2020 IL App (1st) 162645-U

FOURTH DIVISION
December 4, 2020

No. 1-16-2645

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

	)	Appeal from the
THE PEOPLE OF THE STATE OF ILLINOIS,	)	Circuit Court of
	)	Cook County
Plaintiff-Appellee,	)	
	)	
v.	)	No. 14 CR 6849
	)	
RICHARD MARTIN,	)	
	)	Honorable
Defendant-Appellant,	)	Erica L. Reddick,
	)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Gordon and Justice Hall concurred in the judgment.

ORDER

¶ 1 *Held*: Affirming the judgment of the circuit court of Cook County where the appellate record did not support the defendant's claim of ineffective assistance of trial counsel.

¶ 2 Following a bench trial in the circuit court of Cook County, defendant Richard Martin was convicted of aggravated battery and aggravated domestic battery based on injuries to 14-month-old Naomi Sky Crawford[1] (Naomi) and sentenced to 10 years in prison. On direct appeal,

[1] The record also refers to Naomi's first name as "Naomisky."

defendant contends that he received ineffective assistance of trial counsel during this "shaken baby" prosecution where his attorney allegedly failed to present a defense supported by scientific and legal authority which should have been known to adequately-prepared counsel. For the reasons discussed herein, we affirm.

¶ 3 BACKGROUND

¶ 4 On March 24, 2014, 22-year-old defendant was in a relationship with Janet Crawford (Janet), Naomi's mother; the three lived in the basement of defendant's father's house. Janet was upstairs the night in question taking a bath before going to work, while defendant was alone with the sleeping baby. When Janet returned to the basement, she observed defendant holding Naomi, who was unresponsive. After attempting cardiopulmonary resuscitation (CPR), the couple drove the baby to Holy Cross Hospital; she was subsequently transported to Mount Sinai Hospital. Naomi was diagnosed with a subdural hematoma (a type of brain bleed), bilateral retinal hemorrhages, and severe brain damage.

¶ 5 Defendant was charged by indictment with three counts of aggravated battery (720 ILCS 5/12-3.05(b)(1) (West 2014)) and three counts of aggravated domestic battery (720 ILCS 5/12-3.3(a) (West 2014)) for shaking Naomi. He retained private counsel and pled not guilty. The testimony and other evidence during the bench trial included the following.

¶ 6 The State's Case

¶ 7 *Law Enforcement Testimony*

¶ 8 Chicago Police Officer Gerardo Quintero (Quintero) testified that he spoke with defendant at Mount Sinai in the early morning hours of March 25, 2014. When asked how Naomi was injured, defendant responded he had "fake dropped" the baby after she was crying. According to Quintero, defendant stated that he would "lift the kid in his arms and let him [*sic*]

go, catch him [*sic*] prior to falling, hitting the floor." Defendant did not indicate how many times he "fake dropped" Naomi. He told Quintero that after he "fake dropped" the baby, she stopped crying, tensed up, and became unresponsive. Janet then entered the room, observed that the baby was unresponsive, and attempted to perform CPR. During cross-examination, Quintero clarified that defendant stated that he had been alone with the sleeping baby and had tried to awaken her.

¶ 9 Detective David Brandt (Brandt) of the Chicago Police Department testified that he also spoke with defendant at Mount Sinai in the early morning hours of March 25. Defendant informed Brandt that he was alone taking care of the baby, while Janet was upstairs taking a bath; he woke the baby to get her ready for the ride to drop off Janet at work. The baby started crying, and defendant was "rocking her or tossing her back and forth in an upward downward motion," which he had previously done with his nieces and nephews. Defendant told Brandt that the baby went limp, and after Janet came downstairs, they attempted CPR and he held a damp cloth to the baby's head. Brandt did not recall defendant using the term "shook." On cross-examination, Brandt testified that defendant stated that his father and two sisters also lived in the same building. Brandt did not question defendant regarding who cared for Naomi before she went to sleep.

