No. 2—10—0436
Order filed June 28, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of McHenry County.
Plaintiff-Appellee,	)	
v.	)	No. 05—CF—1151
JAY SIEDELBERG,	)	Honorable Joseph P. Condon,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Hutchinson and Birkett concurred in the judgment.

ORDER

Held: Where defendant failed to establish ineffective assistance of trial counsel for failure to impeach the State's expert witness and advise defendant that his suppressed statements could be admissible if he testified, and where the trial court did not err in denying defendant's motion for a directed finding of not guilty, defendant's conviction for aggravated battery of a child was affirmed.

Defendant, Jay Siedelberg, appeals his conviction for aggravated battery of a child (720 ILCS 5/12-4.3(a) (West 2004)). He argues that his trial counsel was ineffective for failing to impeach the State's expert witness and advise defendant that his suppressed statements could be admissible if he

testified. Defendant also argues that the trial court erred in denying his motion for a directed finding of not guilty. For the following reasons, we affirm.

BACKGROUND

Defendant was indicted for aggravated battery of a child and aggravated reckless conduct arising out of injuries his then two-month-old son, Kaden, sustained while in defendant's care on October 27, 2005. The indictments alleged that defendant knowingly caused great bodily harm to Kaden and, while acting in a reckless manner, caused great bodily harm to Kaden in that defendant struck Kaden's head against the corner of an entertainment center.

At the time of the incident, defendant and his wife, Kristine, lived in a home in Huntley, Illinois, with Kaden and their other child, then two-year-old daughter, Kiley. Erin Lawlor testified that on October 27, 2005, she babysat Kaden and Kiley at their house. Lawlor left when defendant returned home from work at around 4 p.m. or 5 p.m. Kristine was still at work.

Kristine testified that on October 27, 2005, she left for work at about 4 p.m. or 5 p.m.[1] According to Kristine, defendant called her at work at approximately 6:45 p.m. and said that he and Kaden "had fallen—fallen into a wall. Kaden hit his head, and that—I asked then how Kaden was doing. He said that he was okay. He was crying. I asked if he had had any marks. He had said no. I just said to place some ice on his head." Kristine further testified that as she was driving home from work at about 7:45 p.m., she telephoned defendant to inquire about Kaden's well being. Defendant "said that something was wrong with Kaden and that he wasn't—something wasn't right with him. His coloring was wrong. And I said to call 911." When Kristine arrived home, Kaden

[1]Subsequent testimony reflected that Kristine left for work that day at 12 p.m., not 4 p.m. or 5 p.m.

was "limp and not moving and breathing was shallow." The ambulance arrived, and Kaden was transported to the hospital.

On cross-examination, Kristine testified that Kaden was a "colick[y] baby. He [*sic*] many, many occasions where he would just scream on hours on end. Certain things we would have to do just to calm him down, whether it be driving in a car, circling laps around the kitchen, or just—just trying to get him in a better mood." She stated that she saw defendant "circle laps" with Kaden in an attempt to quiet him "[a]ll the time." Kristine acknowledged that at the hospital, "[a]bout 36 hours later," defendant told her how the accident happened. As a result, Kristine testified, she was very upset and angry and "felt betrayed." According to Kristine, subsequent to the conversation at the hospital, defendant was "consistent in telling [her] what had happened."

On redirect, Kristine discussed Kaden's current medical condition: "He's four and, well, he's not walking currently right now. It's a work in progress." Kristine stated that Kaden does not have other medical problems but sees a neurologist and a rehabilitation doctor.

Brian Harders, a lieutenant, firefighter, and paramedic for the Village of Huntley Fire Protection District, testified that he was dispatched to defendant's home at 8:05 p.m. on October 27, 2005. According to Lieutenant Harders, Kaden was "dusky, like a blue-ish gray; had difficulty breathing, slow, labored breathing; didn't appear to be moving." At this time, Kaden scored a three (the lowest possible score) on the Glascow Scale (a scale that measures the level of a person's consciousness). Lieutenant Harders testified that Kaden's oxygen-saturation level was 82%; the normal oxygen-saturation level in a two-month-old infant is 95 to 100%. Kaden's respiration level was 10 breaths per minute in contrast to the 30 to 60 breaths per minute of a typical two-month-old infant. Kaden's capillary refill was delayed—another indicator of a low oxygen level. Lieutenant Harders testified that Kaden was transported by ambulance to Woodstock Memorial Hospital.

On cross-examination, Lieutenant Harders testified that he did not notice any laceration, bump, bruising, contusion, or anything unusual on Kaden's head and did not observe any scratches, bruises, or contusions on Kaden's body. The ambulance arrived at Woodstock Memorial Hospital at 8:19 p.m. According to Lieutenant Harders, Kaden's level of consciousness, heart rate, and respirations significantly improved during the transport to the hospital. Once Kaden was stabilized, he was transported to Children's Memorial Hospital in Chicago.

Kevin Keane, a detective with the Village of Huntley Police Department, testified that he was dispatched to defendant's home on October 27, 2005, at 8:02 p.m. He described Kaden as very pale and nonresponsive. Detective Keane testified that he spoke with defendant within a minute or two of his arrival at the home. According to Detective Keane, defendant told him that Kaden "had not eaten all day and that approximately two hours ago, him [*sic*] and the child fell and the child hit his head."

