STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MILTON LEE LEMONS,

Defendant-Appellant.

UNPUBLISHED
November 18, 2021

No. 348277
Wayne Circuit Court
LC No. 06-004818-01-FC

Before: TUKEL, P.J., and JANSEN and CAMERON, JJ.

PER CURIAM.

Following a bench trial in 2006, defendant[1] was convicted of first-degree felony murder, MCL 750.316(1)(b) (predicated on first-degree child abuse), in connection with the death of her daughter, Nakita, and sentenced to life imprisonment without the possibility of parole. She now appeals as on leave granted[2] an order denying her second motion for relief from judgment. We affirm.

I. BACKGROUND

Nakita was the youngest of defendant's two children. According to defendant's wife, they discovered that Nakita was allergic to milk when she was approximately one week old after she began gasping during a feeding. Following a second incident of this nature, Nakita was switched to a soy formula and had no further problems. Defendant was caring for the children on October 10, 2005, while her wife was at work. Nakita was 2½ months old at the time. Defendant called her wife to come home at approximately 7:00 p.m. because Nakita was choking. Nakita

[1] Defendant identifies as a female. We will adopt her preferred use of a feminine pronoun in this opinion.

[2] This Court initially denied defendant's application for leave to appeal, *People v Lemons*, unpublished order of the Court of Appeals, entered July 22, 2019 (Docket No. 348277), but the Supreme Court remanded the case for consideration as on leave granted, *People v Lemons*, 505 Mich 1084; 943 NW2d 139 (2020).

was subsequently transported by ambulance to Annapolis Hospital, then by helicopter to University of Michigan Children's Hospital, where she died the following morning.

Dr. Bader Cassin, the Washtenaw County Medical Examiner at the time of Nakita's death, performed Nakita's autopsy on October 11, 2005. He indicated that there were no external signs of trauma or abuse. But during an internal examination, Dr. Cassin discovered "brain swelling with blood on the brain surfaces as well as in the nerve sheaf of both eyes . . . ." There was also hemorrhaging in both retinas. In the absence of other findings, he recognized these symptoms as indicative of shaken baby syndrome (SBS). Dr. Cassin testified that the immediate visible symptoms for this type of injury would include vomiting or regurgitation and loss of consciousness. An x-ray also revealed a small fracture at the top of Nakita's right shoulder.

Detective John Williams interviewed defendant on October 12, 2005. Defendant initially said she fed Nakita around 5:30 p.m., burped her, and put her to bed around 5:50 p.m. Shortly afterward, defendant heard her son banging on the wall and went to check on the children, at which point she discovered Nakita was having trouble breathing. Defendant said she did not know if she shook Nakita too hard while trying to wake her up. Detective Williams then confronted defendant with the autopsy results suggesting that Nakita died from SBS. Defendant "got very quiet and [s]he provide[d] me with a different version of what happened." This version was reflected in defendant's written statement:

> On October 10th, 2005, my wife left for work at 2:30 p.m., which I dreaded because I didn't like to be left alone with her. At four p.m., I fed my son and laid him down for a nap. About 4:40 p.m., Nikita was in her swing fussing at this time. About 5:34 p.m., I fed her a bottle and laid her down. At about 6:20, my son started fussing and then she started crying also. I went into the room to get him out, but picked her up instead. She wouldn't stop crying and he was still crying too. So I shook her three or four times to get her to be quiet. She stopped crying and started spitting up formula, but was unresponsive.

Defendant confirmed these facts and provided additional details in response to Detective Williams's follow up questions. As noted earlier, the trial court found defendant guilty of first-degree felony murder and sentenced her to life imprisonment without the possibility of parole. This Court denied defendant's direct appeal in February 2008. *People v Lemons*, unpublished per curiam opinion of the Court of Appeals, issued February 26, 2008 (Docket No. 273058).

