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2015 IL App (3d) 140272-U

Order filed March 17, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Tazewell County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-14-0272
v.	)	Circuit No. 12-CF-489
	)	
AUSTIN LOVEL,	)	Honorable Kevin R. Galley,
Defendant-Appellant.	)	Judge, Presiding.

PRESDING JUSTICE McDADE delivered the judgment of the court.
Justices Carter and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The evidence at trial was sufficient to prove defendant guilty beyond a reasonable doubt of aggravated battery to a child; (2) the trial court did not abuse its discretion in: (a) allowing the State to reopen its case after it rested; (b) imposing a 25-year prison sentence; and (c) denying defendant's posttrial motion seeking a new trial and investigation based on newly discovered evidence.

¶ 2 Defendant, Austin Lovel, was convicted of aggravated battery to a child (720 ILCS 5/12-3.05(b)(1) (West 2012)) following a jury trial. Defendant was sentenced to 25 years' imprisonment in the department of corrections (DOC). Defendant appeals, arguing: (1) the

evidence at trial was insufficient to prove him guilty beyond a reasonable doubt; (2) the court erred in allowing the State to reopen its case after it rested; (3) defendant's sentence was excessive; and (4) the court erred in denying defendant's posttrial motion seeking a new trial and investigation based on evidence that his uncle committed the offense. We affirm.

¶ 3 FACTS

¶ 4 Defendant was charged by information—later supplanted by indictment—with aggravated battery to a child (720 ILCS 5/12-3.05(b)(1) (West 2012)) following incidents that allegedly occurred between August 9 and 18, 2012. Defendant pled not guilty, and the cause proceeded to jury trial.

¶ 5 Karmen Toney testified that she was the mother of G.S., the alleged victim. In August 2012, G.S. was approximately 18 months old. Toney shared physical custody of G.S. with G.S.'s father, Blake S. Each parent spent approximately half of each week and alternating weekends with G.S. Toney alternated between living with her friend, Mercedes Lyons, and her boyfriend, defendant. Defendant lived with his aunt and uncle, Rebecca and Michael Hoke. Toney and G.S. lived with defendant for approximately two months. During that time, defendant watched G.S. on three occasions while Toney was at work.

¶ 6 On August 9, 2012, defendant watched G.S. while Toney was working. When Toney returned home, she saw bruises on G.S.'s face. Defendant said G.S. sustained the bruises when they were in the basement and he put a table in front of the stairway. G.S. tried to climb on the table, and it hit her in the face. Toney took G.S. to Pekin Hospital. Christina S., Blake's mother, met them there. Toney told Christina and medical personnel that G.S. was injured at Lyons's house when G.S. knocked over a baby gate and slid down the stairs on the gate. Toney lied because she was still in love with Blake and did not want him to find out that she was living with

defendant. Toney was told by medical personnel that nothing was wrong with G.S.

¶ 7 After leaving the hospital, Toney did not notice G.S. sleeping excessively, vomiting, or being listless. On August 10, G.S. went to stay with Blake. Toney visited G.S. on August 12, and G.S. had darker, more prominent bruises on her face but otherwise appeared to be healing. Blake returned G.S. to Toney on August 15.

¶ 8 On August 16, 2012, Toney was playing with G.S. in a recliner in the basement at the Hoke residence. She leaned back in the chair, and G.S. went over Toney's head and hit her head on the carpet. G.S. had a small rug burn mark above her right eye. G.S.'s behavior was normal after the incident. Toney originally told medical personnel the incident occurred August 17. On August 17, Toney did not notice any marks or bruising on G.S.'s body when she changed her diaper or bathed her. The bruises on G.S.'s face from the August 9 incident were gone.

¶ 9 On August 18, Toney went to work at approximately 9 a.m. G.S. was sleeping when she left. Defendant watched G.S. while Toney was at work. Toney came home at 2:30 or 3 p.m. on her break. Defendant told Toney that G.S. had just eaten lunch, and she was sleeping. He said G.S. had fallen in the basement earlier and hit her head. He told Toney not to wake G.S. because she was feeling nauseous. Toney kissed G.S. on the forehead and returned to work. Nothing about G.S.'s appearance concerned Toney at that time.

¶ 10 At approximately 6:30 or 6:40 p.m. on August 18, Toney returned home from work after picking up defendant's friend, Bobby Michaels. When she first returned home, Toney, Michaels, and defendant smoked in the garage. Defendant told Toney he had given G.S. dinner, she still was not feeling well, and she was taking a nap. The three then went downstairs. Defendant and Michaels played video games while Toney sat on the couch for approximately 1½ hours.

¶ 11 Around 8 p.m., Toney got up and said she was going to go check on G.S. Defendant told

Toney not to wake G.S. because he had been with G.S. all day. Toney started toward the stairs. Defendant stood next to Toney and told her she was not going wake G.S. Toney then went outside with Michaels to smoke. Defendant brought G.S. out to Toney. G.S. appeared lifeless and vomited on Toney. G.S. had bruises all over her face and could not hold her head up. Toney believed G.S. had been abused. Toney called G.S.'s pediatrician's after-hours line and asked if she should take G.S. to the hospital. Defendant told her not to go, but Toney went to the hospital anyway.