Leonard Marak, a police officer with the Village of Huntley, testified that on November 1, 2005, he obtained consent from defendant's wife to enter her and defendant's home and photograph the living room and kitchen area. Defendant was at home when Officer Marak and an evidence technician arrived to take the photographs. Officer Marak read defendant his *Miranda* warnings and asked defendant to show him the location where Kaden's head hit the entertainment center. According to Officer Marak, defendant "demonstrated how he had swung his son towards the entertainment center." Specifically, defendant "placed his one hand—I'm sorry—He had placed his right hand underneath like he was holding his son under the back, and he had his left hand on what would be—what he described as his son's side, and he said he swung him like that (indicating)." Defendant pointed to the area of the entertainment center where Kaden's head was struck—the very top left corner. The prosecutor clarified for the record that when Officer Marak displayed how

defendant held Kaden, he had his right hand extended at a 90-degree angle with his forearm parallel to the ground, right palm facing upward, left arm extended and palm facing to the right.

On cross-examination, Officer Marak testified that he did not ask defendant the reason he swung Kaden and admitted that the answer would have been important in the investigation. On redirect examination, Officer Marak testified, over defendant's objection, that he did not ask defendant the reason he swung Kaden because he "had previous knowledge of why he had swung the baby" from an earlier conversation with defendant.

Thomas Valvano, M.D., a pediatrician at Children's Memorial Hospital at the time of the incident, testified that on the evening of October 27, 2005, he was on call for the hospital's protective services team and was alerted to Kaden's case. Dr. Valvano reviewed Kaden's hospital records and obtained Kaden's medical history from both parents.

Regarding his conversation with defendant, Dr. Valvano testified that defendant told him that when he arrived home from work at around 5 p.m. on October 27, 2005, Kaden was crabby and crying but fell asleep after defendant rocked him for a few minutes. However, at 6 p.m., Kaden awoke crying. Defendant told Dr. Valvano that after he unsuccessfully attempted to feed Kaden a bottle, and Kaden continued to cry, defendant walked in circles around the living room with Kaden in his arms to soothe him. Defendant told Dr. Valvano that his two-year-old daughter Kiley was following him around in the circles and that,

> "at one point [defendant] sort of got tangled up in—in or tripped over his daughter while he was holding Kaden and fell forward into the living room wall. And he described the fall. He said that he was holding Kaden so that Kaden's head was in the crook of his right elbow and his—Kaden's legs were in the crook of his left elbow. So he's sort of cradling Kaden like this (indicating). And when he fell forward, [defendant's] right shoulder

fell into the living room wall; and Kaden's head sort of bumped into the wall as well. He said this happened at or near the corner of the living room wall and the hallway. So near a corner of a wall at any rate, and he wasn't sure whether Kaden's head actually struck the corner or just struck the wall near the corner."

Dr. Valvano testified that defendant informed him that after Kaden bumped his head, Kaden cried for a few minutes and then fell asleep. Defendant said that Kaden awoke crying at some point after that and refused a bottle. Defendant described Kaden to Dr. Valvano at that point as "floppy and only—with long gaps between his breaths, so abnormal respirations with, you know, long pauses between each breath. And he described Kaden as seeming to be out of it, not really focusing on him and not really responsive. So clearly abnormal at that point in time."

Dr. Valvano testified that he noticed swelling to Kaden's head, but Kaden did not exhibit any bruises, scars, or pattern injuries. Dr. Valvano explained that he reviewed the laboratory findings and reviewed the imaging studies, including a CT scan of Kaden's head, an MRI of his brain, neck and chest X rays, and a skeletal survey. Based on his review, Dr. Valvano found significant injuries to Kaden::

"[Kaden] had skull fractures to the left side of his skull. The skull fractures were described as mildly depressed, so sort of like a [*sic*] dented in a little bit. The location of the fractures was to the left posterior parietal bone. So the parietal bone is the left side—the big bone on the left side of the skull. The skull is composed of various plates or different bones that eventually fuse together, but in an infant Kaden's age are still separate. So the big bone on the side of the left side of his head towards the back of that bone was where the fracturing was located, and it was slightly dented in in what is known as comminuted, which means that

it is—that there are multiple fractures or multiple segments to it. So mildly depressed, comminuted posterior parietal skull fracture."

Dr. Valvano stated that comminuted or depressed skull fractures are classified as complex skull fractures as opposed to simple skull fractures. According to Dr. Valvano, a simple skull fracture is a "simple linear parietal skull fracture, which is just a single crack in the skull." A simple skull fracture can be caused by abuse but is also seen in accidental injuries, such as when a baby falls off a bed or changing table or is accidentally dropped. In contrast, a comminuted or depressed skull fracture indicates that different forces are involved. Dr. Valvano explained,

"When we see those skull fractures [comminuted or depressed], we worry more about non-accidental trauma in those infants. It takes more force to cause a fracture with multiple branches or multiple fractures to the bone. And with regards to a depressed skull fracture, it takes a specific very—a specific force that's concentrated over a very small area of the skull to cause that denting in of that skull, so an impact against the edge of an object or a very small object impacting the head, a corner or an edge of a table or the railing of a crib or something like that. And you can get depressed skull fractures accidentally as well as inflicted, but you have to have the right history for that."

