2025 IL App (4th) 241380-U

NO. 4-24-1380

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
November 14, 2025
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Tazewell County
MICHAEL COOKSON,	)	No. 20CF203
Defendant-Appellant.	)	
	)	Honorable
	)	Christopher R. Doscotch,
	)	Judge Presiding.

JUSTICE VANCIL delivered the judgment of the court.
Justices Doherty and Lannerd concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed defendant's conviction for aggravated battery causing great bodily harm to a child under the age of 13 (720 ILCS 5/12-3.05(b)(1) (West 2020)), finding (1) defendant did not show he was prejudiced by his attorney's failure to ask that the trial court instruct the jury on the Illinois Pattern Jury Instructions' definition of "knowingly"; (2) no actual conflict of interest prevented defense counsel from arguing the lack of instruction on "knowingly" required a new trial; (3) the trial court did not manifestly err in concluding, after a hearing pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), that defense counsel did not neglect defendant's case in declining to present expert testimony; and (4) the record does not establish that defense counsel's omission of instructions on reckless conduct as a lesser included offense constituted ineffective assistance of counsel.

¶ 2 A jury found defendant, Michael Cookson, guilty of aggravated battery causing great bodily harm to a child under the age of 13 (720 ILCS 5/12-3.05(b)(1) (West 2020)), a Class X felony. Defendant appeals his conviction, arguing (1) he received ineffective assistance of counsel when his attorney failed to ask the trial court to instruct the jury on the definition of

"knowingly"; (2) an actual conflict of interest prevented his attorney from arguing that he received ineffective assistance of counsel in a posttrial motion; (3) a hearing pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), revealed that his attorney possibly neglected his case in failing to present expert testimony; and (4) his attorney provided ineffective assistance in failing to request jury instructions on reckless conduct as a lesser included offense.

¶ 3 We affirm.

¶ 4 I. BACKGROUND

¶ 5 In March 2020, the State charged defendant with aggravated battery, alleging that he struck his one-month-old child, D.C., in the face. Defendant pleaded not guilty, and the trial court appointed the public defender's office to represent him.

¶ 6 Before trial, defendant moved for the appointment of a medical expert to consult on the case. Defendant's motion indicated that defense counsel had contacted Dr. Marcus E. DeGraw, and Dr. DeGraw had "agreed to serve as [d]efendant's consulting medical expert." At a hearing on defendant's motion, defense counsel represented to the court that the defense team had considered two other doctors as potential expert witnesses, but defendant's attorneys decided one of the doctors would not be an appropriate expert "after reviewing certain information that [they] had been provided." Defendant's attorneys also did not receive a response from their attempts to contact the other doctor. Defense counsel emphasized that they looked for a "pediatrician with certification in the field of child abuse," not simply a general practitioner, because defendant's attorneys wanted an expert who was as qualified as the State's potential witnesses. The court approved defendant's request for funds for an initial review and consulting fee, but it required defense counsel to seek further authorization for additional funds. Defense

counsel did not request additional funds for an expert witness, and no expert witness testified for the defense at trial.

¶ 7 At trial, Sarah W. testified she and defendant were the parents of D.C., who was born on February 12, 2020. She and defendant lived together in March 2020. On March 18, she was with D.C., who was five weeks old. About an hour after defendant returned home from work, she and defendant began to argue. Sarah was upset and frustrated, and she went for a walk around the block to calm down. When she returned home, she saw that her car was gone. Defendant eventually returned home with the car. He exited the car without D.C., approached Sarah, and demanded that they continue their conversation. Sarah refused, and defendant got the car seat and brought it inside the house. The car seat had a cover over the baby and another cover over that. Sarah did not see D.C. She saw only the car seat. She and defendant went to the garage to continue their argument.

¶ 8 Sarah testified that she went back into the house, and she heard "the quietist, most painful, never ending sob of a child. A sob [she had] never heard from any child ever." Sarah went to D.C., and she saw that the car seat was covered. She unzipped the car seat's cover and saw a blanket folded over D.C., which she removed. Sarah testified, "[D.C.'s] head was so much larger than it had ever been. He was screaming. His face was red. Couldn't see his eyes. They were swollen. I'm gonna be honest with you, much after that I didn't keep looking." As she was looking at D.C., defendant came into the room, and Sarah asked what he did to her child. According to Sarah, defendant answered, " 'What happened? What happened to him? I didn't do anything. What happened?' "

¶ 9 Sarah testified that she took D.C. to the emergency room, where they transferred him to another hospital. The doctors were not certain what injuries he sustained, but they

suspected “shaken baby syndrome with blunt force trauma on his head.” He was in the hospital for one month before he was discharged. Sarah testified that she takes care of D.C. now. He cannot see normally, and he is not mobile. He cannot talk, feed himself, or swallow. He has spastic quadriplegic cerebral palsy. She explained, “He has no physical control over his limbs at this time.” He also has breathing problems and seizures.

¶ 10 Dr. Channing Petrak, the medical director of the Pediatric Resource Center at the University of Illinois College of Medicine, testified as an expert in the field of pediatric child abuse. As a standard part of its practice, the Pediatric Resource Center offers medical opinions about “whether injuries are consistent with abuse, accidental trauma, or undetermined.” It makes those determinations using the patient’s history, family history, underlying medical conditions, the age and development of the child, images, and laboratory studies.

¶ 11 On March 18, 2020, Dr. Petrak was asked to consult on D.C. When she first saw him, D.C. was intubated on a ventilator for breathing. He was “not very responsive,” and “he had bruising on multiple areas of his body.” She testified she found this concerning because “[i]nfants who are not mobile should not have any bruising at all, and he had multiple bruises on multiple areas of his body.” Dr. Petrak explained that infants have more collagen than adults, and more force is necessary to bruise infants than adults. Infants who are not mobile cannot generate enough force to bruise themselves. She explained that the multiple locations of the bruising were further cause for concern, stating:

> “Even if there had been one accidental injury, a fall, which we rarely see bruises after one fall with an infant, but if there had been one fall and one plane of injury, it should have been on one part of the body, not multiple planes.
>
> It shouldn’t have curved around the face. It shouldn’t have been on the

opposite part or the opposite side of the body on another limb. So we shouldn't have had multiple planes of injury present on the body."

