded in a very few instances. In *Chesson v. Commonwealth*, 216 Va. 827, 223 S.E.2d 923 (1976), the trial Court disregarded a story of how defendant obtained a dog. Even though defendant's story was uncontradicted, the story itself was contradictory, inconsistent, vague and evasive, unsatisfactory, and unconvincing, and therefore the Supreme Court permitted the testimony to be disregarded by the trier of fact. *Id.* at 832, 223 S.E.2d at 926. Dr. Thibault's testimony was consistent, clear, satisfactory, convincing and not evasive, i.e., could not be ignored under the rule in *Chesson*.

In *Williams v. Vaughan*, 214 Va. 307, 199 S.E.2d 515 (1973), a deceased passenger's estate brought suit against deceased driver's

estate. Dolan, a surviving passenger, testified he warned the driver to slow down as the car approached an unmarked, dangerous "S" curve. The driver did not heed multiple warnings, and the car crashed into a tree, killing the driver and another passenger. On cross-examination, Dolan admitted to telling the police and insurance investigators the driver was driving safely. The trial Court granted the motion to strike and entered summary judgment for defendant. The Supreme Court reversed the case, stating:

> Prior inconsistent statements do not render sworn testimony nugatory. And the uncontradicted testimony of an unimpeached witness, unless inherently incredible, cannot be arbitrarily disregarded, even though the witness is interested in the outcome of the case.

Id. at 310, 199 S.E.2d at 517. In the instant case Dr. Thibault did not make inconsistent statements or have any interest in the outcome of the case, and consistent with *Williams*, his testimony could not be discredited by the jury.

In *Hodge v. Am. Family Life Assurance Co. of Columbus*, 213 Va. 30, 189 S.E.2d 351 (1972), after discovering an apparent intruder in his country store, plaintiff was subsequently shot by his wife. Plaintiff instituted an action against defendant insurer to recover under an insurance policy covering accidental injuries. The trial judge, however, did not believe the

plaintiff's testimony, though on its face it established the shooting was accidental. The Supreme Court reversed and entered final judgment on the amount owed by the insurer:

> While a jury, or a judge trying a case without a jury, are the judges of the weight of the testimony and the credibility of witnesses, they may not arbitrarily disregard uncontradicted evidence of unimpeached witnesses which is not inherently incredible and not inconsistent with the facts appearing in the record, even though such witnesses are interested in the outcome of the case.

Id. at 31, 189 S.E.2d at 353. Dr. Thibault's testimony was uncontradicted, unimpeached, not inherently incredible, not inconsistent with the facts appearing in the record, nor did he have any interest in the outcome of the case. Under *Hodge,* the jury could not disbelieve his testimony except by doing so arbitrarily.

In *Presley v. Commonwealth*, 185 Va. 261, 38 S.E.2d 476 (1946), Presley claimed to have shot Crouse in self-defense. All witnesses corroborated his story except a female bystander. The trial court convicted him of second degree murder. The Supreme Court reversed the conviction. The female bystander was found "incredibly ignorant" noting her "reputation for truthfulness has been so thoroughly discredited that we may disregard any unsupported statement which she has made." Therefore, Presley's testimony became uncontradicted:

> The general rule, that where unimpeached witnesses testify positively to a fact, and are uncontradicted, the jury are not at liberty to discredit their testimony, is subject to exceptions; as, where the statements of the witness are grossly improbable, or he has an interest in the question at issue. However well settled the rule may be that the credibility of a witness is for the jury, the judge has power to instruct them as to what circumstances are to be unfavorably considered in their estimation of his evidence. So the testimony of a witness may be wholly rejected by a jury, if from his manner *and* the improbability of his story or his self-contradiction in the several parts of his narrative, the jury become convinced that he is not speaking the truth; and this is true although he be not attacked in his reputation, or contradicted by other witnesses. (emphasis added).

Id. at 266-67, 38 S.E.2d at 478. Dr. Thibault's fact-based evidence could not be rejected, as there was neither an instruction from the Court it was to be unfavorably considered under certain circumstances, nor more importantly, could the jury find his facts self-contradictory or improbable. This Court should reverse this case under the ruling in *Presley*.

