2015 IL App (1st) 132588-U
No. 1-13-2588
Order Filed September 30, 2015

SIXTH DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	No. 09 CR 18430
v.	)	
	)	
FERNANDO MONTES, SR.,	)	
	)	Honorable
Defendant-Appellant.	)	Neera Walsh,
	)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Rochford and Justice Hoffman concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant's aggravated battery of a child conviction was affirmed. The evidence established beyond a reasonable doubt that the injury to the child-victim was intentionally inflicted by the defendant. The defendant's failure to raise as error the trial court's restriction of the defendant's expert witness's testimony in his posttrial motion forfeited the error for review. In the absence of error, a plain-error analysis was not required, and even if error occurred, the defendant failed to establish that the error required our review under either prong of the plain-error analysis.

¶ 2 Following a jury trial, the defendant, Fernando Montes, Sr., was found guilty of aggravated battery of a child and was sentenced to a term of eight years' imprisonment in the Department of Corrections. The defendant appeals raising the following issues: whether the State proved beyond a reasonable doubt that he intentionally or knowingly committed the act that injured the child, and whether the trial court erred when it restricted the testimony of the defendant's expert witness. For the reasons explained below, we affirm the defendant's conviction and sentence.

¶ 3 BACKGROUND

¶ 4 I. Facts

¶ 5 On October 5, 2009, the defendant was indicted and charged with multiple counts of aggravated battery to a child, aggravated domestic battery and aggravated battery. The defendant pleaded not guilty. The defendant was tried on count 1 of the indictment alleging in pertinent part that the defendant committed the offense of aggravated battery of a child, in that he "a person 18 years of age and upwards, intentionally or knowingly, and without legal justification, and by any means, caused great bodily harm to Fernando Montes, Jr., a child under the age of 13 years, to wit: burned Fernando Montes, Jr. about the body with an iron." (Emphasis omitted.) See 720 ILCS 5/12-4.3(a) (West 2008).[1]

¶ 6 II. Jury Trial

[1] Section 12-4.3 was repealed. See P.A. 96-1551, Art. 5 § 5-6, eff. July 1, 2011.

¶ 7 The defendant's jury trial commenced on June 11, 2013. The pertinent testimony from the trial is summarized below.

¶ 8 A. For the State

¶ 9 1. *Martha Perez*

¶ 10 a. Direct Examination

¶ 11 Martha Perez (Ms. Perez) and the defendant are the parents of Fernando Montes, Jr. (Fernando). At the time of the incident, Ms. Perez and the defendant resided in Ms. Perez's apartment with three-year-old Fernando and Ms. Perez's son, 10-year-old Angel. Ms. Perez worked at Dunkin Donuts from 4 p.m. until midnight. Due to a back injury, the defendant was not working, and he babysat the children while Ms. Perez was working.

¶ 12 Around 11:30 p.m., on September 3, 2009, the defendant, accompanied by Fernando, picked Ms. Perez up from work. When they arrived at the apartment, Ms. Perez noticed a mark above Fernando's left elbow. The defendant told her that Fernando had fallen. Ms. Perez cleaned the area with soap and water and applied Neosporin. She then covered it with a bandage.

¶ 13 On September 7, 2009, Ms. Perez telephoned the defendant, who was attending a party at his cousin's apartment with Fernando, to pick her up from work. Before leaving for work, Ms. Perez had asked the defendant to check Fernando's arm to see if it was infected. When they arrived at the apartment, the defendant told her he forgot. Ms. Perez removed Fernando's sweater and noticed a red mark on top of the first mark. She described the new mark as red, bigger than the first mark and circular in shape, like an oval. Ms. Perez was worried that the arm was infected and wanted to take Fernando to the hospital, but the

defendant decided they should wait until the next day to take him to Dr. Hussaini, his pediatrician. Ms. Perez agreed and cleaned the area with Peroxide and alcohol.

¶ 14 On September 8, 2009, Ms. Perez and the defendant took Fernando to Dr. Hussani. Ms. Perez told the doctor that Fernando had fallen four days before and had awakened with the red mark. Dr. Hussani gave her a cream to apply to Fernando's arm. Before Ms. Perez had an opportunity speak to the defendant about the marks on Fernando's arm, a social worker arrived at the apartment. When the defendant picked her up from work the next day, Ms. Perez asked him to tell her the truth about the marks on Fernando's arm because she was afraid that her children might be taken away from her. The defendant told her that while he was ironing on the bed, Fernando jumped on the bed, and the iron fell on his arm. Later that day, Ms. Perez again asked the defendant to tell her what happened. The defendant explained that Fernando was injured a second time when he fell against a barbeque grill. Because the defendant lied to her about Fernando's injuries, she insisted he move out of the apartment. Fernando made a complete recovery and did not have a scar.

¶ 15 b. Cross-Examination

¶ 16 Ms. Perez and the defendant had a very happy and loving relationship. However, when the defendant had to stop working, there was not enough money to pay the bills. Ms. Perez became frustrated and angry with the defendant. The defendant was kind and loving; he was not a person who was constantly angry or screamed and yelled. His behavior did not change during the time he was not working. The children thrived under the defendant's care. Ms. Perez never observed any signs of injuries on the children.

¶ 17 Ms. Perez described the first injury as a scratch, about the size of a dime or a nickel. The scratch was white and circular, not pointed, and appeared to be healing over the next several

days. When Ms. Perez removed Fernando's sweater, she noticed that there was an oval reddish mark, much larger than the white mark. There was no point or angle to the red mark. There was a dry, yellowish substance on top of the redness.

