2016 IL App (2d) 150430-U
No. 2-15-0430
Order filed October 27, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kendall County.
Plaintiff-Appellee,	)	
v.	)	No. 11-CF-370
CYNTHIA ROSENWINKEL,	)	Honorable Timothy J. McCann,
Defendant-Appellant.	)	Judge, Presiding

JUSTICE SPENCE delivered the judgment of the court.
Justices Zenoff and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: The evidence was sufficient to support the verdict that defendant committed an aggravated battery against the infant, K.S. Defense counsel was not ineffective for losing photographic evidence of defendant's bruises, because the absence of this evidence did not prejudice her. Next, the trial court provided proper instructions to the jury. Finally, the trial court did not err in denying defendant's motion for a *Frye* hearing, and the State did not violate defendant's right against self-incrimination. Therefore, we affirmed.

¶ 2 Defendant, Cynthia Rosenwinkel, was indicted on 12 counts of aggravated battery of a child (720 ILCS 5/12-4.3(a) (West 2010)) on December 7, 2011. The counts were based on allegations that she caused bodily harm to K.S. on February 24, 2011, in that she knowingly and

without legal justification harmed K.S. by shaking him or inflicting an impact injury to his head. K.S. was born August 11, 2010.

¶ 3 Prior to trial, defense counsel moved to bar testimony of shaken baby syndrome (SBS) and abusive head trauma (AHT), arguing that, per *Frye*, these theories were not generally accepted within the medical community. The court denied the motion.

¶ 4 At trial, both the State and the defense called expert witnesses to testify to K.S.'s injuries. The State's experts opined that K.S.'s injuries were the result of non-accidental trauma, whereas the defense's experts opined that K.S.'s injuries could be explained by an accidental fall.

¶ 5 The jury found defendant guilty of aggravated battery against K.S. We affirm.

¶ 6 I. BACKGROUND

¶ 7 A. Pre-Trial

¶ 8 Defendant filed a motion to bar testimony of SBS. SBS was otherwise known as AHT. The motion alleged that the theory of SBS was not generally accepted within the relevant scientific communities, as required under *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). In particular, defendant argued that SBS remained an "unproven, unreliable, novel scientific theory, not generally accepted in the scientific community." Accordingly, defendant requested that the trial court bar admission of testimony of SBS, that K.S. was shaken, or that his injuries resulted from shaking.

¶ 9 Defendant filed a memorandum in support of her motion to bar testimony of SBS. Therein, defendant argued as follows. The State would not present any direct evidence that she shook K.S. Rather, the State would rely on the theory of SBS in order to establish that K.S. must have been shaken, as deduced by his injuries. SBS referred to the "medicolegal" hypothesis that, when there are no confirmed alternate explanations for a child's injuries, a "triad" of three

findings reliably diagnosed abuse. These three findings were: internal hemorrhage, retinal hemorrhage, and encephalopathy. However, the SBS hypothesis was not scientifically supported, and the presence of the triad alone was not enough to diagnose abuse. SBS also had not been the subject of a *Frye* hearing in Illinois.

¶ 10 The State responded that it intended to present the testimony of experts that included, but was not limited to, medical opinions that K.S.'s injuries were the result of AHT. Further, the State argued that a *Frye* hearing was not necessary or required for the introduction of AHT evidence, citing *People v. Cook*, 2014 IL App (1st) 113079.

¶ 11 The trial court denied defendant's motion to bar testimony of SBS on June 6, 2014. The court relied on *People v. Cook*, 2014 IL App (1st) 113079, where the challenge raised by the defendant was not as to the methodology employed by the experts to diagnose SBS but rather to their conclusion of SBS after examination of the child. Therefore, no *Frye* hearing was required.

¶ 12 B. Trial

¶ 13 Trial commenced on January 27, 2015. The State first presented a stipulation from Jillian McMillan, who, if called to testify, would have testified as follows. She was a dispatcher who responded to emergency 911 calls in Kendall County. On February 24, 2011, she received a 911 call from defendant around 11:50 a.m. Defendant identified herself as the babysitter of a six-month-old child, and said that she had slipped and fallen while carrying the baby.

¶ 14 1. Non-expert Witness Testimony

¶ 15 David Jordan testified for the State as follows. He was a firefighter-paramedic dispatched to defendant's residence in response to a report that a child had fallen around 11:50 a.m. on February 24, 2011. He was the first to arrive at defendant's residence, and as he pulled

into the driveway, he observed defendant in the garage walking towards him. He asked her what happened, and she responded that K.S. had fallen. She directed him to K.S. in the house.

¶ 16 Jordan asked defendant to tell him "exactly what happened." She responded that K.S. had fallen off a high chair. He asked how far K.S. fell, and defendant estimated he fell from a height of about Jordan's waist—approximately three feet.

¶ 17 Inside, he observed K.S. in a car carrier on the floor. He was awake, and his eyes were open. He did not have labored breathing or appear to be in distress, and he was sucking on a pacifier. Jordan conducted a physical assessment, checking the back-side of K.S.'s head. He did not note any swelling at the time. K.S. had a bag of frozen vegetables placed on his right shoulder, functioning as an ice pack. K.S. did not appear dehydrated.

¶ 18 Additional paramedics arrived two or three minutes after he examined K.S. He continued to assess K.S., performing a capillary refill test and an acuity check. For the capillary refill test, he pushed on the child's finger and then observed how quickly blood would return to the fingertips. K.S.'s capillary refill was less than two seconds, which was normal. However, K.S. did not respond to the acuity check. K.S.'s eyes did not follow Jordan's hands when he moved them across his face, nor did K.S. recognize the snapping of his fingers; his eyes remained focused straight ahead.

¶ 19 Jordan identified pictures offered by the State, including a picture of the steps from the garage leading into the home of defendant's residence. There were three steps.

¶ 20 Robert Blockinger testified next as follows. He was a paramedic-in-training who responded to the 911 call from defendant on February 24, 2011. He responded with paramedics Derek Hagerty and Kristine Pruski. Pruski was responsible for his instruction at the time.

¶ 21 Blockinger spoke with defendant. He obtained patient information for K.S., such as his date of birth and allergies to medication. She told him that K.S. had been sick for several days prior and that he had been vomiting. Blockinger also spoke with Jordan, who informed him that K.S. had minor swelling on the back-right side of his head.

¶ 22 Defendant appeared "flustered." Blockinger tried to calm her down and have her explain what happened. She told him that she had been coming from her car in the garage and up the steps to the kitchen. She was holding K.S.'s carrier in her right hand. While standing on the bottom step, she lost her balance and fell backwards. She did not appear to be injured, and she did not complain of an injury. He spoke with her again after K.S. was taken to the ambulance and asked her to demonstrate how she tripped on the stairs. While demonstrating, she saw a pacifier on the garage floor and picked it up.

¶ 23 The paramedics then transported K.S. to the hospital in an ambulance. At first, K.S. appeared stable. During the ambulance ride, however, his condition began to deteriorate. He became "unresponsive" and would not look at the paramedics or focus. His pulse became irregular, but his capillary refill response remained normal.

¶ 24 Kristine Pruski testified next as follows. Pruski was an emergency medical technician (EMT) course coordinator and a licensed paramedic-firefighter. On February 24, 2011, she, Blockinger, and Hagerty responded to a dispatch regarding an infant who had fallen. Defendant was on her phone when she arrived. She met with Jordan inside defendant's home, and she asked him what he knew about K.S. He had not found any injuries at the time. He told her that K.S. had fallen from a high chair, from a height of less than six feet.

¶ 25 Pruski then met with defendant and asked her how K.S. was hurt. Defendant said that she set K.S.'s carrier on top of a high chair, and that K.S. was not restrained within the carrier.

Defendant was bringing groceries into the house, and she tripped into the kitchen and accidentally knocked K.S. off the high chair. Pruski did not observe any groceries strewn about.

¶ 26 Pruski decided to transport the child to the ambulance in his carrier. At this point, she was trying to continue interaction with defendant, but defendant was still on the phone. Defendant was "very upset" on the phone and was "very, very engaged" in the phone call. She described defendant as frantic.

¶ 27 Once in the ambulance, Pruski described K.S. as "somewhat lethargic," although defendant had told them that he recently had been sick and was tired. He was sucking heavily on his pacifier and looked a little pale, but he was otherwise normal at the time. As they drove to the hospital, K.S.' vitals began to "bounce." He became more lethargic and less responsive. His papillary reaction—which is where she shined a light on his eyes and then observed how his pupils would constrict and dilate—was abnormally sluggish in both eyes. His pulse dropped abnormally low, which was called bradycardia, and his respiration started to slow. He began to lose color and was very pale by the time they arrived at the hospital. His capillary refill time was more delayed by the time they reached the hospital—it was around four or five seconds. Upon arriving at the hospital, she turned over care of K.S. to the Emergency Room staff.

¶ 28 Pruski then reviewed Blockinger's report. She realized that defendant had given her a different version of events than she gave Blockinger. She made a note on the report that they received conflicting reports, but she did not alter his narrative or file her own report.

¶ 29 Meghan Murphy testified as follows. She was a nurse, and she responded to a dispatch for a pediatric patient with a head injury on February 24, 2011. Her job was to help patients that were injured or acutely ill, which required quickly sorting out what the primary injury or threat

was. She spoke with K.S.'s mother at the hospital. Murphy was told that K.S. had fallen from a high chair. As a result, she gathered that K.S.'s injury was likely a head or neck injury.

¶ 30 Murphy observed K.S. at the hospital. He was not breathing effectively and his heart rate was abnormally slow. He was not responding to tactile stimulation and he was pale. He would intermittently become more responsive, cry, and his heart rate and breathing would improve, but he would cycle back to being unresponsive with poor vitals.

¶ 31 Murphy assessed K.S.'s CT scan. She observed that he had a subdural hematoma, that is, a pool of blood in one of the layers of the brain. The hematoma increased the pressure in the infant's head, which affected his breathing and heart rate. Thereafter, medical staff prepared K.S. for transport to a more advanced hospital in Rockford for surgery.

