Illinois Official Reports

Appellate Court

People v. Logan, 2022 IL App (4th) 210492

Appellate Court Caption	THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JESSICA A. LOGAN, Defendant-Appellant.
District & No.	Fourth District No. 4-21-0492
Filed	September 30, 2022
Decision Under Review	Appeal from the Circuit Court of Macon County, No. 19-CF-1648; the Hon. Thomas E. Griffith Jr., Judge, presiding.
Judgment	Affirmed.
Counsel on Appeal	James E. Chadd, Douglas R. Hoff, and Gilbert C. Lenz, of State Appellate Defender's Office, of Chicago, for appellant. Scott Reuter, State's Attorney, of Decatur (Patrick Delfino, David J. Robinson, and Timothy J. Londrigan, of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People.
Panel	JUSTICE DeARMOND delivered the judgment of the court, with opinion. Presiding Justice Knecht concurred in the judgment and opinion. Justice Doherty specially concurred, with opinion.

OPINION

¶ 1 Following a June 2021 jury trial, defendant, Jessica A. Logan, was convicted of one count of first degree murder (720 ILCS 5/9-1(a)(1) (West 2018)). Prior to trial, defendant filed a motion to suppress any evidence obtained by the State during a video-recorded reenactment of the incident, claiming she was subject to a custodial interrogation without the benefit of the prescribed warnings pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). The trial court subsequently denied the motion.

¶ 2 Defendant appeals, arguing (1) the trial court erred in denying her motion to suppress evidence where "no detective ever admonished [her] as to her Fifth Amendment rights prior to the re-enactment" and (2) she was denied the effective assistance of counsel. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In November 2019, the State charged defendant by information with three counts of first degree murder (counts I-III) (720 ILCS 5/9-1(a)(1), (2) (West 2018)). Count I alleged defendant, without lawful justification and with the intent to kill or do great bodily harm, knowingly asphyxiated her 19-month-old son, J.C., causing his death.

¶ 5 A. Motion to Suppress

¶ 6 In July 2020, defendant filed a motion to suppress video-recorded statements she made to police. Defendant argued she was subject to custodial interrogation without first being informed of her *Miranda* rights during a "reenactment/interview" of the events that transpired on the night of J.C.'s death. Defendant asserted the reenactment "lasted five or six minutes" and "the remaining time was dedicated to asking [her] interrogatory questions unrelated to the reenactment." Thus, defendant argued, her statements should be suppressed. The State responded, conceding that the police did not inform defendant of her *Miranda* rights, but asserted the "reenactment and conversation that ensued at defendant's residence was not a custodial interrogation, and therefore, there was no requirement for *Miranda* rights."

¶ 7 In October 2020, the matter proceeded to an evidentiary hearing on defendant's motion to suppress. Leandra Tate, an investigator with the Illinois Department of Children and Family Services (DCFS), testified she "was assigned to the investigation when it came in" and met with defendant at the Anna Waters Head Start Preschool to "have a conversation about the reenactment." Although Tate could not recall "word for word," she testified she "basically told [defendant] *** we need to do a reenactment. We do that in all of our own child death cases. It will be a detective, at least myself and her, where it will be videotaped." Tate further testified she told defendant they "need[ed] to do the reenactment so [they could] move forward on the investigation." Tate acknowledged defendant "didn't really want to do it, but *** there was no saying no. She didn't refuse to do it, if that's what you're asking." Defendant "was worried about having to go back into the apartment, and emotionally she was not looking forward to that at all." She did not "want to have to go back in the apartment. Her son passed away there. She was very upset." According to Tate, Decatur police officer Eric Matthews arranged the time and place of the reenactment.

¶ 8 On cross-examination, Tate testified she told defendant the reenactment was

"just a process for DCFS and for criminal investigation that both parties would need the reenactment *** to better understand what happened in her home that night *** so it was best to get this done so we can move forward in the investigation for both DCFS and for criminal."

¶ 9 Hope Taylor, J.C.'s paternal grandmother, testified she was employed as a certified nursing assistant and acted as "a mother figure to [defendant]." Taylor was familiar with defendant's educational upbringing and stated defendant had been enrolled in an "Individualized Education Plan" (IEP) while in high school. Taylor explained that defendant had to have her tests read to her, "[s]he would have unlimited test time, and her tests [were] broken down to where they're more explanatory for her *** where she [could] understand them." Defendant's IEP also included special education classes. Taylor recalled meeting with Tate sometime after J.C.'s death and recalled Tate telling defendant "she would have to do [the reenactment], and that is normal procedure in a child's death." Tate also informed Taylor and defendant the reenactment would be "set up" by Matthews.

¶ 10 Taylor testified the reenactment occurred at defendant's residence on October 17, 2019. Taylor, defendant, and defendant's four-year-old son arrived together. Upon their arrival, Taylor saw "two or three detective cars" and observed Tate, another DCFS caseworker, as well as "Detective Matthews and two other detectives on the porch." Prior to that day, defendant had only returned to pack her belongings "because she didn't want to go back to the house, so she had made arrangements to move out to Bristol Gardens." When Matthews invited everyone inside, Taylor testified he "put his hand out and said, 'I think it's best to stay out.' " Taylor "sat on the porch with [defendant's] son for probably the first 15, 20 minutes" before walking to the park. The pair stayed at the park for "about another 15 minutes" and "walked back up to the house and just stood out waiting for them to come out."

¶ 11 Defendant testified she had been enrolled in an IEP since elementary school due to her difficulties with reading and comprehension. At some point after J.C.'s death, defendant spoke with Matthews over the telephone to set up a time for the reenactment. Matthews explained the reenactment "was standard procedure." Although defendant did not decline to participate in the reenactment, she "didn't feel like [she] had a choice" after her conversation with Tate. On the day of the reenactment, defendant testified she was upset because she "didn't want to replay the moment back in [her] head." However, she acknowledged she made no attempt to terminate the encounter early. She further acknowledged giving the detectives consent to search her cell phone and residence. Upon conclusion of the reenactment, defendant was allowed to leave the residence with Taylor and her other son.

¶ 12 Eric Matthews, a juvenile detective with the Decatur Police Department, testified he was the lead detective in the investigation related to J.C.'s death. Matthews testified the pathologist informed him that no cause of death had been identified following J.C.'s autopsy on October 7, 2019, and the pathologist "requested additional information and further investigation into the incident, including wanting a reenactment done of the incident." Matthews then "scheduled a reenactment with [defendant]," which occurred 10 days later due to Matthews having "difficulty locating a toddler-sized mannequin to be used in the reenactment." During his telephone conversation with defendant, Matthews "explained to her about the request from Dr. Denton to have a reenactment" and "asked her if she would be willing to participate in that and she said that she would." Matthews denied telling defendant she was required to participate in the reenactment.

¶ 13 Shortly before the reenactment took place, Matthews testified he "spoke to [defendant] briefly on the *** front porch." He "asked Hope if she would mind staying outside with the child so that [they] wouldn't have any distractions while *** doing the reenactment inside." Defendant then "opened the locked front door *** and escorted [them] to the bedroom where the death took place." Matthews further testified he "asked Detective Appenzeller to come in order to video record the reenactment ***, and Sergeant Carroll came because it was a death investigation and he's overseeing the investigation." Although the officers carried their badges, they were not uniformed and were instead "wearing just dress shirts and dress pants and shoes." Defendant interacted exclusively with Matthews throughout the reenactment while Appenzeller operated the video camera. "Sergeant Carroll was in and out of the room for the majority of the time *** and Leandra Tate was in the room for most of the time, kind of standing back by the doorway." According to Matthews, none of the officers blocked any entryway or restricted defendant's freedom of movement inside the residence. Matthews could not recall "the other DCFS investigator *** being in the room much at all." Matthews acknowledged he did not advise defendant of her *Miranda* rights at any point before, during, or after the reenactment "[b]ecause she wasn't in custody or under arrest."

¶ 14 On cross-examination, Matthews testified he asked defendant several questions during the reenactment related to who treated J.C. for his breathing problems, who refilled J.C.'s breathing treatment prescription, what defendant was told regarding J.C.'s diagnosis, and when the last time J.C. saw his treating physician. However, Matthews acknowledged asking J.C.'s primary healthcare provider the same questions on October 15, 2019. Matthews claimed he repeated the questions to defendant "[f]or the benefit of the reenactment for Dr. Denton to hear her version of the account," but admitted he "had suspicions" after listening to defendant's 911 call and was attempting to compare answers.

¶ 15 Upon examination by the trial court, Matthews reiterated he conducted the reenactment based on his conversation with Denton and the uncertainty surrounding Denton's initial autopsy findings. Although not conducted in every case involving child deaths, Matthews told the court he had performed "[s]everal" reenactments in the past where there were similar uncertainties as to what occurred.

¶ 16 Following arguments, the trial court denied the motion to suppress. In doing so, the court stated:

> "I am troubled by this process. If you have a child death, and DCFS and the police officers want a reenactment based on comments from a pathologist, boy, there's some issues here. The defendant may well be a suspect.
>
> It seems to me, and that's obviously what Detective Matthews thought, *** somebody should tell the defendant at some point, understand the statements you make during the course of this reenactment may be used against you during the course of a murder investigation or a DCFS investigation. You may want to consult with a lawyer. Understand you don't have to participate in this reenactment, etc. None of that was ever done. And, again, it's troubling, but the question before the Court is not whether I'm troubled, but whether or not I believe this was a custodial interrogation."

¶ 17 In explaining its ruling, the trial court considered the fact defendant "voluntarily agreed to the interview and voluntarily traveled there." She "did not appear to be in any type of emotional distress during the course of the interview" and "appeared to be of average intelligence." The court noted defendant was "25, held a job, graduated from high school and took care of two

children by herself in her own home. She spoke well during the course of the interview." Although the court "believe[d] she may have some type of reading disability," it did not find "any type of intelligence disability." The court further noted the reenactment "occurred at the defendant's residence with her mother figure really right outside the residence," and the "interview itself was about 31 minutes." The court did not have "any problem with the police officer keeping the mom figure outside of the residence because the other child was there." The court also found the mood of the reenactment was "not accusatory" and "low key." Despite the presence of three police officers, "[t]here was no showing of force during the course of the interview, no guns displayed, no badges displayed. *** There [were] no physical restraints, no handcuffs, no being told you can't leave the room or residence or anything of that nature." The court stated, "it was only *** Matthews that was conducting the questioning," and he was "very low key and polite as he tends to be." He "asked straightforward, albeit not forced questions."

¶ 18 Finally, the court noted defendant "was allowed to leave the house at the conclusion of the interview, was not arrested until *** six days later, and *** she also voluntarily agreed to a consent search of her phone and the residence."

¶ 19 B. Jury Trial

¶ 20 1. *Joseph Sawyer*

¶ 21 In June 2021, the trial court conducted defendant's jury trial. Decatur police officer Joseph Sawyer testified he was dispatched to defendant's residence in the early morning on October 7, 2019, after a 911 call came in related to "a young child there that was no longer breathing." When Sawyer arrived, he observed defendant and Taylor seated on a sofa holding J.C. The minor was "unresponsive. He was cold to the touch. *** And he had *** foam coming out of one of his nostrils." Defendant and Taylor "appeared as if they were upset," and defendant was crying. When asked whether he had any other observations at that point, Sawyer stated, "when I was on scene, [defendant] appeared upset," but "it seemed that it was forced." Sawyer further stated, "she mimicked, in my opinion, the sound of crying ***. It was clear with Hope, when she was holding the child, that she [was] upset and crying and I saw tears, with [defendant] that wasn't the case."

