2016 IL App (2d) 150484-U
No. 2-15-0484
Order filed May 26, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ISAAC GONZALEZ, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Boone County. No. 10-CF-392 Honorable C. Robert Tobin III, Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices McLaren and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: There was no merit in any of defendant's various claims of ineffective assistance of counsel.

¶ 2 Defendant, Isaac Gonzalez, appeals his conviction for aggravated battery of a child. He claims multiple instances at trial where he was denied his constitutional right to the effective assistance of counsel. We reject all of his claims and affirm.

¶ 3 I. BACKGROUND

¶ 4 In October 2010, defendant was indicted on three counts of aggravated battery of a child (720 ILCS 5/12-4.3(a) (West 2008)). The alleged victim was N.G., the biological child of

defendant and his wife, Elizabeth Gonzalez. N.G. was born in May 2009. The indictment alleged that, on January 8, 2010, defendant abused, shook, or dropped N.G. on his head, causing a subdural hematoma and retinal hemorrhages.

¶ 5 On June 2, 2014, the date set for trial, defense counsel filed a motion for a continuance. Counsel claimed that he was unable to subpoena Dr. Michael Shapiro, one of the physicians who treated N.G. following his injuries. According to counsel, Shapiro's opinions were important to the defense case because they contradicted the opinions of Dr. Raymond Davis, "the primary witness against the defendant." Counsel also asserted that the medical records that the State produced in discovery were missing a significant amount of documentation from Lutheran General Hospital, including records of Shapiro's treatment of N.G.

¶ 6 Arguing in court on June 2 in support of the motion, defense counsel stated that he had 65 pages of records from Lutheran General. Counsel suggested that N.G.'s month-long stay at Lutheran General would have generated in excess of 65 records, particularly considering that the State had tendered 1,900 pages from Rockford Memorial Hospital where N.G. stayed for a much shorter period. Also, while the Lutheran General records in the defense's possession referenced a follow-up exam by Shapiro, they did not address the results of that exam.

¶ 7 Counsel also asserted that he was still "trying to get Dr. Shapiro," whose testimony counsel anticipated would contradict Dr. Davis' opinion that N.G. suffered from shaken baby syndrome. Counsel claimed that he subpoenaed Shapiro the month before but that he was no longer at that address. (There is no subpoena for Shapiro in the record.) When the court asked when counsel last spoke with Shapiro, counsel replied that he had not yet spoken with Shapiro but that Shapiro had spoken with defendant and Elizabeth and told them that he would not come

to court. For this reason, counsel noted, the defense "ended up *** going with Dr. [Herbert] Becker."

¶ 8 Opposing the requested continuance, the State asserted that it provided the defense all medical records in the State's possession. The State expressed doubt that any additional records existed.

¶ 9 The court declined to grant a continuance. The court noted that the case was originally set for trial six months before and was previously continued at the defense's request. The court agreed with the State that additional records from Lutheran General did not likely exist. Regarding Shapiro, the court remarked that counsel should have subpoenaed him. The court also commented that "we don't even know what Dr. Shapiro's testimony would be."

¶ 10 (In posttrial proceedings, in which defendant was represented by new counsel, defendant agreed that the State had in fact tendered additional records from Lutheran General to defendant's former counsel prior to the June 2 motion for a continuance. As part of his posttrial claims of ineffectiveness, defendant alleged that trial counsel was ineffective for forgetting he had the records and thus failing to use them in preparation for trial.)

¶ 11 The trial proceeded. The parties' respective theories were in agreement that N.G. suffered a physical incident on the night of January 8, 2010. The State contended that defendant intentionally abused N.G., while the defense claimed that defendant accidentally dropped N.G.

¶ 12 The State's seven witnesses consisted of one deputy sheriff (Rhonda Moore) and six medical doctors: Drs. Errol Baptist, Herbert Becker, Jane Pearson, Raymond Davis, Michael Wagner, and John Ruge. These physicians testified to their medical treatment of N.G. on and after January 9, 2010, the day following the alleged battery of N.G. Some of these physicians

had also treated N.G. prior to January 9, 2010, in connection with issues stemming from his premature birth in May 2009. N.G. was hospitalized for roughly two months following his birth.

¶ 13 The State's first witness was Dr. Bapist, a pediatrician, who testified that he first saw N.G. on August 7, 2009, following his discharge from the neonatal intensive care unit at Rockford Memorial. At that time, N.G. was "a two-month-old high risk baby who was born at a gestational age of 26 weeks, weighing two pounds and three ounces." N.G. had respiratory distress following his delivery by emergency cesarean section. He was diagnosed after birth with various medical conditions including peripheral pulmonary stenosis, retinopathy of prematurity, germinal matrix bleed, and anemia.

¶ 14 Baptist explained each of these conditions. Peripheral pulmonary stenosis is a narrowing of the arteries in the lungs. Many premature babies have the condition, which typically resolves over time as it did in N.G.'s case. According to Baptist, pulmonary stenosis is not indicative of weak blood vessels in other parts of the circulatory system.

¶ 15 Baptist described retinopathy of prematurity as "changes in the retinas" due to prematurity. Baptist further explained that a germinal matrix bleed is an intraventricular hemorrhage in the brain, which in N.G.'s case was a "very[,] very minimal bleed, if it was that." Asked if a child suffering from that kind of brain bleed would be at "a high risk for more brain bleeds," Baptist answered that it "all depends on the patient and other factors." Baptist further testified however, that "[o]nce a newborn baby *** goes beyond the neonatal period, his stay in the intensive care unit, I do not expect him to get another brain bleed." Baptist noted that an intracranial ultrasound performed on N.G. in June 2009 showed no remaining intraventricular hemorrhage.

¶ 16 Baptist testified that his examination of N.G. on August 7, 2009, was unremarkable. N.G.'s head circumference was in a low percentile because he was premature. In follow-up appointments in later August and September 2009, N.G. continued to grow and his head circumference expanded. At those visits, Baptist gave N.G. injections of Synagis, which is designed to prevent respiratory syncytial virus infection, or RSV. Baptist saw no evidence of abuse in N.G. during this time period.

¶ 17 According to Baptist, he received a call from defendant on the evening of January 8, 2010. Defendant told Baptist that N.G. had suffered some type of fall. Baptist did not recall the details, but the incident did not seem major. He recommended that defendant take N.G. to the emergency room if N.G. had problems.

¶ 18 On January 15, 2010, following N.G.'s discharge from Rockford Memorial, defendant and Elizabeth brought N.G. to Baptist for his Synagis shot. They informed Baptist that, since N.G.'s discharge from Rockford Memorial, he was spitting up and his eyes were crossing occasionally. Baptist took note of the condition of N.G.'s anterior fontanel, which is the gap between cranial bones in infants. The fontanel was firmer and more elevated than normal.

¶ 19 Dr. Becker testified that he is a pediatric ophthalmologist at Rockford Memorial with a particular expertise in the retina. Becker saw N.G. in June 2009 to track his retinal development. On that date, Becker diagnosed N.G. with mild retinopathy of prematurity. Becker continued to see N.G. for follow-up visits until August 2009, when Becker determined that his retinas were mature. Becker saw no evidence of retinal hemorrhages during any of these visits.

¶ 20 Becker next saw N.G. on January 19, 2010, following his release from Rockford Memorial. Becker noticed that N.G.'s left eye was turned inward towards his nose. Becker suspected that the eye deviation was due to palsy of the sixth nerve, which feeds the lateral rectus

muscle of the eye. Becker explained that impairment of that nerve can have various causes including intracranial pressure or head trauma.

¶ 21 Becker also observed at the January 19 appointment that N.G. had three hemorrhages in the retina of his right eye and numerous hemorrhages in the retina of his left eye. One large hemorrhage in the left retina covered the 20/20 area. This hemorrhage "wasn't just in the substance of the retina but it actually had broken out into *** the jelly cavity[.]" This hemorrhage was of particular concern to Becker because it could cause permanent vision impairment. Becker recommended that N.G. see Shapiro about the hemorrhages.

