2015 IL App (4th) 140676-U

NO. 4-14-0676

FILED
September 8, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Coles County
JAMIE L. THOMASSON,	)	No. 09CF303
Defendant-Appellant.	)	
	)	Honorable
	)	Mitchell K. Shick,
	)	Judge Presiding.

PRESIDING JUSTICE POPE delivered the judgment of the court.
Justice Knecht and Turner concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in dismissing defendant's postconviction petition at the second stage of postconviction proceedings as defendant failed to make a substantial showing trial counsel was ineffective for failing to (1) present expert testimony and (2) review medical evidence.

¶ 2 In December 2010, a jury found defendant, Jamie L. Thomasson, guilty of first degree murder (720 ILCS 5/9-1(a)(2) (West 2008)) and the aggravated battery of a child (720 ILCS 5/12-4.3(a) (West 2008)). In February 2011, the trial court sentenced defendant to concurrent prison terms of 70 years for first degree murder and 20 years for the aggravated battery of a child. In March 2013, defendant filed a *pro se* postconviction petition. In July 2014, the trial court dismissed defendant's petition during the second stage of postconviction proceedings. Defendant appeals, arguing he made a substantial showing trial counsel was

ineffective for failing to (1) present expert testimony and (2) review medical evidence. We disagree and affirm.

¶ 3 I. BACKGROUND

¶ 4 In July 2009, the State charged defendant by information with one count of first degree murder (count I) (720 ILCS 5/9-1(a)(2) (West 2008)) as a result of the death of H.J. (born May 19, 2007) and one count of the aggravated battery of a child (count II) (720 ILCS 5/12-4.3(a) (West 2008)). As to count I, the State alleged defendant caused H.J.'s brain injuries, which led to his death, by impacting his head and shaking his body, knowing such acts created a strong probability of death or great bodily harm. As to count II, the State alleged defendant knowingly caused great bodily harm to H.J. by breaking his clavicle.

¶ 5 In August 2010, defendant filed a motion *in limine* to bar reference to the phrase "Shaken Baby Syndrome." Defendant's motion alleged the postmortem examination report of Dr. John Ralston, the forensic pathologist who performed the autopsy on H.J., determined the cause of death to be "subdural hematoma, due to, or as a consequence of child abuse," and did not reference "Shaken Baby Syndrome." Therefore, defendant asserted, such a phrase should be barred as it would be unsupported as a matter of forensic science and would serve to inflame the passions of the jury and prejudice the accused.

¶ 6 In October 2010, defendant filed a memorandum in support of his motion *in limine*, alleging the theory of shaken baby syndrome failed to pass the general acceptance test established under *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). The memorandum highlighted the ongoing controversy in the fields of pediatric neurology, neurology, biomechanics, and related scientific and medical disciplines regarding the causes, effects, and

physics related to the production of the symptoms thought to be indicative or diagnostic of shaken baby syndrome. The memorandum presented studies indicating subdural hematomas can occur from childbirth with no history of trauma. It further presented court decisions from other jurisdictions barring expert testimony regarding shaken baby syndrome.

¶ 7 That same month, the trial court held a hearing on defendant's motion. At the hearing, defense counsel clarified the motion sought to bar reference to the phrase "Shaken Baby Syndrome" as it was not included in the pathologist's reports. As to the October 2010 memorandum in support, defense counsel argued the State, in a responsive pleading, raised the issue as to whether shaken baby syndrome was a well-documented, scientifically sound theory, but that argument had nothing to do with defendant's motion. The court denied the motion, concluding the phrase could be used if it was consistent with the pathologist's findings. (The court also found defendant's motion did not adequately raise the issue of whether a *Frye* hearing was warranted.)

¶ 8 After the trial court's ruling, the State requested prompt disclosure of whether defendant intended to call expert witnesses or present expert opinions. Defense counsel replied as follows:

> "Your honor, it is only based upon the ruling today that we now know that we are going to fight a shaken baby syndrome war.
>
> So, there was no affirmative representation that we would have an expert testify to, I guess, the unscientific or unaccepted or unfundamental or nonfoundational aspects of that theory.
>
> Based up the Court's ruling today, however, that may

become one of necessity. So, I will have to confer with [co-]counsel outside of court.