¶ 22 After checking "for any signs of forced entry, foul play, anything like that," Sawyer "took [defendant] into another room and began [his] initial interview with her." Defendant told Sawyer she "put [J.C.] in bed at about 8 p.m. that evening. *** [S]he explained that she was going to be getting up or she had planned on getting up at midnight and at 3 a.m. to give him a breathing treatment *** which was a nebulizer Albuterol." Defendant explained, when J.C. was "first born[,] he had *** pneumonia a couple times. And when it gets cold outside he require[d] a breathing treatment in the evening." Defendant stated she had been giving J.C. treatments twice, each night, for the past four days "at midnight and two in the morning." She also told Sawyer she attempted "[c]hest compressions and mouth to mouth resuscitation" on J.C. that morning. Sawyer asked defendant where she kept the albuterol, and she told him "it was kept in *** the closet hallway in between their bedrooms in the apartment." When Sawyer asked defendant if he could see the albuterol, "she found a box, but it was empty."

¶ 23 2. *Justin Closen*

¶ 24 Decatur police officer Justin Closen testified he was Sawyer's backup officer on October 7, 2019. Closen testified he searched defendant's bathroom trash can that morning because he was "looking for evidence of a breathing treatment um—pieces to a nebulizer, *** small vials of Albuterol that would [be] administered via a nebulizer if a breathing treatment was administered at some point *** over the course of the evening." Closen also inspected defendant's kitchen garbage can, which was nearly full, for "anything associated with the administration of a breathing treatment." However, Closen found no empty vials of albuterol or any pieces of evidence that would have been associated with a nebulizer. Closen further testified he performed a protective sweep of defendant's residence, checking "specific areas, closets, things of that nature, where normally a *** nebulizer, things of that nature would have been kept," and was unable to locate any vials of albuterol.

¶ 25 3. *James Calloway*

¶ 26 Decatur police officer James Calloway testified he extracted the contents of defendant's iPhone using "GrayKey and Cellebrite" software. Calloway explained he then "used [the] Cellebrite physical analyzer software to analyze that data" and compared the contents of the extraction with "the actual phone to see that data on it was correct." Calloway also identified People's Exhibit L as "the Google returns for the search warrant [he] did for the email account of [defendant]." Based on those results, a search of the phrase, "how do you suffocate," was conducted at 8:04 a.m. on October 6, 2019. Although Calloway could not determine whether any hyperlinks were followed, he verified the results were accurate by locating the same search within the contents of defendant's phone extraction.

¶ 27 4. *Scott Denton*

¶ 28 Dr. Scott Denton, a forensic pathologist with the McLean County Coroner's office, testified as an expert in forensic pathology. He identified People's Exhibit C as the autopsy and X-ray photographs taken over the course of his examination of J.C. When Denton received J.C.'s body, he "noted [J.C.] was wearing a diaper that was fairly clean *** so, it had been recently placed on his body." Denton also noticed J.C. was "relatively large" for a 19-month-old, "appeared very healthy, well developed, [and] well nourished. He had no dehydration, no evidence of disease. And then [Denton] noticed he had evidence of trauma on his body."

¶ 29 At the outset of his examination of J.C., Denton "started from head to toe." Denton observed "edema foam" coming out of J.C.'s nose and "more edema foam *** coming out his mouth." Denton testified, "when [*sic*] see this, you know, you're looking at some kind of asphyxial death." Denton explained asphyxia "encompasses a large number of conditions. Anything that will block the nose or mouth to prevent you from breathing oxygen, something that will obstruct the airway, such as food or an injury to the neck, or anything like that." However, there were "lots of things [Denton] ruled out," such as manual strangulation, as there were "no finger marks or bruising on [J.C.'s] neck." Denton "excluded pinching of the nose and pushing of the mouth together." He also "excluded blunt trauma" and looked for signs of drowning but "did not see any evidence of that."

¶ 30 The "most notable external injuries" Denton observed were "petechial hemorrhages or petechiae," which Denton identified as the "fine red dots on the skin where capillaries have burst on [J.C.'s] face, his eyelids, *** and his neck." Denton explained petechiae are "a

pressure phenomenon" where "the veins are compressed, but the arteries still pump. So the blood can't get back to the heart." Denton further explained, "if you compress the veins ***," they "start bursting and it's usually in the skin and certain conditions." Denton testified "the petechiae were very prominent in [J.C.'s] eyelids ****. They're prominent on both sides of the face and *** very prominent on the neck." Denton also observed "pressure blanching" on J.C.'s nose, which "indicate[d] that something was pushing on his nose and also on his chin." Given the "localized pressure" and absence of petechiae on J.C.'s chest and abdomen, Denton determined a child the same age as J.C.'s four-year-old sibling "would not have the strength to do this."

¶ 31 With respect to his internal examination of J.C., Denton observed "evidence of compression or impaired blood return to his heart." Denton noted J.C. "had petechiae in his heart and his thymus gland up in the chest area," a "very prominent" amount of edema foam in his lungs, and "swelling of his brain," which Denton testified were "very indicative of asphyxia and some kind of compression to his face."

¶ 32 After being informed of J.C.'s reported breathing problems, Denton "tested for influenza A and B," which came back negative. Denton stated, "I looked at the airways myself grossly with my eye. They were open. They were—there was nothing blocking [J.C.'s] airways. I did microscopic biopsies of all his organs including the airways, the lungs. I looked for microscopic asthma, microscopic virus infection *** and I saw none." Denton found "no evidence of allergic reaction." Denton also "submitted blood for toxicology analysis for drugs and poisons," which returned negative results. Finally, Denton "did a bacteria culture to make sure there was no bacteria in [J.C.'s] lungs or bacterial infection." Denton testified he "sent that to the microbiology lab and that was negative," and the following colloquy ensued:

> "And then *** I told everybody that I was doing more or further studies. And I told everybody it was gonna [*sic*] be pending further studies and investigation, but it looked he was—this was an asphyxia death possible suffocation, smothering, um—I left it open. Possibly strangulation. I didn't have all the information.
>
> And then I asked that they perform something called a child death investigation, which is standard in child deaths. That—that investigators whether it's the coroner, or a medical examiner, or police will go talk to the person at the home or person's at the home and *** try to find out what happened and correlate the autopsy findings."

When asked by the prosecutor if he "believe[d] that should be done in all child death cases," Denton responded,

> "That is standard practice, yes. In all child or infant deaths there is something called a doll reenactment, which is *** very emotional. But you actually take a doll and you ask the person to place the infant or child in the position they were found. First, they were placed and then how they were found. And you do that in the environment. And you try to do it as soon as you can after *** the death."

¶ 33 After reviewing defendant's video-recorded reenactment, Denton testified, "the doll was placed face down on a bed. There was a comforter and there was a fitted bedsheet. And it looked like *** the corner of the fitted bedsheet was over the head and then the comforter was over [the] body and [J.C.] was face down ***." According to Denton, the "most important" piece of information given was the possibility that J.C. became entangled in his bedsheets. However, Denton concluded it "did not account for [J.C.'s] death. They could not have killed him in that position that was shown on the video," because Denton had "never heard of a 19

month old getting entangled and then dying in bed sheets, especially a large 19 month [old], who's at 75th percentile." Despite being unable to determine the manner in which J.C. suffocated, "based on everything [he] put together," Denton opined J.C.'s cause of death was "asphyxia due to smothering and compression of the neck."

¶ 34 5. *Eric Matthews*

¶ 35 After being assigned to defendant's case, Matthews testified he "read through the initial police reports and then the preliminary autopsy report." He also "obtained the copy of [defendant's] 911 call recording from [the] dispatch center," spoke with Sawyer regarding his observations, and "spoke with [J.C.'s] primary care physician, Angie King, about his medical history." Thereafter, Matthews "obtained a toddler size mannequin for use in the reenactment with [defendant]." He then "contacted her by phone and asked her to perform the reenactment at her apartment and she agreed." Following the reenactment, Matthews conducted a search of the home looking for albuterol. Matthews "looked in the closet where [he] was told that [defendant] normally keeps them. [He] looked in the garbage cans. Looked in all of the cabinets, the rooms, drawers." However, he "wasn't able to find it anywhere in the apartment."

¶ 36 On cross-examination, Matthews acknowledged having suspicions after listening to defendant's 911 call. Defense counsel then inquired:

> "Q. Okay. Where were indicators of guilt that you listed when you listened to 911? Why did you not think she was being sincere in the 911 call?
>
> A. I had attended a multi day training on 911 phone call analysis. And in this training um—the instructors, who had reviewed thousands of 911 calls in different cases across county, they had analyzed different statements, and things that are said on 911 calls, that would be indicators of guilt.
>
> In this particular call I noted that there were several. Um—for instance, she never once asked for help to the 911 dispatchers. It was almost a minute before she even told the dispatchers what she needed and what was going on."

¶ 37 6. *Recorded Phone Calls*

¶ 38 During defendant's trial, the State played several clips from defendant's recorded phone calls with J.C.'s incarcerated father, Shawneen Comage, largely consisting of defendant describing her financial problems and Comage requesting money. On a phone call in June 2019, defendant said she was "trying to come up with something" but was unable to find employment due her lack of work experience. Defendant's supplemental security income (SSI) was going to be "cut *** off" starting in August. Defendant then listed "all kinds of bills" totaling several hundred dollars she did not know how she was going to pay before shouting at J.C.'s older sibling to "close that f*** window, you p*** me off."

¶ 39 On August 1, 2019, defendant stated her bank account was "overdrawn" because "Rent-A-Center was due." During the phone call, defendant told J.C., "you going to f*** yourself up" as a child cried in the background. Defendant was attempting to get approved for a loan to cover her monthly bills and expenses because "this s*** ain't going to cut it." Comage repeatedly requested defendant send him $200.

¶ 40 In a subsequent phone call on August 9, 2019, defendant told Comage she was "stressing out" and was going to quit her job because her shifts were too short and her paychecks were

too small. Defendant complained her bills were "starting to get higher than usual," and she would be losing LINK benefits in September. Defendant was uncertain how she was going to repay her $1000 loan, of which she sent Comage a $400 portion. Defendant still owed $1200 for her furniture and, despite getting "caught up" on most of her bills, defendant was unable to pay her bills for power and AT&T. Later, on August 26, 2019, Comage stated, "you know what I need," and defendant confirmed he was asking for money. Comage then told defendant to send him $60 and overdraft her account "as soon as [she got] to the house."

¶ 41 During a September 3, 2019 phone call, defendant again stated she had been "stressing" about how she was going to pay for her bills. Defendant listed bills totaling several hundred dollars which remained unpaid, including J.C.'s life insurance premium. Comage stated he could send funds to cover the insurance premium because "that's the main thing that needs to be paid." Defendant said she would "figure something out." Later, on September 12, 2019, defendant told Comage she "literally broke down" due to her unpaid bills. Defendant stated she was one month behind and was unable pay rent without being employed.

¶ 42 Finally, on October 2, 2019, while a child cried in the background, defendant said she threw one of her children's toys away because "we haven't had TV in over 4 days." Comage responded, "good." Defendant added that she told the child, "I don't got no TV to watch, you ain't going to have no toys to play with," and he was not going to get anything other than cake for his birthday. Comage asked when defendant was going to get her next "big check." Comage requested "$100 now and $100 later" so he could buy an "MP3 player" because he got bored watching the same programs on television whenever the prison locked down. Defendant's employer had recently "switched [her] to fulltime," but she had not paid any bills for October before exclaiming that one of her children was "being annoying as f***."