In 2010, defendant filed her first unsuccessful motion for relief from judgment *in propria persona*. With the assistance of counsel, defendant filed her second motion for relief from judgment in 2016; it is this motion that is at issue in this appeal. Defendant argued that she was entitled to a new trial because of newly discovered evidence about the significant controversy regarding SBS in the medical community. Defendant also raised several additional legal theories for relief regarding this same evidence, including a claim that she was denied the effective assistance of counsel because her trial counsel failed to investigate or present evidence regarding the SBS controversy at the time of her trial. The prosecution asked the trial court to declare defendant's proposed expert testimony inadmissible because it failed to meet the standards for admissibility outlined in *Daubert v Merrell Dow Pharm, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

Over the course of 11 evidentiary hearings held throughout 2017, the trial court heard testimony from several defense experts, including Dr. John Galaznik, an expert in pediatrics; Dr. George R. Nichols, an expert in forensic pathology; Dr. Patrick D. Barnes, an expert in pediatric radiology and neuroradiology; Dr. Chris Van Ee, an expert in biomechanical engineering; and Dr. Roland Nikolaus Auer. Dr. Nichols explained the general science behind the "SBS hypothesis":

> Well, the theory is that an adult, or I guess a minor of adult stature[,] can grasp an infant by the chest, or I guess maybe by the arm and vigorously shake the child back and forth.
>
> The motion that is produced is sufficient to cause tearing of veins that run from the upper surface of the brain through the dura, which is the outer membrane over the brain to enter into a big vein called the superior sagittal sinus. The rupture of the bridging vein results in bleeding into a potential space within the head called the subdural space.
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> There is a bleeding in the subdural space, which is associated with damage, functional damage to the brain with alteration in mental status and also the finding of retinal hemorrhages. So that's the triad that composes SBS. Subdural bleeding and encephalopathy of some type and retinal hemorrhages.

This "triad" of findings, i.e., subdural hemorrhaging, retinal hemorrhaging, and some form of encephalopathic presentation, was discussed at length. Collectively, the defense experts questioned whether abusive shaking alone was capable of causing the triad, criticized use of the triad as a means of diagnosing SBS, and opined that Nakita's injuries could have been attributed to causes other than SBS. The primary alternative theory of causation urged by the defense was that Nakita choked on formula, which caused hypoxic-ischemic encephalopathy (HIE), and the subdural and retina hemorrhages were secondary to the HIE.

Dr. Cassin was also called as a defense witness. Dr. Cassin confirmed the accuracy of his findings during the autopsy, but indicated that his opinion regarding SBS had changed since the time of defendant's trial because of developments in scientific research. Looking at the evidence now, Dr. Cassin would have characterized Nakita's manner of death as indeterminate, meaning it could have been natural, accidental, or homicidal.

Forensic pathology expert Dr. Jeffrey Jentzen, pediatric radiology expert Dr. Peter Strouse, forensic pathology expert Dr. Daniel Davis, and pediatric expert Dr. Cindy Christian testified on behalf of the prosecution. They defended the validity of SBS as a subcategory of abusive head trauma (AHT), and opined that while the triad is not exclusive to SBS, it is highly indicative of child abuse and requires further evaluation with an eye toward that possibility. The prosecution's experts emphasized that the vast majority of medical professionals endorsed SBS as a legitimate diagnosis, while most of the defense theories regarding alternative causation were considered "fringe opinions" held by less than 5% of the medical community. They maintained that the evidence was consistent with Dr. Cassin's original SBS diagnosis and, conversely, did not support defendant's alternative theories. Both sides cited numerous professional studies, case reports, and other literature supporting their respective opinions and explained why they disagreed with contrary authorities.

The trial court denied defendant's motion for relief from judgment after finding that none of defendants' new expert testimony was admissible. With respect to Dr. Cassin's retraction of his previous opinion regarding SBS as the probable cause of Nakita's death, the court determined that his new testimony would not result in a different outcome on retrial. This appeal followed.

II. STANDARDS OF REVIEW

We review a trial court's denial of a motion for relief from judgment for an abuse of discretion. *People v Kasben*, 324 Mich App 1, 7; 919 NW2d 463 (2018). Decisions regarding the admissibility of expert testimony are likewise reviewed for an abuse of discretion. *People v Brown*, 326 Mich App 185, 195; 926 NW2d 879 (2018). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes, or makes an error of law[.]" *People v Swain*, 288 Mich App 609, 628-629; 794 NW2d 92 (2010) (*Swain I*) (citations omitted). We review factual findings supporting the trial court's decision for clear error. *Kasben*, 324 Mich App at 7. "Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made." *People v McDade*, 301 Mich App 343, 356; 836 NW2d 266 (2013).

III. DENIAL OF MOTION FOR RELIEF FROM JUDGMENT

Defendant first challenges the trial court's treatment of SBS precedent, rejection of the defense experts, and denial of her motion for relief from judgment. Although we agree that the trial court abused its discretion by excluding *all* of the defense experts' proposed testimony, we are not persuaded that the trial court ultimately abused its discretion by denying defendant's motion.