¶ 18 The defendant explained to Ms. Perez that he was ironing a shirt for his job interview when Fernando fell against the iron. Ms. Perez confirmed that the defendant had a job interview the day following the incident with the iron. The white mark did not get any larger in size.

¶ 19 2. *Elisa Corona*

¶ 20 Ms. Corona was employed by the Department of Children and Family Services (DCFS) as a child protection investigator. On September 8, 2009, she met with Ms. Perez, the defendant, Fernando and "Alex,"[2] at the family's apartment.

¶ 21 Ms. Corona interviewed Fernando alone and explained to him that she was there to make sure he was safe. She observed a dry scab on the outside of his left forearm by the elbow. It was long and had a pointed end to it with an oval scab in the center. The injury extended from the end of the elbow almost to the wrist. When Ms. Corona asked Fernando how he burned himself, he did not speak but pointed to the kitchen. The only item in the kitchen, other then the stove, refrigerator and sink, was an iron.

¶ 22 Ms. Corona then spoke with the defendant alone and asked him to explain what happened to Fernando. The defendant told her that he was in the bedroom when he heard Fernando crying in the living room. He went to investigate, but he did not see anything. The next day he noticed the red mark on Fernando's arm. When Ms. Corona told the defendant the mark looked like a burn, the defendant responded that there had been a pot of beans

[2] Ms. Corona was probably referring to Angel.

boiling on the stove. Ms. Corona determined that Fernando was too short to reach the stove top without help. At the completion of the interview, Ms. Corona referred the family to a burn specialist.

¶ 23 On September 9, 2009, Ms. Corona received a telephone call from Ms. Perez. The defendant had told Ms. Perez that Fernando burned himself with an iron. Ms. Corona arranged for a scene investigation at the Perez apartment for the following day.

¶ 24 On September 10, 2009, Ms. Corona, accompanied by Detective O'Donnell, met with the family. Ms. Corona and Detective O'Donnell spoke to the defendant alone in the bedroom of the apartment. The defendant explained that he was ironing his clothes on the nightstand and resting the iron vertically on the bed. The defendant had instructed Fernando not to come into the bedroom, but he jumped on the bed causing the iron to fall on him and burning his arm. At Ms. Corona's request, the defendant showed her the iron. Fernando began screaming and crying and ran into the living room.

¶ 25 When Ms. Corona told the defendant she was still confused about how Fernando burned himself, the defendant told her that on September 7, 2009, Fernando and he had attended a family barbeque at his cousin's house. Fernando had been playing with one of his cousins and brushed his arm against the hot barbeque grill.

¶ 26 3. *Eileen O'Donnell*

¶ 27 Detective O'Donnell worked in the special victims unit of the Chicago police department and investigated juvenile and abuse cases. On September 10, 2009, the detective accompanied Ms. Corona to meet with Ms. Perez and the defendant. Detective O'Donnell observed what looked like a burn in the area of Fernando's left elbow. The detective

described it as a few inches long and coming to a triangular point. The burn was very red and had two scabs on it.

¶ 28 4. *Syed Hussani, M.D.*

¶ 29 a. *Voir Dire*

¶ 30 Dr. Hussaini completed medical school in India in 1980 and did his residency in pediatrics at the University of Illinois. The doctor is licensed to practice medicine in Illinois and has been a practicing pediatrician since 1993. His practice is limited to general pediatrics. In his practice, he does physical examinations, administers immunizations and treats injuries. The trial court qualified Dr. Hussani as an expert in the field of pediatric medicine.

¶ 31 b. Direct Examination

¶ 32 Prior to September 8, 2009, Dr. Hussaini had seen Fernando a few times as a patient. On September 8, 2009, Ms. Perez and the defendant brought Fernando to the doctor's office to have an injury to his left arm evaluated. The doctor described the injury as red in appearance, like a sunburn, with a deeper whitish area in the center. The defendant told the doctor that Fernando may have fallen in the living room a few days before.

¶ 33 Dr. Hussaini opined within a reasonable degree of medical certainty that the injury to Fernando's left arm was a burn. The doctor informed the defendant and Ms. Perez that the history of the injury provided by the defendant was inconsistent with a burn injury and that he was required to report the case to DCFS.

¶ 34 c. Cross-Examination

¶ 35 On previous visits, Dr. Hussaini never noticed any signs of abuse on Fernando. Other than the injury to his left arm, Dr. Hussaini saw no other unusual marks on Fernando.

¶ 36 5. *Marjorie Fujara, M.D.*

¶ 37 a. *Voir Dire*

¶ 38 Dr. Fujara is a pediatrician and employed at John H. Stroger, Jr. Hospital (Stroger Hospital) in the child protective services division of the department of pediatrics. Her division performs consultative services, evaluating the causes of the injuries suffered by children. Doctor Fujara is also the attending physician in the clinic at Chicago Children's Advocacy Center. There she sees children where there is an allegation or concern of sexual abuse.

¶ 39 Dr. Fujara was board certified in general pediatrics and child abuse pediatrics. The doctor was a member of several organizations for physicians who practice in the fields of pediatrics and who had cases involving child abuse and neglect. She has lectured in the Chicago area to practicing physicians and medical students at two area hospitals, to DCFS investigators and at the police academy.

¶ 40 At Stroger Hospital, approximately 800 children per year are seen by Dr. Fujara's division; she either sees the child personally or becomes familiar with the case through the weekly group discussions. At the Children's Advocacy Center, 600 to 800 children come through the clinic for evaluations.

¶ 41 Dr. Fujara has been qualified as an expert witness several dozen times in Cook, Lake and Peoria counties. She has testified for both the State and the defense but predominately for the State. The trial court found Dr. Fujara to be an expert in the field of pediatrics, general pediatrics and child abuse pediatrics and qualified to testify and give an opinion in those fields of medicine.

