2019 IL App (2d) 170515-U
No. 2-17-0515
Order filed May 28, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. NICHOLAS E. GLUCKSMANN, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 11-CF-2074 Honorable John A. Barsanti, Judge, Presiding.

JUSTICE Spence delivered the judgment of the court.
Justices Hutchinson and Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: The evidence was sufficient to support defendant's conviction of aggravated battery of a child. In addition, the trial court did not err in denying defendant's motion for a *Frye* hearing, and defendant did not receive ineffective assistance of counsel. Therefore, we affirmed.

¶ 2 Defendant, Nicholas E. Glucksmann, directly appeals from his conviction following a bench trial of aggravated battery to his then three-month-old child, E.G. He contends that we should reverse for three reasons: the evidence was insufficient; the trial court erred in refusing a hearing pursuant to *Frye v. United States*, 293 F. 1013 (D.C. 1923), on shaken baby syndrome

(SBS) and abusive head trauma (AHT); and he received ineffective assistance of counsel. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was indicted on January 25, 2012, on three counts of battery: aggravated battery of a child (720 ILCS 5/12-4.3(a) (West 2010)) (class X felony); aggravated battery of a child (720 ILCS 5/12-4.3(a-5)) (West 2010)) (class 3 felony); and aggravated domestic battery (720 ILCS 5/12-3.3) (West 2010)) (class 2 felony). For all three counts, defendant allegedly injured E.G. on or around April 16, 2011, by causing trauma to his head.

¶ 5 On November 1, 2013, defendant moved pursuant to *Frye*, 293 F. 1013, to bar evidence of the theory of SBS on grounds that it failed to pass the *Frye* general acceptance test. The State moved to strike defendant's motion, arguing that their witnesses' opinion testimonies were outside of the scope of *Frye*. The trial court initially denied the State's motion to strike and granted defendant's motion to bar certain testimony. The court explained that, absent a *Frye* hearing, it would bar expert testimony stating that the victim was suffering from SBS, AHT, or physical child abuse. However, the State could have experts opine based on their experience as to how the victim's injuries were caused and whether the injuries were accidental.

¶ 6 The State moved to reconsider the trial court's ruling, and on April 24, 2014, the court again denied its motion. The court explained that, absent further testimony or evidence presented by the State, it was barring opinion testimony that characterized the victim's injuries as the result of SBS, AHT, or physical child abuse. On the other hand, the court would allow a witness to opine based on their observations, training, and experience. Examples of permissible testimony would include opinions that his injuries were caused by blunt trauma or rapid movement of the infant's head. The court wanted to resolve any *Frye* issues before trial, including whether the

State's witnesses' opinions would be based "totally on [the] expert's opinion, training and experience" and therefore not subject to a *Frye* hearing.

¶ 7 In response to the trial court's ruling, the State elicited testimony at a September 2014 pretrial hearing from Dr. Suzanne Dakil. Dakil was a child abuse pediatrician at Advocate Children's Hospital, and she testified as follows. At the time, she was the director of Advocate's CARE team, which stood for Child Abuse Referral and Evaluation. During her professional experience she had treated up to 1,000 children; about 40% of the children she had treated had some variation of head trauma. She had previously testified for both the defense and the prosecution as an expert. The court accepted Dakil as an expert in the field of pediatrics and child abuse pediatrics.

¶ 8 As part of her medical practice, Dakil performed differential diagnoses. She described a differential diagnosis as a process similar to "brainstorming." During a differential diagnosis, she would come up with a variety of options that may explain a patient's symptoms, illness, or injury. For example, a differential diagnosis of a three-month old child presenting with vomiting may yield around 50 potential causes. Then, she would work through which causes were more or less likely until reaching a final diagnosis. She used differential diagnoses to diagnose issues from cancer to child abuse. She ruled out possible diagnoses based on her training and experience.

¶ 9 In order to diagnose a case of AHT, she followed the American Academy of Pediatrics' guidelines, which recommended "complete evaluation of the patient, a physical exam when possible, imaging, labs, a complete review of the chart and the patient, and understanding of the history." She also explained that the preferred term was AHT and not SBS, because it was not possible to determine whether the mechanism of injury necessarily included shaking. A head

trauma could be caused by shaking; by shaking and impact; or by impact only. When evaluating possible AHT, she would examine a child's CT or MRI scans, skeletal survey findings, eye findings, laboratory results, and the child's medical history. In those records, she specifically looked for skull fractures, subarachnoid hemorrhage, contusion of the brain, shearing injury, or swelling of the brain.

¶ 10 Dakil had not personally examined E.G. while he was a patient at Advocate Children's Hospital, which at the time was called Lutheran General Children's Hospital, but she reviewed E.G.'s records. The records she reviewed included medical records of his prior medical history, medical records from his treating physicians at Advocate, police records, and Department of Children and Family Services (DCFS) records.

¶ 11 The State then asked Dakil whether she had formed a medical opinion on E.G.'s case and, if so, what that opinion was based on. She had formed an opinion, and her opinion was based on her review of E.G.'s records and history, as well as her training and experience. When asked on cross-examination how she would determine whether someone was intentionally abused, Dakil answered that she did not "appropriate intent to that term. Abuse is the outcome."

¶ 12 The trial court also questioned Dakil. The court first revisited her remark that she did not infer intent when she determined an injury was "abusive." Dakil answered that as a physician, her diagnoses were not attempting to impart intent. Rather, she was diagnosing an end result where an injury was inflicted on a child outside of what a normal caretaker would inflict. When she found an injury to be abusive, that meant the injury was non-accidental. A non-accidental injury is one where a person inflicted it on the child, whereas an accidental injury was not inflicted by anyone. An AHT diagnosis did not mean that anybody intended to harm or abuse the child, only that the end result of somebody's actions was head trauma. "The person made a

choice to do something that caused injury. Whether their intent was to harm or their intent was to scare or their intent was to make the baby stop crying, I don't know."

¶ 13 Following counsel's arguments on the State's motion to reconsider, the court denied defendant's request for a *Frye* hearing. The court concluded that, based on Dakil's testimony, the State's testimony to be offered at trial was not subject to *Frye*. Rather, the State's witnesses' opinions would be based on training and experience. The court then stated that it would not allow any doctor to testify to a diagnosis of AHT at trial, although it would allow a doctor to testify that something was consistent with AHT.