Dr. Valvano testified that Kaden had several areas of subdural hemorrhages, or bleeding around the outside of the brain inside the skull, as well as bilateral hemorrhages over the occipital area of the brain. The hemorrhaging showed that Kaden's brain "suffered really diffuse rotational forces as opposed to localized compact forces, which would be what we would expect from the type of injury that [defendant] described." Dr. Valvano explained that in contrast to Kaden's injuries, head injuries from an accidental fall or bump are focal (localized to the area where the contact occurred), such as a bump on the head, a bruise, a skull fracture in rare cases, and possibly blood

underneath the skull fracture. According to Dr. Valvano, Kaden's injuries suggested "rotational or acceleration, deceleration forces"—a "force that when the head is moving through an arch, accelerating and then suddenly decelerating at the end of that arch, you get forces that are applied to the entire brain; and as that brain is moving inside the skull, it comes up against the inside of the skull and that causes trauma to the brain."

In Dr. Valvano's opinion, the subdural hemorrhages that Kaden sustained were not consistent with defendant's description of events. When questioned as to what kind of force would be needed to cause Kaden's injuries, Dr. Valvano stated,

> "[I]t requires a significant force, a severe force. Normal handling or even minor trauma doesn't cause this kind of severe brain injury. We see these only as a result of severe accidental trauma, of which there was no history in Kaden's case, or abusive head trauma."

Dr. Valvano's opinion was that Kaden's injuries were caused by abusive head trauma.

On cross-examination, Dr. Valvano testified that Kaden's injuries were not consistent with falling into a wall accidentally as defendant had described to him. However, Dr. Valvano was shown a photograph of the entertainment center in defendant's living room. He testified that the corner of the entertainment center could have caused Kaden's skull fracture if there were sufficient force, accidental or inflicted although "comminuted and depressed skull fractures really speak to more significant force than what we see in typical accidental injuries."

Regarding his opinion that Kaden's injuries were caused by acceleration, deceleration forces to the brain from the violent shaking or swinging of the infant and high speed impact of his skull against an object, Dr. Valvano testified,

> "[W]e don't always know exactly what happened. So it could be from both. Either or or a combination of those mechanisms.

> We know that in Kaden's case there was clearly impact. To what extent there were multiple episodes of shaking or acceleration, deceleration before or after that impact, I can't say. But those are the types of forces that caused these injuries.
>
> * * *
>
> I describe what I think caused the injuries, and that's what it says in [my report]. The shaking and swinging or swinging and impact of against an object."

In response to the question of whether the diffuse injuries from the acceleration, deceleration forces could happen from "one forceful swing," Dr. Valvano testified, "One good acceleration through a significant arch with a good deceleration, but it would have to be very significant force." He explained that the required force would be the "type of force that if someone saw this happening, they would be afraid for that child's life."

Elizabeth Froemel, a social worker at Children's Memorial Hospital, testified that she met with defendant at the hospital at approximately 1 a.m. or 2 a.m. on October 28, 2005. Defendant told Froemel that Kaden had "fussy periods" between the hours of 5 p.m. and 8 p.m. where he needed to be walked around and calmed. With respect to the injury that led to Kaden's hospitalization, Froemel testified,

> "[Defendant] told me that the child—He was home alone with their two children when he had gotten home from work, and Kaden was having his usual fussy period, and so [defendant] would—[defendant] was walking his child around in his arms as he often does in their home. He said that at one point his daughter, his two-year-old daughter kind of got tangled up beneath his feet when she was playing with some toys, and he tripped while holding his son. He described to me that he was holding Kaden with his head cradled in his right arm, and he tripped in an area between—it was a hallway adjacent to their living room.

And he said he never completely fell, but he tried to protect the child; but as he himself fell with his right shoulder into the wall and that the child's head hit the corner of the wall."

According to Froemel, defendant explained that Kaden cried immediately and that defendant noticed a small bruise on the back of Kaden's head right after the incident occurred. Defendant said that it took approximately 10 minutes to console Kaden, at which point Kaden took a nap for 30 minutes in a baby swing. Defendant further told Froemel that when Kaden awoke, he was a bit fussy, would not take any formula, and Kaden then "all of a sudden went kind of—well, he started screaming and then went somewhat limp and was breathing in a concerning manner."

The State rested. At the close of the State's case, defendant moved for directed finding; the trial court denied the motion. Defendant testified on his own behalf. He described Kaden as a colicky baby and explained that when Kaden was fussy, defendant "would hold him and walk around in circles like through our living room, dining room, kitchen because that seemed to work to calm him down." Defendant said that if the "laps" did not work, defendant would swing Kaden with defendant's hands on Kaden's sides while holding Kaden's neck with his fingers.

