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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Winnebago County.
)	
Plaintiff-Appellee,)	
v.)	No. 06-CF-12
)	
MATTHEW D. MCNABB,)	Honorable
)	John R. Truitt,
Defendant-Appellant.)	Judge, Presiding.

PRESIDING JUSTICE SCHOSTOK delivered the judgment of the court.
Justices McLaren and Spence concurred in the judgment.

ORDER

¶ 1 *Held:* The defendant was proved guilty beyond a reasonable doubt of aggravated battery to a child. Prosecutorial comments in closing argument were not improper.

¶ 2 On November 25, 2013, the defendant, Matthew McNabb, was found guilty of aggravated battery to a child (720 ILCS 5/12-4.3(a) (West 2004)), and sentenced to six and a half years' imprisonment. On appeal, the defendant argues that he was not proved guilty beyond a reasonable doubt and that prosecutorial comments in closing argument denied him a fair trial. We affirm.

¶ 3 BACKGROUND

¶ 4 On January 3, 2006, the defendant was charged by criminal complaint with aggravated battery of a child (720 ILCS 5/12-4.3(a) (West 2004)). The complaint alleged that the defendant picked up his son, Tyler, by the shoulders and shook him causing retinal hemorrhaging and bleeding in the brain. On January 18, 2006, the defendant was indicted on the same charge.

¶ 5 On November 19, 2013, following various continuances, a jury trial commenced. Yaira Barrios testified that he was a deputy for the Winnebago County Sheriff's Department. On January 1, 2006, at 10:37 a.m., he was dispatched to the defendant's home. When he arrived, Tyler, who was three-months old, was pale, unresponsive, and not breathing. The paramedics arrived shortly after him and moved Tyler to the ambulance. Barrios testified that he and another officer, Anthony Micelli, then questioned the defendant. The defendant stated that his wife fed Tyler at 8 a.m. and then went grocery shopping. Tyler had been in the car seat for about 20 minutes watching television. When Tyler became quiet, the defendant went to check on him. The defendant found Tyler gasping for air. The defendant said he then picked up Tyler and that Tyler was limp. The defendant then began giving Tyler CPR and Tyler began vomiting.

¶ 6 Hannalore Pearson testified that she was a paramedic. She responded to the call for service at the defendant's residence on the morning of January 1, 2006. When she walked in, she saw two police officers performing CPR on a very blue baby. She scooped up Tyler and began doing compressions and ventilations on him. She did not have to clear Tyler's airway as nothing was blocking it. She went out to the ambulance and continued CPR using the necessary equipment. Tyler was vomiting while she was performing CPR, which was a common occurrence. They began to drive to the hospital after about six minutes and it took about seven minutes to get to the hospital. While on the way to the hospital, after continued compression and ventilation, Tyler's heart rate had only come up to 80, about half of a normal heart rate. Pearson decided that Tyler needed a more direct route of oxygenation, so she intubated him with an

endotracheal tube. After Tyler was intubated, his skin began to turn pink, his heart rate came up to the normal range, and she began to feel a pulse.

¶ 7 On cross-examination, Pearson acknowledged that Tyler had formula coming from his mouth and nose when she arrived. The formula may have been there as a result of CPR but Tyler could have been vomiting prior to CPR. Pearson had written in her report that Tyler had “junky lung sounds,” or a noise in the lung. This meant that Tyler had ingested something into his lungs. Pearson acknowledged that if a person was choking on vomit, there would be aspiration. Aspiration in the lungs would affect the airflow during CPR.

¶ 8 Anthony Micelli testified that he was a sergeant with the Winnebago County Sheriff’s Department. On January 1, 2006, at about 10:37 a.m., he was dispatched to the defendant’s home. On arriving, he found the defendant on the floor performing CPR on Tyler. Tyler had no pulse, there was nothing in his mouth obstructing the airway, and he was not breathing. Micelli then started to assist in performing CPR. The defendant did the breaths and Micelli did compressions. Tyler’s chest was rising, so air was going in. This continued for about one minute, and then the paramedics arrived and took over. He noticed that Tyler had a bump and bruise on his forehead. Micelli asked the defendant what caused the bump and bruise. The defendant stated that the minor had fallen about six weeks prior but was taken to the hospital and determined to be fine.

¶ 9 Nicola Bennett testified that she was a registered nurse and worked in the emergency room of Rockford Memorial Hospital. On January 1, 2006, she attended to Tyler when he arrived at the emergency room with the paramedics. The paramedics informed her that Tyler had vomited and stopped breathing. Tyler’s temperature was a little low, his heart rate was high, and he was given forced respirations through a tube placed in his trachea. The tube had to be repositioned a couple millimeters higher. It was too low, meaning that it was only fully

oxygenating one lung and sending a little less to the other lung. Tyler had no response to pain which indicated that there was brain damage. Tyler's lungs were clear; there was no obstruction or fluid in his airways. Tyler had a small bruise on his upper right forehead and a small round bruise on his left chest. The bruise on the left chest was consistent with CPR. Tyler had good femoral pulses. Tyler had retinal bleeding in both eyes.

