

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

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of
)	Cook County.
Plaintiff-Appellee,)	
)	
v.)	Nos. 04 CR 25203 and 09 CR 893
)	
GUILLERMO DOMINGUEZ,)	Honorable Thomas J. O'Hara,
)	Judge Presiding.
Defendant-Appellant.)	

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

ORDER

- ¶ 1 **Held:** The State's evidence was sufficient to convict defendant of involuntary manslaughter. Defendant's trial counsel was not ineffective for failing to request a *Frye* hearing with respect to the State's evidence about shaken baby syndrome.
- ¶ 2 Following a bench trial, defendant Guillermo Dominguez was convicted of involuntary manslaughter of his infant son, Guillermo Dominguez, Jr., and sentenced to eight years' imprisonment. On appeal, defendant argues that: (1) the State failed to prove him guilty beyond a reasonable doubt and (2) his trial counsel was constitutionally deficient for failing to request a

hearing pursuant to *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) to test the admissibility of the State's expert testimony regarding Shaken Baby Syndrome (SBS). We affirm.

¶ 3 Background

¶ 4 The events underlying this case began on December 12, 2002. That evening, defendant and his wife, Maria Dominguez, were in their apartment with their infant son, Guillermo, Jr. Around 7 p.m., Maria noticed "something a little bit in [Guillermo's] eyes but not something really bad." She explained that Guillermo's eyes were "a little bit raised." However, by the time Maria put Guillermo to bed at 9:30 p.m., she did not notice anything wrong with Guillermo's eyes. Around midnight, defendant woke up to take care of Guillermo.

¶ 5 Maria checked on Guillermo at 6:30 a.m. the following morning. Guillermo was sleeping at the time and did not appear to be in distress. Maria then left for work, leaving Guillermo in defendant's sole care.

¶ 6 At 12:20 p.m., approximately six hours after Maria left for work, Douglas Fisher and Wendell Thomas—both paramedics with the Chicago Heights fire department—responded to a 9-1-1 call at defendant's apartment. When they arrived, Fisher tried talking to defendant while Thomas attended to Guillermo, for whom the 9-1-1 call was made. Fisher testified that there were no other adults present in the apartment at the time. Thomas quickly realized that Guillermo was not breathing and did not have a pulse. He told Fisher and then began cardiac pulmonary resuscitation (CPR), which he continued performing while they transported Guillermo by ambulance to St. James Hospital.

¶ 7 Guillermo arrived at St. James around 12:30 p.m. and was taken to the emergency room, where he was treated by Dr. James Bajo, an emergency medicine physician. Dr. Bajo explained that, although Guillermo did not show any external injuries, he was in full respiratory cardiac

arrest when he arrived. Because Guillermo was not breathing, Dr. Bajo ordered the initiation of advanced pediatric life support and CPR. In addition, Dr. Bajo requested that blood testing be performed in order to determine the cause of Guillermo's injuries. According to Dr. Bajo, the blood tests revealed that Guillermo's hemoglobin count was low and his white blood cell count was "slightly elevated," which indicated that Guillermo was anemic.

¶ 8 At 1:52 p.m., Guillermo was transferred to Christ Hospital. He was received there around 4 p.m. and placed under the care of Dr. Rabi Sulayman. At that time, according to Dr. Sulayman, Guillermo had suffered cardiopulmonary arrest and was unconscious. Once Dr. Sulayman stabilized Guillermo's vital functions, he ordered blood testing and diagnostic testing on Guillermo's brain to determine the cause of his injuries.

¶ 9 The tests revealed that Guillermo sustained a traumatic brain injury. Specifically, Dr. Sulayman noted that Guillermo had (1) a subdural hematoma which covered nearly all of his brain; (2) hemorrhages in the brain parenchymas; (3) hemorrhages in both retinas; (4) hygromas, *i.e.*, spaces in the brain filled with fluid that form after a bleeding injury; and (5) a cerebral edema, *i.e.*, swelling of the brain in response to an injury.

¶ 10 The cerebral edema proved critical in Dr. Sulayman's assessment of Guillermo's condition. According to Dr. Sulayman, Guillermo's cerebral edema was so severe that it had interfered with his brain's ability to regulate his breathing and heart function. In essence, Dr. Sulayman elaborated, the swelling was causing Guillermo's body to shut down, which he explained was the reason why Guillermo was not breathing.