¶ 12 Dr. Petrak testified that she observed bruises "[a]ll along the left side of the face." She testified that "[s]ome of it was linear in nature," adding, "There was bruising that curved around to the front of the face so below the eye, the left eye, on the nose, the nasal bridge." She also observed bruises on D.C.'s arms and legs and above his genitals. Dr. Petrak explained that linear bruising, especially on the left side of a face, indicates a higher risk for abuse because hands can leave liner imprints, and most people are right-handed.

¶ 13 Photographs of D.C. from the hospital were admitted into evidence and published to the jury. Dr. Petrak explained that D.C. had abrasions and lacerations on his inner lip, and his upper frenulum was torn. She noted that the frenulum does not tear easily. She explained:

"For the left side of the face, it appears he was struck with an object like a hand which would leave those linear bruises.

The injury to the nose and mouth appears to be a direct blow to that area which would cause that sort of injury to the upper lip as well as the nose.

The bruising on the arm and the leg there were some that looked a little bit like abusive squeezing."

She added:

"And then again the area near the suprapubic area or above the genitals and the low abdomen could be just a direct blow, but there's nothing that would be accidental that would cause these injuries."

¶ 14 Dr. Petrak testified that D.C. also had swelling on his forehead overlying a skull fracture, indicating impact or blunt force trauma to that area. D.C. also had a brain injury and

bleeding. Dr. Petrak stated that she knew of no "accidental mechanisms" that could cause D.C.'s combination of head injuries other than a severe car accident involving being thrown from the car, although she had seen children involved in such accidents who did not have such significant brain injuries. Shaking and shaken impact were also consistent with these injuries. She also testified that D.C. sustained injuries to his optic nerve, and he had cerebral palsy.

¶ 15 Dr. Petrak testified that, in her medical opinion, a five-week-old child could not have such brain injuries and "be fine" for hours or days beforehand. A child with these injuries would not eat, sleep, or breathe normally. She also opined, "The skull fracture is part of his abusive head trauma, and in my opinion, all of his head injuries including his retinal hemorrhages and the skull fracture were due to—due to abusive head trauma." She concluded, "[H]is injuries were inflicted and were due to child physical abuse and abusive head trauma."

¶ 16 On cross-examination, Dr. Petrak acknowledged that infants could sustain injuries from accidental traumas, including falls. She testified that even if a baby fell onto his head, she would not expect these injuries. Defense counsel asked if any other type of accidental head trauma could cause these injuries, and she answered, "With the extent of [D.C.]'s injuries, no." She testified that she uses the phrase "[a]busive head trauma" instead of the phrase "shaken baby syndrome," because "abusive head trauma" is more "comprehensive." Defense counsel asked about falls, and she testified that even in falls from a two-story window, "children do not have this severe of head injury," although she would need to have more information about the fall to give that opinion with a reasonable degree of medical certainty.

¶ 17 On redirect examination, Dr. Petrak testified about photographs of bruising on D.C.'s extremities. She testified that these bruises were "linear," with a "slightly scalloped appearance" consistent with "abusive squeezing." She testified that a three- or four-foot fall

would not cause D.C.'s injuries, even if a parent was holding the child, tripped, grabbed at the child, and jostled the child around.

¶ 18 Detective Steven Smith from the Washington Police Department testified that he spoke to defendant on March 19, 2020, and defendant denied hitting D.C. Recordings of portions of his interview were admitted into evidence. In the interview, defendant confirmed that he was home alone with D.C., that he did not go to the hospital with D.C., and that he instead went to buy liquor.

¶ 19 Detective Steve Hinken testified he interviewed defendant on March 20, 2020. Defendant told him that he and Sarah argued on March 18, and she walked away to cool off, which upset defendant. He told Detective Hinken that he got into his car to try to find her, he brought D.C. in a car seat, and D.C. did not appear injured at this time. When they returned, he and Sarah argued in the garage. Defendant did not tell Detective Hinken that he ever hurt D.C. In a recording of the interview, defendant denied that D.C.'s face hit anything that evening.

¶ 20 Defendant testified that on March 18, 2020, he woke up around 6:30 or 7:30 a.m., and he was still intoxicated from the previous night. He went to work around 11 a.m. D.C. showed no signs of any problems that morning. Defendant returned home from work around 4 p.m. He and Sarah talked, and later they argued. At one point, Sarah got upset and left. Defendant decided to go after her. Defendant testified that he went to get D.C. to put him in the car seat, but when he picked D.C. up, defendant's foot caught on the edge of D.C.'s baby swing. Defendant testified, "I put my right hand underneath of his neck and then picked his, put my left hand under his bottom and just kind of half stood up with him." Defendant testified his right foot caught on the swing, and he fell. He explained that as he fell, he pushed D.C. away by extending both of his arms and hands to avoid landing on him. He estimated that D.C. was four and a half

feet from the floor when he began to fall. They both hit the floor. D.C. was facing defendant, and he rotated a little, and his face was almost in defendant' hand. Defendant testified that the right side of D.C.'s face was not covered by defendant's hand, and the left side of his face was covered by defendant's right hand. He explained that the floor was carpeted, and it was "generally soft."

¶ 21 Defendant testified that after D.C. fell, he observed a "pressure bruise" on his nose, and his face was red, but it did not look like the injuries shown in the photographs admitted at trial. D.C. started crying, then he let out a "breathless wail that infants sometimes do when they're really upset." D.C. cried for a couple of minutes, then he started to calm down. Defendant put D.C. in the car seat, put a blanket over him, and they went after Sarah. Defendant did not observe anything about D.C. that made him think something was wrong. They came back after about 15 minutes, and Sarah was sitting on the front porch. Defendant brought D.C. in the house, still in the car seat and still covered. He did not hear any noises coming from D.C., and he thought he was asleep. Defendant and Sarah went to the garage and argued for another 10 minutes, and then, Sarah went inside.