In *Worsham v. Commonwealth*, 184 Va. 192, 34 S.E.2d 234 (1945), a police officer attempted to stop a speeding car. In pursuit, the officer observed a bottle thrown from the vehicle. The bottle was subsequently found and contained unstamped and unlawful liquor. The defendant's car eventually stalled and the passenger fled and was not apprehended. The trial court convicted the defendant for illegal transportation of ardent spirits. Defendant testified the passenger was a hitchhiker who was carrying a

package whose contents were unknown to the defendant—the whiskey thrown from the vehicle. The Supreme Court reversed and dismissed:

> The uncontradicted evidence of a witness cannot be disregarded by either the jury or by the court if it is not inherently improbable.... In short, there is neither evidence nor circumstances to prove the defendant guilty of the illegal transportation of whiskey or to overcome the presumption of innocence.

Id. at 194, 196, 34 S.E.2d at 235, 236. In the instant case, Dr. Thibault's uncontroverted evidence was disregarded though not inherently improbable, a result this Court should not countenance based on the reasoning in *Worsham*.

In *Hamilton v. Commonwealth*, 177 Va. 896, 15 S.E.2d 94 (1941), a woman was present when her eleven year-old son shot a man. She testified she did not say anything to him when it happened, threaten the deceased, or do anything to aid or abet. The trial court, nonetheless, convicted her of second degree murder. The Supreme Court reversed the case, finding no evidence to show she aided or abetted:

> While the jury is a judge of both the weight of the testimony and the credibility of the witnesses, it may not arbitrarily or without any justification therefor give no weight to material evidence, which is uncontradicted and is not inconsistent with any other evidence in the case, or refuse to credit the uncontradicted testimony of a witness, even though he be the accused, whose credibility has not been impeached, and whose testimony is not either in and of itself, or when viewed in the light of all the other evidence in the case, unreasonable or improbable, and is not inconsistent with any fact or circumstance to which there is

> testimony or of which there is evidence. There must be something to justify the jury in not crediting and in disregarding the testimony of the accused other than the mere fact that he is the accused, or one of them.

Id. at 903, 15 S.E.2d at 97. In the instant cause there is nothing to justify the jury's arbitrary disregard of Dr. Thibault's factual findings. The crime was not possible under the hypothesis posited by the Commonwealth when its own expert affirmed 50 Gs of force was necessary to effect injury on Noah. This Court should reverse under the rule as stated in *Hamilton*.

In *Fairfax v. Commonwealth*, 177 Va. 824, 13 S.E.2d 315 (1941), sentencing on a charge of unlawfully possessing alcohol required defendant abstain from possessing any alcohol. Subsequently the police searched his home and discovered twenty-two pints of liquor in a locked safe and four pints in an unlocked kitchen closet. Defendant testified his wife inherited the home and he was not in control of it. The wife corroborated his testimony and said the liquor was hers and the four bottles in the kitchen should have been stored and locked but were not due to her oversight. The trial Court convicted. The Supreme Court reversed and dismissed. There was no indication defendant had been drinking, and there was no evidence to contradict his or his wife's testimony:

> While the jury is the judge of both the weight of the testimony and the credibility of witnesses, it may not arbitrarily or without any justification therefor give no weight to material evidence, which is uncontradicted

> and is not inconsistent with any other evidence in the case, or refuse to credit the uncontradicted testimony of a witness, even though he be the accused, whose credibility has not been impeached, and whose testimony is not either in and of itself, or when viewed in the light of all the other evidence in the case, unreasonable or improbable, and is not inconsistent with any fact or circumstance to which there is testimony or of which there is evidence. There must be something to justify the jury in not crediting and in disregarding the testimony of the accused other than the mere fact that he is the accused, or one of them.

Id. at 828, 13 S.E.2d at 316. Violating the rule in *Fairfax,* the jury gave Dr. Thibault's testimony no weight, for if they had done otherwise, logic and the requisite standard of proof beyond a reasonable doubt demanded only one result: acquittal. This Court should not permit such arbitrary action and should reverse and dismiss as in *Fairfax*.