¶ 32 Michael Dantzer was K.S.'s pediatrician since August 2010, and he testified as follows. He saw K.S. on February 19, 2011, because K.S. had been vomiting and less active than normal. K.S. appeared normal upon his examination. He did not have a fever. K.S.'s anterior fontanel, or soft spot on his head, was soft and flat, which was normal. A sunken soft spot would have indicated dehydration and have been consistent with vomiting. A bulging soft spot would have been consistent with increased pressure inside the head. He recommended clear liquids and did not prescribe medication.

¶ 33 The State next called Tulla S., K.S.'s mother. She testified as follows. She had two children, K.S. (who was four years old at the time of trial) and an 11 year-old daughter. She described K.S. as a really good baby—he ate, played, and did not fuss or cry much. He was generally relaxed and laid back. He was rarely sick prior to February 2011.

¶ 34 Tulla left her children, including K.S., with defendant when she had to work. Defendant was her ex-husband's cousin by marriage. Their daycare arrangement was that defendant

watched the children and she paid her $50 per week. Defendant watched her children during the week but not on the weekend. Defendant also had a child of her own, Morgan. Tulla identified pictures of defendant's home, including the entrance to the home in the garage.

¶ 35 She thought K.S. had the flu during the week leading up to the February 24, 2011, incident. On February 17, she picked K.S. up at defendant's home, and defendant informed her that he had projectile vomited in her house. K.S. was about five months old at the time. When she took him home, he went right to sleep and slept through the night. That was unusual for him at the time; he usually woke for a feeding. She took K.S. to see Dr. Dantzer, who told her to keep him hydrated and contact him if he got worse. K.S. was throwing up less in the following days but he was not eating much and was tired. His vomiting was more "spit up than vomiting. *** It was just a little bit." She never observed him projectile vomit.

¶ 36 On February 24, she dropped K.S. off at defendant's home around 10:30 a.m. and then went to work. Around noon, she received a phone call from defendant. Defendant said that she had fallen on the stairs and that K.S. fell out of his car seat. She did not mention a high chair. K.S. was being taken to the hospital. Tulla left work and went directly to the hospital. When she saw him at the hospital, he was unconscious and being tended to by physicians. He was not breathing on his own.

¶ 37 K.S. was taken to Rockford Memorial Hospital for surgery. She was told he had to have surgery to relieve pressure on his brain. The pressure was caused by blood pooling around his brain, and the blood had to be drained. He eventually stabilized and remained in the hospital for weeks afterward. He had an additional surgery on his eyes at another hospital. When he was released, he was prescribed multiple eye drop medications. He was also prescribed medication for seizures that he experienced at the hospital. K.S. did not have seizures after being released

from the hospital, although tests showed he was at a higher risk of having them. He had never had seizures before February 24, 2011.

¶ 38 After his eye surgery, it was uncertain whether K.S. would be able to see again. The blood in his eyes had rendered him blind at the time. It was unclear to her how well he could see at the time of trial, although he was not blind. He was uncooperative with the eye doctors and would not let them look at his eyes. Since his ordeal, he tended to favor his left side and exhibited aggressive behavior. He would kick, bite, and throw things, and he was abusive with other children. He was currently four-and-a-half years old and attending school, but his development was delayed.

¶ 39 Trial continued on January 28, 2015. The State called Mitch Hattan, who testified as follows. He was a detective with the Kendall County Sheriff's Office. He was assigned to K.S.'s case on February 29, 2011, and he began his investigation that same day. He first visited K.S. at the hospital, and he spoke with K.S.'s mother and medical personnel. He visited the Rosenwinkel residence, where he spoke to defendant's husband and took photographs, including of the interior of the garage. He identified various pictures of defendant's residence.

¶ 40 A couple days later, he returned to defendant's home to attempt to speak with defendant. He also set up interviews with children who may have been present at defendant's home on February 24, including Morgan Rosenwinkel. He spoke with some witnesses in this case, such as Brenda White and Tanzi Melton, but he was unable to speak with others, including Antoinette Vasquez.

¶ 41 Defense counsel objected to Hattan's testimony that he met with other witnesses but not defendant, on grounds that it violated defendant's right against self-incrimination. Counsel moved for a mistrial. The court denied the motion. The court explained that while Hattan

mentioned that he tried to interview defendant, he did not say that she refused to talk or anything else—he offered no explanation as to why he was unable to speak with her. Further, Hattan testified that he attempted to interview others but was unable to do so.

¶ 42 Michael Shapiro testified next as follows. He was a doctor who performed retinal surgeries. He performed surgery on K.S. on March 8, 2011, to remove blood from both eyes. The retinal hemorrhaging that he observed in K.S.'s eyes was uncommon in his patients. He had performed around 1,000 eye surgeries in his career, and about 30 of those were for eye injuries consistent with SBS. K.S.'s hemorrhaging was consistent with SBS. Other conditions could cause retinal hemorrhaging as well, such as blunt trauma to the head.

¶ 43 Lori Thompson testified for the defense as follows. She was a pediatric nurse practitioner. As part of K.S.'s case, she interviewed his mother, Tulla, at the hospital to acquire his history. Tulla told her that K.S. had several episodes of vomiting that began on February 17, 2011, around 2 a.m.

¶ 44 Several witnesses testified that defendant was a peaceful person. They were: Brenda White, Tanzi Melton, and Antoinette Vasquez, all of whom had known defendant anywhere from 6 to 33 years; and Candice S., who was K.S.'s grandmother. Candace was also defendant's husband's aunt. She further testified that on February 24, 2011, she observed a scrape on defendant's right elbow and "a bruise on her derriere," which was about an inch or so round.

¶ 45 Defendant's husband, Jeff Rosenwinkel, testified as follows. He and defendant had been married for over 12 years. He had viewed a video reenactment of the defendant falling on the garage stairs ascending into her home. The defense played the video for the jury. The video depicted defendant carrying a baby carrier up their garage steps, falling onto her buttocks, and a baby doll falling out of the carrier onto the garage floor.

¶ 46 On February 24, 2011, he received a call about the incident with K.S. at defendant's home. When he returned home, defendant was there, and he observed an injury to her right elbow. She also had a bruise on her right butt cheek, although he was unsure if he saw that bruise on February 24th; he did see the bruise three or four days later. He described the bruise as three or four inches in diameter, colored "purple and yellowish." He took pictures of the bruises and gave them to defense counsel, but he did not have any backup picture or electronic storage. He did not observe an injury on defendant's left side.

¶ 47 After the court sent the jury home for the day, the State requested that the defense provide the photographs that Jeff Rosenwinkel testified he took and gave to defense counsel. Defense attorney Blake informed the court that he had lost the photographs sometime after February 24, 2011. He had "looked everywhere" for them.

¶ 48 The State moved for a mistrial and to disqualify Blake from representing defendant. The State argued that counsel knew of the loss of evidence well before trial but did not bring it to the State's attention until now. The State worried about an ineffective assistance of counsel claim on appeal. It also argued that Blake might have to testify at trial, which would conflict with his role as an advocate for defendant. Defense counsel responded that the lost photographs did not warrant a mistrial or disqualification of Blake.

¶ 49 The court denied the motion for mistrial and to disqualify Blake. The court was disappointed in the loss of the photographs and defense counsel's failure to disclose the loss earlier. Nevertheless, the court reasoned that the photographs were not the "smoking gun" in this case. The photographs were evidence of a bruise, but a bruise could have different causes and did not alone establish defendant's account. The court instead decided to instruct the jury to disregard any testimony related to the photographs. Defense counsel could argue that Candice or

Jeff observed the bruise but could not argue that photographs were taken. With respect to Blake, the court did not disqualify him but would not permit him to be called as a witness.

¶ 50 2. Expert Witness Testimony

¶ 51 The State called Dr. Raymond Davis, who was accepted as an expert in pediatrics and child abuse. He testified as follows. He was a medical director for MERIT (Medical Evaluation Response Initiative Team) in Rockford. The MERIT program saw approximately 240 to 300 cases of child abuse a year. He primarily saw patients under the age of 18 that were victims of physical and sexual abuse. His patients included six-month olds. For every patient he and his program saw, they rendered an opinion on abuse. He found that about one third of patients seen for physical abuse were the likely victims of physical abuse. The rest were the result of accidental injuries or were impossible to determine whether abuse occurred.

¶ 52 He explained that increased intracranial pressure in an infant could cause neurological symptoms, including headaches, irritability, vomiting, and even seizures. Significant pressure on the brain can push the brain down into the spinal canal, which is life-threatening. It would affect respiration. Intracranial pressure could also affect the nerve that allows a child's eyes to look to the side.

¶ 53 A subdural hematoma was a collection of blood that occurs in the dural lining on the surface of the brain. When observing a subdural hematoma on a CT scan, chronic hematomas appeared darker, whereas acute hematomas were a brighter white. In this context, chronic meant an older hematoma and acute meant a newer hematoma. It was currently impossible to precisely date a hematoma from a scan.

¶ 54 He had an opportunity to review K.S.'s case. He viewed K.S.'s CT scans and his medical history at the hospital, and he personally examined him. K.S. presented with an "acute subdural

hemorrhage," which could have had a variety of causes, from an infection to trauma. K.S. had soft tissue swelling on the side of his head, observable on his CT scan. He also had a subdural hemorrhage at the top of the brain between the two lobes. Further, he suspected a fracture of the temporal bone, although an autopsy was necessary to confirm it, and, fortunately, K.S. had survived. Based on his review, Davis ruled out alternative causes of K.S.'s injuries, including meningitis, metabolic diseases, and leukemia.

¶ 55 At this point in Davis's testimony, the court held a sidebar. Defendant's counsel renewed the motion for a *Frye* hearing on SBS. The court denied the motion and permitted the witness to give his expert opinion on K.S's injuries.