I would just ask for some period of time for, A, us to make a determination whether or not a Frye hearing is necessary and warranted on our facts. And then, if so, to find and disclose who we would have testify to the same, Your Honor."

The trial court granted defendant an additional three weeks to file further motions or witness disclosures. (Defendant did not file a motion for a *Frye* hearing or a disclosure of expert witnesses.)

¶ 9 In December 2010, the trial court held a jury trial. At trial, the jury heard an audio-video recording of defendant's interview with police. Defendant admitted he was the only person with access to H.J. prior to his death. Defendant played "rough" with H.J. because he was trying to "toughen" him up. While they were "play wrestling," defendant admitted he "choke slam[med]" H.J. and put him in a "rear naked choke." He tossed H.J. onto an air mattress 10 to 12 times. On the last occasion, around 9 p.m., H.J. missed the mattress and hit an ottoman. H.J. cried and then became unconscious. Defendant laid H.J. on the mattress and shook him for about five minutes, telling him to "wake up." Around 1 a.m., defendant placed H.J. in the shower, hoping he would demonstrate consciousness by crying. With no success, defendant put H.J. to bed and defendant went to sleep. Defendant awoke at 7:30 a.m., finding H.J. deceased.

¶ 10 In addition to the interview video, the State presented numerous witnesses' testimony, including that of Amy Bennett, H.J.'s mother, and Dr. Ralston. Bennett testified, in relevant part, H.J. suffered from "speech delay" and was nonverbal. A week prior to his death,

H.J. suffered an injury to his eye from jumping on the couch. A few days prior to his death, H.J., while wearing a monkey harness with a leash attached, tried to reach into a mud puddle. Bennett, admittedly frustrated, yanked H.J. by the leash, preventing him from reaching into the puddle. Bennett further testified, in the days leading up to his death, H.J. acted grumpy and tired.

¶ 11 The jury also heard testimony from Dr. Ralston. On direct appeal, we summarized Dr. Ralston's testimony as follows:

> "Dr. Ralston testified X-rays revealed H.J.'s left clavicle had been fractured. Ralston also stated H.J. had a subdural hematoma on both sides of his brain and subarachnoid hemorrhages all over the surface of his brain. H.J. also had a hemorrhage along one of his optic nerves.
>
> Dr. Ralston testified H.J.'s clavicle was fractured in the middle of the bone. Ralston testified breaks that occur as a result of a fall normally are found at the end of the bone, which is weaker than the center. Dr. Ralston testified H.J.'s fractured clavicle was 'more consistent with direct trauma to the center of the bone' as opposed to trauma resulting from a fall.
>
> As for H.J.'s brain injuries, Dr. Ralston testified H.J.'s brain seemed to expand as soon as he opened H.J.'s skull during the autopsy. H.J.'s brain was significantly softer than a healthy brain. The brain had swollen to an extent the wrinkles normally present

in the brain had started to flatten. H.J.'s death was caused by the subdural hematoma. Dr. Ralston offered the following opinion as to the specifics of how H.J. suffered the clavicle and brain injuries:

> 'In terms of the injuries to his clavicle or the collar bone, that would be a fracture due to direct application of force.
>
> And as far as the wounds to his head, subdural hematoma, that would be consistent with a shaking type motion.' "

People v. Thomasson, 2012 IL App (4th) 110488-U, ¶¶ 11-13.

¶ 12 Defense counsel cross-examined Dr. Ralston as to his opinions and the basis of his opinions. As to H.J.'s clavicle fracture, Dr. Ralston thought it unlikely the jerking of the harness could have caused H.J.'s clavicle fracture. The strap of the harness alone would not be sufficient to break the bone, but if something pressed down deeply into the bone, it could break. Dr. Ralston admitted he initially told the police he thought the clavicle fracture was caused by the jerking of the left arm. Dr. Ralston testified H.J.'s clavicle fracture could have occurred as early as two to three days prior to H.J.'s death.

¶ 13 Dr. Ralston admitted H.J.'s subarachnoid hemorrhaging, subdural hematoma, and optic nerve damage could have been caused by a "one force injury" that does not require shaking. Hemorrhaging could also occur while an individual is unconscious but still alive. Hemorrhaging could affect an individual's verbal skills. Dr. Ralston acknowledged there were different schools of thought on the exact cause of retinal hemorrhages. One school of thought believed the exact

cause of retinal hemorrhages remained unknown. Another school of thought believed these injuries can be caused by shaking. Finally, defense counsel elicited testimony Dr. Ralston was employed by the Coroner's office to perform autopsies and render an opinion as to cause of death.