¶ 22 Becker had no opinion as to the cause of the retinal hemorrhages. He could not say to any degree of scientific certainty whether the cause was accidental or nonaccidental. Becker agreed that "retinal hemorrhages do not automatically mean it is shaken baby syndrome."

¶ 23 Dr. Pearson testified that, on January 9, 2010, defendant and Elizabeth brought N.G. to the emergency room at St. Anthony Medical Center where Pearson was working as an emergency room physician. Pearson took a history from defendant. He told Pearson that N.G. suffered an accidental fall the night before. According to defendant, the accident occurred while he was giving N.G. "tummy time," which, as Pearson understood it, involved defendant lying on the floor with N.G. on his chest. Defendant stated that, during this activity, N.G. accidentally fell about ten inches and landed on the thinly carpeted floor. N.G. did not lose consciousness but cried. He did not bleed. According to defendant, N.G. seemed fine after the incident. Defendant called Baptist, who recommended that defendant take N.G. to the emergency room. Instead of doing that, defendant phoned his sister, Isabel Gonzalez, who is a pediatrician. Isabel came over, examined N.G., and said he was fine. That night, N.G. vomited twice and was fussy. His fontanel appeared swollen. Defendant and Elizabeth decided to bring him to the emergency

room. They told Pearson that the fall on January 8 was the only physical trauma N.G. ever suffered.

¶ 24 Pearson described her findings from her physical examination of N.G. He had no external injuries and appeared normal except for a slight fullness in the fontanel. Pearson ordered a CT scan of N.G.'s head, which showed two areas of internal bleeding. One was a left frontal intraparenchymal bleed. This was a bleed "not around the brain, but actually in the tissue of the brain." This bleed was "acute and new," meaning it had been there a very short time. The other bleed was in the left subdural area, or between the brain and the membrane called the dura. This kind of bleed is caused by tearing of the blood vessels that bridge the dura and the brain tissue. N.G.'s subdural bleed was "acute to subacute, meaning that it had been there a little bit longer time" than the intraparenchymal bleed. Pearson testified that the time differential between the two bleeds was "24 hours to a few days."

¶ 25 Pearson opined, to a reasonable degree of medical certainty, that N.G.'s "constellation of injuries represented shaken baby syndrome," a condition caused by an acceleration-deceleration motion in which the infant's brain impacts the inside of the skull and bleeds. Pearson acknowledged that the mechanism "doesn't have to be a back and forth motion," such as shaking, but "could just be a sudden motion with a deceleration" such as an impact with a surface. Pearson did not believe that a fall from a height of ten inches, such as defendant described, could have caused the extent of intracranial bleeding in N.G. Also, blunt trauma could not have caused that type of bleeding without leaving external marks of trauma, and N.G. had none. Impact with a soft surface would not have carried the force of deceleration necessary to inflict N.G.'s injuries. Pearson testified that, because of the severity of the intracranial bleeding, she arranged for N.G.'s transfer to Rockford Memorial. Also, because of her

suspicions of child abuse, Pearson notified the Department of Child and Family Services and arranged for N.G. to be seen by Dr. Davis.

¶ 26 Pearson acknowledged that premature babies, because of their larger intra-axial space, are more prone to intracranial bleeding in the perinatal period. However, Pearson was unaware of any data suggesting that such proneness to bleeding continues into the seventh month after birth.

¶ 27 The State called Moore next. Prior to Moore's testimony, defendant made an oral motion *in limine* to bar any mention by Moore that, after defendant retained an attorney, he and Elizabeth invoked their rights against self-incrimination and refused to speak further with Moore or other officers. The court granted the motion.

¶ 28 Moore testified that, on the night of January 9, 2010, she was dispatched to Rockford Memorial to investigate a possible shaken baby case. When she arrived, she spoke to defendant and Elizabeth, the parents of the suspected victim. Moore spoke to defendant and Elizabeth separately. Defendant told Moore that, on the day before, he arrived home at about 3 p.m. and spoke with Elizabeth, who said that N.G. was tired and napped most of the day. When Elizabeth left, defendant went downstairs to play a video game and took N.G. with him. N.G. became a little fussy, so defendant gave him toys. Shortly afterward, he decided to give N.G. some "tummy time," which involved lying N.G. on his stomach to encourage him to raise his head and torso and thereby improve his upper body strength. Defendant was in a hurry to play his video game, so he "lifted [N.G.] like by his wrists and went to set him on the floor[.]" "[W]hen [N.G.'s] toes touched the floor he let go, and [N.G.] fell forward and his face bounced off the floor." Defendant told Moore that, during this session of tummy time, he did not have the blanket

that he normally uses for such sessions. Therefore, the surface on which N.G. fell was only "thin cheap carpet on top of cement."

¶ 29 Defendant told Moore that when N.G. struck the floor he "cried hard initially, but then calmed down pretty quick." As defendant began to run upstairs, he looked back and saw that N.G. had flipped himself onto his back. Defendant went to N.G. and praised him for turning over. Noticing that N.G.'s limbs were rigid, he placed him on the couch and tried to bend his knees. He then took N.G. upstairs and changed his diaper. At this time, he noticed that N.G. was lethargic and that every couple of breaths were deep.

¶ 30 Defendant told Moore that at this point he called a pediatrician, who told him to bring N.G. to the emergency room because he "might have pulled something." Instead of following that advice, defendant called Isabel. She came over, examined N.G., and concluded that he was fine. She helped defendant give N.G. a bath and remained for a short time afterward. Defendant told Moore that he did not tell Isabel that he had dropped N.G. Defendant's friends came over around 9:30 p.m. as was previously planned. They drank beer and played video games while N.G. sat in his baby seat. According to defendant, N.G. was "[w]as fine, acted normal" during this time. He put N.G. to bed around 11 p.m.

¶ 31 Moore asked defendant if he had ever struck or shook N.G. Defendant denied it. He said that he customarily played with N.G. by throwing him up and catching him.

¶ 32 Moore testified that, as part of her investigation in the case, she sought to interview Isabel. Moore spoke to her by phone to set up an interview. Later, however, an attorney "called and said she was representing [Isabel] and said she would not be coming in."

¶ 33 Dr. Davis testified that he is a pediatrician and child abuse specialist. In January 2010, while N.G. was at Rockford Memorial, Davis was called in to determine whether N.G. had suffered abuse.

¶ 34 Davis stated that he first spoke with defendant on January 10. Defendant described what happened on January 8. Elizabeth departed for work around 5:30 p.m., leaving defendant with N.G. Defendant went downstairs with N.G. to play video games. Defendant sat N.G. on the couch with him as he played the game. At one point, defendant rose from the couch to do something. He tried to pick N.G. up but he "slipped out and fell to the floor." Defendant could not recall exactly how N.G. made contact with the floor, but believed that his feet hit first and then he fell forward on his face or head. According to defendant, N.G. fell at most a distance of two feet. After the fall, defendant went to go upstairs. He looked back and saw that N.G. had turned over onto his back. Defendant praised N.G. and picked him up. Defendant noticed that N.G.'s body was stiff. Defendant tried to bend N.G.'s legs and then took him upstairs for a diaper change. Afterwards, defendant noticed that N.G. was listless and sleepy. Defendant phoned Baptist, who recommended that defendant take N.G. to the emergency room. Instead, defendant phoned Isabel, who came over around 7 p.m. She asked defendant if N.G. had fallen or been dropped. Defendant denied it. Isabel examined N.G. and concluded that he was fine. Defendant and Isabel gave N.G. a bath and put him to bed.

¶ 35 Davis testified to his medical evaluation of N.G. A complete skeletal survey of N.G. came back normal. In his physical examination of N.G., Davis found no cuts or bruises but did notice hemorrhages in both of N.G.'s retinas. Accordingly, Davis requested an ophthalmologic exam of N.G.