¶ 12 When Toney arrived at the hospital, G.S. was taken in to be examined immediately. A nurse called the police and the Department of Child and Family Services (DCFS). In a written statement Toney prepared for the police on August 18, she said she brought G.S. to the hospital because G.S. vomited; Toney did not mention G.S.'s bruises, that G.S. appeared lifeless, or that she believed G.S. had been beaten. The prosecutor showed Toney several photographs of G.S. that were taken in the emergency room. Toney testified that the marks and redness on G.S.'s face, back, buttocks, legs, flank area, and right arm shown in the photographs were not present on the night of August 17 when Toney gave G.S. a bath, in the morning of August 18 before Toney left for work, or in the afternoon when Toney came home on her break. G.S. was eventually transferred to OSF Saint Francis Medical Center in Peoria (OSF), where she stayed for six days.

¶ 13 Toney continued to lie about what happened to G.S. on August 9 to the police, DCFS, and medical personnel after the incident of August 18. When G.S. was at OSF, Toney called Lyons and said she had told the police that G.S. was injured at Lyons's house on August 9. Toney asked Lyons to keep her secret, and Lyons replied that she would not do so. Toney believed defendant was being truthful on August 9 when he told her how G.S. was injured. After

August 18, she realized he was probably lying. She did not want the police and DCFS to think that she had re-exposed her daughter to harm because she feared G.S. would be taken from her. During her third interview with the police on August 23, 2012, Toney told the police that G.S. had been injured on August 9 while she was in defendant's care.

¶ 14 Rob Jones, a registered nurse, testified that he treated G.S. at Pekin Hospital on August 9, 2012. G.S.'s family told Jones that G.S. crawled up on a child safety gate in a doorway leading to a stairway, the gate fell through the doorway, and G.S. rode the gate headfirst down the stairs. Jones and a doctor examined G.S. G.S. had some minor abrasions and ecchymosis to the face, but otherwise there were no abnormal findings. G.S. was given no treatment.

¶ 15 Christa Ingolia, a registered nurse, testified that she treated G.S. at Pekin Hospital on August 18, 2012. G.S. had multiple bruising and abrasions to her face and was not acting appropriately for her age. G.S. had bruising to the right and left sides of her head, the right front part of her head, both earlobes, both eyes, her abdomen, her flank, and her legs. G.S. vomited once at the hospital. A doctor ordered that a CT scan of G.S.'s brain be taken, which revealed that G.S. had a depressed right frontal skull fracture and a right frontal bleed under her skull.

¶ 16 Toney told Ingolia that defendant watched G.S. all day. Toney brought G.S. in to be treated because defendant told her G.S. had vomited several times. When Ingolia undressed G.S. to examine her, Toney seemed surprised to see G.S.'s bruising. Toney said the bruises and abrasions were "new from today," and she did not notice them until Ingolia showed her. Ingolia contacted DCFS and the police department because she believed G.S. had been abused. G.S. was transferred to the pediatric intensive care unit at OSF.

¶ 17 Christina testified that Blake was her son and G.S. was her granddaughter. Blake lived with her and her husband. On August 9, Christina met Toney and G.S. at the Pekin Hospital

after Toney called her and said that G.S. fell down the stairs on a baby gate at Lyons's house. There were red marks on both sides of G.S.'s face. Christina took photographs of G.S. at the hospital on August 9 and during the following days.

¶ 18 G.S. stayed with Christina and Blake from August 10 to 15, 2012. Christina testified that Toney did not visit G.S. during that time. Blake testified that when he saw G.S. on August 10, there were deep bruises on both sides of her face. Blake and Christina testified that the bruises were completely healed by August 15. Between August 9 and 15, both Blake and Christina had changed G.S.'s diaper. G.S. had no bruises from the neck down and showed no signs of dizziness, vomiting, changes in her sleeping patterns, or changes in activity level.

¶ 19 On August 18, Christina and Blake went to see G.S. at Pekin Hospital. G.S. had marks and bruises all over her body, including on her head, back, legs, arms, and chest. The marks were not present on August 15. Toney told Christina that night that G.S. was actually injured at defendant's house on August 9.

¶ 20 About a week before trial, Blake and Christina overheard Toney telling the State's Attorney that at some point before August 18, G.S. hit her head on the floor while she and Toney were playing in a reclining chair. That was the first time they had learned about that incident.

¶ 21 Chad Hazelwood, a Pekin police department detective specializing in child abuse, testified that he was the lead detective on G.S.'s case. On the evening of August 18, he went to the emergency room at Pekin Hospital to investigate the possible abuse of G.S. He took photographs of G.S. in the examination room. The doctor who had been treating G.S. discussed her injuries with Hazelwood. The doctor said some bruising on G.S.'s legs could be hand prints. Hazelwood obtained Toney's written statement from one of the officers who initially responded.