¶ 43 7. *Angela King*

¶ 44 Angela King, a pediatric nurse practitioner at Crossings Healthcare, testified she had been J.C.'s primary healthcare provider since September 2018. King testified J.C. "had RSV bronchiolitis *** in 2018. And subsequently had some viral infections that caused a little bronchiolitis as well during that year." King testified J.C. was last treated for anything breathing-related in December 2018, and he received no further refills of his albuterol prescription after January 2019. In March 2019, J.C. was admitted to Decatur Memorial Hospital after being diagnosed with bronchiolitis. On September 9, 2019, King examined J.C. to address "some atopic dermatitis so, a rash. And *** a sore throat with a negative rapid strep test." Defendant also "complained that [J.C.] had a *** little bit of a cough, but no runny or stuffy nose." However, King listened to J.C.'s lungs and they were "clear." King also "did not see any record of a phone call" from defendant on October 4, 2019.

¶ 45 8. *Patrick Delatte*

¶ 46 Patrick Delatte, an American Family Insurance agent, testified he issued defendant a $25,000 "whole life insurance policy" for J.C. in December 2018. Delatte identified People's Exhibit V as "the life insurance [policy] on [J.C.]," which included the policy's specifications and disclosures. The policy disclosed the total amount of coverage was $25,000, and defendant was obligated to pay $34.54 each month for 10 years. In order to claim the death benefit, the policy provided the death benefit would be paid to the insured's beneficiary after receiving "all claim requirements legally necessary in order to pay the claim," which included, "[p]roof of

death of the insured." The policy defined satisfactory proof of death as "a final certified death certificate or other lawful evidence providing equivalent information that is acceptable to [American Family Insurance]." Additionally, the policy calculated the death benefit as the amount of insurance, plus the cash value of any existing dividend accumulation or face value of any paid-up additions, minus any outstanding loan balances and past due premiums. No loans could be drawn against the policy until 2021, and Delatte testified there were no lapses in J.C.'s coverage. Delatte testified defendant submitted a "life insurance claim" related to J.C.'s death on October 7, 2019. During cross-examination, Delatte testified, "If the insured on the policy were to pass away, prior to the ten years, it would be paid out. The full 25,000." However, Delatte stated there is a two-year "contestability clause" in all life insurance policies. Delatte explained, "if a death claimed [*sic*] is turned in, in the first two years, the company *** could look in and figure out why *** the insured passed away to make sure that it was natural causes."

¶ 47 9. *Leandra Tate*

¶ 48 Leandra Tate, a child welfare specialist with DCFS, testified she met with defendant, Taylor, and defendant's four-year-old son shortly after J.C.'s death and "put a safety plan in place." Tate stated her responsibilities as a child welfare specialist were to "go out, meet with the parents, interview the children separately," and work with the family "to try to make sure that the children are safe." However, Tate explained, "If I find out they're not [safe], then sometimes we put in safety plans or if in extreme cases or cases that have been going like on for a while *** then I remove children from the home."

¶ 49 10. *Defendant*

¶ 50 Defendant testified on her own behalf and stated she was 27 years old and currently residing in Decatur, Illinois. Defendant was diagnosed with attention-deficit/hyperactivity disorder when she was five years old and attended special education classes "through college," due to her having difficulties with reading and comprehension. Defendant stated, "I had to go into a separate room to get my test read to me ***. Because I couldn't concentrate around a lot of people."

¶ 51 Defendant stated she bought socks for J.C. and his sibling at Walmart on October 6, 2019. After returning home, defendant fed the children dinner and then "gave them a bath." Defendant "let them play and watch TV for a little bit. And about 8:30 [she] laid them down for bed." Defendant set alarms "to give *** [J.C.] a breathing treatment at twelve o'clock a.m. and three o'clock a.m." She also "put the albuterol medicine in the machine to get it prepared for *** the twelve o'clock *** breathing treatment." J.C.'s albuterol had been prescribed "[a]s needed," and defendant testified she had been administering albuterol treatments twice each night for the last three or four nights because J.C. was "congested" and had a "runny nose." According to defendant, she discarded the empty vials of albuterol in her kitchen trash can, which she claimed she emptied "the evening before."

¶ 52 Defendant missed her 12 a.m. alarm on October 7, 2019, because she "overslept." She eventually woke up at 3 a.m. and "went in [J.C.'s] room to give him a breathing treatment." Defendant "saw him laying in the bed," facedown, with his left hand pointed up and his right arm pointed down, which was how J.C. ordinarily slept. When defendant picked J.C. up, she noticed he "had foam coming from his nose." Defendant testified she did not immediately call

911 because J.C. was "really stiff" and she "knew [J.C.] was already gone." Defendant also did not attempt CPR as J.C. was "cold and hard." Instead, defendant called Taylor at approximately 3:17 a.m., "told her that [J.C.] wasn't breathing and *** hung up the phone and immediately called 911" at Taylor's suggestion. When asked what she did during the 17 minutes between the time she woke up and called Taylor, defendant responded, "Nothing."

¶ 53 After the Macon County coroner retrieved J.C.'s body, defendant went with Taylor back to her house and spoke with other family members about how J.C. "could have passed." One of the possibilities discussed was suffocation, so defendant "Googled how do you suffocate." However, defendant claimed she learned "[n]othing" because she "didn't click on the link." Defendant denied making the search the day before J.C.'s death on October 6, 2019.

¶ 54 Defendant was also concerned about paying for J.C.'s funeral. Shortly after J.C.s death, defendant called Delatte and asked about using J.C.'s life insurance policy to pay for his funeral. Delatte told her "he was going to send a packet in the mail." Dellate did not tell defendant she needed J.C.'s death certificate to file a claim and defendant testified she "didn't know [she] needed one." Defendant then went to the funeral home where her "distant cousin" worked to make arrangements for J.C.'s funeral and "learned that anybody under the age of 15 *** is free." After receiving the insurance packet from Dellate, defendant "put it on [her] dresser" and never opened it as J.C.'s funeral "was already paid for."

¶ 55 Approximately 10 days after J.C.'s death, defendant "got a call from Detective Matthews." Defendant testified Matthews "asked [her] to *** meet him and Leandra Tate at [her] house to do the reenactment." Defendant agreed but "didn't really feel up to it" at the time of the reenactment. Following the reenactment, defendant gave Matthews permission to search her residence and cell phone because she "didn't have nothing to hide."

¶ 56 On cross-examination, defendant testified she prioritized paying J.C.'s life insurance premium over other bills because it was "an important bill" and "due to [her] child." She also acknowledged having only one remaining vial of albuterol the night before J.C.'s death, which she preloaded in the nebulizer for J.C.'s 12 a.m. treatment. When asked by the prosecutor why it was necessary to set a second alarm at 3 a.m. if she would have run out of medicine, defendant responded, "I mean, I just set it—just—that—it was already set on my phone *** from the previous days."

¶ 57 11. *Closing Arguments*

¶ 58 During its closing argument, the State discussed how the evidence satisfied the elements of each offense. The State also highlighted Denton's testimony, stating, "Was another expert called to refute his expert opinion? *** No. He is [the] sole unrefuted opinion *** given there." The State asserted that Denton excluded allergic reactions, the possibility J.C. got something caught in his throat, and "the idea of breathing problems." The State remarked, "The evidence doesn't support that. This is a child whose lungs were clear." The State also pointed out the inconsistencies in defendant's version of events, noting that, in her testimony, she did not attempt to resuscitate J.C., despite telling Sawyer she had done so. The State also highlighted Calloway's extraction of the contents of defendant's phone and argued, "Google tells us that October 6th, 2019, 8:05 a.m. [defendant's] phone, searched, in [defendant's] account *** for how do you suffocate." Further, the prosecutor suggested defendant was "desperate" due to her financial difficulties and argued J.C.'s life insurance "answers the problems, solves it.

$25,000. Gets the bill collectors off. It's more money than is necessary to pay the funeral on top of it." The State continued:

> "After you have month after month, after month put that as priority number one and you're not gonna [*sic*] collect? Why didn't she fill the paperwork out? She needed a death certificate and didn't get on[e] *** with the murder investigation going on. That's why she doesn't open the package ***.
>
> She can't fill the package out 'cause [*sic*] she doesn't have all the documentation. She can't make the claim."

Ultimately, the State requested the jury "just do what the evidence tells you to do," and if the State had proven defendant guilty beyond a reasonable doubt, "sign the verdict of guilty."

¶ 59 In his closing argument, defense counsel vigorously attacked the State's case as circumstantial and asserted he was not "disputing what Dr. Denton said. At no time throughout the course of this trial did we try to introduce any sort of evidence that indicated that [J.C.] did not die from asphyxiation. Absolutely he died from asphyxiation. He suffocated to death. We're not denying that." Counsel stated, "People suffocate. Kids suffocate. Kids hang themselves on blinds. They suffocate on their mattresses. *** But just because it happens doesn't mean we need to point the finger at somebody." Counsel also asserted J.C.'s funeral was paid for and there was "no indication whatsoever that [defendant] had any reason to murder her son. *** It's not about finances."

¶ 60 Further, counsel suggested that authorities perceived defendant as "public enemy number one," and Matthews "considered [defendant] to be a person of interest" as soon as he listened to the 911 call because "she wasn't being emotional enough." Counsel argued, "from that day forward it was [defendant] that did it," and he asked the jury, "How is that an investigation? *** How is that anything more than Detective Matthews'[s] opinion, his theory, his hypothesis, about what occurred?" In rebuffing Matthews's suspicions regarding "why it took a minute" before defendant got "anything out to the dispatcher," counsel argued, "she couldn't gather herself." Counsel also attacked Matthews's conclusion "a guilty indicator was that [defendant] didn't ask for help," by suggesting defendant "knew that [J.C.] was deceased. *** There's no reason for her to ask for help." Further, counsel challenged Matthews's characterization of the reenactment as "just standard procedure," asserting,

> "if this is just something you're trying to figure out, if [defendant is] not a suspect, then why do you bring these consents with you? *** The consent to search her home, the consent to search her phone, is that something that everyone carries around with them, detectives? *** I doubt it."

¶ 61 Ultimately, defense counsel urged the jury to "[u]se the evidence that you have to determine whether or not [defendant] is guilty of first degree murder. Don't take anyone's word for it." Counsel remarked, "You cannot convict an individual for first degree murder because of Detective Mathews['s] gut instinct," and he further argued, "We have a theory of Detective Matthews," but "[t]heories do not lead to convictions. Show the evidence. There is none."

¶ 62 Following evidence and argument, and prior to deliberations, the trial court provided instructions to the jury, which included instructions on judging the credibility of the evidence presented. The court also informed the jury that closing arguments were not to be considered evidence. Ultimately, the jury found defendant guilty of first degree murder, as alleged in

count I.

¶ 63 C. Posttrial Motion and Sentencing

¶ 64 In July 2021, defendant filed a motion for new trial or, alternatively, for a judgment notwithstanding the verdict. Defendant alleged, "the State failed to prove [her] guilty beyond a reasonable doubt at trial," and the trial court "erred in not allowing Leandra Tate *** to testify about any opinions that she may have or had relevant to this case." The court ultimately denied defendant's motion. Thereafter, the court sentenced defendant to 33 years' imprisonment.

¶ 65 This appeal followed.

¶ 66 II. ANALYSIS

¶ 67 On appeal, defendant argues (1) the trial court erred in denying her motion to suppress evidence where "no detective ever admonished [her] as to her Fifth Amendment rights prior to the re-enactment" and (2) she was denied the effective assistance of counsel. We address each of defendant's arguments in turn.