¶ 10 Detective Eugene Schleder (Schleder) of the Chicago Police Department was assigned to investigate Naomi's case on the afternoon on March 25. When Schleder spoke with defendant at Mount Sinai, defendant described "play dropping" the baby while getting her dressed to take Janet to work. Defendant told the detective that Naomi then went stiff and her eyes rolled back in her head; he said he could not feel a heartbeat, so he immediately commenced CPR. When Janet came running downstairs, she yelled "what did you do to my baby?" After speaking with Janet, Schleder asked defendant to accompany him to the police station, and defendant agreed.

¶ 11 At the police station later that evening, Schleder read defendant his *Miranda* rights and informed him he was under arrest for aggravated battery; defendant continued to speak with Schleder. Defendant initially indicated that the baby had been in a crib but later suggested that he had learned that the Department of Children and Family Services can remove a child from the home if the baby shares a bed with the parent. Schleder testified that defendant then stated that Naomi had fallen three or four times and that he had informed Janet of a bump on the baby's head. According to Schleder, defendant said he did not believe the injuries from the falls were significant or required medical attention.

¶ 12 During cross-examination, Schleder testified regarding defendant's description of the events prior to the incident. Defendant stated that he went to pick up food for Janet in the afternoon, during which time she was alone with Naomi; he produced receipts for the food purchase. He then prepared a bath for Janet after she woke from an afternoon nap. When he subsequently went to wake Naomi, she would not awaken immediately. Schleder acknowledged that he did not reference Janet's alleged statement, *i.e.*, "what did you do to my baby," in his four-page general progress report – which Schleder prepared as he spoke with defendant – but that it was included in his 18-page "closing" submitted two months later.

¶ 13 Detective James Decicco (Decicco) of the Chicago Police Department testified that he interviewed defendant on March 26, 2014. When Decicco asked defendant what did "fake dropp[ing]" the baby mean, defendant indicated Naomi's head may have jerked as he dropped her toward the bed; defendant was unsure because he had watched her feet. After describing the "fake drop," defendant stated, "I know it's my fault." Decicco testified that defendant stated that he shook the baby to try to awaken her, but he was uncertain how forcefully he had shaken her. Decicco provided defendant with a baby doll and asked him to demonstrate how he shook the

baby; defendant "grabbed the doll from underneath its arms and shook the baby very slowly."

¶ 14 On the following day, after being Mirandized, defendant agreed to speak with Decicco, and another detective, as well as with an assistant State's attorney (ASA). When describing the "fake dropping" during that interview, defendant indicated that he never let go of Naomi. Defendant said that after he "fake dropped" the baby, her body went stiff and then he shook her to "shock her out of it." When defendant indicated that the baby's head was "just moving around," the ASA asked if it was like a bobblehead, and defendant responded affirmatively. According to Decicco, defendant stated that Janet said "what did you do" when she came downstairs to the basement.

¶ 15 On cross-examination, Decicco confirmed that defendant had been in custody for almost two days at the time of their March 27 interview; Decicco had personally conducted four interviews with defendant by that point. Decicco also testified that there were periods of time in the afternoon before the incident when Janet was alone with Naomi.

¶ 16 *Social Worker's Testimony*

¶ 17 Minerva Esparza (Esparza), a medical social worker at Mount Sinai, testified that she spoke with defendant in the early afternoon on March 25, 2014. Defendant told her that the baby had fallen asleep, and Janet went upstairs to take a bath. Shortly thereafter, he attempted to awaken the baby because they were going to drive Janet to work. According to Esparza, defendant stated he was pretending to drop Naomi to awaken her; the baby became limp and "in a coma-like state." Janet returned to the basement, and they splashed water on the baby's face, attempted CPR, and drove the baby to Holy Cross. Defendant never told Esparza that he shook Naomi or that the baby had been crying prior to the "pretend dropping." On cross-examination, Esparza testified she did not know who placed the baby to sleep or how long she had slept.

¶ 18 *Janet's Testimony*

¶ 19 Naomi's mother Janet testified that on the afternoon of March 24, 2014, she played with Naomi and used her cellphone to take photographs of the baby, who was healthy and happy.[2] When Janet went upstairs to take a bath before work, she left the sleeping baby with defendant in the basement. While in the bathtub, Janet heard Naomi "whine" and returned downstairs,[3] which is when she observed the baby in defendant's hands. The baby's arms, legs, and torso were "straight," and she was awkwardly positioned. Defendant told Janet that the baby was not responding. Janet performed CPR, and defendant called 911.[4] Janet denied shaking or hurting Naomi in any manner.