¶ 14 In closing argument, defense counsel argued Dr. Ralston's opinion lacked credibility. Defense counsel asserted Dr. Ralston reported on two separate occasions H.J.'s clavicle fracture was the product of a jerking of the arm and then later changed his opinion at trial. Defense counsel argued Dr. Ralston's testimony H.J.'s clavicle injury could have occurred several days prior to his death was consistent with the injury occurring when H.J. was abruptly pulled out of the puddle in the harness. Defense counsel discredited Dr. Ralston for never analyzing the harness or performing tests to see whether the harness could cause such an injury. Defense counsel further argued Dr. Ralston's testimony indicating the symptoms a child would have with a fractured clavicle comported with the testimony of H.J.'s aunt and grandmother, who described H.J.'s behavior leading up to his death.

¶ 15 Defense counsel presented several possible explanations for the cause of H.J.'s brain injuries. First, defense counsel argued Dr. Ralston's testimony internal injuries could occur while an individual is unconscious supported defendant's statement he shook H.J. for the purpose of reviving him. Second, defense counsel asserted Dr. Ralston's testimony a child with brain-related issues would likely have a speech impediment comported with a theory H.J. had a preexisting brain injury. Finally, defense counsel contended Dr. Ralston admitted there were medical opinions which refuted the theory of shaken baby syndrome and the exact cause of

retinal hemorrhaging remained unknown. Therefore, defense counsel argued, the State failed to prove defendant's guilt beyond a reasonable doubt.

¶ 16 Over the State's objection, the jury was instructed on involuntary manslaughter as an alternative to first degree murder.

¶ 17 The jury found defendant guilty of first degree murder and aggravated battery of a child. In February 2011, the trial court sentenced defendant to concurrent prison terms of 70 years for first degree murder and 20 years for the aggravated battery of a child. In April 2012, this court affirmed defendant's conviction and sentence on direct appeal. *Thomasson*, 2012 IL App (4th) 110488-U, ¶ 30.

¶ 18 In March 2013, defendant filed a postconviction petition and a motion for the appointment of counsel. Defendant's petition alleged trial counsels' failure to (1) retain an expert witness and elicit his or her testimony at trial and (2) investigate medical evidence fell below a reasonable standard of effective assistance of counsel and unfairly prejudiced the outcome of the jury verdict. As to his failure-to-investigate allegation, defendant specifically alleged defense counsel failed to investigate (1) an accidental explanation for H.J.'s broken clavicle, (2) medical literature challenging shaking as a mechanism for causing subdural and subarachnoid bleeding, (3) natural diseases as a differential diagnosis, (4) medical literature challenging Dr. Ralston's finding of bleeding around the cervical spinal cord, and (5) medical literature challenging Dr. Ralston's testimony that a fall from a couch was unlikely to cause the injuries suffered by H.J.

¶ 19 In support of the petition, defendant attached multiple affidavits, including those from (1) Dr. Chris Van Ee, a licensed professional engineer; (2) Dr. Michael Baden, an anatomic, clinical, and forensic pathologist; and (3) William Clutter, a private investigator. Dr.

Van Ee averred, when considering the biomechanics of pediatric head injuries as they related to this case, (1) good biomechanical evidence existed to question Dr. Ralston's testimony regarding shaken baby syndrome, and (2) further research was required to rule out the harness as a cause for H.J.'s clavicle injury. Dr. Baden averred, based on his review of the medical evidence, police reports, and a summary of the testimony of the witnesses, (1) shaking H.J. could not have caused his fatal injuries, (2) H.J.'s injuries were consistent with defendant's statement he intended to throw H.J. on the mattress but missed, and (3) the failure to retain a forensic pathologist deprived the court of this information. Clutter averred, had he been retained as a defense investigator, he would have recommended expert witnesses be retained and consulted to assist with pretrial investigation. Clutter's affidavit further provided various resources disputing the theory of shaken baby syndrome and highlighting potential causes of H.J.'s injuries.