¶ 42 b. Direct Examination

¶ 43 Dr. Fujara examined Fernando at Stroger Hospital on September 10, 2009. The doctor could not communicate with Fernando, who did not exhibit the normal speaking patterns of a three-year-old child. Her examination of Fernando's left arm revealed a burn on his elbow. The burn was a mixed superficial burn, formerly referred to as a first-degree burn, which covered the skin and was similar to a bad sunburn, and a partial thickness burn, formerly referred to as a second-degree burn, which involved deeper layers of skin, causing blistering. On a photograph taken on September 10, 2009, Dr. Fujara identified two small ruptured circular blisters located in the area of the partial thickness burn, which were healing.

According to Dr. Fujara, the burn showed no signs of infection. The application of Neosporin or Peroxide or mustard would not have made the burn worse.

¶ 44 Dr. Fujara opined that Fernando was suffering from "a one percent total body surface area mixed superficial partial thickness burn, contact burn of his left arm." The partial thickness burn would have been extremely painful, causing the child to scream and cry for an extended period of time. The doctor's opinion that it was a contact burn was based on the arrowhead or triangular shape of the top of the burn, that the burn ran down the arm beyond the elbow joint, indicating that the Fernando's arm was extended at the time of the burn, and the blisters that were consistent with the deeper burn. The doctor further opined that the burn was not a glancing-type injury, which was usually caused by brushing up against something hot. Such burns are usually linear, a line of redness and generally are not partial thickness burns, such as the one Fernando suffered, because the natural instinct, even in a three-year-old child, would be to pull away.

¶ 45 According to Dr. Fujara, a burn resulting from a fall in a park or a fall on carpeting or from coming in contact with a pot of boiling liquid or food would not have resulted in the

pattern of the burn on Fernando's arm. The doctor further opined that Fernando's burn would not have been caused by brushing against the barbeque grill. Such a burn would have been a glancing injury and his arm would have been locked at the elbow rather than extended.

¶ 46 Approximately 200 children per year were seen at Stroger Hospital for burn injuries; over 90% of them were accidental. Dr. Fujara was familiar with burns caused when children came into contact with hot irons. Even if a child fell on a hot iron, the resulting injury would be a glancing superficial burn because the child would withdraw from the hot surface.

¶ 47 Dr. Fujara opined that Fernando's burn was intentionally inflicted with an iron. Her opinion was based on the size and shape of the wound, and the two circular burns deeper into the skin. The injury was caused by an iron because it was a contact burn, and the burn formed the shape of an iron, including the two small blisters, which were consistent with the iron's steam holes. While iron burns were not very common, her division saw approximately three iron burns per year. All of her opinions were based on a reasonable degree of medical certainty.

¶ 48 c. Cross-Examination

¶ 49 Dr. Fujara covered burn injuries in her presentations on physical abuse. The doctor had not published any books or articles on burn injuries.

¶ 50 Dr. Fujara opined that Fernando suffered only one injury and that Fernando's arm was extended at the time of the injury. The doctor could not determine whether someone was holding Fernando's arm down when the burn was inflicted. If Fernando brushed up against the iron or the iron fell on him, he would have suffered a glancing injury because, in either case, Fernando would immediately have withdrawn his arm from the source of the heat. A

glancing injury would not result in the amount of contact between the iron and Fernando's arm shown by the size of the burn.

¶ 51 Dr. Fujara agreed that "arrowhead" was not quite an accurate description of the top of the burn, but it was meant to suggest an image to other doctors who could not view the photographs of the burn. The presence of the partial thickness burn indicated that the top part of the iron was in closer contact with the arm. The doctor acknowledged that there were no indications of steam holes on the lower part of the burn. There was a third blister that was smaller than other blisters that Dr. Fujara attributed to the steam holes on the iron. The doctor explained that the size difference resulted from the fact that the iron was flat and did not conform exactly to the shape of the arm, which was round.

¶ 52 The State rested, and the defendant's motion for a directed verdict was denied. The defendant proceeded with his case as follows.

¶ 53 B. For the Defendant

¶ 54 1. *Claudio Ocampo*

¶ 55 a. Direct Examination

¶ 56 Claudio Ocampo is the defendant's cousin. September 7, 2009, was Labor Day, and the Ocampos were having a family party. There were about 10 people there, including the defendant and Fernando.

¶ 57 Fernando was playing with a little girl, who was between four and five years-of-age. Mr. Ocampo was sitting by the barbeque grill when the children began to fight over a baby stroller. Fernando and the little girl were each pulling on the stroller when Fernando let go and fell against the grill. His left elbow came into contact with the grill, and he began to scream. The defendant grabbed Fernando and hugged him. Mr. Ocampo did not see any

injury to Fernando, but his wife put mustard on Fernando's arm. Fernando then continued to play. The defendant and Fernando were at the party for about four hours.

¶ 58 b. Cross-Examination

¶ 59 Mr. Ocampo explained that Fernando's left side was to the grill as he pulled on the stroller. Fernando's arms were outstretched as he pulled on the stroller but bent at a 90 degree angle when he fell against the grill. Mr. Ocampo described Fernando's injury as the size of a quarter and red in color. He did not see a large oval mark on Fernando.

¶ 60 On February 17, 2010, Mr. Ocampo was interviewed by an investigator from the State Attorney's office. Mr. Ocampo maintained that, in the interview, he described the burn as the size of a quarter. He further maintained that he told the investigator that Fernando yelled out when he came in contact with the grill, that the little girl was four or five years old, not two years old, and that the defendant hugged Fernando after he was injured. The investigator did not have a tape recorder and was not taking notes during the interview. No one else came to interview him about the incident.