Defendant testified that when he returned home from work at about 5 p.m. on October 27, 2005, Kaden was crabby, fussy, and crying. Defendant made Kaden a bottle; Kaden drank an ounce or two of the bottle and then fell asleep. Defendant fed his two-year-old daughter Kiley dinner. At about 5:30 p.m. or 5:45 p.m., Kaden awoke crying. Defendant testified that he picked Kaden up, tried to play with him, and did "laps" for about 10 minutes to calm him. At that point, defendant was standing in the living room approximately a half inch from the edge of the entertainment center. Defendant swung Kaden for a few minutes while his daughter and their dog played behind him in the living room. Defendant testified that the following events ensued:

> "Then the dog and Kiley were playing around, making a bunch of noise. She was screaming or something, so I got my attention to turn around; and as I turned, I was still swinging him, and that's when his head hit the entertainment center, and I was like, Oh, no. I freaked out. I was checking him. He started crying. And I checked him to make sure he was okay. I didn't see anything wrong with his head, like a bump or bruise or scratches or anything."

Defendant testified that Kaden cried for five or ten minutes, but defendant was able to calm him. At that point, defendant laid Kaden in his baby swing, and Kaden fell asleep. After Kaden had been asleep for about a minute, defendant's wife Kristine telephoned. Defendant testified that he told Kristine that Kaden hit his head. Specifically, he told Kristine that "I was holding [Kaden] and walking around with him and I fell into the wall" even though that was not what happened. Defendant explained, "I pretty much lied to her, too, because I thought she would be pissed at me for what I was doing with him." Defendant testified that what really happened was "the swinging and hitting his head on the entertainment center." Defendant testified that he did not intentionally or knowingly hurt Kaden.

Defendant testified that Kaden awoke about an hour or an hour and a half later. Defendant noticed then that Kaden was "not breathing right" and was limp. Defendant explained that he started to panic and tried to wake Kaden and help him. Defendant was about to telephone 911 when Kristine telephoned. Defendant relayed Kaden's condition to Kristine and then telephoned 911. Kristine arrived home; the ambulance arrived minutes later; Kristine rode in the ambulance with Kaden to the hospital.

Defendant testified that he went to Woodstock Memorial Hospital after he secured child care for Kiley. Kaden was treated at Woodstock Memorial Hospital for about 20 minutes and then

transferred by helicopter to Children's Memorial Hospital. Defendant and Kristine arrived at Children's Memorial Hospital at around 11 p.m. Defendant testified that he met with Dr. Valvano on October 28, 2005. According to defendant, he did not tell Dr. Valvano how the incident really happened because he was scared and in shock.

On cross-examination, the prosecutor questioned defendant about whether his statements to Officer Marak at Children's Memorial Hospital on October 28, 2005, were inconsistent with his testimony that Kaden hit his head on the entertainment center when defendant was swinging him back and forth. Defense counsel objected on grounds that the statements were the subject of a pre-trial motion to suppress which the trial court had granted. Specifically, defendant had successfully filed a motion to suppress statements he made at Children's Memorial Hospital to Officer Marak about the incident on grounds that the statements were obtained as a result of an illegal detention and that defendant was not advised of his *Miranda* rights until the end of the interrogation.

The trial court overruled the objection, stating that "the exclusionary rule does not preclude the State from using prior inconsistent statements in the excluded statement if the Defendant testifies on the stand inconsistently with the excluded statement." The following colloquy ensued:

"Q: You spoke with Detective Marak[2] on October 18th of 2005:

A: Yes.

Q: And that was about this case?

A: Yes.

Q: And he asked you what happened?

A: Yes.

---

[2]Although the parties sometimes referred to Officer Marak as a detective, his testimony reflected that he was a police officer.

Q: And you told him that you had Kaden left propped up on the couch between pillows. You had gone upstairs, and while you were upstairs you heard a thump and heard Kaden crying. When you came downstairs, Kaden was lying on a pile of toys? Is that correct, that's what you told Detective Marak?

A: He had somewhat said that story.

Q: So are you saying that you did not say that, or are you saying you said that?

A: I agreed to that because I had been up for almost two days straight and I just wanted to get out of that room.

Q: So you did agree to that statement then?

A: Yes.

Q: As to what happened?

You then told Detective Marak that you were frustrated that Kaden would not stop crying and Kiley was running around screaming, and that you had Kaden face up in your left arm and you were walking fast as you passed the entertainment center, and you felt Kaden's head bump into the corner?

A: Yes.

Q: Is that true you made that statement as well?

A: Yes.

Q: And as you were questioned more, you then made the statement that you were very frustrated with Kaden and Kiley because Kaden would not stop crying and Kiley was running around screaming. You then stated that you were walking in a fast pace. You held Kaden's face up by the waist and you swung Kaden around. Kaden's head hit the corner of

the entertainment center, and that you lost your temper when you swung Kaden; is that correct?

A: I never said I lost my temper. That is not correct.

Q: Everything else you said to Detective Marak except about the losing the temper part?

A: Yes."

The defense rested, and defendant renewed his motion for a directed finding. The trial court denied the motion.