¶ 22 Defendant testified that Sarah began screaming at him. Defendant came into the house, and he saw D.C. had a red mark on his nose. He did not see any other marks. D.C.'s breathing "was all messed up," and he was trying to cry. Sarah put D.C. back in the car seat and said she was taking him to the hospital. She asked what defendant did to D.C., and defendant said, " 'Nothing. What are you talking about?' " Defendant did not go with them to the hospital, and Sarah did not ask him to. He explained that he did not go with them because he was "in shock." He acknowledged that he did not say anything about falling with D.C. because it was "[j]ust another reason for her to leave," adding, "[H]e was fine when I put him in the car seat."

Defendant admitted he did not tell the detective about the fall and denied that any fall occurred when asked about it. Defendant testified that he was still intoxicated, and he was afraid. Earlier, on his break at work, he had consumed alcohol, and he drank more after Sarah took D.C. to the hospital. Later, he explained, "[Sarah] had said something about an allergic reaction," and, "She was being accused of hurting our son."

¶ 23 Defendant testified that he did not hit D.C. with his fist, his hand, or any object. He denied shaking him or grabbing him, except to pick him up. He testified he did nothing to cause D.C.'s injuries except fall to the floor. On cross-examination, defendant acknowledged that he did not tell Sarah about the fall when she asked what happened to D.C. He also did not tell the police, the Illinois Department of Children and Family Services (DCFS), or the hospital that he fell while holding D.C.

¶ 24 Sarah was recalled as a rebuttal witness. She testified she saw no indication that defendant was intoxicated when he arrived home after work on March 18, 2020.

¶ 25 During closing arguments, defense counsel conceded that D.C. sustained great bodily harm. But, defense counsel argued, "The issue in this case, ladies and gentlemen, is whether these injuries were knowingly caused by [defendant]." Defense counsel argued that the State did not prove defendant knowingly caused D.C.'s injuries because D.C.'s injuries resulted from an accidental fall.

¶ 26 During jury deliberations, the jury asked the trial court to define the terms "aggravated" and "knowingly." An assistant state's attorney thought there was no definition for "knowingly," so she suggested that the court should instruct the jury, "Follow the law as I have given it." The court expressed its belief that a jury instruction existed for the definition of "knowingly." Referring to the Illinois Pattern Jury Instructions, it stated, "It's in there

somewhere." It then asked for the attorneys' responses. The State reiterated that the jury should be instructed to follow the law as it had been given. Defense counsel agreed.

¶ 27 The trial court then stated that when the jury asked a question, the court was obligated to answer. The court referred to a case without citation where the court instructed the jury that the word "knowingly" should be given its plain meaning within the jury's understanding. The State responded, "I have no problem with what the Court had just said. I think it follows the committee's words which is what the case law indicates *** is appropriate *** when knowingly is questioned." The court agreed that the "plain meaning" language came from the Committees Note, adding that the "the old way" of responding to such jury questions consisted of merely telling the jury that it had already been given the instructions and should just re-read them. Defense counsel agreed that doing so effectively "sa[id] nothing." Both parties therefore agreed that the court should respond to the jury's question with, "[T]he word knowingly should be given its plain meaning within the jury's common understanding."

¶ 28 The jury found defendant guilty. After trial, defendant filed a posttrial motion through his attorney. He also filed a *pro se* motion for a new trial, claiming, in part, that he received ineffective assistance of counsel and the court erred in its response to the jury's question.

¶ 29 The trial court held a *Krankel* hearing to inquire into defendant's claim. The court asked defense counsel if he looked into calling a medical expert. Defense counsel explained:

> "We were attempting to locate a medical expert in the case. We were not able to get one. I always kept [defendant] informed where we were with that situation. There were reasons with respect to the evidence why that ultimately did

not pan out, and based on our, on the theory of defense and the trial strategy, the case, you heard the case that we tried, and that's how we presented our defense."

¶ 30 The trial court responded:

"So and you looked into that issue, and I will say this comment first. The nature and extent of the injuries based upon as it was presented was pretty clear-cut, so I could see that being a problem with obtaining an expert and then the believability of the mechanism of injury as described compared to the magnitude of what I would call very objective severe injuries. That's the way I recall the evidence. And so I can see how that was part of the case."

¶ 31 Defense counsel further explained that, after discussing the issue with defendant before trial, defendant conceded the issue of great bodily harm "in order to minimize the prejudicial effect in front of the jury."

¶ 32 The trial court found no ineffective assistance of counsel, and it denied defendant's motion.

¶ 33 Still represented by the same counsel, defendant filed an amended posttrial motion. Defendant argued, "[I]t was plain error for the Court to not give the jury instruction number IPI Criminal 5.01B in response to the jury's written request for definition of the term 'knowingly.' " See Illinois Pattern Jury Instructions, Criminal, No. 5.01B (approved Oct. 28, 2016) (hereinafter IPI Criminal No. 5.01B).

¶ 34 The trial court denied defendant's motion. It stated, "Knowingly, the Court believes it properly filed the—and gave proper instruction regarding that question."

¶ 35 This appeal followed.

¶ 36 II. ANALYSIS

¶ 37 On appeal, defendant argues (1) his trial attorney was constitutionally ineffective in failing to seek a jury instruction on the definition of "knowingly," (2) his attorney failed to argue he received ineffective assistance of counsel in a posttrial motion because of an actual conflict of interest, (3) the *Krankel* hearing demonstrated that his attorney may have neglected to sufficiently investigate his case and secure an expert witness, and (4) his attorney's failure to request jury instructions on reckless conduct as a lesser included offense constituted ineffective assistance of counsel.