¶ 20 In addition, Clutter's affidavit asserted he was in contact with defense counsel, Mark Wykoff, both before and after defendant's trial. Prior to trial, Wykoff contacted Clutter seeking a list of experts to retain. (Clutter's affidavit does not indicate whether he in fact gave Wykoff a list of experts.) Clutter was not retained as an investigator. In March 2013, for the purposes of defendant's postconviction petition, Clutter conducted an interview with Wykoff. Wykoff allegedly indicated he decided not to hire an expert because he believed Dr. Ralston would be "fair," and defense counsels' theory of defense was based on H.J.'s mother's admission to the police she may have accidentally broken H.J.'s clavicle when she jerked the leash of his harness.

¶ 21 In June 2013, the trial court advanced defendant's petition to the second stage of postconviction proceedings and appointed counsel.

¶ 22 In July 2014, the State filed motions to dismiss defendant's petition and strike portions of the affidavit of Clutter. Following a hearing, the trial court granted the State's motion to dismiss, finding defendant's petition failed to make a substantial showing his constitutional rights were violated.

¶ 23 This appeal followed.

¶ 24 II. ANALYSIS

¶ 25 On appeal, defendant argues the trial court's dismissal was in error as his postconviction petition made a substantial showing trial counsel rendered ineffective assistance by failing to (1) retain an expert and elicit his or her testimony at trial and (2) investigate medical evidence. We address these arguments in turn.

¶ 26 A. Post-Conviction Hearing Act

¶ 27 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2012)) grants criminal defendants a means by which they can assert their convictions resulted from a substantial denial of their rights under the United States Constitution, the Illinois Constitution, or both. *People v. Guerrero*, 2012 IL 112020, ¶ 14, 963 N.E.2d 909.

¶ 28 The Act contemplates three distinct stages of review. At the first stage, a trial court will summarily dismiss a postconviction petition if it is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2012). That is, if it "has no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 11-12, 912 N.E.2d 1204, 1209 (2009).

¶ 29 If the petition is not summarily dismissed, it advances to the second stage, where the trial court may appoint counsel to an indigent defendant, the petition may be amended, and the State may move to dismiss or answer the petition. 725 ILCS 5/122-4, 122-5 (West 2012). At

the second stage, the court tests the legal sufficiency of the petition in determining whether the petition and any accompanying documentation make a substantial showing of a constitutional violation. *People v. Edwards*, 197 Ill. 2d 239, 245-46, 757 N.E.2d 442, 446 (2001). In making this determination, the court accepts all well-pleaded facts as true unless affirmatively refuted by the record. *People v. Domagala*, 2013 IL 113688, ¶ 35, 987 N.E.2d 767. The defendant bears the burden of making a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473, 861 N.E.2d 999, 1008 (2006).

¶ 30 If the trial court determines the petition and accompanying documentation make a substantial showing of a constitutional violation, the petition proceeds to the third stage for an evidentiary hearing. 725 ILCS 5/122-6 (West 2012). At the third stage, the trial court serves as the fact finder, deciding the weight to be given to testimony and evidence and resolving any evidentiary conflicts. *Domagala*, 2013 IL 113688, ¶ 34, 987 N.E.2d 767. If the well-pleaded allegation of a constitutional violation is proved, the defendant is entitled to relief. *Domagala*, 2013 IL 113688, ¶¶ 34-35, 987 N.E.2d 767.

¶ 31 Defendant's postconviction petition was dismissed at the second stage of review. Our review of a second-stage dismissal is *de novo*. *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008. Therefore, we may affirm the trial court's dismissal on any grounds substantiated by the record, regardless of the trial court's reasoning. *People v. Snow*, 2012 IL App (4th) 110415, ¶ 17, 964 N.E.2d 1139.

¶ 32 B. Ineffective Assistance of Counsel

¶ 33 Ineffective-assistance-of-trial-counsel and -appellate-counsel claims are subject to the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). See *People v.*

Albanese, 104 Ill. 2d 504, 526-27, 473 N.E.2d 1246, 1255 (1984). To succeed on a claim of ineffective assistance of counsel, a defendant must show (1) counsel's performance fell below an objective standard of reasonableness, and (2) the deficient performance resulted in prejudice. *Strickland*, 466 U.S. at 687; *People v. Evans*, 186 Ill. 2d 83, 93, 708 N.E.2d 1158, 1163-64 (1999).