¶ 10 Dr. Martin Wakeham testified that for the past five years he was the assistant professor of pediatrics in the division of pediatric health care of the Medical Coalition of Wisconsin. He was board-certified in pediatrics and in pediatric critical care. After medical school, he completed a pediatric residency and a fellowship in pediatric critical care medicine. In 2006, he was the director of the pediatric critical care unit at Rockford Memorial Hospital. On January 1, 2006, he was called to the emergency room to examine Tyler. Tyler was comatose, completely unresponsive, and had retinal hemorrhaging. There was no external explanation for the minor's condition. Upon examining the minor with an ophthalmoscope, he determined that the minor had brachial hemorrhage. This was the type of finding that you see after severe head injury.

¶ 11 Dr. Wakeham further testified that a CT scan of Tyler's head revealed that the minor had different kinds of intracranial hemorrhage: subdural hemorrhage and subarachnoid hemorrhage. In the skull, there is an outermost membrane (the dura mater), then a very small space (called the subdural), and then an inner membrane attached to the brain (the pia mater). The CT scan showed that there was blood in the subdural space, which was not normal. There was also blood between the pia mater and the brain itself, which was also not normal. Such findings were usually present due to trauma, whether accidental or not. Examples of trauma were strong acceleration or deceleration forces such as when one was in a car accident. One need not hit his head. Rather, the forces could cause the brain to hit the skull which could cause small veins in the brain to tear and bleed.

¶ 12 Dr. Wakeham opined that Tyler suffered bleeding and brain injury that resulted in respiratory arrest and cardiopulmonary collapse. The same forces that produced the bleeding in the brain also produced bleeding in the retina. Tyler's brain was deprived of oxygen for enough time to produce permanent brain damage. Simply ceasing to breathe could not have caused the bleeding that was observed on Tyler's CT scan. Dr. Wakeham believed that Tyler's condition was caused by what was classically described as shaken baby syndrome. Coagulation studies were done, which ruled out a bleeding disorder as the cause of Tyler's bleeding in the brain. Tyler was also tested for other types of illnesses that could cause spontaneous hemorrhaging, such as leukemia, glutaric aciduria, microcephaly, metabolic disorders, and a platelet disorder. All these tests were negative. No tests pointed to any other diagnoses besides shaken baby syndrome. Such a diagnosis was generally accepted by the pediatric medical community and by the American Academy of Pediatrics. Neck injury was not necessarily associated with shaken baby syndrome.

¶ 13 On cross-examination, Dr. Wakeham testified that a failure to breath can cause increased cranial pressure and cranial pressure has long been associated with retinal hemorrhaging. He acknowledged that retinal hemorrhaging can also be caused by cortical venous thrombosis. This meant that when veins in the brain became thrombosed they can clot and bleed. Dr. Wakeham acknowledged that Tyler was not tested for venous thrombosis. However, he explained that when you have venous thrombosis in the brain to the degree of producing bleeding you usually have a hemorrhagic stroke associated with it that would be seen on an MRI. An MRI was performed on Tyler. Dr. Wakeham testified that there was no reason to test for thrombosis because there was no evidence of a hemorrhagic stroke on Tyler's MRI.

¶ 14 Dr. Wakeham further testified that, in addition to treating children with shaken baby syndrome, he learned about it as part of his boards and he attended lectures on the topic. He was

educated in the late 1980s and in the 1990s. He acknowledged that for a small minority of the medical profession there was a controversy over shaken baby syndrome. He also acknowledged that there was an argument over whether shaking alone, without impact, would lead to obvious neck injuries. Dr. Wakeham acknowledged that the hemorrhaging in Tyler's brain was small. The CT and MRI showed only small hemorrhagic bleeds. Tyler had subarachnoid hemorrhage and subdural hemorrhage. Subarachnoid hemorrhage was a result of extreme forces and, as such, was more common in car accidents as opposed to shaking. Dr. Wakeham also acknowledged that studies have shown that retinal hemorrhaging has been linked to prolonged CPR but stated that it was very uncommon and any retinal hemorrhaging from CPR would be minimal.

¶ 15 Dr. Wakeham further acknowledged that Tyler's x-ray, CT scan, and MRI did not indicate that there was any neck injury. However, he explained that, in infants, even with MRIs, you cannot completely rule out ligament injury in the neck. Dr. Wakeham testified that trauma would not necessarily have resulted in more bleeding in the brain than seen in the minor. Dr. Wakeham stated that he had seen children with less bleeding than Tyler who suffered severe and fatal trauma.

¶ 16 Keely McNabb testified that she was married to the defendant and they had three children: Skylar who was 16 years old, Tyler who was 8 years old, and Riley, who was 5 years old. Tyler was born on September 26, 2005. On November 20, 2005, Tyler was taken to the emergency room because he had fallen out of the defendant's arms and onto the floor. Tyler was examined and released. Tyler had a small mark under his eye but did not seem to have any other complications. Between that time and January 1, 2006, Tyler had "head butted [the defendant]" and had a bump on his forehead from that incident. Tyler also had gastro-intestinal issues and was fussy. He would cry a lot like he was in pain. The doctor had prescribed some medication

for gas issues and recommended exercises to relieve gas in Tyler's belly. They were also told to try different formula.