¶ 38 A. Jury Instruction

¶ 39 Defendant first argues that his trial counsel was constitutionally ineffective in failing to ask the trial court to instruct the jury on the definition of "knowingly." Criminal defendants have the right to effective assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8; *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *People v. Albanese*, 104 Ill. 2d 504, 525-27 (1984). To obtain relief on appeal, a defendant must show that defense counsel's performance fell below an objective standard of reasonableness, and the deficiency prejudiced him. *Strickland*, 466 U.S. at 687; *Albanese*, 104 Ill. 2d at 525-27. To establish prejudice, a defendant must show a reasonable probability that the result of the proceeding would have been different, such that the deficient performance undermined confidence in the outcome, rendering the trial result unreliable or fundamentally unfair. *People v. Sperry*, 2020 IL App (2d) 180296, ¶ 12; see *Strickland*, 466 U.S. at 694.

¶ 40 During deliberations, the jury asked the trial court to define "knowingly." After discussing the matter with the State and defense counsel, the court told the jury, "[K]nowingly should be given as plain meaning within the jury's common understanding." The State and defense counsel both agreed with this response.

¶ 41 Neither the trial court nor the attorneys discussed the content of IPI Criminal No. 5.01B. This instruction states:

> "[1] A person [(knows) (acts knowingly with regard to) (acts with knowledge of)] the nature or attendant circumstances of his conduct when he is consciously aware that his conduct is of that nature or that those circumstances exist. Knowledge of a material fact includes awareness of the substantial probability that the fact exists.
>
> [2] A person [(knows) (acts knowingly with regard to) (acts with knowledge of)] the result of his conduct when he is consciously aware that that result is practically certain to be caused by his conduct.
>
> [3] Conduct performed knowingly or with knowledge is performed willfully." IPI Criminal No. 5.01B.

¶ 42 However, the trial court referred to the "committee notes." The Committee Note for IPI Criminal No. 5.01B states:

> "The Committee takes no position as to whether this definition should be routinely given in the absence of a specific jury request. See *People v. Powell*, 159 Ill. App. 3d 1005*** (1st Dist. 1987), for the general proposition that the words 'intentionally' and 'knowingly' have a plain meaning within the jury's common understanding. If given, it should only be given when the result or conduct at issue is the result or conduct described by the statute defining the offense." IPI Criminal No. 5.01B, Committee Note (approved Oct. 28, 2016).

¶ 43 Defendants argues his attorney's failure to request IPI Criminal No. 5.01B fell below an objective standard of reasonableness. He contends that his mental state was a "core

issue" in dispute. According to defendant, the jury's question demonstrated the jurors were confused about this key element of his defense, and defense counsel could have had no strategic reason to refrain from providing this instruction. Indeed, because defense counsel failed to acknowledge IPI 5.01B at all, defendant contends that defense counsel could not have been acting strategically.

¶ 44 Defendant further contends that this deficiency prejudiced him. Defendant claimed at trial that he accidentally fell while holding D.C. He argues that, considering his intoxication, his adamant denial that he struck D.C., and the lack of any history of abuse before this case, there is at least a reasonable probability that the jury could have accepted he did not "knowingly" strike D.C., if the trial court had defined this term.

¶ 45 Defendant relies on *People v. Lowry*, 354 Ill. App. 3d 760 (2004), and *Sperry*. In *Lowry*, the victim testified that the defendant tied him up, shot him, and robbed him. *Lowry*, 354 Ill. App. 3d at 761. The defendant maintained that he did not intend to hurt or kill the victim. *Id.* During deliberation, the jury asked the trial court whether the defendant's conduct could be both "knowing" and accidental. The court and the attorneys agreed that the jury should be told it had already been instructed on the law. *Id.* at 762. The jury found the defendant guilty of armed robbery and aggravated battery with a firearm but not guilty of attempted murder. *Id.* at 761. The appellate court reversed the convictions, finding defense counsel provided ineffective assistance in failing to provide the jury with the definition of "knowingly" in IPI Criminal No. 5.01B. *Id.* at 764. The court reasoned that the "defendant's state of mind was clearly in issue," and the jury's question demonstrated its confusion. *Id.* The court also determined the defendant suffered prejudice. The State used the defendant's statement that he did not intend harm to prove the defendant shot the victim, but it disputed the defendant's claim that the shooting was accidental.

Id. at 768. Because a "critical issue in the instant case was whether [the] defendant fired the gun knowingly or accidentally," the court found defense counsel's failure to offer the instructions rendered the trial "fundamentally unfair." *Id.* at 768.

¶ 46 In *Sperry*, the victim testified that the defendant shot at his head, cracking his jaw. *Sperry*, 2020 IL App (2d) 180296, ¶ 4. The defendant testified that the gun "went off by itself." *Id.* ¶ 5. During deliberations, the jury asked, " 'Does "knowingly discharged a firearm," mean he intended to discharge the gun on purpose or he knew a gun was discharged?' " *Id.* ¶ 8. The attorneys discussed IPI Criminal 5.01B's definition of "knowingly," but the trial court and attorneys agreed that the jury should not receive this instruction. *Id.* Instead, the court told the jury, " 'The instructions you received are sufficient.' " *Id.* The jury found the defendant guilty of aggravated battery and two counts of aggravated fleeing and eluding, but not guilty of attempted first degree murder. *Id.* ¶ 9.

¶ 47 The appellate court reversed, finding that the defendant's attorney provided ineffective assistance of counsel in failing to request IPI Criminal No. 5.01B. The court explained, "[I]f a jury asks the court to define a mental state term, or manifests confusion or doubt regarding such a term's meaning, the court must instruct them accordingly." *Id.* ¶ 15. The court further found counsel's failure prejudiced the defendant. *Id.* ¶ 18. As in *Lowry*, the defendant's mental state was "the critical issue at trial." *Id.*; see *Lowry*, 354 Ill. App. 3d at 768. By asking whether the defendant acted knowingly if he "knew a gun was discharged," the jury could have improperly found defendant acted "knowingly" even if the gun discharged accidentally. *Sperry*, 2020 IL App (2d) 180296, ¶ 21. Defense counsel should have properly instructed the jury to avoid this risk. *Id.*

¶ 48 Regardless of whether counsel's performance was deficient here, defendant has

not satisfied the prejudice prong of *Strickland*. The State's evidence was overwhelming, and there is no reasonable probability that the jury would have found defendant innocent if it was given IPI Criminal No. 5.01B. See *People v. Coleman*, 2024 IL App (1st) 220917-U, ¶ 86 (affirming the defendant's conviction because "the evidence of defendant's guilt of aggravated battery with firearm was so strong that the jury's verdict would not have changed if the jury had been tendered IPI Criminal 5.01B").