¶ 22 Hazelwood went to defendant's residence, and defendant agreed to speak with him at the police station. Hazelwood interviewed defendant in the early morning hours of August 19, 2012. Defendant said he was 19 years old and lived with his aunt and uncle. Toney had been living with them for about three weeks. Defendant had been G.S.'s caregiver on August 18. His aunt and uncle were home, but defendant was the one watching G.S. G.S. vomited that morning while she and defendant were playing outside. They then went inside to the basement. G.S. went down the stairs in front of defendant, tripped on the last step, and fell. G.S. hit her face on the carpeted concrete floor. Defendant took G.S. upstairs for his uncle to look at her. Defendant told his uncle G.S. had fallen.

¶ 23 Hazelwood told defendant that G.S.'s injuries were not consistent with falling off a step onto a basement floor. Hazelwood showed defendant five of the photographs of G.S. that he had taken at the hospital. Hazelwood asked how someone would get those injuries falling off of a stair. Defendant said that G.S. had sustained the injuries at her father's house earlier; she may have gotten a scratch from falling down the stair.

¶ 24 Approximately 30 to 45 minutes into the interview, Hazelwood showed defendant a picture of G.S.'s legs and said it looked like G.S. had hand prints on the back of her legs. Defendant replied that at approximately 1 or 1:30 p.m., he swung G.S. around by her legs in the basement, and she slipped out of his hands and hit the floor face first. The marks to her legs could have been from when he was swinging her. Defendant did not tell Hazelwood about the swinging incident initially because it was an accident and he did not want to get in trouble. Defendant stated that the injury to G.S.'s back could have been a carpet burn, but he did not say when or how she received the carpet burn. Initially, defendant said the right side of G.S.'s face

hit the floor. He then said it was the left side. Defendant did not have a reaction when Hazelwood showed him the photographs; he "just had the same blank, straight face."

¶ 25 Defendant told Hazelwood that none of the marks from the photographs of G.S. were present the morning of August 18. Defendant said that the injuries to G.S.'s face were old injuries from her father's house. The injuries to G.S.'s calves could have been from when he was swinging her. He could not account for any of the other injuries. Defendant did not want Toney to take G.S. to the hospital on August 18 because his uncle looked at G.S. and thought she was okay. Defendant thought Toney wanted to take G.S. to the hospital because she had been vomiting. Defendant thought G.S. vomited because she was dizzy from being swung around.

¶ 26 At approximately 2 a.m. on August 19, Hazelwood returned to the Hoke residence and talked to Michael and Rebecca. Hazelwood confirmed that defendant lived with the Hokes and that Toney and G.S. had been staying with them. Hazelwood discussed G.S.'s injuries with them.

¶ 27 On August 21, Hazelwood spoke with Dr. Channing Petrak, a doctor specializing in child abuse injuries, who had examined G.S. Petrak explained how G.S.'s injuries were caused.

¶ 28 Hazelwood again interviewed defendant on August 21 at the police department. On August 18, defendant and G.S. played outside in the morning, came in and ate lunch, went out and played again, and then went to the basement. G.S. vomited in the basement. Defendant initially stated that G.S. vomited while he was playing with her, but later said it was after she climbed onto his lap while he was playing video games. G.S. was injured when defendant, while holding her by her calves and swinging her around, lost his grip and she hit the basement floor. G.S. hit the floor with the side of her face and her chest and with her buttocks up in the air and

her hands out to her side. Defendant was surprised G.S. was not crying because she hit her head hard on the floor.

¶ 29 Defendant took G.S. upstairs for his uncle to look at her. Defendant put ice on G.S.'s face and her back to keep her awake. Then, at approximately 3 p.m., defendant laid her down to sleep upstairs in the living room. Defendant went down to the basement. Defendant stated that G.S. slept until approximately 6:30 p.m. He later said G.S. slept until approximately 8 p.m.

¶ 30 G.S. vomited once that day before slipping out of his hands and three to four times afterward. Defendant stated that when G.S. vomited the first time, he gave her a bath. At that time, he did not see any of the injuries present on the evening of August 18. Near the end of the interview, Hazelwood asked defendant what he hit G.S. in the legs with. Defendant said he did not hit G.S. with anything.

¶ 31 After Hazelwood finished interviewing defendant, he interviewed Michael. Hazelwood showed Michael the photographs he had previously shown defendant of G.S.'s injuries on August 18. Michael appeared disturbed when he saw the photographs.

¶ 32 Hazelwood interviewed Toney on August 22 and 23. During the second interview, Toney said she had never seen defendant or anyone else abuse G.S. About 15 minutes after the interview ended, Toney called Hazelwood and said she wanted to talk to him again. Toney came back and told Hazelwood that G.S. was injured on August 9 while defendant was watching her, not at Lyons's house as she previously reported. Hazelwood did not recall Toney telling him that G.S. struck her head on the basement floor while she was with Toney before August 18.

¶ 33 On August 28, Hazelwood interviewed defendant again. Hazelwood showed defendant pictures of G.S. from August 9. Defendant remembered watching G.S. on August 9 while Toney was at work. When he was watching G.S., she pulled a table that had been blocking the stairs

onto herself. Defendant thought G.S. had a scratch or a cut from that incident. Defendant said G.S. went to give him a kiss and they head-butted, so he did not believe that the injuries from the photographs were caused by G.S. pulling the table onto herself.