¶ 17 McNabb further testified that on January 1, 2006, she woke up at about 8 a.m. and then woke up Tyler to change and feed him. Thereafter, she and Skylar went to the grocery store for about a half hour. When she left, the defendant was holding Tyler and watching television. When she returned from the grocery store, there were police cars and emergency personnel. The defendant told her that he had put Tyler in the car seat in front of the television and went to the bathroom. When he came back, Tyler had stopped breathing. The defendant stated that he picked Tyler up but Tyler was unresponsive so he began CPR and called 911. The defendant had attended all her prenatal doctor appointments when he did not have to work. Tyler was very fussy and cried a lot. The defendant would hold Tyler, cuddle him, and wrap him up. The defendant never acted inappropriately toward Tyler. She and the defendant had been married for almost 10 years.

¶ 18 Dr. Jill Glick testified that she was a professor of pediatrics at the University of Chicago (University) and she was the medical director of the child protective services team. She had worked at the University since 1985. After graduating medical school, she completed a three-year residency in pediatrics at the University. She was chief resident for a year and then was hired as a clinical instructor/faculty administrator. She was board certified in pediatrics and in child abuse pediatrics. Between 1993 and 2008, she was also board certified in pediatric emergency. Whenever a child under age two was admitted to the hospital, she and the child protective services team reviewed the case to determine whether there was abuse involved. She reviewed about 300 cases per year. About 25% of the cases were found to have abuse or neglect at a level of concern. The remaining cases were deemed either accidents or indeterminate.

¶ 19 Dr. Glick testified that she was being paid by the State for her testimony, but that the money would go to the University's Department of Pediatrics. She would still receive the same salary from the University and would not receive any additional payment for her testimony. The University was being paid \$500 an hour for her testimony. However, she spent considerable time reviewing the medical records in this case, for which the University was not being reimbursed. Dr. Glick testified that she reviewed many records, including birth records, primary care notes, hospital admissions, DCFS notes, imaging studies, photographs, police reports, and the opinion of the defendant's expert, Dr. Janice Ophaven.

¶ 20 Dr. Glick testified that she reviewed the emergency room medical records from January 1, 2006, relating to Tyler. The CT scan indicated that there was intracranial hemorrhaging at multiple sites around the brain. Such bleeding was not common and was indicative of brain trauma. The minor also had extensive retinal hemorrhaging in both eyes. Retinal hemorrhaging was also a sign of severe brain trauma. That there was blood in multiple spots around the brain showed that there was not one impact point. Rather, blood vessels were sheared due to some acceleration/deceleration forces. There was no evidence in Tyler's medical records of any underlying medical condition that would have resulted in his traumatic brain injury. Further, a CT scan was performed on November 20, 2005, and it was normal; there were no deformities, abnormal cranial masses, or any signs of bleeding.

¶ 21 Dr. Glick opined that Tyler was a victim of child abuse and that he was violently shaken, which resulted in his brain injury. Choking and ceasing to breathe would not cause bleeding in the brain or eyes. CPR, even if aggressive, would not cause the extensive retinal or brain hemorrhaging that was seen in Tyler. There were no medical, metabolic, or genetic disorders that could explain Tyler's condition. The November 20, 2005, incident could not explain Tyler's condition on January 1, 2006. The 2005 CT scan showed Tyler was neurologically intact and

there was no other evidence of brain trauma. She opined that Tyler's injuries occurred between 8 a.m. on January 1, 2006, and the time the 911 call was made because there was no evidence that Tyler was ill or vomiting either the night before or in the morning. Shaken baby syndrome was a generally accepted medical diagnosis.

¶ 22 On cross-examination, Dr. Glick testified that only trauma, and not intracranial pressure, could cause multi-layered retinal hemorrhaging. She acknowledged that there was no documentation of neck injury in Tyler's medical record. Babies normally did not suffer whiplash injuries. Although neck injuries in children were rare, they could occur. Babies that were violently shaken do not have neck injuries that can be seen "by imaging and clinically often [do not] have findings of neck injuries." Dr. Glick acknowledged that Dr. Patrick Barnes, a radiologist at Stanford, did not agree that shaking alone would cause brain injury without showing neck injuries first. Dr. Glick testified that there could be neck injury in children that are violently shaken and there could be pulling on the nerves; however, this cannot be seen postmortem and it cannot be seen on an x-ray or CT scan.

¶ 23 Dr. Glick acknowledged that it was not determined whether Tyler had any vascular malformations in the brain. However, even if he did, Dr. Glick testified that it would not cause the bleeding and retinal hemorrhaging experienced by Tyler. Dr. Glick testified that electrolyte imbalances could not have lead to Tyler's injuries. Dr. Glick acknowledged that the radiologist characterized the collection of blood in Tyler's brain as "small." Dr. Glick explained that this was just semantics. There were multiples sites of blood in Tyler's head, albeit in thin layers. It did not matter how big because, regardless of size, blood in the brain was a marker for significant injury.