In *Epperson v. DeJarnette*, 164 Va. 482, 180 S.E. 412 (1935), defendants Epperson and Carter at a jury trial were found joint and severally liable for fire damage occurring to DeJarnette's land. Epperson and Carter owned a lumber mill. They testified however they allowed Scott to use their mill as an independent contractor, and none of their employees were near the mill when the fire erupted and Scott was in complete control of the mill. The Supreme Court reversed and dismissed the jury verdict. Though circumstantial evidence may have supported a finding of liability, the uncontradicted testimony established Scott was in control and they were therefore not liable. *Id.* at 485-86, 180 S.E. at 413. Like in *Epperson*,

the jury's disregard of the uncontradicted testimony of Dr. Thibault should not be accepted.

In *Spratley v. Commonwealth*, 154 Va. 854, 864, 152 S.E. 362, 365 (1930), an officer discovered several bottles of whiskey, wrapped and unwrapped, in a car occupied by the defendant and codefendants. Defendant and codefendants were jointly indicted for violating the prohibition law. At trial, defendant and codefendants testified they had picked up defendant and were giving him a ride and he knew nothing about the liquor. The jury found defendant guilty as charged. The Supreme Court reversed:

> While a jury is the judge of both the weight of the testimony and the credibility of witnesses, it may not arbitrarily or without any justification therefor give no weight to material evidence, which is uncontradicted and is not inconsistent with any other evidence in the case, or refuse to credit the uncontradicted testimony of a witness, even though he be the accused, whose credibility has not been impeached, and whose testimony is not either in and of itself, or when viewed in the light of all the other evidence in the case, unreasonable or improbable, and is not inconsistent with any fact or circumstance to which there is testimony or of which there is evidence. There must be something to justify the jury in not crediting and in disregarding the testimony of the accused other than the mere fact that he is the accused, or one of them.

Id. at 864, 152 S.E. at 365. Dr. Thibault's testing which discloses Rueda was factually incapable of committing the crimes charged as a matter of

physics was sadly disregarded arbitrarily “without any justification” as in *Spratley*, an injustice this Court should not let stand.

The Commonwealth, in its reliance on circumstantial evidence, namely for the contention Rueda had opportunity and shook Noah, coupled with medical symptomatology becoming manifest while he was in her care, failed in its express duty to exclude every reasonable hypothesis of innocence. Not only did it not exclude the hypothesis the injury as claimed from shaking alone was impossible, with other competent evidence, but rather the Commonwealth through its witnesses actually supported the hypothesis of innocence. Dr. Futterman was unequivocal: 50 Gs force through acceleration was required as the threshold for injury. Dr. Young concluded it would take “violent shaking” to cause the injuries. (T2.111:1) He admitted it more likely for neck injuries to occur in an infant who was violently shaken. (T2.111:8-9). He averred a four-month-old cannot hold his neck up for any length of time. (T2.111:17). There was no damage whatsoever to the child’s neck. (T2.112:23). No grip marks, fingernail marks, bruising or external evidence of shaking were found on Noah. (T2.116:18). The lack of any external physical findings was further supportive of the opinion of Dr. Thibault, probative of the notion not much force was used to handle Noah. As he opined, defendant was physically

incapable of shaking the child much above the 8 G level, well below any threshold for inflicting brain injury.

Precedent directs when the Commonwealth fails to exclude a reasonable hypothesis of innocence, the evidence is insufficient to convict.

> "[I]f the proof relied upon by the Commonwealth is wholly circumstantial, as it here is, then to establish guilt beyond a reasonable doubt all necessary circumstances proved must be consistent with guilt and inconsistent with innocence. They must overcome the presumption of innocence and exclude all reasonable conclusions inconsistent with that of guilt. To accomplish that, the chain of necessary circumstances must be unbroken and the evidence as a whole must satisfy the guarded judgment that both the corpus delicti and the criminal agency of the accused have been proved to the exclusion of any other rational hypothesis and to a moral certainty. . . ."
>
> But, circumstances of suspicion, no matter how grave or strong, are not proof of guilt sufficient to support a verdict of guilty. The actual commission of the crime by the accused must be shown by evidence beyond a reasonable doubt to sustain his conviction.

