

No. 1-14-2257

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 07 CR 18083
	)	
GABRIEL SLOAN,	)	Honorable
	)	Steven J. Goebel,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE PIERCE delivered the judgment of the court.  
Presiding Justice Hyman and Justice Neville concurred in the judgment.

**ORDER**

¶ 1 *Held:* Defendant did not receive ineffective assistance of counsel. Trial counsel’s choice not to present evidence in the form of expert testimony was not objectively unreasonable and did not prejudice the defendant. The mittimus is corrected.

¶ 2 Defendant Gabriel Sloan was convicted of first degree murder following a jury trial and was sentenced to 50 years’ imprisonment. He now appeals and argues: (1) his trial counsel was ineffective for failing to present expert testimony that contradicted the State medical examiner’s opinion that the victim may not have died from child abuse and rather from a combination of symptoms due to recent illness; and (2) his mittimus should be corrected. For the following

reasons, we affirm the judgment of the trial court but correct the mittimus.

¶ 3

### BACKGROUND

¶ 4 On the afternoon of August 3, 2007, at roughly 2 p.m., 13-year-old Shavon Miles collapsed on the front patio of her home after returning from running errands with her family. After being brought inside, she became unconscious, went into seizure, and stopped breathing. Paramedics were called and at about 3:15 p.m. Shavon was taken via ambulance to Holy Cross Hospital, where she was pronounced dead approximately twenty minutes later.

¶ 5 Shavon had a prior history of brain trauma and seizures. At the age of three months Shavon and her twin brother were diagnosed with shaken baby syndrome. Prior to her collapse, Shavon had been ill and unable to keep solid food down for several days.

¶ 6 The next morning, Dr. Crowns of the Cook County Medical Examiner's office performed an autopsy and concluded that Shavon died of "multiple injuries due to child abuse," the cause of death being homicide. The police then took defendant, Shavon's step-father, and Lynnesia Hiles-Sloan, Shavon's mother, into custody. Lynnesia pled guilty to first-degree murder and received a 58-year sentence. The State charged defendant with several counts of first degree murder but chose to proceed to trial on a single charge alleging that defendant inflicted multiple blunt trauma injuries that killed Shavon, knowing that such acts created a strong probability of death or great bodily harm.

¶ 7 Prior to trial, defense counsel filed a motion to exclude evidence or in the alternative to conduct a Frye hearing. Attached to the motion was a letter from Dr. Janice Ophoven, a pediatric forensic pathologist with over 30 years' experience in that field and a qualified expert. At defense counsel's request, Dr. Ophoven reviewed Dr. Crowns' autopsy findings,

neuropathologist Dr. Marc Reyes' findings, and Shavon's medical history dating back to birth. According to the letter, Dr. Ophoven noted that Shavon had "known developmental delays and other problems related to abusive head trauma" since as early as three months. Shavon had a history of seizure disorder for which she was prescribed medicine, however at the time of her death she was not prescribed an anticonvulsant.

¶ 8 Dr. Ophoven noted that Dr. Crowns diagnosed Shavon with cerebral edema—swelling of the brain—with "notching indicating herniation." Dr. Ophoven noted that Dr. Reyes' findings did not confirm Dr. Crowns' finding of cerebral edema, because Dr. Reyes found mild ventricular dilation. According to Dr. Ophoven, had there been significant cerebral edema the ventricles would become compressed, not dilated. Dr. Ophoven also observed that while Shavon was smaller for her age in both height and weight, she was normally proportioned and her low weight may be the result of dehydration during the illness.

¶ 9 Ultimately, Dr. Ophoven found the evidence inconclusive that Shavon died as a result of child abuse. She found that Shavon was at a significant risk for dehydration given the recent vomiting and reduced oral intake. She pointed out that Dr. Crowns did not perform the "usual" tests for dehydration, and that "the postmortem photographs and report indicate physical findings associated with dehydration [dry oral mucosa and dry and cracking lips]." She concluded that given Shavon's history of seizure disorder and lack of anticonvulsant medicine, uncontrolled seizures can lead to death and in Shavon's case her seizures may be the result of "physiological/chemical complications of dehydration, the result of shock and altered brain circulation, delayed complications of blunt force trauma, and complications of hyperthermia among other." Because of Shavon's developmental delays and preexisting brain damage from

injuries suffered since infancy, Shavon was at an increased risk of serious complications with subsequent trauma. Secondary complications such as seizures, excessive fluid losses associated with vomiting, and increased temperatures all could have played a roll leading to Shavon's cardiac arrest. Dr. Ophoven did not find evidence of an acute fatal traumatic injury at the time of Shavon's death.