¶ 14 Defendant waived his right to a jury trial, and the case proceeded to a bench trial.

¶ 15 A. Bench Trial

¶ 16 Trial began on April 27, 2015, and it continued over five days. The State called Gary LaBarbera, a patrol officer for the Batavia Police Department, and he testified about his work on E.G.'s child abuse investigation. He observed E.G. at Mercy Hospital in Aurora on April 16, 2011, and he noticed that E.G. was wearing a neck brace and had a bruise and slight puffiness on the left side of his face. He also spoke with defendant. Defendant told him that he was upstairs with E.G. on April 16, and he placed E.G. on the bed. He said that while getting food ready for E.G., he tripped on the comforter. Shortly thereafter he realized that E.G. had fallen off the bed. He picked up E.G. and went downstairs to tell his wife that E.G. fell. He indicated that E.G. had not lost consciousness in the car ride to the hospital but had vomited. LaBarbera then had defendant make a written statement, and that statement was admitted into evidence.

¶ 17 Mark Kowalewski was a patrol officer for the Batavia Police Department, and he also spoke with defendant. Kowalewski testified that defendant told him about a separate, prior

incident where he brought E.G. into bed with him for a nap and, while sleeping, elbowed E.G. in the head.

¶ 18 Following the police officers' testimony, the State called Dr. David Hulsey. He was an emergency medicine physician, and he was accepted as an expert in emergency and internal medicine. He was working at the Provena Mercy emergency room on April 16, 2011, when E.G. was admitted around 9 p.m. He observed that E.G. was crying and that he had a bulging fontanelle. The fontanelle was the soft spot on the skull of an infant where the bones of the skull come together and have not yet fused. The fontanelle is usually flat, but E.G.'s was "raised and tense." This indicated increased intracranial pressure and fluid or swelling around the brain. Hulsey noted bilateral retinal hemorrhages, that is, blood in the back of both of the eyeballs. Retinal hemorrhages could indicate trauma. E.G. also had bruising of his face both above and below the left eye. The nurses noted that he had dried blood in his nostrils. He ordered blood work, X-rays, and a CT scan.[1]

¶ 19 Hulsey received a call from the radiologist that E.G.'s CT scan showed several areas of bleeding around the brain. There were areas of both acute and subacute bleeding; that is, both fresh and older bleeding. He then transferred E.G. via air helicopter ambulance to another hospital that had pediatric neurosurgeons and specialists that were not available at the Aurora hospital. At the time he believed E.G.'s situation was life threatening.

¶ 20 Hulsey was told that E.G. had rolled off the bed and fell three-and-a-half to four feet onto the hardwood floor. In his experience, E.G.'s injuries were not consistent with a fall from that

[1] Some portions of the record use the term CAT scan, and others use CT scan. We note that these terms are interchangeable and represent the same medical examination. For consistency, we use the term CT scan.

height. He had "never, in the years [he had] been doing this, seen an infant come in with retinal hemorrhages and multiple degrees of intracranial hemorrhages in healing states from a fall." He had treated over a thousand children with a history of a fall.

¶ 21 Robert Bryant was a DCFS investigator, and he testified about his work on E.G.'s case. On April 16, 2011, DCFS received a hotline call regarding a three-month-old child, and he was assigned to investigate possible neglect. Around 10 days later, he spoke at the Elgin DCFS office with defendant. Defendant told him what occurred on April 16 as follows. That evening, E.G. was asleep in the basinet in the upstairs bedroom, and E.G.'s mother was downstairs. E.G. woke up, and defendant placed him on the bed, between 1½ and 2 feet from the edge. He went to the master bedroom bathroom to see if there was a bottle, and his foot caught on the bed's comforter. This caused E.G. to fall from the bed onto the hardwood floor. He did not know this happened until he heard a thump. He found E.G. face first on the floor; E.G. had swelling on the left side of his face, and his eyes were closed and rolling back. E.G. was pale, and defendant thought E.G. had passed out. He then held E.G. in his arms and shook him. Defendant used a doll in the interview to demonstrate to Bryant how he shook E.G. in an up-and-down motion. Defendant returned to his account, stating that he took E.G. downstairs, spoke to his mother, and then took him to the hospital. E.G. rode to the hospital in his car seat.

¶ 22 Defendant also told Bryant about an incident approximately three weeks prior to April 16, 2011, where, while sleeping next to E.G., he elbowed E.G. in the head. E.G. "whined" a bit afterward but did not cry.

¶ 23 Tracy Lombardo was a medical social worker at Lutheran General Hospital, and she testified to her conversation with defendant. She spoke with defendant several days after April 16, 2011. He said his foot had gotten caught in the comforter, which caused E.G. to fall off the

bed. Defendant mentioned that the comforter that he tripped on was long and silky and slippery. He told her the fall was approximately 2½ feet and that E.G. landed face first. At first E.G. was crying, and then he passed out. After E.G. passed out, he shook him. He explained that when he was a lifeguard as a teenager, he had been instructed to shake a person when they were unconscious. Nobody else was in the room when the incident occurred.

¶ 24 Dr. Bernard Schupbach was a radiologist, and the court accepted him as an expert in the fields of radiology and neuroradiology without objection. As a radiologist, he interpreted various diagnostic images, including CT scans. He described a CT scan as a form of imaging that uses beams of ionizing radiation to create an image based on difference in the density of the material scanned.

¶ 25 Schupbach testified that a hemorrhage is the leakage of blood outside the normal blood vessels. There were several types of intracranial hemorrhages, including hemorrhages in the epidural space, the subdural space, and the subarachnoid space. Hemorrhages could be acute—bleeds within the last 7 days—or chronic—which is a bleed that was probably older than 21 days. He explained that hemorrhages were also referred to as hematomas.

¶ 26 Schupbach interpreted E.G.'s April 16, 2011, CT scan of his head. At the time he interpreted the CT scan, he did not have E.G.'s history of injury. He made the following findings based on the CT scan: an acute epidural hematoma over the left frontal region; an acute parietal subdural hematoma on the left side; a chronic subdural hematoma over the left temporal region, with a superimposed acute hemorrhage; some evidence of a contusion in the anterior right temporal lobe; and an acute hemorrhage over the left tentorium at the back of the brain. In summary, E.G. had a contusion of the brain, which meant a brain bruise; and he had bleeding around the brain. The hemorrhages were on both sides of the brain, in both the front and back.