¶ 11 After ruling out other potential causes of Guillermo's injuries, such as CPR, Dr. Sulayman testified that he believed to a reasonable degree of medical certainty that Guillermo's brain injury was caused by SBS. Dr. Sulayman defined SBS as follows:

“It is when the body of the baby and, therefore, the head is shaken back and forth forcefully where the brain starts moving in opposite direction of the shaking. And, therefore, the force could be severe enough to cut, shear off the blood vessels that attach the brain to the skull and the blood vessels inside the brain.”

On cross-examination, he made clear that he was not *diagnosing* Guillermo with SBS:

“Q. [DEFENSE COUNSEL:] And have you ever made a wrong diagnosis as to Shaken Baby Syndrome?

* * *

THE WITNESS: Physicians don’t make the diagnosis of Shaken Baby Syndrome. Physicians make the diagnosis of traumatic brain injury, the etiology of which could be Shaken Baby Syndrome. It is up to the follow-up and the investigative procedures that take place to make the diagnosis as the etiology.”

¶ 12 Dr. Sulayman testified that he could not pinpoint the precise time when Guillermo actually sustained his injuries. Instead, he offered a general time frame for when Guillermo’s injuries could have been inflicted, explaining that in the majority of cases, subdural hematomas become symptomatic within 12 hours of the underlying injury.

¶ 13 While the doctors were working to save Guillermo’s life, the Chicago Heights police department was investigating his injuries. Around 1:30 p.m., Detective Jimmy Martinez went to Christ Hospital and spoke to Guillermo’s doctors and defendant’s wife, who had come to the hospital along with defendant. Afterwards, Detective Martinez spoke to his supervisor, Sergeant

Brian Howard, and determined that “it was best” to speak to defendant at the police station.

Around 2:30 p.m., Detective Martinez asked for and received defendant’s consent to an interview at the police station.

¶ 14 The interview commenced around 4:30 p.m. According to Detective Martinez, defendant first told him that he was taking care of Guillermo because his wife had left for work. Guillermo had been laying on a bed crying during the morning, but at some point defendant realized Guillermo had stopped crying. When defendant went to check on Guillermo, he said he realized that Guillermo was not breathing, so he called 9-1-1.

¶ 15 In response, Detective Martinez told defendant that he had spoken with Guillermo’s doctor and was told that Guillermo had bruising on his brain. He explained that a baby could not sustain such an injury by laying on a bed, and that “something must have happened” to Guillermo.

¶ 16 According to Detective Martinez, defendant responded by explaining that earlier in the morning, he gave Guillermo a bottle of milk, but forgot to burp him. Defendant reasoned that Guillermo was crying because he had not been burped, so he picked Guillermo up to burp him. Defendant explained that, as he picked Guillermo up, Guillermo’s head jerked back, and then forward, striking defendant’s chin and chest. Defendant then began burping Guillermo by patting him on the back and head.

¶ 17 Detective Martinez testified that he did not memorialize defendant’s interview because he was busy with other cases and because he transferred to the New Lenox police department a few months later. He did testify, however, that he took notes during the conversation and that the notes should have been in his case file at the police station.

¶ 18 After the interview was over, Detective Martinez and Sergeant Howard determined that there was probable cause to arrest defendant. Accordingly, at 7:30 p.m., defendant was placed under arrest. On December 15, defendant was charged by indictment with aggravated battery of a child. See 720 ILCS 5/12-4.3(a)(2) (West 2002).

¶ 19 Sometime between December 13 and 17, Guillermo became comatose. On December 17, 2002, Dr. Benjamin Ticho, whom the court accepted as an expert in pediatric ophthalmology, performed an ophthalmologic examination on Guillermo's eyes. The examination revealed that Guillermo sustained multiple intra-retinal and pre-retinal hemorrhages in both eyes. According to Dr. Ticho, these hemorrhages were "consistent and suggestive of *** a shaking injury." That conclusion was founded, in part, on the absence of any evidence showing that Guillermo sustained ocular trauma or suffered from a bleeding disorder. Moreover, Dr. Ticho explained that the retinal hemorrhages Guillermo sustained were inconsistent with the type of retinal hemorrhaging caused by CPR because Guillermo's hemorrhages existed in multiple layers of his eyes.