¶ 49 This case presented the jury with two alternative accounts of D.C.'s injuries. The State claimed that D.C. suffered injuries from intentional strikes. Defendant claimed that D.C.'s injuries resulted from an accidental fall.

¶ 50 The State's evidence, especially its expert witness, conclusively demonstrated that D.C. suffered injuries from strikes while in defendant's care. Photographs of D.C.'s bruises, accompanied by Sarah's description of D.C.'s condition on the evening of March 18, 2020, demonstrated his condition after Sarah returned home that evening. Dr. Petrak's expert testimony proved that a fall of between four and five feet onto soft carpet could not have caused these injuries. Indeed, she testified that even a fall from a second story would not cause such injuries. She explained that the bruises on D.C.'s extremities were consistent with "abusive squeezing," and the bruise patterns on the left side of D.C.'s face demonstrated a higher risk of being caused by strikes from someone's right hand. She further explained that falls typically do not cause bruises across multiple planes of the body, and they do not "curve[ ] around the face," like D.C.'s bruises did.

¶ 51 In contrast, defendant's account of D.C.'s injuries was not believable. Defendant testified that he tripped over a baby swing while holding D.C., and he extended his arms while falling to prevent himself from falling on D.C. He provided no expert testimony to refute Dr.

Petrak's testimony that such injuries could not be caused by a short fall. Defendant's claim that D.C. appeared unharmed after his fall, despite the permanently disabling injuries he had suffered, is highly implausible. Furthermore, defendant did not tell the police, medical professionals, or DCFS about this alleged fall, despite his son's hospitalization. He also did not tell Sarah that D.C. fell when she asked what happened to him. Once again, defendant's account of the manner in which D.C. was injured was wholly unbelievable. Considering the strength of the State's case and the weakness of defendant's, we do not find that an instruction on the definition of "knowingly" would have affected the result.

¶ 52 B. Conflict of Interest

¶ 53 Defendant next claims that his attorney suffered from a conflict of interest. In his amended posttrial motion, defense counsel argued that the trial court's failure to provide IPI Criminal No. 5.01B warranted a new trial. But counsel did not argue his own failure to request that instruction deprived defendant of effective assistance of counsel. Defendant claims that an actual conflict of interest prevented defense counsel from arguing his own ineffectiveness.

¶ 54 The constitutional right to an attorney includes the right to conflict-free representation. *People v. Peterson*, 2017 IL 120331, ¶ 102. Conflicts of interest may be *per se* or actual. *People v. Yost*, 2021 IL 126187, ¶ 37. Here, defendant asserts an actual conflict, which requires a defendant to demonstrate that the conflict "adversely affected counsel's performance." *Peterson*, 2017 IL 120331, ¶ 105. "The defendant is required to identify a specific deficiency in his counsel's strategy, tactics, or decision making that is attributable to the alleged conflict." *Yost*, 2021 IL 126187, ¶ 38. Where the facts are undisputed, whether a conflict of interest existed is a question of law, which we review *de novo*. *Peterson*, 2017 IL 120331, ¶ 101.

¶ 55 Three cases provide useful comparisons: *People v. Sullivan*, 2014 IL App (3d) 120312, *People v. Brown*, 2017 IL App (3d) 140921, and *People v. Garcia*, 2018 IL App (5th) 150363. In *Sullivan*, a jury found the defendant guilty of first degree murder and aggravated battery of a senior citizen. *Sullivan*, 2014 IL App (3d) 120312, ¶ 1. Defense counsel filed a posttrial motion claiming 18 errors at trial, including a claim that the court erroneously omitted a jury instruction on causation. *Id.* ¶ 20. The trial court denied the motion. *Id.* On appeal, the defendant argued that his attorney suffered from a conflict of interest because the posttrial motion required him to argue his own error in failing to request the instruction. The appellate court rejected this argument, explaining that "counsel did not argue he provided inadequate representation. All defense counsel did was argue that the failure to instruct the jury on causation was error and explain that he did not request such an instruction." *Id.* ¶ 47. The court added, "We will not transform counsel's acknowledgement that the error with the jury instruction was not raised at trial into an allegation of ineffective assistance of counsel." *Id.*

¶ 56 In *Brown*, the defendant argued that his trial attorney suffered from an actual conflict of interest when she argued her own ineffectiveness in a motion to set aside the guilty verdict. *Brown*, 2017 IL App (3d) 140921, ¶ 32. The appellate court agreed. Although defense counsel's motion argued ineffective assistance of counsel, she "failed to make any reasonable effort with respect to either prong of the *Strickland* standard." *Id.* ¶ 33. Instead, she blamed the defendant for any error at trial. *Id.* She also failed to attach necessary affidavits to her motion. *Id.* The court explained that once trial counsel raised the issue of her own ineffectiveness, "she had a duty to zealously represent her client in that proceeding." *Id.* ¶ 34. The court found that this counsel failed to do so, and it remanded for appointment of new counsel. *Id.*

¶ 57 Finally, in *Garcia*, after the defendant's conviction for attempted burglary, defense counsel filed a posttrial motion alleging the trial court committed plain error in admitting the defendant's videotaped confessions, which contained inadmissible prejudicial other crimes evidence. *Garcia*, 2018 IL App (5th) 150363, ¶ 2. However, defense counsel did not argue ineffective assistance of counsel in his motion. At a hearing on the motion, defense counsel claimed that he had expected the State to redact the videos. *Id.* ¶ 21. The trial court commented that it remembered that defense counsel had properly understood the contents of the video and simply chose not to object as a matter of trial strategy. *Id.* The court told defense counsel that if he wanted the court to consider his account of his reasons for allowing the video to be admitted, he would need to present sworn testimony. *Id.* Defense counsel declined to do so. *Id.* ¶ 24. The trial court denied the motion, but the appellate court found defense counsel suffered from an actual conflict of interest. *Id.* The court explained that "defense counsel's failure to present evidence was attributable to his reluctance to prove his own ineffectiveness." *Id.* ¶ 42.