¶ 34 Defendant stated that when he changed G.S.'s diaper on the morning of August 18 he observed no injuries to G.S.'s buttocks and legs. Defendant and Toney argued about taking G.S. to the hospital because defendant thought Toney wanted to take G.S. because she had been vomiting. Defendant did not think G.S. needed to go to the hospital for that. Defendant did not try to keep Toney from going to the hospital with G.S. At the end of the interview, Hazelwood placed defendant under arrest.

¶ 35 Michaels testified that he went to defendant's house on the afternoon of August 18. He and defendant played video games in the basement while Toney watched. Toney wanted to see G.S., but defendant told her not to because G.S. had been vomiting and did not need to be bothered. After approximately two hours, Toney and defendant started arguing. Toney wanted to see G.S., but defendant told her she did not need to. Toney started to go upstairs, and defendant tried to block her from going. Michaels suggested they go upstairs and smoke to calm down. Michaels and Toney went to the garage to smoke, and defendant brought G.S. out and handed her to Toney. Michaels noticed some markings on G.S.'s right side. Toney made a phone call. Michaels heard the person on the phone say that Toney should take G.S. to the hospital. Defendant told Toney she did not need to take G.S. to the hospital, but Toney took G.S. anyway. Michaels stated that he had some difficulty with his memory.

¶ 36 Michael Hoke testified that he resided in Pekin, Illinois, with his wife and defendant. Toney began staying at the Hoke residence for a few days at a time in June or July of 2012.

Sometimes G.S. was with Toney and other times she was not. Michael and his wife never babysat G.S., but defendant did occasionally.

¶ 37 On August 18, defendant brought G.S. upstairs between 2 and 2:30 p.m. Before defendant brought G.S. upstairs, Michael did not hear her crying from the basement. Defendant told Michael he had been swinging G.S. around by the ankles and defendant lost his grip and G.S. hit her head on the floor. G.S. seemed to respond normally to Michael and knew who he and defendant were. G.S. did not cry and Michael did not see any marks on her. Defendant put some ice on G.S.'s head. She began walking around and playing. The prosecutor asked Michael if he told the police on August 21 that defendant had told him G.S. fell and hit her head on the concrete floor. Michael replied that he did not remember saying that, but he might have.

¶ 38 Michael left the house around 2:30 or 2:40 p.m. on August 18, drove his wife to work, and returned home. Michael left again around 4 or 4:30 p.m. and returned home after 9 p.m. Toney was leaving to take G.S. to the hospital. Toney was not crying and did not seem upset. She said G.S. had been vomiting, and she talked to someone on the phone who said G.S. may be dehydrated. Michael did not see any marks on G.S. at that time. The prosecutor asked Michael if he told Hazelwood on August 19 that he had seen marks on G.S.'s face on the evening of August 18. Michael did not remember. Neither Michael nor his wife caused G.S.'s injuries on August 18. Defendant was the only person babysitting G.S. on August 18.

¶ 39 Petrak testified that she was a physician and worked as the medical director of the Pediatric Resource Center in Peoria, Illinois, which medically evaluates children when there is a suspicion of child abuse. Petrak was certified in pediatrics and child abuse pediatrics by the American Board of Pediatrics. Petrak was qualified as an expert. Petrak examined G.S. one

time on August 19; Petrak was not G.S.'s primary care physician. Petrak reviewed G.S.'s medical records, including records from the Pekin Hospital emergency department.

¶ 40 The CT scan showed that G.S. had a vertically oriented depressed left frontal skull fracture with subdural bleeding underneath the fracture. Unlike a linear skull fracture in which there is no change in the contour of the skull, in a depressed skull fracture there is a change in the contour of the skull such that part of the bone fragment is depressed downward. In G.S.'s case, the bone fragment was depressed deep enough to compress the brain tissue. A linear skull fracture occurs when the head hits a broad surface. A depressed fracture occurs where the force is more concentrated; the skull is hit by a smaller area of force to cause depression of the skull. G.S.'s skull fracture was left to heal on its own because it was near a large blood vessel.

¶ 41 A depressed skull fracture causing subdural bleeding is a serious injury to a child. Children with such injuries often have long-term aftereffects like learning disability, cognitive problems, and attention problems. They are at risk for seizures for a year or so after the injury. Petrak opined that it was difficult to predict whether G.S. would experience these aftereffects, but she would expect G.S. to show at least some mild cognitive delays once she is in school.

¶ 42 Petrak reviewed the results of G.S.'s laboratory tests. G.S.'s liver enzymes were elevated, which was indicative of blunt trauma to the liver or abdominal trauma. G.S.'s creatinine phosphokinase was elevated, which is consistent with extensive bruising and muscle injury. G.S. was also anemic, which was likely caused by the subdural bleed in G.S.'s brain and the extensive bruising all over her body. G.S.'s blood tests showed no indication of a viral illness.

¶ 43 In obtaining a history of G.S.'s present illness, Petrak interviewed G.S.'s mother, father, and grandmother about her injuries. Toney told Petrak G.S. was injured on August 9 when she fell on a baby gate and slid down some stairs.