¶ 56 Davis resumed his testimony. He opined that K.S. had experienced AHT, formerly known as SBS. His opinion was based on K.S.'s injuries and symptoms, including a low heart rate and low respiratory rate. These symptoms were evidence of a concussive effect on K.S., and they were "very uncommon and rarely reported" in short falls, that is, falls less than four feet. To his knowledge, about 75 percent of subdural hemorrhages were the result of child abuse.

¶ 57 The "most overwhelming" factor contributing to his opinion was the appearance of K.S.'s eyes. His extensive, bilateral retinal hemorrhaging, extending to the very edges of his eyes, was a finding seen almost exclusively with AHT and had not been reported in studies with simple falls. Newborns often had retinal hemorrhaging, but those bleeds healed within a few weeks after birth and therefore did not explain K.S.'s retinal hemorrhaging. K.S.'s symptoms—extensive subdural hemorrhaging, bilateral retinal hemorrhaging, and neurological injury—were not consistent with a fall onto the garage floor, which was his reported history.

¶ 58 Davis further explained that a child with a chronic subdural hematoma could have a "rebleed" with minor trauma, which would appear acute on a CT scan. A minor trauma

sufficient to cause a rebleed included a bad sneeze or a cough. However, with a rebleed from minor trauma, the child would not present with neurological symptoms but rather would appear healthy. K.S. presented with neurological symptoms. A short fall could have caused a rebleed. His opinion, however, was that K.S.'s symptoms were not consistent with a short fall.

¶ 59 Davis explained that in an abuse case, doctors also look for neck injuries and for bruising throughout the entire body. K.S. did not present with neck injuries or body bruising. Neck injuries on babies were difficult to detect because their bones are not yet well formed. Failure to observe a neck injury did not preclude a neck injury. In the majority of documented AHT cases, doctors did not observe bruising on the chest itself. Davis was not paid for his testimony. He generally testified as an expert for the State but had testified for the defense five times in the past.

¶ 60 The defense called Dr. Chris Van Ee as an expert witness in biomechanics. He testified as follows. He was a biomechanical engineer whose study focused on impact and orthopedic biomechanics. His training was not medical; he studied how injuries took place and had a Ph.D. in biomechanical engineering. Orthopedic biomechanics included examining how joints worked and understanding the forces that affect bones, joints, and other parts of the body. In particular, he studied how force or acceleration related to the physical injuries people suffered. He performed "lots of testing" with crash dummies.

¶ 61 He received certain documents and records from defense counsel to review. He listened to the 911 call from February 24, 2011; reviewed K.S.'s medical records; reviewed reports by other defense experts; and viewed photos and video of defendant reenacting her reported fall with K.S. in her garage.

¶ 62 He explained that two factors contributed to the speed at which a child may hit the floor after a fall. First was the drop height, and second was the motion of the adult carrying the child. He cited a study that demonstrated that a fall from three feet or less for a 0 to 12 month old child could cause serious injury, including subdural hemorrhage or a skull fracture. About 13% of children whose eyes were checked had some bleeding in their eyes. He did not know whether shaking a baby caused bilateral retinal hemorrhage. Some of the studies on the matter were performed on animals and others did not test shaking but tested other forces, such as the force effect of whiplash. The scientific community, in his opinion, did not know for sure whether shaking a baby caused bilateral retinal hemorrhaging. It was his opinion that bilateral hemorrhaging could result from a fall.

¶ 63 He described the fall in this case as "complex," because he had to account for the movement of defendant in addition to K.S. There was not enough information to detail how the fall precisely occurred. He based his analysis on the defense reenactment video and documents provided.

¶ 64 He concluded that the accidental fall described by defendant could have resulted in an impact to K.S.'s head consistent with his acute head injuries. He acknowledged that biomechanics could not rule out abuse, but he also did not observe biomechanical evidence of abuse. It was his opinion that, within a reasonable degree of certainty, K.S.'s injuries could have been caused by the short fall as reenacted in the defense's video.

¶ 65 The defense next called Dr. Waney Squier as an expert witness in neuropathology. She testified as follows. She was a consultant pediatric neuropathologist from the United Kingdom. She received her medical education there and resided in Oxford, England. Neuropathologists

specialized in examining the central nervous system, including the brain and spinal cord. She was a licensed pediatric physician but had not practiced medicine in about 30 years.

¶ 66 Squier had been studying findings of SBS and abuse since reading a study on infant abuse published by a colleague in 2001, which caused her to question her acceptance of SBS as taught in medical textbooks. Her day-to-day practice was to look at the brains of babies who died and offer an opinion as to the cause of death. She worked primarily for the UK National Health Service but also consulted on independent cases, usually for a fee. The last time she rendered an opinion that a child's injuries were consistent with SBS was in 1999.

¶ 67 Squier had doubts about SBS and questioned its validity as a diagnosis. However, she acknowledged that her view went against the mainstream view of the medical community. SBS was still a diagnosis recognized in the United States and taught in medical schools. There was evidence of an impact in this case, whereas a traditional SBS diagnosis did not necessarily involve evidence of an impact. This was not a "pure" SBS case.

¶ 68 Squier prepared a report for K.S., dated July 15, 2013. She reviewed K.S.'s medical records, including CT scans, and they formed the basis for her opinion. She did not review the police reports or statements of witnesses. She opined that the subdural hematoma on K.S.'s scan could explain his vomiting or could have indicated another event, such as trauma; "we simply don't know." The hematoma was at least a week old by the time of the scan. She did not observe any rib fractures or neck injury. Squier opined that falls from less than three feet could cause subdural hematomas for infants. She further opined that, with respect to K.S.'s injuries, nothing suggested that the cause had to be non-accidental. Rather, the explanation that K.S. was dropped could account for his injuries.

¶ 69 On cross-examination, Squier confirmed that one of her primary findings that led to her opinion was an absence of brain swelling. However, she agreed that K.S. suffered from brain swelling after his initial scan. Brain swelling was a process and the rate of swelling varied. She relied on his initial presentation in rendering her opinion, because those findings were, in her opinion, very important. Brain swelling was not "of great concern" to her opinion. She did not know whether subdural hemorrhaging that occurred as a result of the birthing process would have resolved itself by the time K.S. was six months old. She disagreed that a rebleed of a chronic subdural hematoma would necessarily present without neurological symptoms.

¶ 70 She did not believe that the absence of neck or rib injuries excluded shaking, but there was no positive evidence to support shaking. She could not say whether shaking occurred. She cited studies performed on animals that failed to mimic the hypothesized injuries from shaking babies, but extrapolating from tests on animals to effects on babies was difficult. Babies and animals were substantially different.

¶ 71 She agreed that a short fall could happen in different ways, from a simple fall to a violent push. Her understanding was that K.S. fell. She further understood that this case was "really an impact case." She could not rule out an intentional impact to K.S.'s head.

¶ 72 The defense called Dr. John Galaznik as an expert witness in pediatrics. He was a pediatric physician from Alabama. His practice for the past 35 years, however, was with college students. He had testified in cases involving allegations of physical injury to infants and small children for the past 12 or 13 years, and he had consulted on about 250 cases. For his consultation on K.S., he received K.S.'s birth records, outpatient pediatric records for his first six months, EMS records, and medical records from all three hospitals that treated K.S., including imaging studies. He also viewed the defense's reenactment video of defendant's fall. In the

video, K.S. appeared to fall from about three feet. He opined that there was adequate evidence of an impact injury in this case.

¶ 73 The exact age of K.S.'s subdural hematoma[1] was impossible to identify, because there was no scientific test to establish the age of chronic subdural hematomas. He was aware that K.S. had been vomiting before the incident, and he agreed that vomiting could be tied to a subdural hematoma. He could not conclude whether K.S.'s injuries were non-accidental. "Impact is impact. The brain doesn't know if it was hit accidentally or intentionally." He continued:

> "And whether that impact occurred as related in the enactment video and as related to the EMS and the hospital, or whether that impact occurred from a caregiver grabbing the infant and slamming the head on the table or the floor, there is nothing that's going to make that distinction."

¶ 74 He opined that a short fall could have caused K.S.'s injuries in this case. He further doubted, based on a lack of experimental evidence, that shaking a baby could cause the observed bilateral retinal hemorrhaging observed in K.S. Tests on lambs and piglets demonstrated only microscopic retinal bleeding after controlled shaking. An impact could explain the retinal hemorrhaging. Retinal hemorrhaging could occur immediately upon impact or develop later.

¶ 75 In addition to his opinion on K.S.'s injuries, he testified to the evolving medical literature on SBS. He explained that the American Academy of Pediatrics periodically released position

[1] The record also refers to a subdural hygroma. Galaznik explained that the literature is "sloppy" with its terminology. In his opinion, hygroma implied water-like, and hematoma implied blood-like. He acknowledged that the literature often used the terms interchangeably. For consistency's sake, we use the term subdural hematoma in recounting Galaznik's testimony.

papers, which summarized the available scientific literature on a topic at the time. These papers provided guidance to pediatricians. In 2001, the Academy's position was that the connection between certain observed symptoms in infants and a diagnosis of SBS was settled. The position noted the triad of retinal hemorrhaging, subdural bleeding, and brain injury were consistent with SBS. Short falls did not result in this triad of symptoms. Physicians who observed this triad of symptoms were to presume abuse occurred.

¶ 76 The Academy issued another position statement in 2007, although not specifically addressing SBS. The 2007 paper discussed "mimics," that is, occurrences other than abuse that could lead to the triad of findings consistent with SBS. The paper still tied retinal hemorrhaging to shaking.

¶ 77 In 2009, the Academy published a paper that advised against using the term SBS, because it implied a specific mechanism of injury. Rather, it proposed using the term AHT. Shaking remained a mechanism under the umbrella of AHT, but AHT also included impact, suffocation, and more.