¶ 36 While awaiting the results of the ophthalmologic exam, Davis reviewed the CT scans of N.G.'s head and found three main areas of note. The first was "a little bit" of excess extra-axial fluid, or fluid around the outside of the brain itself. The second was a subdural hemorrhage, which was "acute or subacute within the past day or two." The third was a hemorrhage in the subarachnoid space, or the space between the arachnoid membrane and the brain itself.

¶ 37 Davis testified that the ophthalmologic exam of N.G. showed hemorrhaging in both retinas. The bleeding in the left retina was extensive, reaching the periphery of the eye. After receiving these results, Davis spoke with defendant a second time. He told defendant that the retinal hemorrhages could not have been caused by a simple fall, and thus defendant had yet to provide an adequate explanation for them. Defendant replied that he would play roughly with N.G. by throwing him up and catching him and also twirling him. Defendant suggested that this activity might have caused the bleeding, but Davis told him he was wrong.

¶ 38 After this second conversation, Davis learned that Isabel was on duty for general pediatrics on N.G.'s floor. To avoid a conflict of interest, Davis asked another pediatrician to cover for Isabel in case N.G. needed immediate care.

¶ 39 Davis testified that he had a third conversation with defendant, which defendant initiated. Elizabeth was also present. Defendant stated that he had been dishonest with Davis as to how the fall occurred. Defendant now claimed that the fall occurred while he was sitting on the couch with N.G. He was holding N.G. the way he liked. Specifically, he had "[N.G.'s] arms *** crossed underneath him and he was holding [N.G.] up under his belly, with him between his legs, and [N.G.'s] face down, facing the floor[.]" While holding N.G. in this position, defendant "dropped him on the floor." He picked him up and then "dropped him again." Defendant claimed he did not know what he was thinking at the time. Davis asked defendant how many

times he dropped N.G. and how much force was involved. Defendant did not answer the questions but expressed concern that DCFS would charge him with child abuse. The conversation ended when Elizabeth became upset and said she needed to take a walk.

¶ 40 In Davis' opinion, N.G.'s injuries were, to a reasonable degree of medical certainty, due to abusive head trauma, which is a broad name for abuse involving acceleration/deceleration force. Abusive head trauma includes shaken baby syndrome, which in current usage is reserved for acceleration/deceleration injuries induced by shaking. Davis based his opinion on the following factors: (1) the intracranial hemorrhages and acute onset in N.G. of neurologic problems such as stiffness, lethargy, and irregular breathing; (2) lack of a medical condition in N.G. that might have caused spontaneous bleeding; (3) lack of an alternative mechanical explanation for the injuries; (4) defendant's shifting accounts of how N.G. sustained the injuries; and (5) defendant's failure to take N.G. to the emergency room after Baptist recommended it.

¶ 41 Davis elaborated on these factors. On factors (1) and (3), Davis noted that a subdural hemorrhage is a "marker" for an acceleration/deceleration injury. Mechanisms forceful enough to cause such an injury include a hit to the head with a baseball bat, impact with a windshield, fall from a second story window, and, in infants, shaking. A subdural hemorrhage can have an accidental cause, but studies from early 2010 show that 75 percent or more of subdural hemorrhages are associated with abusive head trauma. Defendant identified no plausible accidental cause for N.G.'s injuries.

¶ 42 On factor (2), Davis noted that N.G.'s medical history did not indicate a possibility that the bleeding was spontaneous. N.G. had several ultrasounds during his lengthy hospitalization after birth. The final ultrasound prior to his discharge showed "a little bit of extra fluid on the outside of the brain." The ultrasound revealed no sign of an intraventricular hemorrhage that

was previously observed. N.G. did not manifest, or have a family history of, any bleeding disorder.

¶ 43 On factors (4) and (5), Davis commented that a "red flag" in child abuse investigations is the suspect's varying explanations for the injuries:

> "Many times the first history is a minimal history because they are afraid of what they know actually happened. But when that doesn't fit the physical findings, the history changes so that maybe that new history will fit these physical findings."

Davis also noted that "most parents that have a serious concern about an injury to their child, particularly if there was a fall involved [with] a baby, and the doctor suggested you should have him checked in the emergency room, generally most parents would pursue that."

¶ 44 On cross-examination, Davis admitted that, after first his interview with N.G.'s parents, he was concerned that there was abuse, but had reached no conclusion. His investigation was still underway as he had yet to review the CT scans and the results of the ophthalmologic exam.

¶ 45 Davis acknowledged that N.G.'s excess extra-axial fluid meant that his brain had more room for movement. Davis was unsure how such added room for movement would impact the amount of force needed to produce brain hemorrhages like N.G.'s. Davis said:

> "In this case, the amount of force, because of that extra fluid, that's the thing we don't know about. If you take a normal child with a normal brain that doesn't have chronic subdural extraaxial fluid, no, that brain isn't easily prone to bleeding. That brain takes a lot of trauma or injury, either forceful shaking or a significant fall to cause the bleed.
>
> Now if a bleed has occurred, and there's a big enough bleed, and you end up with some fluid in there or a chronic subdural, that's the part we don't have enough

information on. So—but it is—we do have studies that have shown that the minor trauma after an acute subdural hemorrhage can re-bleed more easily, at least within that first four to six weeks."

The exchange with Davis continued:

Q. And [N.G.] was at risk for IVH [intraventricular hemorrhages], correct, when he was born?

A. Yes, he was, when he was born.

Q. So in terms of going back to the 75 percent abusive head trauma, if you have a greater amount of extraaxial fluid, that's going to expand the possibilities, right? He may well be within that 25 percent category if he has more extraaxial brain fluid, correct?

A. If you look at just the subdural hemorrhage and the extraaxial fluid, yes, that opens up a wide degrees [*sic*] of forces or mechanisms of injury."

¶ 46 Davis reiterated that his finding of abusive head trauma was based not just on the subdural hemorrhaging but also the retinal hemorrhaging, the spontaneous onset of symptoms, the absence of explanations for the bleeding other than abuse, and defendant's behavior that suggested guilty knowledge. Davis agreed that the mere presence of a retinal hemorrhage does not point definitively to child abuse, but rather that the number, extent, and location of retinal hemorrhages must be taken into consideration. Given the nature of the hemorrhages in this case and the other circumstances, Davis could not agree with Becker that it was inconclusive whether N.G.'s injuries were accidental or nonaccidental. Becker, Davis noted, was not

"a child abuse expert that investigates, looks at history and mechanisms of injury and then makes a determination based upon all of the information available. [Becker] is looking at eyes and sees retinal hemorrhages. If I saw a sore throat I can't say it is strep

or mono, it is a sore throat. I can then further determine what that is by getting history, doing laboratory evaluation."

¶ 47 Davis was also asked on cross-examination whether he spoke to Isabel about defendant's failure to tell her on the night of the incident that he had dropped N.G. Davis replied that he did not speak with Isabel about the case. Defense counsel asked these follow-up questions:

"Q. And, in fact, in terms of not talking to [Isabel]. You specifically wanted her not to be involved at all?

A. Well, I didn't want her to be involved in [N.G.'s] care when he was in the hospital. No, that's a different story. I did mention to her that, you know, if she did go to the house and did see [N.G.], she needs to be careful, because her medical license can be on the line. It is a family member, but she's also a physician mandated to report child abuse, mandated to be involved in and give information and not withhold. And should she break that mandate, it can *** go to the [S]tate licensing board. It could be potentially a misdemeanor crime, and even a felony if it is a second offense. So I did talk to her about that, and why I didn't want her to take care of [N.G.] that night.

Q. And it was in relation to the licensing issue and to not reporting that you told her you didn't want her to be involved with the care of [N.G.]?