¶ 44 Petrak performed a head-to-toe exam on G.S. on August 19. Photographs of G.S. were taken during the examination. G.S. had many bruises on her face and they were not all in the same body plane. G.S. had a large bruise on her forehead near the location of the skull fracture; there were other bruises that were linear and perpendicular to that bruise. Because the bruises were on multiple planes and were perpendicular to one another, they were not caused by the same injury. One single event of falling could not cause all of the marks on G.S.'s body because one fall would have only caused marks to one body plane.

¶ 45 There were multiple bruises on the top of G.S.'s ears. The ears are mostly cartilage and are not very vascular, so it takes a significant amount of force to cause bruising to the ears. There was a bruise on the left side of G.S.'s neck and along her back and trunk. Bruising on the torso, ears, and neck of a young child are highly suspicious of abuse because those areas do not bruise easily and are not commonly injured in normal play.

¶ 46 There was bruising to most of G.S.'s right and left calves and her right thigh. There was bruising to the lateral area of G.S.'s right shin and a small red loop mark, which was probably caused by something flexible like an electric cord. There was an area of bruising on G.S.'s left ankle that had an angled pattern, indicating that it was caused by an object. Most of the bruising on G.S.'s legs was not over the shins. The shins are commonly bruised during normal activities because there is less tissue there and the blood vessels are easily crushed between the shin bone and whatever object the shin comes into contact with. However, most of G.S.'s bruising was on the softer areas at the back and sides of the calves where there is no bone underneath for the blood vessels to be crushed against. Consequently, more force is required to cause a bruise.

¶ 47 There were several large bruises on G.S.'s buttocks. The buttocks do not overlay any bony prominences, so there is not much that would cause extensive bruising to that area other

than being struck. There was also a bruising on G.S.'s left lower abdomen and her mid and upper back in areas that did not have overlying bone. It would take some force to cause the bruising in those areas. Those areas are not typically caused by a child falling down. The number of bruises was also inconsistent with a child playing and falling.

¶ 48 Petrak noted approximately 70 bruises and injuries to G.S.'s body. Petrak opined that G.S.'s injuries as a whole were consistent with physical abuse. With the exception of maybe one bruise on her shin, none of the bruises on G.S.'s body were consistent with childhood play. Petrak opined that the injury to G.S.'s head was inflicted by a person. There was nothing in G.S.'s medical records or history that indicated a medical reason for the head injury.

¶ 49 Petrak read in the medical records from Pekin Hospital that G.S. fell while with her mother on August 17. Petrak opined that one fall the day before would not have caused all of G.S.'s injuries. Petrak opined that G.S.'s injuries were not consistent with an adult swinging her playfully and her falling and hitting her head on the carpet face first. Had this happened, Petrak would not expect to see extensive bruising on the back of her legs and would expect one plane of injury rather than multiple planes. Petrak opined that G.S.'s injuries were not consistent with a single fall off a step onto a carpet-covered concrete floor.

¶ 50 On August 21, Hazelwood provided Petrak with photographs of G.S.'s injuries taken on or around August 9. Hazelwood reported to Petrak that he was told that G.S. was injured on August 9 either when a small table fell on her or when she slid down some stairs on a baby gate. The injuries Petrak observed in the photographs were not consistent with either of these stories.

¶ 51 After Petrak's testimony, the State rested. Defense counsel stated that defendant would present no additional evidence. Defendant did not testify. The prosecutor asked to recall Hazelwood as a rebuttal witness to perfect its impeachment of Michael. Defendant objected,

arguing that there was nothing to rebut because defendant did not present any evidence. The prosecutor stated he wished to reopen his case for the limited purpose of impeachment. Over defendant's objection, the court allowed the State to reopen its case-in-chief to recall Hazelwood.

¶ 52 When recalled, Hazelwood testified that on August 19, at approximately 2 a.m., Michael told Hazelwood that he had seen marks on G.S.'s face when she and Toney were leaving for the hospital. On August 21, Michael stated during a police station interview that on the afternoon of August 18, defendant came up from the basement with G.S. and told him that G.S. fell and hit her head on the concrete. Hazelwood showed Michael photographs of G.S.'s injuries, and Michael said he had not seen any of the injuries. The prosecutor played a portion of a recording of Hazelwood's interview with Michael.

¶ 53 The jury found defendant guilty of aggravated battery of a child. Defendant filed a motion for judgment of acquittal or, in the alternative, for a new trial, arguing, among other things, that he was not proven guilty beyond a reasonable doubt and the court erred in allowing the State to reopen its case. Thereafter, defendant filed an amendment to his motion, alleging that Michael had confessed to the crime of which defendant was found guilty.

¶ 54 At the hearing on defendant's motion for judgment of acquittal and his amendment to the motion, defendant testified that he watched G.S. on August 18 while Toney was at work. G.S. had gotten sick after eating around 11 or 11:30 a.m. Defendant swung G.S. around by her ankles sometime between 11 a.m. and 2 p.m. When he was swinging G.S., defendant accidentally dropped her, and she struck her head on the floor. G.S. lay down for a nap around 1 or 2 p.m. Toney came home while G.S. was sleeping and then returned to work. At approximately 3 p.m., Michael returned home from dropping his wife off at work. Defendant left at around 3:05 p.m. to go to a tattoo parlor, leaving G.S. home with Michael. Defendant had to sign in at the tattoo

parlor on two prior occasions, but he did not have to on August 18 because he was getting a touch-up rather than a new tattoo. When defendant returned home at approximately 3:50 or 3:55 p.m., Michael was watching "spanking videos" on the computer. Michael said he thought he had spanked G.S. too hard. There was a red mark on G.S.'s buttocks and her back. The only other bruise defendant saw on G.S. was one on her face from falling off a bed at Blake's house.