¶ 61 2. *Eileen O'Donnell*

¶ 62 a. Direct Examination

¶ 63 As part of an investigation of a case, Detective O'Donnell verified the statements and assertions by the persons involved. In this case, the detective took statements from Ms. Perez and the defendant. She did not examine the barbeque grill or interview Mr. Ocampo.

¶ 64 b. Cross-Examination

¶ 65 Detective O'Donnell did not examine the grill or speak to Mr. Ocampo because both Dr. Fujara and Dr. Hussaini told her that Fernando's injury was not consistent with the type of burn caused by brushing up against a grill.

¶ 66 c. Redirect Examination

¶ 67 Even though there were witnesses to the grill incident, Detective O'Donnell did not further investigate the defendant's statement that Fernando was burned by the grill because the defendant had lied about what had happened.

¶ 68 3. *Fernando Montes, Sr.*

¶ 69 a. Direct Examination

¶ 70 In 2009, the defendant was living with Ms. Perez and their son Fernando. In 2008, the defendant suffered a work-related injury preventing him from working. Prior to his injury, Ms. Perez and he had a good relationship. Following his injury, there was insufficient money to pay the family's bills, which had a negative effect on their relationship. While Ms. Perez went to work, he took care of Fernando and Ms. Perez's son, Angel. The defendant described his relationship with Fernando as "[t]he best, the max," and "my life."

¶ 71 On September 3, 2009, the defendant was ironing a shirt for a job interview he had the next day. In order to iron, he placed a two and half foot long ironing board on the night stand at the head of the bed. While he was stretching out the shirt on the ironing board, he placed the iron vertically and to his right on the bed. The bed surface was soft rather than hard. The defendant heard a scream and saw Fernando by the head board of the bed and about the width of the bed from the hot iron. The defendant grabbed the iron and put it away. He then hugged Fernando, who was crying.

¶ 72 The defendant noticed that there was a white mark the size of a nickel on Fernando's left arm and put peroxide on it. After the defendant brought Ms. Perez home from work, she took off Fernando's sweater and saw the injury to Fernando's left arm. The defendant told

her that Fernando had fallen in the park. He lied to her because she had been asking that he move out of the apartment due to the financial situation.

¶ 73 On September 7, 2009, the defendant, accompanied by Fernando, drove Ms. Perez to work and then visited his cousin, Mr. Ocampo, and his family. Mr. Ocampo decided to fix some meat on the barbeque grill. While the defendant and Mr. Ocampo were sitting by the grill, Fernando was playing with a girl. Several times Fernando and the girl came too close to the grill. The defendant pulled Fernando away, telling him to play further away from the grill. Fernando and the girl were pulling on a stroller. When the girl pulled very hard on the stroller, Fernando let go. As he fell backwards, his left arm touched the grill. Fernando screamed, and the defendant hugged him. The defendant noticed a large red burn on Fernando's left arm. Mr. Ocampo's wife put some mustard on the burn, and Fernando continued playing.

¶ 74 After the defendant brought Ms. Perez home from work, she took off Fernando's sweater and saw the redness around the original mark. The defendant did not tell her about the incident with the grill because he was afraid he was going to lose Fernando and her.

¶ 75 The next day, Ms. Perez and the defendant took Fernando to the doctor. Later that day, Ms. Corona came to the apartment and asked him about Fernando's injury. The defendant lied to Ms. Corona. Later, Ms. Perez asked him to tell her the truth about Fernando's injury. After the defendant told her the truth, she ordered him to move out of the apartment. The defendant denied that he was angry with Fernando at the time of the incident with the iron and denied that he ever abused Fernando.

¶ 76 b. Cross-Examination

¶ 77 The defendant acknowledged that the burn from the grill was very big, not the size of a quarter. He admitted that he did not seek medical attention for Fernando after he was burned by the iron or after he was burned by the grill. The defendant further admitted that he told Ms. Perez they should wait to take Fernando to his regular doctor rather than go to the emergency room. When they took Fernando to Dr. Hussaini, the defendant lied to the doctor telling him that Fernando had fallen in the living room. He also lied to Ms. Corona telling her that Fernando might have fallen, or burned himself on the stove. Ms. Perez ordered the defendant to leave the apartment because he had lied about how Fernando was injured.

¶ 78 The defendant acknowledged that Fernando was wearing a sweater with long sleeves at the time he was burned by the iron and when he was burned by the grill. On both occasions, Fernando's bare skin did not come into contact with the hot objects.

¶ 79 3. *Werner Spitz, M.D.*

¶ 80 a. *Voir Dire*

¶ 81 Dr. Spitz maintained that he did not need to refer to his curriculum vitae to establish his credentials. The doctor was born in Germany, attended college and medical school at the University of Geneva in Switzerland and at the Hebrew University Hadassah Medical School in Jerusalem. Dr. Spitz practiced in the area of pathology and then in forensic pathology. He received his training in forensic pathology in both Berlin and Baltimore. In Berlin, he worked at the Institute of Legal Medicine at the University of Berlin where his work involved individuals who had suffered or died from trauma. In Baltimore, he worked for the medical examiner's office in Maryland.

¶ 82 In 1972, Dr. Spitz was appointed chief medical examiner for the County of Wayne in Michigan. As chief medical examiner, his duties included determining the cause of injuries

or death to individuals. The doctor had seen victims of burns. While he could not give an exact figure, in 60 years of practice, he had done over 60,000 autopsies, which would have included several hundred such cases.

¶ 83 Dr. Spitz had consulted on investigations with police departments, the Federal Bureau of Investigation, universities and other medical examiners' offices. He consulted with the Rockefeller Committee on the assassination of President Kennedy and testified before the House of Representatives about the circumstances of the deaths of President Kennedy and Martin Luther King, Jr. He had lectured in the United States and Canada and the Middle East countries.