To begin, defendant relies heavily on the decisions in *People v Ackley*, 497 Mich 381; 870 NW2d 858 (2015), and *In re Yarbrough Minors*, 314 Mich App 111; 885 NW2d 878 (2016), maintaining as she did below that these decisions stand for the proposition that a judgment in a contested case involving SBS cannot be sustained if the fact-finder heard only one side of the scientific controversy.

We disagree with defendant's interpretation of this precedent. Although both cases cited by defendant recognized medical controversy surrounding SBS and the importance of expert evidence in rebutting SBS allegations, *Ackley*, 497 Mich at 391-395; *Yarbrough*, 314 Mich App 131-132, 135, they do not compel the conclusion that the trial court abused its discretion in this case. Neither case held or implied that all expert testimony proffered by a party accused of abusive shaking is per se admissible. Indeed, neither case referenced the admissibility of specific proposed testimony at all. An otherwise precedential decision that presumes, but does not decide, a related legal issue is not binding with respect to the presumed point. *People v Douglas (On Remand)*, 191 Mich App 660, 662; 478 NW2d 737 (1991). See also *Riverview v Michigan*, 292 Mich App 516, 523; 808 NW2d 532 (2011) ("A matter that a tribunal merely assumes in the course of rendering a decision, without deliberation or analysis, does not thereby set forth binding precedent.").[3] The

[3] *Riverview* has since been superseded by statute on other grounds. *Telford v Michigan*, 327 Mich App 195, 197-198; 933 NW2d 347 (2019).

trial court correctly concluded that *Ackley* does not control the issue of admissibility of expert testimony, and it did not err by declining to address *Yarbrough* in its opinion.

Defendant moved for relief from judgment on the basis of newly discovered evidence that she characterizes as falling within two categories: Dr. Cassin's recantation and the broader controversy concerning the validity of SBS diagnoses. Because the latter category of evidence involves preliminary questions of admissibility and has foundational significance to Dr. Cassin's recantation, we will address the admissibility of the excluded evidence first.

A. ADMISSIBILITY OF DEFENSE EXPERTS' TESTIMONY

In our view, the "broader controversy" evidence actually involved two types of evidence, supported by multiple witnesses. The first was the validity of SBS diagnoses and, more particularly, the reliability of the triad as diagnostic criteria. The second matter included the defense experts' alternative theories regarding the cause of Nakita's death. These are distinct issues involving different scientific support and, therefore, must be addressed separately. See *People v Kowalski*, 492 Mich 106, 135-136; 821 NW2d 14 (2012) (finding that exclusion of one subject of expert testimony did not preclude the expert from testifying about other related subjects).

MRE 702 governs the admissibility of expert testimony:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

"A court considering whether to admit expert testimony under MRE 702 acts as a gatekeeper and has a fundamental duty to ensure that the proffered expert testimony is both relevant and reliable." *Kowalski*, 492 Mich at 120. Because MRE 702 has been recognized as incorporating the reliability principles articulated in *Daubert*, see, e.g., *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 781; 685 NW2d 391 (2004), Michigan courts generally turn to *Daubert* and its progeny for guidance in assessing the reliability of proposed expert testimony.

Daubert outlined several factors that a court may consider in assessing reliability, including "whether the theory has been or can be tested, whether it has been published and peer-reviewed, its level of general acceptance, and its rate of error if known." *Kowalski*, 492 Mich at 131, citing *Daubert*, 509 US at 593-594. This list, however, is not exhaustive, nor will each factor be applicable in every case. *Kumho Tire Co, Ltd v Carmichael*, 526 US 137, 150; 119 S Ct 1167; 143 L Ed 2d 238 (1999); *Daubert*, 509 US at 593-595. Additionally, the focus "must be solely on principles and methodology, not on the conclusions that they generate." *Daubert*, 509 US at 595. The United States Supreme Court later qualified this statement, noting that a court may properly exclude proposed expert testimony if "there is simply too great an analytical gap between the data and the opinion proffered." *Gen Electric Co v Joiner*, 522 US 136, 146; 118 S Ct 512; 139 L Ed 2d 508 (1997). As this Court has previously summarized:

> Pursuant to *Daubert* and MRE 702, "the trial court's role as gatekeeper does not require it to search for absolute truth, to admit only uncontested evidence, or to resolve genuine scientific disputes." *Chapin v A & L Parts, Inc*, 274 Mich App 122, 127; 732 NW2d 578 (2007) (opinion by DAVIS, J.). Instead, the proper role of the trial court is
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> > to filter out expert evidence that is unreliable, not to admit only evidence that is unassailable. The inquiry is not into whether an expert's opinion is necessarily correct or universally accepted. The inquiry is into whether the opinion is rationally derived from a sound foundation. [*Id*. at 139.]
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> See also *Nelson v American Sterilizer Co (On Remand)*, 223 Mich App 485, 491-492; 566 NW2d 671 (1997). The standard focuses on the scientific validity of the expert's methods rather than on the correctness or soundness of the expert's particular proposed testimony. *Daubert, supra* at 589-590. An expert's opinion is admissible if it is based on the "methods and procedures of science" rather than "subjective belief or unsupported speculation." *Id*. at 590. [*People v Unger*, 278 Mich App 210, 217-218; 749 NW2d 272 (2008) (alteration in original).]

The trial court's opinion said little about the defense experts' testimony regarding the validity of SBS, instead focusing primarily on the prosecution's evidence demonstrating that SBS is a generally accepted diagnosis within the medical community, and that the triad findings are not intended as an exclusive diagnostic tool. It did, however, determine that the testimony offered by Dr. Van Ee, i.e., the only biomechanical engineering expert, was inadmissible under *Joiner* because the biomechanical studies could not replicate the intricacies of the infant brain. Presumably, the trial court's rationale concerning Dr. Van Ee's opinions extended to the other defense experts' reliance on biomechanical studies and literature.

The respondent in *Joiner* claimed that his exposure to polychlorinated biphenyls (PCB's) "promoted" his development of small-cell lung cancer. *Joiner*, 522 US at 143. But the animal studies his experts relied on involved clearly dissimilar circumstances in which the animals were injected with substantially higher doses of concentrated PCB's than the respondent encountered and developed a different form of cancer than the respondent was diagnosed with. *Id*. at 144. Other epidemiological studies either did not conclude that PCB exposure caused cancer in the test group, did not establish a statistically significant rate of cancer deaths to suggest a causal link, involved chemicals other than PCB, or focused on a test group who had been exposed to numerous other potential carcinogens. *Id*. at 145-146. Under these circumstances, the Court was satisfied that the trial court did not abuse its discretion by excluding the proposed expert testimony because "[a] court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *Id*. at 146.

Considering the parallels between the Supreme Court's decision in *Joiner* and the trial court's ruling in this case, we find *Joiner* particularly persuasive. While the biomechanical research and studies may very well involve legitimate scientific methods and reasoning, they extrapolate data from animal studies, physical modeling, computational modeling, cadaver studies, and recorded data from other mechanisms of injury dissimilar to abusive shaking. The defense did not establish that principles derived from this research can be reliably applied to alleged SBS

cases. Although Dr. Van Ee indicated that the research to date established good reason to question whether angular accelerations produced by shaking could cause torn bridging veins, he also acknowledged several deficiencies in the research. Dr. Van Ee seemed to agree that, despite improvements over the years, mechanical models generally attempted to simulate only specific, relevant parameters and some of the foundational studies used models that were not even close to representative of an infant. Many of the studies were also premised on data from animal experiments involving a single acceleration or hyperextension of the neck, as opposed to the repetitive forces that would occur in the context of shaking. The prosecution's medical experts emphasized that the biomechanical studies using inanimate models or animal testing were unreliable because the results would not necessarily translate to human infant anatomy. For obvious ethical reasons, there was no way to corroborate the biomechanical findings through human testing in a controlled setting. The trial court determined that the deficiencies in the biomechanical evidence rendered its application to the case too tenuous. Like the Supreme Court in *Joiner*, we must conclude that the trial court's decision fell within the range of principled outcomes.

Biomechanical studies, however, were not the only reasons cited by the defense experts for their skepticism of relying on the triad as diagnostic of SBS. They also questioned the scientific quality of the professional literature regarding the diagnostic accuracy of the triad and, as further evidence that its use in diagnosing SBS was unreliable, identified a number of other conditions that could cause the triad. The defense experts cited published articles, reports, and studies that supported their opinions. Although the opinions expressed in those articles have been criticized, the mere fact that many or even most practitioners do not agree with these opinions does not make them automatically unreliable. This type of evidence does not easily lend itself to the factors identified in *Daubert*, in that the opinions are more akin to peer review of existing literature than scientific theories that can be tested or explored for error rate. But it is noteworthy that those who favor SBS and the diagnostic significance of the triad apparently rely on the same sources of data—existing literature regarding the subject and empirical evidence on which the literature is based—as a basis for their favorable opinions. They simply attach different interpretations and importance to the information. In other words, their conflicting opinions are but two sides of the same coin. "[A]n opposing party's disagreement with an expert's opinion or interpretation of facts, and gaps in expertise, are matters of the weight to be accorded to the testimony, not its admissibility." *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 401; 628 NW2d 86 (2001). The extensive expert testimony offered in this case and plethora of authority cited below make it clear that there is a genuine dispute regarding SBS and the diagnostic significance of the triad, and it was not for the trial court to decide which view ought to be credited.