¶ 10 At a status hearing on October 3, 2013, the trial judge stated, "I've been told the expert is not available until March, and as far as the Court is concerned that's not acceptable. The expert is going to have to get in here when we decide to set this for trial, which I hope is going to be this year, obviously." Thereafter, the case was continued 15 times by agreement from October 3, 2013 to March 27, 2014.

¶ 11 A week before trial, the prosecutor indicated to defense counsel that Dr. Philkins from the Cook County Medical Examiner's office might testify in lieu of Dr. Crowns, who had moved to Texas. Dr. Philkins reviewed both Dr. Crowns' autopsy report and Dr. Ophoven's report. The State indicated that Dr. Philkins might also testify in rebuttal depending on Dr. Ophoven's testimony for the defense. Ultimately, neither Dr. Ophoven nor Dr. Philkins were called as witnesses.

¶ 12 At trial Lynnesia testified and stated she received no deals for testifying in the case and simply wanted to tell the truth about her daughter. She testified that both she and defendant would physically punish Shavon. She would use a belt or extension cord and sometimes slap Shavon. Defendant would sometimes punch and hit Shavon with items such as a belt, an extension cord, a hairbrush, or a wooden two-by-four. At times, Shavon was required to hold a dictionary above her head, and if the book fell she would be "whooped" with a belt. She testified

that she never refused to feed Shavon, but that defendant at times would and that he would often ask her to do so as well.

¶ 13 Lynnesia testified that on the day of the incident Shavon collapsed on the front porch after walking back with her and the family after running errands. She testified that Shavon had been vomiting and unable to eat solid foods for a week prior to her collapse. She stated that after she fell, defendant picked Shavon up and brought her into the house. Once the door was shut, Lynnesia testified that defendant threw Shavon against it. Shavon fell to the floor at which point defendant told her to stop faking. According to Lynnesia, defendant then went over and banged Shavon's head into the concrete floor that had a layer of carpeting over it. Lynnesia stated she did not recall telling the police that defendant slammed Shavon into the refrigerator.

¶ 14 Lynnesia testified that Shavon then had a seizure and her eyes rolled into the back of her head. Shavon was shaking and foaming at the mouth and moaning. At some point shortly thereafter, a cable repairman came to the house for a scheduled appointment, and defendant moved Shavon to a bedroom so she would not be seen. Lynnesia stayed with Shavon and called 911 after the repairman left; at this point Shavon was no longer breathing. After being taken to the hospital Shavon was pronounced dead.

¶ 15 Dr. Kendall Crowns testified that he performed the autopsy on August 4, 2007. He confirmed that Shavon was 72 pounds and 4 feet 8 inches tall. He testified that his external examination of the body revealed three scars from old, healed injuries – one on the right forehead, one on the right upper back, and one in the mid back, all of which could have been anywhere from months to years old. He found 40 separate points of recent injury with several clusters of injuries among those, and concluded they all occurred within a day of Shavon's death.

In particular, Dr. Crowns found purple bruises on Shavon's right and left forehead and around her right eye, on her lateral right cheek, and lateral right neck. He testified that because the bruises were purple the injuries happened on or around the time of death. He further testified that all of these injuries were caused by blunt force trauma by a hand or foot or if the body hit a hard surface. Dr. Crowns testified to other external injuries, specifically bruises on Shavon's right side of her body near the armpit and breast. He stated that these bruises had a c-shape loop pattern, often found in child abuse cases when someone is whipped with a cord that has been doubled over while the child's arm is up and away from the body.

