No. 129054

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JESSICA A. LOGAN, Defendant-Appellant.	))))))))))	On Appeal from the Appellate Court of Illinois, Fourth Judicial District, No. 4-21-0492 There on Appeal from the the Circuit Court of the Sixth Judicial Circuit, Macon County, Illinois, No. 19 CF 1648 The Honorable Thomas E. Griffith, Judge Presiding.

BRIEF OF PLAINTIFF-APPELLEE PEOPLE OF THE STATE OF ILLINOIS

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NATURE OF THE ACTION

In 2021, defendant was convicted of first degree murder for smothering her 19-month-old son J.C., and she was sentenced to 33 years in prison. C163; R571, 602-03.[1] Defendant appeals from the appellate court's judgment affirming that conviction. No question is raised on the charging instrument.

ISSUES PRESENTED FOR REVIEW

Among the evidence presented at trial was a videorecorded interview at defendant's home, during which she reenacted putting J.C. to bed the night before his death and finding his body the next morning and answered a detective's questions. The issues presented are:

1. Whether the circuit court did not plainly err by denying defendant's motion to suppress the videorecorded statements as obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), because she was not clearly and obviously in custody when she made them, the evidence was not closely balanced (as required to establish first-prong plain error), and any error in admitting the statements was not structural error (as required to establish second-prong plain error).

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[1] Citations to the common law record appear as "C__," to the report of proceedings as "R__," to the paper trial exhibits as "E__," to defendant's brief as "Def. Br. __," and to the appellate court's opinion as "Op. __." Citations to defendant's opening brief in the appellate court and petition for leave to appeal appear "Def. App. Br. __" and "PLA __," respectively. The audio and video exhibits are cited by the exhibit number, followed by a progress bar time-stamp for the cited portion (*e.g.*, "Exh. E1 at 00:23-01:13"). The recording of defendant's 911 call is cited by the page number of the accompanying transcript (*e.g.*, "Exh. D at 1").

2. Whether trial counsel provided effective assistance without moving to suppress defendant's videorecorded statements as involuntary.

3. Whether trial counsel provided effective assistance without moving to suppress defendant's videorecorded statements as the product of an unconstitutional seizure.

4. Whether trial counsel provided effective assistance without moving to redact certain statements from the videorecorded reenactment and audio-recorded phone calls.

JURISDICTION

On January 25, 2023, this Court allowed defendant's petition for leave to appeal. Accordingly, this Court has jurisdiction under Supreme Court Rules 315 and 612(b).

STATEMENT OF FACTS

Defendant was charged with first degree murder for smothering her 19-month-old son J.C. in October 2019. C20-22.

I. Defendant's Motion to Suppress Is Denied.

Before trial, defendant moved to suppress statements that she made to police while performing a videorecorded reenactment of putting J.C. to bed the night before his death and discovering his body early the following morning, arguing that the reenactment was a custodial interrogation and therefore police erred "by not Mirandizing [her] prior to said reenactment/interview." C49-50.

The circuit court heard testimony from Juvenile Detective Eric Matthews, who arranged and conducted the reenactment, R71-72, 77; DCFS investigator Leandra Tate, who discussed the reenactment with defendant, R48; Hope Taylor, J.C's paternal grandmother and a maternal figure to defendant, R52; and defendant, R65. The circuit court also watched the videorecording. R45.

Detective Matthews testified that Dr. Scott Denton, who conducted J.C.'s autopsy, had requested the reenactment to provide additional information regarding the cause of death. R72, 87.

About a week after the autopsy, Matthews telephoned defendant and explained that Denton had requested a reenactment. R72-73. He "asked [defendant] if she would be willing to participate in that and she said that she would." R73-74. Defendant and Matthews agreed to meet at her apartment in a few days — on October 17 — to conduct the reenactment. R74. Defendant testified that she agreed to the reenactment, which Matthews had explained was "standard procedure," and that she never told Matthews she did not want to participate. R69. Matthews testified that he neither told defendant that she was required to participate nor had any conversations with DCFS investigator Tate about telling defendant she was required to participate. R74.

Tate testified that she also spoke to defendant about the reenactment. R48. Tate told defendant that "we need to do a reenactment," which DCFS

did "in all our own child death cases." R48. Tate explained to defendant that DCFS and police "would need the reenactment . . . to better understand what happened in [defendant's] home that night," R51, and to "move forward with the investigation," R48. Tate told defendant that "it was best to get this done so we can move forward in the investigation for both DCFS and for criminal." R51.

Tate could tell that defendant was "upset" at the prospect of participating in the reenactment — "emotionally she was not looking forward" to returning to the apartment where J.C. died — but defendant never refused to participate. R48-49 ("She didn't really want to do it, but there was no — there was no saying no. She didn't refuse to do it, if that's what you're asking."). Defendant testified that after Tate explained that the reenactment was standard procedure in child death investigations, defendant "didn't feel like [she] had a choice." R65-66. Taylor testified that her understanding after the meeting was that Tate had told defendant "she would have to do it, and that [it] [wa]s normal procedure in a child's death." R55.

On October 17, defendant drove to her apartment with Taylor and defendant's surviving four-year-old son. R55, 59, 68, 76. When they arrived, Tate was standing in the yard with a DCFS trainee, who was there to observe the reenactment, R50, 56, 75-76, and Matthews was standing on the porch, with Detective Appenzeller, who was there to videorecord the reenactment,

and Sergeant Carroll, who was overseeing the death investigation, R56, 74-75. All three officers had their badges, but none were in uniform. R76; *see* Exh. E2 at 12:38 (showing Matthews wearing khaki pants and a jacket).

After making introductions, Matthews suggested that everyone go inside to start the reenactment. R56-57. He "asked [Taylor] if she would mind staying outside with the child" to avoid distractions during the reenactment. R76; *see* R61. Taylor agreed and waited on the porch with the four-year-old while defendant unlocked the front door and led the rest of the group inside. R57, 61, 67, 76.

Defendant escorted them to J.C.'s bedroom, where they conducted the reenactment. R76-77. Only Matthews, Appenzeller, and Tate were in the room with defendant during the reenactment, with Matthews asking defendant questions, Appenzeller holding the video camera, and Tate observing off to the side. R50, 77-78; *see* Exh. E1 at 00:32 (showing woman wearing red sweatshirt, jeans, and sneakers observing reenactment). Matthews recalled that Carroll and the DCFS trainee might have occasionally stepped into the room but mostly stayed out. R77-78.

Matthews testified that he made no promises or threats to defendant and did not administer *Miranda* warnings because defendant was not in custody. R78, 80. At no point did anyone block any doorways or otherwise prevent defendant from moving freely around the apartment. R80.

Matthews and defendant both testified that defendant never indicated during the reenactment that she did not want to participate. R68, 77, 80.

The videorecording of the reenactment showed that Matthews asked defendant questions in a conversational tone for about 30 minutes. *See generally* Exhs. E1 & E2. The reenactment took place inside a first-story bedroom, which contained a bunkbed and a large window overlooking a residential street. *See*, *e.g.*, Exh. E1 at 00:18; Exh. E2 at 06:15. Pedestrians periodically walked past on the sidewalks outside. *See* Exh. E1 at 03:59-04:01; Exh. E2 at 00:23-00:29, 02:21-02:28, 05:35-05:38, 07:46-07:53, 10:58-11:03.

Matthews started the interview by asking defendant about putting J.C. to bed the night before his death, and defendant used a toddler-sized mannequin to demonstrate. Exh. E1 at 00:23-1:13. Defendant then started telling Matthews about discovering J.C.'s body when she came in at 3:00 a.m. the next morning to give him a "breathing treatment," *id.* at 01:13-01:42, so Matthews started asking about finding the body, *id.* at 01:43-05:06, then moved on to the breathing treatments, *see id.* at 5:06-17:42; Exh. E2 at 00:00-00:14. After they had talked about the breathing treatments and J.C.'s medical history, Matthews asked follow-up questions about putting J.C. to bed the night before his death and the children's bedtime routine, Exh. E2 at 00:21-04:33; the breathing treatments, *id.* at 04:38-05:44, 10:03-11:20; and discovering the body, *id.* at 5:58-10:02.

Throughout the interview, Matthews stood about two arm's lengths away from defendant. *See generally* Exhs. E1 & E2. At no point did anyone touch defendant, display a badge or weapon, or tell her that she was required to do anything. *See generally* Exhs. E1 & E2. Defendant had her cell phone throughout the interview; at one point, her phone rang and she took it out of her pocket and looked at it before continuing. Exh. E1 at 11:38-11:45. No one told her not to answer her phone or to turn it off. *See generally* Exhs. E1 & E2.

After about 30 minutes, Matthews asked for permission to search the apartment. Exh. E2 at 11:43-46. Defendant agreed to the search, *id.* at 11:46-11:48; R67-68, 79; went over the consent form with Matthews before signing it, *id.* at 11:48-13:35; then walked out of the room, returning momentarily to pick up a hairnet from the floor, *id.* at 13:35-13:58. She did not ask permission before leaving the room, and no one commented on her departure or made any attempt to stop her. *See id.* Defendant then walked outside, where Taylor was waiting with defendant's child, R57, and the three left together, R68. She was arrested six days later. R80.