¶ 20 Guillermo remained in a coma until March 15, 2004, when he died from complications due to his injuries. Following Guillermo's death, the State amended defendant's indictment to add two counts of first degree murder. See 720 ILCS 5/9-1(a)(1), (2) (West 2002).

¶ 21 On March 17, 2004, Dr. Nancy Jones, an assistant medical examiner whom the court accepted as an expert in forensic pathology, performed an autopsy on Guillermo. Dr. Jones observed that Guillermo's head was smaller than typical for his age, and that the bones in his skull had fused together prematurely and were overlapping. An internal examination of Guillermo's skull revealed that his brain was very small. Dr. Jones attributed Guillermo's brain size to the fact that he suffered an anoxic injury which deprived his brain of oxygen.

¶ 22 In addition, Dr. Jones observed the presence of bilateral subdural hygromas covering the superior aspect of Guillermo's brain and the inferior surface of the dura mater and "subdural membranes from a healed subdural hematoma." She explained that a hygroma is fluid leftover from the brain trying to heal a subdural hematoma or blood clot. According to her, a child of Guillermo's age could sustain a subdural hematoma by (1) falling from a "relatively large height"; (2) being in a car accident with "rotational motion"; and (3) by suffering "abusive head trauma such as violent shaking or violent shaking and slamming the child."

¶ 23 Dr. Jones found that Guillermo's injuries were consistent with SBS, which she defined as a "constellation of findings" which include the presence of such indicators as subdural hematomas on the brain, retinal hemorrhaging, and rib fractures. She based her conclusion on the fact that there were no organic medical explanations for Guillermo's injuries. She specifically ruled out the possibility that Guillermo's retinal hemorrhaging was caused by CPR, explaining that it would have required "significant force" akin to "a car coming down on an adult chest" to cause Guillermo's retinal hemorrhages and that he would not have sustained that much force through CPR. She also ruled out the possibility that Guillermo's injuries were caused by a simple accident, answering "no" when asked on cross-examination whether injuries like Guillermo's could be caused if "a parent lifted [a] baby with force and the baby's head snapped back and then hit the adult in the head." Based on her assessment of Guillermo's injuries and the fact that she could not attribute the injuries to any organic cause, Dr. Jones concluded that Guillermo's manner of death was homicide.

¶ 24 Defendant testified in his own defense. According to defendant, on the morning of December 13, 2002, he fed and burped Guillermo and then put him in his crib. Defendant then went to the kitchen to eat. Fifteen to 20 minutes later, defendant checked on Guillermo and

realized that he was choking. Defendant immediately went downstairs to get his landlord because he was not sure what to do. When defendant was unable to find his landlord, he called 9-1-1. Defendant estimated that a total of four to five minutes passed between the time when he realized Guillermo was choking and the time when the paramedics arrived.

¶ 25 When the paramedics arrived, they took Guillermo to St. James Hospital. Eventually, Guillermo was transferred to Christ Hospital. While at Christ Hospital, defendant was approached by two Chicago Heights police officers who asked him to come to the police station for a five to ten minute interview. Defendant testified that he agreed to the interview, but he explained that it lasted for 30 minutes and he was arrested afterwards.

¶ 26 On cross-examination, defendant testified that he fed Guillermo three times on December 13: once between 6:30 and 7 a.m.; once at 9 a.m.; and once between 11:30 a.m. and noon. After the noon feeding, defendant ate lunch and then checked on Guillermo. It was at that time that defendant saw Guillermo was choking. Defendant tried finding his landlord but could not, so he called 9-1-1. Defendant testified that that he did not try calling anyone else before calling 9-1-1.

¶ 27 The prosecutor then impeached defendant with testimony he gave during a December 8, 2003 juvenile proceeding. During that proceeding, defendant testified that he tried calling his mother-in-law before looking for his landlord. He further testified that when he was looking for his landlord, he saw a neighbor and told him that “my child was bad. He was breathing very little.” After looking at Guillermo, the neighbor told defendant to call 9-1-1, so he did.