Next, the defense experts also proposed a number of alternative theories to explain the autopsy findings that were attributed to SBS. The trial court determined that these opinions were inadmissible because they either lacked factual or scientific support. The trial court's decision regarding these opinions was generally reasonable, and most of the alternative theories do not merit significant discussion. For instance, Dr. Cassin was asked whether he could rule out the possibility that Nakita's subdural and retinal hemorrhages were caused by a reaction to vaccines. Although he answered in the negative, he also said he did not believe that to be true in this case. The defense did not otherwise demonstrate the reliability of this theory, so the trial court properly excluded it. Dr. Cassin's brief reference to the possibility of Nakita's acromion fracture having been inflicted during the autopsy was clearly at odds with the record evidence, which included a

premortem imaging in which the fracture was visible. There were also suggestions that the fracture could have been inflicted in the course of the back blows defendant was instructed to use during CPR, but the defense experts were unable to cite any authority for this theory.

Concerning the nature of the fracture seen in the x-rays, Dr. Nichols testified that Dr. Cassin should have visually explored the shoulder joint to confirm whether it was truly a fracture and whether there was any evidence of healing. Dr. Barnes reviewed the postmortem x-ray and observed that the x-ray was insufficient to establish whether the defect was a fracture or mere evidence of a developmental defect or bone fragility disorder. He too indicated that the best practice for resolving the question would have been for Dr. Cassin to conduct a gross examination, followed by a microscopic examination, which was not done in this case. Dr. Barnes was of the opinion that if the defect seen in the x-ray was not a fracture, it could be evidence of healing rickets. Yet Nakita's laboratory results during her hospital admission were not indicative of the deficiencies associated with rickets, so Dr. Barnes's opinion on this matter was nothing more than irrelevant speculation that would not aid a fact-finder in deciding a material issue.

The one alternative theory of causation that requires further consideration is defendant's contention that Nakita choked on formula, with the resulting asphyxiation leading to HIE and secondary subdural and retinal hemorrhages. Again, the experts seemed to uniformly rely on the same types of evidence—medical literature, general understanding of anatomical and physical processes, personal clinical experience, etc.—to support their opinions. The trial court determined that the defense experts' opinions regarding this theory were inadmissible because one of the primary articles cited by the defense studied a group of subjects of dissimilar age to Nakita (ranging from fetuses to three-year-old children), did not provide error rates for the age group comparable to Nakita, and there was no showing of general acceptance in the medical community. An additional article cited by Dr. Nichols did not involve a peer reviewed scientific study, error rates, or data and analysis that satisfied the requirements of *Daubert*. Moreover, the prosecution presented two studies finding no evidence of subdural hemorrhaging and, therefore, contradicted the defense theory. The court viewed these articles as supporting a 2016 study that reported less than 5% of the medical community as believing that choking or HIE caused subdural hemorrhages.

We find the trial court's reasoning troubling, as it appears that the court was attempting to assess which of the competing views regarding HIE was correct. The defense theory is again one that is apparently disputed within the medical community, and the court should have focused on the reliability of the underlying scientific methods, rather than attempting to resolve the dispute. *Unger*, 278 Mich App at 217. The trial court could not accept the opinions of the prosecution's experts that were premised on traditionally accepted medical research and evidence as reasonable and admissible, while rejecting competing opinions involving the same methodologies as unreliable merely because the defense experts' views represented a minority opinion within the medical community. General acceptance of an opinion is but one factor in assessing reliability. The experts relied on the same methods to reach their opinions, and the court's role as gatekeeper did not allow it to limit expert testimony to a one-sided set of opinions that it deemed more correct or universally accepted. *Id*. Moreover, unlike other defense theories that were highly speculative and unrelated to the facts of the case, there was factual evidence to support this theory, including Nakita's earlier history of apparent life-threatening events and witness statements about the formula in her mouth during resuscitative efforts.