¶ 16 Dr. Crowns testified that the internal exam showed 17 internal injuries. Though he found numerous older hemorrhages that could be days, weeks, or even months old, Dr. Crowns found seven areas of recent hemorrhage. Most significantly, he found subdural hemorrhages within the left side of the brain with 39 grams of clotted blood and 22 ccs of fluid blood in the left cranial cavity in the subdural space. He stated that any bleeding in the cranial cavity is a problem because it gets trapped in the skull and the only way out is to form a magnum, which is a hole at the base of the skull where the spinal cord goes. The bleeding pushes on the brain and the brain reacts by swelling. The brain then starts pushing out through the foremen magnum where the brain stem is sitting, which is also where control of the heart and respiratory drive sit. Eventually, this swelling impinges on the heart rate and ability to breath.

¶ 17 Dr. Crowns found two subgaleal hemorrhages from the forehead to the ear on both sides, as well as across the top of the head. He stated these could have come from one large strike or multiple strikes that bled together. Last, Dr. Crowns found three subarachnoid hemorrhages that occurred from at least three blows, and were consistent with Shavon's head being pounded on a

hard floor or wall.

¶ 18 Dr. Crowns testified that his conclusion to the cause of death was multiple external blunt force injuries that caused head trauma and resulted in brain edema and hemorrhage—all from child abuse—and the manner of death was homicide. He further testified that the mechanism of death was likely shock, and such cumulative injuries to the body would have all contributed to her death. He stated such head injuries could not have come from Shavon falling because she was too small and would not generate enough force to injure herself in the way she was injured.

¶ 19 On cross-examination Dr. Crowns testified the most serious injuries in this case were the head injuries. He explained that the brain has cerebral spinal fluid that helps hold the brain in place. When somebody's head hits something very quickly the skull stops but the brain keeps moving, which can cause tugging on the bridging vessels that are part of the venous drainage of the brain causing them to start to leak blood. Dr. Crowns explained that while not all subdural bleeding results in death, 20-30 milliliters of blood would create a problem because it will eventually lead to the cerebellum pushing down on the spinal cord damaging the part of the brain that sends signals to the heart and lungs.

¶ 20 Defense counsel asked Dr. Crowns if he remembered speaking with him over the phone a week prior, telling him that he thought Shavon's head injuries could have been caused by a fall from her standing height. Dr. Crowns admitted that he made that statement, but then after he did more research, he concluded Shavon would have to have fallen from a distance greater than her standing height to sustain her head injuries.

¶ 21 Defense counsel confirmed with Dr. Crowns that Shavon had a history of being shaken as a baby, which would have caused injuries that may affect her brain later in life. Defense counsel

asked if Shavon might have had more space between her brain and skull putting her at a greater risk to experience subdural hematomas from falling. Dr. Crowns responded that there was no scientific evidence to support that theory, but that scientific literature talks of the risk of re-bleeding from old subdurals, which Shavon had.

¶ 22 Defense counsel confirmed with Dr. Crowns that Shavon's lips were dry and cracked, which could be indicative of dehydration due to vomiting during the week prior to death. Dr. Crowns testified that there is mixed evidence as to whether dehydration reduces cerebral spinal fluid, but at least one theory supports it. However, Dr. Crowns testified it was not his belief that Shavon died of dehydration because she had a good amount of clear yellow urine in her bladder indicating she was not so dehydrated to the point of not producing urine. Defense counsel asked Dr. Crowns if the best test for dehydration is to test the vitreous fluid in the eyeballs as a whole to be evaluated by a specialist, and he admitted that it was yet he did not do that and made his conclusion based solely off of the presence of urine. Dr. Crowns also confirmed that Shavon did not have any fractures to her face or skull, though fractures frequently occur in child abuse cases.

¶ 23 Lavon Miles, Shavon's twin brother, Joevonne Hiles, Shavon's half-brother, and Diablique Karl Alford, defendant's son, testified that defendant also physically abused them. Lavon testified that Shavon suffered more physical abuse than he did. Gabriel Sloan, Jr., defendant's son and Diablique's brother, testified that he saw defendant hit his brother with a belt at least three times, and saw defendant hit Shavon with a belt.