¶ 28 Defendant admitted that he consented to the interview with Detective Martinez. He denied, however, being told by Detective Martinez that Guillermo could not have sustained bruising on his brain unless something happened. Defendant also denied telling Detective Martinez that Guillermo’s head snapped back and forth and struck defendant while he was

picking up Guillermo. Defendant conceded, however, that he was not arrested until after the interview.

¶ 29 Defendant also presented testimony from Dr. Richard Grostern and Dr. John Paul Cueva. Dr. Grostern testified that he examined Guillermo's eyes in early 2004. To prepare for the examination, Dr. Grostern reviewed a hematology report about Guillermo which was created by St. James Hospital. The report showed that Guillermo's hemoglobin levels were extremely low, which indicated that he was severely anemic, and that his white blood cell count was extremely high, which indicated that something was wrong with his blood. Dr. Grostern explained that low hemoglobin levels can cause retinal hemorrhaging.

¶ 30 Dr. Cueva testified that he was Guillermo's primary care physician. After reviewing the St. James Hospital report, Dr. Cueva explained that Guillermo's low hemoglobin levels could have caused his retinal hemorrhages. He then opined that, based on his review of Guillermo's medical records, there was no basis to diagnosis Guillermo with SBS.

¶ 31 After the close of evidence and closing arguments, the trial court announced its ruling. The court, explaining that it looked at the "totality of the evidence here," including the "totality of the medical testimony," found that "the State has proven beyond a doubt that this was a homicide." The court then explained that "the question is whether or not the Defendant's actions are responsible for those injuries that [Guillermo] suffered which caused his death." The court resolved that question in favor of the State:

"The State has shown testimony that the child was in the exclusive control of the Defendant during the period of time when these injuries were sustained. The defendant's own statement to Detective Martinez, which I do find credible, the testimony of

Detective Martinez, that there was some shaking even though he minimized the shaking.

I reject the Defendant's testimony is incredible that on the witness stand denying any actions on his part. I feel that his statement to Detective Martinez minimizing the shaking was more accurate than the testimony that he gave on the stand here today."

The court then found, "based on the totality of the evidence," that the State had proven beyond a reasonable doubt that "the injuries suffered by [Guillermo], which caused his death, were at the hands of the Defendant."

¶ 32 The court next found that the State failed to produce any evidence to support the factual proposition that defendant acted intentionally or knowingly. The court found, however, that the State had proven beyond a reasonable doubt that defendant acted recklessly. Accordingly, the court acquitted defendant of first degree murder and instead found him guilty of involuntary manslaughter. The court sentenced defendant to eight years' imprisonment for involuntary manslaughter. Separately, the court sentenced defendant to a consecutive term of eight years' imprisonment for violating a bail bond as to this proceeding. This appeal of the involuntary manslaughter conviction followed.

¶ 33 ANALYSIS

¶ 34 Defendant raises two arguments on appeal. First, he argues that the State failed to prove him guilty beyond a reasonable doubt of involuntary manslaughter. Second, he contends that his trial counsel was ineffective for failing to request a *Frye* hearing with respect to the State's SBS evidence.

¶ 35

A. Sufficiency of the Evidence

¶ 36 We first consider defendant’s argument that he was not proven guilty of involuntary manslaughter beyond a reasonable doubt. “The due process clause of the fourteenth amendment to the United States Constitution requires that a person may not be convicted in state court ‘except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.’ ” *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004) (quoting *In re Winship*, 397 U.S. 358, 364 (1970)). As a court of review, we may not retry a defendant. *People v. Wheeler*, 226 Ill. 2d 92, 114 (2007). Instead, we must merely “determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.” *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 318 (1979)). In so doing, we must give “great weight” to the factual determinations made by trial judge because the judge had the opportunity to hear the witnesses and observe their demeanor in court. *Id.* at 114-15.

¶ 37 Defendant first argues that the trial court’s reliance on “the totality of the medical testimony” was misplaced because SBS has come under intense scientific scrutiny since the time when the doctors treated Guillermo and performed their post-mortem examinations of him. In support of his position, defendant directs our attention to numerous secondary sources discussing SBS. See, e.g., Deborah Tuerkheimer, *The Next Innocence Project: Shaken Baby Syndrome and the Criminal Courts*, 87 Wash. U.L. Rev. 1 (2009).