The circuit court denied the motion to suppress the videorecorded reenactment. R96. The court was "troubled by this process," *id.* — because defendant "may well [have been] a suspect," the court felt that somebody "should" have explained to her that her statements "may be used against her," suggested that she "may want to consult with a lawyer," and expressly

told her that she did not have to participate in the reenactment, R97. But the court recognized that "the question before [it] [wa]s not whether [it was] troubled, but whether or not [it] believe[d] this was a custodial interrogation." *Id.*

The court considered the totality of the circumstances to determine whether defendant was subjected to custodial interrogation. R98. The court found that defendant was a 25-year-old mother and a high-school graduate. R99. The court found that defendant voluntarily agreed to the reenactment, which took place at her home with "her mother figure [Taylor] really right outside." R98. The court found nothing wrong with Matthews asking Taylor to stay outside during the reenactment given that she was with a four-year-old child. *Id.* The court found that "the mood of the interview was not accusatory," and that Matthews, the only person who questioned defendant, was "very low key and polite." *Id.* The court further found that defendant never displayed any kind of emotional distress during the interview, she was never physically restrained or told that she could not leave, and no one ever made any show of force, such as by displaying a badge or a gun. R98-99. At the end of the interview, defendant voluntarily agreed to a search of the apartment and left. R99. The court concluded that defendant was not subjected to custodial interrogation and therefore no *Miranda* warnings were required. R98-99.

II. Defendant Is Convicted of First Degree Murder.

The trial evidence established that at 3:18 a.m. on Monday, October 7, 2019, defendant called 911. R278, 324; Exh. D. Defendant told the dispatcher that J.C. "had a real bad breathing problem." Exh. D at 2. She "came in [his] room to try to give him a breathing treatment," found that "he's not breathing," and "tried to do CPR" and "mouth to mouth." *Id.* at 1-2.

When Officer Joseph Sawyer responded to defendant's apartment, he found Taylor sitting on the couch holding J.C.'s body and defendant sitting beside her. R223-24. J.C. had foam coming out of his nostrils. R225; *see* E387. Both defendant and Taylor were crying, R225, but defendant's crying did not seem genuine, R236-37, 240. Over Sawyer's 12-year career, R222, he "deal[t] with people crying all the time" — "one of the terrible things about being a police officer" was that he "deal[t] with people" at "their worst time" and "s[aw] people cry every single day" — and he observed that defendant's crying seemed "forced." R236. Although she made crying sounds, there were no tears. R236-37. In contrast, Taylor's crying was accompanied by tears. R237.

After Sawyer and his partner checked the apartment and found no signs of forced entry, Sawyer asked defendant what happened. R225-26, 239. Defendant said she put J.C. to bed at around 8 p.m. and had planned to get up at midnight and 2 a.m. to give him breathing treatments — Albuterol administered via a nebulizer — because he had bouts of pneumonia after he was born and needed treatments in the evening when the weather got cold.

R226-27. She said that she had given J.C. breathing treatments twice a night for the past four days, but the Albuterol box in the closet was completely empty, and the officers found no vials of Albuterol anywhere else in the apartment. R227-28, 247-48. Nor were there any empty vials in any of the trash cans, including the trash can in the kitchen, which was full. R227, 245-47; *see* E394. Defendant told Sawyer that when she found J.C., she administered CPR, then called Taylor before calling 911. R235.

Patrick Delatte from American Family Insurance testified that later that same morning, defendant called him to collect on J.C.'s $25,000 life insurance policy. R365, 368-69. Defendant had taken out the policy during the preceding December and had never let it lapse. R366-68.

Dr. Denton, a forensic pathologist who had conducted approximately 12,000 autopsies over 25 years, R282-84, conducted J.C.'s autopsy that same morning, R287-88. J.C. had been a large, well-developed, and apparently very healthy 19-month-old child, R288-89, who died from asphyxiation, as evident from the white edema foam coming from his nose, R290-92. Denton searched J.C.'s airways for anything that could have blocked them — he had been told that J.C. had breathing problems — but J.C.'s airways were open; Denton found no signs of any object, asthma, mucus, or inflammation that could have prevented J.C. from breathing. R298-99, 305. Denton then conducted a microscopic examination of the lungs, searching for any signs of asthma or bacterial or viral infections; he found none. R299-300. Nothing in

J.C.'s airways could have caused him to have breathing problems, and the toxicology report showed no signs of any drug or poison. *Id.* But there was evidence of trauma, R289: petechial hemorrhages on J.C.'s face and neck and "pressure blanching" on his nose and chin indicated that pressure had been applied to his face, R293, 295-96, 298.

At that point, Denton reported that J.C. had asphyxiated, possibly by smothering or strangulation. R300. Denton was doing "further studies," but in the meantime he asked for a child death investigation, which "is standard in child deaths" and involves an investigator — "whether it's the coroner, or a medical examiner, or police" — going to the location where the child's body was found and talking to the person who found it to "try to find out what happened and correlate the autopsy findings." R300. The investigation involves a "doll reenactment," which can be "very emotional" because the person is asked to place a doll in the position in which she found the child's body. R300-01.

The video of the reenactment was played for the jury. R323-24. In the video, defendant told Matthews that she put J.C. to bed at 8:30 p.m. on Sunday night. Exh. E1 at 00:31-01:07, 04:41-04:50. She had given him breathing treatments twice a night for the three preceding nights — once at midnight and again at 3:00 a.m. — and planned to give him two treatments that night as well, but she slept through the alarm that she set on her phone

for the midnight treatment and did not wake up until the second alarm went off for the 3:00 a.m. treatment. *Id.* at 07:16-08:34, 08:57-09:21.

When defendant went into the bedroom at 3:00 a.m. on Monday morning, she found J.C. lying face down on the bed with a corner of the fitted sheet over his head. Exh. E1 at 01:07-01:57, 03:38-03:55, 04:12-04:37. Defendant had set up the nebulizer and was going to fetch the medicine when she saw that J.C. was wrapped in the fitted sheet. *Id.* at 05:44-06:07. When Matthews asked where defendant kept the medicine, defendant said that she kept it in the hallway closet but that it was "all gone now." *Id.* at 16:42-16:52.

Defendant said that she pulled the sheet away, turned J.C. over, and found that he was "hard and stiff." *Id.* at 01:59-02:28. Contrary to what she told the 911 dispatcher, defendant told Matthews that she did *not* administer CPR. Exh. E2 at 07:02-07:40. She thought J.C. had been "deceased probably for maybe a couple hours." Exh. E1 at 02:28-03:29.

Defendant said that when she saw J.C.'s condition, the first thing she did was get her phone and call 911. Exh. E2 at 06:06-06:52. She then stayed on the phone with the dispatcher until help arrived. *Id.* at 06:40-07:01. When Matthews asked how Taylor arrived before the responding officers, defendant asserted first that she called her after calling 911, and then that she called Taylor before calling 911. *Id.* at 07:44-08:48.

Matthews asked why J.C. received breathing treatments, and defendant said that J.C. had been in the hospital for pneumonia several times between his birth and his first birthday, but then clarified that he was prescribed the breathing treatments for RSV[2] a few months before his death. Exh. E1 at 9:22-11:22. In recounting J.C.'s trips to the hospital, defendant mentioned that when he was two months old, she took him to the hospital for a bump on his head, which led to DCFS getting involved and creating a "safety plan" before it was determined that the bump was from birth and the matter dropped. *Id.* at 11:24-12:16.

Defendant told Matthews that pediatric nurse practitioner Angie King (and only King, Exh. E2 at 04:40-04:52) prescribed refills of the medication. Exh. E1 at 12:55-13:03. Each refill was for a three-month supply. *Id.* at 15:17-15:22. When Matthews asked what the medication was, defendant was silent for about ten seconds, then said that she could not think of the name but it started with "A." *Id.* at 15:00-15:15. (When Matthews later mentioned Albuterol, defendant said that was it. Exh. E2 at 04:38-04:50.) Each treatment with the nebulizer used one vial of medicine, *id.* at 04:54-05:02, and defendant would then discard the empty vial in the kitchen trash, *id.* at 10:03-10:25.

Defendant had been giving J.C. breathing treatments for three days before his death because his nose was "stuffed up" and "congested." Exh. E1

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[2] Respiratory syncytial virus. *Am. Heritage Dictionary* 1530 (5th ed. 2018).

at 08:00-08:32. Defendant said that she had called King's office on Friday — that is, two days before she put J.C. to bed for the last time — and spoke with a receptionist about getting a refill because she only had "a couple more" vials remaining. *Id.* at 16:52-17:42.

The videorecording ended with defendant agreeing to let Matthews search her apartment. Exh. E2 at 11:43-13:58. Matthews testified that when he searched the apartment, he found no Albuterol anywhere. R325.

Denton testified that he later reviewed the video of the reenactment and J.C.'s medical records. R301-02. He had ruled out the possibility that J.C. was manually strangled or smothered by a hand pressed over his nose and mouth because there was no bruising on his neck and no trauma to the lips from being pressed against the teeth. R303-04. He also ruled out the possibility that J.C. had asphyxiated due to drowning or a head injury, tumor, or allergic reaction. R304-05. After ruling out everything "known in forensic pathology with investigating infant and child deaths," Denton determined that J.C. had been asphyxiated by smothering, R305, either by having his head pushed down while he lay face down or by having something like a pillow or rolled-up comforter pressed over his face while he lay faceup, R302-03. Denton was able to rule out the possibility that J.C.'s four-year-old brother smothered him. R306. Denton explained that a four-year-old child would not have the strength to smother a large 19-month-old child like J.C., which would require pressing something over J.C.'s nose and mouth for three

to five minutes while J.C. struggled and flailed. R306-07. Moreover, the petechiae showed that the pressure was localized over J.C.'s face, which ruled out his brother having overcome his struggling by "sitting on his chest or anything like that." R307.