In sum, the trial court did not abuse its discretion by concluding that the biomechanical engineering evidence and testimony was inadmissible or excluding alternative causation theories that lacked scientific or factual support. However, its decision to exclude the defense experts' opinions regarding the validity of SBS diagnoses, reliance on the triad as a diagnostic tool, and the possibility of choking as an alternative cause of death was outside the range of reasonable outcomes.

B. ENTITLEMENT TO NEW TRIAL ON THE BASIS OF NEWLY DISCOVERED EVIDENCE

A defendant who seeks a new trial on the basis of newly discovered evidence must prove four things: "(1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial." *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003) (quotation marks and citation omitted). In assessing the probability of a different result on retrial, "the evidence that must be taken into consideration . . . is not simply the evidence at the original trial, but also the evidence that would be presented at a new trial." *People v Johnson*, 502 Mich 541, 571; 918 NW2d 676 (2018).

With respect to Dr. Cassin's recantation, defendant has likely established the first three requirements outlined in *Cress*. Dr. Cassin did not express his change of opinion until the 2017 evidentiary hearings were under way, and his new testimony was clearly not cumulative because it is contrary to the only expert medical testimony offered at defendant's trial. The prosecution does not take issue with these requirements in its appellate brief. Instead, the focus of the parties' disagreement regarding this issue is whether Dr. Cassin's new testimony would make a different result probable on retrial. The trial court observed that lay witnesses who recant testimony are generally viewed with skepticism and opined that the same principle applied to Dr. Cassin, despite his role as an expert witness at defendant's trial. The court also viewed Dr. Cassin's testimony about why he changed his opinion as vague, while other portions of his testimony were speculative or clearly inaccurate. Additionally, Dr. Cassin still acknowledged that Nakita's death could have been a homicide. Considering the sum total of Dr. Cassin's new testimony, the court did not believe a different result was probable on retrial.

We disagree with the trial court's stated reasons. Although it is true that courts are not typically swayed by recantations, *People v Rogers*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 336000); slip op at 12, the general rule has little application in this context. Dr. Cassin has no relation to defendant that might tempt him to change his testimony for improper reasons. His new testimony centers on his change of professional opinion, rather than personal observations or perceptions that may have faded with time. Moreover, Dr. Cassin's change of opinion came about because of developments in scientific research, so this is not a situation in which he must establish that he perjured himself in the past and simultaneously demonstrate that he is still worthy of belief.

Nor do we agree that Dr. Cassin's testimony was rendered unreasonably vague merely because he was unable to cite specific authority for his change of opinion. Dr. Cassin did not become involved in the postconviction proceedings until the evidentiary hearings were already

under way, so it does not appear that he was called by the defense for the purpose of establishing the shifting medical perspectives regarding SBS. Instead, his role was merely to discuss how new developments affected the opinion he offered at trial. Dr. Cassin made it clear that his new opinion was premised on the changes in scientific and professional literature, and defendant presented testimony from several other experts to discuss those changes in greater detail. Finally, while the trial court correctly observed that Dr. Cassin's testimony about when Nakita's acromial fracture occurred was clearly inaccurate, this detail was not so pivotal to the case that it outweighed the importance of Dr. Cassin's other testimony. After all, Dr. Cassin performed the autopsy, he was the only medical expert to testify at defendant's trial, and his original testimony regarding SBS was crucial to defendant's conviction.

Even so, we are convinced that the trial court reached the correct result regarding this evidence. The crux of Dr. Cassin's testimony at the evidentiary hearing was that his findings regarding the triad were correct, but he would no longer attribute the findings to SBS and he was no longer persuaded that those findings were sufficient to characterize the manner of death as a homicide. He would therefore certify the manner of death as indeterminate. This evidence is obviously favorable to defendant, but defendant's confession leaves the distinction drawn by Dr. Cassin without significant weight.