¶ 84 Dr. Spitz had authored 96 scientific articles in medical journals and a forensic pathology textbook. The textbook was first published in 1972 and was updated in 1980 and 1993. In 2006, a new edition was published that was twice the size of the previous editions. The textbook contained a chapter on burn injuries and a chapter on injuries to children. The doctor was almost certain he had authored both of them. He had also authored several articles on burn injuries, including the affect of alcohol on burns.

¶ 85 Over his 60 years as a physician, Dr. Spitz had testified as an expert witness several thousand times. While he was sure he had testified as an expert in burn cases, he did not recall how many.

¶ 86 At the time of trial, Dr. Spitz was a professor of forensic pathology and pathology at Wayne State University School of Medicine in Detroit, Michigan. The doctor was also an adjunct professor of chemistry at the University of Ontario, Canada. He was licensed in Maryland, Virginia, the District of Columbia and Michigan, as well as all of the European

Union countries. Dr. Spitz was affiliated with the American Academy of Forensic Science and the National Association of Medical Examiners.

¶ 87 Defense counsel moved to enter Dr. Spitz's curriculum vitae into evidence. The trial court sustained the prosecutor's hearsay objection. Defense counsel then moved to have Dr. Spitz qualified as an expert in pathology and burn injuries. The prosecutor objected arguing that the foundation was insufficient to qualify Dr. Spitz as an expert in burn injuries. The trial court agreed, stating as follows:

> "I don't know if there is more or there is not. But based on what he said, he said he doesn't know how many times he's treated anyone for burns. He's sure he has. He says he believes he may have authored some chapters in that book and he thinks he wrote most of those. He thinks."

¶ 88 The trial court sustained the prosecutor's objection to qualifying Dr. Spitz as an expert in burn injuries. The court allowed defense counsel to question the doctor further to establish the necessary foundation. When defense counsel asked how many times in his career had the doctor treated or examined burn victims, Dr. Spitz answered as follows:

> "I don't know that I can tell you, but I've examined - - you know, being the medical examiner calls upon me to examine dead people and live people. Live people less often than dead people. But dead people were also alive until they died so they - -"

The trial court sustained the prosecutor's objection. Defense counsel then moved to have Dr. Spitz qualified as an expert in pathology. The trial court qualified Dr. Spitz as a medical doctor and as a pathologist, and the doctor would be allowed to give his opinion as an expert in those two fields.

¶ 89 a. Direct Examination

¶ 90 Dr. Spitz reviewed the medical records, the police and DCFS reports, the statements of the witnesses, photographs of Fernando's arm and Dr. Fujara's September 10, 2009 report. The doctor also inspected the iron and measured the distance from the tip of the iron to the location of the steam holes.

¶ 91 On a photograph of Fernando's left arm, Dr. Spitz identified two burn areas: the red area was a first-degree burn and the white area was a second degree burn. The second-degree burn was older. While originally it would have been red, in the healing process, the skin sloughs off leaving a white area. Defense counsel then asked Dr. Spitz the following question:

> "Now, assuming that a child jumped on a bed on which a hot iron was placed standing and that hot iron made contact with the child's arm, what kind of burn could it possibly produce?

The prosecutor's objection was sustained by the trial court.

¶ 92 Dr. Spitz disagreed with Dr. Fujara that the lesions in the white area were caused by two steam holes of an iron coming into contact with the relatively flat surface of the arm because of the way the steam holes were distributed on the iron. After examining the iron, Dr. Spitz opined that the tip of the iron, which was pointed, did not match the top of the burn, which was rounded.

¶ 93 Defense counsel then asked Dr. Spitz the following question:

> "Now, the red area that is surrounding the white area, assuming that a child bumped their arm against a very hot grill, could such a bump of the arm against a grill cause this red area?

The trial court sustained the prosecutor's objection. After ascertaining that Dr. Spitz was familiar with the facts of the case and that he had reviewed the pertinent documents, defense counsel asked the doctor the following question:

> "Based on your review of the facts of the case, do you believe that a grill could cause this type of red burn area?"

Again, the trial court sustained the prosecutor's objection.

¶ 94 Dr. Spitz was familiar with the effects of different substances on burns. The doctor explained that treating a recent burn with a chemical, such as peroxide or rubbing alcohol, risked removing the upper layer of skin and causing a second-degree burn. Mustard was also a strong irritant, and if rubbed on, it could have a sloughing effect on the skin. The use of such substances makes the injury worse because it allows bacteria to enter the body.

¶ 95 b. Cross-Examination

¶ 96 In preparing for his testimony, Dr. Spitz reviewed various medical records, Dr. Fujara's September 10, 2009 report from her examination of Fernando, Ms. Perez's and the defendant's narratives of the incident and the opinion of nurse Valerie Broons. The doctor did not know if nurse Broons actually saw or treated Fernando, and he did not know what her nursing background was. Other than defense counsel, the doctor did not speak personally with anyone involved in the case.

¶ 97 Dr. Spitz prepared a written report on January 3, 2012. In his report, Dr. Spitz disagreed with Dr. Fujara's opinion that Fernando's injury was not caused accidently. The doctor also disagreed with Dr. Hussaini's opinion that Fernando did not suffer a glancing injury. When confronted with the fact that it was Dr. Fujara who indicated it was not a glancing injury, Dr. Spitz did not recall what her opinion was.