Clodfelter v. Commonwealth, 218 Va. 619, 623, 238 S.E.2d 820, 822 (1977) (quoting *LaPrade v. Commonwealth*, 191 Va. 410, 418, 61 S.E.2d 313, 316 (1950)). The evidence thus must exclude every reasonable hypothesis of innocence. When such evidence creates merely a suspicion or probability of guilt, it is insufficient to support a conviction. *Yarborough v. Commonwealth*, 247 Va. 215, 218, 441 S.E.2d 342, 344 (1994). A reasonable hypothesis of innocence based on evidence cannot be met with mere conjecture. The defendant's guilt "cannot be based upon

surmise or speculation." *Patterson v. Commonwealth*, 215 Va. 698, 699, 213 S.E.2d 752, 753 (1975). Moreover, "[w]here inferences are relied upon to establish guilt, they must point to guilt so clearly that any other conclusion would be inconsistent therewith." *Dotson v. Commonwealth*, 171 Va. 514, 518, 199 S.E. 471, 473 (1938).

In few instances do the facts in a case demand reversal and dismissal as clearly as in this cause, where unimpeachable fact testimony tell us defendant's guilt was not proven beyond a reasonable doubt on this record. The Commonwealth's evidence provides no basis for contradicting the biomechanical test results. Most Commonwealth's experts testified in circular fashion the injuries must be SBS because there was no other explanation, and there was no other explanation because it must be SBS. None of the Commonwealth's experts validated the SBS hypothesis advanced with actual experimental testing. Nor is it relevant whether Rueda did in fact shake the baby, something she nevertheless denied under oath. (T5.122:4-9). Tellingly, Dr. Futterman, an ardent proponent of the theory of SBS, through his testimony set a baseline of force required on this record for proof of injury to the brain of the child: 50 Gs. Dr. Thibault's testing showed shaking alone could not produce the required 50 Gs. The only way his testing and opinions could be ignored is if the

Commonwealth had presented evidence Dr. Thibault's testing was flawed, fabricated or the product of lies. The Commonwealth did no such thing. There has not been any competent evidence suggesting Dr. Thibault's work reflects other than sound science. Rueda was not proven guilty beyond a reasonable doubt on this record and her convictions should be reversed and dismissed for insufficient evidence.

II. The trial Court erred in allowing Commonwealth's medical experts to state opinion on the ultimate issue of guilt, namely that the injuries to the child were "inconsistent with accidental trauma." (T1.164:20-176:5, 188:18-189:10, T2.3:3-31:10, 3:4-16:2, 30:7-17, 100:13-101:3, 108:6-11, T3.220:10-226-11, T5.271:1-T6.4:1, and transcript citations listed in petition).

A. Standard of Review

The trial court's decision to admit evidence is reviewed using an abuse of discretion standard. *Avent v. Commonwealth,* 279 Va. at 197, 688 S.E.2d at 256.

B. Argument

The prosecution sought to introduce medical testimony the injury of child was "non-accidental." The defense objected, on foundational grounds, this is not an opinion an expert could properly give. (T1.188:18-189:10). Both parties cited *Velasquez v. Commonwealth,* 263 Va. 95, 557 S.E.2d 213 (2002), to the Court, a case the Court fully read and considered. (T2.5:10-12). The Court ultimately allowed the

Commonwealth's medical experts to opine the injury to Noah was consistent with its being non-accidental and inconsistent with being accidental. (T2.28:23-29:11). As defense counsel made clear, allowing physicians in this cause to testify to non-accidental causation in no way satisfied the permissible limits established by *Velasquez*. (T2.9:6-16). As *Velasquez* directs, no foundation may be laid for such an opinion nor will the opinion be permitted because:

> the admission of expert opinion upon an ultimate issue of fact in a criminal case is impermissible because it invades the province of the jury. *Llamera v. Commonwealth*, [Page 105] 243 Va. 262, 264, 414 S.E.2d 597, 598 (1992); *Bond v. Commonwealth*, 226 Va. 534, 538, 311 S.E.2d 769, 771-72 (1984); *Cartera v. Commonwealth*, 219 Va. 516, 519, 248 S.E.2d 784, 786 (1978); *Webb v. Commonwealth*, 204 Va. 24, 34, 129 S.E.2d 22, 29 (1963).

Id., at 104-105, 557 S.E.2d at 219.