¶ 20 On cross-examination, Janet testified that defendant left their home in the afternoon to pick up food. Janet could not recall whether the baby was asleep when defendant returned from the restaurant. Janet further testified that defendant had called out to her that there was a problem with the baby. She denied saying to defendant "what did you do to my baby?" Janet testified that she said, "What's wrong with her?" Before dialing 911, Janet called her grandmother, whom Janet always consulted regarding medical issues.

¶ 21 *Physician Testimony*

¶ 22 Dr. Joe Eggebeen, an emergency physician at Holy Cross on March 24, 2014, testified Naomi was unconscious upon arrival at the hospital. Based on a conversation with Janet, Dr. Eggebeen initially concluded that the baby had a seizure at home. According to Janet, the baby had awoken out of sleep and cried but then became difficult to wake up. The doctor

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[2] The evidence included a photograph of Naomi taken at 5:23 p.m. on March 24, 2014.

[3] On cross-examination, defense counsel asked: "[I]t was Richard that called you to the basement, not a scream from the child, correct?" Janet responded, "I just came down there because I was about to be late for work anyway."

[4] In a 911 recording which was admitted into evidence, defendant stated, among other things, that the baby was "in shock" and that he had been "shaking, not really shaking" the baby. When asked if he dropped the baby, defendant responded, in part: "I was playing with her waking her up."

ordered a computed tomography (CT) scan of the baby's head and blood tests. The CT scan revealed a subdural hematoma on the right side of her brain. Dr. Eggebeen recognized a midline shift, "the actual shift of brain contents from one side to another" that can occur after bleeding inside the brain. He also observed a 2- to 3-centimeter bruise on the left side of her forehead, which he believed to be several days to a week old. Since Holy Cross did not have neurosurgeons, he arranged her transfer to Mount Sinai, a Level 1 trauma center. On cross-examination, Dr. Eggebeen testified he did not observe other bruises on Naomi. He also testified that he would have checked her eyes but did not notice bleeding on the eyes or any other abnormality.

¶ 23 Dr. Abayomi Akintorin, the director of the Mount Sinai pediatric intensive care unit, testified he examined Naomi after she underwent the removal of a subdural hematoma and a craniectomy. He explained that part of her brain had been removed to prevent further damage to her brain, which was swollen and could not be contained in the cranium; he diagnosed her with traumatic brain injury. Dr. Akintorin requested an ophthalmology consult to check for retinal hemorrhages, which would be difficult to view "with [the] naked eye." He testified that an ophthalmologist – who dilated her pupils and used a special ophthalmoscope – found Naomi had extensive retinal hemorrhages in multiple layers, indicating "that the mechanism of injury would have been like repeated motion or like shaking," *i.e.*, consistent with nonaccidental injury.

¶ 24 During cross-examination and redirect examination, Dr. Akintorin rejected the suggestion that Naomi's injuries were caused by thrombosis, *i.e.*, an occlusion of a blood vessel by a blood clot, based on the extensive swelling and bleeding in her brain. After defense counsel's questioning regarding an assessment in Naomi's medical reports of thrombocytopenia, *i.e.*, a reduced platelet count which may hinder the ability for blood to coagulate, Dr. Akintorin

explained that thrombocytopenia would have been the result, not the cause, of bleeding on her brain. Defense counsel also questioned the doctor regarding the difference between a chronic subdural hematoma – a bleed that has been going on for a period of time – and an acute subdural hematoma – which comes on immediately or within a limited period of time. When presented with the CT report from March 24, 2014, Dr. Akintorin acknowledged that the scan revealed evidence of acute *and* chronic hemorrhage; he later characterized a CT scan as a "quick *** screen test" and only one of a number of tests used to "determine bleeding on the brain." He further testified that "[e]verything we did for this patient was for the acute injury."