A. No, it just makes sense not to have her involved in the care. She was involved in this case. She may be a witness in this case. And certainly, being a family member, she is not the best person in this situation to be taking care of a child who might have significant complications, especially when there's an expert pediatric intensivist in the house at the same time. I mean, I would have done [*sic*] to myself and any other

physician. If I was on, I would have recused myself and asked somebody else if I had been in her position."

¶ 48 Davis further testified on cross-examination that, after N.G.'s release from the hospital, Elizabeth came to speak with Davis. Davis denied telling her that this was not necessarily a shaken baby case. Davis did not recall speaking with Attorney Elder Granger in April or May 2012, or with Ryan Sharp in June 2012, about Davis' opinion in the case. He would not have told them in any case that there were "numerous possibilities of how [N.G.] could have sustained injuries." Davis was further asked:

"Q. You tell [*sic*] him [Granger] you could not conclude that [N.G.'s] injuries in this matter were sustained as a result of abuse or shaken baby syndrome?

A. No, I will say this, and I said this to many lawyers all the time: The only absolute way that I can say it is impossible to happen any other way, and it was only abuse, is if I was there and I saw it. But I can say, based upon my professional expertise in this area, and having done extensive review of the injuries, the timing of the injuries, the findings we have, and the lack of any other reasonable explanation, this is a case of shaken baby in this case.

Now does that mean that something else that even yet we don't know didn't happen? I mean, I wasn't there, so I can never absolutely say, that I know—know—period. ***

I can make an opinion—a very strong opinion based upon my medical expertise and experience in these evaluations, that yes, this is a case of shaken baby. So, if I said that to him, and he misinterpreted, and that's what came out, it is out of context.

I don't recall the conversation with him, but I have told many lawyers that if I'm not there, I can't say absolutely."

¶ 49 On redirect, Davis acknowledged that the age differential in the two areas of hemorrhaging in N.G.'s brain could mean that N.G. also sustained abusive head trauma prior to January 8, 2010.

¶ 50 Dr. Wagner, an ophthalmologist, testified that he examined N.G. at Rockford Memorial on January 9 and 10, 2010. In N.G.'s right eye there were "a few little hemorrhages in the retina, not much." In the left eye, however, there was extensive retinal hemorrhaging. Wagner explained that if the eye is distorted by direct trauma or by an impact against the skull, retinal bleeding can occur. Wager could not conclusively determine that the retinal hemorrhaging he observed in N.G. was the result of intentional head trauma.

¶ 51 Dr. Ruge testified that he saw N.G. on January 21, 2010, for a surgical consultation. Ruge noted that N.G.'s fontanel was tense from pressure and that imaging studies showed fluid accumulation between his brain and his skull. The pressure within the skull was pushing the brain down and causing palsy of the sixth nerve, which affected eye movement. Ruge performed surgery on N.G. to drain his skull and release the pressure. The fluid that accumulated in the skull was a mix of blood and spinal fluid. The accumulation could have resulted from an accidental impact to the skull. Ruge acknowledged that a lesser degree of force is required to cause a subdural hemorrhage in a person with excess extra-axial fluid.

¶ 52 After the State rested, the trial court broached the subject of whether Isabel, whom the defense listed as a witness, was likely to assert her right against self-incrimination if called to testify. Defense counsel stated that he had not yet met with Isabel but did not anticipate that she would assert the privilege since his questions on direct examination would concern "[h]er basic

observations" when she went to defendant's home on January 8, 2010. The court, however, observed that the State might well ask Isabel about her status as a mandatory reporter of child abuse (a fact brought out by Davis), and since the failure to report is subject to criminal prosecution, Isabel might refuse to answer that question. The court noted that Isabel's assertion of the right could damage the defense's case. The State confirmed that it would indeed question Isabel on her status as a mandatory reporter. Defense counsel informed the court that he would speak to Isabel's attorney and report back.

¶ 53 The following day, defense counsel reported that he had been told by Isabel's attorney that she would not testify voluntarily in the case. Counsel noted that Isabel was not under subpoena.

¶ 54 The defense proceeded with its case, calling Elizabeth as the first of five witnesses. Elizabeth explained that N.G. was born prematurely and remained approximately two months in the hospital, where he was on a ventilator and feeding tube. After his discharge, he remained on a sleep monitor. He was a slow eater and suffered from reflux. Some tension developed between Elizabeth and defendant because of the stress involved in meeting N.G.'s particular needs. Over the following months, however, N.G. improved and by January 2010 it was "a pretty normal situation." Per medical instructions, defendant and Elizabeth gave N.G. regular "tummy time" to strengthen his muscles. Elizabeth was N.G.'s primary caregiver.

¶ 55 Elizabeth testified that, about a month before January 8, 2010, N.G. rolled off the bed and hit his head on the corner of a nightstand. He received a black eye. Elizabeth and defendant did not seek medical treatment because N.G. seemed fine.

¶ 56 On January 8, 2010, Elizabeth watched N.G. during the day while defendant was at work. N.G. was in a good mood and was smiling and laughing. Defendant came home about 3 p.m.

and Elizabeth left for her job about 5 p.m. Defendant later phoned her at work and sounded "very scared." When she returned home about 10:15 p.m., defendant was there with two friends. They were playing videogames. Elizabeth, knowing "something had happened" while she was at work, focused on N.G.'s condition. He was smiling and seemed fine. He took his bottle without incident. Elizabeth then read him a story, bathed him, and put him to bed. N.G. vomited around 11 p.m. About an hour later, N.G. woke up and became fussy. This did not alarm Elizabeth because N.G. was "always up in the middle of the night." N.G. vomited again about 3 or 4 a.m. Elizabeth was concerned about the vomiting and resolved to take N.G. to Baptist or to the emergency room later that morning.

¶ 57 Elizabeth and defendant took N.G. to the emergency room at St. Anthony Medical Center. Defendant told the intake nurse what happened the night before. Defendant had already given Elizabeth this information: he told her some of the details when he called her at work the night before and gave her more information the morning after.

¶ 58 Afterwards, a doctor told Elizabeth and defendant that a CT scan had revealed brain bleeds in N.G. The doctor said that one of the bleeds was older. The doctor "pretty much insinuated that [N.G.] was being abused." The doctor asked, "[I]s there anyone that has been abusing [N.G.] consistently, or is there any way—was there any severe trauma that could have happened that could have caused this second brain bleed?" Elizabeth did not mention N.G.'s fall off the bed because it seemed that the doctor was asking only about possible intentional abuse. The doctor told Elizabeth and defendant that DCFS was being contacted.

¶ 59 Elizabeth then became hysterical and cried uncontrollably. N.G. was transferred to Rockford Memorial and placed in the pediatric intensive care unit. Meanwhile, defendant and Elizabeth were questioned by a sheriff's deputy and a DCFS worker.

¶ 60 Elizabeth testified that Davis also spoke to her and defendant at Rockford Memorial. During their first conversation, which occurred on or about January 10, 2010, Davis was very friendly and reassuring. He told them that he "was going to close the case." At this point, the State objected and the court sustained the objection. At a sidebar, the State argued that Davis' out-of-court statement was not proper impeachment because Davis was never asked whether he told Elizabeth that he was going to close the case. The court agreed and affirmed its ruling.

¶ 61 Elizabeth testified that Davis remarked during their first conversation that he wanted to have some tests done on N.G. In Davis' second conversation with defendant and Elizabeth, he was very accusatory and "pretty much said that somebody had to have abused [N.G.], or he got into a rollover car accident." Davis asked them several questions. Elizabeth and defendant were shocked and defendant began to cry. Elizabeth was so upset that she left the room, and defendant followed. Later, defendant approached Davis for a third conversation. Elizabeth was present. Davis was very angry during this conversation. Elizabeth was also angry. Defendant was terrified and very upset.

¶ 62 Elizabeth stated that N.G. was eventually released from Rockford Memorial. Afterward, however, N.G.'s eyes began to cross, and defendant and Elizabeth took him back to Rockford Memorial. N.G. was ultimately transferred to Lutheran General where he was seen by Ruge and Shapiro. Ruge performed surgery to relieve the pressure on N.G.'s brain. N.G. recovered well from the surgery.