¶ 68 A. Custody for *Miranda* Purposes

¶ 69 Defendant first argues the trial court erred in denying her motion to suppress evidence because "a reasonable person in [defendant]'s position would not have felt free to decline to participate in the re-enactment, and she was thus in 'custody' under the Fifth Amendment." Despite defendant's failure to raise this issue in her posttrial motion, she contends her procedural default should be excused and her claim considered under the plain-error doctrine.

¶ 70 Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court. Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). The doctrine, however, serves as a narrow and limited exception to the general rule of procedural default. *People v. Ahlers*, 402 Ill. App. 3d 726, 733, 931 N.E.2d 1249, 1255 (2010). This court may review unpreserved issues under the plain-error doctrine, which we have explained as follows:

> "The plain-error doctrine allows a court to disregard a defendant's forfeiture and consider unpreserved error in two instances:
>
> '(1) where a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error and (2) where a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process.' " *People v. Matthews*, 2017 IL App (4th) 150911, ¶ 16, 93 N.E.3d 597 (quoting *People v. Belknap*, 2014 IL 117094, ¶ 48, 23 N.E.3d 325).

¶ 71 Defendant asserts her contention is cognizable under the first prong. "Under the first prong of plain-error analysis, '[w]hat makes an error prejudicial is the fact that it occurred in a close case where its impact on the result was potentially dispositive.' " *People v. Stevens*, 2018 IL App (4th) 160138, ¶ 71, 115 N.E.3d 1207 (quoting *People v. Sebby*, 2017 IL 119445, ¶ 68, 89 N.E.3d 675). "Thus, for purposes of the first prong, the claimed error—substantial or not—has to be *of such a nature* that it might have tipped the scales against the defendant." (Emphasis in original.) *People v. Ely*, 2018 IL App (4th) 150906, ¶ 18, 99 N.E.3d 566. "In determining

whether the evidence adduced at trial was close, a reviewing court must evaluate the totality of the evidence and conduct a qualitative, commonsense assessment of it within the context of the case." *Sebby*, 2017 IL 119445, ¶ 53.

¶ 72 "Under both prongs of the plain-error analysis, the burden of persuasion remains with the defendant. [Citation.] As the first step in the analysis, we must determine whether any error occurred at all." *Matthews*, 2017 IL App (4th) 150911, ¶ 17. "If error did occur, we then consider whether either prong of the plain-error doctrine has been satisfied." *People v. Sykes*, 2012 IL App (4th) 111110, ¶ 31, 972 N.E.2d 1272.

¶ 73 The fifth amendment to the United States constitution states no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const., amend. V. In *Miranda*, 384 U.S. at 444, the United States Supreme Court held that, to ensure the fifth amendment right against self-incrimination is protected, an accused subject to a custodial interrogation must be informed by the police that he has the right to remain silent, any statement he makes may be used as evidence against him, and he has the right to an attorney, either retained or appointed. Custodial interrogation means "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444. Accordingly, "[t]he finding of custody is essential because the preinterrogation warnings required by *Miranda* are intended to assure that any inculpatory statement made by a defendant is not simply the product of the compulsion inherent in custodial surroundings." (Internal quotation marks omitted.) *People v. Wyma*, 2020 IL App (1st) 170786, ¶ 56, 167 N.E.3d 196.

¶ 74 To determine whether a person is in custody, thus requiring *Miranda* warnings prior to questioning, courts engage in a two-part inquiry. First, courts consider the circumstances surrounding the interrogation. *People v. Coleman*, 2015 IL App (4th) 140730, ¶ 27, 37 N.E.3d 360. Second, a court should determine whether, given those circumstances, a reasonable person, innocent of any crime, would have felt he or she could not terminate the interrogation and leave. *Coleman*, 2015 IL App (4th) 140730, ¶ 27.

> "[Our supreme] court has identified several factors relevant to the first inquiry: '(1) the location, time, length, mood, and mode of the questioning; (2) the number of police officers present during the interrogation; (3) the presence or absence of family and friends of the individual; (4) any indicia of a formal arrest procedure, such as the show of weapons or force, physical restraint, booking or fingerprinting; (5) the manner by which the individual arrived at the place of questioning; and (6) the age, intelligence, and mental makeup of the accused.' " *In re D.L.H.*, 2015 IL 117341, ¶ 51, 32 N.E.3d 1075 (quoting *People v. Slater*, 228 Ill. 2d 137, 150, 886 N.E.2d 986, 994 (2008)).

In addition to those factors, in some situations, an officer's beliefs as to the defendant's guilt may be considered. *Slater*, 228 Ill. 2d at 153. This is so, however, only if those beliefs are conveyed, by word or deed, to the person being questioned. *Slater*, 228 Ill. 2d at 153. In turn, such disclosed beliefs would be relevant only to the extent they would affect how a reasonable person in the position of the suspect would assess the extent of his freedom of action. *Slater*, 228 Ill. 2d at 153. Even if such circumstance exists, it is to be considered only as one of many factors that bear on the question of whether the individual was in custody, and not the sole determinant of that issue. *Slater*, 228 Ill. 2d at 153.

¶ 75 When a defendant moves to suppress evidence claiming a violation of *Miranda* rights, we apply a two-part test. *People v. Kadow*, 2021 IL App (4th) 190103, ¶ 22, 182 N.E.3d 814. We

review the trial court's factual findings under the deferential manifest-weight-of-the-evidence standard, rejecting them only if they are unreasonable, arbitrary, or contrary to the evidence. *People v. Woods*, 2013 IL App (4th) 120372, ¶ 20, 995 N.E.2d 539. "However, a court of review is permitted to undertake its own assessment of the facts and draw its own conclusions when deciding what relief, if any, should be granted." *Kadow*, 2021 IL App (4th) 190103, ¶ 22. Although we give substantial deference to the factual findings of the trial court, "[w]e remain free *** to decide the legal effect of those facts, and we review *de novo* the trial court's ultimate ruling on the motion." *People v. Lindsey*, 2020 IL 124289, ¶ 14, 181 N.E.3d 1.

¶ 76 Defendant contends the totality of the circumstances "demonstrates that [she] was in Fifth Amendment 'custody' when she was subjected to interrogation during the video-recorded re-enactment." As to the first factor, the mood and mode of the questioning was predominately cordial, relaxed, and nonconfrontational. The length of the questioning does not strike us as excessive, as the reenactment lasted for a relatively short duration—approximately 31 minutes. See *In re Tyler G.*, 407 Ill. App. 3d 1089, 1093, 947 N.E.2d 772, 775 (2010) (factors supporting a finding the defendant was not in custody included the defendant's interrogation over a "limited duration" of 30 minutes). It is noteworthy that the reenactment itself lasted only about five minutes, with the remainder constituting a criminal interrogation. However, that fact alone does not transform the nature of the interaction. Although we note the reenactment occurred in the same room wherein J.C. died, which likely would have presented a more distressing atmosphere, there was no evidence the officers blocked any entryway or restricted defendant's freedom of movement inside the residence. Defendant also did not appear to be in any type of emotional distress over the course of the reenactment, and under the current state of the law, without some means of gauging the psychological impact of the location on the defendant, we are not in a position to speculate. See *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (stating, "a noncustodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes *** the questioning took place in a 'coercive environment' ").

¶ 77 As for the number of officers, there were three detectives in the room. However, there is no evidence they converged on defendant as a group. More importantly, defendant interacted exclusively with Matthews during this short session, and there was no evidence the investigators harassed her or raised their voices. One was operating the video equipment, and one was in and out of the room. That is not an excessive number for such an encounter and does not indicate defendant was in custody. See *People v. Beltran*, 2011 IL App (2d) 090856, ¶ 42, 956 N.E.2d 1021 (one factor in finding of no custody was, although four officers were present during questioning, only two asked questions and one of these asked the majority).

¶ 78 Defendant was alone with the investigators during the reenactment and, even though the reenactment "occurred *** with her mother figure really right outside the residence," that certainly supports a finding of custody. Matthews may well have had justifiable reasons for wanting defendant to participate in the reenactment alone when he "asked Hope if she would mind staying outside with the child so that [they] wouldn't have any distractions while *** doing the reenactment inside." However, the fact defendant was alone with the investigators is evidence of custody. See *People v. Vasquez*, 393 Ill. App. 3d 185, 190, 913 N.E.2d 60 (2009) (police asking the defendant's parents to leave the room so they could question the defendant was a factor suggesting the defendant was in custody); see also *United States v. Griffin*, 922 F.2d 1343, 1352 (8th Cir.1990) ("Officers diminish the public character of, and assert their

dominion over, an interrogation site by removing a suspect from the presence of third persons who could lend moral support.").

¶ 79 Next, there was no indicia of formal arrest procedures. There was no evidence of any show of weapons or force, any physical restraint, or any booking or fingerprinting. See *Slater*, 228 Ill. 2d at 156 (no indicia of formal arrest existed where, during the questioning of the defendant, there was no evidence of "a show of force or weapons, physical restraint, booking, or fingerprinting"). The investigators wore civilian clothes. Despite carrying holstered sidearms, the fact the detectives were merely armed does not bear on the question of custody. See *Slater*, 228 Ill. 2d at 156-57 (finding no show of force or any indicia of formal arrest procedures where the officers were dressed in plainclothes, despite carrying holstered weapons).

¶ 80 As for the manner in which defendant arrived at the reenactment, she did so of her own volition—albeit reluctantly—as she drove to her residence with Taylor. See *Slater*, 228 Ill. 2d at 154 ("Defendant's voluntary arrival at the [place of questioning] by means of her own transportation is distinguishable from a situation in which a defendant is transported to and from the place of [questioning] by law enforcement officers and has no other means of egress from that location."). Defendant claimed she "didn't feel like [she] had a choice" subsequent to her conversation with Tate—who, while speaking with the authority of DCFS and power to remove defendant's other son from her home, informed defendant she "need[ed] to do the reenactment so [they could] move forward on the investigation." Thus, defendant did not decline to participate. Further, defendant agreed over the phone to meet with Matthews at her residence. Matthews denied telling defendant she was required to participate in the reenactment, and we must presume the trial court credited his testimony when it found this factor favored a finding that defendant was not in custody. See *People v. Winters*, 97 Ill. 2d 151, 158, 454 N.E.2d 299, 303 (1983). We must defer to that finding. See *Woods*, 2013 IL App (4th) 120372, ¶ 20 (trial court's findings of fact on the issue of custody will not be disturbed unless against the manifest weight of the evidence).

¶ 81 Defendant's age, intelligence, and mental makeup do not show she was in custody. Defendant was 27 years old, was a high school graduate, and attended some college. Despite having an IEP and attending special education classes while in school, defendant appeared to have no difficulty communicating with anyone during the reenactment. There was little outward indication she is developmentally delayed. The defendant's deficits appear to be related more to reading comprehension, although we have no way to assess that from a video and cold trial transcript. The evidence also showed defendant has two prior felony convictions and has dealt with DCFS in the past. Defendant spoke coherently with Matthews, engaged him in conversation, and had no apparent communication difficulties. She demonstrated a reasonable degree of intellect during her testimony and appeared to have all of her faculties. There was nothing about her age, intelligence, or mental makeup that would support a finding of custody.