¶ 25 The State also called Dr. Jill Glick, a board-certified physician in child abuse pediatrics who was the medical director of the child abuse and protective services team at the University of Chicago. Defense counsel did not object to her qualification as an expert in the field of pediatrics and child abuse. As part of the Multidisciplinary Pediatric Education and Evaluation Consortium (MPEEC),[5] she had been assigned to Naomi's case. She reviewed the Holy Cross and Mount Sinai records, including the ophthalmology, neurosurgery, radiology, operation, and social work reports. Dr. Glick also discussed the case with a physician at Mount Sinai and the police officers assigned to the case on March 25 and 26, 2014.

¶ 26 Dr. Glick's understanding of the timeline before Naomi's hospitalization was that she had not exhibited irritability or lethargy earlier on the day on March 24 while in Janet's care, but she became acutely ill after being in defendant's care. Dr. Glick testified that Naomi sustained severe brain trauma, "which would require significant forces applied to the brain to cause that injury." After looking at the medical report history, the doctor opined "there was no real history of trauma provided at the time of presentation that would be consistent with that type of injury."

[5] The MPEEC is a "DCFS program which provides medical experts to examine children under three years of age who are reported to have head or skeletal trauma." *In re Davon H.*, 2015 IL App (1st) 150926, ¶ 17 n.1.

¶ 27 When questioned regarding the CT scan which demonstrated "acute-on-chronic" bleeding, Dr. Glick explained that the coloration of blood in a CT scan is "not very precise" and has been "very poorly studied" in children. The doctor testified that there was no evidence of old bleeding when the surgeons removed Naomi's dura, the outermost membrane protecting the brain. Dr. Glick also testified that the baby's extensive retinal hemorrhaging evidenced traumatic injury to the eye and that retinal hemorrhaging is "very sensitive or specific to shearing injury," *i.e.*, a shaking injury. According to Dr. Glick, the severity of Naomi's injuries would have caused her to become immediately symptomatic within seconds or a couple of minutes.

¶ 28 Dr. Glick testified that "play dropping" – where someone drops and catches a child – would never cause the type of brain bleed or retinal hemorrhaging suffered by Naomi because such injuries result from excessive force, not normal force. The doctor further testified that resuscitative efforts like CPR have not been shown to cause retinal hemorrhaging, brain dysfunction, or subdural hematoma. Dr. Glick indicated the required force to cause such injuries would compare to a major vehicle accident; shaking a child to awaken her would not cause such force. The doctor also testified that the type of injuries sustained by Naomi would not be caused by a fall from a bed. According to Dr. Glick, "the large subdural hematoma that was over her whole head, the herniation, the brain swelling, and the extensive retinal hemorrhaging all are consistent with cranial rotation or shaking." The doctor ultimately opined that Naomi was abused and that she suffered inflicted head trauma with evidence of acute cranial rotational injuries, *i.e.*, she was shaken.

¶ 29 During cross-examination, Dr. Glick testified that thrombocytopenia is more of a manifestation than a cause of a clotting problem. Dr. Glick also testified that an "acute-on-chronic" subdural hematoma could occur where an individual has a chronic bleed in their brain

which is exacerbated by an acute injury. According to Dr. Glick, the operation report indicated that Naomi's surgeon observed only "acute blood" in her brain. Dr. Glick opined that the bruise on Naomi's head was not evidence of an "old subdural."

¶ 30 After certain exhibits were admitted, the State rested. Defendant's motion for a directed finding was denied.

¶ 31 The Defense

¶ 32 Defendant was the sole witness presented by the defense. He testified that on March 24, 2014, Naomi was awake when he returned from picking up some food and visiting his grandmother. After eating, Janet and defendant played with the baby, and then defendant went upstairs as Janet put the baby to sleep. He later watched television in the basement while the baby slept in the bed and Janet bathed upstairs. Defendant attempted to "get the baby ready" to take Janet to work. Although Naomi usually awakened when defendant picked her up, her arms and legs were stiff this time. He testified that she made a "weird sound," like a gasp of air. He denied shaking, throwing, or otherwise harming the baby. When Janet came downstairs, defendant told her that something was wrong with the baby. Janet called her family in Iowa, and defendant told her they needed to call 911.