¶ 34 To satisfy the deficiency prong of *Strickland*, counsel's performance must be so deficient that counsel was "not functioning as the 'counsel' guaranteed by the sixth amendment [(U.S. Const., amend. VI)]." *People v. Easley*, 192 Ill. 2d 307, 317, 736 N.E.2d 975, 985 (2000). A party raising this claim must overcome "the strong presumption the challenged action or inaction of counsel was the product of sound trial strategy." *People v. Coleman*, 183 Ill. 2d 366, 397, 701 N.E.2d 1063, 1079 (1998).

¶ 35 To satisfy the prejudice prong of *Strickland*, the defendant must demonstrate, but for counsel's deficient performance, there is a reasonable probability the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687-88, 694; *People v. Houston*, 226 Ill. 2d 135, 144, 874 N.E.2d 23, 29 (2007). Failure to satisfy either prong defeats the claim. *Strickland*, 466 U.S. at 697; *Coleman*, 183 Ill. 2d at 397, 701 N.E.2d at 1079.

¶ 36 Defendant asserts his petition and accompanying affidavits set forth sufficient allegations to meet both *Strickland* prongs.

¶ 37 1. *Failure To Present Expert Testimony*

¶ 38 Defendant argues trial counsel rendered ineffective assistance by failing to retain an expert witness and present his or her testimony to the jury. In support, defendant attached multiple affidavits from individuals contesting the theory of shaken baby syndrome, highlighting

potential causes of H.J.'s injuries, disputing the State's expert's findings, and questioning defense counsels' decision not to retain an expert. Accepting all well-pleaded facts as true, we find defendant has failed to make a substantial showing counsel rendered ineffective assistance.

¶ 39 "The decision whether to call particular witnesses is a matter of trial strategy and thus will not ordinarily support an ineffective-assistance-of-counsel claim." *People v. Patterson*, 217 Ill. 2d 407, 442, 841 N.E.2d 889, 909 (2005). Failure to call an expert witness, even where doing so may have made the defendant's case stronger, is not *per se* ineffective assistance because the State could always call its own witness to offer a contrasting opinion. *People v. Hamilton*, 361 Ill. App. 3d 836, 847, 838 N.E.2d 160, 170 (2005). As the Supreme Court observed in *Strickland*:

> "Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. [Citation.] A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide

> range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' [Citation.] There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689.

¶ 40 Here, although defense counsel did not call an expert witness, he extensively cross-examined Dr. Ralston. Defense counsel elicited testimony indicating (1) H.J.'s clavicle fracture, although unlikely, could have been caused by the jerking of the harness, (2) Dr. Ralston initially told the police he thought the clavicle fracture was caused by the jerking of the left arm, and (3) the clavicle fracture could have occurred two to three days prior to H.J.'s death. Defense counsel also elicited testimony indicating (1) H.J.'s brain injuries could have been caused by a "one force injury" that does not require shaking; (2) hemorrhaging could occur while an individual is unconscious; (3) hemorrhaging could affect verbal skills; and (4) there were different schools of thought on the exact cause of retinal hemorrhages, including those that believe the exact cause of retinal hemorrhages remained unknown and those that believe these injuries can be caused by shaking. Finally, defense counsel elicited testimony Dr. Ralston was employed by the Coroner's office and was paid to perform autopsies and render opinions on cause of death.

¶ 41 Defense counsel used the testimony elicited during cross-examination to argue during closing argument Dr. Ralston's opinions lacked credibility. Counsel further offered Dr.

Ralston's testimony in support of the defense theory of how H.J.'s clavicle injury occurred. Counsel asserted, when considering the dispute in the medical community over the theories on which Dr. Ralston based his opinions, the evidence supported differing causes of H.J.'s brain injuries.

¶ 42 "While the testimony of an expert may have been more effective than counsel's cross-examination and closing argument in which he drew conclusions as to the reliability of the expert's DNA testing, we cannot say that failure to produce such an expert fell below an objective standard of reasonableness, considering all the circumstances, or so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *People v. Mehlberg*, 249 Ill. App. 3d 499, 546, 618 N.E.2d 1168, 1199-1200 (1993). We find co-counsel's decisions to challenge Dr. Ralston's opinion through cross-examination and closing argument, rather than independent expert testimony, fell within the wide range of reasonable professional conduct.