¶ 63 Elizabeth testified that, in 2011 or 2012, she went to see Davis about N.G.'s injuries. She asked Davis whether the injuries could have occurred by accident, and he said yes. She later relayed to Granger what Davis had said.

¶ 64 The defense's next witness was Eileen Paul, Elizabeth's mother. She testified that she was involved in the care of N.G. since this birth. In November or December 2009, she noticed a bruise or bump on the left side of N.G.'s forehead. She did not observe N.G. act in an unusual manner during that period. Paul was not at defendant's home on January 8, 2010.

¶ 65 Defendant testified next. He explained that N.G. had complications from his premature birth and that it was strenuous to care for him in the early months. Defendant and Elizabeth became stressed and their relationship became "more difficult." Elizabeth was sometimes displeased with how defendant was helping in the care of N.G.

¶ 66 Defendant testified that, on the evening of January 8, 2010, he returned home from work and had dinner with Elizabeth. After she left, he phoned friends and invited them to come over later and play a video game he had just obtained. Defendant then took N.G. down to the middle level of their tri-level home and began playing the video game. Defendant propped up N.G. in the corner of the couch on which defendant sat. The game console was several feet in front of the couch. The game controller was strapped to defendant's right wrist. While defendant played the game, N.G. began to squirm. Defendant moved N.G. closer and tucked him under his left arm as he continued to play the game. Because N.G. was still fidgety, defendant decided it was a good occasion to give N.G. tummy time. Defendant took hold of N.G. with his right hand, which was still holding the controller. As he lifted N.G. off the couch, defendant tried to make N.G. laugh by swinging him up. During that motion, however, N.G. squirmed out of defendant's grasp. Defendant was unable to grab N.G. and he landed on the floor, which was concrete covered by thin carpet. N.G. began crying. As defendant went to pick up N.G., he tensed up and made a thrashing movement. He violently flipped over and jerked his head back, striking it against the floor. Defendant was concerned because this motion was not normal. He did not call

911 because he "[didn't] want to believe that [N.G.] was that injured." Defendant described what happened as a "drop then a violent rollover and it [was] in the violent rollover [that] N.G. hit[] his head." Defendant denied that he shook or tried to harm N.G. that night.

¶ 67 Defendant testified that, after the fall, he placed N.G. on the couch. He noticed that N.G.'s muscles were tense. As defendant was moving N.G.'s limbs, he had a bowel movement. Defendant took him upstairs for a diaper change. N.G. had shortness of breath but calmed down during the diaper change. Defendant was still concerned about N.G. and called Baptist, leaving a message with a nurse. As he waited for Baptist's call, he phoned Isabel, who worked in the pediatric intensive care unit at Rockford Memorial. Defendant told Isabel to come over right away because it was an emergency. While Isabel was on her way, Baptist called and recommended that defendant take N.G. to the emergency room.

¶ 68 Shortly afterward, Isabel arrived. By that time, N.G. "appeared happy, normal, like nothing had happened." Isabel examined N.G. She "looked [defendant] right in the eye" and asked if he had dropped N.G. Defendant said no. He explained at trial that he had a "mother-son" relationship with Isabel, who was ten years older than him and had done better in school. He knew that he had been irresponsible in how he picked up N.G. from the couch and did not want to disappoint Isabel. After she examined N.G., Isabel and defendant gave N.G. a bath and she played with him. Defendant felt relieved at this time because he seemed to have "dodged a bullet." Since Isabel examined N.G. and found nothing wrong, defendant felt no need to take him to the emergency room.

¶ 69 Defendant also called Elizabeth after the accident. She returned his call after Isabel left. Defendant did not tell her that he had dropped N.G. Defendant explained that he did not want to worry her. He also did not want her to be angry with him.

¶ 70 At some point after Isabel left, but before Elizabeth came home, defendant's friends arrived. He had forgotten to cancel with them. As N.G. seemed fine, he let the friends stay. They played video games while N.G. sat in his infant seat.

¶ 71 N.G. was still awake when Elizabeth came home. She asked what "emergency" defendant had called her about. He said that N.G. had acted weird and had muscle spasms. As N.G. had no injuries and appeared normal, defendant decided not to trouble Elizabeth by telling her that he dropped N.G.

¶ 72 Defendant testified that N.G. vomited before bed, which was not unusual. He also vomited in the middle of the night. Defendant still did not tell Elizabeth about the accident. Defendant examined N.G. and noticed that his fontanel was firm. In the morning, defendant told Elizabeth that he dropped N.G. the night before. She became upset. They took N.G. to St. Anthony. Defendant told the intake nurse and Pearson that he had dropped N.G. while putting him down for tummy time. According to defendant, he did not volunteer, nor did Pearson ask, what he meant by tummy time. Pearson's testimony was incorrect as to what tummy time involved; N.G. was placed on the floor, not on defendant's stomach.

¶ 73 When Pearson explained the results of the CT scans, she asked if anyone could have been abusing N.G. Defendant denied it. He did not mention N.G.'s accidental fall off the bed in December 2009 because that did not constitute abuse. When Pearson stated that she was contacting DCFS, he was shocked. In his experience, DCFS was "very negative" toward parents.

¶ 74 Defendant testified that N.G. was transferred to Rockford Memorial, where defendant was interviewed by Moore and a DCFS worker. Defendant was "relieved" at this point because he could "[t]ell [them] the truth about what happened to [N.G.]." Moore asked defendant if he

had ever shaken N.G., and defendant said no. Defendant told Moore that he accidentally dropped N.G. while picking him up off the couch. He did not tell Moore that he was in a hurry to play his video game on the night of the incident.

¶ 75 Defendant next had his first conversation with Davis. At this meeting, Davis was calm and friendly. Defendant then spoke to Wager, and afterward to Davis a second time. Davis' demeanor was completely different than at their first meeting. He was accusatory and threatening. He said that N.G. might go into foster care. Defendant asked Davis how the discovery of the retinal hemorrhages had changed his opinion. Davis replied that the hemorrhages could only have been caused by back-and-forth motion. Davis did not ask defendant whether he shook N.G. Rather, he said "somebody shook your baby, or you got into a car crash, or somebody dropped him from a two-story window." Defendant replied that none of these things happened to N.G.

¶ 76 As defendant was about to describe something else Davis said, the State objected. Defense counsel proffered that defendant would testify that Davis "encourage[d] him to tell the truth, if this was an accident, this is just an accident." The State objected that this out-of-court statement by Davis was not admissible to impeach him because he was never asked if he made the statement. The court sustained the objection, agreeing that the statement did not constitute impeachment.

¶ 77 Continuing with his testimony, defendant explained why he sought out Davis for a third conversation:

> "I wanted to try to explain how these—how these injuries could have happen [*sic*] from an accident. I wanted him to not take my son away from my wife. And I wanted to—I don't know—I wanted him to—he didn't believe the truth that I had told DCFS and him.

> I wanted him to—I wanted to explain to him why this could be an accident, but just tell him what he wanted to hear really. Explain like an upward-and-downward motion type-of-thing, something that could explain [N.G.'s] injuries."

¶ 78 Defendant testified that, in their third meeting, he told Davis that he picked N.G. up and dropped him and then picked him up and dropped him again. Defendant was lying to Davis at this point. He gave this account to Davis because "he hadn't believed the truth that [defendant] had told him." Defendant wanted to protect his family.

¶ 79 Defendant's final two witnesses were Elder Granger and Ryan Swift. Both were associates in the same law firm as defense counsel. Granger testified that he had previously worked on defendant's case. In connection with that work he spoke to Elizabeth. She told him of information she received from Davis. Later, in April or May 2012, Granger phoned Davis for the purpose of verifying what Granger learned from Elizabeth. Granger spoke to Davis on speaker phone with Swift in the room. Davis told Granger that he "could not say one way or the other whether or not it was shaken baby." Davis "believed potentially that it was shaken baby based upon reading *** [defendant's] statements and his story in terms of what took place." Davis "could not say 100 percent that it was shaken baby, that it could be from numerous other things," such as a fall.