¶ 55 When Toney came home from work, G.S. vomited. Toney went into the bathroom to change G.S., called defendant in, and showed him a bruise on G.S.'s lower left leg. Defendant did not see any of the other bruising until Hazelwood showed him the photographs. Defendant believed if he was responsible for any of G.S.'s injuries, it would be for the skull fracture because he dropped her while spinning her and she hit her head on the floor.

¶ 56 Michael told defendant that "if it ever got [as] far [as it did]," Michael would come forward and "take care of it." Michael posted defendant's bond, bought him things, and gave him money so that defendant would not tell the police that Michael caused G.S.'s injuries. After sitting in jail for four days, defendant realized how serious his situation was. When Michael still had not confessed, defendant called his attorney's office and said that Michael had caused G.S.'s injuries. Defendant was told that if he wanted anything done about it, he would have to record Michael confessing. Defendant called Michael from the Tazewell County jail and lied to him about talking to the prosecutor in an attempt to scare Michael into confessing.

¶ 57 The recording of the phone call was played for the court and admitted into evidence. During the phone call, Michael expressly denied harming G.S. several times. Defendant said the prosecutor told him that if Michael confessed to harming G.S., defendant would be released from jail and Michael would get probation or be imprisoned for one to two years. If he did not

confess, Michael would be arrested for possession of child pornography and go to prison for 50 years. Michael said he needed to talk to an attorney, but would do what he could for defendant.

¶ 58 The trial court denied defendant's motion, finding that the new evidence presented was not sufficiently compelling to order a new trial. The court also declined to order an investigation into the allegation that Michael was responsible for G.S.'s injuries. The court reasoned that the jury's determination is entitled to great weight and deference. The court noted that defendant made numerous, substantial misrepresentations to Michael during the phone call and found that it was not clear what Michael meant by his comments during the phone call. One interpretation was that Michael's comments implicated him for battering G.S., while another was that Michael had child pornography on his computer and feared criminal charges would be brought against him on that basis. The court noted that defendant acknowledged during his testimony that he was responsible for G.S.'s head injury. Defendant testified that Michael caused three or four of the marks on G.S.'s body, but did not account for the remaining approximately 65 marks on G.S.

¶ 59 The trial court proceeded to sentencing. The presentence investigation revealed that defendant had a juvenile adjudication for burglary. While defendant was out on bond in the present case, he committed the offenses of consumption of liquor by a minor, disregarding a stop sign, and possession of alcohol by a minor. Each offense was committed on a separate occasion.

¶ 60 The trial court sentenced defendant to 25 years in the DOC. The court reasoned that the injuries to G.S. were severe and covered her body from head to toe. The injuries were not consistent with an accident but with a concerted intention to cause harm to an 18-month-old child. Defendant consistently minimized his involvement in causing G.S.'s injuries. The court found Petrak's explanation of G.S.'s injuries more credible than that offered by defendant.

¶ 61 Defendant appeals.

¶ 62 ANALYSIS

¶ 63 I. Sufficiency of the Evidence

¶ 64 On appeal, defendant argues that the evidence presented at trial was not sufficient to prove beyond a reasonable doubt that he committed the offense of aggravated battery to a child. When presented with a challenge to the sufficiency of the evidence, we ask whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). "[I]t is for the jury to weigh the credibility of the witnesses and to resolve conflicts or inconsistencies in their testimony." *People v. Frieberg*, 147 Ill. 2d 326, 360 (1992). It is not the function of this court to retry the defendant. *People v. Givens*, 237 Ill. 2d 311, 334 (2010). When a challenge to the sufficiency of the evidence is presented, all reasonable inferences from the record are drawn in favor of the prosecution. *Id.*

¶ 65 To convict defendant of aggravated battery to a child, the State was required to prove that defendant knowingly caused great bodily harm to G.S., a child under the age of 13. 720 ILCS 5/12-3.05(b)(1) (West 2012). "Because of its nature, knowledge is ordinarily established by circumstantial evidence, rather than by direct proof." *People v. Rader*, 272 Ill. App. 3d 796, 803 (1995). "A defendant is presumed to intend the probable consequences of his acts, and great disparity in size and strength between the defendant and the victim, as well as the nature of the injuries, may be considered in this context." *Id.* Defendant argues that the State failed to prove him guilty beyond a reasonable doubt because it failed prove that defendant acted knowingly and because Toney's testimony was not credible. We disagree.