¶ 98 Dr. Spitz acknowledged that in his report, he stated that he believed that Fernando was injured when he fell on or against the iron, referencing nurse Broons' opinion. The doctor denied that he had relied on her opinion in forming his own and maintained that he had relied only on the photographs of the injury. However, he acknowledged that the photographs he used in arriving at his opinion may have been out-of-focus, which always creates some problems.

¶ 99 When asked what caused the injuries to Fernando, Dr. Spitz explained that one injury appeared to be caused by a hot iron and a second injury was caused by something else. The doctor's report did not indicate two injuries, but at the time he authored the report, he did not understand the injury as well as he did at this time. He did not prepare a second report because he was not asked to do so. His January 3, 2012, report referred only to an iron as the cause of Fernando's injury because he did not have all the evidence at that time.

¶ 100 While Dr. Spitz maintained that he did not have much information at the time he authored the January 3, 2012 report, he acknowledged that he had the child protective and Stroger Hospital records, the police reports, photographs of the injury and of the iron, nurse Broons' opinion, as well as some e-mails and correspondence. The doctor did not know what other documents he received after he wrote the January 3, 2012 report.

¶ 101 Dr. Spitz opined that Fernando's burns occurred within 1/10th of a second and could have occurred even if he was wearing a shirt. At least part of the injury was caused by contact with an iron.

¶ 102 d. Redirect Examination

¶ 103 Dr. Spitz opined that the injury could have been caused by the tip of the iron but not from the entire face-plate. In that case, there would be more than two markings from the steam holes.

¶ 104 III. The Verdict and Sentencing

¶ 105 The jury returned a verdict finding the defendant guilty of aggravated battery of a child. The trial court denied the defendant's motion for a new trial and sentenced the defendant to eight years' imprisonment in the Department of Corrections. The court denied the defendant's motion to reconsider the sentence. The defendant appeals.

¶ 106 ANALYSIS

¶ 107 The defendant contends that the evidence was insufficient to prove him guilty of aggravated battery of a child beyond a reasonable doubt. The defendant further contends that the trial court erred in restricting Dr. Spitz's testimony and the error requires that he receive a new trial. We will consider each contention in turn.

¶ 108 I. Reasonable Doubt

¶ 109 A. Standard of Review

¶ 110 A challenge to the sufficiency of the evidence necessary to sustain a conviction requires the reviewing court to determine whether, after considering the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Moore*, 375 Ill. App. 3d 234, 238 (2007). This " 'means the reviewing court must allow all reasonable inferences from the record in favor of the prosecution.' " *People v. Wheeler*, 226 Ill. 2d 92, 116-17 (2007) (quoting *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004)). This standard is applied whether the evidence is direct or circumstantial. *Moore*, 375 Ill. App. 3d at 238.

¶ 111 It is not this court's function to retry the defendant. *People v. Tenney*, 205 Ill. 2d 411, 428 (2002). As a reviewing court, we will not substitute our judgment for that of the trier of fact on questions involving the weight of the evidence or the credibility of the witnesses unless the evidence is " 'so palpably contrary to the verdict or so unreasonable, improbable or unsatisfactory as to create a reasonable doubt of [the defendant's] guilt.' " *People v. Rodriguez*, 312 Ill. App. 3d 920, 932 (2000) (quoting *People v. Abdullah*, 220 Ill. App. 3d 687, 693 (1991)).

¶ 112 B. Discussion

¶ 113 No issues are raised in this case as to the age and bodily harm elements of the offense. The defendant contends only that the State failed to prove beyond a reasonable doubt that he inflicted the burn on Fernando's left arm either intentionally or knowingly.

¶ 114 The defendant maintains that the State's evidence was insufficient to prove that he intentionally inflicted the burns on Fernando's arm. The defendant points out that the State did not present any eyewitnesses to the circumstances resulting in the burn injury to Fernando's arm, whereas the defendant presented his own testimony that Fernando was injured when an iron fell on Fernando and that of Mr. Ocampo who, along with the defendant, witnessed Fernando falling against the barbeque grill, which caused a second burn. The defendant maintains that Mr. Ocampo's and his testimony was corroborated by Ms. Perez, Ms. Corona and Detective O'Donnell when they testified that Fernando appeared to have suffered two separate injuries. He points to Ms. Perez's testimony confirming that he had a job interview as supporting his explanation that he was ironing a shirt when Fernando suffered the first injury. Ms. Perez further corroborated the defense case by her testimony that she observed a yellow substance on the burn, which would have confirmed Mr.

Ocampo's and the defendant's testimony that Mr. Ocampo's wife put mustard on Fernando's arm after he was burned by the grill.

¶ 115 As the trier of fact, it is the function of the jury to assess the credibility of the witnesses, the weight to be given their testimony and the determination as to the inferences to be drawn from that testimony. *Tenney*, 205 Ill. 2d at 428. It is also the function of the jury to resolve conflicts or inconsistencies in the evidence. *Tenney*, 205 Ill. 2d at 428.

¶ 116 Where the defendant provides the only evidence as to the circumstances of the offense, the absence of other direct evidence challenging his testimony does not require the jury to accept the defendant's testimony in its entirety. *People v. Ortiz*, 65 Ill. App. 3d 525, 530 (1978) (the jury could believe as much or as little of the defendant's story). The trier of fact is not required to accept the testimony of the defendant or his witnesses. *People v. Fender*, 91 Ill. App. 3d 844, 846 (1980). Mr. Ocampo was the defendant's cousin and that could cause the jury to afford his testimony less weight. *People v. Lacy*, 407 Ill. App. 3d 442, 466 (2011); see *People v. Deloney*, 341 Ill. App. 3d 621, 635 (2002) (as the defendant's cousins, the witnesses' credibility may have carried little weight).