The multiple areas of intracranial hemorrhage raised his concern of intentional trauma or nonaccidental head injury. He also worried that E.G.'s condition was life threatening because any intracranial hemorrhage was possibly life threatening.

¶ 27 On cross-examination, Schupbach answered that E.G. did not receive an MRI scan. Although both a CT scan and an MRI scan could be helpful to diagnose an infant's head trauma, a CT scan was the quicker screening tool for an acute setting in the emergency room. At the time, he did not believe an MRI was necessary. He was not aware of E.G.'s prenatal conditions when reviewing the CT scan, and he could not say whether trauma was intentional based only on a review of the scan. He agreed that an old bleed "could re-bleed as a new bleed"; "bleeding can occur any where [*sic*] at any time. So it could occur into any area of the brain, including an old hemorrhage."

¶ 28 Genevieve Grimes, E.G.'s mother, testified as follows. Defendant was E.G.'s biological father, and E.G. was born on January 11, 2011. On April 16, 2011, E.G. went to sleep around 8:30 p.m. in the bassinet in the master bedroom. Genevieve initially fell asleep in the bed next to E.G., but sometime after he fell asleep, she went downstairs. Defendant was in the bed next to the bassinet when she left, and nobody else was at home. While downstairs, she heard E.G. cry very loudly. She started walking toward the stairs when she saw defendant bringing E.G. downstairs. E.G. looked "purple-ish," but she did not notice that his face had any swelling. Defendant said that he fell, and she said they immediately needed to go to the hospital. They took E.G. to Aurora Mercy Hospital, and E.G. was later airlifted to Lutheran General.

¶ 29 When asked about defendant's demeanor that evening before E.G. went to sleep, she answered that he seemed tired and frustrated. That is, he was angered easily by little things. E.G.

had not lost consciousness before, and he had not been to a hospital or urgent care since his birth. She and defendant were his only caretakers. She never hurt or shook E.G.

¶ 30 Steve Grimes was Genevieve's father and E.G.'s grandfather, and he had been taking care of E.G. since April 22, 2011. He testified that he agreed to take care of E.G. after his hospitalization. On DCFS instruction, he took E.G. to see Dr. Michael Shapiro, an eye specialist. He also took E.G. to Lurie Children's Hospital to see a psychologist and a pediatrician. He testified that E.G. was not on any medications for diseases or illnesses; he was not seeing a hematologist; and he did not have a blood disorder.

¶ 31 Dr. Gina Song was E.G.'s pediatrician, and the court accepted her as an expert in pediatrics. She testified as follows. She first saw E.G. on January 25, 2011, two weeks after his birth. At that time, he had no retinal hemorrhages or intracranial hemorrhages. E.G. had been hospitalized when he was born for several reasons: for transient tachypnea; to rule out sepsis; and for withdrawal monitoring. She explained that tachypnea was respiratory distress, sepsis was a blood infection, and the withdrawal monitoring was for exposure to narcotics. When E.G. was discharged after 14 days, all his symptoms were resolved. E.G. had a wellness checkup in March 2011, and he was developmentally normal: He was healthy.

¶ 32 She next saw E.G. in May 2011. He was developmentally normal and he "looked well." At that time, he was unable to roll from front to back. She had no concern that E.G. had any genetic condition. She also never treated him for any metabolic condition, clotting disorder, autoimmune condition, or nutritional deficiency. In her practice, Song had seen children who had fallen off beds and changing tables. None of those children presented with retinal hemorrhages or intracranial hemorrhages.

¶ 33 Dr. Ebele Chinwuba was a pediatric emergency medicine physician, and she testified as follows. She was working at Lutheran General on April 17, 2011, and E.G. came into the emergency department as a transfer trauma patient. As the attending physican, she supervised E.G.'s examination and assessed his injuries. She received E.G.'s history from the transferring hospital, and she also reviewed his CT scan and report. E.G. had head trauma and a facial contusion.

¶ 34 In her opinion, E.G.'s injuries were not consistent with his reported history. She saw a lot of children that rolled off a bed, but absent some underlying medical problem or a fall from a bunk bed, she had not seen E.G.'s type of head trauma or head bleed. She agreed on cross-examination that it was "possible" for a short fall to cause re-bleeding from an old bleeding.

¶ 35 Dr. Suresh Havalad was a pediatric intensive care specialist, and he testified as follows. He was working at Lutheran General on April 17, 2011, in the pediatric intensive care unit, where he treated E.G. He read E.G.'s CT scan report, and he physically examined E.G. He also spoke with defendant, who told him that E.G. had fallen off the bed. After speaking with defendant, Havalad contacted DCFS. DCFS asked what E.G.'s most likely cause of injury was, and he responded that his injury was most likely a nonaccidental or intentional injury. When asked whether E.G.'s injury was consistent with AHT, he responded yes, he was concerned about AHT.

¶ 36 On cross-examination, he agreed that a fall could cause an old bleed to re-bleed. He did not know what caused the old bleeds on E.G.'s CT scan. It was his opinion, however, that the new bleeding on the CT scan was not consistent with a fall from a bed triggering an old bleed. Based on his experience and reading of medical literature, most retinal hemorrhages were caused

by violently shaking a baby. Such shaking could increase "interval pressure and pressure on the vessels in the back of the optic nerve" resulting in bleeding.

¶ 37 Dr. Dana Kolton was a pediatric ophthalmologist, and the court accepted her as an expert in both ophthalmology and pediatric ophthalmology. She was asked to consult on E.G.'s case by Lutheran General, and she personally examined E.G. She testified that he had retinal hemorrhages in both eyes. A retinal hemorrhage meant bleeding in the layer of the eye called the retina. His hemorrhages were "fairly defused," specifically in the posterior poles and the periphery of the eyes. The posterior pole was the central area of the eye, and the periphery was the outside areas beyond that. In her opinion, E.G.'s retinal hemorrhages were unlikely to have been caused by a fall.

¶ 38 Dr. Michael Shapiro was an ophthalmologist, and the court accepted him as an expert in ophthalmology with specialization in retinas. He testified that he examined E.G.'s eyes in the hospital in April 2011, and E.G. had retinal hemorrhages in both eyes. He thought E.G.'s retinal hemorrhages were consistent with SBS. He continued to see E.G. after April 2011, and he last saw him a week before trial. E.G. did not have retinal hemorrhages the last time he saw him.