In recognition of this problem, defendant preemptively argues that her confession is unreliable because she confessed only after Detective Williams told her about the "supposedly conclusive medical evidence." Defendant cites *Aleman v Hanover Park*, 662 F3d 897 (CA 7, 2011), another case involving SBS allegations in which the plaintiff "admitted" shaking an 11-month-old baby after he was falsely told that three doctors had determined the baby was abusively shaken. *Id*. at 902. The plaintiff had, indeed, shaken the baby gently after the baby collapsed, and a police officer implied that the plaintiff must have caused the child's injuries. *Id*. at 901-902. The plaintiff then said: "I know in my heart that if the only way to cause [the injuries] is to shake that baby, then, when I shook that baby, I hurt that baby . . . . I admit it. I did shake the baby too hard." *Id*. at 902 (quotation marks omitted; alteration in original). In the plaintiff's civil lawsuit, the Seventh Circuit Court of Appeals reasoned that the officer's lie "destroy[ed] the information required for a rational choice." *Id*. at 906. Faced with a "settled medical opinion" excluding other possible causes, the plaintiff could only conclude that the gentle shaking "*must* have been the cause of death." *Id*.

Although similar in some respect, the circumstances of defendant's confession are distinguishable. Unlike in *Aleman*, defendant was the first to question whether she shook Nakita too hard. It was only after defendant raised this issue in her first account of events that Detective Williams told defendant about the autopsy results. Defendant then admitted shaking Nakita "three or four times to get her to be quiet," after which Nakita stopped crying, began spitting up formula, and became unresponsive. Thus, by defendant's account, Nakita's health declined *after* defendant shook her, whereas the baby in *Aleman* collapsed before the plaintiff shook him to elicit a response. Defendant also estimated that, on a 1-to-10 scale, she shook Nakita at a seven. While defendant's estimation cannot be quantified in terms of force, she subjectively believed that the shaking was vigorous, which would be consistent with defendant's stated intention to "quiet her up." Defendant also stated that she did not tell anybody about what happened because she did not want anybody to be disappointed in her. In contrast, even after his "confession," the plaintiff in *Aleman* repeatedly expressed disbelief that he could have caused the baby's injuries. *Id*. at 902.

Furthermore, we do not agree with defendant's suggestion that her confession and Dr. Cassin's testimony were the only sources of inculpatory evidence at trial. Defendant's neighbor testified that defendant brought Nakita to her for help, claiming that Nakita started choking while drinking from a bottle. The neighbor told defendant to call 911. Defendant handed Nakita to the neighbor and stepped into a bedroom. But instead of calling 911, defendant called her wife. When defendant returned from making this call, the neighbor again urged defendant to call 911 because Nakita was not breathing. Defendant stepped back into the bedroom and called her mother-in-law. The neighbor insisted, for a third time, that defendant call 911 because the neighbor did not know CPR. At that point, defendant said she knew CPR and took Nakita from the neighbor's arms. It was the neighbor, rather than defendant, who ultimately called 911. Defendant's reluctance to call 911 after Nakita stopped breathing can easily be construed as consciousness of guilt, and this evidence is entirely independent of Dr. Cassin's original testimony. Considering this delay and defendant's admissions, it is improbable that Dr. Cassin's new uncertainty about the manner of Nakita's death would cause a different outcome on retrial.

The same analysis is applicable to the newly discovered admissible expert testimony. This evidence would call the prosecution's causation theory into question and provide a possible alternative explanation for Nakita's death, but SBS would also remain a plausible explanation. Even if a jury was persuaded by the defense experts that the subdural hemorrhage, retinal hemorrhage, and brain swelling discovered during Nakita's autopsy did not establish a sufficient basis for diagnosing SBS, defendant's suspicious behavior and subsequent confession would likely be viewed as confirming the diagnosis. Thus, it is improbable that defendant would be acquitted on retrial, and the trial court did not abuse its discretion by denying defendant's motion for relief from judgment.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Lastly, defendant argues that the trial court erred by refusing to consider her claim of ineffective assistance of counsel because the Supreme Court's order in *People v Swain*, 499 Mich 920 (2016) (*Swain III*), confirms that all legal claims may be considered in a successive motion for relief from judgment as long as they are based on new evidence that a defendant did not possess at the time of an earlier motion. We agree that the trial court should have considered defendant's alternative legal theory. Nonetheless, the trial court's error was harmless and does not warrant appellate relief.

MCR 6.502(G)(1) states that "one and only one motion for relief from judgment may be filed with regard to a conviction." At the time of the trial court's ruling in this case, MCR 6.502(G)(2) carved out an exception to this general rule, permitting a successive motion for relief from judgment based on a retroactive change in the law or "a claim of new evidence that was not discovered before the first motion."[4] See also *Swain I*, 288 Mich App at 632 (discussing limited scope of successive motions).