¶ 24 Defendant called Department of Children and Family Services (DCFS) investigator Linda Anderson to testify. Anderson testified that she interviewed the family several times before Shavon's death. She visited Shavon's home on July 3, 2007, and did not see any indications that



Shavon was being abused. Shavon was clean, with no visible bruises and there was ample food in the home.

¶ 25 After hearing all of the evidence, the jury returned a guilty verdict of first degree murder. Defendant was sentenced to 50 years' imprisonment. It is from this judgment that defendant now appeals.

¶ 26 ANALYSIS

¶ 27 Defendant argues that he was denied his constitutional right to effective assistance of counsel (U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8) because defense counsel failed to present the testimony of Dr. Ophoven whose testimony would have contradicted the testimony of the state's medical examiner, Dr. Crowns and failed to adequately investigate.

¶ 28 Claims for ineffective assistance of trial counsel are evaluated under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). See also *People v. Albanese*, 104 Ill. 2d 504, 525–26 (1984). To succeed on such a claim, the defendant must establish (1) counsel's conduct was deficient, and (2) the deficiency prejudiced him. *Strickland*, 466 U.S. at 687; *People v. Gordon*, 2016 IL App (1st) 134004, ¶ 40.

¶ 29 To satisfy the deficiency prong, the defendant must overcome the high level of deference we give to counsel's performance by showing that counsel's conduct fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 687, 689. Our inquiry into the reasonableness of counsel's challenged performance must consider all circumstances particular to his case, viewed at the time of his performance, under the presumption that counsel's actions were sound trial strategy. *Id.* at 689-90. We do not focus on "isolated incidents of conduct" but instead "look to the entire record to determine if under all of the circumstances counsel's

assistance was ineffective.” *People v. Cloyd*, 152 Ill. App. 3d 50, 57 (1987). Once counsel has thoroughly investigated the law and facts, strategic decisions made thereafter are “virtually unchallengeable.” *Strickland*, 466 U.S. at 690. To satisfy prejudice under the second prong, defendant must show there is a reasonable probability that, but for counsel’s errors, the outcome of the proceeding would have been different. *Id.* at 695. The failure to establish either prong is fatal to a claim of ineffective assistance of counsel. *People v. Richardson*, 189 Ill. 2d 401, 411 (2000).

¶ 30 In this case, there is no explanation contained in the record as to why defense counsel did not call Dr. Ophoven as a witness to rebut the testimony of Dr. Crowns. “The decision whether to call particular witnesses is a matter of trial strategy and thus will not ordinarily support an ineffective-assistance-of-counsel claim.” *People v. Patterson*, 217 Ill. 2d 407, 422 (2005). Mistakes in trial strategy or the benefit of another attorney’s hindsight are not sufficient to demonstrate that the trial lawyer was objectively incompetent. *People v. Hamilton*, 361 Ill. App. 3d 836, 847 (2005). Failure to call an expert witness, even where doing so may have made the defendant’s case stronger, is not *per se* ineffective assistance because the State could always call its own witness to offer a contrasting opinion. *Id.*

¶ 31 Sloan first relies on *People v. Solomon*, 158 Ill. App. 3d 432 (1987), in contending that defense counsel’s decision not to call Dr. Ophoven as a witness could not have been the result of sound trial strategy. In *Solomon*, the defendant asserted an entrapment defense when he was charged with delivery of a controlled substance. *Id.* at 434. During trial, defendant testified that a third party had introduced him to an undercover agent who wanted to buy drugs, which the third party furnished for defendant who subsequently sold to the agent. *Id.* at 436. Defendant

also testified that the third party was his sole source of drugs and that he would stop providing them for defendant's own use unless he agreed to pose as the supplier of the pills to the agent.

*Id.* The court held that defense counsel provided ineffective assistance when he failed to locate and present the third party witness for trial. *Id.* The court reasoned that the witness's testimony was essential to corroborating the entrapment defense, which required a showing of improper inducement on the part of the government and lack of predisposition to commit the crime on the part of the defendant. *Id.* This witness was the only person who could testify to the manipulation and influence he had over the drug-dependent, susceptible defendant. *Id.* at 436-37.