¶ 58 The court distinguished *Sullivan*, explaining:

> "The underlying allegation in the present case does not involve a defense attorney '[m]erely bringing a possibly forfeited error to the trial court's attention' as was the case in *Sullivan*. [Citation.] Here, the substance of the underlying allegation is counsel's failure to object to inadmissible and prejudicial other crimes evidence contained in the videotapes." *Id.* ¶ 45 (quoting *Sullivan*, 2014 IL App (3d) 120312, ¶ 48).

Later, the court added:

> "*Sullivan* is further distinguishable from the present case in that *Sullivan* did not involve evidence that defense counsel's performance in arguing the posttrial

motion was adversely affected by counsel having to admit his error. Our decision here, as in *Brown*, is based on evidence that an actual conflict adversely affected counsel's performance in presenting grounds for a new trial at the posttrial hearing." *Id.* ¶ 46.

¶ 59 We find this case more similar to *Sullivan* than *Brown* or *Garcia*. As in *Sullivan*, defense counsel filed a posttrial motion seeking a new trial based on a forfeited error. See *Sullivan*, 2014 IL App (3d) 120312, ¶ 47; see also Ill. S. Ct. R. 451(c) (eff. July 1, 2006). Defense counsel did not argue his own ineffectiveness. As in *Sullivan*, we decline to "transform counsel's acknowledgement that the error with the jury instruction was not raised at trial into an allegation of ineffective assistance of counsel." *Sullivan*, 2014 IL App (3d) 120312, ¶ 47. Furthermore, *Garcia* distinguished *Sullivan* because the attorney in *Garcia* failed to object to prejudicial evidence, whereas the attorney in *Sullivan* failed to request a certain jury instruction. See *Garcia*, 2018 IL App (5th) 150363, ¶ 45. Here, trial counsel's alleged omission was his failure to request a jury instruction, like *Sullivan* and unlike *Garica*. Finally, unlike in *Brown* and *Garcia*, nothing in the record indicates to us that defense counsel was reluctant to argue his own ineffectiveness. See *id.* ¶ 48. For example, defense counsel did not blame defendant for the error at trial, as in *Brown*. See *Brown*, 2017 IL App (3d) 140921, ¶ 33. Nor did defense counsel refuse the trial court's invitation to testify at the posttrial hearing to avoid explaining why he failed to object, as in *Garcia*. See *Garcia*, 2018 IL App (5th) 150363, ¶ 42.

¶ 60 Defendant argues that *Sullivan* is distinguishable. He claims that his attorney here not only forfeited any objection but also invited the error. "[I]nvited error or acquiescence 'does not raise a mere forfeiture to which the plain-error exception might apply; it creates an estoppel that precludes plain-error analysis.' " *People v. Quezada*, 2024 IL 128805, ¶ 59 (quoting *People*

v. Holloway, 2019 IL App (2d) 170551, ¶ 44). Defendant contends that by inviting the error, his attorney foreclosed any argument based on plain error. He further contends that ineffective assistance provided the only means to assert his claim, but defense counsel failed to make this argument.

¶ 61 We reject defendant's attempt to distinguish *Sullivan*. Whether defense counsel invited the error would be relevant if defendant sought appellate review based on plain error. But the question presented is whether defense counsel failed to zealously advocate for defendant because of an actual conflict of interest. Here, we see no indication that defense counsel was prevented from arguing that the trial court's answer to the jury's question was erroneous. In the amended posttrial motion, counsel argued, "[I]t was plain error for the Court to not give the jury *** IPI Criminal 5.01B in response to the jury's written request for a definition of the term 'knowingly.' " The court heard this argument and concluded that it gave the proper response. Defense counsel zealously advocated for his client, but the court rejected defense counsel's argument on its merits, rather than relying on invited error. If defendant intends to argue that his attorney chose a meritless plain-error argument over a meritorious ineffective-assistance claim, we note that we find defendant's ineffective-assistance framing also lacks merit. Defendant's arguments based on the definition of "knowingly" failed not because his attorney suffered from any conflict of interest, but because they were not persuasive. Defense counsel's own interests did not prevent him from zealously advocating for defendant, so we find no actual conflict of interest.

¶ 62 C. *Krankel*

¶ 63 Next, defendant claims that the *Krankel* hearing revealed possible neglect of his case. When a defendant claims after trial that defense counsel was ineffective, the trial court

must inquire into the allegations. See *Krankel*, 102 Ill. 2d at 189; see also *People v. Roddis*, 2020 IL 124352, ¶ 35. If the court determines that the claim lacks merit or concerns only trial strategy, the court may decline to appoint new counsel. *Roddis*, 2020 IL 124352, ¶ 35. "However, if the allegations show possible neglect of the case, new counsel should be appointed." *Id.* "A court's determination that a defendant's claim does not demonstrate a possible neglect of the case will be reversed where that decision is manifestly erroneous." *People v. Maya*, 2019 IL App (3d) 180275, ¶ 17. A decision is manifestly erroneous when the error is "clearly evident, plain, and indisputable." *People v. Jackson*, 2020 IL 124112, ¶ 98.

¶ 64 Defendant argues that the *Krankel* hearing here revealed possible neglect. His trial counsel sought funds for consulting Dr. DeGraw, but counsel did not call Dr. DeGraw to testify as an expert witness, nor did he present testimony from any other expert witness. At the *Krankel* hearing, the trial court asked counsel why he did not present expert testimony, and counsel answered that he was "unable to locate a medical expert" and stated, "There were reasons with respect to the evidence why that ultimately did not pan out." Counsel testified that his decision was a matter of "trial strategy." He explained that he sought to avoid placing too great an emphasis on the great bodily harm element of the offense.