¶ 33 On cross-examination, defendant denied shaking the baby, even while trying to awaken or revive her. He testified that he "play dropped" the baby while she was stiff. When he demonstrated the "play drop," he moved his hands approximately three inches. According to defendant, Naomi did not cry; he also denied putting a damp cloth on her head or saying that he woke the baby. Although defendant denied stating that he shook Naomi, he admitted telling a detective that he thought what happened to Naomi was his fault.

¶ 34 Subsequent Proceedings

¶ 35 The State presented two witnesses in rebuttal, both ASAs who participated in the interviews of defendant. The first ASA testified that defendant indicated that he continued to hold the baby as he "fake-dropped" her, but the "drop" was approximately nine inches. A second ASA testified that defendant stated that Naomi was crying when he woke her, that he had "play dropped" her to try to stop her crying, that she gasped and her body went stiff, and he shook her to "get her out of shock." According to the ASA, defendant agreed with her "bobblehead" reference, and he stated that Janet asked "what did you do" when she came downstairs.

¶ 36 *Closing Argument*

¶ 37 During closing argument, the State asserted that in the absence of any evidence of Naomi's involvement in a high-speed vehicular crash, "[t]he only other possibility according to the expert in the area of this type of injury is that it was shaken baby." The State argued that the evidence demonstrated that defendant felt overwhelmed when Naomi was upset and crying as he tried to wake her to take Janet to work. The State maintained that defendant shook the baby forcefully, as evidenced by her retinal hemorrhaging and "massive" subdural hematoma. According to the State, defendant's differing statements to law enforcement were "a classic case of shifting sands of a guilty mind."

¶ 38 Defense counsel argued that, contrary to the State's suggestion, defendant's "story" did not change during the interviews following Naomi's hospitalization. He argued that it was normal to "play drop," shake, or try to awaken an unresponsive child, that Janet was alone with the baby throughout the day, and that the initial diagnosis of "acute on chronic" bleeding meant that her injuries could have been caused at an earlier time than suggested by the State. Defense

counsel also pointed out that defendant called 911, remained in the hospital the entire night with Janet, and consistently denied hurting Naomi. As to the 911 call, counsel argued that shaking an unresponsive child "doesn't make any difference" because "[i]t is already an acute hemorrhage."

¶ 39 *Trial Court's Rulings*

¶ 40 After considering the medical testimony and other evidence, the trial court convicted defendant on all six counts of aggravated battery and aggravated domestic battery and sentenced him to 10 years' imprisonment. The trial court found, in part, that defendant had provided conflicting stories regarding what had occurred but was clear that Naomi "was healthy and well up until the time of the events preceding her going limp." Defendant filed a posttrial motion wherein he argued that the State failed to prove him guilty beyond a reasonable doubt. According to defendant, if Naomi had a *chronic* subdural hematoma, the injury could have occurred hours or even days prior to his contact with her, and even if Naomi had an *acute* subdural hematoma, it is "conceivable" that Janet could have committed the battery. Defendant further argued that his statements to the police should not have been considered by the trial court, and any discrepancies in his statements were attributable to the "frequent interrogations" and the length of his time in custody. The trial court denied this motion, as well as defendant's motion to reconsider sentence. Defendant is represented in this timely appeal by the Office of the State Appellate Defender (OSAD).

¶ 41 ANALYSIS

¶ 42 We initially note the procedural posture of this appeal. OSAD filed a motion seeking leave to withdraw as appellate counsel pursuant to *Anders v. California*, 386 U.S. 738 (1967). The rationale for a withdrawal motion is that an attorney should not be forced to choose between two ethical duties – their duty to zealously advocate for their client and their duty of candor to

the court – when those duties conflict. *People v. Davis*, 382 Ill. App. 3d 701, 707 (2008).