¶ 39 In addition to retinal hemorrhages, Shapiro described other eye conditions, specifically retinoschisis and retinal folds. Retinoschisis was a splitting of the retina; and retinal folds were large wrinkles in the retina, "sort of like a fold in the wallpaper." While trauma could possibly cause either condition, trauma rarely caused retinoschisis or retinal folds in his experience. He did not see either of those conditions in E.G.'s eyes, and in the absence of these conditions, it remained his assessment that E.G.'s retinal hemorrhages were consistent with SBS.

¶ 40 Dr. Suzanne Dakil, who had first testified at the pre-trial hearing, testified again at trial, and the court accepted her as an expert in pediatrics and child abuse pediatrics. She reviewed

E.G.'s case and rendered an opinion. Her review consisted of police records, DCFS records, audio recordings from the police, and all of E.G.'s medical records, including his birth records, CT scans, and past medical history. Based on her review, E.G. had subdural hemorrhages around his brain on both the left and right side; retinal hemorrhages in both eyes; a contusion on the right side of the brain; and a bruise on his left cheek.

¶ 41 In her opinion, the explanation for E.G.'s injuries was not consistent with his injuries. She did not believe that a short fall off the bed would produce bilateral retinal hemorrhages or his bruise to the cheek. E.G. had a "linear bruise" pattern, and landing on a flat surface was unlikely to cause such a pattern. Rather, a sharp impact force was more likely the cause of the bruise. She also did not believe that gentle shaking could have caused E.G.'s injuries; his injuries would have required violent shaking.

¶ 42 With respect to a potential re-bleed of a chronic hematoma, Dakil explained that the two sides of the brain are "relatively separate." Therefore, even if a minor trauma could cause a re-bleed of E.G.'s chronic hematoma on one side of the brain, it did not explain why E.G. had bleeding on both sides of his brain.

¶ 43 She further did not believe that E.G.'s injuries were explained by his birth history. In her opinion, neither his mother's use of Methadone[2] nor the use of vacuum extraction for his delivery accounted for his injuries.

¶ 44 Dakil concluded that E.G.'s injuries were consistent with AHT and child physical abuse. AHT was a diagnostic term for inflicted injuries to a child's head; it not only encompassed SBS

[2] Dakil specifically testified that Methadone in and of itself should be relatively safe. There were no known major deformities or issues associated with it, and doctors continued to prescribe it to pregnant women.

but also encompassed other, non-shaking mechanisms of injury. E.G. did not have any disease or illness in his records that would explain his constellation of injuries.

¶ 45 After the court denied defendant's motion for a directed finding, defendant called Dr. Shaku Teas, who was a pathologist with a subspecialty in forensic pathology. The court found that Teas was an expert in the fields of anatomical, clinical, and forensic pathology. Teas reviewed E.G.'s case, which included review of his medical records since birth, police reports, DCFS reports, and the CT scan. She also consulted with two radiologists.

¶ 46 Teas testified that E.G. did not have any fractures, such as a rib fracture, and that his cervical spine assessment was normal. She disagreed that E.G.'s CT scan showed a brain contusion. Two important factors in Teas's review of E.G.'s injuries were his chronic subdural hemorrhage and his mother's use of Methadone during pregnancy. She was also concerned that E.G. suffered from hypoxia during birth.

¶ 47 Teas also discussed bleeding disorders, testifying that doctors did not rule out a thrombosis diagnosis. Thrombosis was a clotting disorder where people had a greater-than-normal propensity to clot. She explained that clotting was dense and therefore would show as white on a CT scan, similar to the appearance of an acute bleed. She believed that E.G.'s chronic bleeds on his CT scan were the result of his birthing process. In her opinion, E.G.'s CT scan did not show massive hemorrhaging but that the hemorrhages resolved quickly. She did not opine whether E.G. had a bleeding disorder.

¶ 48 Teas opined that a fall from a short distance could have caused E.G.'s type of brain injury. She cited literature on biomechanical engineering and her own experience. In her opinion, E.G.'s fall also explained his bruise. E.G.'s bruising was to his forehead and cheekbone, which were areas of prominence on the face.

¶ 49 With respect to retinal hemorrhages, Teas acknowledged there were theories as to their causation, such as shaking, but she testified that those theories were not proven. She testified that E.G.'s retinal hemorrhages were caused by increased intracranial pressure, but she had no opinion on why his intracranial pressure increased.

¶ 50 On cross-examination, Teas stated that she did not consult with a hematologist, ophthalmologist, or a child abuse pediatrician in forming her opinions. When asked why she didn't consult with a child abuse pediatrician, she answered that she "[knew] more about injury mechanisms than any of the child abuse pediatricians that [she had] seen or heard of." She did not consult with an ophthalmologist because "retinal hemorrhages have no meaning to draw conclusions about mechanisms of injury." In her opinion, retinoschisis or retinal folds would have been more diagnostic of abuse than retinal hemorrhages.

¶ 51 The State then called Dr. Bradley Strimling as a rebuttal witness. He was a neuroradiologist, and the court found that he was an expert in the fields of radiology and neuroradiology. He interpreted E.G.'s CT scans, and he found hemorrhages of various ages on both the left and right hemisphere of the brain. In the temporal lobe on the right side of the brain, he also found a brain contusion. His review raised concerns that E.G.'s trauma was nonaccidental. In particular, the new bleeding on the right side of the brain could not be explained by a re-bleed on the left side of the brain. Strimling placed importance on multiple sites of hemorrhage; it did not matter whether the hemorrhages were epidural, subdural, or subarachnoid because all hemorrhages spoke to the same level of injury. In his opinion, the contusion he identified on the CT scan was not caused by thrombosis.

¶ 52 B. Trial Court's Findings and Verdict

¶ 53 The trial court announced its decision on July 8, 2015. There was no dispute that defendant was over 18 years old at the time of the alleged offenses and that E.G. was a family or household member under 13 years old.