¶ 78 The State called Dr. Nancy Jones as a rebuttal expert witness. She testified as follows. She was a coroner's physician and an independent forensic pathologist for Lake and McHenry counties, and she was a professor at the Chicago Medical School. She performed autopsies to determine cause and manner of death. She had performed over 10,000 autopsies, including hundreds of autopsies on infants up to one year old. She had testified as an expert witness over 900 times. She did not use the term "SBS" but instead used "AHT" when discussing head injuries to infants such as K.S.

¶ 79 Jones was retained by the State to review K.S.'s case. For this case, her review included the police reports, the defendant's statements made during the investigation, K.S.'s medical

records from all the hospitals involved in his treatment, K.S.'s CT scans, a transcript of the 911 call, and the defense's reenactment video of defendant's fall.

¶ 80 Jones recounted K.S.'s symptoms. K.S.'s CT scans showed a subdural hematoma, an additional hematoma on the surface of his scalp behind his right ear, and a non-displaced fracture of his right temporal bone. He had bilateral retinal hemorrhaging, with hemorrhaging in several layers of the retina in both eyes. His difficulty breathing and loss of consciousness were associated with a traumatic brain injury.

¶ 81 K.S. had a craniotomy to relieve his intracranial pressure. The procedure involved drilling a small hole into the right side of his head and placing a catheter to drain the fluid inside. Records showed that the doctors drained bloody fluid from his head. The bloody fluid was significant because the fluid from an older, healed collection of fluid should be yellow, not bloody. Bloody fluid indicated hemorrhage. A hyper-acute subdural hemorrhage may look the same as an old accumulation of fluid on a CT scan, but the presence of bloody drained fluid was consistent with an acute hemorrhage.

¶ 82 She agreed that skull fractures and subdural hematomas could occur from a simple fall. However, infants did not typically incur brain damage from short falls. K.S. had brain injuries, indicated by his CT scan and his symptoms, including respiratory difficulties and increased intracranial pressure.

¶ 83 Referring to recent studies, Jones testified that the retinal hemorrhaging that is associated with short distance or accidental falls is different than the retinal hemorrhaging associated with a traumatic, non-accidental brain injury. Retinal hemorrhaging in traumatic or non-accidental injuries tended to be widespread, involving multiple layers of the entire retina. K.S.'s retinal hemorrhaging was widespread.

¶ 84 She did not find it significant that K.S. did not have additional injuries, such as bruises to his body. It actually took more force to bruise a baby than an adult. She did not find K.S.'s lack of a neck injury significant, either. She did not expect to observe a neck injury in conjunction with K.S.'s injuries.

¶ 85 Jones opined that, due to K.S.'s size and weight, a short-distance fall, such as the one reenacted in the defense video, could not have caused his injuries. A short fall could cause a skull fracture and even cause a subdural hematoma, but it could not cause the brain injury or retinal hemorrhaging observed in K.S. Also significant to her opinion was that the defendant's statements to medical personnel were inconsistent. In her experience, the story stays the same if what occurred was an accident. In her report, she wrote that K.S. had likely incurred a separate trauma sometime prior to February 24, 2011.

¶ 86 C. Jury Instruction and Verdict

¶ 87 The court held a conference on jury instructions on February 3, 2015. Defense counsel submitted Illinois Pattern Jury Instruction, Criminal, No. 5.01(B) (4th ed. 2000) (hereinafter IPI Criminal 4th 5.01B), an instruction on the definition of knowledge. The court responded that it would do as "[it had] done in many other cases, not give it at this point. If the jury sends out a question, then I'll address it at that point." Accordingly, the court refused to give the instruction.

¶ 88 During deliberation, the jury requested a definition of "knowingly" as used in the specific charges. The court reconsidered whether to use defendant's proposed jury instruction, IPI Criminal 4th 5.01B. The court asked defense counsel whether he drafted this instruction earlier, and counsel replied yes. The court continued that it believed it was using the exact language in defense counsel's prior proposed instruction. It later confirmed that it was the same language, and defense counsel agreed to send the instruction to the jury.

¶ 89 On February 5, 2015, defense counsel asked that the court instruct the jury on the definition of recklessness. The State objected. The trial court asked defense counsel if he had case law to support such and instruction, and defense counsel replied that he did not. The court denied the request, noting that recklessness was not the standard that applied and that providing its definition "might confuse the jury even more."

¶ 90 The jury returned a guilty verdict, finding that defendant committed an aggravated battery of a child by knowingly causing great bodily harm to K.S. Thereafter, defendant moved for a new trial or judgment notwithstanding the verdict. The trial court denied the motion. Defendant was sentenced to six years' imprisonment with three years' mandatory supervised release.

¶ 91 Defendant timely appealed.

¶ 92 II. ANALYSIS

¶ 93 A. Sufficiency of the Evidence

¶ 94 Defendant first argues that she was not proved guilty beyond a reasonable doubt. She argues as follows. The State provided no direct evidence that defendant struck or shook K.S. but instead relied upon the testimony of expert witnesses to prove that defendant knowingly injured K.S. The State's expert witnesses, Drs. Davis and Jones, opined that K.S. had been abused prior to February 24, 2011, specifically on February 17. However, K.S. was not in defendant's care at that time.

¶ 95 The evidence in support of K.S. being abused prior to February 24 was that he had been vomiting since February 17 and that he had a subdural hematoma that formed days prior to February 24. Relying on nurse Lori Thompson's testimony, K.S. did not begin vomiting until

2:00 a.m. on February 17. K.S.'s mother had not worked from 3:20 p.m. on February 15 until the time K.S. began vomiting.

¶ 96 Davis testified that minimal trauma could cause a rebleed of a subdural hematoma. Accordingly, K.S.'s injuries on February 24 could have resulted from a short fall of less than four feet. Davis did not observe that K.S. had any neck or rib injuries.

¶ 97 Jones likewise testified that she believed K.S. experienced intentional trauma on or around February 17, when K.S. began vomiting. Both she and Davis testified that a minor trauma could exacerbate a pre-existing condition, causing more severe injuries. Their testimony "dovetailed" with the defense experts', all of whom concluded that K.S.'s injuries could be explained by a fall, as depicted by the defense's reenactment video.

¶ 98 Further, the State failed to prove the required mental state that defendant "knowingly" caused injury. While circumstantial evidence can prove a mental state, the circumstantial evidence in this case was insufficient. The State relied on (1) the triad of SBS symptoms that K.S. presented with and (2) the fact that defendant was the last person with custody of K.S. before his injuries. These two factors amounted to speculation, not proof of knowledge. Moreover, defendant's behavior cut against the State's argument that she knowingly injured K.S. She was the one to call 911 in response to K.S.'s symptoms; she explained to the paramedics how she fell; and the paramedics described her as worried or frantic.

¶ 99 Finally, the State did not explain away evidence that defendant fell in the garage while carrying K.S. First, the paramedics found a pacifier on the garage floor. Second, the defense presented a photograph of defendant's bruised elbow and testimony describing a bruise to her buttocks. These two pieces of evidence corroborated her explanation of events.

¶ 100 The State responds as follows. The evidence was sufficient to sustain the jury's verdict. No witness in this case testified that K.S. had been abused prior to February 24, 2011. The defense's argument that a previous abuse was the underlying pre-condition of K.S.'s injuries is unsupported by the record.

¶ 101 The experts consistently testified that a prior subdural hematoma could predispose an infant to further hematomas, *i.e.*, a rebleed. However, no witness testified that a prior hematoma occurred on February 17, 2011. In fact, all the experts agreed that it was impossible to attach an exact time frame to K.S.'s prior subdural hematoma, other than it must have been at least four or five days prior to February 24. Further, no witness testified that the severity of K.S.'s injuries on February 24 resulted from a rebleed but rather from an impact. The issue was whether the impact was intentional.

¶ 102 The State continues that it was up to the jury to assess the witnesses' credibility and assign weight to their testimonies. Defendant could not re-argue the reasonableness of the expert witness opinions or argue that the defense's experts were more compelling that the State's. See *People v. Tudaj*, 2015 IL App (1st) 092536, ¶¶ 81-82. All expert witnesses acknowledged that K.S.'s injury resulted from an impact, and therefore the issue of SBS was not central to this case.

¶ 103 We agree with the State. When reviewing a challenge to the sufficiency of the evidence, we do not retry the case or ask whether we believe the evidence at trial established guilt beyond a reasonable doubt. *People v. McCullough*, 2015 IL App (2d) 121364, ¶ 73. Our review does not necessitate a point-by-point analysis of every piece of evidence or every possible inference that could be drawn therefrom, because such a review amounts to an effective retrial on appeal. *People v. Wheeler*, 226 Ill. 2d 92, 117 (2007). Rather, viewing the evidence in the light most favorable to the State, we review whether any rational trier of fact could have found the essential

elements of the crime beyond a reasonable doubt. *McCullough*, 2015 IL App (2d) 121364, ¶ 73. This standard applies regardless of whether the evidence is direct or circumstantial, and a court should not substitute its judgment for that of the fact finder on witness credibility or weight of the evidence. *People v. Torres*, 269 Ill. App. 3d 339, 346 (1995). A verdict need not be supported by direct evidence but can be supported by circumstantial evidence and expert testimony. *People v. Patterson*, 217 Ill. 2d 407, 434-35 (2005).

¶ 104 Here, defendant was convicted of aggravated battery of a child (720 ILCS 5/12-4.3 (West 2010)), in that she knowingly caused bodily harm to K.S., a child under the age of 13. Both parties relied on expert witnesses to testify whether, based on K.S.'s injuries and the story related by the defendant, K.S.'s injuries were accidental in nature. The defense experts testified that K.S.'s injuries could be explained by accidental means; the State experts testified that his injuries were explained only by intentional conduct.

¶ 105 This case was a battle of the experts, and it was for the jury to listen to the conflicting evidence, exercise judgment, and determine what occurred. *Snelson v. Kamm*, 204 Ill. 2d 1, 36 (2003). The defense presented three expert witnesses. First, Dr. Van Ee, an expert in biomechanics, testified regarding the physical forces involved in the fall that defendant described occurring in her garage on February 24, 2011. He opined that K.S.'s injuries could have resulted from the fall, but he could not rule out abuse. He relied on the defense's reenactment video in reaching his opinion.