¶ 80 On cross-examination, Granger admitted that he could not recall the specific date of the conversation. He explained: "I don't [recall] because I'm no longer the attorney on that file, so the file was reassigned within our office after I guess I became a witness."

¶ 81 Swift testified that he participated with Granger in a phone call to Davis in April or May 2012. Davis "indicated that he wasn't able to necessarily conclude that the cause of [N.G.'s] injuries was, in fact, shaken baby syndrome." Davis opined that "there could be any number of

causes as to those injuries." Swift admitted on cross-examination that he did not recall the exact date of the conversation.

¶ 82 The jury found defendant guilty of one count of aggravated battery of a child. By new counsel, defendant filed a posttrial motion, which he amended twice. Defendant raised numerous claims that his trial attorney provided ineffective assistance of counsel. Following an evidentiary hearing, the court denied the motion and sentenced defendant to six years in prison.

¶ 83 Defendant filed this timely appeal.

¶ 84 II. ANALYSIS

¶ 85 A. Forfeiture

¶ 86 Defendant claims that trial counsel committed various errors at trial. Defendant advances seven individual claims. Trial counsel erred, he asserts, in (1) neglecting to review, prior to trial, certain medical records from Lutheran General; (2) failing to subpoena Shapiro as an expert witness; (3) failing to subpoena Isabel as a witness; (4) neglecting to move *in limine* to bar Moore from testifying that Isabel's attorney cancelled Moore's interview with Isabel; (5) while cross-examining Davis, failing to move to strike his testimony that Isabel, as a physician, was mandated by law to report child abuse; (6) also during the cross-examination of Davis, failing to lay the groundwork for impeaching him with the subsequent testimony of Elizabeth and defendant; and (7) failing to establish the exact date of the conversation that Granger and Swift testified they had with Davis. Here we follow the numbers that defendant assigns to the contentions, with the exception of contention (7), to which he assigns no number.

¶ 87 Appellate counsel, who also represented defendant in posttrial proceedings, frankly states that he preserved none of these contentions for appeal because he did not raise them below. However, upon our review of counsel's third amended motion for a new trial, he appears

to have preserved contentions (1), (4), and (6). His argument on the merits in these contentions is that trial counsel's errors deprived him of his constitutional right to the effective assistance of counsel, as elaborated in *Strickland v. Washington*, 466 U.S. 668 (1984). Contentions (2), (3), (5), and (7) are indeed forfeited because defendant failed to raise them in posttrial proceedings. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (failure to raise an issue in a written motion for a new trial results in forfeiture of that issue on appeal).

¶ 88 Defendant, however, asks us to review his forfeited contentions under the plain error doctrine, which permits a reviewing court to overlook forfeiture and address a claim of error if either: (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant; or (2) the error was so fundamental and of such magnitude that it affected the fairness of the trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Wilmington*, 2013 IL 112938, ¶ 31.

¶ 89 Defendant submits, as with his preserved contentions, that trial counsel's errors as alleged in contentions (2), (3), (5), and (7) deprived him of the effective assistance of counsel. Where a defendant satisfies the *Strickland* standards, he has demonstrated the existence of a fundamental error that challenged the integrity of the judicial process, and so has satisfied the second prong of the plain-error doctrine. See *People v. Wood*, 2014 IL App (1st) 121408, ¶ 56; *In re J.C.*, 163 Ill. App. 3d 877, 891 (1987).

¶ 90 B. Plain Error

¶ 91 We apply the *Strickland* standards to the preserved and unpreserved claims alike. We hold that the standards were not satisfied with respect to any of the claims. Accordingly we reject the preserved claims on the merits and hold that *Strickland* provides no ground for overlooking the forfeiture of the unpreserved claims.

¶ 92 First, we explain the *Strickland* standards. A criminal defendant's right to the effective assistance of counsel is guaranteed by both the Illinois and United States Constitutions. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. Claims of deprivation of the federal right of effective assistance are governed by the standards set forth in *Strickland*, which Illinois courts have adopted for claims based on the state constitutional right (see *People v. Albanese*, 104 Ill. 2d 504, 526 (1984)). To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687. First, the defendant must show that counsel's performance was objectively unreasonable under prevailing professional norms. Here the defendant must overcome the strong presumption that the challenged action or inaction of counsel was the product of sound trial strategy and not of incompetence. *People v. Clendenin*, 238 Ill. 2d 302, 317 (2010). Second, the defendant must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A "reasonable probability means a probability sufficient to undermine confidence in the outcome." *Id.* at 694. As a defendant must satisfy both prongs of this test, the failure to establish either prong is fatal to the claim. *Clendenin*, 238 Ill. 2d at 317-18.

¶ 93 We begin with contentions (1) (discovery), (2) (Shapiro), and (6) (failure to impeach Davis), regarding which defendant, in his reply brief, makes significant concessions on the issue of prejudice.

¶ 94 Regarding contention (1), defendant states in his reply brief that he "reviewed the [discovery] materials in question" and saw "nothing in them that would have changed the outcome of the trial." Indeed, since defendant did not adduce in the trial court any evidence of

the content of the materials, the record does not support a claim of prejudice. See *People v. Stewart*, 122 Ill. App. 3d 546, 552 (1984) (prejudice prong of *Strickland* not met where defendant failed to indicate nature of omitted evidence upon which ineffectiveness claim was based). Therefore, contention (1) fails.

¶ 95 Regarding contention (2), defendant concedes in his reply brief that "[t]he State is correct that we have not demonstrated how trial counsel's failure in this instance prejudiced defendant." Defendant is correct that he failed to establish prejudice, since the only suggestion in the record as to the nature of Shapiro's anticipated testimony was trial counsel's remark on the first day of trial that Shapiro would contradict Davis' opinion that N.G. was abused. Without a fuller sense of Shapiro's anticipated testimony, we cannot judge whether its omission prejudiced defendant. See *Stewart*, 122 Ill. App. 3d at 552. Thus, contention (2) lacks merit as well.

¶ 96 Inexplicably, however, defendant insinuates later in his reply brief that he was, in fact, prejudiced by the errors alleged in contentions (1) and (2). Given that the record does not support a claim of prejudice, contentions (1) and (2) fail regardless of defendant's concession.

¶ 97 As for contention (6), defendant claims that counsel's failure to ask Davis whether he made certain statements to Elizabeth and defendant was a failure "to lay a proper foundation for helpful questions he tried to pose" later to Elizabeth and defendant. During defense counsel's direct examination of Elizabeth, the State objected to counsel's attempt to elicit from Elizabeth that, during her first conversation with Davis on or around January 10, 2008, Davis told her that "he was going to close the case." Later, the State objected to counsel's attempted to elicit from defendant that, during their second conversation, Davis "encourage[d] [defendant] to tell the truth, if this was an accident, this is just an accident." In both instances the trial court sustained

the objection, agreeing with the State that the out-of-court statement was not proper impeachment because Davis had not been asked whether he made the statement.

¶ 98 Defendant cites *People v. Vera*, 277 Ill App. 3d 130, 138 (1996), for the proposition that a "failure to establish a foundation for important evidence" can amount to ineffective assistance of counsel. However, as with contentions (1) and (2), defendant states in his reply brief that he "[does] not assert that [he] was prejudiced by this individual error." Therefore, contention (6) fails.

¶ 99 To summarize so far, contentions (1) (discovery), (2) (Shapiro), and (6) (failure to impeach Davis) all fail because defendant concedes the issue of prejudice, and, in the case of contentions (1) and (2), fails to show prejudice regardless of his concession. Nonetheless, defendant believes that the errors alleged in these three contentions are still relevant as showing a "pattern" of incompetency by trial counsel. We cannot grant relief under *Strickland*, however, unless there is a showing of prejudice, and, as we will explain, defendant has made none with respect to his remaining contentions of error.