¶ 54 The court found that E.G. had suffered great bodily harm. It explained that the State's witnesses testified to several injuries: three areas of acute intracranial hemorrhage; retinal hemorrhaging in both eyes; and bruising on E.G.'s face. They testified that these injuries were not consistent with a fall from a bed onto a hardwood floor, nor could retinal hemorrhages be caused by gentle shaking. Rather, they testified that E.G.'s injuries were not accidental but intentional based on their nature, number, and location. The court also considered Teas's alternative explanations for E.G.'s injuries, including how the birthing process may have caused subdural hematomas, that retinal hemorrhaging was caused by sudden intracranial pressure, and that abnormalities on the CT scans could be caused by thrombosis.

¶ 55 The court found the State's witnesses' testimonies to be credible, consistent with the facts of the case, and "generally corroborative of each other." On the other hand, it found Teas's testimony to be speculative, inconsistent with other facts in the case, and not credible. The court found that E.G. did in fact suffer three areas of acute hemorrhaging and also suffered retinal hemorrhaging. The court drew "no conclusions from the experts' opinions that the injuries were consistent with shaken baby syndrome or abusive head trauma."

¶ 56 Next, the court found that defendant created the situation that lead to E.G.'s injuries. He was the only person present with E.G. when he was injured. He admitted to causing injury to E.G. in that he caused E.G. to fall off the bed. He also admitted that he shook E.G. Defendant's version of events, however, was not consistent with the State's credible medical testimony. Even

though defendant was generally consistent in his statements regarding the events of April 16, 2011, the court did not believe his version of events would have caused E.G.'s injuries.

¶ 57 Finally, the court found that defendant knowingly caused the situation that lead to E.G.'s injuries. Its finding was based on the circumstantial evidence in the case. The court specifically found that defendant shook E.G., that his version of the shaking was not credible and contradicted by E.G.'s injuries, and the nature and extent of E.G.'s injuries was indicative of intentional trauma. The court drew its conclusion of intentional trauma from "the injuries caused, actually the totality of the circumstances of the evidence presented in this case."

¶ 58 Accordingly, the court found defendant guilty on all three counts.

¶ 59 C. Post-Trial Proceedings

¶ 60 Defendant, represented by new counsel, moved for judgment notwithstanding the verdict or, in the alternative, for a new trial. On April 19, 2016, he filed an amended motion for the same. He argued that the State failed to prove that E.G. suffered great bodily harm; that it failed to prove he was consciously aware that his conduct would cause great bodily harm; that the State's witnesses were impermissibly allowed to testify that E.G. was abused; and that he received ineffective assistance of counsel.

¶ 61 The court heard defendant's motion beginning on May 18, 2016. Defendant called Teas again, and she testified in pertinent part as follows. In reviewing E.G.'s case, she consulted with two radiologists, Drs. Barnes and Mack. She concluded that E.G. suffered "no brain injuries." She continued, however, that "there was a subdural [hemorrhage], both a more recent and a chronic subdural." In her opinion, a chronic subdural hemorrhage could re-bleed, sometimes spontaneously and sometimes with minor injury.

¶ 62 Teas then addressed E.G.' bilateral retinal hemorrhages. In her opinion, retinal hemorrhages were not an injury but a "diagnosis." Retinal hemorrhages were "secondary to rather than being an injury *per se*." She also disagreed with the State's experts that E.G. had a brain contusion. Rather than a contusion, she believed the CT scan showed a clotted vein. She acknowledged that E.G. had some increased intracranial pressure, which caused his retinal hemorrhages, but he had no permanent injuries.

¶ 63 Teas believed that E.G.'s injuries were consistent with defendant's account. She explained that E.G.'s chronic subdural hematoma made him more susceptible to sustaining injuries from a fall. In her opinion, E.G.'s chronic subdural hematomas were the result of his particular birthing process, including that during pregnancy, his mother had used opioids. This made him more susceptible to hypoxia (*i.e.*, lack of oxygen) during birth. In addition, E.G. was delivered with the aid of vacuum extraction.

¶ 64 The hearing continued to November 21, 2016, where defendant called Dr. Julie Mack. She was a diagnostic radiologist, and she reviewed E.G.'s CT scans from April 16 and 17, 2011. She testified that there were portions of E.G.'s scans with both newer and older hemorrhages. In her opinion, birth trauma could be responsible for all the hemorrhages. Re-bleeds around the brain could occur spontaneously from anything that increased pressure in the capillary beds, including trauma. She believed E.G. had a pre-existing condition or "alteration of the anatomy" in the brain. In particular, he had a separation of the dura and subarachnoid anatomy around the brain that was susceptible to re-bleeds without trauma or with minor trauma. Trauma from birth was, in her opinion, a likely cause of E.G.'s pre-existing condition.

¶ 65 She noted that E.G.'s second scan from April 17, 2011, showed that the bleeding had "essentially gone away." In her opinion, he did not have a significant injury with long-term

consequences. It was also her opinion that his injuries did not require violent or intentional trauma; and his injuries were not consistent with injury from shaking.

¶ 66 Finally, the court accepted a written report from Dr. Patrick Barnes. He had provided the report to Teas in September 2013. Barnes was a radiologist who reviewed E.G.'s CT scans, and in his report, he made the following findings and conclusions. Some of the hemorrhages on the scans "may be considered by some observers to represent acute-subacute traumatic injury (e.g. contusion or head injury, or subdural or subarachnoid hemorrhage)." In his opinion, however, "such imaging findings can represent venous thromboses with perivenous hemorrhage or hemorrhagic infarctions (i.e. "strokes")." He believed different scanning methods with an MRI would provide a more reliable diagnosis than the CT scans. He noted that medical imaging cannot often distinguish between accidental and non-accidental injury, and he did not see anything on the scans that was specific to or characteristic of non-accidental injury. E.G.'s CT scans did not show any swelling or definitive "brain injury pattern," and his neurodevelopmental outcome was favorable.

¶ 67 The court denied defendant's motion on February 10, 2017. The court continued to find that E.G. suffered great bodily harm based on the testimony from the State's witnesses, including acute intracranial hemorrhages and retinal hemorrhages. The court also continued to find that defendant acted with the requisite intent, inferred from the nature of E.G.'s injuries. The court acknowledged that defendant presented more extensive testimony during the post-trial hearing than at trial, but the post-trial testimony established the same points as the testimony elicited at trial. Finally, the court did not find that State witnesses improperly testified that E.G. was abused or that defendant's trial counsel was ineffective.