¶ 106 Next, Dr. Squier testified that there was evidence of an impact in this case. She opined that short falls could cause subdural hematoma and that K.S.' injuries could be explained by an accident. K.S.'s subdural hematoma could have been caused by trauma, but "we simply don't know." She testified that the hematoma was at least one week old by the time of the CT scan.

¶ 107 In reaching her opinion, Squier noted the absence of brain swelling. However, she admitted that K.S. had brain swelling subsequent to his initial C.T. scan. She did not consider brain swelling to be of great concern to her opinion. She also noted the absence of rib and neck injuries, but the absence of these injuries did not exclude the possibility that defendant shook K.S. She could not say whether shaking occurred. Nonetheless, she understood this case was an impact case, not truly an SBS case. She agreed that a fall, resulting in an impact injury, could happen accidentally or intentionally.

¶ 108 Dr. Galaznik, an expert in pediatrics, testified that there was adequate evidence of an impact injury in this case. He could not conclude that K.S.'s injuries were accidental or intentional—rather, "impact was impact." He opined that a short fall could have caused K.S.'s injuries. He also testified that by 2009, the favored term in the medical community was no longer SBS but AHT, because head trauma could occur via various mechanisms, not just shaking.

¶ 109 In contrast, the State's experts testified that K.S.'s injuries could not be explained by a short fall. Dr. Davis opined that K.S. had experienced AHT. He based his opinion on K.S.'s symptoms and injuries. K.S.'s low heart and respiratory rates were evidence of a concussive effect and were rarely seen as a result of a short fall in children. The "most overwhelming" factor in his opinion was K.S.'s bilateral retinal hemorrhaging. This type of hemorrhaging was strongly correlated with AHT and was not observed after simple falls.

¶ 110 Davis further testified that rebleeds of subdural hemorrhages, while easy to induce, rarely presented with neurological symptoms. However, K.S. presented with serious neurological symptoms. He acknowledged that doctors looked for rib and neck injuries in abuse cases, but the absence of such injuries did not rule out abuse. Neck injuries were difficult to detect in babies

because bones are not yet well formed, and doctors did not observe chest bruising in the majority of AHT cases.

¶ 111 Finally, Dr. Jones testified as an expert rebuttal witness. Like Davis, she found K.S.'s bilateral retinal hemorrhaging significant. Also like Davis, she used the term AHT and not SBS. She explained that retinal hemorrhaging from traumatic, non-accidental brain injury was distinguishable from non-abusive injuries. Retinal hemorrhaging resulting from traumatic injuries was more widespread across multiple layers of the retina than retinal hemorrhaging from an accident. K.S.'s retinal hemorrhaging was across several layers of the retina in both eyes. K.S. also exhibited difficultly breathing and loss of consciousness, which were consistent with a traumatic brain injury.

¶ 112 She emphasized that the fluid drained from K.S.'s head was bloody. She found this significant because fluid from a chronic (older) injury would be yellow. The bloody fluid indicated an acute (newer) hemorrhage.

¶ 113 She opined that a short-distance fall, such as the fall reenacted in the defense video, could not cause all of K.S.'s injuries. A short fall could cause a subdural hematoma or a skull fracture, but it could not cause the brain injury and retinal hemorrhaging that she observed in K.S.

¶ 114 The jury heard these experts and resolved any conflicts among them. Importantly, no defense expert ruled out abuse. Rather, each defense witness testified that the injuries could be explained by an accident—a short fall, as demonstrated in the reenactment video. The State witnesses disagreed, opining that K.S.'s injuries—especially his bilateral retinal hemorrhaging and his brain injury—could only be explained by non-accidental trauma. No expert relied on shaking as the mechanism of injury. The State and defense experts agreed that this was not a pure SBS case but involved an impact.

¶ 115 We reject defendant's argument that a finding of prior abuse was significant to the opinions of the State's experts. While Davis and Jones provided some testimony as to what occurred prior to February 24, 2011, their opinions on abuse were based on K.S.'s presentation on and after February 24. In particular, they focused on his brain injury and his bilateral retinal hemorrhaging. Davis explained that a rebleed from a prior injury based on minimal trauma would not manifest with neurological symptoms. Therefore, he specifically rejected that a minor trauma occurred on February 24, because K.S. presented with serious neurological symptoms.

¶ 116 The jury also heard testimony from non-expert witnesses. The paramedics related defendant's account of what happened, and these accounts varied. First, defendant told paramedic Jordan that K.S. had fallen from his high chair. Then, she told paramedic Pruski that she tripped while carrying groceries into the kitchen and in doing so, accidentally knocked K.S. off his high chair. Finally, she told Blockinger that she tripped while ascending the garage stairs to the kitchen while carrying K.S. in his carrier in her right arm. Pruski made a note on Blockinger's report that she had received a conflicting report, although she did not file her own report. The jury had to resolve the defendant's conflicting accounts to the paramedics, especially in light of the conflicting expert testimony.

¶ 117 Two non-expert physicians also testified. Dr. Shaprio performed K.S.'s retinal surgeries. He testified that K.S.'s retinal hemorrhaging was uncommon and was consistent with SBS, although other causes, such as blunt head trauma, could have caused his retinal hemorrhaging. Dr. Dantzer, K.S's pediatrician, testified that K.S. had been vomiting and was less active on February 19, 2011, but his head appeared normal. He sent K.S. home without prescribing medication. These testimonies were either consistent with the State's experts' opinions (Shapiro) or irrelevant to their ultimate opinions (Dantzer).

¶ 118 Viewing the evidence in the light most favorable to the State, the jury could have concluded that defendant knowingly caused K.S.'s injury. It was the jury's prerogative to accept the expert testimony of the State witnesses over that of the defense witnesses. The State witnesses, based on their experience and training, offered opinions that ruled out an accidental injury. In particular, it was up to the jury to consider whether K.S.'s bilateral retinal hemorrhaging and neurological symptoms were caused by abuse or could be explained by accidental means. The State's expert witnesses provided testimony from which a reasonable jury could conclude that K.S.'s injuries were knowingly committed, that is, his injuries were not the result of an accident but necessitated abuse.

¶ 119 B. Ineffective Assistance

¶ 120 Defendant next argues that she received ineffective assistance of counsel and that counsel violated the rules of professional conduct. She argues that counsel lost photographs of bruises resulting from her fall in the garage on February 24, 2011, and that these photographs were fundamental to her defense. The photographs would have corroborated her video reenactment of her fall. Instead, the loss of the photographs caused the court to strike all references to the photographs. Further, she contends that defense counsel did not timely disclose the loss of photographs and was the only witness who could testify to the loss of the photographs, placing him in the untenable position of witness and advocate.

¶ 121 The State responds that defense counsel's representation was effective. The State argues that the trial court properly reasoned that the existence of defendant's bruise, as allegedly depicted in the lost photographs, was not the "smoking gun" in this case, and the loss of the photographs did not prevent a fair trial. Rather, the existence of a bruise on defendant's buttocks demonstrated only that she experienced some type of blunt force trauma within a few days of the

bruise, not that she necessarily tripped on the garage stairs while carrying K.S. Two witnesses, including defendant's husband, testified that they observed a bruise on her buttocks on or after February 24, 2011. Thus, the State concludes that defendant was not prejudiced by the loss of the photographs.

¶ 122 We agree with the State. A claim for ineffective assistance of counsel must satisfy the two-prong test—deficiency and prejudice—set out in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Simms*, 192 Ill. 2d 348, 361 (2000). Failure to satisfy either prong is fatal to a claim of ineffective assistance. *Id.* at 362. Thus, a defendant must show that (1) counsel's performance was deficient in that it failed to meet an objective standard of competence under prevailing professional norms (*People v. Nunez*, 325 Ill. App. 3d 35, 42 (2001)), and (2) counsel's deficient representation prejudiced the defendant in that, but for the deficient representation, there was a reasonable probability that the result of the proceeding would have been different (*People v. Clark*, 2011 IL App (2d) 100188, ¶ 23).

¶ 123 Here, defendant cannot show that she was prejudiced by counsel's loss of the photographs. The trial court, in denying the State's motion for a mistrial, summarized the importance of the photographs to her defense as follows:

> "The existence or non-existence of this bruise is an item of evidence that the jury may consider. However, the *existence or non-existence of this bruise is not the smoking gun or fingerprint on the murder weapon type of evidence that is so clearly compelling that the loss of a photograph of the bruise would prevent the State from receiving a fair trial.*

> Indeed, all the possible existence of a bruise actually means is that the defendant experienced some type of blunt force contact with her buttocks within a few days preceding the appearance of the bruise." (Emphasis added.)

¶ 124 We find the reasoning of the trial court sound and persuasive. This case did not turn on the absence of the photographs. Ineffective-assistance-of-counsel claims must be viewed under the totality of the circumstances. *People v. Shatner*, 174 Ill. 2d 133, 147 (1996). Here, the totality of the circumstances included testimony by two defense witnesses that they observed a bruise on defendant's buttocks. Jeff Rosenwinkel testified that he observed a bruise on defendant's buttocks several days after February 24, 2011, and Candice S. testified that she observed a bruise there on February 24. Further, the defense played its reenactment video for the jury, depicting defendant falling on the garage stairs and landing on her buttocks. The jury also heard defendant's accounts of the incident through the testimony of the paramedics. In particular, defendant told paramedic Blockinger that she tripped carrying groceries from her car in the garage to the kitchen while holding K.S. in his carrier with her right hand.

¶ 125 However, the totality of the circumstances in this case also included paramedic Pruski's testimony, which related a different account by defendant. Defendant told her that she placed K.S. on his high chair and tripped, accidentally knocking him off the chair. The jury also heard the testimony of the State's experts, who opined that a short fall, such as the one depicted in the defense reenactment video, could not have caused K.S.'s injuries.