¶ 82 That brings us to the last inquiry as to custody, whether the detectives conveyed to defendant they believed she was guilty. There is no evidence detectives may have related their belief of defendant's potential culpability to her. Further, even if the detectives expressed some belief she was guilty, that is only one of many factors we are to consider. When weighed against the number of factors indicating a lack of custodial circumstances, it is not sufficient to warrant a conclusion defendant was in custody during the reenactment. Even defendant did not contend she believed herself to be in custody, which would also be relevant to any *Miranda*

custody analysis. See *People v. Urban*, 196 Ill. App. 3d 310, 314, 553 N.E.2d 740, 742 (1990) (finding the State's contention the defendant was free to leave at any time unrebutted by defendant).

¶ 83 Having examined and weighed the various factors, we objectively determine, under the facts of this case, a reasonable person innocent of any crime would have believed she could terminate the encounter and leave. See *Slater*, 228 Ill. 2d at 150. Thus, the trial court correctly ruled defendant was not in custody and the investigators were not required to have given her *Miranda* warnings. Having so found, we are troubled—as was the trial court—by a number of facts surrounding the conduct of this supposed "need" for a reenactment. First, there was no clear explanation ever given, or tested, through cross-examination for why a forensic pathologist, who is rarely able to rely on a "reenactment" before determining a cause of death, would need one if it happens to be a child death. More importantly, it appeared from the testimony of Dr. Denton that he had, in fact, made a cause of death determination but merely had not concluded by what instrumentality or actor it had occurred. Neither of those things are relevant to the medical question before him and instead fall within the scope of a criminal investigation. A skeptic might question whether the reenactment was medically necessary or simply a way to assist a criminal investigation.

¶ 84 Next, given that child deaths have both criminal and social welfare implications, "DCFS and the State's Attorney may naturally share some involvement in a particular case." *In re C.J.*, 166 Ill. 2d 264, 270, 652 N.E.2d 315, 318 (1995). The fact DCFS first told defendant she had to participate in the reenactment as part of the DCFS investigation as well as the criminal investigation is equally troubling since defendant, already familiar with the workings of DCFS, knew they had the power to remove her other child from her custody if she failed to cooperate—a fact which, in itself, seems somewhat coercive. See *People v. Kerner*, 183 Ill. App. 3d 99, 104, 538 N.E.2d 1123, 1125 (1989) (finding DCFS was acting as a " 'conduit for information elicited from [the] defendant and used by the authorities in the prosecution of [the] defendant' " when the investigator questioned the defendant about allegations of sexual abuse, so that *Miranda* warnings were required (quoting *People v. Baugh*, 19 Ill. App. 3d 448, 451, 311 N.E.2d 607, 609 (1974))). Further, by doing so, DCFS appeared to be working effectively as an agent of the police, and one wonders whether this was by coincidence or design. See *C.J.*, 166 Ill. 2d at 270 (stating, "where DCFS acts at the behest of and in tandem with the State's Attorney, with the intent and purpose of assisting in the prosecutorial effort, DCFS functions as an agent of the prosecution"). Combining the "need" of the medical examiner with the "need" of DCFS for this reenactment as part of a criminal investigation, one could surmise the real purpose was to obtain incriminating information, by word or act, from defendant under circumstances, which permitted them to skirt the requirements of *Miranda* in the process. However, *Miranda* "custody," as it currently stands, does not include an analysis of the subjective intentions of police investigators to avoid providing *Miranda* warnings as long as other factors evincing "custody" are not present. See *Stansbury v. California*, 511 U.S. 318, 319 (1994) (finding, "an officer's subjective and undisclosed view concerning whether the person being interrogated is a suspect is irrelevant to the assessment whether the person is in custody"); *Slater*, 228 Ill. 2d at 153 (stating, " 'a police officer's subjective view that the individual under questioning is a suspect, if undisclosed, does not bear upon the question whether the individual is in custody for purposes of *Miranda*' " (quoting *Stansbury*, 511 U.S. at 324)); *Coleman*, 2015 IL App (4th) 140730, ¶ 59 (stating, "the initial determination of

custody depends on 'the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned' " (quoting *Stansbury*, 511 U.S. at 323)). Although we see a distinction between the subjective view of police regarding a suspect's status and the subjective *intent* of those same officers to circumvent *Miranda* in the process, this has not been addressed by either our or the United States Supreme Court.

¶ 85 It would be a simple matter to avoid these concerns by making it clear to the suspect—who is also the subject of a DCFS investigation—that she did not have to participate in the reenactment, just as an individual who is asked to accompany police to the station for questioning may be told he is not required to do so. The trial court found this troubling, as do we. The risk police take by proceeding in this manner is in finding a trial court unwilling to allow this amount of coordinated effort to create the appearance of a "need" to cooperate, resulting in the granting of a motion to suppress, as the trial court appeared close to doing here. Trial courts are given substantial discretion when weighing the various factors at play in assessing "custody" under *Miranda*—discretion to which we should most frequently defer. See *Woods*, 2013 IL App (4th) 120372, ¶ 20. The process may be "legal," but when police interrogative procedures are taken to their legal extreme, some courts may weigh the coercive or custodial factors differently, resulting in dramatically different results.

¶ 86 However, in this instance, because the factors for *Miranda* custody were not present, defendant was not in custody, *Miranda* warnings were not necessary, and the trial court did not err when it denied defendant's motion to suppress. See *Slater*, 228 Ill. 2d at 149. Accordingly, having found no error, our plain-error analysis need go no further. See *People v. Hood*, 2016 IL 118581, ¶ 18, 67 N.E.3d 213 (absent error, there can be no plain error).

¶ 87 B. Ineffective Assistance of Counsel

¶ 88 The sixth amendment guarantees a defendant the right to effective assistance of counsel at all critical stages of a criminal proceeding. U.S. Const., amend. VI; *People v. Hughes*, 2012 IL 112817, ¶ 44, 983 N.E.2d 439. A defendant's claim of ineffective assistance of counsel is analyzed under the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Veach*, 2017 IL 120649, ¶ 29, 89 N.E.3d 366. To prevail, "a defendant must show that counsel's performance was (1) deficient and (2) prejudicial." *People v. Westfall*, 2018 IL App (4th) 150997, ¶ 61, 115 N.E.3d 1148. "Failure to satisfy either prong negates a claim of ineffective assistance of counsel." *People v. Hibbler*, 2019 IL App (4th) 160897, ¶ 88, 129 N.E.3d 755. If there is no prejudice, we need not decide whether counsel's performance was deficient. *People v. Evans*, 186 Ill. 2d 83, 94, 708 N.E.2d 1158, 1164 (1999).

¶ 89 To establish deficient performance, the defendant must show "counsel's performance 'fell below an objective standard of reasonableness.' " *People v. Valdez*, 2016 IL 119860, ¶ 14, 67 N.E.3d 233 (quoting *Strickland*, 466 U.S. at 688). A defendant is only entitled to competent, not perfect representation. *People v. Bradford*, 2019 IL App (4th) 170148, ¶ 14, 123 N.E.3d 1285. " '[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. [Citation.]' " (Internal quotation marks omitted.) *People v. Manning*, 241 Ill. 2d 319, 334, 948 N.E.2d 542, 551 (2011) (quoting *Strickland*, 466 U.S. at 689).

¶ 90 Prejudice is established when a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Evans*, 209 Ill. 2d 194, 219-20, 808 N.E.2d 939, 953 (2004) (citing *Strickland*, 466 U.S. at 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding." (Internal quotation marks omitted.) *People v. Moore*, 2020 IL 124538, ¶ 29, 161 N.E.3d 125. "[T]here is a strong presumption of outcome reliability, so to prevail [on an ineffective assistance claim], a defendant must show that counsel's conduct 'so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' " *People v. Pineda*, 373 Ill. App. 3d 113, 117, 867 N.E.2d 1267, 1272 (2007) (quoting *Strickland*, 466 U.S. at 686). "Satisfying the prejudice prong necessitates a showing of actual prejudice, not simply speculation that defendant may have been prejudiced." *People v. Patterson*, 2014 IL 115102, ¶ 81, 25 N.E.3d 526.

¶ 91 "We review a defendant's claim of ineffective assistance of counsel in a bifurcated fashion, deferring to the trial court's findings of fact unless they are contrary to the manifest weight of the evidence, but assessing *de novo* the ultimate legal question of whether counsel was ineffective." *People v. Manoharan*, 394 Ill. App. 3d 762, 769, 916 N.E.2d 134, 141 (2009). In resolving issues related to counsel's performance, reviewing courts must consider the totality of counsel's conduct, not just an isolated incident. *People v. Hamilton*, 361 Ill. App. 3d 836, 847, 838 N.E.2d 160, 170 (2005).

¶ 92 1. *Involuntary Statement*

¶ 93 Defendant alleges trial counsel rendered ineffective assistance by failing to raise any argument "that [her] statements and actions during the re-enactment were constitutionally involuntary" in the motion to suppress evidence. Defendant contends, "Had trial counsel argued *** that [her] statements and actions during the re-enactment were constitutionally involuntary, that claim would have been meritorious."

¶ 94 The fifth amendment prohibits the use of compelled or involuntary statements. *People v. Winsett*, 153 Ill. 2d 335, 357, 606 N.E.2d 1186, 1198 (1992). "Compelled or involuntary statements are excluded under the fifth amendment *** because such statements are regarded as inherently untrustworthy and, thus, not probative." *Winsett*, 153 Ill. 2d at 352. "The test for voluntariness is 'whether the defendant made the statement freely, voluntarily, and without compulsion or inducement of any sort, or whether the defendant's will was overcome at the time he or she confessed.' " *Slater*, 228 Ill. 2d at 160 (quoting *People v. Gilliam*, 172 Ill. 2d 484, 500, 670 N.E.2d 606 (1996)). In making this determination, "a court must consider the totality of the circumstances of the particular case," and "no single factor is dispositive." *People v. Richardson*, 234 Ill. 2d 233, 253, 917 N.E.3d 501 (2009). Our supreme court specified:

> "Factors to consider include the defendant's age, intelligence, background, experience, mental capacity, education, and physical condition at the time of questioning; the legality and duration of the detention; the presence of *Miranda* warnings; the duration of the questioning; and any physical or mental abuse by police, including the existence of threats or promises." *Richardson*, 234 Ill. 2d at 253-54.

¶ 95 As stated (*supra* ¶ 94), in considering defendant's age, intelligence, background, experience, mental capacity, education, and physical condition at the time of the reenactment, the record reflects defendant's intellectual limitations were not outwardly apparent to the

investigators and did not appear to interfere with her ability to communicate with them. Defendant spoke clearly during the reenactment. She engaged Matthews conversationally, freely offered details, and was open and cooperative. Based on our review of defendant's recorded statements, we have no way to assess the level of any disability.

¶ 96 Regarding the legality and duration of the detention and questioning, defendant arrived at her residence to participate in the reenactment of her own accord and not by police transport. The reenactment was of relatively short duration—approximately 31 minutes—and she was questioned by Matthews exclusively. Further, defendant was not the subject of any physical or mental abuse by the detectives. Admittedly, she was placed in an emotionally upsetting environment, indicating to Tate she did not want to return to the house. However, we are unable to assess the level of the coercive impact of doing so based on the record before us. Nothing in the record suggests any overt threats or promises of adverse consequences were made if defendant declined to participate in the reenactment. Although defendant was not told she could leave, she never indicated a desire to terminate the reenactment and leave the premises.