¶ 65 Defendant argues that his attorney failed to understand the value of a potential expert witness. According to defendant, an expert witness could have helped prove that D.C. suffered injuries from a fall, rather than from strikes. Defendant argues that an expert would not need to refute the extent of the harm D.C. suffered, and defense counsel's explanation for failing to call a witness is unsatisfactory. Defendant contends his attorney should have sought out an expert witness to contest the cause of D.C.'s injuries and should have sought additional funding from the trial court if Dr. DeGraw's consultation was unhelpful.

¶ 66 Defendant cites *People v. Quesada*, 2023 IL App (1st) 220493-U. There, the defendant was found guilty of aggravated battery of a 21-month-old child after a bench trial. *Id.* ¶ 2. A doctor testified that she diagnosed the baby with abusive head trauma and eye hemorrhages of the sort that resulted from "high-velocity car accidents or violent shaking." *Id.* ¶ 16. After his conviction, the defendant accused his trial counsel of failing to solicit funds from the trial court to hire an expert to contest the State's medical evidence. *Id.* ¶ 29. At a *Krankel* hearing, defense counsel testified that the defendant could not afford a medical expert. *Id.* ¶ 33. The appellate court determined that the hearing revealed possible neglect because counsel failed to ask the trial court for funds to retain an expert witness. *Id.* ¶¶ 44-45. The record did not indicate that defense counsel consulted any expert, even though he acknowledged the value, even the necessity, of expert testimony to the defense. *Id.* ¶ 60.

¶ 67 *Quesada* is easily distinguishable. Here, defense counsel asked the trial court for funds to consult an expert, and the court granted those funds. Defense counsel considered the potential expert's testimony and decided the value of the expert's testimony was not worth subjecting the jury to further discussion of D.C.'s severe injuries. Finally, defendant points to no statement in the record like the *Quesada* counsel's acknowledgment that expert testimony was "necessary" in that case. See *id.*

¶ 68 Defendant also cites a variety of out-of-state cases discussing the medical controversy around identifying the causes of children's brain injuries. For example, in *People v. Ackley*, 870 N.W.2d 858 (Mich. 2015), a three-year-old child died while the defendant was with her. *Id.* at 860. At the defendant's trial, the State's five expert witnesses testified that the child's injuries resulted from nonaccidental shaking or blunt force trauma. The defendant claimed that

an accidental fall caused the injuries. *Id.* The Michigan jury found the defendant guilty of first degree murder and first degree child abuse. *Id.*

¶ 69 After trial, the defendant claimed that his attorney was ineffective in failing to call an expert witness to challenge the State's experts. *Id.* The trial court held a hearing to inquire into the defendant's claim. Defense counsel testified that he spoke to one expert, who told him that he was " 'not the best person' " to act as a witness for the defense because his views of the medical controversy surrounding shaken baby syndrome or abusive head trauma were not favorable to the defense. *Id.* The expert referred defense counsel to a second medical expert, but defense counsel never followed up on the referral or consulted any other expert. *Id.* at 861. The defendant also provided an affidavit from a third medical expert, who reviewed the material from the trial and opined that the child's injuries were caused by an "accidental 'mild impact,' " rather than abuse. *Id.* The trial court found defense counsel was ineffective, and it granted the defendant a new trial. *Id.* at 862.

¶ 70 The appellate court reversed, but the Michigan Supreme Court agreed with the trial court. The Michigan Supreme Court found that defense counsel's failure to properly investigate and present expert testimony constituted ineffective assistance of counsel. *Id.* at 863. Defense counsel failed to educate himself on the medical issues involved in the case and inexplicably failed to follow up on the referral. Instead, he relied on only the medical expert who was "a self-proclaimed *opponent* of the very defense theory counsel was to employ at trial." (Emphasis in original.) *Id.* The court further found that counsel's ineffectiveness prejudiced the defendant because the State's medical experts were essential to the prosecution's case, and defense counsel failed to contest that essential testimony. *Id.* at 865.

¶ 71 In addition to *Ackley*, defendant cites other cases with similar reasoning. See *Spurgeon v. State*, 298 So. 3d 726, 731 (Fla. Dist. Ct. App. 2020) (finding defense counsel was ineffective because he presented expert testimony to refute a theory not advanced by the State instead of presenting expert testimony to challenge the State's expert's theory on a child's cause of death); see also *Commonwealth v. Millien*, 50 N.E.3d 808, 817-22 (Mass. 2016) (finding defense counsel ineffective "because he failed to seek funds from the court to retain an expert witness for his indigent client" when the State's case relied on expert testimony and discussing scientific studies "in support of an opinion that accidental short falls can produce injuries of the nature and severity suffered by [the child]"); *State v. Hales*, 2007 UT 14, ¶¶ 69-83, 152 P.3d 321 (finding ineffective assistance of counsel where defense counsel failed to have any qualified expert review the deceased child's CT scans and challenge the State's expert's interpretation of those scans). According to defendant, these cases demonstrate scientific debate over the causes of traumatic brain injury in infants and the importance of expert testimony to contest the State's claims.

¶ 72 We do not find that the trial court manifestly erred. The court could have accepted that defense counsel was motivated by a reasonable trial strategy. "The selection of an expert witness is a paradigmatic example of the type of 'strategic choic[e]' that, when made 'after thorough investigation of [the] law and facts,' is 'virtually unchallengeable.' " *Hinton v. Alabama*, 571 U.S. 263, 275 (2014) (quoting *Strickland*, 466 U.S. at 690). We are not persuaded that defense counsel failed to thoroughly investigate the facts. Unlike in *Hales*, there is no indication that defense counsel consulted an unqualified expert here. *Hales*, 2007 UT 14, ¶ 78. Unlike in *Ackley*, the record does not indicate that the consulting expert preemptively told defense counsel that he would not make an effective expert witness for the defense, nor does it

appear that the consulting expert provided a referral that defense counsel simply refused to pursue. *Ackley*, 870 N.W.2d at 863. Indeed, at the hearing on defendant's motion, defense counsel represented that he sought a "pediatrician with certification in the field of child abuse," he considered three potential experts, and Dr. DeGraw agreed to provide at least a consultation. Defense counsel consulted a qualified expert and made a strategic decision to avoid subjecting the jury to further detailed exploration of D.C.'s injuries.