¶ 100 We move to contention (7). Defendant asserts that trial counsel was ineffective for failing to establish the precise date of a conversation that Granger and Swift claimed to have had with Davis. Granger testified that Davis made the following statements during their conversation: (1) he "could not say one way or the other whether or not it was shaken baby"; (2) he "believed potentially that it was shaken baby based upon reading *** [defendant's] statements and his story in terms of what took place"; and (3) he "could not say 100 percent that it was shaken baby, that it could be from numerous other things," such as a fall. Swift recalled Davis "indicat[ing] that he wasn't able to necessarily conclude that the cause of [N.G.'s] injuries was,

in fact, shaken baby syndrome." Davis said that "there could be any number of causes as to those injuries."

¶ 101 According to defendant, Swift's and Granger's credibility was "severely undermined" by their failure to date the conversation with any more precision than that it occurred in April or May 2012. Defendant states: "If these statements are part of your defense strategy, then get your telephone records from those two months and look for the date and time of Dr. Davis' telephone call."

¶ 102 We see no *Strickland* violation here. Even if counsel erred in not tracking down the date of the conversation, there was no prejudice shown. Defendant overstates how a reasonable jury would view Granger's and Swift's inability to recall the precise date of the conversation. Granger testified that he could not recall the exact date because the case was reassigned to another attorney within his firm once Granger became a witness. As for Swift, he was not asked for, and did not offer, an explanation for his inability to recall, but the jury could reasonably presume that, as with Granger, the sheer passage of time was responsible. A reasonable trier of fact would not look askance at a witness who, relying on unaided recollection, was not able to pinpoint the date of a conversation two years past even while purporting to remember its substance. Dates fade faster in the memory than substance. Finding no prejudice, we reject contention (7).

¶ 103 We proceed to the final three contentions, (3), (4), and (5), all of which concern Isabel. Defendant contends that counsel was ineffective for failing (3) to call Isabel as a defense witness; (4) to move the court to bar Moore from testifying that Isabel's attorney called and cancelled an appointment that Moore had made to interview Isabel; and (5) to move the court to strike Davis' testimony, elicited on cross-examination, that Isabel was a mandatory reporter of

child abuse, and thus could face criminal prosecution for failing to report suspected abuse. According to defendant, these errors combined to create the impression in the jury's mind that the reason Isabel did not speak with Moore or testify at trial was that she had suspected that N.G. was abused and feared prosecution for breaching her legal duty to report the abuse.

¶ 104 The errors alleged in contentions (3), (4), and (5) all fall within the ambit of trial strategy, which includes counsel's decisions "whether to offer certain evidence or call particular witnesses, whether and how to conduct cross-examination, [and] what motions to make[.]" *People v. Lowry*, 354 Ill. App. 3d 760, 766 (2004). Counsel's strategic choices made after investigation of the law and the facts are virtually unassailable. *People v. Ramsey*, 239 Ill. 2d 342, 433 (2010).

¶ 105 We begin by observing that trial counsel was, in the end, well advised not to secure Isabel as a witness. Counsel did not subpoena her earlier in the case when he decided to call her as a witness. Presumably, counsel believed that, as defendant's sister, she would testify voluntarily. What is in question, then, is counsel's decision not to seek to compel Isabel's appearance after she refused to appear voluntarily.

¶ 106 Defendant contends that counsel deserves no deference on this point since he admitted to the trial court that he had not interviewed Isabel. See *People v. Cooper*, 2013 IL App (1st) 113030, ¶ 57 ("An attorney who fails to conduct a reasonable investigation and interview witnesses cannot be found to have made decisions based on valid trial strategy."). Defendant overlooks that counsel nonetheless was aware, as shown in his remarks to the court, of the matter to which he anticipated Isabel would testify, namely her observations of N.G. on the night of January 8. This was information enough to raise concern in the trial court's mind that Isabel, given her potential criminal liability as a mandatory reporter of child abuse, would invoke her

right against self-incrimination and refuse to testify to her observations of N.G. that night. The court suggested that Isabel's invocation of the right in the presence of the jury might damage the defense's case. Trial counsel then agreed to consult with Isabel's attorney and report back to the court.

¶ 107 The following day, counsel reported that he was told by Isabel's attorney that she would not testify voluntarily. Counsel did not pursue a subpoena. He did not explain why at the time, nor were his reasons ever disclosed in the record. The silence of the record is held against defendant, who has the burden of overcoming the strong presumption that counsel's decision was the product of sound trial strategy and not of incompetence. *Clendenin*, 238 Ill. 2d at 317. Defendant has not eliminated legitimate possible reasons for counsel's decision not to compel Isabel's presence. Counsel might well have believed it likely that subpoenaing Isabel to testify would be fruitless because she would take the witness stand only to assert her right against self-incrimination. Counsel might also have shared the court's concern—a legitimate one—that the jury would draw negative inferences against defendant from Isabel's invocation of the right. While "[t]he privilege against self-incrimination is a personal one and cannot be vicariously asserted by a defendant through a defense witness" (*People v. Godsey*, 74 Ill. 2d 64, 73 (1978)), there are nonconstitutional concerns associated with a defense witnesses' invocation, in court, of the right against self-incrimination. "The refusal of a witness to testify or speak because of the exercise of self-incrimination rights may lead a jury to imply [*sic*] that the witness was engaged in illegal activities, which can all too easily be transferred over to the defendant." *People v. Harris*, 198 Ill. App. 3d 1002, 1012 (1990).

¶ 108 Defendant suggests that the jury "had to wonder why" Isabel was not called as a witness when she was mentioned in opening statements and closing arguments. Neither party, however,

claimed in opening statements that Isabel herself would testify; they referenced testimony about Isabel, not testimony from her, and that evidence came in at trial in the testimony of Davis, Moore, and defendant. Defendant at least had the benefit of their second- and third-hand accounts of Isabel's visit to defendant's house on the night of January 8 and her examination that supposedly found nothing wrong with N.G. Relying on such accounts was preferable to Isabel invoking in the jury's presence her right against self-incrimination. We also note that Isabel's refusal to testify was never mentioned before the jury, and the State did not even comment on her absence. For the foregoing reasons, contention (3) fails.

¶ 109 Defendant's further complaint is that counsel's omissions as alleged in contentions (4) (Moore's testimony) and (5) (Davis' testimony) led the jury to draw negative inferences from Isabel's absence. That may have been the jury's ultimate impression, however, but our concern is whether counsel was responsible for it. Moore and Davis testified *before* counsel was informed that Isabel would not be appearing for the defense. We judge counsel's performance with respect to Moore and Davis by facts known to him at the time.

¶ 110 To elaborate on contentions (4) and (5), contention (4) concerns trial counsel's failure to file a motion to bar Moore from testifying (as defendant characterizes it to us) that Isabel "had refused on the advice of counsel" to meet with Moore. Contention (5) concerns, as defendant frames it, counsel's eliciting from Davis that Isabel was a mandatory reporter and subject to criminal liability for failing to fulfill that duty. More precisely, however, what defendant challenges in contention (5) is counsel's failure to move to strike Davis' testimony about Isabel's status as a mandatory reporter. Counsel did not specifically ask Davis whether Isabel had that status, but rather Davis included that fact in answering a question on a different topic.

¶ 111 The decision whether to make a motion is a matter of trial strategy that will be accorded great deference. *People v. Hobley*, 182 Ill. 2d 404, 454 (1998). An ineffectiveness claim based on such a decision is subject to the same performance-and-prejudice test as other *Strickland* claims. The decision passes the performance prong of *Strickland* if it is "strategic in nature and a reasonable exercise of judgment." *People v. Smith*, 265 Ill. App. 3d 981, 984 (1994). The prejudice prong is two-fold. The defendant must demonstrate a reasonable probability that the trial court would have granted the motion, and, if so, that the outcome of the trial would have been different. See *People v. Kelley*, 2013 IL App (4th) 110874, ¶ 38.