¶ 38 The problem with this argument is none of the secondary sources cited by defendant in his brief were submitted to the trial court—not as substantive evidence, and not even to impeach the State’s witnesses—and we therefore cannot consider them. See *People v. Mehlberg*, 249 Ill. App. 3d 499, 531-32 (1993) (declining to take judicial notice of secondary sources not submitted

to trial court which were submitted to the appellate court to impeach the State's expert witnesses). Because defendant's entire first argument is premised on these sources, it fails.

¶ 39 Defendant next argues that Detective Martinez's trial testimony wherein he recounted defendant's statements during the interview at the police station was not credible because Detective Martinez "was able to recite the precise statement" defendant made to him during the interview. We have reviewed the record and disagree with defendant's contention that Detective Martinez testified as to defendant's "precise" or "exact" statements during the interview. Nothing in the record suggests that Detective Martinez was quoting defendant verbatim. Thus, while it is true that the interview occurred 11 years before trial and was not memorialized, those facts were made known to the trial court, which nonetheless found Detective Martinez credible. The court's assessment of Detective Martinez's credibility is entitled to great deference from this court. *Wheeler*, 226 Ill. 2d at 114-15. On the record before us, we find no basis to disturb the court's finding.

¶ 40 Finally, defendant contends that the State failed to prove the essential elements of involuntary manslaughter. At the time of indictment, the offense of involuntary manslaughter was codified in section 5/9-3(a) of the Criminal Code of 1961, which provided in relevant part:

"A person who unintentionally kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly." 720 ILCS 5/9-3(a) (West 2002).

¶ 41 Defendant argues that two factual findings made by the trial court subordinate to its guilty finding were not supported by the evidence. The specific findings with which defendant

takes issue are: (1) that defendant had “exclusive control” of Guillermo “during the time when these injuries were sustained”; and (2) that “there was some shaking even though [defendant] minimized the shaking” during his interview with Detective Martinez.

¶ 42 With respect to the first point, the evidence showed that defendant had exclusive control over Guillermo from 6:30 a.m., when Maria left for work, until 12:20 p.m., when the paramedics arrived. There was no testimony that any adults other than defendant had access to Guillermo during that time period. Furthermore, the evidence showed that from 7 p.m. until 6:30 a.m., defendant was present and caring for Guillermo. Although it is true that Maria was also in the home with Guillermo from 7 p.m. until 6:30 a.m., the evidence showed that defendant, and not Maria, cared for Guillermo during the night. Specifically, Maria testified that defendant woke up to put Guillermo back to sleep around midnight. Thus, the record shows that defendant was the only parent to physically care for Guillermo during the 12 hour time period preceding the onset of symptoms from the subdural hematoma. Thus, the trial court’s statement that Guillermo was in defendant’s “exclusive control” was a substantially correct summation of the facts, even though it was not literally accurate.

¶ 43 In his petition for rehearing, defendant argues that a stipulation entered into between the parties regarding testimony Maria gave during a November 13, 2003 juvenile court proceeding to the effect that Maria did in fact feed Guillermo on the morning of December 13 “undermines the notion that [defendant] was the only parent to tend to their baby.” This argument is not well founded. As the record makes clear, the stipulation was not accepted as substantive evidence. Rather, the trial court accepted the stipulation for the limited purpose of perfecting the State’s attempted impeachment of Maria at trial using the same testimony.

¶ 44 Nor does the trial court’s finding that “there was some shaking even though [defendant] minimized the shaking” necessitate reversal. In order to arrive at that conclusion, the trial court had to first make a credibility assessment with respect to defendant. Specifically, the court had to determine whether defendant or Detective Martinez was telling the truth about whether defendant actually said during the interview at the police station that Guillermo’s head snapped back and forth while defendant was picking up Guillermo. Defendant denied making that statement at trial. The judge did not believe that defendant’s trial testimony was truthful, stating “I reject the Defendant’s testimony is incredible that on the witness stand denying any actions on his part. I feel that [defendant’s] statement to Detective Martinez minimizing the shaking was more accurate than the testimony that he gave on the stand here today.”