[4] MCR 6.205(G) has since been amended to add the caveat that the trial court "may waive the provisions of this rule if it concludes that there is a significant possibility that the defendant is

In *People v Swain*, unpublished per curiam opinion of the Court of Appeals, issued February 5, 2015 (Docket No. 314564) (*Swain II*),[5] this Court reversed a trial court's grant of a successive motion for relief from judgment in connection with a *Brady*[6] violation, reasoning that the defendant had not satisfied several requirements of the four-part *Cress* test applicable to motions for a new trial on the basis of newly discovered evidence. *Id*. at 3-5. The Supreme Court reversed this Court's decision in a brief order stating:

> The Court of Appeals erred in applying *People v Cress*, 468 Mich 678; 664 NW2d 174 (2003), to an analysis of a successive motion filed pursuant to MCR 6.502(G)(2). *Cress* does not apply to the procedural threshold of MCR 6.502(G)(2), as the plain text of the court rule does not require that a defendant satisfy all elements of the test. . . . The defendant provided "a claim of new evidence that was not discovered before the first" motion for relief from judgment, MCR 6.502(G)(2), and we conclude that the trial court did not abuse its discretion in ordering a new trial on the facts of this case. [*Swain III*, 499 Mich at 920.]

The Supreme Court's reversal in *Swain III* demonstrates that MCR 6.502(G)(2)'s reference to new evidence is a "procedural threshold" for determining whether a successive motion for relief from judgment is permitted, and the procedural threshold is entirely distinct from the separate question of whether the defendant is actually entitled to relief. Additionally, the fact that the motion at issue in *Swain II* was premised on a *Brady* violation, rather than a typical motion for a new trial on the basis of new evidence, shows that the legal theory asserted is not dispositive of whether the successive motion is allowed. Thus, an ineffective assistance of counsel claim is not precluded as a matter of law. To be clear, this interpretation does not create an open door for every claim of ineffective assistance that a defendant was not previously aware of. In all cases not involving a retroactive modification of the law, there must be actual new evidence that was discovered after the defendant's first motion for relief from judgment. A new legal theory or new appreciation for the significance of existing evidence would not suffice.

Defendant's claim of ineffective assistance of counsel met the threshold for consideration because she argued that new evidence, i.e., expert testimony challenging the validity of SBS diagnoses, was not, yet should have been, discovered and presented by her trial counsel. Defendant submitted an affidavit with her motion explaining that she knew nothing about the controversy surrounding SBS when she filed her first motion for relief from judgment in 2010. Thus, defendant's motion was "based on . . . a claim of new evidence that was not discovered before the first such motion." MCR 6.502(G)(2). That defendant presented more than one legal theory regarding the significance of the new evidence is irrelevant. The trial court erred by refusing to consider defendant's alternative theory.

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innocent of the crime," and to specifically include "shifts in science" within the scope of new evidence for purposes of a successive motion for relief from judgment. MCR 6.205(G)(2).

[5] Although we do not ordinarily cite unpublished opinions, we do so in this case to clarify the significance of the Supreme Court's later order in *Swain III*.

[6] *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

Although we would ordinarily remand to the trial court for consideration of this theory in the first instance, the record suggests that a remand in this case would be futile. To prevail on a claim of ineffective assistance, a defendant must establish that "(1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). In its opinion denying defendant's motion, the trial court already commented on the other evidence of defendant's guilt, the most significant of which is her own confession. Defendant admitted that she vigorously shook Nakita several times to make the child stop crying, triggering the quick and ultimately fatal decline in Nakita's health.

The testimony from the defense experts suggests there was already a debate in the medical community regarding SBS in 2006, but much of the evidence offered in connection with defendant's motion encompassed advancements in the relevant research and literature that occurred after defendant's trial. It is therefore unlikely that trial counsel would have been able to marshal the same quantity or quality of expert support for the defense that was seen in the context of this motion but for his alleged failure to diligently investigate the SBS issue. Even if trial counsel had been able to secure comparable expert testimony with adequate support from the then-existing research, there is no reason to believe that he would have been more successful in admitting a wider scope of expert opinion than was properly admissible here. As explained in Part III(B) of this opinion, the evidence would still demonstrate that SBS was a plausible cause of Nakita's death. Coupled with defendant's admission and other circumstantial evidence, it is improbable that the expert testimony would have resulted in a different outcome but for trial counsel's allegedly deficient performance. As such, defendant cannot demonstrate entitlement to a new trial on the basis of ineffective assistance of counsel.

Affirmed.

/s/ Kathleen Jansen
/s/ Thomas C. Cameron

TUKEL, P.J., did not participate.