¶ 112 First, as to contention (4), we note that Moore did not testify, as defendant claims, that Isabel refused *on the advice of counsel* to speak with Moore. Rather, Moore said only that Isabel's attorney reported that Isabel would not be sitting for her prearranged interview with Moore. Defendant claims that Moore's testimony was "prejudicial and irrelevant." Defendant's proposed authority for this characterization is *Vera*, where the defendant was on trial for attempted murder. His theory at trial was that the shooter was not him but Humberto Beltran. The defense called Beltran as a witness, but he invoked his right against self-incrimination and refused to testify. The defense asked the trial court to draw inferences favorable to the defense from Beltran's refusal to testify. The court declined. The appellate court affirmed, applying the principle that "it is improper for a party to call a witness he has reason to believe will invoke the privilege [against self-incrimination] before the jury, and a trial judge does not err when he precludes calling such a witness." *Vera*, 277 Ill. App. 3d at 137. The court agreed with the trial court that "it would be improper *** to draw any inference from Beltran's refusal to testify by invoking the fifth amendment." *Id.* at 138.

¶ 113 *Vera* simply does not speak to the situation at hand. The witness in *Vera* refused in open court to testify. Isabel did not take the stand; hers was a pretrial refusal to speak with police. Moreover, the record does not show that her refusal was on Fifth Amendment grounds. We reserve comment on the analysis in *Vera* because the facts of that case are so dramatically different than the case at hand that further comment is unnecessary.

¶ 114 Defendant cites no other authority in claiming that Moore's testimony was irrelevant. In fact, the testimony was quite obviously relevant to show the scope of Moore's investigation: she interviewed defendant but was not able to interview Isabel.

¶ 115 Defendant also claims that Moore's testimony was prejudicial. He cites no authority here, but appears to assert that a motion to bar Moore from testifying that Isabel declined to be interviewed was as critical to the defense as its successful motion to bar Moore from testifying that defendant and Elizabeth invoked their right against self-incrimination in refusing to speak with police officers. Defendant is mistaken because situations are not comparable. The State was prohibited under *Doyle v. Ohio*, 426 U.S. 610, 619 (1976), from mentioning defendant's invocation of his right against self-incrimination. Under Elizabeth also invoked that right, and though her invocation could not be transferred to defendant (*Godsey*, 74 Ill. 2d at 73) there were still legitimate concerns that the jury would construe it against defendant (see *Harris*, 198 Ill. App. 3d at 1012). By contrast, Moore did not testify that Isabel invoked her right against self-incrimination in declining an interview with Moore. In fact, Moore did not cite any reason provided by Isabel's attorney for cancelling the interview. Therefore, we fail to see a basis in the law for analogizing Isabel's refusal with defendant's and Elizabeth's refusals.

¶ 116 Accordingly, even if we assume that trial counsel erred by failing to move the trial court to bar Moore from testifying that Isabel declined to speak with Moore, contention (4) fails

because defendant has not shown a reasonable likelihood that the trial court would have granted the motion.

¶ 117 We reject contention (5) as well. Defendant asserts that counsel should have known that Davis' testimony that Isabel was a mandatory reporter would, combined with Moore's testimony (contention (4)), create the unfavorable impression that Isabel declined to speak with Moore because she feared prosecution for breaching her duty to report. That may indeed have been the impression, but defendant must establish that the trial court was reasonably likely, under the rules of evidence, to strike Davis' testimony that Isabel was a mandatory reporter. We fail to see on what ground the trial court was likely to strike that part of Davis' testimony. First, the testimony was relevant. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ill. R. Evid. 401 (eff. Jan. 1., 2011). The fact that Isabel was a mandatory reporter was material for both the prosecution and the defense. It could have helped the defense by suggesting that Isabel, conscious of her duty under the law, would have reported her suspicions about abuse if she had them. On the other hand, it could have helped the prosecution by suggesting a reason why Isabel would decline to speak with Moore: fear of prosecution for breaching her duty to report.

¶ 118 Even relevant evidence may be excluded if its probative value is "substantially outweighed by the danger of unfair prejudice[.]" Ill. R. Evid. 403 (Eff. Jan. 1, 2011). Unfair prejudice means "an undue tendency to suggest decision on an improper basis, commonly an emotional one, such as sympathy, hatred, contempt, or horror." (Internal quotation marks omitted.) *People v. Lewis*, 165 Ill. 2d 305, 329 (1995). Defendant does not attempt to show how any improper element infected Davis' testimony that Isabel was a mandatory reporter. We can

discern no risk that this testimony was the subject of anything but logical inferences, some of which, as noted, could have benefitted the defense. Because defendant has failed to show a reasonable likelihood that the court would have granted a motion to strike Davis' testimony that Isabel was a mandatory reporter, contention (5) fails regardless of whether counsel erred.

¶ 119 Moreover, even if we found that counsel erred as alleged in contentions (4) and (5), *and* that the trial court likely would have granted the motions and excluded or struck the testimony in question, we would not find a reasonable likelihood that the result at trial would have been different. "[E]ven where counsel's mistakes are egregious, we are required to examine them in the context of all of the evidence in the case to determine whether they created a reasonable probability of a different result." *People v. Moore*, 279 Ill. App. 3d 152, 159 (1996).

¶ 120 The State put on seven witnesses. The most significant for its case were Pearson and Davis, who both opined, to a reasonable degree of medical certainty, that N.G. was the victim of abuse. Significant for their opinions was the nature of N.G.'s injuries, which they asserted could not have occurred in the manner defendant described. Davis, who was a child abuse specialist, made a more comprehensive inquiry than Pearson. Davis' conclusion rested on many factors, including defendant's varying accounts to the doctors and Moore of how he supposedly dropped N.G. by accident. Davis admitted that a person, like N.G., with excess extra-axial fluid might be more susceptible to brain bleeds (an opinion shared by Ruge), but Davis' finding of abusive head trauma was based also on the retinal hemorrhages. Some of the physicians who testified for the State were unable to determine whether N.G.'s injuries were from abuse, but these witnesses did not consider all of the data that Pearson and Davis considered.

¶ 121 The defense produced no expert to rebut the opinions of Pearson and Davis. In his testimony, defendant yet again changed his account of how he dropped N.G., giving a different

version than the latest he provided Davis. Defense witnesses Granger and Swift, called to impeach Davis, testified that in April or May 2012 Davis stated that he was unsure that N.G.'s injuries were from abuse. Elizabeth testified that Davis told her in 2011 or 2012 that N.G.'s injuries could have been accidental. It was the province of the jury to judge the credibility of the witnesses and assess the weight of the expert testimony. *People v. Gregg*, 315 Ill. App. 3d 59, 75 (2000).

¶ 122 Moore's and Davis' testimony about Isabel was a small part of the State's case at trial, in terms of both volume and emphasis. In closing argument, the State mentioned Isabel only briefly, dismissing defendant's claim that he, a grown man, would be too ashamed to admit to Isabel that he accidentally dropped N.G. The State did not suggest that Isabel knew N.G. was abused. Therefore, we hold that defendant could not have been prejudiced by the errors alleged in contentions (4) and (5).

¶ 123 As the preceding analysis establishes, none of defendant's seven contentions of error meets the *Strickland* standards. Therefore, we reject the preserved contentions—(1), (4), and (6)—on their merits and hold that *Strickland* provides no ground for overlooking the forfeiture of the unpreserved contentions—(2), (3), (5), and (7).

¶ 124 III. CONCLUSION

¶ 125 For the foregoing reasons, we affirm the judgment of the circuit court of Boone County.

¶ 126 Affirmed.