¶ 45 In a bench trial, the trial judge, sitting as the fact finder, makes determinations about witness credibility. *People v. Williams*, 2013 IL App (1st) 111116, ¶ 77. And although this court will not serve as a “rubber stamp” approving every bench trial guilty verdict (*People v. Hernandez*, 312 Ill. App. 3d 1032, 1037 (2000)), we must nonetheless grant the trial judge’s credibility determinations wide deference, for the trial judge had the opportunity to listen to defendant and Detective Martinez, as well as observe their demeanor and mannerisms while testifying (*Samour, Inc. v. Board of Election Commissioners of City of Chicago*, 224 Ill. 2d 530, 548 (1997); *People v. Smith*, 185 Ill. 2d 532, 542 (1999)). In the present case, nothing in the record provides any basis for us to disturb the trial court’s determination that defendant’s explanation at trial for Guillermo’s injuries was not believable.

¶ 46 We find that the court’s determination that defendant’s statement to Detective Martinez “minimized the shaking” was a reasonable inference based on the totality of the evidence. Notably, during the interview, after being asked by Detective Martinez to explain what happened

before he called 9-1-1, defendant initially gave an answer that did not involve defendant touching Guillermo in anyway whatsoever. Specifically, Detective Martinez explained that defendant told him that “the baby was laying on the bed crying throughout the morning, and then [defendant] didn’t hear the baby crying or making any noise, so he went to see how the baby was doing, and he noticed that the baby was not breathing, and so he called the paramedics.”

¶ 47 Detective Martinez then told defendant that he had been informed by Guillermo’s doctors that Guillermo had a brain injury which could not have been sustained if Guillermo had simply been laying down. Only then did defendant tell Detective Martinez that Guillermo’s head snapped back and forth while defendant was lifting Guillermo. Based on the manner in which the interview progressed, the trial court was justified in concluding that defendant did *something* to Guillermo which caused his injuries.

¶ 48 The trial court was not required to blindly accept the version of events defendant gave to Detective Martinez. The court heard extensive testimony from several expert witnesses describing the severity of Guillermo’s injuries and eliminating numerous possible organic causes for those injuries. Chief among those witnesses was Dr. Jones, who explicitly testified that Guillermo’s injuries could not have possibility been caused by a parent performing the precise action defendant told Detective Martinez he took with respect to Guillermo. Accordingly, the trial court was justified in making a reasonable inference from the totality of the evidence that defendant shook Guillermo.

¶ 49 Finally, defendant argues that the State failed to produce evidence showing that he acted recklessly. This argument has no merit. To show that defendant acted recklessly, the State needed to prove that defendant “consciously disregard[ed] a substantial and unjustifiable risk that circumstances exist or that a result will follow *** and such disregard constitute[ed] a gross

deviation from the standard of care which a reasonable person would exercise in the situation.”

720 ILCS 5/4-6 (West 2002). “The mental state of recklessness is to be inferred from all the facts and circumstances in the record, viewed as a whole.” *People v. Wilson*, 143 Ill. 2d 236, 246 (1991). Evidence that a defendant possessed the mental state requisite for conviction may be inferred from “the severity of violence necessary to cause the injuries.” *People v. Rader*, 272 Ill. App. 3d 796, 804-05 (1995). In the present case, the expert testimony revealed that Guillermo’s injuries required the application of extreme force equivalent to a vehicular accident. Based on that testimony and the evidence regarding the extent of Guillermo’s injuries, we find that the State produced sufficient evidence to support a finding of recklessness.

¶ 50

B. Ineffective Assistance of Counsel

¶ 51 We next consider whether defense counsel was ineffective for failing to request a *Frye* hearing to determine the admissibility of the State’s SBS testimony. See *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). The *Frye* test is codified in Illinois Rule of Evidence 702, which provides in relevant part:

“Where an expert witness testifies to an opinion based on a new or novel scientific methodology or principle, the proponent of the opinion has the burden of showing the methodology or scientific principle on which the opinion is based is sufficiently established to have gained *general acceptance* in the particular field in which it belongs.” Ill. R. Evid. 702 (eff. Jan. 1, 2011).