¶ 43 Further, defendant's claim fails to meet the second prong of *Strickland*. See *Strickland*, 466 U.S. at 687-88, 694. As addressed above, defense counsel thoroughly challenged Dr. Ralston's opinions and presented alternative causes of H.J.'s injuries through cross-examination and closing argument. Even if defendant had called his own expert witness, with qualifications and experience similar to that of Dr. Ralston, the jury would not have been obligated to disregard Dr. Ralston's testimony or defer to that of defendant's expert. *Hamilton*, 361 Ill. App. 3d at 848, 838 N.E.2d at 171. Therefore, assuming, *arguendo*, counsels' performance was deficient, we cannot say the testimony of an expert witness in favor of defendant would have made his conviction any less likely. Accordingly, defendant was not

deprived of his constitutional right to the effective assistance of counsel by trial counsels' decision to refrain from calling an expert witness. Because trial counsel was not ineffective, appellate counsel was not ineffective for failing to raise this claim on direct appeal.

¶ 44 2. *Failure To Investigate*

¶ 45 Defendant further alleges trial counsel rendered ineffective assistance by failing to investigate (1) an accidental explanation for H.J.'s broken clavicle, (2) medical literature challenging shaking as a mechanism of causing subdural and subarachnoid bleeding, (3) natural diseases as a differential diagnosis, (4) medical literature challenging Dr. Ralston's finding of bleeding around the cervical spinal cord, and (5) medical literature challenging Dr. Ralston's testimony that a fall from a couch was unlikely to cause the injuries suffered by H.J. We disagree.

¶ 46 Defense counsel has a duty to conduct "reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. This includes the duty to independently investigate any possible defenses. *Domagala*, 2013 IL 113688, ¶ 38, 987 N.E.2d 767. As we are reviewing defense counsels' decisions in hindsight, we judge a lack of investigation against a standard of reasonableness given all of the circumstances, applying a heavy measure of deference to counsels' judgment. *Domagala*, 2013 IL 113688, ¶ 38, 987 N.E.2d 767.

¶ 47 In support of his allegation trial counsel failed to investigate, defendant offered affidavits of three professionals questioning Dr. Ralston's opinions and raising possible causes of H.J.'s injuries. As discussed above, although defense counsel did not present expert testimony, they did cross-examine Dr. Ralston about his opinions, elicited testimony of possible alternative

causes of H.J.'s injuries, and asserted during closing argument H.J.'s injuries could have been caused by (1) natural, preexisting conditions; (2) being pulled by a harness; or (3) an accident, as described by defendant in the interview video. Further, defendant's October 2010 memorandum in support of his motion *in limine* highlighted (1) the ongoing controversy regarding the causes, effects, and physics related to the production of the symptoms thought to be indicative or diagnostic of shaken baby syndrome; (2) statistical studies indicating subdural hematomas can occur from childbirth with no history of trauma; and (3) decisions from other jurisdictions barring expert testimony regarding shaken baby syndrome. Based on a review of this memorandum, the cross-examination of Dr. Ralston's opinions, and closing argument, and in applying a healthy measure of deference to counsels' judgment, the record reflects defense counsel adequately investigated the medical evidence to present a defense on defendant's behalf.

¶ 48 Even if, *arguendo*, counsels' performance was deficient in failing to thoroughly investigate and present additional evidence, defendant fails to show prejudice. See *Strickland*, 466 U.S. at 687-88, 694. Had defendant presented additional evidence, the jury would not have been under any automatic obligation to disregard Dr. Ralston's findings and find for acquittal. *People v. Enis*, 194 Ill. 2d 361, 413, 743 N.E.2d 1, 29-30 (2000). Given these circumstances and the facts known to counsel at the time of trial, including defendant's damaging admissions in the interview video, we conclude defendant failed to show counsel rendered ineffective assistance. Because trial counsel was not ineffective, appellate counsel was not ineffective for failing to raise these claims on direct appeal.

¶ 49 III. CONCLUSION

¶ 50 For the reasons stated, we affirm the trial court's dismissal of defendant's postconviction petition as defendant failed to make a substantial showing trial counsel was ineffective for failing to (1) present expert testimony and (2) review medical evidence. As part of our judgment, we award the State its $75 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2012).

¶ 51 Affirmed.