¶ 126 It was incumbent on the jury to resolve the conflicting evidence. While photographs of defendant's bruise would have further corroborated her version of events, the trial court was correct that the photographs did not necessitate acceptance of her version of the events.

¶ 127 Defendant's case law is inapposite. In *People v. Bryant*, 391 Ill. App. 3d 228, 239 (2009), counsel was ineffective for failing to present any witness for the defense despite promising the jury in opening argument that it would hear evidence that other persons committed the murder, contra the State's case. In *People v. Davis*, 287 Ill. App. 3d 46, 55 (1997), the defendant received ineffective assistance when his counsel told the jury in opening argument that the defendant would testify, the defendant did not testify, and counsel drew attention to the fact that the defendant did not testify in closing argument. Finally, in a different *People v. Davis*, 203 Ill. App. 3d 129, 140-41 (1990), defense counsel was ineffective in failing to interview eyewitnesses to the defendant's alleged robbery, even though they were unable to pick the defendant out of a lineup.

¶ 128 In contrast, photographs of defendant's bruise are not commensurate with establishing identification of a robber or failing to present any witness in defense at trial, despite promises to the jury to do so. Here, defense counsel called two witnesses who testified to defendant's bruises, played a reenactment video of defendant's fall for the jury, and called expert witnesses who testified that a fall could have caused K.S.'s injuries. Importantly, the bruise did not establish that she fell with K.S., only that she experienced trauma to her behind at some point on or around February 24, 2011.

¶ 129 Accordingly, we reject defendant's ineffective assistance of counsel argument, because she cannot establish prejudice in this case. We do not further address defendant's argument that counsel violated rules of professional conduct because (1) we resolved her arguments on prejudice, meaning any such violation was harmless, and (2) counsel did not have to testify at trial and was indeed barred by the court from doing so.

¶ 130 C. Jury Instructions

¶ 131 Defendant argues that the trial court erred in its instruction to the jury on the meaning of "knowingly," as used in the aggravated battery statute. Defendant continues that the court further erred in failing to instruct the jury on the mental state of recklessness and on the lesser included offense of reckless conduct.

¶ 132 Defendant relies on *People v. Willett*, 2015 IL App (4th) 130702, to argue that the court erroneously defined knowingly for the jury. In particular, defendant argues that the proper definition of knowingly should have been that defendant knew she would cause great bodily harm to K.S., not merely that she knew that she committed the acts that lead to his injury.

¶ 133 Defendant also relies on *Willett* to argue that the court failed to instruct the jury on the definition of recklessness. She further cites *People v. Perry*, 2011 IL App (1st) 081228, ¶ 36, where the trial court provided the jury with the definition of recklessness because defense counsel indicated he would argue recklessness to the jury in the defendant's first degree murder case.

¶ 134 Finally, defendant argues that just as jurors may confuse recklessness with negligence, so too may they confuse recklessness with knowledge. *People v. Lowry*, 354 Ill. App. 3d 760, 762 (2004). Defendant argues that providing the jury with the definition of recklessness would have aided its evaluation of the evidence, especially in light of the jury's question to define knowingly and its 16-hour deliberation.

¶ 135 The State responds as follows. First, defendant is estopped from raising the issue on appeal because the defense invited any alleged error. To wit, defense counsel requested the exact instruction that the court provided the jury. Further, the State disagrees that *Willett* controls. In *Willett*, the issue was not whether an improper instruction was given but whether the State had argued an improper interpretation of the law.

¶ 136 Moreover, the State posits that it may have been reversible error for the court to instruct the jury on recklessness because the mental state of recklessness was not at issue here. Finally, the court did not abuse its discretion by not instructing the jury on a lesser-included offense. See *People v. Garcia*, 188 Ill. 2d 265, 274 (1999) (commenting that courts should consider the public interest in the punishment of wrongdoers and not allow unlawful conduct to escape punishment).

¶ 137 We agree with the State. First, defendant invited the error she now complains of, and she does not argue plain error. "[A] defendant's invitation or agreement to the procedure later challenged on appeal 'goes beyond mere waiver.' " *People v. Harvey*, 211 Ill. 2d 368, 385 (2004) (quoting *People v. Villarreal*, 198 Ill. 2d 209, 227 (2001)). Simply, an accused cannot proceed in one manner and later argue that his course of conduct was in error; to do so " 'would offend all notions of fair play' " and encourage duplicitous trial strategies. *Id.* (quoting. *Villarreal*, 198 Ill. 2d at 227). Here, defense counsel initially proffered IPI Criminal 4th 5.01B to define knowingly, and then in response to the jury's question, counsel agreed that the court should instruct the jury using that same language to define knowingly.

¶ 138 Even then, defendant's reliance on *Willett* is misplaced. The State is correct that the issue in *Willett* was the propriety of counsel's closing argument, not the propriety of submitting IPI Criminal 4th 5.01B to the jury. *Willett*, 2015 IL App (4th) 130702, ¶ 48. In fact, the *Willett* court explained that IPI Criminal 4th 5.01B was consistent with the well-settled rule that for aggravated battery, a defendant acts knowingly when he is consciously aware that his conduct is practically certain to cause great bodily harm. *Id.* ¶¶ 51-53. Therefore, *Willett* not only addressed a different issue, it also supports the trial court's decision to use IPI Criminal 4th 5.01B to define knowingly.

¶ 139 In addition, the court did not err in refusing to instruct the jury on the definition of recklessness. A trial court has discretion to determine which instruction to give a jury and that determination will not be disturbed absent an abuse of discretion. *People v. Cook*, 2011 IL App (4th) 090875, ¶ 27. Here, the mental state of recklessness was not an element in the aggravated battery charges against defendant. Our supreme court has held that a court committed error when it instructed the jury on mental states that could not satisfy the offense charged. See *People v. Roberts*, 75 Ill. 2d 1, 8-15 (1979) (finding error where, in an attempt-murder charge requiring specific intent, the court provided instructions defining murder to include mental states other than the specific intent to kill); *cf People v. Leonard*, 171 Ill. App. 3d 380, 385 (1988) (holding it was unnecessary to instruct the jury on mental state, despite the indictment charging that defendant knowingly committed the crime, because the crime charged was a general intent crime). Unlike in *Perry*, defense counsel did not indicate to the court that it needed the definition to argue mental state but simply requested that the instruction be given to the jury. The court worried that the instruction would cause further confusion, especially because the mental state in this case was only knowledge. Accordingly, the court had no reason to provide the jury with the recklessness definition but did have reason to believe such instruction may have constituted error or would hinder jury deliberations. Therefore, it did not abuse its discretion in refusing to instruct the jury on recklessness.

¶ 140 Finally, the court did not err in failing to instruct the jury on the lesser-included offense of reckless conduct. The standard for whether a court erred in refusing to give an instruction on a lesser-included offense is an abuse of discretion. *Perry*, 2011 IL App (1st) 081228, ¶ 27.

¶ 141 In *Perry*, the court held that the court did not abuse its discretion in refusing to instruct the jury on involuntary manslaughter, because the evidence supported the first-degree murder

instruction and not the involuntary manslaughter instruction. *Perry*, 2011 IL App (1st) 081228, ¶¶ 28-38. The *Perry* court rejected the argument that the recklessness instruction implied that there was evidence to support an involuntary manslaughter instruction. *Id.* ¶ 36-37. Rather, the trial court gave the instruction because defense counsel indicated that it would argue that, at best, defendant's conduct amounted to recklessness and therefore did not satisfy the mental state required for first-degree murder.

¶ 142 Defendant argues that similar to *Perry*, defense counsel argued that the State could not prove the necessary mental state of the offense charged, that is, knowledge. However, as in *Perry*, attacking the State's evidence of defendant's mental state does not entitle the defendant to an instruction of a lesser-included offense. *Id.* ¶ 37. *Perry* made an appropriate distinction between an argument that the State failed to prove the mental state for the offense charged and an argument that the evidence in the case entitled the defendant to an instruction on a lesser-included offense.

¶ 143 Nor does *Willett* aid defendant. Unlike in *Willett*, defense counsel did not request a lesser-included offense in the trial court. Rather, defendant raises the issue for the first time on appeal.

¶ 144 Under appropriate circumstances, a trial court may *sua sponte* instruct the jury on a lesser-included offense. *Garcia*, 188 Ill. 2d at 282. However, the supreme court explained that where the defense does not tender an instruction for a lesser-included offense, the possibility that this decision was the product of viable trial strategy militates against finding that the trial court should have instructed the jury *sua sponte* on the lesser-included offense. *Id.* at 280.

¶ 145 In *People v. Lewis*, 97 Ill. App. 3d 982, 987 (1981), the court explained that it would be error for the trial court to have refused a *tendered instruction* for the lesser-included offense of

voluntary manslaughter. In the absence of a tender, however, the court had no duty to instruct the jury *sua sponte* on voluntary manslaughter. *Id.* Accordingly, a trial court's discretion to instruct the jury *sua sponte* does not equate to a duty to instruct. See *Garcia*, 188 Ill.2d at 280-81.

¶ 146 We find the logic of *Garcia* and *Lewis* applicable and prudent. Defense counsel did not tender a lesser-included offense instruction. Even if the evidence supported an instruction on the lesser-included offense of reckless conduct—and we offer no opinion whether it did—we are not presented with authority that the trial court should have instructed the jury *sua sponte* on that offense. Rather, our supreme court cautions against such a holding. Therefore, the trial court did not abuse it discretion.

¶ 147 D. *Frye* Hearing

¶ 148 Defendant also argues that the trial court erred in failing to conduct a hearing pursuant to *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), on the admissibility of SBS or AHT evidence. She argues that an Illinois court has never held a *Frye* hearing on the theory of SBS or AHT prior to this case, and that the trial court's reliance on *Cook*, 2014 IL App (1st) 113079, was misplaced. In particular, defendant argues that current scientific research refutes the proposition that manually shaking or striking an infant are the only causes of the triad of symptoms—subdural hematoma, retinal hemorrhaging, and brain injury—used to identify abuse. Defendant continues that experts for both the State and the defense acknowledged advances in medical science, including favoring the term AHT over SBS, because SBS implied only one mechanism of injury.