¶ 52 To establish a claim of ineffective assistance of counsel, defendant must satisfy the two-prong test set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). First, defendant must show that his trial counsel’s performance was objectively

deficient. Second, defendant must show that there is “a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *People v. Ramsey*, 239 Ill. 2d 342, 433 (2010). In cases where the alleged deficiency relates to the failure to request a *Frye* hearing, the *Strickland* analysis requires the defendant show that, had defense counsel filed a motion requesting a *Frye* hearing, there is a “ ‘reasonable probability that: (1) the motion would have been granted, and (2) the outcome of the trial would have been different had the evidence been [excluded].’ ” *People v. Luna*, 2013 IL App (1st) 072253, ¶ 88 (quoting *People v. Bew*, 228 Ill. 2d 122, 128-29 (2008)).

¶ 53 Here, defendant’s *Strickland* claim fails at the threshold because SBS is not a “scientific methodology or principle” as that term is understood in the context of *Frye* and Rule 702. To be sure, scientific testimony regarding the diagnosis of a medical condition is subject to *Frye*. See *In re Detention of New*, 2013 IL App (1st) 111556, ¶ 53. In *New*, we explained the rationale for defining the term “scientific methodology or principle” to include medical diagnoses as follows:

“[D]iagnosing a medical condition, in this case a mental disorder, by considering characteristic signs and symptoms presupposes a mental condition exists as a matter of scientific evidence. Put another way, a prerequisite for a diagnosis is scientific evidence that such a mental condition exists. Absent reliable scientific validation or acceptance of the mental condition, its presence would be merely theoretical. Before diagnosis comes identifying, naming, describing, and classifying the condition. A *Frye* hearing is appropriate to determine whether an emerging diagnosis is an actual illness or disorder.” *Id.* ¶ 53.

¶ 54 The testimony in the present case, however, clearly places SBS testimony beyond the reach of that rationale, and by extension, *Frye* itself. At trial, Dr. Sulayman testified that SBS is an *etiology*, not a diagnosis. Black’s Law Dictionary defines “diagnosis” as the “determination of a medical condition (such as a disease) by physical examination or by study of its symptoms”. Black’s Law Dictionary 518 (9th ed. 2009). The term “etiology,” by contrast, means “[t]he science and study of the causes of disease and their mode of operation.” Stedman’s Medical Dictionary 492 (24th ed. 1982). In other words, SBS is not an independent diagnosis, but rather a causal explanation for a diagnosis.

¶ 55 In this case, the expert testimony regarding the *etiology* of SBS was made based on each expert’s individual medical judgment and expertise. The experts testified that Guillermo’s injuries were consistent with SBS because they were able to scientifically exclude other methods of injury. For example, Dr. Ticho’s conclusion that Guillermo’s injuries were “consistent and suggestive of *** a shaking injury” was based on the fact that Guillermo’s retinal hemorrhages were in multiple layers of the eyes, and thus inconsistent with hemorrhages caused by CPR, as well as the fact that he did not observe evidence that Guillermo sustained ocular trauma or suffered from a bleeding disorder. We explained in *People v. Cook*, 2014 IL App (1st) 113079, that *Frye* is not implicated when experts like Dr. Ticho testify about conclusions they arrived at as a result of their medical training and experience. *Id.* ¶¶ 50-51 (holding that SBS is not subject to *Frye* because “it is a conclusion that may be reached based on observations and medical training which is not new or novel.”).

¶ 56 Of course, the principles and methodologies underlying the individual diagnoses comprising SBS *may* be subject to *Frye*, assuming that they are “new or novel.” But the fact that the component diagnoses underlying SBS are subject to *Frye* does not transform SBS into *Frye*-

able subject matter. Because SBS is not subject to *Frye*, we find that trial counsel was not ineffective for failing to request a *Frye* hearing. See *Luna*, 2013 IL App (1st) 072253, ¶ 88 (“The failure to file a motion does not establish incompetent representation when the motion would have been futile.”).

¶ 57

CONCLUSION

¶ 58 Based on the foregoing, we affirm defendant’s conviction for involuntary manslaughter.

¶ 59 Affirmed.