Denton viewed the reenactment video as evidence that the smothering occurred in bed because it showed that "he was found dead in bed." R316-17. Denton rejected the possibility that J.C. asphyxiated as a result of entanglement in the fitted sheet that defendant said she found over his head. R301-02. Not only had Denton never heard of a 19-month-old child dying from such entanglement, but the entanglement depicted in the video could not have killed J.C. if he was in the position that defendant said she found him. *Id.*

Angela King, a pediatric nurse practitioner, testified that she had treated J.C. since September 2018, when he had RSV followed by some viral infections that caused bronchiolitis later in the year. R335-36, 340. The last time he was treated for anything related to his breathing was in December 2018, after which she refilled his Albuterol prescription for the last time in January 2019. R340-41. Although J.C. was diagnosed with bronchiolitis in in March 2019, R345, his lungs were clear at all of his visits in 2019, R343, and when King last saw him a month before his death, he was not congested, and his lungs were clear, R343. King's office had no record of any phone call

from defendant on the Friday before J.C.'s death. R341-42. Had defendant called, a note would have been put in J.C.'s chart. R342.

The jury also heard evidence that defendant was under increasing financial strain in the months before J.C.'s death. The parties stipulated that an employee of The Cash Store would testify that on August 2, 2019, defendant took out a $1,075 personal loan, with payments of $202.57 due every two weeks. R355-36. She missed the first payment and every payment thereafter, making only a partial payment of $100 in mid-September. R355.

Recordings of the increasingly demanding voicemails from The Cash Store were played for the jury. R357-61; Exh. P (voicemails 1, 4, 5, 9, 10, and 11). An employee made a "courtesy call" to remind defendant that she had a payment due the next day, Exh. P (voicemail 11), followed by three messages asking defendant to call back about an "urgent matter," *id.* (voicemails 1, 4, and 10). After defendant missed the first payment on August 15, a message told her that the debt was accruing daily interest of $11.90 and warned about it "get[ting] out of control" to the point where it was "hard for [defendant] to get out from under." *Id.* (voicemail 9). The final message informed defendant that she had missed two payments, her outstanding balance was now up to $1,527.25, her next payment was due September 13, and she was "going to hit debt status," at which point they would "start calling [her] employer" and "ruin her credit." *Id.* (voicemail 5).

The jury also heard clips from several recorded phone calls made between May and October 2019, during which defendant described her financial problems to J.C.'s imprisoned father, Shawneen Comage, and Comage pressed her to send him money. R266, 362-64. In May, defendant told Comage that the bills were "killing" her, and she needed a job. Exh. Q1, #20 at 00:35-03:45. Comage complained that she had been promising to send him money since March, *id.* at 01:22-01:55, and she said she would try to send money by overdrawing her account, *id.* at 03:07-03:32. In June, defendant told Comage that she was not sure how she would pay the bills and was "getting bad news" every day; no one would hire her, and Social Security was going to stop sending checks in August, at which point she would have no income. Exh. Q1, #200 at 02:51-04:03. Comage asked her to overdraw her account to send him $30. *Id.* at 05:17-05:53.

On August 1, the day before she took out the loan from The Cash Store, she told Comage that her account was overdrawn, they had received a final warning on the phone bill, and she was going to take out a loan to pay the bills. Exh. Q1, #368 at 00:00-00:16, 00:34-00:55, 01:35-02:55. Comage told her that he needed $200. *Id.* at 03:48-04:03. About a week later, defendant told Comage that her Link[3] benefits would end in September, and she did not know how she would repay the $1,000 loan ($400 of which she

[3] A Link card provides access to cash and food stamp benefits. *In re N.B.*, 2019 IL App (2d) 180797, ¶ 34 n.5.

had sent to Comage). Exh. Q1, #393 at 01:09-01:13, 01:38-01:45, 02:35-03:32. When they spoke at the end of August, Comage told her he needed her to overdraw her account again to send him $60, pressing her to do so as soon as she got home. Exh. Q1, #433 (Clip 1) at 00:00-00:20; Exh. Q1, #433 (Clip 2) at 00:00-01:47.

In early September, defendant told Comage that she was stressed about the bills, Exh. Q1, #467 (Clip 1) at 00:18-00:22, because the entirety of her upcoming paycheck would go toward overdraft fees, Exh. Q1, #467 (Clip 2) at 00:15-00:27. Comage reminded her that J.C.'s life insurance bill was "the main thing that needs to be paid," and defendant agreed. Exh. Q1, #467 (Clip 1) at 02:38-03:08. Later that month, defendant told Comage that she had broken down in tears from the stress of unpaid bills and could not afford the rent. Exh. Q1, #519 at 00:09-00:22, 01:07-02:31.

In the final clip from a call on October 2, five days before J.C.'s death, Comage told defendant that he needed $100 to buy an mp3 player. Exh. Q1, #606 (Clip 2) at 00:12-0021. Defendant said that she had been unable to pay a single bill that month, but Comage repeated that he needed at least $100 from her next paycheck. *Id.* at 00:25-01:38. Defendant told Comage she was "going to figure something out," then screamed at one of the children, remarking that the child was "being annoying as fuck." *Id.* at 01:50-02:07.

Defendant had occasionally spoken sharply to the children while on the phone in earlier recordings, but she had not previously screamed at them like

that. *See generally* Exh. Q1, #20, 38, 200, 368, 393, 433, 467, 519. In May, she had told one of the children to "stop," Exh. Q1, #20 at 01:15-01:17; and in June she had told J.S.'s brother to "shut up" because she was on the phone, then to "close that fucking window, you're pissing me off," Exh. Q1, #200 at 02:25-02:29, 05:59-06:03. In August, she warned J.C. that he was "gonna fuck [him]self up," Exh. Q1, #368 at 00:31-00:35, then, after he started crying a short time later, remarked that he was "a beast, he don't care; he gonna try any goddamn thing in the book until he really hurt himself," *id.* at 04:02-04:10. But defendant did not scream at the children like she did in the October 2 call, in which she also told Comage that she had "dragged [J.C.'s brother's] toy box out to the dumpster, and threw all his fucking toys away" because they had not had a working television for over four days and if she had no television to watch, then he would have no toys to play with. Exh. Q1, #606 (Clip 1) at 00:00-00:43.

Data extracted from defendant's phone and corroborated by Google showed that four days later, at 8:04 a.m. on the day before J.C.'s death, an Internet search was run from defendant's phone for "how do you suffocate." R259-60, 261-63; *see* E401.

Defendant testified in her own defense and called three other witnesses, including Taylor. R378, 384, 394, 420. Defendant testified that she had two children with Comage: J.C. and his older brother. R430-31. Soon after the birth of her first child, Taylor purchased life insurance policies

for both defendant and the child. R435-36. When J.C. was born, Taylor offered to pay for his insurance as well, but defendant declined and purchased the policy herself. R437-38. Defendant's main source of income after J.C.'s birth was from Social Security and babysitting. R432-34. Taylor testified that defendant often "went without" because she prioritized her bills and her children's needs. R398.

Defendant testified that on the morning before J.C.'s death she realized she was down to the last vial of Albuterol. R483. She had given J.C. breathing treatments at midnight and 3:00 a.m. for the previous several days because he was "congested"; he had no trouble breathing through his mouth, but his nose was stuffed up. R442, 472-73. Before she put the children to bed that night, she emptied the last vial into the nebulizer in preparation for the treatment at midnight, R441-42, then put the empty vial in the kitchen trash, where she had also put the empty vials from the previous nights, R470-71.

Defendant admitted that she had not told police that she pre-loaded the nebulizer with the last vial of Albuterol before putting J.C. to bed, R469-70, and further admitted that if she had given him a breathing treatment at midnight that night, she would not have had a vial for the second treatment at 3:00 a.m., R484. When asked where the empty vials from the Saturday night treatments had gone, she claimed that she had taken the trash out "the evening before." R471. But defendant then testified that the trash that filled

the kitchen trash can when police arrived Monday morning was all from Saturday. R471; *see* E94. Defendant did not explain why the trash from Saturday did not contain the empty vials from the treatments that she gave at midnight on Saturday and 3:00 a.m. on Sunday or the empty vial from pre-loading the nebulizer for Sunday's midnight treatment. *See* R470-72.

Defendant testified that she slept through the alarm for the midnight treatment but awoke at 3:00 a.m. R443-44. She immediately went to J.C.'s room, where she saw him lying on his stomach with "the sheet on his head." R474. She called Taylor at 3:17 a.m., R475, as her phone records reflected, R278, 280, then called 911, R448. Defendant called Taylor before calling 911 because she knew that J.C. was already dead. R446. When asked what she did during the 17 minutes between finding J.C.'s body and calling Taylor, defendant answered, "Nothing." R475. She denied performing CPR on J.C. and denied telling Officer Sawyer that she performed CPR. R449-50, 477-78.

After the coroner had left with J.C.'s body, Taylor drove defendant to her house, where they talked with family members about how J.C. might have died. R408-09, 456-57. Defendant testified that someone speculated that J.C. suffocated, which prompted her to run the Internet search for "how do you suffocate." R458, 488. Defendant denied that she ran the search the day before J.C.'s death but could not explain why both the data from her phone and Google's own records showed otherwise. R467-69; *see* R261-63.

Taylor testified that she told defendant to call the insurance company so that they could pay for the funeral, R406, and defendant confirmed that she called the insurance company out of concern about funeral expenses, R459. Delatte (the insurance agent) told her that he would mail her a packet, R480, which Taylor later received and gave to defendant, who was staying with her after J.C.'s death, R406-07, 462. Defendant testified that she never opened the packet or filled out the forms because she had since learned that that the funeral would be free because of J.C.'s age, and she did not want the $25,000 because it would not bring J.C. back. R461-63.