¶ 66 The State presented sufficient evidence for a rational trier of fact to find that defendant knowingly caused great bodily harm to G.S. Defendant told Hazelwood that he was G.S.'s

caregiver on August 18, 2012, and G.S. was injured when she hit her head on the basement floor after he accidentally dropped her while swinging her by her ankles. However, Petrak testified that G.S.'s bruising and skull fracture were not consistent with being swung and dropped on a hard surface but rather were consistent with physical abuse. There were over 70 bruises on G.S.'s body on multiple body planes. If G.S. were dropped on a broad, flat surface like a floor, Petrak would expect to see injury to only one body plane. Most of the bruising to G.S.'s body was over soft areas that are not commonly bruised absent a significant deal of force. Some of the bruises were consistent with G.S. being struck by an object. Depressed skull fractures like the one G.S. had are caused when the skull is struck with a smaller, more concentrated area of force. The jury was reasonable in finding Petrak's testimony about the nature of G.S.'s injuries more credible than defendant's explanation and, consequently, in finding that G.S.'s injuries were inflicted knowingly or intentionally.

¶ 67 Defendant further contends that he was not proven guilty beyond a reasonable doubt because Toney's testimony was inconsistent and not credible. The jury observed Toney's demeanor at trial and considered her explanations for inconsistencies in her story throughout the investigation. Toney's testimony regarding the events of August 18, 2012, was corroborated in part by other evidence, including Michaels's testimony. Additionally, there was compelling evidence outside of Toney's testimony that defendant caused great bodily harm to G.S., including defendant's statement to Hazelwood that he was G.S.'s caregiver on August 18 and Petrak's testimony regarding the nature of G.S.'s injuries.

¶ 68 Based on the totality of the trial evidence, we cannot say that the jury's finding was unreasonable, and we decline defendant's invitation to reweigh the testimony. Accordingly, we

conclude that defendant was proven guilty beyond a reasonable doubt of aggravated battery to a child.

¶ 69 II. Reopening State's Case

¶ 70 Next, defendant argues that the trial court erred in allowing the State to reopen its case after it had rested. "Illinois law generally recognizes the power of a trial court to allow a litigant to reopen his or her case in an appropriate circumstance." *People v. Canulli*, 341 Ill. App. 3d 361, 367 (2003). After the State has rested, the trial court has discretion to allow it to put on additional evidence. *Id.* A trial court's decision to reopen a case for presentation of further evidence is reviewed for abuse of discretion. *People v. Berrier*, 362 Ill. App. 3d 1153, 1163 (2006).

¶ 71 In considering a motion to reopen a case, a trial court considers various factors, including " ' "the existence of an excuse for the failure to introduce the evidence at trial, *e.g.*, whether it was inadvertence or calculated risk; whether the adverse party will be surprised or unfairly prejudiced by the new evidence; whether the evidence is of utmost importance to the movant's case; and whether there are the most cogent reasons to deny the request." ' " *People v. Mandarino*, 2013 IL App (1st) 111772, ¶ 44 (quoting *People v. Figueroa*, 308 Ill. App. 3d 93, 103 (1999), quoting *People v. Watkins*, 238 Ill. App. 3d 253, 258 (1992)).

¶ 72 Here, the trial court did not abuse its discretion in allowing the State to reopen its case. Although the State could have easily recalled Hazelwood for the purpose of impeaching Michael in its case-in-chief, defendant was not unfairly prejudiced by the reopening of the State's case. The State asked to reopen its case within minutes after it rested and defendant stated that he would not be testifying or presenting additional evidence. Closing arguments had not yet been heard, and the jury had not begun deliberating. As the prosecutor had confronted Michael with

his prior statements to Hazelwood when Michael testified, Hazelwood's testimony regarding said statements could not have surprised defendant. Under these circumstances, the trial court's decision to allow the State to reopen its case was not an abuse of discretion.

¶ 73 Defendant cites *People v. Jose*, 241 Ill. App. 3d 104 (1993), in support of his position that the trial court erred in allowing the State to reopen its case because Hazelwood's testimony was not newly discovered and the State gave no reason for its failure to present it earlier. In *Jose*, the court held that the trial court did not abuse its discretion in denying the State's motion to reopen the evidence where "the State did not seek to reopen the evidence until after receiving an adverse ruling, the evidence sought to be admitted was not newly discovered and had been available at the original hearing, and the State presented no reason for its failure to present the evidence at the original hearing other than its own 'oversight' or lack of diligence." *Id.* at 113.

¶ 74 Initially, we note that *Jose* did not hold that the trial court may allow evidence to be reopened only when evidence is newly discovered or when the State presents a compelling justification for its failure to present the evidence. Further, this case is distinguishable because unlike *Jose*, the State in the instant case did not wait until after receiving an adverse ruling to seek to reopen its case. Rather, the State sought to introduce Hazelwood's impeachment testimony before closing arguments and jury deliberations. A trial court may properly allow a party to reopen its case even when the party's failure to present the testimony was not inadvertent. See, *e.g.*, *Figueroa*, 308 Ill. App. 3d at 104 (holding that the court did not err in allowing the defendant to reopen his case though his failure to testify earlier was not inadvertent where the defendant's request came before closing arguments; the State was prepared to cross-examine the defendant; the State did not argue it would no longer have rebuttal witnesses available; and the defendant's testimony was of utmost importance to his case.) Thus, under the

circumstances of this case, we do not find that the trial court abused its discretion in allowing the State to reopen its case.