¶ 43 As contemplated by *Anders*, the OSAD attorneys herein filed a supporting memorandum indicating they had explored the possibility of briefing various issues (see *id.* at 708): (a) the sufficiency of the indictment; (b) the admissibility of defendant's custodial statements; (c) the failure to prove guilt beyond a reasonable doubt; (d) the failure to seek a *Frye* hearing (*Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)) on the issue of whether "shaken baby syndrome" is a generally accepted methodology or principle; (e) the ineffectiveness of trial counsel for failing to offer expert testimony; and (f) the legality of the sentence. As to the potential ineffective assistance of trial counsel argument, appellate counsel contended that certain recent decisions reveal that "the shaken baby theory is in fact a disputed and indeed controversial issue among physicians and bio-mechanical engineers." OSAD concluded, however, that any ineffective assistance challenge to defendant's conviction must take place in a collateral forum – under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2018)) – which would allow defendant to develop the "extra-record" expert evidence which was lacking at trial.

¶ 44 After defendant failed to respond to the *Anders* motion, this court denied the motion and ordered OSAD to file an appellate brief addressing the issue of whether trial counsel was ineffective for failing to offer expert testimony and any other issue counsel deemed necessary. Such ruling was based primarily on our concern that a defendant must generally raise a constitutional claim alleging ineffective assistance of counsel on direct review or risk forfeiting the claim. *People v. Veach*, 2017 IL 120649, ¶ 47. See also *People v. Ligon*, 239 Ill. 2d 94, 112 (2010) (noting that issues that could have been considered on direct appeal are deemed procedurally defaulted). As our supreme court has recognized, ineffective assistance of counsel claims may sometimes be better suited to collateral proceedings but only when the record is

incomplete or inadequate for resolving the claim. *Veach*, 2017 IL 120649, ¶ 46. In the instant case, the appellate briefing was intended to clarify and expand upon defendant's ineffective assistance claim so this court could properly assess the adequacy and completeness of the appellate record with respect to this claim. *People v. Gayden*, 2020 IL 123505, ¶ 38 (noting that "because reasonable minds can differ concerning whether the record is sufficiently developed to decide a defendant's claim on appeal, a prudent defendant must raise an apparent claim of ineffective assistance of counsel on direct appeal and then file a petition for postconviction relief if the appellate court on direct appeal finds the record is inadequate to decide the claim"). See also *Veach*, 2017 IL 120649, ¶ 48 (requiring reviewing courts to carefully consider each ineffective assistance of counsel claim on a case-by-case basis); *People v. Teran*, 376 Ill. App. 3d 1, 5 (2007) (providing that, on a motion to withdraw, the ultimate responsibility to determine the frivolity of the potential issues lies with the court rather than appellate counsel).

¶ 45 OSAD filed a brief raising a single key argument, *i.e.*, that defendant received ineffective assistance of counsel in this "shaken baby" prosecution where his trial counsel "failed to present a defense supported by scientific and legal authority that should have been known to adequately prepared counsel at the time this case was prosecuted." Defendant asks this court to vacate his conviction and sentence and remand the case for a new trial or, alternatively, to vacate his conviction and sentence and remand the case to the circuit court for an evidentiary hearing on his claim of ineffective assistance of counsel.

¶ 46 Defendant argues on appeal that his trial counsel was ineffective. Claims of ineffective assistance of counsel are evaluated under the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prevail under *Strickland*, a defendant must demonstrate that his attorney's assistance was both deficient and prejudicial. *People v. Harris*, 225 Ill. 2d 1, 20

(2007). More precisely, a defendant must establish that his attorney's assistance was objectively unreasonable under prevailing professional norms, and that there is a reasonable probability that, but for the attorney's unprofessional errors, the result of the proceeding would have been different. *Id.* A reasonable probability is one that is sufficient to undermine confidence in the outcome. *Id.* Even though defendant retained private counsel, the same principles apply. *People v. Albanese*, 104 Ill. 2d 504, 526-27 (1984) (providing that the *Strickland* rule applies to challenges to the effectiveness of both retained and appointed counsel).

¶ 47 Judicial scrutiny of an attorney's performance must be highly deferential. *Strickland*, 466 U.S. at 689. Accord *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000). " '[S]trategic choices made after thorough investigation of law and facts relevant to plausible opinions are virtually unchallengeable.' " *Harris*, 225 Ill. 2d at 49, citing *Strickland*, 466 U.S. at 690. An attorney's decision regarding whether to present a particular witness is generally a strategic choice that does not support an ineffective assistance of counsel claim. *People v. Klein*, 2015 IL App (3d) 130052, ¶ 72. See also *People v. Davis*, 353 Ill. App. 3d 790, 795 (2004) (noting the presumption that "a challenged omission was trial strategy"). We review *de novo* whether an omission by counsel supports an ineffective assistance claim. *Id.* at 794.