Defendant agreed to Matthews's request that she participate in the reenactment. R464. She testified that she "didn't really feel up to it" emotionally, but she had no reason to believe that she was in any trouble. R464-65. When the coroner had taken J.C.'s body, he told her that "no foul play was involved" and that J.C. "might have got caught under the sheets." R479. No one suggested that she had suffocated him, *id.*, and she did not think she was suspected of any involvement in J.C.'s death, R465.

The jury found defendant guilty of first degree murder. R571; C157. Defendant filed a post-trial motion, which omitted any argument that the court erred in admitting the reenactment video. C161-62; R578-80. The court denied the motion, R581, and sentenced defendant to 33 years in prison, R602-03; C163.

III. The Appellate Court Affirms.

On appeal, defendant argued that the circuit court committed first-prong plain error by denying her motion to suppress the reenactment video based on a *Miranda* violation, Op. ¶¶ 69, 71, and that trial counsel was ineffective for not moving to suppress the video on the additional grounds that her statements were involuntary and the product of an unconstitutional seizure, *id.* ¶¶ 93, 100, and for not moving to redact certain statements from the reenactment video and the recorded phone calls with Comage, *id.* ¶ 110. The appellate court affirmed, holding that the circuit court did not plainly err in finding no *Miranda* violation because defendant was not in custody, Op. ¶ 86, and that counsel was not ineffective for declining to move to suppress on the additional grounds because such motions would have been denied as meritless, *id.* ¶¶ 98, 108. The appellate court further held that even if counsel performed deficiently by not moving to redact the challenged statements, defendant could not show prejudice because the evidence of her guilt was overwhelming. *Id.* ¶¶ 112-13.

STANDARDS OF REVIEW

Defendant's claim that the circuit court erred by denying her motion to suppress the videorecorded reenactment on *Miranda* grounds is reviewed for plain error because defendant did not preserve the claim in her post-trial motion. *See People v. Smith*, 2016 IL 119659, ¶¶ 38-42, 76.

Defendant's claims that trial counsel was ineffective are reviewed de novo. *People v. Johnson*, 2021 IL 126291, ¶ 52.

ARGUMENT

I. The Circuit Court Did Not Plainly Err by Denying Defendant's Motion to Suppress the Reenactment Video Because She Was Not in Custody and Therefore *Miranda* Warnings Were Not Required.

Defendant forfeited her claim that the circuit court erred by denying her motion to suppress the reenactment video as obtained in violation of *Miranda* because she did not include the claim in her post-trial motion. *See* C161; R578-80; *People v. Cosby*, 231 Ill. 2d 262, 271-72 (2008) (challenge to denial of motion to suppress forfeited if not raised in post-trial motion). Accordingly, the claim is reviewed only for plain error. *Cosby*, 231 Ill. 2d at 271-73; *see Smith*, 2016 IL 119659, ¶¶ 38-42, 76 (reviewing challenge to denial of motion to suppress statement on *Miranda* grounds for plain error where claim was not preserved in post-trial motion).

Contrary to defendant's suggestion, her claim of a *Miranda* violation is not exempt from forfeiture because it "was arguably 'constitutional' or at least 'constitutionally based,' such that counsel's pre-trial motion was sufficient to preserve the claim." Def. Br. 29. "[T]he mere fact that an alleged error affects a constitutional right does not provide a separate ground for review, for 'even constitutional errors can be forfeited.'" *Cosby*, 231 Ill. 2d at 272-73 (2008) (quoting *People v. Allen*, 222 Ill. 2d 340, 352 (2006)). Thus, the denial of a motion to suppress may be reviewed only for plain error unless preserved in a post-trial motion, regardless of whether the defendant alleged a constitutional basis for suppression. *See id.* (appellate court erred by

invoking "constitutional nature" of forfeited challenge to denial of motion to suppress as justification for reviewing that challenge other than for plain error).

Moreover, such a forfeiture exception for constitutional claims would not excuse defendant's forfeiture of her claim of a *Miranda* violation because a *Miranda* violation is not a constitutional violation. *See Vega v. Tekoh*, 142 S. Ct. 2095, 2106 (2022) (*Miranda* violations are not constitutional violations); *People v. Winsett*, 153 Ill. 2d 335, 353 (1992) ("*Miranda* warnings are not constitutional rights, but are simply prophylactic measures designed to safeguard a suspect's fifth amendment rights."). Accordingly, defendant's forfeited claim of a *Miranda* violation is subject only to plain-error review.

To rise to the level of plain error, the circuit court's denial of defendant's motion to suppress first must have been clearly or obviously erroneous. *See People v. Jackson*, 2022 IL 127256, ¶ 21 (first step of plain-error analysis "is to determine whether a clear or obvious error occurred"). Thus, defendant must show that she was clearly and obviously subjected to custodial interrogation during the reenactment, such that the absence of *Miranda* warnings required that the video be suppressed. *See infra* § I.A.1. In evaluating the circuit court's denial of the motion to suppress, the Court "may consider evidence presented at defendant's trial in addition to the evidence presented during the suppression hearing." *People v. Carter*, 2021 IL 125954, ¶ 21. If the circuit court's ruling was clearly or obviously

erroneous, then defendant's forfeiture may be excused if she further shows that (1) "the evidence was so closely balanced that the error alone severely threatened to tip the scales of justices" or (2) "the error was so serious it affected the fairness of the trial and challenged the integrity of the judicial process" — so-called first- or second-prong plain error. *People v. Moon*, 2022 IL 125959, ¶¶ 23-24 (internal quotation marks omitted).

Defendant can make none of these showings. Defendant was not clearly or obviously in custody when she participated in the reenactment at her home, but even if defendant could show clear or obvious error, she could not establish first-prong plain error because the evidence was not closely balanced. Nor could defendant establish second-prong plain error. First, defendant forfeited any argument that the alleged error constituted second-prong plain error because in both the appellate court and in her PLA to this Court she argued only that the error constituted first-prong plain error. *See* Def. App. Br. 28; PLA at 19; *People v. Williams*, 235 Ill. 2d 286, 298 (2009) (issue was "twice forfeited" where defendant omitted it from his brief in appellate court and PLA). And in any event, the admission of a statement in violation of *Miranda* is not second-prong plain error because it is not a structural error that undermines the integrity of the judicial process.

A. The circuit court did not clearly or obviously err by concluding that defendant was not in custody.

1. *Miranda* requires warnings only if a person is subjected to custodial interrogation.

The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const., amend. V.; *see* Ill. Const. 1970, art. I, § 10 ("No person shall be compelled in a criminal case to give evidence against himself[.]"). This provision both prohibits the government from compelling a person "to testify against himself in a criminal trial in which he is a defendant" and "privileges [a person] not to answer official questions put by him . . . where the answers might incriminate him in future proceedings." *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984) (internal quotation marks omitted).

In *Miranda v. Arizona*, the Supreme Court recognized that when a person is subjected to custodial interrogation, "the privilege against self-incrimination is jeopardized." 384 U.S. 436, 478 (1966). Custodial interrogation — defined as "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," *id.* at 444 — is inherently coercive because "'incommunicado' interrogation in 'a police-dominated atmosphere' involves psychological pressures that 'work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely.'" *People v. Hunt*, 2012 IL 111089, ¶ 23 (quoting *Miranda*, 384 U.S. at 456-57, 467) (internal citations omitted). Accordingly, to protect the

constitutional privilege against compulsory self-incrimination against "the 'inherently compelling pressures' of custodial interrogation," *id.* (quoting *Miranda*, 384 U.S. at 467), *Miranda* adopted a set of prophylactic rules, under which a defendant's statements elicited under custodial interrogation are inadmissible unless she was warned that they may be used against her and that she has the rights to remain silent and have an attorney present (at public expense, if necessary), *id.* ¶¶ 23, 25 (citing *Miranda*, 384 U.S. at 444, 467, 479).

Because these warnings are not required unless a person is in custody, *People v. Slater*, 228 Ill. 2d 137, 149 (2008), whether the circuit court clearly or obviously erred by denying defendant's motion to suppress her statements as obtained in violation of *Miranda* turns on whether she was in custody at the time. A person is in custody for the purposes of *Miranda* if, under the totality of the circumstances, "'a reasonable person, innocent of any crime,' would have believed that he or she could terminate the encounter and was free to leave." *Id.* at 150 (quoting *People v. Braggs*, 209 Ill. 2d 492, 506 (2003)).

To establish that a reasonable, innocent person would not feel free to end the reenactment and leave, defendant must show that "the relevant environment present[ed] the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Howes v. Fields*, 565 U.S. 499, 509 (2012). That is, defendant must show that the reenactment at her

apartment presented coercive pressures equivalent to those of an "incommunicado interrogation" after being "thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures." *Miranda*, 384 U.S. at 445, 457-58.