¶ 75 III. Excessive Sentence

¶ 76 Defendant argues that the sentence imposed by the trial court—25 years' imprisonment—is excessive considering defendant's age, minimal prior criminal history, the fact that G.S. suffered no permanent injuries, and strong evidence that defendant acted negligently rather than intentionally. A trial court has wide discretion in sentencing a criminal defendant. *People v. Markley*, 2013 IL App (3d) 120201, ¶ 31. We review the trial court's sentencing decision for abuse of discretion. *Id.* When a sentence falls within the statutory range, the sentence does not constitute an abuse of discretion unless it is manifestly disproportionate to the nature of the offense. *Id.*

¶ 77 It is not our duty to reweigh the factors involved in the trial court's sentencing decision. *People v. Coleman*, 166 Ill. 2d 247, 261-62 (1995). "[T]he trial judge is normally in a better position to determine the punishment to be imposed than the courts of review." *People v. Perruquet*, 68 Ill. 2d 149, 154 (1977). It is presumed that the court considered any mitigating evidence absent some indication, other than the sentence itself, to the contrary. *People v. Anderson*, 225 Ill. App. 3d 636, 652 (1992).

¶ 78 The trial court did not abuse its discretion in sentencing defendant to 25 years' imprisonment. Aggravated battery of a child is a Class X felony with a mandatory prison sentence of not less than 6 years and not more than 30 years. 720 ILCS 5/12-3.05(b)(1), (h) (West 2012); 730 ILCS 5/5-4.5-25(a) (West 2012). Defendant's 25-year prison sentence falls within the statutory range. There is no indication that the trial court failed to consider any mitigating factors, including defendant's youth. While defendant's prior criminal history was not

extensive, defendant committed three offenses while out on bond in this case. Contrary to defendant's argument that G.S. suffered no permanent injuries, Petrak testified that G.S. will likely suffer at least some mild cognitive delays as a result of the depressed skull fracture. The trial court found Petrak's testimony to be compelling evidence that G.S.'s injuries were inflicted knowingly and intentionally rather than negligently, as defendant claimed. The trial court based its finding on Petrak's credentials and the fact that defendant's explanation of how G.S. was injured failed to account for many of the marks on her body. We will not reweigh the factors involved in the trial court's sentencing decision. Given G.S.'s age and the nature and extent of her injuries, we do not find the trial court's sentence of 25 years' imprisonment to be manifestly disproportionate to the nature of the offense.

¶ 79 IV. Denial of Posttrial Motion

¶ 80 Defendant argues that the trial court erred in denying his posttrial motion seeking a new trial or a separate investigation into whether Michael committed the offense. Defendant contends that Michael confessed during a recorded conversation with defendant. The denial of a motion for a new trial based on newly discovered evidence will not be disturbed on appeal absent an abuse of discretion. *People v. Gabriel*, 398 Ill. App. 3d 332, 350 (2010).

¶ 81 "[N]ewly discovered evidence warrants a new trial when: (1) it has been discovered since the trial; (2) it is of such a character that it could not have been discovered prior to the trial by the exercise of due diligence; (3) it is material to the issue and not merely cumulative; and (4) it is of such a conclusive character that it will probably change the result on retrial." *Id.* at 350. The Illinois Supreme Court has noted that applications for a new trial based on newly discovered evidence are generally disfavored should be subject to the "closest scrutiny" by the court "in order to prevent *** fraud and imposition which defeated parties may be tempted to practice, as

a last resort, to escape the consequence of an adverse verdict[.]" *People v. Reese*, 54 Ill. 2d 51, 59 (1973) (quoting *People v. Holtzman*, 1 Ill. 2d 562, 569 (1953)).

¶ 82 Here, defendant's alibi testimony—that Michael injured G.S. on August 18, 2012, when defendant left the house for approximately one hour to get a tattoo touched up—has not been "discovered" since trial. Defendant knew of this evidence at the time he was arrested and tried. Defendant never told the police about Michael staying with G.S. while defendant went to get a tattoo. Defendant had an opportunity to present this evidence at trial but exercised his constitutional right not to testify. Defendant's belief that Michael would confess on his own does not excuse defendant's failure to present the evidence at trial.

¶ 83 The trial court did not abuse its discretion in finding that the evidence presented by defendant was not sufficiently compelling to warrant a new trial. Defendant testified that Michael said he spanked G.S. too hard and showed defendant two to three marks that he left on G.S.'s body. Defendant maintained that he believed that he was responsible for G.S.'s head injury because he accidentally dropped her while swinging her. Defendant's testimony did not account for approximately 65 of G.S.'s injuries. Further, the recording of the jailhouse phone call between defendant and Michael is not "of such a conclusive character that it will probably change the result on retrial." *Gabriel*, 398 Ill. App. 3d at 350. Defendant made substantial misrepresentations to Michael during the phone call to try to scare him into confessing. Michael did not explicitly confess to committing the offense during the phone call. In fact, Michael expressly denied harming G.S. several times.

¶ 84 For the same reasons, the trial court did not abuse its discretion in declining to order an investigation into whether Michael committed the offense.

¶ 85 CONCLUSION

¶ 86 The judgment of the circuit court of Tazewell County is affirmed.

¶ 87 Affirmed.