¶ 48 The core of defendant's arguments on appeal is that his trial counsel was ineffective because he failed to present expert witnesses to challenge the viability of the "shaken baby" theory. In support of this contention, defendant points to a number of Illinois "shaken baby" cases wherein experts were presented by the defense. See *People v. Schuit*, 2016 IL App (1st) 150312; *Klein*, 2015 IL App (3d) 130052[6]; *People v. Alvidrez*, 2014 IL App (1st) 121740; *People v. Sanders*, 368 Ill. App. 3d 533 (2006). None of the cases hold or suggest, however, that

[6] Although defendant characterizes *Klein* as a "shaken baby" case, the case appears to have involved blunt force trauma rather than shaken baby syndrome. See *id.* ¶ 58.

the failure to present an expert witness constitutes *per se* ineffective assistance of trial counsel. See also *People v. Hamilton*, 361 Ill. App. 3d 836, 847 (2005) (providing that "[c]ounsel's failure to call an expert witness is not *per se* ineffective assistance, even where doing so may have made the defendant's case stronger, because the State could always call its own witness to offer a contrasting opinion"). In three of the cases – *Klein*, *Alvidrez*, and *Sanders* – the defense presented the same expert witness, Dr. John Plunkett. The *Alvidrez* court observed that the "evidence showed that Dr. Plunkett admittedly represented a minority position in the medical community that shortfalls in children[7] could cause the type of head and eye injuries" sustained by the victim in that case. *Alvidrez*, 2014 IL App (1st) 121740, ¶ 32. In *Schuit*, the appellate court noted that the United States Centers for Disease Control and Prevention, the National Institutes of Health, and the American Academy of Pediatrics (AAP) "all acknowledge" shaken baby syndrome. *Schuit*, 2016 IL App (1st) 150312, ¶ 90. The *Schuit* court further observed that although the AAP had embraced the broader term "Abusive Head Trauma," it had not expressed any doubt regarding the existence of shaken baby syndrome, which the AAP described as "a term often used by doctors and the public to describe abusive head trauma inflicted on infants and young children." (Internal quotation marks omitted.) *Id.* n.3. Although the Illinois cases cited by defendant involved the presentation of expert witnesses, the cases neither mandate defense expert witnesses nor conclude that shaken baby syndrome is no longer a viable theory.

¶ 49 Defendant's appellate brief also includes a detailed summary of the expert testimony in *habeas corpus* proceedings in *Del Prete v. Thompson*, 10 F. Supp. 3d 907 (N.D. Ill. 2014), "to show that the medical and other scientific evidence that could have been offered in defense of [defendant] was well established, well known, and available to any attorney who adequately

[7] A "shortfall" was defined as a fall from a caregiver's arms or a changing table. *Alvidrez*, 2014 IL App (1st) 121740, ¶ 9.

researched published 'shaken baby' cases during the time [defendant's] case was awaiting trial." The expert witnesses in *Del Prete* included (a) a biomechanical engineer who testified that the level of acceleration required to inflict serious head injury on a child would necessarily result in neck injury as well and (b) a pathologist who opined that retinal hemorrhaging can occur even in the absence of traumatic injury. *Id.* at 929, 931. Defendant expressly recognizes that "[i]t is conceivable that counsel consulted experts and could find no support for a [defense] position" but speculates that this is unlikely in light of the expert testimony presented in other "shaken baby" cases like *Del Prete*. Simply put, this court cannot engage in such speculation. The basis for trial counsel's decision to *not* call an expert witness regarding shaken baby syndrome – whether rooted in unavailability, financial constraints, oversight, or otherwise – is not discernable from the record provided. *E.g.*, *Massaro v. United States*, 538 U.S. 500, 505 (2003) (noting that a trial record may contain no evidence of an omission, much less the reasons underlying an omission). Among other things, an expanded record may reveal whether counsel consulted with any medical or biomechanical expert regarding this case. To the extent that defendant specifically argues that his trial counsel was ineffective because he failed to present expert witnesses to challenge the viability of the "shaken baby" theory, the record is inadequate for our review and the claim is better suited for presentation in a postconviction petition. See, *e.g.*, *Gayden*, 2020 IL 123505, ¶ 38.