¶ 97 Here too, we pause to note our concern over the circumstances presented by the facts of this case. We are required to find defendant's statements and actions voluntary for the reasons stated above. The coercive nature of being told by DCFS that a reenactment was "needed" and that it was necessary for the DCFS and criminal investigations to go forward would seem obvious. Further, defendant made it clear she did not wish to return to the house but did so because of the "need" for a reenactment. Once there, she was isolated from the support of her "mother figure" and instead of conducting just a reenactment, which took about five minutes, she was then subjected to an additional 25 minutes of questioning related less to the reenactment than to a criminal interrogation of the one and only suspect in the case. Couple this with what one could surmise was an intentional circumventing of *Miranda*, and we question at what point the subjective intent of police and their agents will be subject to consideration in a voluntary statement analysis. This again is the risk of "pushing the envelope" of what may be legal. When the coercive nature of the facts become close, outcomes can differ, and the Illinois Supreme Court may be called in to address the issue—sometimes with a less-preferred solution based on the bad facts of the case before it. Having defendant acknowledge on the record she agreed to participate, or that no one was forcing her to participate, would have gone far to allay the concerns of the trial court and would have been clear evidence of the voluntary nature of her participation. Advising her on the record that she did not have to participate would have been equally curative of the court's concerns.

¶ 98 However, having examined the particular circumstances of this case, as well as defendant's relevant personal characteristics, we find defendant's recorded statements were voluntary and not the product of police coercion. See *Richardson*, 234 Ill. 2d at 253-54. As a result, defendant's trial counsel could not have rendered ineffective assistance for failing to raise this issue in his motion to suppress evidence. See *People v. Boyd*, 2021 IL App (1st) 182584, ¶ 64 ("Refraining from *** a futile act is not ineffective assistance of counsel.").

¶ 99 2. *Reasonableness Under the Fourth Amendment*

¶ 100 Next, defendant alleges the reenactment was the product of an illegal seizure under the fourth amendment, and trial counsel rendered ineffective assistance by failing to raise this argument in his motion to suppress evidence.

¶ 101 The United States Constitution and the Illinois Constitution protect individuals from unreasonable searches and seizures. U.S. Const., amend. IV; Ill. Const. 1970, art. I, § 6. "[T]he touchstone of the fourth amendment is reasonableness, which is measured objectively by examining the totality of the circumstances surrounding a police officer's encounter with a citizen." *People v. Lake*, 2015 IL App (4th) 130072, ¶ 28, 28 N.E.3d 1036.

¶ 102 "It is well settled that not every encounter between the police and a private citizen results in a seizure." *People v. Luedemann*, 222 Ill. 2d 530, 544, 857 N.E.2d 187, 196 (2006). Police-citizen encounters are divided into three categories: "(1) arrests, which must be supported by probable cause; (2) brief investigative detentions, commonly referred to as '*Terry* stops,' which must be supported by reasonable, articulable suspicion of criminal activity; and (3) consensual encounters, which involve no coercion or detention and thus do not implicate the fourth amendment." *Lake*, 2015 IL App (4th) 130072, ¶ 35.

¶ 103 When determining whether a challenged encounter was consensual, the United States Supreme Court has found "a person is seized within the meaning of the fourth amendment 'only when, by means of physical force or a show of authority, his freedom of movement is restrained.' " *People v. Almond*, 2015 IL 113817, ¶ 57, 32 N.E.3d 535 (quoting *United States v. Mendenhall*, 446 U.S. 544, 553 (1980)). If, given the totality of the circumstances, a reasonable person would not feel free to leave, a seizure has occurred. *Almond*, 2015 IL 113817, ¶ 57.

> "Generally, the following *Mendenhall* factors indicate a seizure without the person attempting to leave: (1) the threatening presence of several officers; (2) the display of a weapon by an officer; (3) some physical touching of the person; or (4) using language or tone of voice compelling the individual to comply with the officer's requests." *Almond*, 2015 IL 113817, ¶ 57 (citing *People v. Oliver*, 236 Ill. 2d 448, 456, 925 N.E.2d 1107, 1112 (2010), citing *Mendenhall*, 446 U.S. at 554).

These factors are not exhaustive, but the absence of any *Mendenhall* factors "is highly instructive" in determining whether a seizure occurred. *Luedemann*, 222 Ill. 2d at 554.

¶ 104 Citing *People v. Lopez*, 229 Ill. 2d 322, 892 N.E.2d 1047 (2008), defendant contends the circumstances were such a reasonable person would not have felt free to refuse to participate in the reenactment or answer Matthews's questions. In *Lopez*, two detectives came to the 15-year-old defendant's home and requested he accompany them to the police station. *Lopez*, 229 Ill. 2d at 347. The defendant's decision to accompany the detectives to the police station was found to be "voluntary and not the result of coercion." *Lopez*, 229 Ill. 2d at 352. Whether his voluntary cooperation dissipated at the police station became the critical issue in that case, and our supreme court considered "whether a reasonable juvenile, in defendant's situation, *** would not have felt free to leave once there." *Lopez*, 229 Ill. 2d at 346-47.

¶ 105 Ultimately, under the totality of the circumstances, our supreme court found the "[d]efendant's voluntary presence at the police station escalated into an involuntary seizure in violation of defendant's fourth amendment rights." *Lopez*, 229 Ill. 2d at 353. In so finding, the supreme court noted the juvenile defendant was placed in an interview room with the door closed, immediately interviewed, and told he was implicated in a murder. *Lopez*, 229 Ill. 2d at 353. He was told to wait in the room and was not allowed to go anywhere in the station without an escort. *Lopez*, 229 Ill. 2d at 353. The juvenile defendant also testified he believed he was locked in the interview room, even though the detectives said the door, while closed, was unlocked. *Lopez*, 229 Ill. 2d at 353. The juvenile defendant "remained in the interview room

for four hours without contact with his family or any other person interested in his well-being" before signing a confession. *Lopez*, 229 Ill. 2d at 353.

¶ 106 The circumstances present in *Lopez* are distinguishable from those presented here. Unlike the defendant in *Lopez*, defendant is not a juvenile inexperienced with the criminal justice system. Defendant also arranged for her own transportation to and from the place of questioning, the entire encounter lasted approximately 31 minutes—as opposed to several hours—and nothing in the record suggests defendant was locked in the room during the reenactment or that her freedom of movement was restrained. See *Almond*, 2015 IL 113817, ¶ 57; see also *Lake*, 2015 IL App (4th) 130072, ¶ 28 (stating, "whether an encounter has become a seizure depends on the officer's objective behavior, not any subjective suspicion of criminal activity" (internal quotation marks omitted)).

¶ 107 More importantly, the record does not support defendant's contention she was seized within the meaning of the fourth amendment. Although the presence of three officers may have been *subjectively* threatening to defendant, there is no evidence suggesting the officers approached defendant in an *objectively* threatening manner. Despite carrying their badges, the officers wore plainclothes, entered defendant's residence peacefully and consensually, and never brandished a weapon of any kind. Defendant interacted exclusively with Matthews throughout the reenactment, and it is undisputed defendant was not physically touched or subjected "to any typical 'arrest procedures.' " Finally, Matthews's tone of voice when speaking with defendant was conversational and unaccusatory, and there was no evidence he issued any orders or used language or tone of voice, which would indicate defendant's compliance was compelled. In fact, defendant concedes in her appellant's brief that the officers "did not use exaggerated strong-arm tactics against her."

¶ 108 Accordingly, we reject defendant's fourth amendment argument and conclude the officers involved in the underlying encounter did not make a show of authority, which would cause a reasonable person not to feel free to leave. See *Almond*, 2015 IL 113817, ¶ 57. In addition, because we find the reenactment was consensual at the outset and did not implicate the fourth amendment, it cannot be said defendant's trial counsel rendered ineffective assistance for failing to raise this argument in his motion to suppress evidence. See *Boyd*, 2021 IL App (1st) 182584, ¶ 64.

¶ 109 3. *Redaction of Reenactment Video and DOC Calls*

¶ 110 Defendant next contends her attorney provided ineffective assistance when he failed to seek redaction of "several highly prejudicial statements" made by defendant during her recorded phone conversations with J.C.'s incarcerated father and of the videotaped reenactment before being published to the jury. Specifically, defendant complains counsel should have sought redaction of defendant's statement "that she took J.C. to the hospital when he was about two months old because he had a bump on his head, at which point, 'DCFS got called' and they created a 'safety plan,' " despite later dropping the case. Defendant further contends counsel "failed to ensure the recorded phone calls between [herself] and J.C.'s father only contained evidence relevant to motive or some other proper purpose." Defendant asserts counsel's failure to seek redaction of her comments directed toward J.C. and his sibling during those phone calls was objectively unreasonable because they lacked "any probative value on the question of whether [she] committed the charged offense."

¶ 111 To be admissible, evidence must be relevant. See Ill. R. Evid. 402 (eff. Jan. 1, 2011). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ill. R. Evid. 401 (eff. Jan. 1, 2011). Even if relevant, however, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Ill. R. Evid. 403 (eff. Jan. 1, 2011).

¶ 112 Assuming, *arguendo*, trial counsel's performance fell below an objective standard of reasonableness, we are confident none of defendant's suggested piecemeal redactions would have changed the outcome of defendant's trial. Notably, the jury listened to the unredacted recordings of defendant's reenactment and phone calls only once, without the benefit of a transcript, and the State did not utilize the contested portions to craft an argument.

¶ 113 The evidence of defendant's guilt was overwhelming. Based on her recorded phone calls with Comage, it is clear defendant was experiencing significant financial hardship between June and October 2019. Defendant's SSI was "cut *** off" in August 2019, she failed to maintain stable employment, and she was ineligible for LINK benefits beginning in September 2019. In several calls, defendant complained of "all kinds of bills" totaling hundreds of dollars. At one point, defendant told Comage she was attempting to get approved for a loan to cover her monthly bills and expenses. Despite this, Comage unrelentingly pestered defendant for money and routinely exhorted her to overdraft her bank account.

¶ 114 During a September 3, 2019, phone call, defendant listed several bills which remained unpaid, including J.C.'s life insurance premium. J.C.'s life insurance policy provided $25,000 of coverage. Comage offered to send funds to cover the insurance premium because "that's the main thing that needs to be paid." Defendant said she would "figure something out." Later, on October 2, 2019, defendant told Comage she had recently been "switched *** to fulltime," but she had not yet paid any of her bills that month.

¶ 115 Officer Calloway testified he located a search of the phrase, "how do you suffocate," within the contents of defendant's phone extraction. The search was conducted at 8:04 a.m. on October 6, 2019, one day prior to J.C.'s death. That evening, defendant allowed J.C. and his sibling to "play and watch TV for a little bit. And about 8:30 [she] laid them down for bed." Defendant set alarms "to give *** [J.C.] a breathing treatment at twelve o'clock a.m. and three o'clock a.m.," although she later acknowledged having only one remaining vial of albuterol the night before J.C.'s death. Defendant testified she had administered albuterol treatments twice a night for the last three or four nights because J.C. was "congested" and had a "runny nose." Defendant stated she discarded the empty vials of albuterol in her kitchen trash, which she claimed she emptied "the evening before." Yet Officer Closen found no empty vials of albuterol or any pieces of evidence associated with a nebulizer in defendant's kitchen garbage bin, which was nearly full. What is more, during his examination of J.C., Denton found "no dehydration, no evidence of disease," and no blockage of the minor's airways. Denton also "looked for microscopic asthma, microscopic virus infection," and found none. Although defendant testified J.C.'s albuterol had been prescribed "[a]s needed," J.C.'s primary healthcare provider, Angela King, testified J.C. was last treated for anything breathing-related in December 2018 and he received no further refills of his albuterol prescription after January 2019.