Likewise in this cause, it might have been permissible for the Commonwealth's experts to testify, assuming they had first laid a proper foundational basis, the injury to Noah was consistent with "violent shaking". However, the judge went further: she allowed the physicians to state, without foundation opinions on the ultimate issue, namely the injury to Noah was "non-accidental." This is exactly the kind of opinion barred by the *Velasquez* case and the cases cited therein, considered by the Court, for it "closed the circle" on the ultimate opinion the defendant was guilty.

The trial Court aptly noted "trauma can be accidental or intentional" (T2.15:3-4). There is no foundation or authorization at law for any expert to be allowed to testify in effect to the conclusion the defendant was guilty. Drs. Thornton and Young were permitted, despite objections, to testify Noah's injuries "were inconsistent with accidental trauma." (T1.164:20-176:5, T2.3:4-16:2, 30:7-17, 100:13-101:3, 108:6-11). In presenting an opinion on the ultimate issue of guilt dressed with the words "inconsistent with accidental trauma," the Commonwealth eliminated the need for the jury to determine whether Rueda had performed the "willful act" of which she was accused. *See Morris v. Commonwealth,* 272 Va. 732, 738, 636 S.E.2d 436, 439 (2006).

One of the cases cited in *Velasquez* guides further why the opinion the trauma to Noah was "non-accidental" is not foundationally proper. Trauma has several possible origins: accident, intentional conduct, or is even unexplained in nature. In *Bond v. Commonwealth* 226 Va. at 537-38, 311 S.E.2d at 771-72, the prosecution elicited testimony from a medical examiner seeking to classify a death as "non-accidental." Like in the instant case, the Commonwealth's expert relied for his finding on the facts supplied by others and in part on his own medical knowledge, and

concluded the mechanism of injury was "non-accidental". As this Court should do in the instant case, the Court, reversed the conviction stating:

> [W]hile an expert witness may be permitted to express his opinion relative to the existence or nonexistence of facts not within common knowledge, he cannot give his opinion upon the precise or ultimate fact in issue, which must be left to the jury or the court trying the case without a jury for determination.

Id. at 538, 311 S.E.2d at 772.

III. The trial Court erred by instructing the jury the "willful act" element required to convict the defendant of child abuse and neglect could be committed in the absence of "bad purpose" and "grounds to believe the act was unlawful," so long as the defendant acted "without justifiable excuse," and further if the conduct was "voluntary" it need not be "knowing" and/or "intentional." (T3.220:10-226-11, T5.271:1-T6.18:10 and transcript citations listed in petition).

A. Standard of Review

The facts should be viewed in the light most favorable to the defendant, but the instruction ordered corrected only if supported by more than a scintilla of evidence. *See Commonwealth v. Sands,* 262 Va. 724, 729, 553 S.E.2d 733, 736 (2001).

B. Argument

The trial Court erred in crafting the instruction explaining the "willful act" element of the crime of abuse and neglect of a child in violation of Virginia Code §18.2-371, through use of disjunctive language when the conjunctive was mandated. When elements of a principle of law are stated

in the conjunctive they may not be stated in the disjunctive in an instruction. *See Commonwealth v. Montague,* 260 Va. 697, 702, 536 S.E.2d 910, 913 (2000). During the trial, the Commonwealth presented no evidence nor argument the defendant acted by omission but, instead, proceeded under the "willful act" prong of the indictment. The trial Court instructed the jury as follows:

> The Defendant is charged with the crime of child abuse and neglect resulting in serious injury. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime: (1) That the Defendant was a parent, guardian or other person responsible for the care of Noah Whitmer and; (2) That Noah Whitmer was a child under the age of 18, and; (3) That the Defendant by willful act caused or permitted serious injury to the life or health of Noah Whitmer.
>
> If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the Defendant guilty, but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you.
>
> If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of this case, then you shall find the Defendant not guilty....
>
> … *A willful act is one done with a bad purpose or without justifiable excuse or without grounds for believing it is lawful. A willful act is intentional or knowing or voluntary as distinguished from accidental.*
>
> The terms bad purpose or without justifiable excuse require knowledge that the particular conduct will likely result in injury or illegality.