¶ 73 We cannot conclude that this strategy was unreasonable. Although defendant did not dispute that D.C. suffered "great bodily harm," defense counsel might reasonably have wanted to avoid greater emphasis on the particular harms that D.C. suffered. As Dr. Petrak testified, these harms included bruises across the left side of his face, his arms, his legs, and above his genitals. His upper frenulum was torn. He had swelling on his forehead and a skull fracture, along with a brain injury and bleeding. Sarah testified that D.C. had cerebral palsy, and he was unable to move normally, could not swallow, and had seizures. Any expert who contested Dr. Petrak's account of D.C.'s injuries would need to thoroughly describe each injury that D.C. suffered, explaining why an accidental fall was a plausible explanation for those injuries. Without knowing what a potential expert witness would say to challenge Dr. Petrak's account of these injuries, we cannot conclude that defense counsel's trial strategy was unreasonable. We do not find the trial court's conclusion that defense counsel acted based on a reasonable trial strategy was manifestly erroneous.

¶ 74 Importantly, defendant still has not provided any basis to refute Dr. Petrak's testimony. This further distinguishes this case from *Ackley*, where the defendant provided an affidavit of an expert who opined that the child's injuries were not caused by abusive head trauma. *Id.* at 862; see *Spurgeon*, 298 So. 3d at 728, 731 (summarizing the testimony of two

biomechanics experts in support of the defendant's motion for postconviction relief); see also *Millien*, 50 N.E.3d at 815-16, 820 (discussing expert testimony presented at a motion for a new trial that challenged the prosecution's experts); *Hales*, 2007 UT 14, ¶¶ 87-91 (summarizing an affidavit from a pediatric neuroradiologist that supported the defendant's motion for a new trial). We cannot conclude that defense counsel's strategy was unreasonable when we have no indication how compelling the testimony of a defense expert witness would be.

¶ 75 Finally, we note that, in *Ackley*, the trial court agreed with the defendant's claim. Here, the trial court rejected it. We review the trial court's decision under the manifest-weight-of-the-evidence standard, reversing only if the court committed an error that was "clearly evident, plain, and indisputable." See *Jackson*, 2020 IL 124112, ¶ 98. We conclude that the court's decision was not manifestly erroneous.

¶ 76 D. Lesser Included Offense

¶ 77 Finally, defendant argues that his attorney should have asked that the jury be instructed on reckless conduct as a lesser included offense. Section 12-5 of the Criminal Code of 2012 states:

> "(a) A person commits reckless conduct when he or she, by any means lawful or unlawful, recklessly performs an act or acts that:
>
> (1) cause bodily harm to or endanger the safety of another person; or
>
> (2) cause great bodily harm or permanent disability or disfigurement to another person." 720 ILCS 5/12-5 (West 2020).

Defendant cites cases that have treated reckless conduct as a lesser included offense of aggravated battery. See *People v. Willett*, 2015 IL App (4th) 130702, ¶ 63; see also *People v. Willis*, 170 Ill. App. 3d 638, 641 (1988); *People v. Roberts*, 265 Ill. App. 3d 400, 402 (1994).

¶ 78 Defendant further claims that his attorney's failure to request an instruction on reckless conduct constituted ineffective assistance of counsel. He contends that, without this instruction, the jury faced a "binary choice" of guilty of aggravated battery or not guilty. An instruction on reckless conduct would have provided an alternative. Defendant also claims there is a reasonable probability that the jury would have convicted him of reckless conduct instead of aggravated battery, especially considering its question about the meaning of "knowingly" and the lack of any witness to D.C.'s injury besides defendant. Defendant especially focuses on the evidence he was intoxicated before D.C.'s injuries. He cites *People v. Gosse*, 119 Ill. App. 3d 733, 736 (1983), to argue that "[e]vidence of intoxication is permissible in criminal prosecutions charging recklessness, and is probative of this issue." He contends this evidence could have shown he was not fully in control of himself when D.C. suffered his injuries, and his actions were only reckless, not intentional.

¶ 79 We find *People v. Moore*, 358 Ill. App. 3d 683 (2005), instructive. There, the defendant claimed that he received ineffective assistance of counsel because his trial attorney failed to request instruction on reckless discharge of a firearm during his trial for aggravated battery with a firearm. *Id.* at 689. The appellate court declined to reverse based on this argument, explaining, "[T]he decision of whether to submit an instruction on a lesser charge to the jury, much like the decision of what plea to enter, ultimately belongs to the defendant." *Id.*; see *People v. Brocksmith*, 162 Ill. 2d 224, 229 (1994). It could therefore only constitute ineffective assistance of counsel if the defendant was prevented from making the decision himself. *Moore*,

358 Ill. App. 3d at 689; see *People v. Dominguez*, 331 Ill. App. 3d 1006, 1014 (2002). Because the record did not indicate whether the defendant had the opportunity to decide to request a lesser included offense instruction, the court determined it could not adjudicate the defendant's claim on direct appeal and the defendant must instead raise the issue in a collateral proceeding. *Moore*, 358 Ill. App. 3d at 689-90.

¶ 80 Similarly, here, the record contains no indication that defendant requested that his attorney instruct the jury on reckless conduct. It also includes no information on what conversations, if any, defense counsel and defendant had on this issue. As in *Moore*, this record does not provide a basis for us to conclude that defense counsel was constitutionally ineffective, so we decline to reverse defendant's conviction based on this issue. Defendant may raise his claim in collateral proceedings. See *id.*

¶ 81 III. CONCLUSION

¶ 82 For the reasons stated, we affirm the trial court's judgment.

¶ 83 Affirmed.