In its rebuttal case, the State called Officer Marak. He testified that on October 28, 2005, he spoke with defendant, and defendant gave different versions about what happened to Kaden. According to Officer Marak, defendant's final version was that defendant "was walking with Kaden in his arms and Kaden and his older daughter Kiley were screaming and crying, and that he became frustrated and swung Kaden by his waist, causing Kaden to strike the entertainment—corner of the entertainment center. Officer Marak also testified that defendant told him that he lost his temper. The State rested in rebuttal.

Following closing arguments, the trial court found defendant guilty of aggravated battery of a child and aggravated reckless conduct (although subsequently merged the lesser included offense of aggravated reckless conduct with the aggravated battery of a child conviction). The trial court reasoned:

"Kaden suffered great bodily harm, and the Defendant caused that harm. The harm consisted of multiple complex head injuries. Those injuries were caused in part by the application of a severe rotational force.

The versions given by the Defendant as to how the injury occurred are not consistent with the medical evidence on how the injury occurred.

Defendant's most recent explanation offered in court accounts only for the fracture in the left posterior parietal bone. The explanation does not account for the internal symptoms diffuse throughout Kaden's skull.

The Defendant has given numerous versions of how the incident occurred.

As the State points out, the Defendant lied to his wife, and the Defendant lied to the child's treating physician, and the Defendant gave multiple inconsistent versions to the police when asked about how this happened.

I've been a lawyer for 26 years before I started acting as a judge. I've been a judge for what, 11 years now. It certainly comes as no surprise to me that spouses lie to each other. And it certainly comes as no surprise to me that suspects lie to the police. However, it is my experience that parents tell the truth to their doctors—their children's doctors, and they do that because the parents' natural impulse is to assist and facilitate the recovery of the child from the injuries. And yet the Defendant lied to the doctor when the doctor asked the Defendant how this injury occurred.

Yesterday the Defendant told me that he knowingly would never hurt his children. That statement is impossible to reconcile with the Defendant's willingness to lie to the child's treating physician at such a dire moment.

The conclusion that I draw is that the Defendant when he lied to the treating physician, was more concerned about avoiding responsibilities for the damage he had done than he was about assisting and facilitating the recovery of his child.

All this lying is evidence of guilty knowledge. That's the only way it can be taken, and that's how I take it.

Kaden was an infant. The Defendant was a grown man. The Defendant had the experience of dealing with his daughter Kiley and his son Kaden from the moments of their birth through their infancies to the point where this injury occurred. The Defendant knew how to care for an infant, and the Defendant knew how not to care for an infant.

Based on everything I've heard in this room, I infer that when Defendant applied the severe force to Kaden's body, the Defendant knew that severe injury would result.

I find the Defendant guilty on each of the two counts of the bill of indictment."

Defendant obtained new counsel and filed a motion for a new trial. Defendant argued, *inter alia*, that trial counsel was ineffective for failing to impeach Dr. Valvano with the fact that, four days prior to the commencement of defendant's trial, a Wisconsin trial court had declared a mistrial in a felony child abuse case (*State v. Benz*, Case No. 08 CF 342 (Sheboygan Cty. Cir. Ct.)), in which Dr. Valvano testified on the State's behalf that the victim's injuries were intentional. The mistrial in *Benz* resulted from the State's failure to disclose that Dr. Valvano had told a social worker that he could not determine the cause of the victim's injuries. Defendant argued that "said fact would be relevant to the expertise of Dr. Valvano, and would have been relevant for the defense to question Dr. Valvano regarding his opinions in this case."

Defendant also argued that his trial counsel failed to advise him that the suppressed statements he made to Officer Marak at the hospital could be admissible to impeach defendant's credibility if he testified. Rather, according to defendant's and his wife's affidavits, as well as their testimony at the hearing on the motion for a new trial, trial counsel advised defendant that the State could not use the suppressed statements against him in any way. Defendant and his wife also

testified that defendant would not have testified if trial counsel had advised defendant that the statements could be used against him.

Defendant's trial counsel testified at the hearing on the motion for a new trial that he advised defendant that the suppressed statements would not be admitted if defendant testified consistently because defendant would essentially admit the impeachment. Trial counsel also testified that he never advised defendant that the suppressed statements would not be used against him. With respect to the mistrial in the *Benz* case, trial counsel testified that he was aware of the case but did not cross-examine Dr. Valvano about it because "it really didn't deal with anything Dr. Valvano had or hadn't done. It seemed to me it was more of an evidentiary issue between the state and the defense counsel."

Following the hearing, the trial court denied defendant's motion for a new trial in a written order. The trial court determined that the "deficiency attributed to [trial counsel] arising from failing to raise the circumstances of the Wisconsin case involving Dr. Valvano is no deficiency at all." The trial court pointed out that the prosecutor in the Wisconsin case knew about Dr. Valvano's inconsistent statements but failed to disclose the information, which resulted in a mistrial. The trial court concluded that it "fail[ed] to see how the doctor's inconsistent statements in a separate case could be impeaching of the doctor's testimony in this case." The trial court also held that defendant was not prejudiced by "any neglect to advise him that his previously suppressed statements could be used to impeach him." The trial court reasoned:

> "Defendant had given several statements to several people. This situation was apparent when the state rested. There had been a statement to his wife, a statement to Dr. Valvano and, on November 1, 2005[,] a statement and demonstration to Officer Marak. Defendant's credibility had been impeached before he took the stand. Then during his direct

examination, before any mention of the suppressed statements, defendant conceded what was already apparent. He had lied to his wife about how the injury occurred. [Citation.] More importantly, he did not tell Dr. Valvano the way it really happened. [Citation.]