¶ 24 Dr. Glick further acknowledged that increased intracranial pressure could result in brain hemorrhaging. However, there was debate in the medical community as to whether respiratory

problems could lead to increased pressure in the brain. Dr. Glick acknowledged that Tyler's x-ray showed a density in the lung which could have been pneumonia, aspirations, or a collapse of the lung. No one could say whether the density was there before Tyler was intubated. However, Tyler's parents did not say he was coughing or running a fever, which are classic indications of pneumonia. Dr. Glick acknowledged that there were articles in the medical literature that supported the theory that shaking alone, without neck injuries, could not lead to brain injury. However, she explained that the articles supporting each theory were not balanced, as the majority of the articles supported the theory that neck injuries were not necessary. Further, she explained that she was not saying there were not neck injuries; she and others believed that violent shaking resulted in microscopic injuries to the neck.

¶ 25 Lisa Haywood, Joyce Corcoran, Alexander Lott, Beth Totenhagen, Annette McNabb, and Keely McNabb all testified to the caring and loving relationship between the defendant and Tyler before and after January 1, 2006.

¶ 26 The defendant testified that he and Keely had been married for 10 years. They had three children: Skylar, Tyler, and Riley. Skylar was his stepson. He was very happy when Keely became pregnant with Tyler. He was very active in taking care of Tyler after he was born, especially for the first month. He accidentally dropped Tyler on November 20, 2005. They took him to the emergency room. They did an x-ray and a CT scan and everything looked fine. The doctor told them to bring Tyler back if he started to act abnormal in any way.

¶ 27 The defendant further testified that Tyler was colicky. He was always in discomfort when he ate and he did not sleep well. The defendant could tell that there was something wrong with him. Tyler cried a lot but the crying never bothered the defendant. The defendant would try to soothe Tyler by swaddling him, rubbing his head, talking to him, or singing to him. On the Friday before January 1, 2006, he was sitting on the couch holding Tyler. He looked away for a

second and when he turned around Tyler was coming forward and they hit heads. Tyler cried for 15 to 20 minutes but was fine after that.

¶ 28 The defendant testified that on the morning of January 1, 2006, his wife woke him up at about 9 a.m. and asked him to watch Tyler while she and Skylar went to the grocery store. When they left, he was sitting on the couch holding Tyler. The defendant put Tyler in his car seat in front of the television because he had to go to the bathroom. He was gone for at least 30 seconds but not more than five minutes. He came back to the living room and sat on the floor. After two or three minutes, he noticed that Tyler was not moving. He put his finger in Tyler's hand but Tyler did not grab it. He then picked Tyler up and noticed that he was limp. He shook Tyler for a couple seconds to see if he could get a response. He then started performing CPR. Tyler vomited formula the first time he started compressions. After about five or six minutes he called 911 and continued CPR. The police and paramedics arrived about five or six minutes later. The paramedics took Tyler to Rockford Memorial Hospital.

¶ 29 As soon as the ambulance was leaving, his wife returned home. They immediately proceeded to the hospital. At some point, Dr. Wakeham came to speak to them and accused them of shaking Tyler. Later in the day, the defendant was taken to the police station for interrogation. He remembered telling the police that, after he took Tyler out of the car seat and realized he was unresponsive, he "freaked out" and perhaps shook Tyler harder than he should have. He only said this because Dr. Wakeham and the police told him there was no other explanation for Tyler's condition. The defendant testified that he did not shake Tyler violently and he would never intentionally have tried to hurt Tyler. The defendant testified that Tyler was living at home and there was nursing care. However, he still helped in taking care of Tyler. Tyler often had seizures. Tyler was unable to talk but can make noises.

¶ 30 Dr. Janice Ophoven, an expert for the defense, testified that she was a medical doctor with a specialization in pediatric forensic pathology. After medical school, she completed an academic internship at a university hospital in the field of pediatrics. Her area of interest was pathology and injury and disease in children. She completed a residency in pediatrics, a residency in pathology, a fellowship in pediatric pathology, and a fellowship in forensic pathology. In 2006, she was retained to evaluate and render an opinion regarding the medical condition of Tyler. She was paid \$8,000 for case review and analysis and to issue a report. She was paid another \$6,500 for testimony and expenses.

¶ 31 Dr. Ophoven further testified that she reviewed the police reports, medical records, agency records, ophthalmology reports, and surgery reports concerning Tyler's condition before, on, and after January 1, 2006. Dr. Ophoven testified that when an infant turned blue and suffered cardiac arrest, one of the key possibilities was interference with breathing. If a child vomited while in a car seat and the vomit entered the trachea, the child would be silent because air would be unable to pass through the vocal chords. In Tyler's case, vomit was present during CPR and the x-ray at the hospital indicated that vomit was in Tyler's lungs. Dr. Ophoven opined that, because they were able to reestablish Tyler's vital signs when the trachea was placed in him, a breathing problem was at the heart of the issue. Another key finding was that there was no evidence of trauma such as a fracture to the skull or damage to his skin or soft tissue. She believed that Tyler's brain damage was due to lack of oxygen. Tyler's x-ray was indicative of encephalopathy, the classic pattern for what you see from lack of oxygen.