¶ 116 When defendant eventually woke up at 3 a.m. to give J.C. his breathing treatment, she noticed he "had foam coming from his nose." Defendant did not immediately call 911 because J.C. was "really stiff" and she "knew [J.C.] was already gone." Instead, defendant called Taylor at approximately 3:17 a.m., "told her that [J.C.] wasn't breathing[,] and *** hung up the phone and immediately called 911" at Taylor's suggestion. Defendant stated she did "[n]othing" during the 17 minutes between when she woke up and called Taylor and did not attempt CPR. However, Officer Sawyer, who responded to defendant's residence in the early morning of October 7, 2019, testified defendant told him she attempted "[c]hest compressions and mouth to mouth resuscitation" on J.C.

¶ 117 Finally, Denton testified J.C. was "relatively large" for a 19-month-old and "appeared very healthy, well developed, [and] well nourished." Denton also testified he had "never heard of a 19 month old getting entangled and then dying in bed sheets, especially a large 19 month [old], who's at 75th percentile." Further, over the course of J.C.'s autopsy, there were "lots of things [Denton] ruled out," such as manual strangulation, as there were "no finger marks or bruising on [J.C.'s] neck." Denton "excluded pinching of the nose and pushing of the mouth together." He also "excluded blunt trauma" and looked for signs of drowning but "did not see any evidence of that." Denton "tested for influenza A and B," which came back negative. "[T]here was nothing blocking [J.C.'s] airways." Denton found "no evidence of allergic reaction." Denton also "submitted blood for toxicology analysis for drugs and poisons," which returned negative results. Finally, Denton "did a bacteria culture to make sure there was no bacteria in [J.C.'s] lungs or bacterial infection." Denton testified he "sent that to the microbiology lab and that was negative."

¶ 118 J.C.'s "most notable external injuries" were "petechial hemorrhages or petechiae," which Denton explained were "a pressure phenomenon" where "the veins are compressed, but the arteries still pump. So the blood can't get back to the heart." Denton testified the petechiae were very prominent in J.C.'s eyelids, both sides of his face, and on his neck. Denton also observed "pressure blanching" on J.C.'s nose, which "indicate[d] that something was pushing on his nose and also on his chin." Given the "localized pressure" and absence of petechiae on J.C.'s chest and abdomen, Denton determined J.C.'s four-year-old sibling "would not have the strength to do this." With respect to his internal examination of J.C., Denton observed "evidence of compression or impaired blood return to his heart." Denton noted J.C. "had petechiae in his heart and his thymus gland up in the chest area," a "very prominent" amount of edema foam in his lungs, and "swelling of his brain," which Denton testified were "very indicative of asphyxia and some kind of compression to his face."

¶ 119 Accordingly, given the overwhelming evidence against defendant, we conclude defendant has failed to demonstrate, absent counsel's alleged errors, a reasonable probability exists the outcome of the trial would have been different. See *Moore*, 2020 IL 124538, ¶ 29.

¶ 120 4. *Sawyer's Testimony*

¶ 121 Defendant argues trial counsel was ineffective for failing to object to Officer Sawyer's testimony as an improper lay opinion. The State responds that trial counsel was not ineffective because Sawyer, during his testimony, "was attempting to describe what he saw, and to the extent he offered an opinion, it was only done in an effort to explain what he observed."

¶ 122 Illinois Rule of Evidence 701 (eff. Jan. 1, 2011) provides that lay witness testimony "is limited to those opinions or inferences which are (a) rationally based on the perception of the

witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge." Initially, we note defendant challenges, in part, testimony from Sawyer which, defendant alleges, impermissibly "veered into his opinion on [her] sincerity." However, our supreme court "drew a line between past and present opinions, concluding statements of past opinions were not improper lay opinions and were admissible." *People v. Martin*, 2017 IL App (4th) 150021, ¶ 30, 80 N.E.3d 94 (citing *People v. Hanson*, 238 Ill. 2d 74, 101, 939 N.E.2d 238, 254 (2010) (finding that testimony regarding a past opinion was not improper opinion testimony)).

¶ 123 In *Martin*, the defendant was involved in a car accident, and a jury subsequently convicted him of driving under the influence. *Martin*, 2017 IL App (4th) 150021, ¶¶ 4, 9. During the defendant's trial, the State asked the responding police officer who he believed had been driving the vehicle at the time of the incident, and the answer reflected the officer's previous belief formed at the scene. *Martin*, 2017 IL App (4th) 150021, ¶ 5. In examining whether testimony was a present or past opinion, this court looked to the tense of the testimony and determined that questions and testimony phrased in the past tense supported the conclusion a witness's testimony was a past, not present, lay opinion. *Martin*, 2017 IL App (4th) 150021, ¶ 32. Ultimately, this court found the police officer's testimony that the defendant was driving the car was not an improper lay opinion because "it was not offered as a present opinion on the defendant's credibility but, rather, was a statement of past belief offered to explain the course of investigation, *i.e.*, why defendant was ultimately arrested." *Martin*, 2017 IL App (4th) 150021, ¶ 32.

¶ 124 Here, Sawyer's opinion was rationally based upon his perceptions of the scene and his conversations with defendant and Taylor. His answers were phrased in the past tense, and the record reflects he was testifying about his prior beliefs. Furthermore, Sawyer's testimony was offered to explain the course of his investigation and why the investigation ultimately focused on defendant. Sawyer testified, "*when I was on scene*, [defendant] appeared upset" (emphasis added), but "it seemed *** forced." Sawyer further stated, "she mimicked, in my opinion, the sound of crying ***." Sawyer's testimony in this specific instance was not an improper lay opinion on defendant's credibility but, rather, reflected his assertion of a belief he held *when he was on scene* at defendant's residence in the early morning of October 7, 2019. Thus, it constitutes testimony regarding a past, rather than present, opinion and was not improper lay opinion testimony. See *Martin*, 2017 IL App (4th) 150021, ¶ 32.

¶ 125 Even if, for argument's sake, defense counsel's failure to object constituted deficient performance, defendant cannot show she was prejudiced by the admission of Sawyer's allegedly impermissible testimony. Taking into account the totality of the evidence the State presented to the jury, the complained-of errors are not sufficient to undermine confidence in the outcome. See *People v. Donegan*, 2012 IL App (1st) 102325, ¶ 47, 974 N.E.2d 352 (stating, "instead of viewing the improper evidence in isolation, the court must look to the ramifications the improper evidence might have had on the factfinder's overall picture of events"). As stated above, the evidence against defendant was overwhelming. Defendant's financial situation between June and October 2019 was dire, and J.C.'s life insurance policy provided $25,000 of coverage.

¶ 126 Officer Calloway located a search of the phrase, "how do you suffocate," within the contents of defendant's phone extraction. The search was conducted at 8:04 a.m. on October 6, 2019, one day prior to J.C.'s death. Following J.C.'s autopsy, Denton determined the minor's

cause of death was "asphyxia due to smothering and compression of the neck." During his examination of J.C., Denton observed "pressure blanching" on J.C.'s nose, which "indicate[d] that something was pushing on his nose and also on his chin." Denton also noted J.C. "had petechiae in his heart and his thymus gland up in the chest area," a "very prominent" amount of edema foam in his lungs, and "swelling of his brain," which Denton testified were "very indicative of asphyxia and some kind of compression to his face." Given the "localized pressure" and absence of petechiae on J.C.'s chest and abdomen, Denton determined J.C.'s four-year-old sibling "would not have the strength to do this."

¶ 127 According to defendant, at approximately 8:30 p.m. on October 6, 2019, she laid J.C. down for bed. Defendant admitted having only one remaining vial of albuterol that evening but testified she set alarms to administer two breathing treatments "at twelve o'clock a.m. and three o'clock a.m." because J.C. was "congested" and had a "runny nose." However, Denton "looked for microscopic asthma, microscopic virus infection" and found none. He found "no dehydration, no evidence of disease," no blockage of J.C.'s airways, "no evidence of allergic reaction," and no bacterial infection. Defendant further impeached her own credibility when she told Sawyer she attempted "[c]hest compressions and mouth to mouth resuscitation" on J.C. but testified she did "[n]othing" during the 17 minutes between when she woke up and called Taylor and did not attempt CPR. She also claimed she discarded the empty vials of albuterol in her kitchen trash from the previous nights. Yet, when Closen searched defendant's kitchen trash can, which was nearly full, he found no empty vials of albuterol or any pieces of evidence associated with a nebulizer.

¶ 128 Accordingly, "[c]ounsel cannot be considered ineffective for failing to make or pursue what would have been a meritless objection." *People v. Edwards*, 195 Ill. 2d 142, 165, 745 N.E.2d 1212, 1225 (2001). Because we conclude Sawyer's testimony was not barred by Rule 701, defense counsel cannot have been ineffective for failing to object on Rule 701 grounds, and defendant has failed to demonstrate, absent counsel's alleged errors, a reasonable probability exists the outcome of the trial would have been different. See *Moore*, 2020 IL 124538, ¶ 29.

¶ 129 5. *Closing Arguments*

¶ 130 Defendant asserts her trial counsel was ineffective for failing to object to the State's allegedly improper comments made during its closing argument. Specifically, defendant argues the State improperly shifted its burden of proof during its argument and constructed arguments unsupported by the evidence presented.

¶ 131 We consider whether a prosecutor's comments during closing argument are sufficiently egregious to require a new trial as a legal issue subject to *de novo* review. *People v. Anderson*, 2018 IL App (4th) 160037, ¶ 47, 102 N.E.3d 260. Prosecutors are afforded wide latitude during closing arguments and may properly comment on the evidence presented and reasonable inferences drawn therefrom, "even if the suggested inference reflects negatively on the defendant." *People v. Jackson*, 2020 IL 124112, ¶ 82, 162 N.E.3d 223. Reversal and retrial are not warranted unless the improper remarks "constituted a material factor in a defendant's conviction." *People v. Wheeler*, 226 Ill. 2d 92, 123, 871 N.E.2d 728, 745 (2007).

¶ 132 Closing arguments are to be viewed in their entirety and remarks claimed to be improper must be considered " 'within the context in which they were conveyed.' " *Anderson*, 2018 IL App (4th) 160037, ¶ 48 (quoting *People v. Lewis*, 2017 IL App (4th) 150124, ¶ 67, 78 N.E.3d

527). "Just as the jury is entitled to draw inferences from the evidence that are reasonable [citation], the attorneys—including the prosecutor—may argue those inferences." *People v. Dunlap*, 2011 IL App (4th) 100595, ¶ 29, 963 N.E.2d 394. Stated differently, "if a jury could reasonably draw certain inferences from the evidence before it, then no attorney—including the prosecutor—commits error by urging the jury to draw those inferences." (Internal quotation marks omitted.) *People v. Custer*, 2020 IL App (4th) 180128, ¶ 35, 156 N.E.3d 1173.

¶ 133 Although a prosecutor must not state that a defendant has an obligation to come forward with evidence, which would create a reasonable doubt as to her guilt, a prosecutor may comment on the "defendant's failure to submit any evidence that would tend to refute the case against [her]." (Internal quotation marks omitted.) *People v. Luna*, 2013 IL App (1st) 072253, ¶ 129, 989 N.E.2d 655; see also *People v. Herrett*, 137 Ill. 2d 195, 211, 561 N.E.2d 1, 8 (1990) (stating a prosecutor may describe the State's evidence as uncontroverted). Thus, a prosecutor may argue its expert witness was not contradicted at trial. See *Luna*, 2013 IL App (1st) 072253, ¶ 129; see also *People v. Peter*, 55 Ill. 2d 443, 460-61, 303 N.E.2d 398, 408-09 (1973) (holding the prosecutor's comments "concerning the lack of evidence contradicting the evidence the State had offered on the subject of fingerprints" did not shift the burden of proof to the defendant).