"Fidelity to the doctrine announced in *Miranda* requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated." *Berkemer v. McCarty*, 468 U.S. 420, 437 (1984). The situations that *Miranda* addressed were those in which a person is "swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above," 384 U.S. at 461 — *i.e.*, confined in an "incommunicado police-dominated atmosphere" that was "created for no purposes other than to subjugate the individual to the will of his examiner," *id.* at 456-57 — and the concern that motivated *Miranda* was "the danger of coercion [that] results from the interaction of custody and official interrogation," whereby a suspect "will feel compelled to speak by the fear of reprisal for remaining silent or in the hope of more lenient treatment should he confess," *Illinois v. Perkins*, 496 U.S. 292, 296-97 (1990); *see Howes*, 565 U.S. at 508-09 (under *Miranda*, "'custody' is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion"). Accordingly, if an encounter does not subject a person to such coercive pressures, it is not custodial under *Miranda*, even if police have restrained the person's

movement. *See, e.g.*, *Maryland v. Shatzer*, 559 U.S. 98, 112-13 (2010) (although reasonable person would not feel at liberty to leave during traffic or *Terry* stops, "the temporary and relatively nonthreatening detention involved in a traffic or *Terry* stop does not constitute *Miranda* custody" (internal citation omitted)). Similarly, if a reasonable person would have felt free to leave, having not had her freedom of movement restrained to a "degree associated with a formal arrest," *Stansbury v. California*, 511 U.S. 318, 322 (1994) (internal quotation marks omitted), then she was not in custody for *Miranda* purposes even if the interview setting was otherwise coercive, *see Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (per curiam) ("[A] noncustodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a 'coercive environment.'").

To determine whether a reasonable, innocent person would have believed that he or she could terminate the encounter and was free to leave, and thus whether *Miranda* warnings were required, the Court considers the totality of the circumstances. *Slater*, 228 Ill. 2d at 150. Relevant circumstances include the location, time, length, mood, and mode of questioning; the number of police officers present; the presence of absence of family and friends; any indicia of formal arrest; the manner in which the person arrived at the place of questioning; and the age, intelligence, and

mental makeup of the accused (if discernable to an interrogating officer). *Id.*; *Braggs*, 209 Ill. 2d at 506-08.

2. Defendant was not clearly or obviously in custody.

The circuit court did not plainly err by denying defendant's motion to suppress the reenactment video because she was not clearly and obviously in custody during the reenactment. Under the totality of the circumstances, her freedom of movement was not restrained to a "degree associated with a formal arrest," *Stansbury*, 511 U.S. at 322 (internal quotation marks omitted), nor did the environment "present[] the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*," *Howes*, 565 U.S. at 509.

First, defendant's freedom of movement was not restrained to a degree associated with formal arrest. She drove to her apartment for the reenactment with her four-year-old child and Taylor, unlocked the front door so that those involved in the reenactment could enter, stayed for a little over half an hour, then left. She never gave any indication that she wished to leave before then and was never subjected to any indicia of formal arrest — no one ever said she was under arrest, placed her under any physical restraint, or made any show of force. Nor did anyone make any show of authority by issuing defendant orders or making demands. Rather, Matthews asked her non-accusatory questions in a polite, conversational tone, then watched her leave without interfering with, or even commenting

upon, her departure. Defendant does not claim that anyone else impeded her departure, either; there was no evidence that the door to the bedroom where the reenactment took place was ever closed or blocked and defendant herself had the key to the apartment. No reasonable innocent person under these circumstances would believe she was not at liberty to leave if she wished, and defendant in fact left when she wished. Thus, defendant's freedom of movement was not restrained to the degree associated with formal arrest and no *Miranda* warnings were required. *See Howes*, 565 U.S. at 509 (restricted movement is "'a necessary and not a sufficient condition for *Miranda* custody'" (quoting *Shatzer*, 559 U.S. at 112)).

But even if defendant's freedom of movement had been so restrained, *Miranda* warnings still would not have been required because the environment where the reenactment took place presented none of the inherently coercive pressures of a station house interrogation, much less was so coercive as to be equivalent to a station house interrogation. Again, defendant agreed to meet investigators by appointment at her own home. When she arrived at that appointment, she did so under her own power and with her own phone, was asked non-accusatory questions in a conversational tone for 30 minutes by a single detective while a second detective recorded and pedestrians passed by outside, then left. Neither detective was in uniform, and Tate, who was observing off to one side, wore a sweatshirt and jeans. No one raised their voice at defendant, touched her, threatened her, or

promised her anything. Under these circumstances, no reasonable person would believe "she was not at liberty to terminate the interrogation and leave." *Slater*, 228 Ill. 2d at 150 (internal quotation marks omitted).

Indeed, this encounter was even further from the coercive environment of a police-dominated station house interview than the encounter this Court found to be non-custodial in *Slater*. There, two armed, plain-clothes detectives, occasionally joined by a DCFS investigator, questioned the defendant about the sexual abuse of her child for 10 to 15 minutes in a child advocacy center interview room with the door closed. *Slater*, 228 Ill. 2d at 155-57. The Court held that the defendant was not in custody, *id.* at 159, noting that the child advocacy center interview room was a less "foreboding, intimidating and adversarial environment" than a police station, there were no indicia of formal arrest procedures, and the officers never "harassed defendant or raised their voices," *id.* at 156.

Defendant's various arguments that she was in custody — because Tate purportedly told her she had to participate in the reenactment and no one told her otherwise, she was isolated in an upsetting environment, and police "intentionally circumvented" *Miranda* — are meritless.[4]

[4] Defendant also asserts in passing that "she knew she was the focus of a criminal investigation," Def. Br. 22, but this assertion is belied by her trial testimony that she had no reason to believe that she was in any trouble and did not think she was suspected of any involvement in J.C.'s death, R465.

a. Tate did not tell defendant she had to participate in the reenactment.

Defendant's argument that she was in custody rests primarily on her assertion that Tate told her several days before the reenactment that "she [wa]s *required* to talk to police." Def. Br. 17 (emphasis in original); *see id.* at 16 (asserting Tate told defendant she was "required" to participate in reenactment); *id.* at 21 (asserting Tate told defendant "she *had* to participate" (emphasis in original)). But Tate did not tell defendant that she was required to participate. Rather, Tate explained that "we" — that is, DCFS — "need[ed] to do a reenactment," which was something "we do . . . in all our own child death cases," R48, and that DCFS and police "need[ed] the reenactment . . . to better understand what happened in [defendant's] home that night," R51, and to "move forward with the investigation," R48. Accordingly, Tate told defendant that "it was best to get this done so we can move forward in the investigation," R51, indicating that defendant had options and that cooperating in the reenactment was the "best" one.

In other words, Tate "merely offer[ed] a truthful explanation" that her and Matthews's "duties as criminal investigators required them to speak with [defendant]." *United States v. Johnson*, 39 F.4th 1047, 1052 (8th Cir. 2022) (defendant not in custody due to agents' statements "that they 'needed to talk with him'"). In doing so, she "never implied that the law or anything else required [defendant] to speak with them." *Id.*; *see United States v. Braxton*, 112 F.3d 777, 781 (4th Cir. 1997) (en banc) ("officers' use of the colloquial

phrase 'we need to talk to you'" was not "evidence that the officers told [the suspect] that he was obligated to speak with them"). Tate certainly did not "affirmatively misinform[] [defendant] as to her rights and legal position," as defendant asserts. Def. Br. 43. Tate did not, like the officer in *Commonwealth v. Novo*, *see* Def. Br. 42, repeatedly tell defendant that "unless [she] offered a reason for injuring [the victim] during the interview, [s]he would not be able to offer any reason to a jury at a subsequent criminal case," 812 N.E.2d 1169, 1174 (Mass. 2004). Nor was Tate's explanation of the importance of a reenactment to the investigation similar to *United States v. Giddins*, *see* Def. Br. 43, where officers told a suspect that signing a *Miranda* waiver and answering their questions "was the normal procedure for obtaining his car," indicating that his car would not be returned unless he waived his rights and answered questions. 858 F.3d 870, 883 (4th Cir. 2017). In short, Tate told defendant that a reenactment was necessary to the investigation, not that defendant was required to assist the investigation.

Indeed, although the objective custody analysis "involves no consideration of the 'actual mindset' of the particular suspect subjected to police questioning," *J.D.B. v. North Carolina*, 564 U.S. 261, 271 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 667 (2004)), defendant's own testimony supports this understanding of Tate's statements. Defendant testified that after Tate explained that the reenactment was standard procedure in child death investigations, defendant "didn't feel like [she] had a

choice," R65-66, suggesting that she felt she had no choice but to participate because the investigation into J.C.'s death depended on her participation, not because she was actually required to participate. A feeling of compulsion arising from internal pressures — a desire to know what happened to one's loved one or relieve one's conscience, fear of looking callous to friends or suspicious to police if one refuses to cooperate, or any number of other reasons — is irrelevant to any analysis under the Fifth Amendment, for "the Fifth Amendment privilege is not concerned 'with moral and psychological pressures to confess emanating from sources other than official coercion.'" *Colorado v. Connelly*, 479 U.S. 157, 170 (1986) (quoting *Oregon v. Elstad*, 470 U.S. 298, 305 (1985)).

Defendant also suggests that the fact that Tate worked for DCFS alone compelled defendant to participate in the reenactment because Tate had authority to take temporary protective custody of defendant's surviving child. Def. Br. 22; *see* 89 Ill. Adm. Code § 300.120 (authorizing temporary protective custody if remaining in caregiver's custody "presents an imminent danger to the child's life or health"). But defendant's position cannot be reconciled with this Court's decision in *Slater*. There, the DCFS investigator told the defendant that he did not believe her denials that her child was not sexually abused and that he could remove the child from her care if he believed it was in danger. *Slater*, 228 Ill. 2d at 155. The Court found this not to be sufficiently coercive for *Miranda* custody, explaining that the investigator

never "threatened that [the defendant's] children would be removed from her care *as a result of* her failure to confess," but "simply apprised [her] of the next steps that would be taken to ensure her child's safety." *Id.* at 155-56 (emphasis in original). Here, not only did Tate never threaten to remove the surviving child from defendant's care, but she also never even mentioned her authority to remove the child, and the mere fact that Tate was a DCFS investigator was not alone inherently coercive enough to place defendant in custody.