¶ 32 Sloan next relies on *People v. Garza*, 180 Ill. App. 3d 263 (1989). In *Garza*, the defendant was charged with murder and asserted an alibi defense. *Id.* at 265. At trial, the state presented the testimony of the sole eyewitness in order to link the defendant with the crime. *Id.* at 269. The witness's description of the attacker as well as how the attack occurred were inconsistent with her prior statements, yet defense counsel never pointed out these inconsistencies for the jury. *Id.* Moreover, defense counsel never called two alibi witnesses *Id.* The court held that defense counsel provided ineffective assistance explaining that a failure to adequately investigate, develop, and corroborate the available defense, coupled with the fact that the jury necessarily weighed the eyewitness's testimony with that solely of the defendant, amounted to ineffective and unreliable assistance. *Id.* at 269-270.

¶ 33 The case at bar is distinguishable from *Solomon* and *Garza*. In *Solomon*, counsel presented an entrapment defense but never called the only witness who could corroborate it, which was ineffective. *Solomon*, 158 Ill. App. 3d at 436. In *Garza*, defense counsel failed to

present alibi witnesses and abandoned defendant's defense, which was also ineffective. *Garza*, 180 Ill. App. 3d at 270. In this case, counsel asserted a lack of causation and although he did not call Dr. Ophoven to testify as an expert witness, he did use the information contained in her report to extensively cross-examine Dr. Crowns and his causation findings. Counsel had the report with all the necessary information to contradict Dr. Crowns' conclusion and establish a lack of causation. Counsel used that report to cross-examine Dr. Crown and elicited testimony indicating Shavon was vomiting for a week before her death; there was evidence of dehydration and hypothermia; Shavon had preexisting brain injuries; and Shavon had a history of seizures since birth. Further, unlike the counsel in *Garza* who failed to point out inconsistencies in the witness's testimony, here defense counsel got Dr. Crown to admit to having changed his opinions about whether a fall could account for Shavon's injuries. Counsel also managed to get Dr. Crown to change his opinion regarding whether shaken baby syndrome could create risks of further head trauma in subsequent falls.

¶ 34 Defense counsel then used the testimony elicited during Dr. Crowns' cross-examination to argue during closing argument that while defendant may have abused Shavon, he did not intend to kill her. Counsel argued that hardly any force was necessary to cause Shavon's head injuries because her brain was smaller than normal and more susceptible to bleeding. Therefore, he argued, Sloan could not have known his acts would cause the harm they did. Defense counsel emphasized that Dr. Crowns changed his opinion regarding whether Shavon's injuries could occur from a simple fall. He stressed the fact that while an expert, Dr. Crowns' testimony is not somehow "special" requiring the jury to accept it, but rather it should be given the weight the jury deems appropriate given all the evidence in the case

¶ 35 Defense counsel argued that Shavon was dehydrated and that Dr. Crowns' conclusion otherwise was premised solely on the presence of clear urine and not from the most reliable test method. Counsel further pointed out that if Shavon were hit as hard as Dr. Crowns stressed, there would have been fractures yet Dr. Crowns found none. Moreover, counsel argued how the lack of a detached retina was significant to show that not much force was actually used.

¶ 36 “While the testimony of an expert may have been more effective than counsel’s cross-examination and closing argument in which he drew conclusions as to the reliability of [an expert witness] testing, we cannot say that failure to produce such an expert fell below an objective standard of reasonableness, considering all the circumstances, or so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *People v. Mehlberg*, 249 Ill. App. 3d 499, 546 (1993). We find that counsel’s decision to challenge Dr. Crowns’ opinion through cross-examination and closing argument, rather than through independent expert testimony, fell within the wide range of reasonable professional conduct. We do not know why counsel chose not to call Dr. Ophoven but we can say that based on our review of the record before us, that decision was not unreasonable.