¶ 32 Dr. Ophoven further testified that Tyler's x-ray revealed small areas of blood on the surface of his brain, which was common in cases of hypoxia. In young children, following hypoxic injuries, it was common to have leakage of blood from the dural venous plexus. Other than the bleeding in Tyler's eyes, there was no evidence of bleeding other than in the small

surface areas identified on the x-ray. Tyler's eyes showed bilateral multi-layer retinal hemorrhage. This was not uncommon when there was pressure in the head and bleeding on the surface of the brain. The pressure in Tyler's head was also caused by swelling of the brain which was also a result of hypoxia. Dr. Ophoven testified that there was much debate in the medical literature as to whether a particular pattern of blood in the eye was indicative of trauma.

¶ 33 Dr. Ophoven testified that numerous things could cause an infant to stop breathing such as vascular anomalies, venous thrombosis, and a number of infections or viruses. Dr. Ophoven opined that Tyler's condition could have been caused by cortical venous thrombosis. She noted, however, that the proper analysis was not done on January 1, 2006, to make that determination. In her opinion, there was strong evidence that Tyler's lack of breathing was caused by choking or respiratory failure and not by trauma. She further opined that there was no evidence that Tyler was a victim of trauma and that his condition was entirely consistent with a hypoxic event. Dr. Ophoven testified that much had changed in the medical world over the last 20 years. She explained that retinal hemorrhaging, subdural bleeding, and brain swelling were not scientifically conclusive for the diagnosis of trauma. She further explained that there was no evidence of trauma to Tyler.

¶ 34 On cross-examination, Dr. Ophoven acknowledged that she had not treated any pediatric patients since 1979. Additionally, when reviewing Tyler's records she did not have a copy of the CT scan that was taken in November 2005. She acknowledged that while retinal hemorrhaging was not limited to traumatic injury, it could be caused by trauma. However, at present, neuropathology, forensics, biomechanics and much research had been unable to provide scientific verification that retinal hemorrhage and/or subdural hematoma could be created by shaking without some other trauma. In Dr. Ophoven's opinion, shaken baby syndrome was a controversial theory and there was no evidence that Tyler was the victim of violence.

¶ 35 Following closing arguments, the jury found the defendant guilty of aggravated battery of a child. Thereafter, the trial court denied the defendant's motion for a new trial and sentenced him to six and a half years' imprisonment. The defendant filed a timely notice of appeal.

¶ 36 ANALYSIS

¶ 37 The defendant's first contention on appeal is that he was not proved guilty beyond a reasonable doubt. The defendant points out that the testimony of Dr. Ophoven conflicted with that of Dr. Glick on numerous issues and argues that her testimony was just as compelling as the testimony of Dr. Glick. While Dr. Glick opined that Tyler's injuries could only have been caused by shaking, Dr. Ophoven opined that Tyler's condition was the result of choking or other medical conditions not involving abuse. The defendant argues that Dr. Ophoven's opinions were consistent with the opinions of other medical experts and researchers and cites to articles in various medical journals. Accordingly, the defendant contends that the evidence was insufficient to sustain his conviction.

¶ 38 When presented with a challenge to the sufficiency of the evidence, it is not the function of the reviewing court to retry the defendant. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). Rather, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis in original.) *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The reviewing court should not substitute its judgment for that of the trier of fact, who is responsible for weighing the evidence, assessing the credibility of witnesses, resolving conflicts in the evidence, and drawing reasonable inferences and conclusions from the evidence. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). However, a reviewing court must set aside a defendant's conviction if a careful review of the evidence reveals that it was so

unreasonable, improbable, or unsatisfactory as to create a reasonable doubt of the defendant's guilt. *People v. Evans*, 209 Ill. 2d 194, 209 (2004).

¶ 39 At the outset, we note that, in support of his arguments on appeal, the defendant cites to various medical studies and journal articles that were not presented at trial. On March 9, 2016, this court "granted without objection" the State's motion to strike any citation or argument related to these medical studies and articles. The defendant filed a motion to reconsider our decision, which we ordered to be taken with this case. In that motion, the defendant argues that he did not file an objection to the State's motion because he did not know of the motion to strike until it was granted. The defendant requests that we reconsider our determination and cites to two cases, *In re Marriage of Schmitt*, 391 Ill. App. 3d 1010, 1017 (2009), and *In re Commitment of Sandry*, 367 Ill. App. 3d 949, 967 (2006), for the proposition that the law review articles and scholarly journals he cites are the type of secondary authority that is generally accepted and relied on by reviewing courts.