¶ 50 Although we have reached the conclusion that the record is inadequate to address defendant's ineffective assistance claim, we find it necessary to briefly address defendant's argument that defense counsel allowed the State to present its theory of the case "uncontradicted." We note that trial counsel attempted to challenge the State's theory by cross-examining witnesses regarding the timeline of events, to establish that Janet or someone else

who was alone with Naomi earlier in the day may have caused her injuries. Trial counsel also cross-examined the medical witnesses regarding the nature of Naomi's injuries, in an effort to demonstrate that defendant's actions did not cause her injuries and/or her injuries were sustained prior to the evening of March 24, 2014. Among other things, trial counsel questioned the physicians regarding the assessment of thrombocytopenia and the "acute on chronic" bleeding detected by the CT scan, which could be indicative of older bleeding. During closing argument, trial counsel noted, in part, that the surgeon who performed Naomi's brain operation did not testify and that Dr. Glick merely reviewed the operation report but did not speak with the surgeon. Trial counsel appears to have generally appreciated and understood the legal principles applicable to the case and to have provided an adversarial check to the prosecutor's efforts. *Cf. People v. Fletcher*, 335 Ill. App. 3d 447, 453 (2002). Accord *Strickland*, 466 U.S. at 690 (describing counsel's function as "mak[ing] the adversarial testing process work in the particular case").

¶ 51 In sum, while we acknowledge that scientific developments in the field of shaken baby syndrome may raise implications for shaken baby prosecutions (see *People v. Nelson*, 2020 IL App (1st) 151960, ¶ 175), we reject defendant's contention that the record herein "points to the conclusion that [defendant] received ineffective assistance of counsel." Based on the appellate record presented, we cannot conclude that defendant's trial counsel was ineffective, and we thus affirm the judgment of the circuit court. Although we find that, on this record, defendant has failed to prove ineffective assistance of counsel, we again note that defendant may raise his challenge regarding trial counsel's failure to present expert witnesses under the Post-Conviction Hearing Act. See *People v. McGath*, 2017 IL App (4th) 150608, ¶ 43. Such proceedings would provide both defendant and the State an opportunity to develop a factual record bearing directly

on this issue. See *People v. Bew*, 228 Ill. 2d 122, 135 (2008).

¶ 52 Finally, we reject defendant's request to remand the matter for an evidentiary hearing on the issue of ineffective assistance of counsel, as the cases he cites – *People v. Moore*, 307 Ill. App. 3d 107 (1999), and *People v. Little*, 322 Ill. App. 3d 607 (2001) – are inapposite. The defendants in both cases argued that they received ineffective assistance of counsel because trial counsel did not file a motion to quash arrest and to suppress evidence. *Moore*, 307 Ill. App. 3d at 110; *Little*, 322 Ill. App. 3d at 613-14. The appellate court in each case concluded that trial counsel was ineffective based on counsel's failure to file a motion to quash and suppress and remanded the cases for further proceedings. *Moore*, 307 Ill. App. 3d at 114; *Little*, 322 Ill. App. 3d at 614. In *Moore* and *Little*, the appellate record was adequate for the court to conclude that counsel was ineffective. The *Little* court rejected the State's assertion that the defendant's claim was better suited for consideration in a collateral proceeding, noting that "the factual record regarding the information known and relied upon by the arresting officers would be no more developed in a post-conviction proceeding than it is here." *Id.* By contrast, for the reasons discussed above, the record would be significantly more developed in a potential collateral proceeding in the instant case.

¶ 53 CONCLUSION

¶ 54 For the reasons stated herein, we affirm defendant's conviction and sentence, but we recognize the possibility that defendant may utilize the Post-Conviction Hearing Act to raise a future ineffective assistance of trial counsel claim.

¶ 55 Affirmed.