Because Tate's explanation of the reenactment was not a command to participate and a reasonable innocent person would otherwise feel free to terminate the non-threatening conversation at her home, there was no need for anyone to affirmatively tell defendant that she did not have to participate or was free to leave. Defendant's reliance on *State v. Barry*, 267 A.3d 682 (Vt. 2021), for the proposition that "whether officers told defendant she was 'free to leave' is the 'most important factor in determining *Miranda* custody," Def. Br. 21, is misplaced. *Barry* held that this was so because a reasonable person's belief "is necessarily influenced by the communication from police about the extent of the person's freedom." 267 A.3d at 687 (internal quotation marks omitted). But while this may be true whenever an officer tells someone they are not free to leave, it is plainly not true whenever an officer says nothing about a person's freedom to leave. For example, officers interviewing witnesses at a crime scene or conducting traffic or *Terry* stops do

not tell the witnesses or detainees that they are free to leave, yet not all witness or traffic and *Terry* detainees are automatically in *Miranda* custody. *See Shatzer*, 559 U.S. at 113. Only when a reasonable person otherwise might not believe she was free to leave are such reassurances particularly relevant to the custody analysis.

For example, in *People v. Brown*, three officers told the defendant he was wanted on criminal charges, searched him, handcuffed him, and took him to the police station. 136 Ill. 2d 116, 119 (1990). There, he was told he was under arrest and interrogated before being released on the condition that he return immediately after he informed his employer about his whereabouts. *Id.* at 119-20, 126-27. After he returned, he was interrogated for another 20 minutes by an angry officer, then told he was "free to leave." *Id.* at 127. Given the character of the preceding events and the absence of similar assurances until that point, the Court concluded that the statement "implie[d] that up until that time [the defendant] was not free to leave and was in fact in the custody and control of the officers." *Id.* at 127.

In contrast, in *Slater*, the Court gave little weight to the fact that the defendant was not told she was free to leave where, as here, the environment was not otherwise particularly coercive and she never expressed any desire to leave. *See* 228 Ill. 2d at 157 (noting that "although defendant was not advised that she was free to leave, she also at no time requested to leave"); R69, 77-78. In short, a non-custodial encounter is not converted to a

custodial interrogation simply because police do not comment on the person's apparent but unexercised freedom to terminate the encounter and leave.

In any event, to the extent that a reasonable person might have understood Tate's explanation of the importance of reenactments in child death investigations as an order to participate, that impression could not survive the subsequent phone call with Matthews, who asked if defendant was willing to participate in a reenactment, R73-74, 464. At that point, still several days before the reenactment took place, a reasonable person would understand that it was defendant's choice whether to participate.

b. Defendant was not isolated in a coercive setting.

Defendant next argues that she was in custody because Matthews prevented Taylor from entering the apartment, thereby isolating defendant from her "mother-figure," and because the apartment was an emotionally upsetting environment. Def. Br. 24-25. But the environment of the reenactment was no more coercive for Taylor being outside, and the fact that the apartment may have been an upsetting location for reasons unrelated to police coercion is irrelevant.

It is not uniformly the case that excluding a family member from an interview moves an environment toward becoming police-dominated and coercive. Sometimes that will be the case, such as when the suspect wants the family member to remain. *See United States v. Fred*, 322 F. App'x 602, 603-04, 606 (10th Cir. 2009) (exclusion of defendant's wife, whom he wanted

remain because she spoke better English, was factor in favor of custody). But sometimes, like here, the exclusion carries no coercive overtones. Here, it was not just Taylor, but defendant's four-year-old child who accompanied her to the meeting at the apartment. R55, 59, 68, 76. Matthews "asked [Taylor] if she would mind staying outside with the child" to avoid distractions during the reenactment. R76; *see* R61-62 (Taylor's testimony that Mathews asked her not to come inside because he "thought it would be best if [she] stayed outside with the child."). Taylor agreed and waited on the porch with the four-year-old while defendant went inside. R57, 61, 76; *see* R98 (circuit court noting that defendant's "mother figure [was] really right outside"). Thus, Taylor was asked, not ordered, to stay outside for reasons that did not suggest an attempt to isolate defendant from her loved ones. Moreover, there was no indication that defendant brought Taylor along because she wanted Taylor to attend the reenactment rather than because she needed Taylor to drive her there or provide childcare. *See* R408 (Taylor gave defendant ride from apartment after coroner took J.C.'s body). Defendant might well have preferred that Taylor stay outside with her son, so as not to subject the four-year-old to a reenactment of his mother discovering his younger brother's body.

Nor was defendant's apartment "*more* coercive than even a police station" because it was an emotionally distressing place for defendant. Def. Br. 25 (emphasis in original). The question is not whether the location was

upsetting; the question is whether the location is so police-dominated that it becomes the functional equivalent of an interrogation room at a police station in terms of its coercive effect on the person being questioned. In other words, a location is not coercive because it is emotionally distressing unless the source of that distress is the police and contributes to a reasonable person's belief that they have curtailed her freedom to terminate questioning and leave. Otherwise, many interviews with victims and witnesses would become custodial interrogations simply because of the nature of the victim's or witness's emotional response to the location. For example, the scene of a recent violent crime will be the "most distressing venue imaginable" to a victim or witness. Def. Br. 25. Similarly, the morgue is an emotionally distressing setting for a person asked to identify the body of a loved one. The fact that Matthews conducted the reenactment at the only place that it could be conducted — the place where the child's body was found, R300-01 — did not render the reenactment custodial.

c. Police did not intentionally circumvent *Miranda*.

Nor was the reenactment custodial as an "intentional circumvention of *Miranda*." Def. Br. 23. First, just as an officer's undisclosed suspicion is irrelevant to the objective custody analysis, an officer's undisclosed reasons for conducting an interview in a particular way are irrelevant. *See Slater*, 228 Ill. 2d at 153 (officer's undisclosed suspicion irrelevant).

Second, Matthews did not "circumvent" *Miranda* in the way defendant suggests. In the cases that defendant cites, police attempted to circumvent *Miranda*'s protections by deliberately administering the warnings only after they had finished interrogations. *See Missouri v. Seibert*, 542 U.S. 600, 611-13, 616 (2004) ("police strategy adapted to undermine the *Miranda* warnings" by "question[ing] first and warn[ing] later"); *People v. Lopez*, 229 Ill. 2d 322, 363-64 (2008) (detectives "engaged in some form of the 'question first, warn later' interrogation technique"). That is not what happened here. Here, Matthews did not give defendant *Miranda* warnings because he did not subject her to the inherently coercive environment of custodial interrogation that makes the warnings necessary. "Circumventing" *Miranda*'s warning requirement by not engaging in custodial interrogation is no more improper than "circumventing" the Fourth Amendment's warrant requirement by obtaining consent to search a home rather than a warrant to search it against the resident's will. There is nothing inappropriate about police pursuing less aggressive investigative tactics simply because those tactics do not require the same procedures as more aggressive tactics.

B. The evidence was not closely balanced, as required for first-prong plain error, nor does a *Miranda* violation constitute structural error, as required for second-prong plain error.

Because defendant was not in custody, the denial of her motion to suppress for want of *Miranda* warnings cannot constitute plain error. *See Smith*, 2016 IL 119659, ¶¶ 75-76. But even if the denial of the motion to

suppress were clearly or obviously erroneous, defendant cannot satisfy the first prong of the plain-error test because the evidence was not closely balanced, and she cannot satisfy the second prong because a *Miranda* violation is not structural error.

1. The evidence was not closely balanced.

Under the first prong of the plain-error test, an error rises to the level of plain error only if the evidence was so closely balanced that any error, no matter how slight, was prejudicial, in that it could have caused the jury to find defendant guilty where it otherwise would have acquitted her. *See People v. Sebby*, 2017 IL 119445, ¶ 51. Defendant cannot show that the evidence was closely balanced because, as the appellate court recognized, Op. ¶ 113, the evidence of her guilt was overwhelming.

The evidence showed that J.C. asphyxiated due to pressure placed over his nose and mouth — that is, he was smothered. R302-03, 305. In conducting the autopsy, Denton ruled out any other possible cause of death, R305: J.C.'s airways were clear, unblocked by any object, mucus, or inflammation, R298-99, 305; microscopic examination of his lungs showed no asthma or infection, R299-300; his breathing had not been affected by any allergic reaction, tumor, or brain trauma, R304-05; he did not drown, R304; and he was not strangled, for there was no bruising on his neck, R303-04. Because the 19-month-old could not have suffocated simply by lying face down on a bed, even with a fitted sheet over his head, R301-02, the only

question was who smothered him. There were no signs of forced entry, R225-26, 239, so the only possibilities were the two people in the house — defendant and J.C.'s four-year-old brother — and Denton explained that the four-year-old was physically incapable of smothering J.C., R306-07. J.C. was an especially large and well-developed 19-month-old, R288-89, 306, and his brother could not have overcome his struggling and maintained the pressure over J.C.'s nose and mouth for the three to five minutes necessary to kill him without sitting or lying on him, which would have left marks elsewhere on the body, R306-07. Because there were no such marks, R307, the medical evidence alone established that defendant was the killer.