¶ 40 We find the defendant's contention to be without merit. In *Schmitt*, this court allowed the appellant to cite an article and a Federal Internal Revenue Service audit report, noting that they were not evidence but proper citations to secondary authorities in support of an argument or holding. *Schmitt*, 391 Ill. App. 3d at 1017. However, a review of the case does not indicate how the article and report were cited or the bases on which the citations were deemed proper. Moreover, the defendant does not cite the medical studies and articles strictly in support of an argument. Rather, he cites to them as evidence in support of his expert's opinions. As such, the defendant's reliance on *Schmitt* is unpersuasive.

¶ 41 In *Sandry*, the issue was whether penile plethysmograph (PPG) testing satisfied the *Frye* standard. *Sandry*, 367 Ill. App. 3d at 963. This court noted that the appropriate standard of review for *Frye* issues was *de novo* and that, in conducting such an analysis, "a court of review is

not bound by the record developed during trial and may consider ‘sources outside the record, including legal and scientific articles, as well as court opinions from other jurisdictions.’” *Id.* at 964 (citing *In re Commitment of Simons*, 213 Ill. 2d 523, 531 (2004)). However, *Sandry* is easily distinguishable as the present case does not involve a *Frye* issue or *de novo* review.

¶ 42 Rather, the issue in the present case is whether, viewing the evidence in the light most favorable to the State, the defendant was proved guilty beyond a reasonable doubt. *Collins*, 106 Ill. 2d at 261. It is well established that a reviewing court must determine the issues before it on appeal solely on the basis of the record made at trial. *People v. Heaton*, 266 Ill. App. 3d 469, 476 (1994). Evidence which is not part of the record on appeal is not to be considered by a reviewing court. *Id.* The defendant cites to the various articles and medical journals as evidence in support of his expert’s opinions and to establish reasonable doubt. It would be improper for us to consider such evidence. *Id.* Moreover, the defendant had the opportunity to fully explore these medical studies and articles at trial, in front of the jurors. Accordingly, we deny the defendant’s motion to reconsider our order striking the citations and argument related to medical studies or articles that were not presented at trial.

¶ 43 Turning to the merits, the jury was presented with a battle of experts regarding the cause of Tyler’s injuries. It was the sole province of the jury to weigh this evidence and to assess the credibility of the witnesses. *Sutherland*, 223 Ill. 2d at 242. The jury was not obligated to accept the opinions of the defendant’s expert witness over those expressed by the State’s witnesses. *People v. Tuduj*, 2014 IL App (1st) 092536, ¶ 80. While Dr. Ophoven opined that Tyler’s injuries were the result of a lack of oxygen due to choking or some other undiscovered cause, Dr. Glick asserted that the only explanation for all of Tyler’s injuries was that Tyler had been violently shaken. Both parties were able to extensively cross-examine each other’s experts as to the bases for their opinions. In addition to the experts, Dr. Wakeham also testified that, in his

opinion, Tyler's injuries were caused by violent shaking and that Tyler's brain injury and subsequent bleeding resulted in respiratory arrest. On this record, we cannot say that no rational trier of fact could have found that Tyler's injuries were the result of shaken baby syndrome.

¶ 44 The defendant argues that Dr. Ophoven's testimony created a reasonable doubt because Tyler did not suffer any neck injuries, there was evidence that Tyler had an obstruction in his airway, and because Tyler was not tested for other causes of his condition such as thrombosis, infection, or a virus. The defendant is essentially requesting that we usurp the jury's role in weighing the evidence and assessing the credibility of the witnesses. This we cannot do. *People v. Larson*, 379 Ill. App. 3d 642, 654 (2008) ("We, as a reviewing court, are not to substitute our own judgment for that of the jury."). Dr. Wakeham testified that Tyler's MRI did not indicate a thrombosis and that Tyler was tested for other types of illnesses that could cause spontaneous hemorrhaging such as leukemia, glutaric aciduria, microcephaly, metabolic disorders, and a platelet disorder. Dr. Glick testified that there were no medical, metabolic, or genetic disorders that could explain Tyler's condition. She also testified that there was no indication that Tyler was sick either the night before or the morning of January 1, 2006. She opined that choking and ceasing to breathe would not cause bleeding in the brain and eyes. Additionally, Drs. Wakeham and Glick both testified that a baby could suffer from shaken baby syndrome even in the absence of visible neck injuries. As such, based on the testimony of Dr. Wakeham and Dr. Glick, the defendant's theory of the case, as supported by Dr. Ophoven, was not the only reasonable conclusion to be drawn from all of the evidence. Accordingly, because the evidence was not so unreasonable, improbable, or unsatisfactory as to create a reasonable doubt of the defendant's guilt (*Evans*, 209 Ill.2d at 209), we hold that the State proved defendant guilty beyond a reasonable doubt of aggravated battery to a child.