(T6.14:18-16:6) (emphasis added). The Supreme Court has previously defined the elements that connote a "willful act" in a penal statute:

> [3-4] We have said that "[t]he term 'willful act' imports knowledge and consciousness that injury will result from the act done. The act done must be intended or it must involve a reckless disregard for the rights of another and will probably result in an injury." *Barrett v. Commonwealth*, 268 Va. 170, 183, 597 S.E.2d 104, 111 (2004). We have also said that the term "willful," as used in the statute, refers to conduct that *"must be knowing or intentional*, rather than accidental, *and [undertaken] without justifiable excuse, without ground for believing the conduct is lawful, or with a bad purpose.* . . . Thus, the term 'willful' . . . contemplates an intentional, purposeful act or omission." *Commonwealth v. Duncan*, 267 Va. 377, 384-85, 593 S.E.2d 210, 214-15 (2004) (citations omitted). Accord *Barrett*, 268 Va. at 183, 597 S.E.2d at 111.

Morris v. Commonwealth, 272 Va. at 738, 636 S.E.2d at 439 (emphasis added).

In the instant case by stating "a willful act is one done with a bad purpose or without justifiable excuse or without grounds for believing it is lawful," the trial Court allowed the jury to assume the act could have been done without a bad purpose and with grounds to believe it was lawful so long as it was done "without justifiable excuse." The language in *Morris* indicates the act must be completed *both* without justifiable excuse *and* without grounds for believing the conduct is lawful if not done for a bad purpose.

The trial Court's misstatement of the law did not stop with this concept alone. In stating "a willful act is intentional or knowing *or voluntary* as distinguished from accidental," the Court allowed the jury to assume the act need not be intentional or knowing so long as it was "voluntary." The

Supreme Court tells us in *Morris* the conduct "must be knowing or intentional." Nowhere does the Supreme Court allow these elements to be supplanted by the term "voluntary" stated in the disjunctive. Thus the jury could conclude the act could be unknowing and unintentional, so long as it was not involuntary, i.e., nobody forced the act on the defendant though she neither acted knowingly nor did so intentionally.

One of the most serious duties of a judge at trial is properly to instruct a jury of the elements of a crime so not to lessen, by judicial fiat, the burden of proof required of the Commonwealth by the statutory elements of a crime. The Court has a duty independent of the parties, properly to instruct about the elements of a crime, whether or not the parties have submitted correct instructions. As the Supreme Court directs:

> [W]hen a principle of law is vital to a defendant in a criminal case, a trial court has an affirmative duty properly to instruct a jury about the matter. *Bryant v. Commonwealth*, 216 Va. 390, 393, 219 S.E.2d 669, 671 (1975); *Whaley v. Commonwealth*, 214 Va. 353, 355-56, 200 S.E.2d 556, 558 (1973).

Jimenez v. Commonwealth, 241 Va. 244, 250-251, 402 S.E.2d 678, 681 (1991). When an instruction omits some essential element of the offense it allows for the conviction of the defendant of a "non-offense." In such circumstances, "to attain the ends of justice" this Court must reverse the conviction. *See Id.* at 251, 402 S.E.2d at 681-82.

IV. The trial Court erred by instructing the jury as to the "negligence" element required to convict defendant of cruelty or injury to the child, wherein the Court failed to instruct "criminal negligence" required the defendant either knew or should have known her actions would cause injury to the child. (T3.220:10-226-11, T5.271:1-T6.18:10 and transcript citations listed in petition).

A. Standard of Review

The facts should be viewed in the light most favorable to the defendant, but the instruction ordered corrected only if supported by more than a scintilla of evidence. *See Commonwealth v. Sands,* 262 Va. at 729, 553 S.E.2d at 736.

B. Argument

The trial Court erred in instructing the jury of the elements of the crime of cruelty to children in violation of Virginia Code § 40.1-103, by failing to state the defendant must have known or have reason to know her actions would cause injury to the child in order to be guilty of this distinct offense. With regard to the crime, the trial Court instructed the jury as follows:

> The Defendant is charged with the crime of cruelty or injury to a child. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime: (1) That the Defendant had custody of Noah Whitmer and; (2) That Noah Whitmer was a child under the age of eighteen and; (3) That the Defendant by willful act or negligence caused or permitted the life of Noah Whitmer to be endangered or the health of Noah Whitmer to be injured or willfully or negligently caused or