Defendant's deception regarding how the injuries occurred was apparent before the state rested. The statement defendant gave his wife differed from the statement defendant gave Dr. Valvano. Each of those statement [*sic*] was inconsistent with the demonstration defendant did for Officer Marak. The doctor explained how the injuries were inconsistent with the version of events defendant gave to the doctor. When the state rested, the court was justified in concluding defendant lied to the doctor. Defendant's admission during his testimony was not necessary to the court's conclusion. Defendant's motion for judgment at the close of the state's case had been denied. There was evidence sufficient to convict defendant at this stage of the case. Had defendant not taken the stand, the state's case would not have gotten weaker."

Following a hearing, defendant was sentenced to 6 years' imprisonment for aggravated battery of a child. Defendant timely appealed.

ANALYSIS

Defendant argues that his trial counsel was ineffective for failing to impeach Dr. Valvano with the proceedings from the *Benz* case and for failing to advise defendant that his suppressed statements could be admissible if he testified. Defendant also argues that the trial court erred in denying his motion for a directed finding.

Ineffective Assistance of Counsel

Defendant's ineffective assistance of counsel claims are subject to the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To succeed on a claim of ineffective assistance

of counsel, a defendant must show both that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defendant in that, but for counsel's deficient performance, there is a reasonable probability that 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 (2007).

In demonstrating that counsel's performance was deficient, a defendant must overcome the strong presumption that counsel's conduct might be considered sound trial strategy. *Strickland*, 466 U.S. at 689; *Houston*, 226 Ill. 2d at 144. "[T]rial counsel's decision regarding the extent of cross-examination, whether to present witnesses, and what defense theory to assert all constitute matters of trial strategy." *People v. Whitamore*, 241 Ill. App. 3d 519, 525 (1993). A reasonable probability that the result of the proceeding would have been different is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694; *Houston*, 226 Ill. 2d at 144. Failure to satisfy one prong defeats the claim. *Strickland*, 466 U.S. at 697; *Houston*, 226 Ill. 2d at 144-45.

With respect to defendant's argument that trial counsel was ineffective for failing to impeach Dr. Valvano with proceedings from the *Benz* case, defendant contends that the evidence was admissible to show Dr. Valvano's bias, interest, or motive to testify falsely. The State contends that defendant should be precluded from raising this argument on appeal because he did not raise it in his motion for a new trial. Rather, defendant merely argued that trial counsel should have questioned Dr. Valvano about the *Benz* case because the evidence was relevant to Dr. Valvano's expertise, not that it was admissible to show bias, interest, or motive to testify falsely. Defendant disputes, without argument or record support, that he did not forfeit the issue.

Forfeiture issues aside, defendant's argument lacks merit. A defendant in a criminal case has the right to cross-examine a witness regarding his bias, interest, or motive to testify falsely. *People*

v. Leak, 398 Ill. App. 3d 798, 822 (2010). However, the evidence used to impeach the witness must raise the inference that the witness has something to gain by his testimony. *Leak*, 398 Ill. App. 3d at 822. The evidence must be timely, unequivocal, and directly related, not remote or uncertain. *Leak*, 398 Ill. App. 3d at 822.

Defendant's theory is that evidence about Dr. Valvano's involvement in the *Benz* mistrial would have raised the inference that Dr. Valvano's testimony for the State in this case was motivated by a desire to "avoid an effective suspension or termination of the State's use of him as an expert witness in child abuse cases." Defendant elaborates: Dr. Valvano "may have testified to the fact he was able to make significant medical opinions because, without those opinions, the State had no need for his testimony (and thus would not have paid him to be absent from his position at an Oregon hospital and travel across the country)."

Defendant analogizes this case to *People v. Phillips*, 95 Ill. App. 3d 1013 (1981). There, the appellate court reversed defendant's conviction for, *inter alia*, attempted murder of a police officer on grounds that the trial court erred in precluding the defendant from cross-examining the officer about his 15 prior suspensions, including two instances in which the officer improperly displayed his weapon and then filed a false report. *Phillips*, 95 Ill. App. 3d at 1019. The defendant's theory at trial was that he shot the officer because the officer was brandishing his weapon at the defendant's brother. *Phillips*, 95 Ill. App. 3d at 1018. The appellate court reasoned that the officer might have been motivated to testify falsely to avoid another suspension or termination. *Phillips*, 95 Ill. App. 3d at 1021-22.

According to defendant, like the officer's motive to avoid suspension or termination in *Phillips*, Dr. Valvano was motivated to avoid the State's failure to call him as an expert witness. *Phillips* is inapposite. The tenuous possibility of loss of work from the State arising from the

mistrial in the *Benz* case is simply not comparable to the officer's fear of job loss in *Phillips*. Moreover, defendant does not explain or support the theory that the State's failure to call Dr. Valvano as a witness would have even been something that Dr. Valvano was motivated to avoid. Under these circumstances, defendant fails to overcome the strong presumption that trial counsel's decision not to question Dr. Valvano about the *Benz* mistrial was trial strategy.