¶ 45 In so ruling, we note that the defendant relies on *In re Yohan K.*, 2013 IL App (1st) 123472, for the proposition that the evidence was insufficient to sustain his conviction. In *Yohan K.*, the minor, Yohan, was taken to the hospital by his parents when he was a few weeks old because he was having seizures. *Id.* ¶ 18. The minor was diagnosed with intracranial bleeding, retinal hemorrhaging, and a possible leg fracture. *Id.* ¶ 23-27. The State filed a petition for adjudication of wardship. *Id.* ¶ 43. Following an adjudicatory hearing, the trial court found that the minor was abused and neglected. *Id.* ¶ 102. The trial court's finding was overturned on appeal. *Id.* ¶ 157. The reviewing court noted that, essential to the trial court's determination, was a finding that the minor had suffered a fracture in his left knee. *Id.* ¶ 119. The reviewing court noted, however, that no doctor definitively diagnosed a fracture on any of the minor's x-rays; the parent's experts, one of which was the only physician qualified as an expert in bone fractures, testified that the minor did not have a fracture; the minor never exhibited signs of pain when moving his leg; and the State's expert's dating of the alleged fracture indicated that it would have occurred while the minor was under the care of medical personnel. *Id.* ¶ 119-123.

¶ 46 Further, there was evidence that the imaging of the minor's left knee was consistent with congenital rickets. One of the parent's experts diagnosed the minor with congenital rickets and the diagnosis was supported by the minor's severe vitamin D deficiency. *Id.* ¶ 125. The reviewing court held that the State's experts' opinions rebutting the diagnosis of rickets should not have been given as much weight because one testified that he had never heard of congenital rickets, the other had no expertise in orthopedics or the diagnosis of rickets, and the third acknowledged that she had viewed images of poor quality and had no expertise in diagnosing rickets in infants under six months of age. *Id.* ¶ 127. Based on the foregoing, the reviewing court held that the trial court's determination that the minor had a fracture caused by abuse was against the manifest weight of the evidence.

¶ 47 In addition, the reviewing court found that there was significant evidence that the minor's intracranial bleeding and retinal hemorrhages were the result of benign external hydrocephalus (BEH). The reviewing court noted that the parent's experts, the only testifying experts who had published peer-reviewed articles on the condition of BEH, diagnosed the minor with BEH. *Id.* ¶ 132. Additionally, the evidence established that infants with BEH could suffer from intracranial bleeds as a result of birth trauma and cortical venous thrombosis. *Id.* ¶ 136. The evidence indicated that the minor had a traumatic birth. *Id.* ¶ 137. The evidence also indicated that there were no tests done to rule out cortical venous thrombosis even though a vitamin D deficiency increased the likelihood of developing thrombosis and several indicators of thrombosis appeared on the minor's MRI. *Id.* ¶ 138. Finally, one of the State's experts had dismissed BEH as an explanation for the intracranial bleeding only because of the other signs of trauma, namely, the alleged leg fracture. *Id.* ¶ 140. Accordingly, based on the evidence presented, the reviewing court held that the trial court's finding of abuse was contrary to the manifest weight of the evidence. *Id.* ¶ 148.

¶ 48 We find the defendant's reliance on *Yohan K.* unpersuasive. In addition to the fact that it is both factually and procedurally distinguishable from the present case, it also does not stand for the proposition that conflicting medical evidence precludes any conviction. Unlike in *Yohan K.*, there is no evidence in the present case that the defendant's expert was any more qualified than the State's witnesses to offer an opinion on Tyler's medical condition. Furthermore, Dr. Ophoven testified that Tyler's condition was due to choking or some other undiagnosed medical condition. However, both Drs. Glick and Wakeham testified that choking and ceasing to breathe would not cause intracranial bleeding and retinal hemorrhaging. Additionally, there was evidence that additional testing was done to rule out other causes of Tyler's condition but that those tests came back negative. While Dr. Ophoven suggested cortical venous thrombosis as a

potential explanation for Tyler's condition and noted that tests were not done to rule out this diagnosis, Dr. Wakeham testified that someone who suffered from cortical venous thrombosis would have certain indicators on an MRI and that Tyler's MRI did not have any such indicators. As such, unlike in *Yohan K.*, the jury's verdict in the present case was supported by the evidence.

¶ 49 Finally, we note that at oral argument, defense counsel emphasized a point raised in his brief, namely, that Tyler's injuries were the result of choking and that the State had failed to prove that the injuries were not due to choking. Dr. Ophoven testified that choking and cessation of breathing could lead to increased cranial pressure, which could result in bleeding in the brain and eyes. However, Dr. Glick testified that neither choking and ceasing to breathe, nor CPR, would cause subdural and subarachnoid hemorrhaging in the brain and retinal hemorrhaging to the extent that it was present in Tyler. Dr. Wakeham acknowledged that failing to breathe could cause increased cranial pressure and that increased cranial pressure could lead to retinal hemorrhaging. However, Dr. Wakeham also testified that ceasing to breathe could not have caused the bleeding that was observed in Tyler's CT scan. The jury apparently gave more weight to the testimony of Drs. Glick and Wakeham. It is within the province of the jury to resolve conflicts in the evidence (*Sutherland*, 223 Ill. 2d at 242) and we decline to substitute our own judgment for that of the jury (*Larson*, 379 Ill. App. 3d at 654).