¶ 68 The court sentenced defendant to seven years' imprisonment on count one for aggravated battery of a child. Counts two and three merged into count one.

¶ 69 Defendant timely appealed.

¶ 70 II. ANALYSIS

¶ 71 Defendant presents three arguments on appeal: (1) the State failed to prove beyond a reasonable doubt that he acted with intent or caused great bodily harm to E.G.; (2) the trial court erred in denying his request for *Frye* hearing; and (3) he received the ineffective assistance of counsel. We address each in turn.

¶ 72 A. Sufficiency of the Evidence

¶ 73 Defendant argues that the State failed to meet its burden of proof that he intentionally harmed E.G. and that E.G. suffered great bodily harm. Defendant first argues that the State's witnesses all relied on Schupbach's flawed diagnosis of a contusion based on his interpretation of E.G.'s initial CT scan. Defendant contends that because the State's witnesses relied on a flawed diagnosis, their opinions lacked foundation. In particular, he argues that Dakil was the State's lone child abuse expert, but she was not a radiologist and did not personally interpret E.G.'s CT scan. Defendant argues that her conclusion that E.G.'s injuries were consistent with AHT "relied entirely on the radiologist's report." Defendant continues that Schupbach "never actually made a definitive diagnosis of contusion." Instead, he testified that there was some evidence of a contusion in the anterior right temporal lobe. Moreover, doctors failed to perform an MRI on E.G.

¶ 74 Defendant further contends that E.G. did not incur a brain injury. He argues that E.G.'s intracranial bleeding had stopped by the time of his second CT scan on April 17, 2011, which occurred only eight hours after the first; and E.G. never needed surgical intervention. Defendant

cites Teas's testimony that E.G. had no swelling of the brain, and therefore he had no brain trauma. Teas testified that E.G. only had "minor transient injuries to the intracranial." Mack also testified at the post-trial hearing that there was no evidence of brain swelling and that the blood detected near the temporal area of the brain was actually outside of the brain. Defendant argues that E.G.'s bleeding was also consistent with a re-bleed of a preexisting injury triggered by a fall from the bed.

¶ 75 Defendant also asserts that a simple bruise or wound without complications is insufficient to prove the bodily harm was great. See *People v. J.A.*, 336 Ill. App. 3d 814, 816-17 (2003) (failing to find great bodily harm where stab wound did not require sutures). Defendant argues E.G. did not show immediate effects of a brain injury, in that he was awake and crying at the emergency department a half-hour after his injury and remained conscious thereafter.

¶ 76 Defendant next argues that evidence of E.G.'s retinal hemorrhages did not indicate intentional abuse. First, he argues that testimony from the State's two ophthalmologist witnesses, Shapiro and Kolton, lacked foundation for their opinions because they did not cite scholarly authorities or medical studies to support that retinal hemorrhages warrant an SBS diagnosis. Moreover, defendant argues that the State's witnesses conceded that E.G. did not have retinoschisis, which is a splitting of the retina, nor did he have retinal folds, which are large wrinkles in the retina. Teas testified that under the theory that violent shaking of a baby caused retinal hemorrhage, one would expect to see further retinal injuries of restinoschisis and retinal folds.

¶ 77 The State responds as follows by addressing the evidence related to the elements of the offenses charged. Regarding proof of great bodily harm, the court heard testimony from ophthalmologists that E.G.'s retinal hemorrhages could not be caused by gentle shaking and that

his injuries were not consistent with a fall off a bed onto a hardwood floor. Dakil testified that E.G.'s injuries were consistent with AHT and child physical abuse, which could include shaking, shaking plus impact, or impact only. She continued that any shaking would have had to have been violent. The court also considered Teas's testimony that E.G.'s birthing process could be responsible for his subdural hemorrhages, that vitamin deficiencies could explain the cranial bleeding, and that abnormalities on E.G.'s CT scan could be explained by thrombosis. However, the court rejected her alternative theories of injury, finding her testimony not credible. In contrast, the court found the State's witnesses to be credible and generally consistent. Moreover, the State argues that acute hemorrhages on both sides of the brain plus retinal hemorrhaging on a three-month-old child constitute great bodily harm. See, *e.g.*, *People v. Renteria*, 232 Ill. App. 3d 409, 417 (1992).

¶ 78 The State next turns to evidence of defendant's mental state. It first notes that defendant admitted to some shaking of E.G. and to dragging covers off the bed, causing E.G. to fall to the floor. The State argues that the court properly inferred defendant's knowledge from the circumstantial evidence, specifically (1) the nature and severity of E.G.'s injuries, (2) the circumstances surrounding the incident, and (3) the inconsistency between defendant's account and the nature of E.G.'s injury.

¶ 79 We hold that the evidence was sufficient to convict defendant of aggravated battery of a child. In reviewing the sufficiency of the evidence, " 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trial of fact could have found the essential elements of the crime beyond a reasonable doubt.' (Emphasis in original.)." *People v. Bishop*, 218 Ill. 2d 232, 249 (2006) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In a challenge to the sufficiency of the evidence, we do not retry the defendant.

People v. Kant, 2016 IL App (2d) 140340, ¶ 18. Rather, we must carefully examine the evidence while giving due consideration to the fact that the court saw and heard the witnesses. *Id.* We will reverse where the evidence is "so unreasonable, improbable, or unsatisfactory" as to justify reasonable doubt of defendant's guilt. *People v. Smith*, 185 Ill. 2d 532, 542 (1999). "The testimony of a single witness, if it is positive and the witness is credible, is sufficient to convict." *Id.* at 541.

¶ 80 A court may infer injury based upon circumstantial evidence. *Bishop*, 218 Ill. 2d at 250. Circumstantial evidence is proof of facts and circumstances from which a trier of fact may make reasonable inferences. *In re Gregory G.*, 396 Ill. App. 3d 923, 929 (2009). Circumstantial evidence alone can sustain a conviction. *People v. Gomez*, 215 Ill. App. 3d 208, 216 (1991).