> permitted Noah Whitmer to be placed in a situation that his life be in danger.
>
> If you find that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the Defendant guilty, but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you.
>
> If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the Defendant not guilty.
>
> The negligence alleged in this case is something called criminal negligence. Gross or culpable negligence is that which indicates a callous disregard of human life and as a probable consequence of the Defendant's acts.
>
> Criminal liability cannot be predicated upon every act carelessly or negligently performed merely because such carelessness or negligence results in harm or even the death of another.
>
> In order for criminal liability to result from negligence, it must necessarily be reckless or wanton and of such a character as to show disregard of the safety of others under circumstances likely to cause injury or death.
>
> Unless you believe from the evidence beyond a reasonable doubt the Defendant was guilty of negligence so culpable or gross as to indicate a callous disregard of human life and of the probable consequences of her act, you cannot find her guilty of negligent cruelty or injury to Noah Whitmer.
>
> Negligence is more than mere inadvertence or misadventure. It is recklessness or indifference incompatible with a proper regard for human life.

(T6.16:10-18:10).

The trial Court's instructions appear consistent with instructions more appropriately given in a civil negligence punitive damages case. This being a criminal cause, the elements which must be proved are different from those more liberally applied in a civil case:

> Criminal negligence is judged according to an objective standard and, thus, may be found when the *defendant either knew or should have known the probable consequences of his acts*.
>
> We also have defined criminal negligence with reference to gross negligence. We have stated that gross negligence is punishable as criminal negligence when acts of a *wanton or willful character*, committed or omitted, show "a reckless or indifferent disregard of the rights of others, under circumstances reasonably calculated to produce injury, or which make it not improbable that injury will be occasioned, *and the offender knows, or is charged with the knowledge of, the probable result of his acts*."

Brown, Douglas v. Commonwealth, 278 Va. 523, 528-529, 685 S.E.2d 43, 46 (2009) (citations omitted) (emphasis added).

The trial Court failed to instruct the jury it was required to find "defendant either knew or should have known the probable consequences of [her] acts" to find her guilty of the charge. The failure to state this knowledge prerequisite with explicit clarity, allowed the jury to convict the defendant of a "non-offense": "It is elementary that where, as here, an indictment charges an offense which consists of an act combined with a particular intent, proof of the intent is essential to conviction." *Patterson v. Commonwealth*, 215 Va. at 699, 213 S.E.2d at 753.

The proof of this knowledge must be beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 315-16 (1979); *In re Winship*, 397 U.S. at 363. Thus, the knowledge element of the offense, having not been imparted, cannot be presumed to have been considered by the jury "upon

surmise or speculation." *See Patterson v. Commonwealth*, 215 Va. at 699, 213 S.E.2d at 753. Here it appears that the trial Court merely combined a number of concepts from the civil law in a confusing manner which left out an important element of consciousness of guilt. The Supreme Court has cautioned against "the danger of the indiscriminate use of language from appellate opinions in a jury instruction." *Clohessy v. Weiler*, 250 Va. 249, 255, 462 S.E.2d 94, 98 (1995) (citation omitted).

As discussed hereinabove, when as here, the granted instruction omits an essential element of the offense, "to attain the ends of justice," the conviction must be reversed. *Jimenez v. Commonwealth,* 241 Va. at 251, 402 S.E.2d at 681-82.

CONCLUSION

WHEREFORE, in light of the foregoing, Trudy Munoz Rueda respectfully requests this Honorable Court grant this petition and reverse and dismiss her convictions.

Respectfully submitted,

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CERTIFICATE AND REQUEST FOR ORAL ARGUMENT

I HEREBY CERTIFY that on the 16th of March, 2011, a copy of this petition was mailed via first-class mail, postage prepaid, to the appellee, The Commonwealth of Virginia, represented by Mr. Gregory O. Holt, Esq. (VSB #), Assistant Commonwealth's Attorney, Commonwealth's Attorney's Office, 4110 Chain Bridge Road, Fairfax VA 22030, (703) 246-2776.

I FURTHER CERTIFY AS FOLLOWS:

The appellant is Trudy Munoz Rueda, currently incarcerated at Fluvanna Correctional Center for Women, Route 250 West, Troy, VA 22974, (434) 984-3700.

Appellant's counsel of record are as follows:

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Counsel desires to state orally to a panel of this honorable Court why this petition should be granted.

____
David Bernhard