Defendant nevertheless contends that trial counsel was deficient for failing to cross-examine Dr. Valvano about his "likely" status as a "professional witness." Defendant relies on *Trower v. Jones*, 121 Ill. 2d 211 (1988), to support his characterization of Dr. Valvano as a possible professional witness. *Trower* was a medical malpractice case in which our supreme court recognized that permissible cross-examination of an expert witness includes inquiry into "(1) the annual income derived from services relating to serving as an expert witness and (2) the frequency with which the witness' testimony in prior cases had been for 'people suing doctors.' " *Trower*, 121 Ill. 2d at 222. The court cited commentary that an expert's effective status as a professional witness, as opposed to a practitioner whose involvement in the lawsuit is merely incidental to his profession, would likely bear on the expert's credibility. *Trower*, 121 Ill. 2d at 218. The expert witness in *Trower* was a "fellow" of the American Board of Medical Legal Consultants (Board)—an organization whose purpose is to review cases involving suspected medical malpractice and to furnish expert testimony. *Trower*, 121 Ill. 2d at 213. The expert witness acknowledged that his involvement in the case was through the Board, that most of the Board's cases were obtained through attorneys, and that 80% of his professional time was devoted to work for the Board. *Trower*, 121 Ill. 2d at 213-14.

In contrast, here, Dr. Valvano became involved in this case when he treated Kaden at Children's Memorial Hospital. Moreover, trial counsel *did* cross-examine Dr. Valvano about his prior testimony on the State's behalf as well as the amount of money the State provided him to

testify. Dr. Valvano acknowledged that he had testified 30 to 50 times in criminal and Department of Human Services hearings—each time on the prosecution's behalf. However, he explained, "I'm always subpoenaed by the prosecution because when my opinion is that the child has not been abused, there normally isn't a criminal proceeding." Dr. Valvano also acknowledged that he was compensated $3,000 for his two days of testimony. But the record demonstrated that Dr. Valvano lived in Oregon at the time of trial. Dr. Valvano testified that he was "being paid for the two days to come out from Portland to be here away from my job and my home, but my testimony is what it is. You know. It's just my report that I prepared before there was ever any criminal proceeding." Defendant recognizes that trial counsel questioned Dr. Valvano about the very issues he now raises: "Trial counsel did skim around the issue that the doctor may have been a professional witness, which should have caused the court to already be weary of his testimony." Under these circumstances, defendant fails to establish that trial counsel's performance was deficient.

Moreover, defendant fails to establish that trial counsel's alleged deficiencies with respect to Dr. Valvano's testimony prejudiced him. Defendant argues that Dr. Valvano's testimony was critical to establishing defendant's requisite mental state. According to defendant, if trial counsel "had provided the trial court with the information he had in his possession regarding the *Benz* mistrial, along with directly arguing the point he skimmed around during cross-examination, the trial court would likely not have credited the opinions made by [Dr.] Valvano, and therefore, his opinions could not have formed the basis for the court's [guilty] finding." We disagree.

Trial counsel cross-examined Dr. Valvano extensively about the nature and cause of Kaden's injuries, the amount of force necessary to cause the injuries, and whether the injuries could have been caused accidentally. Trial counsel also attempted to discredit Dr. Valvano's testimony by questioning him about his history of prior testimony on the State's behalf and financial

compensation. We cannot say that there is a reasonable probability that introduction of evidence that the prosecutor in an unrelated case failed to disclose Dr. Valvano's inconsistent statements would have caused the trial court to discredit Dr. Valvano's opinions here.

Regarding defendant's argument that trial counsel was ineffective for failing to advise him that his suppressed statements could be admitted if he testified, defendant failed to establish prejudice. The suppressed statements were different versions of the incident that defendant told Officer Marak at the hospital. However, in its case-in-chief, the State already had introduced testimony establishing that defendant had relayed multiple versions of the incident. Shortly after the incident occurred, defendant telephoned his wife and told her that Kaden hit his head when defendant and Kaden fell into a wall. When Detective Keane arrived at defendant's home on the night of the incident, defendant told him that he and Kaden fell and Kaden hit his head. At the hospital, defendant told Dr. Valvano and the social worker that he was walking "laps" while holding Kaden, and Kaden's head bumped into the wall when defendant became tangled up with or tripped over his daughter and fell. A few days after the incident, when Officer Marak was at defendant's home to take photographs, defendant told him that Kaden's head hit the corner of the entertainment center when he was swinging Kaden. As the trial court found, defendant's "deception regarding how the injuries occurred was apparent before the state rested." In light of the extensive evidence of defendant's inconsistent versions of the incident, defendant fails to establish that the result of the trial would have been different if trial counsel had advised him that his suppressed statements to Officer Marak could be admissible if he testified. In sum, defendant's ineffective assistance of counsel claims do not warrant relief.