¶ 117 "A false exculpatory statement is 'probative of a defendant's consciousness of guilt.' " *People v. Milka*, 211 Ill. 2d 150, 181 (2004) (quoting *People v. Shaw*, 278 Ill. App. 3d 939, 951 (1996)). In this case, the defendant admitted that he lied to Ms. Perez, Ms. Corona, Detective O'Donnell and Dr. Hussaini about how Fernando was injured. It was not until after Ms. Perez insisted that he tell her the truth about Fernando's injury that he told her about the incident with the iron. She still had to ask him a second time to tell her the truth before he told her about the grill incident.

¶ 118 The defendant maintains that Dr. Fujara's opinion that Fernando's injuries were not accidental was not supported by the State's other witnesses and was rebutted in large part by Dr. Spitz's opinion testimony. He points out that Dr. Fujara did not examine Fernando until September 10, 2009, that she never examined the iron, and that while she opined that there was only one injury, the State's other witnesses testified that there were two injuries.

¶ 119 We disagree with the defendant's claim that the State's witnesses supported his contention that Fernando suffered two separate injuries. Ms. Corona and Detective O'Donnell did not testify that Fernando suffered two separate injuries. They merely described the appearance of the injury to Fernando's arm. While Ms. Perez referred to two injuries, one white and one red, she believed that the redness she observed indicated that the wound was infected. Moreover, none of these witnesses testified to any medical qualifications that would allow them to render an opinion as to the number of burn injuries. We further disagree that Dr. Fujara's opinion that Fernando's injuries were not accidental was rebutted by Dr. Spitz's expert testimony.

¶ 120 The trier of fact determines the credibility and weight to be given the testimony of an expert witness, and the trier of fact is not obligated to accept the opinion of defendant's expert witnesses over those opinions presented by the State. *People v. Urdiales*, 225 Ill. 2d 354, 431 (2007). In determining the weight to be given an expert's testimony, the jury may consider: the ability and character of the witness, the behavior of the witness while testifying, the weight and process of reasoning by which the witness supported his or her opinion, possible bias in favor of the party for whom the witness is testifying, whether the witness is being compensated for his or her testimony, the relative opportunities for study or observation of the matters about which the witness testifies, and any other matters, which

serve to illuminate the witness' statements. *People v. Platter*, 89 Ill. App. 3d 803, 818 (1980); 31 Am. Jur. 2d *Expert & Opinion Evidence* §181 (1967). "An opinion of an expert is to be accorded such weight that, in the light of all of the facts and circumstances of the case, reasonably attaches to it." *In re Glenville*, 139 Ill. 2d 242, 251 (1990).

¶ 121 We have set forth the testimony of Dr. Hussaini, Dr. Fujara and Dr. Spitz in detail. All three doctors were qualified as experts in their respective fields and testified to their opinions and what they relied in reaching those opinions. Each was thoroughly cross-examined by the opposing party. All three doctors agreed that Fernando suffered a burn injury. Dr. Fujara and Dr. Spitz agreed that Fernando's left arm showed both first and second degree burns on Fernando's left arm and that an iron was involved in causing the burns. The doctors differed over whether there was only one injury as Dr. Fujara concluded or two injuries as Dr. Spitz concluded.

¶ 122 The jury also was aware of the weaknesses in the experts' testimony, such as Dr. Fujara's admission that her description of the top of burn was inaccurate and that she never examined the iron the defendant used. Unlike Dr. Fujara and Dr. Hussaini, Dr. Spitz did not examine Fernando and admitted he may have viewed out-of-focus photographs of the injury. In his January 3, 2012 report, he did not state that there were two separate injuries. While the doctor claimed that he understood the case better than he did when he authored the January 3, 2012 report, he could not recall what documents he received after he authored his report. Moreover, Dr. Spitz appeared to suffer from a hearing problem, and at various times in his testimony, he appeared confused and disorganized in his attempts to state his opinions and how he arrived at them. In contrast, Dr. Fujara stated her opinions and her reasons for arriving at them in a clear concise manner.

¶ 123 The defendant points to Dr. Spitz's impressive and extensive credentials, suggesting that the jury should have given more weight to his opinion in this case. However, as our supreme court has observed " '[e]ven if several competent experts concur in their opinion and no opposing expert testimony is offered, it is still within the province of the trier of fact to weigh the credibility of the expert evidence and to decide the issue *** in light of all of the facts and circumstances of the case ***.' " *Urdiales*, 225 Ill. 2d at 431 (quoting *Glenville*, 139 Ill. 2d at 251).

¶ 124 In the present case, the jury accepted the opinion testimony of Dr. Fujara that Fernando suffered one injury that was inflicted intentionally with an iron and causing first and second degree burns to his left arm. Dr. Fujara's opinion was supported by Dr. Hussaini's testimony that Fernando suffered a burn and that the burn-injury was inconsistent with the defendant's explanation for the injury. The defendant admitted that Fernando was injured by the iron, but not until after he lied to Ms. Perez, Dr. Hussaini, Ms. Corona and Detective O'Donnell. The defendant's testimony that on both occasions Fernando was wearing a sweater when he was injured supports the inference that the burns to Fernando's left arm did not occur under the circumstances described by the defendant. We consider Dr. Spitz's opinion that the burn to Fernando's arm could have occurred even if Fernando was wearing a shirt, questionable, particularly in light of Ms. Perez's testimony that she did not notice the large red burn until after she removed Fernando's sweater.

¶ 125 Finally, the defendant points to his testimony that he loved Fernando and that even the State's witnesses testified that Fernando exhibited no prior signs of abuse or neglect. However, we also consider that the defendant lied about the cause of Fernando's injuries, did not seek medical treatment for Fernando for the injury from the iron and convinced Ms.