This evidence that defendant smothered J.C. was corroborated by substantial evidence of motive. Defendant had taken out a $25,000 life insurance policy on J.C., R366-67, and the evidence showed that she faced increasingly dire financial straits in the months before his death, as her struggles to pay bills were compounded by her inability to obtain steady employment, Exh. Q1, #20 at 01:52-02:10; Exh. Q1, #393 at 00:00-00:44; the termination of her Social Security benefits two months before J.C.'s death, Exh. Q1, #200 at 03:32-04:00, and the loss of her Link benefits the month before his death, Exh. Q1, #393 at 01:38-01:45. Throughout these struggles, she continued to overdraw her account to satisfy Comage's demands for money. *See*, *e.g.*, Exh. Q1, #20 at 01:21-03:45. Yet, as phone and electricity bills went unpaid and the overdraft fees accumulated, defendant never failed

to pay the monthly premium for J.C.'s $25,000 life insurance policy, R366-68, which Comage reminded her just a month before J.C.'s death was "the main thing that need[ed] to be paid," Exh. Q1, #467 (Clip 1) at 02:43-03:08. Five days before J.C.'s death, when defendant had been unable to pay a single bill that month and Comage insisted that she send him $100, she told him she was going to "figure something out." Exh. Q1, #606 (Clip 2) at 00:25-02:07. Four days later, the day before J.C. was smothered to death, she ran an internet search for "how do you suffocate," R259-63; E401. Mere hours after she reported J.C.'s death, she called the insurance company to collect the life insurance proceeds. R368-69.

Further supporting the case against defendant were her inconsistent and implausible stories that she had been treating J.C. with Albuterol for breathing problems twice a night for several days before his death. To the extent that defendant sought to explain J.C.'s death as the result of those breathing problems, her explanation was defeated by the medical and physical evidence. Defendant claimed that J.C. had gone to bed with congestion that prevented him from breathing through his nose, R472-73, but the autopsy the next morning showed no mucus blocking his airways, R298-99. Moreover, defendant's story of breathing treatments was not corroborated by any other evidence. The last time defendant obtained a three-month refill of J.C.'s Albuterol prescription was nine months before his death, R340-41; Exh. E1 at 15:17-15:22; there was no Albuterol in the home,

R228, 247-48, 325; and there were no empty Albuterol vials in the trash can even though the trash was full on the morning of J.C.'s death, R227, 245-47.

Ultimately, nothing rebutted the medical and strong circumstantial evidence that defendant killed J.C. Defendant merely asserted that she had found J.C. dead in his bed, waited 17 minutes, then called Taylor and 911. In closing, she argued that J.C. had suffocated without anyone's involvement and that she was being blamed because "we need to point the finger at somebody." R543-44.

In sum, the evidence of defendant's guilt was not closely balanced. Therefore, she cannot show first-prong plain error.

2. A *Miranda* violation is not structural error.

Nor did any error rise to the level of prong two plain error. To satisfy the second prong of the plain-error test, an error must be "structural," meaning that it "affect[s] the framework within which the trial proceeds, rather than mere errors in the trial process itself." *Moon*, 2022 IL 125959, ¶¶ 28-29. Thus, for example, a failure to swear the jury constitutes structural error (and, if forfeited, second-prong plain error) because it "affects the very framework within which the trial proceeds" and therefore "cannot be logically categorized as a mere trial error." *Id.* ¶ 70. In other words, structural errors undermine the integrity of the judicial process itself, rendering that process "an unreliable means of determining guilt or innocence." *Id.* ¶ 28. For that reason, "[s]tructural error 'def[ies] analysis by

"harmless error" standards'" like those that govern even constitutional errors, *Jackson*, 2022 IL 127256, ¶ 49 (quoting and altering *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991)), and warrants automatic reversal "regardless of the strength of the evidence of the defendant's guilt," *id.* ¶ 28. Accordingly, structural errors have been recognized in only "a 'very limited class of cases.'" *Moon*, 2022 IL 125959, ¶ 28 (quoting *Johnson v. United States*, 520 U.S. 461, 468 (1997)).

The admission of statements in violation of *Miranda*'s prophylactic rule does not constitute structural error because it reflects an error within a functioning judicial process, not an error that prevents the judicial process from functioning. Unlike trial before a biased judge or the complete denial of counsel, *see id.* ¶ 29, the mere fact that a particular trial may contain an evidentiary error does not render the judicial process itself fundamentally unfair, *Allen*, 222 Ill. 2d at 353 ("[A] fair trial is different than a perfect trial.").

That is why, as defendant concedes, Def. Br. 30, the admission of a statement in obtained in violation of *Miranda* is not automatically reversible error but instead is reviewed for harmlessness. *See People v. R.C.*, 108 Ill. 2d 349, 355-56 (1985) (applying harmless-error analysis to *Miranda* violation); *United States v. Lee*, 413 F.3d 622, 627 (7th Cir. 2005) (same). Indeed, even the constitutional error of admitting an involuntary statement is reviewed for harmlessness. *See People v. Salamon*, 2022 IL 125722, ¶¶ 121-23 (applying

harmless-error analysis to admission of involuntary statement); *see also* *Fulminante*, 499 U.S. at 311-12 (admission of involuntary statements subject to harmless-error analysis). The fact that a *Miranda* violation is reviewed for harmlessness demonstrates that such errors are not structural.

Defendant argues that the alleged *Miranda* violation in this case nonetheless rises to the level of second-prong plain error because Denton's request for a child death investigation after J.C.'s autopsy showed he had been asphyxiated was somehow improper. Def. Br. 35. In support, defendant relies on the appellate court's musings that "[a] skeptic might question whether the reenactment was medically necessary or simply a way to assist a criminal investigation," Op. ¶ 83, and that "one wonders" whether the cooperation between DCFS and police "was by coincidence or design," *id.* ¶ 84; *see* Def. Br. 35 (quoting Op. ¶¶ 83-84). But there is nothing troubling, much less unconstitutional, about a forensic pathologist requesting an investigation into a child's death after the autopsy shows that the child was asphyxiated by smothering or strangling. *See* R300. The purpose of an autopsy is to determine the cause of death, *see* R284-85, 316, and if the autopsy indicates an unnatural death, it is entirely appropriate that the death be further investigated. Nor is there anything improper about the forensic examiner, DCFS, and police cooperating to conduct that investigation.

More fundamentally, the manner in which police obtained statements is irrelevant to whether a resulting *Miranda* violation constitutes structural error. Regardless of how the defendant came to be custodially interrogated or whether the failure to administer *Miranda* warnings was inadvertent or deliberate or attributable to one investigating agency rather than another, the erroneous admission of a defendant's unwarned statements is "a classic 'trial error,'" *Fulminante*, 499 U.S. at 309 — an "error which occurred during the presentation of the case to the jury, and which may therefore be quantatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt," *id.* at 307-08. Therefore, the error could not constitute second-prong plain error even if there were something somehow untoward about police or DCFS assisting in Denton's death investigation.

II. Counsel Provided Effective Assistance by Not Moving to Suppress the Reenactment Video on Other Grounds or Moving to Redact Various Statements from the Video and Audio-Recorded Phone Calls.

Defendant's claims — that counsel was ineffective for not moving to suppress her statements in the reenactment video as involuntary or as the product of an unconstitutional seizure and not moving to redact certain statements from the reenactment video and phone call recordings — are meritless. To show ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), defendant must establish both that (1) counsel's performance fell below an objective standard of reasonableness

and (2) there is a reasonable probability that she would have been acquitted but for counsel's deficient performance. *People v. Gayden*, 2020 IL 123505, ¶ 27. Failure to establish either *Strickland* prong — deficient performance or prejudice — is fatal to defendant's claim. *Id.*

Defendant cannot make either showing. She cannot show that counsel performed deficiently because the motion to suppress she faults counsel for not filing was meritless, *see id.* ¶ 28, and counsel reasonably declined to move to redact the recordings. And she cannot show prejudice because there is no reasonability probability that she would have been acquitted even had all the challenged evidence been suppressed or excluded. *Id.*

A. Counsel was not ineffective for not moving to suppress defendant's statements as involuntary or the product of an unconstitutional seizure.

1. Defendant's statements were not involuntary.

"Police coercion is a prerequisite to finding that a confession was involuntary." *Salamon*, 2022 IL 125722, ¶ 83. Accordingly, a statement is voluntary if it was "made freely and without compulsion or inducement of any kind" and involuntary if "the will of the defendant [was] overborne and his capacity for self-determination critically impaired." *Id.* ¶ 80 (cleaned up); *see Slater*, 228 Ill. 2d at 160. To determine the voluntariness of a statement, the Court considers the totality of the circumstances, which include factors like the defendant's personal characteristics and background; the length, legality, and character of the questioning; whether *Miranda* warnings were given; whether any physical or mental abuse was inflicted; and whether any

promises or threats were made. *Salamon*, 2022 IL 125722, ¶ 81; *see Slater*, 228 Ill. 2d at 160.

Under the totality of the circumstances, defendant's statements during the reenactment were voluntary. As discussed, *see supra* pp. 31-33, defendant agreed to meet with police at her home, where Matthews asked her non-accusatory questions in a polite, conversational tone for about 30 minutes. In other words, defendant participated in a short, civil interview, during which she was not physically abused (or even touched); endured no shouting, cursing, or even particularly pointed questioning; and was induced by no threats or promises. As a result, defendant remained calm throughout the interview, displaying no signs of emotional distress or physical discomfort before she left without incident after giving her consent for Matthews to search the apartment.