¶ 37 Further, Sloan’s claim fails to meet the second prong of *Strickland*. 466 U.S. at 687. Defense counsel used Dr. Ophoven’s report to thoroughly challenge Dr. Crowns’ opinions, present alternative causes of Shavon’s death, and then utilize that testimony in his closing argument. Even if Dr. Ophoven had been called as an expert witness, the jury would not have been obligated to disregard Dr. Crowns’ testimony or defer to that of Dr. Ophoven’s. *Hamilton*, 361 Ill. App. 3d at 684. Moreover, given the specific testimony of Lynnesia and the other testimony from family members identifying other acts of defendant’s abuse directed at Shavon,

it is doubtful that Dr. Ophoven's testimony "would have created a reasonable doubt indicative of a reasonable probability that the outcome of the trial would have been different." *People v. Pisani*, 180 Ill. App. 3d 812, 819–20 (1989). See also *People v. Brackett*, 117 Ill. 2d 170 (1987) (finding that there was no reversible error on the issue of causation when the trier of fact found "that the defendant, a 21-year-old male, 6 feet 3 inches tall and 170 pounds, who battered and raped an 85-year-old woman, set in motion a chain of events which contributed to her death").

¶ 38 We similarly reject defendant's argument that counsel was ineffective for failing to investigate. Defendant's reliance on *People v. Montgomery*, 327 Ill. App. 3d 180, 185 (2001), is unavailing. The defense theory was that the victim died not from strangulation but from a seizure, as the victim suffered from a seizure disorder. *Id.* At trial, the only evidence offered by the defense was by way of stipulation that the victim had a 20-year history of the seizure disorder; the prosecution had no physical evidence linking defendant to the crime other than his statement to the police. *Id.* The court found that defense counsel failed to adequately investigate into whether there was medical evidence that would have contradicted defendant's statement that could have raised a reasonable doubt as to the victim's cause of death. *Id.* In coming to its conclusion, the court looked into the value of the evidence that was not presented at trial and its closeness of the evidence that was presented. *Id.*

¶ 39 Unlike the defense counsel in *Montgomery*, defense counsel here did not fail to investigate. The day after Shavon's death, Dr. Crowns performed an autopsy and concluded that Shavon died of "multiple injuries due to child abuse," the cause of death being homicide. Defense counsel then contacted Dr. Ophoven, a pediatric forensic pathologist and qualified expert with over 30 years of experience in that field, to get her medical opinion as to the cause of

Shavon's death. Dr. Ophoven reviewed Dr. Crowns' autopsy findings, Dr. Marc Reyes' findings, and Shavon's medical history dating back to birth. After review, Dr. Ophoven found the evidence inconclusive that Shavon died as a result of child abuse. Dr. Ophoven concluded that dehydration may have led to Shavon's death, as dehydration can lead to seizures which, given Shavon's history of brain damage and increased risk of complications with subsequent trauma, may have led to her cardiac arrest. Dr. Ophoven did not find any evidence of an acute fatal traumatic injury at the time of Shavon's death. Defense counsel was familiar with the issues surrounding the case of Shavon's death. In an attempt to discredit the findings of Dr. Crowns, defense counsel sought out and retained Dr. Ophoven, an expert witness from Minnesota.

¶ 40 The court in *Montgomery* found the failure to investigate into an alternative cause of death an essential element in its holding of ineffective assistance of counsel. *Id.* at 185-86. Here, however, it is clear that defense counsel did investigate, as he sought and obtained an opinion from Dr. Ophoven, and as discussed, adequately used the information contained therein to pursue a valid defense.

¶ 41 Finally, defendant argues that his mittimus be corrected to reflect the proper number of days credit he for time he spent in custody prior to sentencing. The State agrees. Pursuant to our authority under Supreme Court Rule 615(b)(1) (Ill. S. Ct. R. 615(b)(1)), we correct the mittimus to reflect 2,532 days presentence credit.

¶ 42

#### CONCLUSION

¶ 43 For the reasons stated, we are unable to conclude on this record that defense counsel rendered ineffective assistance. Therefore, we affirm defendant's conviction on direct appeal.

1-14-2257

We correct the mittimus to reflect 2,532 days of presentence credit.

¶ 44 Affirmed; mittimus corrected.