¶ 149 Defendant relies on *People v. McKown*, 226 Ill. 2d 245 (2007), to argue that the court should have conducted a *Frye* hearing. In *McKown*, the defendant was charged with driving

under the influence. *McKown*, 226 Ill. 2d at 247. The supreme court held that the trial court erred in taking judicial notice of horizontal gaze nystagmus (HGN) evidence that was used to prove alcohol impairment. *Id.* at 272. The court remanded for a *Frye* hearing to determine whether an HGN test was generally accepted as a reliable indicator of alcohol impairment. *Id.* at 276. Defendant contends that in this case, the triad of symptoms used to establish abuse is similar to the HGN test in *McKown* and is not reliable.

¶ 150 Further, defendant argues that debate and change within the scientific community can alter the need for a *Frye* hearing on scientific topics. Defendant cautions that a refusal to hold a hearing in the face of new scientific research would foreclose any future challenges to accepted medical practice, regardless of the strength of the new research.

¶ 151 Last, defendant argues that the factual background of *Cook*, 2014 IL App (1st) 113079, rendered it inapplicable to the court's decision to deny the motion for a *Frye* hearing. In *Cook*, defendants argue that the court did not reach the issue of whether *Frye* hearings were required before admitting SBS evidence. Here, however, the defense directly challenged the use of the triad of symptoms to establish SBS with scientific literature.

¶ 152 The State responds as follows. The trial court correctly followed *Cook*, 2014 IL App (1st) 113079, and defendant's reading of *Cook* is inaccurate. In particular, the defendant in *Cook* did challenge the scientific principles underlying SBS. Nevertheless, the core issue in this case was not whether a diagnosis of SBS or AHT was accurate but whether K.S.'s injuries were accidental or knowingly caused by the defendant. The experts in this case testified from their medical training, experience, and expertise. The severity of K.S.'s injuries led the State's experts to rule out accidental injury. Because the State's experts reached their opinions by

applying their medical training and experience to their observations and knowledge of the facts of this case, no *Frye* hearing was required.

¶ 153 We agree with the State. We review *de novo* a trial court's decision whether to hold a *Frye* hearing. *In re Commitment of Simons*, 213 Ill. 2d 523, 531 (2004). In conducting our *de novo* review, we may consider not only the trial court record but also sources outside the record, including legal and scientific journals and opinions from other jurisdictions. *Id.*

¶ 154 Illinois follows the "general acceptance" test for determining the admissibility of scientific evidence at trial as first established in *Frye*, 293 F. at 1014.[2] *Id.* at 529. Illinois' adherence to *Frye* is codified in Rule 702 of the Illinois Rules of Evidence. See Ill. R. Evid. 702 cmt. (eff. Jan. 1, 2011) ("Rule 702 confirms that Illinois is a *Frye* state."). Our supreme court has rejected a "*Frye*-plus-reliability" test. *Donaldson v. Central Illinois Public Service Co.*, 199 Ill. 2d 63, 80 (2002) (abrogated on other grounds). In other words, a trial court is not required to perform a two-part inquiry into whether an expert's methodology is both general accepted and reliable. *Id.* at 81.

¶ 155 "General acceptance" focuses on the underlying methodology used to generate a conclusion, not the conclusion itself. *Id.* at 77. General acceptance does not require a universal acceptance of a methodology. *Id.* It does not even require that a methodology be accepted by a majority of experts. *In re Commitment of Simons*, 213 Ill. 2d at 530.

¶ 156 There are several limitations to whether the *Frye* standard of general acceptance applies. First, the evidence must be scientific. *Id.* Second, the methodology must be new or novel. *Id.* at

[2] The federal courts no longer use the *Frye* "general acceptance" standard but instead rely directly on the standard set forth in the Federal Rules of Evidence. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 586-89 (1993).

257; *In re Commitment of Simons*, 213 Ill. 2d at 530 ("Significantly, the *Frye* test applies only to 'new' or 'novel' scientific methodologies."). Moreover, Illinois courts have recognized a so-called "pure opinion" exception to *Frye*, whereby a *Frye* hearing is not required when experts rely on their training and experience rather than a particular test or new methodology to render their opinion. *In re Detention of New*, 2013 IL App (1st) 111556, ¶ 56.

¶ 157 Here, we consider significant the distinction between expert testimony employing a general scientific methodology or principle, which can be subject to a *Frye* hearing, and expert testimony based on personal experience and expertise, which is not subject to *Frye*. See *Noakes v. National R.R. Passenger Corp.*, 363 Ill. App. 3d 851, 857 (2006) (" 'Pure opinion testimony' is not subject to *Frye*."). The court in *Cook*, 2014 IL App (1st) 113079, drew this distinction. In *Cook*, the defendant was convicted of involuntary manslaughter of a four-month-old boy. *Id.* ¶¶ 3, 20. Prior to trial, the defendant moved to bar testimony of SBS or AHT, arguing that such evidence did not pass the *Frye* general acceptance test. *Id.* ¶ 3. The circuit court denied the motion, reasoning that the opinion testimony regarding the cause and manner of the death of the victim did not implicate *Frye*. *Id.* ¶ 5.

¶ 158 At trial, the State called two expert witnesses who testified that they examined the victim and observed a subdural hematoma and retinal hemorrhaging. *Id.* ¶¶ 6-8, 12-13. Both witnesses opined that the victim had experienced head trauma that led to his death. *Id.* One witness explicitly ruled out any other cause before reaching her opinion that the victim experienced AHT. *Id.* ¶ 13.

¶ 159 The appellate court affirmed the denial of the defendant's motion for a *Frye* hearing, holding that the expert opinion testimony did not implicate *Frye*. *Id.* ¶ 48. The *Cook* court reasoned that the experts did not use a test or new methodology to reach their conclusions but

instead relied upon their medical training and experience. *Id.* ¶ 50. The court distinguished *McKown*, where the defendant challenged a specific test as a reliable indicator of alcohol impairment. In *McKown*, the HGN test result was used to reach a definitive conclusion of alcohol impairment, whereas in *Cook*, the witnesses relied on personal experience and training to render their opinion on AHT. *Id.* ¶¶ 50-51.

¶ 160 The expert opinion testimony in our case is similar to that in *Cook* and distinguishable from *McKown*. Neither Davis nor Jones relied on a rigid test to reach a definite conclusion but instead relied on their experience and training to explain the implications of K.S.'s symptoms. They discussed individual symptoms and their causes before placing them in the overall context of the case. Neither concluded that K.S. was shaken. Based on their training and experience, they ruled out an accidental fall as the cause of his injuries.

¶ 161 In particular, Davis had extensive personal experience as a MERIT physician, which worked on up to 300 child abuse cases a year. He explained that K.S.'s low heart and respiratory rates were evidence of a concussive effect, rarely observed in children after a short fall. In his experience, bilateral retinal hemorrhaging, such as he observed in K.S., was a finding strongly associated with AHT and was not reported in conjunction with short falls. Finally, he explained that a rebleed of a subdural hematoma would not present with the neurological symptoms that K.S. presented with. In rendering his opinion, he reviewed K.S.'s medical record, CT scans, and personally examined him.

¶ 162 Likewise, Jones had extensive personal experience. She was a coroner's physician who had performed hundreds of autopsies on infants to determine the cause and manner of death. She testified that K.S. had a craniotomy to relieve intracranial pressure, and that the fluid removed was bloody. This indicated to her that his subdural hemorrhage was acute, rebutting the

defense's argument that the subdural hematoma was old. She further testified that infants did not typically incur brain damage from short falls, but K.S. had brain damage, manifested in his poor breathing, reduced heart rate, and high intracranial pressure.

¶ 163 She acknowledged that retinal hemorrhaging may result from multiple causes, including short falls. However, she explained that the retinal hemorrhaging that occurs after a fall is different than hemorrhaging associated with abuse. Traumatic, non-accidental injuries caused widespread retinal hemorrhaging. K.S. had widespread retinal hemorrhaging.

¶ 164 Therefore, we believe this case is an example of "pure opinion" testimony, where the State's experts based their opinions on personal training and experience. *Noakes*, 363 Ill. App. 3d at 857; see *Cook* 2014 IL App (1st) 113079, ¶ 51 (experts reached their opinions "after an application of their medical training to their observations"). Here, the expert testimony was detailed and nuanced. Unlike in *McKown*, where the result of the HGN test equated to alcohol impairment, the experts here did not simply equate a triad of symptoms with AHT. Rather, based on their observation and experience, they explained why K.S.'s symptoms ruled out an accidental cause. Like in *Cook*, the State's experts ruled out alternative explanations but did not offer the precise manner in which the trauma was afflicted.

¶ 165 We are not persuaded by defendant's concern that our refusal to hold a *Frye* hearing would foreclose challenges to accepted medical practice. Even if the testimony here were subject to *Frye*, a *Frye* hearing is not the only safeguard against debunked scientific theories. Most challenges to expert testimony will be on non-*Frye* grounds, including whether the expert testimony is generally admissible (*People v. Gilliam*, 172 Ill. 2d 484, 513 (1996)), whether the expert is qualified by knowledge, skill, and experience (*Snelson*, 204 Ill. 2d at 24), and whether the testimony improperly asserts conjecture (*People v. Ceja*, 204 Ill. 2d 332, 355 (2003)). As

occurred here, the opposing party may introduce its own expert witnesses, and the jury will consider the probative value of the testimony and the credibility of the witnesses.

¶ 166 Furthermore, defendant's argument that SBS lacks a proper empirical foundation goes toward the reliability of an SBS diagnosis, not its general acceptance. Our supreme court has specifically rejected the trial court's role in assessing the reliability of expert opinion testimony. *Donaldson*, 199 Ill. 2d at 78 ("*Frye* does not make the trial judge a 'gatekeeper' of all expert opinion testimony.").