¶ 50 At oral argument, the defendant also suggested that Dr. Glick's testimony was so unreasonable that it was insufficient as a matter of law to sustain the defendant's conviction. As an example, the defendant noted, both in his brief and at oral argument, that Drs. Wakeham and Ophoven both characterized the amount of blood in Tyler's brain as "small," and that Dr. Glick described it as a "large" amount of blood. Apparently, defense counsel believes this renders her entire testimony incredible. We disagree. What Dr. Glick testified to was that there were multiples sites of bleeding in Tyler's brain and that there was a large amount of blood in his

head. However, she acknowledged that there was no radiographically large collection of blood. She explained that with these types of injuries there is also brain swelling which makes it more difficult to see the amount of blood on a CT scan or MRI. She did not disagree with the radiologists characterization of the bleeding as “small.” She said this was just semantics. She opined that the CT scans and MRI showed multiple sites of blood in Tyler’s brain in thin layers and that blood in all these sites was a marker for significant injury. Based on this testimony, Dr. Glick explained that her characterization of a large amount of blood was due to the multiple sites of abnormal bleeding and that often, due to brain swelling, there is more blood than what one sees on a CT scan or MRI. This explained why her characterization of the amount of blood was not necessarily inconsistent with that of the other doctors or the radiologist. As such, Dr. Glick’s testimony was not so unreasonable or inconsistent as to create a reasonable doubt of the defendant’s guilt. See *Evans*, 209 Ill. 2d at 209.

¶ 51 The defendant’s second contention on appeal is that the prosecutor made improper statements in closing argument. The portion of the State’s closing argument at issue is as follows:

“MS. LARSON [Assistant State’s Attorney]: Dr. Glick told you children’s necks don’t break from shaking. She told you that based on research—

MR. LIGHT [defense attorney]: Objection to the term ‘break.’

THE COURT: That objection is sustained. Again, rely upon your memory of the evidence, but the objection is sustained.

MS. LARSON: Which, I believe what she told you is that the neck doesn’t— there’s no injury observed in children who are diagnosed with shaken baby syndrome, and she told you, CAT scans are not the proper tool for looking at that. It doesn’t show soft tissue injury, and I believe her testimony was there’s a belief in the medical

community right now that children who suffer from shaken baby syndrome may, in fact, have micro-injuries, microscopic injuries that—

MR. LIGHT: Objection

THE COURT: Sustained

MS. LARSON: —that aren't evident—

MR. LIGHT: Objection.

MS. LARSON: —on CT scans.

THE COURT: Again, rely upon your memory of the evidence.”

¶ 52 The defendant contends that the prosecutor's argument denied him a fair trial because the fact that Tyler did not suffer any neck injuries was crucial to his defense. Specifically, while Drs. Glick and Wakeham testified that neck injuries were not necessary to a diagnosis of shaken baby syndrome, Dr. Ophoven opined that violent shaking would result in obvious neck injuries. The defendant argues that the prosecutor's comments were improper because there was no evidence that victims of shaken baby syndrome could sustain microscopic neck injuries that could not be detected. The defendant contends that the prosecutor improperly inserted new expert medical evidence that had never been presented to the jury or subjected to cross-examination.

¶ 53 The defendant acknowledges that this argument is forfeited because he failed to raise it in a posttrial motion. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (failure to object at trial and in a posttrial motion generally results in forfeiture of the issue for review). He argues, nonetheless, that we should review this claim for plain error. Plain-error review permits us to consider a forfeited claim of clear error where the evidence is so closely balanced that the error alone might have resulted in the defendant's conviction, or where, regardless of the closeness of the evidence, the error is so serious that it affected the fairness of the defendant's trial and

challenged the integrity of the judicial process. *People v. Sargent*, 239 Ill. 2d 166, 189 (2010).

The defendant argues that this was both a close case and that the error denied him a fair trial.

¶ 54 The first step in plain-error analysis is to determine whether a clear or obvious error occurred. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Prosecutors are afforded wide-latitude in closing argument. *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). While prosecutors may not argue assumptions or facts not contained in the record, they are permitted to comment on the evidence and any fair, reasonable inferences it yields. *Id.*

¶ 55 In the present case, the prosecutor's comments were fair comment on the evidence presented. Dr. Glick testified that babies who are violently shaken do not have neck injuries that can be seen "by imaging and clinically often [do not] have findings of neck injuries." However, Dr. Glick also testified that there could be neck injury in children that are violently shaken, and there could be pulling on nerves, but that it could not be seen on an x-ray or CT scan. Additionally, while Dr. Glick acknowledged that there were articles in the medical literature indicating that shaking alone, without neck injuries, could not lead to brain injury, she also testified that she and others believed that there were microscopic injuries to the neck. Dr. Wakeham also testified that neck injury was not necessarily associated with shaken baby syndrome but that, even though it could not necessarily be detected by an MRI, shaken babies could have ligament injury in the neck. Accordingly, we find that the prosecutor's comments were based on the evidence and the inferences flowing from the evidence. As there was no error, the defendant has failed to establish plain error.

¶ 56 CONCLUSION

¶ 57 For the foregoing reasons, the judgment of the circuit court of Winnebago County is affirmed.

¶ 58 Affirmed.