¶ 81 Here, there was sufficient evidence that E.G. suffered great bodily harm. Contrary to defendant's argument, we cannot say that Schupbach's CT scan analysis was "flawed." Rather, the weight and validity of Schupbach's testimony was an issue for the trial court to resolve. The court heard his testimony—that E.G. had acute intracranial hemorrhages and evidence of a brain contusion—and it weighed that testimony against Teas's conclusions that E.G. did not have a brain contusion and his CT scan abnormalities were explained by his birthing process. It found Schupbach credible, resolving this evidentiary conflict in favor of the State. Moreover, Schupbach was not the State's only radiologist witness. Strimling, who specialized in neuroradiology, corroborated Schupbach's diagnoses of intracranial hemorrhage and brain contusion.

¶ 82 The evidence also supported that E.G. incurred brain injury. All witnesses, including Teas, agreed that E.G. presented with increased intracranial pressure, and the State's witnesses consistently testified that E.G. had intracranial hemorrhages on both sides of the brain.

¶ 83 Moreover, contrary to defendant's argument, evidence of E.G.'s intracranial bleeding was sufficient to prove his brain injury constituted *great* bodily harm. While great bodily harm requires proof of injury more serious in nature than a simple battery, it does not lend itself to a precise legal definition. *In re Vuk R.*, 2013 IL App (1st) 132506, ¶ 9. Instead, whether a particular injury constitutes great bodily harm for purposes of aggravated battery is a question of fact. *People v. Cisneros*, 2013 IL App (3d) 110851, ¶ 12; *People v. Edwards*, 304 Ill. App. 3d 250, 253-54 (1999). Great bodily harm does not need to be permanent. *People v. Smith*, 6 Ill. App. 3d 259, 264 (1972) ("[M]any serious bodily injuries leave no lasting effect on the health, strength, and comfort of the injured person."). Here, the court heard testimony not only that E.G. had intracranial bleeding but also that physicians feared the bleeding could be life threatening. In fact, E.G. was transferred to another hospital in case specialized surgical intervention was necessary. The court also heard testimony that intracranial bleeding on both sides of E.G.'s brain could not result from a short fall. Both Dakil and Strimling explained that even if a minor trauma such as a short fall could trigger a re-bleed of the chronic hemorrhage on the left side of E.G.'s brain, it could not explain the acute bleeding on the right side of the brain.

¶ 84 In addition to evidence of E.G.'s brain injuries, the court heard consistent testimony that E.G. had bilateral retinal hemorrhaging. The State's ophthalmologists both testified that retinal hemorrhages were unlikely to occur from a short fall. While Teas did not place much importance on E.G.'s retinal hemorrhages, the court found Kolton's and Shapiro's testimony more credible. Accordingly, the evidence was sufficient that E.G. suffered great bodily harm.

¶ 85 Next, the evidence was also sufficient to prove defendant's mental state. The State's ophthalmologist witnesses, Kolton and Shapiro, were both accepted as experts and both personally examined E.G. Kolton never testified to AHT or SBS, only that in her opinion, a short

fall was unlikely to cause retinal hemorrhages. Shapiro testified that, based on his examination, E.G.'s retinal hemorrhages were "consistent with" SBS. He also testified that retinoschisis and retinal folds were rarely caused by trauma. Teas agreed that increased intracranial pressure could cause retinal hemorrhages, but she disagreed that retinal hemorrhages were diagnostic of abuse. Contrary to Shapiro's testimony, she believed retinoschisis and retinal folds would have been more diagnostic of abuse. The court resolved this conflict in the evidence in the State's favor, finding Shapiro's testimony more credible than Teas's.

¶ 86 Beyond the testimony from the ophthalmologists, the court heard additional circumstantial evidence of defendant's intent. Dakil testified that E.G.'s bruise was unlikely to have been caused by a fall but more likely to have been caused by a sharp impact force. She also testified that Genevieve's use of Methadone and E.G.'s vacuum extraction delivery did not explain his head injuries. Song and Chinwuba, both pediatricians, testified that they had treated many children who fell off beds, and absent some underlying issue, those children did not present with intracranial bleeding or retinal hemorrhages.

¶ 87 Accordingly, there was sufficient evidence for a rational trier of fact to convict defendant. The trial court weighed the State's medical testimony against Teas's testimony, and it found the State witnesses more credible. We are mindful that we do not retry a defendant on appeal (*Kant*, 2016 IL App (2d) 140340, ¶ 18), and under these facts, we cannot say that the trial court's findings were unreasonable.

¶ 88 B. *Frye* Hearing

¶ 89 Defendant next argues that the trial court erred in refusing to hold a *Frye* hearing on the admissibility of evidence of SBS and AHT. He argues that the theory of SBS or AHT, based on the presence of subdural hemorrhage and retinal hemorrhage, is widely discredited, and that the

forces required to injure a child by shaking would also cause other injuries. Defendant argues that the trial court's finding that the State's experts simply relied upon their medical training and experience instead of a scientific theory was clearly erroneous. Rather, he contends that the State's experts failed to testify to particular medical training and experience in diagnosing SBS, and he asserts they were "merely guessing" about the cause of E.G.'s intracranial bleeding.

¶ 90 The State responds that defendant forfeited the issue by failing to raise the denial of a *Frye* hearing in a post-trial motion, and even if defendant had not forfeited the *Frye* issue for review, his argument fails on the merits.[3] Citing Dakil's testimony at great length, the State argues that the trial court correctly ruled that the methodology its experts used did not constitute a novel methodology but was instead based their conclusions on training and experience.

¶ 91 We hold that, forfeiture aside, the trial court did not err in denying defendant's motion for a *Frye* hearing. Illinois follows the "general acceptance" test for determining the admissibility of scientific evidence at trial as first established in *Frye*, 293 F. at 1014. *In re Commitment of Simons*, 213 Ill. 2d 523, 529 (2004). 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."). "General acceptance" focuses on the underlying methodology used to generate a conclusion; it does not require a methodology's universal acceptance or even that the methodology be accepted by a majority of experts. *In re Commitment of Simons*, 213 Ill. 2d at 529-30.

[3] The State also moved to file a surreply to defendant's arguments, arguing the doctrine of invited error. As we resolve defendant's arguments in favor of the State on the merits, we hereby deny the State's motion.