Sufficiency of the Evidence

Defendant next contends that the trial court erroneously denied his "motion for a directed verdict" because the State did not prove defendant's mental state beyond a reasonable doubt. This was a bench trial, not a jury trial. The motion at issue was a motion for a directed finding of not guilty, not a motion for a directed verdict. *People v. Cazacu*, 373 Ill. App. 3d 465, 473 (2007). Nevertheless, the same standard applies. *Cazacu*, 373 Ill. App. 3d at 473.

Section 115—4(k) of the Illinois Code of Criminal Procedure (725 ILCS 5/115—4(k) (West 2008)) provides:

> "When, at the close of the State's evidence or at the close of all of the evidence, the evidence is insufficient to support a finding or verdict of guilty the court may and on motion of the defendant shall make a finding or direct the jury to return a verdict of not guilty, enter a judgment of acquittal and discharge the defendant."

In moving for a directed finding of not guilty, the defendant admits the truth of the facts presented in the State's evidence for purposes of the motion. *Cazacu*, 373 Ill. App. 3d at 473. The trial court must determine whether a reasonable mind could fairly conclude the guilt of the defendant beyond a reasonable doubt, considering the evidence most strongly in the State's favor. *Cazacu*, 373 Ill. App. 3d at 473. A motion for a directed finding of not guilty presents a question of law, which we review *de novo*. *Cazacu*, 373 Ill. App. 3d at 473.

Initially, the State argues that defendant forfeited this issue because he did not renew his motion for a directed finding at the close of all the evidence. *People v. Wilson*, 143 Ill. 2d 236, 245 (1991) ("Where a defendant elected to present evidence following the denial of his motion for a directed finding, any error in the trial court's ruling on the motion is waived unless the defendant renews the motion at the close of all the evidence."). Defendant does not respond to the State's

forfeiture argument. We note that defendant renewed his motion for a directed finding after the defense rested. However, the State presented a rebuttal case, and defendant did not renew his motion for a directed finding after the State rested in rebuttal. Accordingly, defendant failed to renew the motion at the close of *all* the evidence.

Forfeiture issues aside, defendant's argument fails. Defendant contends that in its case-in-chief, the State failed to prove that he knowingly caused great bodily harm to Kaden. 720 ILCS 5/12—4.3(a) (West 2004). A defendant acts knowingly when he is consciously aware that his conduct is practically certain to cause the result. 720 ILCS 5/4-5(b) (2004); *People v. Hall*, 273 Ill. App. 3d 838, 842 (1995). A defendant is presumed to intend the probable consequences of his acts. *People v. Rader*, 272 Ill. App. 3d 796, 803 (1995). Knowledge may be inferred from the surrounding circumstances. *People v. Renteria*, 232 Ill. App. 3d 409, 416-17 (1992).

Here, defendant admitted that he swung Kaden's head into the corner of the entertainment center. The probable consequence of swinging a two-month-old infant's head into an entertainment center is great bodily harm to the infant. Moreover, defendant's knowledge may be inferred from his multiple inconsistent versions of the incident and Dr. Valvano's testimony that Kaden's injuries were inconsistent with the version of events defendant relayed to him. See, *e.g.*, *People v. Lind*, 307 Ill. App. 3d 727, 735-36 (1999) (affirming the defendant's conviction for aggravated battery of a child where the jury reasonably could have found that the defendant acted with the requisite mental state based on evidence that the victim's injuries were inconsistent with the defendant's conflicting version of events); *Rader*, 272 Ill. App. 3d at 805 (affirming the defendant's conviction for aggravated battery of a child where a "rational trier of fact could infer defendant *must have known* of the substantial probability of causing injury to [the victim] based on the severity of violence

necessary to cause the injuries" and the victim's injuries were inconsistent with the defendant's conflicting versions of events).

Defendant contends that *Lind* and *Rader* are distinguishable because Dr. Valvano merely testified that Kaden's injuries were inconsistent with defendant's version of events as they were described to him, namely, that defendant and Kaden fell into a wall. However, defendant admitted that this version was not true. Rather, he testified that he hit Kaden's head on the corner of the entertainment center when he was swinging Kaden and turned around to look at Kiley and the dog. According to defendant, Dr. Valvano "was not able to testify that this version was inconsistent with the medical evidence, and his testimony implied that one, *albeit* forceful, swing could cause the rotational forces, and the impact could be caused by Kaden's head hitting the corner of the entertainment center."

Defendant fails to address the entirety of Dr. Valvano's testimony. While Dr. Valvano acknowledged that an edge of furniture, with enough force, could cause a comminuted or depressed skull fracture, he explained that the force would have to be significant and severe—the "type of force that if someone saw this happening, they would be afraid for that child's life." Dr. Valvano stressed that the force required to cause Kaden's skull fractures is not the type seen in accidental injuries. In addition, as the trial court pointed out, defendant's version at trial—that he swung Kaden's head into the corner of the entertainment center—did not account for the internal symptoms diffuse throughout Kaden's skull. The State presented sufficient evidence of defendant's mental state. Accordingly, the trial court did not err in denying defendant's motion for a directed finding of not guilty.

For the foregoing reasons, we affirm the judgment of the circuit court of McHenry County.

Affirmed.