¶ 167 Accordingly, the circuit court did not err in denying defendant's motion for a *Frye* hearing.

¶ 168 E. Right Against Self-Incrimination

¶ 169 Defendant's final argument is that the State violated her right against self-incrimination when it referenced her failure to discuss criminal allegations with the police and commented on her failure to testify at trial. Defendant argues as follows. Detective Hattan testified that he was able to speak with defendant's husband during his investigation but not with defendant. He visited her home twice but never met with her there. He scheduled interviews with several other witnesses at trial but never with defendant. Under Illinois law, the State cannot generally use the silence of a defendant to suggest her guilt. The detective's testimony did not serve any discernible purpose other than to highlight her pre-arrest silence.

¶ 170 Moreover, during the State's closing argument, counsel commented that there was no reasonable explanation for K.S.'s injuries and that more than a fall must have occurred. Later, counsel commented that "only two people that were there can give us any information or potentially were there to absorb the information are [K.S.], right? And the defendant." This

remark constituted a direct comment on defendant's right against self-incrimination because the purpose of the remark was to draw the jury's attention to her failure to testify.

¶ 171 Defendant compares her case to *People v. Wollenberg*, 37 Ill. 2d 480, 487-88 (1967), where the State highlighted that eight witnesses testified at trial but others did not. She also cites *People v. Tate*, 156 Ill. App. 3d 950, 953-54 (1987), where the State commented that the only person in the courtroom that could provide the defendant's mental state was the defendant himself, and *People v. Lyons*, 44 Ill. App. 3d 802, 804 (1976), where the court considered comments that the defendant was the only person who knew where the weapon in question was located. Finally, defendant cites *People v. Smith*, 402 Ill. App. 3d 538, 541-45 (2010), where the State improperly commented that the defense had failed to explain the defendant's mental state.

¶ 172 The State responds as follows. Its comments during closing arguments were not intended to direct attention to defendant's right against self-incrimination. Prosecutors are allowed wide latitude in closing argument, and reviewing courts must review closing arguments in their entirety. Here, the defense presented a reenactment video of defendant falling and dropping K.S. on the garage stairs. The State's closing argument challenged whether a fall actually occurred at all. Importantly, the State questioned the validity of testimony relating to the reenactment, not defendant's failure to testify. The reenactment video was, in effect, a way for defendant to tell her story without testifying and being subject to cross-examination. The State highlighted that what occurred in the reenactment video was not necessarily what occurred on February 24, 2011.

¶ 173 Moreover, the State's comment was made in rebuttal and was accurate and brief. The statement's purpose was to suggest that the State's explanation for K.S.'s injuries was more logical than relying on the reenactment video to determine what occurred.

¶ 174 We agree with the State. A criminal defendant has a fifth amendment right not to testify as a witness on his own behalf, and the prosecution may not directly or indirectly comment on a defendant's failure to testify. *People v. Bannister*, 232 Ill. 2d 52, 88 (2008); *Smith*, 402 Ill. App. 3d at 542. To determine whether the prosecution made an improper comment on a defendant's silence, we must determine whether the comment was intended or calculated to direct the jury's attention to the defendant's decision not to testify. *Bannister*, 232 Ill. 2d at 88. This determination is made within the context of the entire proceeding. *Id.*

¶ 175 Where the purpose of the State's comment is to demonstrate the absence of any evidentiary basis for defense counsel's argument rather than to call attention to the defendant's decision not to testify, such argument is permissible. *People v. Dixon*, 91 Ill. 2d 346, 350 (1982). Furthermore, a defendant cannot ordinarily claim error where the State's comments were in reply to or invited by defense counsel's arguments. *Id.* at 350-51.

¶ 176 We reject the argument that Hattan's testimony violated defendant's right against self-incrimination. Hattan was assigned to work on K.S.'s case, and in doing so he interviewed several witnesses and took pictures at defendant's residence. His background testimony did not highlight any silence on the part of defendant that would suggest her guilt. Importantly, he never testified that defendant declined to speak with him or provided any reason why they did not speak. He testified that he interviewed some people but not others in his investigation.

¶ 177 Further, we reject the argument that the State's comments during closing argument violated her right against self-incrimination. We must put counsel's remarks in context, not only within the entirety of the proceeding (*Bannister*, 232 Ill. 2d at 88) but also within the rebuttal closing argument itself (see *People v. Hayes*, 409 Ill. App. 3d 612, 625 (explaining that "brief and isolated" comments within the context of a lengthy closing argument were not improper)).

In his argument, counsel addressed defendant's account that she fell while carrying K.S. and concluded that her version did not make sense as follows:

> "She's holding on to the child in that carriage. That's her version. And she goes down, right? The child should stay in the seat, just like the water stays in the bucket. This doesn't make any sense, ladies and gentlemen.
>
> Initially, this would make sense on a short fall, right, if the child would fall off the high chair. *** But we know that didn't happen. *** We also know putting everything together, circumstantial evidence, that this, when she's walking and carrying little [K.S.], she didn't fall.
>
> How do we know that? We know that for a couple of reasons. *Circumstantially, again, because the only two people that were there that can give us any information or potentially were there to absorb information are [K.S.], right. And the defendant.*
>
> So how do we know?
>
> ***
>
> This is, ladies and gentlemen, *a circumstantial case, absolutely*." (Emphases added.)

¶ 178 Looking at these comments in context reveals that the purpose of counsel's statements was to highlight the importance of the State's circumstantial evidence, not to highlight defendant's decision not to testify. Therefore, the comments were not improper. See *Dixon*, 91 Ill. 2d at 350.

¶ 179 Defendant's case law is inapposite here. In *Wollenberg*, the defendant argued that the State improperly commented on his failure to testify at his trial for armed robbery. *Wollenberg*, 37 Ill. 2d at 487. There, the State argued:

> " 'Ladies and gentlemen, you will be returning soon to the jury room to deliberate upon your verdict. Remember there is only one defendant on trial, Anthony Wollenberg. There was [*sic*] only eight witnesses in his case. *** On behalf of the defendant, just two witnesses *** No one else testified. Let's get that straight.' " *Id.*

The supreme court rejected the State's argument that the prosecutor's comments were "merely referring to the strength and uncontradicted nature of the State's case." *Id.* at 488. Rather, the State's case was not uncontradicted because two witnesses testified on the defendant's behalf. *Id.* Combined with the "import of the language used," the court found the underlying purpose of the remarks was to call attention to the defendant's failure to testify and constituted plain error. *Id.* In contrast here, the State consistently relied on circumstantial evidence and sought to highlight its importance in closing argument. The State did not emphasize defendant's lack of testimony but instead emphasized that circumstantial evidence was necessary to establish what must have occurred. Here, the State wanted to "get straight" that "[t]his is, ladies and gentlemen, a circumstantial case, absolutely."

¶ 180 In *Lyons*, the State directly remarked that the defendant was the only man who knew where the gun used to kill the victim was located, but the jury heard no testimony at trial about the gun's location. *Lyons*, 44 Ill. App. 3d at 803-04. The court found that these comments concerned the defendant's failure to testify and further concerned a material fact in the defendant's case, that is, the ownership of the gun. *Id.* at 804. Accordingly, the court remanded for a new trial. *Id.* Here, counsel's brief comment did not infer that defendant's failure to testify deprived the jury of critical evidence. Rather, counsel argued that the State's circumstantial evidence was stronger evidence than defendant's reenactment video and proved that defendant committed a battery on K.S.

¶ 181 In *Tate*, the defendant did not call any witnesses. The defense's only evidence was the parties' stipulation to a line-up identification. *Tate*, 156 Ill. App. 3d at 952. The prosecution commented that the defense did not "want to help your job out at all. They chose not to help you out by presenting any evidence." *Id.* These comments were made in the State's initial closing argument, not in rebuttal. *Id.* at 953. The court held that these comments improperly called attention to the defendant's failure to testify. *Id.* at 953-54. *Tate* is readily distinguishable from our case because here, the defense called multiple witnesses; the comments were made in rebuttal; and the comments did not criticize the defense for failing to provide the jury more evidence.

¶ 182 Finally, in *Smith*, the defense again called no witnesses at trial for attempted murder of a peace officer. *Smith*, 402 Ill. App. 3d at 541. The prosecutor commented, " 'Have you heard any evidence that he didn't know they were the police?' " *Id.* He continued: " 'You didn't hear anything from that witness stand. You didn't hear any evidence that he didn't know they were the police. *** Similarly you didn't hear any evidence that he wasn't trying to kill someone.' " *Id.* The court held that these remarks violated the defendant's right to remain silent and also shifted the burden of proof to the defense. *Id.* at 544. In stark contrast, the comments here did not emphasize the failure of the defense to present evidence but instead emphasized that the State's circumstantial evidence controlled.

¶ 183 Accordingly, we reject defendant's argument that the State violated her right against self-incrimination.

¶ 184 III. CONCLUSION

¶ 185 The evidence was sufficient to prove defendant guilty of aggravated battery beyond a reasonable doubt. This case presented a battle of the experts, and it was the jury's prerogative to

assess the witnesses' credibility and resolve inconsistencies in the evidence. Defendant did not receive ineffective assistance of counsel. Defense counsel's loss of photographs of defendant's bruises did not prejudice her because they did not affect the probable outcome of trial.

¶ 186 Further, defendant was estopped from challenging the court's instruction to the jury on the definition of knowingly. The court did not err in refusing to tender a definition of recklessness and did not err in failing to instruct the jury *sua sponte* on the lesser-included offense of reckless conduct. The court also properly denied defendant's motion for a *Frye* hearing, because the testimony in this case was opinion testimony not subject to the *Frye* standard.

¶ 187 Finally, defendant's right against self-incrimination was not violated. The State's remarks in its closing argument did not have the intent of drawing the jury's attention to her decision not to testify.

¶ 188 Accordingly, we affirm the judgment of the Kendall County court.

¶ 189 Affirmed.