¶ 92 The *Frye* standard has several limitations in scope. First, it only applies to "new" or "novel" scientific evidence. *Id.* In addition, Illinois courts have recognized a "pure opinion" exception to *Frye*: A *Frye* hearing is not required when, instead of relying on a particular test or methodology, experts opine based on their training and experience. *In re Detention of New*, 2013 IL App (1st) 111556, ¶ 56; *Noakes v. National R.R. Passenger Corp.*, 363 Ill. App. 3d 851, 857-58 (2006) (citing other jurisdictions' distinctions between pure opinion testimony and testimony based on "studies and tests"). Expert opinion testimony based on training and experience does not have the same potential to mislead a jury as testimony based on a novel scientific theory. *People v. Schuit*, 2016 IL App (1st) 150312, ¶ 95. In *Schuit*, expert testimony was not subject to *Frye* where the experts relied on their training and experience to diagnose a child's head injury as inflicted by trauma or shaking. *Id.* ¶ 96.

¶ 93 Here, the record demonstrates that the State's witnesses relied on their training and experience to render their opinions, placing their testimony outside the scope of *Frye*. All of the State's physician witnesses testified to their years of training and practice, which often included seeing hundreds of children with reported falls or head trauma. None relied on an SBS or AHT methodology. To wit, Schupbach had concerns of intentional trauma based on E.G.'s CT scan, and Hulsey had never seen a child present with retinal and intracranial hemorrhages from a short fall. Likewise, Song and Chinwuba had not seen children that presented with retinal or intracranial hemorrhage after a short fall. Havald, based on his experience, believed that retinal hemorrhages in babies were caused by violent shaking. Kolton did not believe that E.G.'s bilateral retinal hemorrhages were caused by a fall. Shapiro testified that E.G.'s retinal hemorrhages were "consistent with" SBS. Strimling worried that E.G.'s trauma was non-accidental because he had bleeding in several locations. And finally, Dakil eliminated several

other causes of E.G.'s injuries, such as his mother's use of Methadone. In particular, Dakil addressed the totality of E.G.'s injuries. She explained that E.G.'s bruise was unlikely to have been caused by a short fall; that gentle shaking would not have caused his injuries; and that a re-bleed of a chronic hemorrhage could not explain the acute bleeding on both sides of E.G.'s brain.

¶ 94 Accordingly, the trial court did not err in denying defendant's motion for a *Frye* hearing. While some but not all of the State's witnesses opined that E.G.'s injuries were consistent with SBS or AHT, their opinions were based on their training and observations. The only scientific methodology a witness employed was differential diagnosis, and differential diagnosis is an established scientific method not subject to *Frye*. *Id.* ¶¶ 95-96.

¶ 95 C. Effective Assistance of Counsel

¶ 96 Defendant lastly argues that he received ineffective assistance of trial counsel. He argues that central to the State's case was testimony that E.G. suffered a brain contusion, and his trial counsel called only one expert witness, Teas, to rebut the contusion diagnosis. Defendant continues that Teas was a pathologist, not a radiologist, and therefore could not rebut a brain contusion diagnosis based on a CT scan. Only during the post-trial hearing did defense counsel call two radiologists, Mack and Barnes, to testify that E.G. did not suffer a brain injury. Defendant argues that had their testimony been given at trial, the court would have rejected an SBS diagnosis. Further, defendant contends that Mack was available to testify at trial.

¶ 97 In addition, defendant argues that his counsel failed to call experts to testify regarding the "growing body of research rejecting the previously-held belief that the finding of subdural hemorrhage and retinal hemorrhage in an infant was strong evidence of SBS." He continues that he was prejudiced by counsel's failure to offer expert testimony rebutting the State's "flawed

science." He argues that, had counsel countered the theory of SBS, it was likely the court would have rejected the State's arguments.

¶ 98 The State first responds that the issue is once again forfeited for failure to raise ineffective assistance during a post-trial motion. Forfeiture aside, the State argues that counsel was not ineffective. It cites the trial court's conclusions that the defense presented coherent medical testimony and had a "fruitful" cross-examination of the State's witnesses. While defendant called only Teas at trial, she testified that she consulted with both Barnes and Mack for her testimony. Finally, the State highlights the trial court's conclusion that even after review of the testimony at the post-trial hearing, defendant's experts established the same points established at trial.

¶ 99 We agree with the State that defendant's trial counsel did not provide ineffective assistance, regardless of any forfeiture. A defendant arguing ineffective assistance of counsel must meet the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Cherry*, 2016 IL 118728, ¶ 31. The *Strickland* test requires that a defendant show that counsel's representation was (1) objectively unreasonable under prevailing professional standards and (2) there was a reasonable probability that but for counsel's deficient representation, the result of the proceeding would have been different. *People v. Patterson*, 2014 IL 115102, ¶ 81.

¶ 100 Defendant's argument is essentially that (1) his trial counsel should have called Mack and Barnes at trial, and (2) his trial counsel should have presented evidence discrediting theories of SBS and AHT. First, trial counsel acted reasonably by electing to call Teas but not Mack or Barnes. The trial court rightly concluded that the evidence presented at the post-trial hearing was substantially cumulative of the testimony elicited at trial. At the post-trial hearing, Teas's

testimony was substantially similarly to her testimony at trial; Barnes's report echoed Teas's testimony that there were other possible causes of E.G.'s injuries, including thrombosis, and that E.G. did not suffer long-term injury; and Mack's testimony was largely cumulative with Teas's. That is, Mack also testified that a fall could trigger a re-bleed of E.G.'s chronic hematoma, and she believed his chronic hematoma resulted from his birthing process. Moreover, the State rightly points out that Teas testified at trial that she consulted with Mack and Barnes in reaching her conclusions. Finally, even after the court heard all the post-trial testimony, it specifically continued to believe the State's witnesses, find that E.G. suffered great bodily harm, and find that defendant acted with the requisite intent.

¶ 101 Furthermore, trial counsel's decision not to present evidence against theories of SBS and AHT was neither unreasonable nor prejudicial. Such evidence was unlikely to be helpful because, as we explained *supra* II.B., the State did not rely on an a theory of SBS or AHT. Rather, the State relied on its physicians' opinions that E.G.'s injuries were not caused by a short fall from the bed, and their opinions were based on their training and experience. Defense counsel reasonably focused on offering alternative explanations for E.G.'s injuries and disputing the State's conclusions, but the court found the State's witnesses to be more credible.

¶ 102 III. CONCLUSION

¶ 103 For the reasons stated, we affirm the judgment of the Kane County circuit court. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 104 Affirmed.