¶ 134 Here, defendant complains the State improperly shifted the burden of proof during its closing argument when the prosecutor asked, "Was another expert called to refute his expert opinion? *** No. He is [the] sole unrefuted opinion *** given there." However, even assuming the State's comments rose to the level of burden-shifting, the comments were brief and isolated. See *People v. Runge*, 234 Ill. 2d 68, 142, 917 N.E.2d 940, 982 (2009) (stating, a significant factor in determining the impact of an improper comment on a jury verdict is whether "the comments were brief and isolated in the context of lengthy closing arguments"). The transcript of the State's entire closing argument was over 30 pages long, and the complained-of comments were the only allegedly improper comments. Moreover, the State was commenting on a non-issue in the case. Neither Denton's credibility nor his findings were at issue in this case. In fact, defense counsel specifically told the jury he was not "disputing what Dr. Denton said." Counsel further stated, "At no time throughout the course of this trial did we try to introduce any sort of evidence that indicated that [J.C.] did not die from asphyxiation. Absolutely he died from asphyxiation. He suffocated to death. We're not denying that."

¶ 135 We also note the trial court instructed the jury, both at the beginning of the trial and again after closing arguments, that both opening statements and closing arguments were not evidence and to disregard any statement or argument made by counsel that did not comport with their recollection of the evidence. See *People v. Kallal*, 2019 IL App (4th) 180099, ¶ 35, 129 N.E.3d 621 (stating erroneous statements may be cured by telling the jury arguments are not evidence and should be disregarded if unsupported or by sustaining an objection). The State's comments, when viewed in the context of its entire closing, did not overcome the court's instructions, and nothing in the record suggests the jury ignored the law pursuant to those instructions. Accordingly, we cannot say a reasonable probability exists that the verdict would have been different had the prosecutor not made the remarks. See *Moore*, 2020 IL 124538, ¶ 29.

¶ 136 Next, defendant alleges the prosecutor "misstated the evidence supporting the State's motive theory" when he inferred defendant "did not file a claim because she did not have 'all the documentation': 'She needed a death certificate and didn't get on[e] *** with the murder

investigation going on.' " Defendant argues her trial counsel's failure to object to these allegedly improper comments fell below an objective standard of reasonableness because the prosecutor "never elicited testimony from the insurance agent that a death certificate was required to submit a claim."

¶ 137 Here, the State's allegedly improper comments regarding the necessity of a "death certificate" to receive the death benefit payout pursuant to J.C.'s whole life insurance policy, which defendant alleges were improper, was a reasonable inference to be drawn from the evidence. Defendant's assertion that "the only evidence about a death certificate was [defendant's] testimony that the agent never told her she needed a certificate to submit a claim" is flatly belied by the record. J.C.'s life insurance policy was submitted into evidence without objection. The policy clearly provided the payout of the death benefit to the beneficiary of the insured would only occur upon receipt of "all claim requirements legally necessary in order to pay the claim," which included, "[p]roof of death of the insured." Although defendant testified she "didn't know [she] needed one," the provisions of J.C.'s life insurance policy defined satisfactory proof of death as "a final certified death certificate or other lawful evidence providing equivalent information that is acceptable to [American Family Insurance]."

¶ 138 Because we conclude defendant's claims related to the prosecutor's remarks during closing arguments are meritless, we reject any notion trial counsel rendered ineffective assistance by failing to object to the State's complained-of comments. See *Bradford*, 2019 IL App (4th) 170148, ¶ 14, 123 N.E.3d 1285 (stating defense counsel cannot be deemed ineffective for failing to make a futile objection).

¶ 139 6. *Eliciting Harmful Testimony*

¶ 140 Finally, defendant argues her trial counsel's elicitation of allegedly harmful testimony from (1) Matthews "about his 'multi day training on 911 phone call analysis,' where he learned to identify 'indicators of guilt,' " and (2) Delatte that, "If the insured on the policy were to pass away, prior to the ten years, it would be paid out. The full 25,000" was objectively unreasonable.

¶ 141 Here, defendant fails to overcome the presumption that trial counsel's decision to solicit Matthews's testimony "about his 'multi day training on 911 phone call analysis," where he learned to identify 'indicators of guilt,' " was part of a reasonable trial strategy. It is well established "whether and how to cross-examine the State's witnesses is generally a matter of trial strategy." *People v. Sturgeon*, 2019 IL App (4th) 170035, ¶ 91, 126 N.E.3d 703. "Counsel's strategic choices are virtually unchallengeable on appeal" (*Sturgeon*, 2019 IL App (4th) 170035, ¶ 83, 126 N.E.3d 703), and this court will not use hindsight "to second-guess trial counsel's strategy or the ways in which he implemented that strategy." *People v. Mabry*, 398 Ill. App. 3d 745, 753, 926 N.E.2d 732, 739 (2010). We do not have to necessarily agree that it was the best or most persuasive trial strategy as long as we can find it to be "reasonable trial strategy." See *People v. Bell*, 2021 IL App (1st) 190366, ¶ 63, 189 N.E.3d 531 (" 'A defendant is entitled to competent, not perfect, representation, and mistakes in trial strategy or judgment will not, of themselves, render the representation ineffective.' " (quoting *People v. Tucker*, 2017 IL App (5th) 130576, ¶ 26, 79 N.E.3d 782)).

¶ 142 Based on the record before us, it appears counsel's strategy at trial was to attempt to show Matthews rushed to judgment regarding defendant's guilt, which, in turn, biased his investigation into J.C.'s death. Counsel built on this theory throughout his cross-examination

of Matthews. At one point, Matthews acknowledged having suspicions after listening to defendant's 911 call, based on her failure to ask for help from the dispatcher and because "[i]t was almost a minute before she even told the dispatchers what she needed and what was going on." In closing, counsel argued defendant was perceived as "public enemy number one" and Matthews "considered [defendant] to be a person of interest" as soon as he listened to the 911 call because "she wasn't being emotional enough." Counsel asserted, "from that day forward it was [defendant] that did it," and he asked the jury, "How is that an investigation? *** How is that anything more than Detective Matthews'[s] opinion, his theory, his hypothesis, about what occurred?" Counsel argued, "You cannot convict an individual for first degree murder because of Detective Matthews['s] gut instinct," and he further remarked, "We have a theory of Detective Matthews," but "[t]heories do not lead to convictions." In rebuffing Matthews's suspicions regarding "why it took a minute" before defendant got "anything out to the dispatcher," counsel asserted, "she couldn't gather herself." Counsel also attacked Matthews's conclusion that "a guilty indicator was that [defendant] didn't ask for help" by suggesting defendant "knew that [J.C.] was deceased. *** There's no reason for her to ask for help." Further, counsel challenged Matthews's characterization of the reenactment as "just standard procedure," asserting, "if this is just something you're trying to figure out, if [defendant is] not a suspect, then why do you bring these consents with you? *** The consent to search her home, the consent to search her phone, is that something that everyone carries around with them, detectives? *** I doubt it."

¶ 143 Accordingly, we find nothing unreasonable or irrational with defense counsel's chosen trial strategy, even though it proved unsuccessful. See *People v. Stevens*, 2018 IL App (4th) 150871, ¶ 23, 112 N.E.3d 609 ("Mistakes in trial strategy or tactics do not necessarily render counsel's representation defective."). Considering the circumstantial nature of the State's case against defendant, counsel's decision to elicit testimony from Matthews regarding the "indicators of guilt" he heard and the suspicions he had after listening to defendant's 911 call—in an effort to convince the jury it was likely Matthews allowed this to cloud his judgment—was reasonable trial strategy. Therefore, we conclude counsel's performance was not objectively unreasonable under prevailing professional norms. *Valdez*, 2016 IL 119860, ¶ 14.

¶ 144 Furthermore, defendant has not shown she suffered any prejudice resulting from counsel's decision to question Delatte as to what amount a beneficiary may receive in the event an insured died before a life insurance policy was paid off. It is difficult to imagine how the result of the proceeding would have been different even without the evidence solicited by counsel. Delatte testified he issued defendant a $25,000 "whole life insurance policy" for J.C. in December 2018. Delatte also identified People's Exhibit V as "the life insurance [policy] on [J.C.]," which included the policy's specifications and disclosures. The total amount of insurance provided by J.C.'s policy was $25,000. Although defendant makes much of Delatte's testimony that, "If the insured on the policy were to pass away, prior to the ten years, it would be paid out," it was merely duplicative. The jury was already aware defendant was eligible to receive at least the "full $25,000" upon J.C.'s death; thus, defendant cannot show she suffered any prejudice from counsel's questioning of Delatte about the insurance policy. See *Moore*, 2020 IL 124538, ¶ 29.

¶ 145 III. CONCLUSION

¶ 146 For the foregoing reasons, we affirm the trial court's judgment.

¶ 147 Affirmed.

¶ 148 JUSTICE DOHERTY, specially concurring:

¶ 149 I join in most of the careful analysis laid out by my distinguished colleagues in the majority, and I also concur in the result reached. There is only one aspect of the majority opinion I decline to join, and I write separately to explain my reasons.

¶ 150 I agree that *Miranda* "does not include an analysis of the subjective intentions of police investigators." *Supra* ¶ 84. Given this conclusion, I feel it is unnecessary to "surmise the real purpose" of the reenactment "was to obtain incriminating information, by word or act, from defendant under circumstances, which permitted them to skirt the requirements of *Miranda* in the process." *Supra* ¶ 84. Such speculation is not only unnecessary to the analysis, but it also does not appear to be supported by the record. The genesis of the reenactment was a suggestion from the coroner's physician, Dr. Scott Denton, who called it "standard practice" in cases of this nature. There is nothing in the record to contradict Dr. Denton on this point.

¶ 151 If we were not to accept Dr. Denton's characterization of the reenactment as "standard procedure," we would have to look beyond the record to scrutinize it. We are permitted to take judicial notice of material on government websites. See *People v. Johnson*, 2021 IL 125738, ¶ 54. Investigation of this topic in such a manner leads to information on the Centers for Disease Control and Prevention website about the benefits and manner of conducting a doll reenactment. See Kathleen Diebold, Centers for Disease Control and Prevention Sudden Unexplained Infant Death Investigation Manual, ch. 7, at 171-85, available at https://www.cdc.gov/sids/pdf/suidmanual/chapter7tag508.pdf (last visited Sept. 29, 2022) [https://perma.cc/9PU2-WX4U]. While in this case the reenactment led to incrimination of defendant, it is not difficult to imagine how a reenactment might lead to exoneration in a different case.

¶ 152 Whether based on the record here or matters beyond, I see no basis to conclude that the doll reenactment conducted in this case was a contrivance devised by law enforcement to circumvent defendant's rights, and I would not characterize such reenactments as "interrogative procedures" taken to their "legal extreme." I do, however, agree with the wisdom of the suggestions made by the majority on how to prevent issues arising out of such reenactments in the future. Involvement of child welfare personnel may be appropriate in such reenactments, but it also means that law enforcement cannot be entirely sure what others have represented to a potential criminal defendant about the voluntariness of his or her participation. I agree with the majority that it behooves law enforcement to ensure that it addresses that topic directly with the individual involved before commencing the reenactment.