Perez to wait to seek medical attention for Fernando. His stated concern that he would be asked to move out Ms. Perez's apartment if he told the truth, belies his concern for the welfare of his son.

¶ 126 The evidence and the reasonable inferences from the evidence established beyond a reasonable doubt that the defendant intentionally, knowingly and without legal justification caused bodily harm to Fernando.

¶ 127 II. Restriction of Dr. Spitz's Testimony

¶ 128 The defendant contends that he was denied the right to present a defense when the trial court prevented Dr. Spitz from rendering an opinion as to how Fernando was injured or to rebut Dr. Fujara's testimony that the injury was not accidental.

¶ 129 A. Forfeiture and Plain Error

¶ 130 The defendant concedes that he failed to raise the error in his posttrial motion and therefore did not preserve this issue for review. See *People v. Woods*, 214 Ill. 2d 455, 470 (2005) (a defendant must both object at trial and raise the specific issue again in a posttrial motion or the error is forfeit for review). He requests that we consider the error under the plain-error doctrine (Ill. S. Ct. R. 615(a) (eff. Aug. 27, 1999).

¶ 131 The plain-error doctrine provides a narrow and limited exception to the rule that unpreserved errors are forfeited for review on appeal. *People v. Naylor*, 229 Ill. 2d 584, 593 (2008). Under the doctrine, a reviewing court may consider an unpreserved error when:

" '(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial

process, regardless of the closeness of the evidence.' " *Naylor*, 229 Ill. 2d at 593 (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Under either prong of the plain-error doctrine, the defendant has the burden of persuasion. *People v. Herron*, 215 Ill. 2d 167, 187 (2005). In conducting a plain-error analysis, we first determine whether error occurred. *People v. Span*, 2011 IL App (1st) 083037, ¶ 73.

¶ 132 "The decision to qualify a witness as an expert rests within the sound discretion of the trial court." *People v. Lovejoy*, 235 Ill. 2d 97, 125 (2009). An abuse of discretion will be found only where the trial court's decision is fanciful, arbitrary, or unreasonable such that no other person would take the view adopted by the trial court. *Lovejoy*, 235 Ill. 2d at 125. A witness will be permitted to testify as an expert if experience and qualifications of the witness afford him or her knowledge that is not common to the average layperson and will assist the jury in evaluating the evidence and reaching a conclusion. *Lovejoy*, 235 Ill. 2d at 125. There are no precise requirements regarding experience, education, scientific study or training. *Lovejoy*, 235 Ill. 2d at 125.

¶ 133 Based on his experience and training, the trial court refused to qualify Dr. Spitz as an expert in the field of burn injuries. In contrast, Dr. Fujara was qualified as an expert in child abuse which included burn injuries. Dr. Fujara explained that approximately 200 children with burn injuries were seen at Stroger Hospital and that 90% of them were accidental. Her division saw three cases per year of burns inflicted with an iron. In contrast, Dr. Spitz was unable to state how many times he had testified as a burn expert in a case. When defense counsel sought to elicit further testimony from the doctor to establish his qualifications as an expert in the area of burns, Dr. Spitz gave a rambling answer which only served to indicate his lack of experience with treating burn injuries.

¶ 134 Dr. Spitz's list of credentials was impressive, and the trial court did qualify him as an expert in the fields of medicine and pathology. However, in contrast to Dr. Fujara's opinions which, based on her experience, provided assistance to the jury in determining how Fernando came to be injured, Dr. Spitz's opinions amounted to nothing more than stating his disagreement with Dr. Fujara's opinions and thus would not have assisted the jury in determining how Fernando sustained the burns to his arm.

¶ 135 We cannot say that the trial court abused its discretion in restricting Dr. Spitz from rendering an opinion as to the accidental or intentional nature of the burn injury to Fernando's left arm. In the absence of error, no plain-error analysis is required. *People v. Calhoun*, 404 Ill. App. 3d 362, 382 (2010).

¶ 136 Even assuming that the trial court's restriction of Dr. Spitz's testimony was error, the defendant cannot satisfy either prong of the plain-error analysis. The defendant does not argue that the error was a structural one requiring automatic reversal, and contrary to the defendant's contention, the evidence was not closely balanced.

¶ 137 In determining whether the evidence is closely balanced, the reviewing court must make a commonsense assessment of the evidence within the circumstances of the case before it. *People v. Belknap*, 2014 IL 117094, ¶ 50. The evidence in this case established that while in the care of the defendant, Fernando suffered an injury consisting of first and second degree burns. The defendant persisted in lying about how Fernando came to be injured even to the point of delaying treatment of the injury and then lying about how it occurred to Dr. Hussaini. The defendant's testimony that Fernando was accidently injured when the iron fell on him was discredited by his earlier lies and was rebutted by the opinion testimony of Dr. Fujara that the burn could not have been caused accidently. Even if Dr. Spitz had been

allowed to testify that the burn could have been caused accidently, in light of Dr. Fujara's experience in the area of burn injuries in contrast to Dr. Spitz's lack of experience in that area and his less than stellar performance as an expert witness, the jury was entitled to give more weight to Dr. Fujara's opinion that Fernando's burns were not the result of an accident.

¶ 138 Viewing the evidence in a commonsense manner in the context of all of the circumstances in this case, we conclude that the evidence was not closely balanced. Therefore we need not determine whether the error had some impact on the jury's verdict. *Belknap*, 2014 IL 117094, ¶ 62. In the absence of plain error, the defendant's claim of error in the restriction of Dr. Spitz's testimony is forfeited.

¶ 139 For all of the foregoing reasons, we affirm the defendant's conviction and sentence.

¶ 140 Affirmed.