Defendant's arguments that her statements were involuntary fail for the same reasons as her arguments that she was in custody. Tate did not "affirmatively misinform[] [defendant] about her rights and legal position" when she explained the purpose and need for a reenactment. *See supra* § I.A.2.a. And Taylor's absence during the reenactment itself, as she stayed outside to care for defendant's four-year-old child, did not render defendant's statements involuntary. *See supra* § I.A.2.b. Defendant is an adult and "there is no evidence a concerned adult's absence caused [her] will to be overcome." *People v. Murdock*, 2012 IL 112362, ¶ 54; *id.* ¶ 55 (juvenile

defendant's statements not involuntary due to "absence of a concerned adult," where videorecording showed defendant was "mostly calm and collected," "did not appear frightened or under any intense coercion," "was never threatened physically or mentally," and police "made no promises or assurances to defendant so as to contribute to a coercive atmosphere"). And because defendant was not in custody, the cases she cites for the proposition that a *Miranda* violation supports a finding of involuntariness are inapposite. *See* Def. Br. 41.

Finally, there is no merit to defendant's intimation that police engaged in malfeasance by asking her to participate in a reenactment as part of the standard procedure in a child death investigation. *See* Def. Br. 42-43. As Denton testified, it *is* part of the standard procedure in child death investigations, which are investigations of a child's death conducted to aid the coroner in determining the manner of a death, not investigations of a person conducted to determine that person's criminal liability for a child's death. R300, 316. And defendant does not explain why this procedure is in any way improper; certainly, it is not an attempt to conceal unconstitutional coercion "under the guise of routine procedure." *Salamon*, 2022 IL 125722, ¶ 107 (coercive practice of making suspects wait indefinite period before receiving telephone access was not constitutionally permissible just because it was "routine procedure"). Nor is asking people to participate in reenactments to gather more information about a suspicious child death in

any way dishonest; Matthews did not claim to be defendant's attorney, *see People v. Easley*, 148 Ill. 2d 281, 316 (1992), or tell her that standard procedure prevented him from returning seized property unless she waived her rights and answered his questions, *see Giddins*, 858 F.3d at 883.

Because defendant's claim is meritless under the Fifth Amendment, it is also meritless under article I, section 10 of the Illinois Constitution. Although the language of Fifth Amendment and article I, section 10 is not identical, this Court has held that "[t]he two provisions differ in semantics rather than in substance." *People ex rel. Hanrahan v. Power*, 54 Ill. 2d 154, 160 (1973); *see also Salamon*, 2022 IL 125722, ¶ 80 (Fifth Amendment principles governing compelled statements "have been adopted by this court"). And "[t]here is nothing in the proceedings of the constitutional convention to indicate an intention to provide, in article I, section 10, protections against self-incrimination broader than those of the Constitution of the United States." *People v. Rolfingsmeyer*, 101 Ill. 2d 137, 142 (1984). Accordingly, to the extent defendant asks this Court to interpret the Illinois provision to bar statements that are voluntary and admissible under the Fifth Amendment, Def. Br. 38-39, she has failed to provide "the substantial grounds necessary for this court to depart from the federal interpretation of the self-incrimination clause," *Relsolelo v. Fisk*, 198 Ill. 2d 142, 150 (2001).

2. Defendant was not seized.

It is well settled that "not every encounter between a police officer and a private citizen involves a seizure or restraint of liberty that implicates the

fourth amendment." *People v. Almond*, 2015 IL 113817, ¶ 56. Rather, "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 553 (1980). Thus, defendant cannot show that counsel was ineffective for not moving to suppress the reenactment video on Fourth Amendment grounds for the same reason she cannot satisfy the freedom-of-movement inquiry necessary to establish *Miranda* custody: no reasonable person would believe that she was not free to leave the apartment if she wished. Defendant voluntarily met investigators at her home, stayed for a short interview during which no one even implicitly restricted her freedom to leave, then left without asking anyone's permission. This consensual encounter "d[id] not violate the fourth amendment because it d[id] not involve coercion or a detention." *Almond*, 2015 IL 113817, ¶ 56.

Application of the *Mendenhall* test, which this Court generally applies to determine whether a person who, like defendant, did not attempt to leave an encounter was seized during that encounter leads to the same conclusion. Under that test, the Court looks for the presence of four factors: "(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 person to comply with the officer's requests." *Id.* ¶ 57.

Here, none of the *Mendenhall* factors are present. *See Cosby*, 231 Ill. 2d at 282 (no seizure where no *Mendenhall* factor is present); *People v. Oliver*, 236 Ill. 2d 448, 458 (2010) (same). Three of the four factors are indisputably absent: no one at the reenactment was threatening in any way, ever displayed a weapon, or ever touched defendant. The only disputed factor is the use of language to compel defendant to comply with Matthews's requests — Tate's comments several days prior about the need to conduct a reenactment — but a fair reading of Tate's statements in their full context makes clear that she did not tell defendant she was required to participate. *See supra* § I.A.2.a. To the extent defendant thought she was required to participate, that misapprehension was dispelled when Matthews called and expressly asked whether she "would be willing to participate," R73-74, clearly communicating that participation was voluntary. Thus, defendant was subject to no commanding language by the time she participated in the reenactment. Under the totality of these circumstances, no reasonable person would believe that she was not free to stop the reenactment and leave if she wished. Therefore, defendant was not seized during the reenactment.

3. Defendant cannot show prejudice from the admission of the reenactment video.

Even if the reenactment video were suppressed, there would be no reasonable probability that defendant would be acquitted, for the remaining evidence was overwhelming. *See supra* pp. 43-46. Defendant's prejudice argument rests on the assertion that Denton's opinion was substantially

based on the reenactment video and therefore would have been excluded altogether or materially limited as fruit of the poisonous tree. *See* Def. Br. 46; *Winsett*, 153 Ill. 2d at 351 (evidence obtained through exploitation of constitutional violation is subject to suppression as fruit of poisonous tree). But defendant mistakes chronology for causation. Denton did not provide his final opinion until after he viewed the video, but his testimony made clear that his opinion that the only possible cause of death was smothering at the hands of someone other than J.C.'s four-year-old brother was based on his methodical and thorough autopsy, not the video. *See supra* pp. 10-11, 14-15.

The only portions of Denton's opinion that he did not explain based entirely on his findings from the autopsy were that the smothering occurred on the bed, based on defendant's story of finding the body there, R316-17, and that the position in which defendant said she found J.C. could not explain his smothering death, R301-02. Excluding those portions, Denton still would have testified that J.C. was smothered by someone other than his brother, and defendant still would have been the only possible perpetrator.

Nor would suppressing these two minor pieces of Denton's opinion have affected the strength of the rest of the evidence against defendant. The jury would still learn that defendant's breathing-treatment story was incredible because there were no Albuterol vials in the apartment, J.C. had not been prescribed Albuterol in nine months, and both the medical records and autopsy showed that he had no breathing problems. And the jury would

still hear that a search for "how do you suffocate" was conducted on defendant's phone the morning before J.C. was suffocated, as well as the evidence of defendant's financial motive. Therefore, defendant was not prejudiced by counsel's decision not to move to suppress the video on additional grounds.

B. Counsel was not ineffective for not moving to redact one statement from the reenactment video.

Defendant argues that counsel was ineffective for not moving to redact her statement in the reenactment video that when J.C. was two months old, she took him to the hospital for a bump on his head, which led to DCFS getting involved and creating a "safety plan" before it was determined that the bump was from birth and the matter was dropped. Def. Br. 52; Exh. E1 at 11:18-12:16. Defendant asserts that this statement should have been excluded under Illinois Rule of Evidence Rule 404(b) as evidence of other crimes or bad acts. Def. Br. 51. But defendant cannot "overcome the strong presumption" that counsel's decision not to seek such redaction "may have been the product of sound trial strategy," *People v. Dupree*, 2018 IL 122307, ¶ 44, nor can defendant show prejudice.

Counsel's strategy was to portray defendant as a concerned mother who sought medical treatment whenever J.C. showed any symptoms, no matter how minor. *See* R346-48 (cross-examining King regarding frequency with which defendant sought medical treatment for J.C.); R452-54 (examining defendant regarding same); R528-29 (arguing in closing that

frequency with which defendant sought medical treatment for J.C. showed she was protective mother). Counsel reasonably could have determined that defendant's statement that she had taken J.C. to the hospital for a bump on his head that was later determined to be from birth supported that defense. Counsel also reasonably could have declined to seek redaction of the statement as evidence of other crimes or bad acts even if the statement had not supported the defense, for he could have determined that evidence that defendant took J.C. to obtain medical treatment for an injury that DCFS concluded she had nothing to do with was not evidence of other crimes or bad acts under Rule 404. Therefore, counsel did not perform deficiently by declining to seek redaction.

Nor was there any reasonable probability that the jury would have overlooked the overwhelming evidence of defendant's guilt and acquitted her had it not heard that when defendant sought medical treatment for a bump on J.C.'s head 17 months before his death, DCFS looked into it and determined it reflected no wrongdoing by defendant. This passing reference to a single, innocent contact with DCFS about an unrelated medical issue 17 months before J.C.'s death is readily distinguished from the evidence admitted in the case defendant cites, *In re Estate of Jackson*, 334 Ill. App. 3d 835 (1st Dist. 2002), where the appellate court reasoned that a guardian's "prior contacts with DCFS" — evidence that DCFS had taken custody of

several of the guardian's other children, *id.* at 839 — "may indicate a pattern of neglecting her children," *id.* at 845.

C. Counsel was not ineffective for not moving to redact various statements from the recorded phone calls.

Defendant claims that counsel was ineffective for failing to move to redact three statements from the recorded phone calls: (1) her comment to J.C.'s brother to "close that fucking window, you're pissing me off," Exh. Q1, #200 at 05:59-06:03; (2) her warning to J.C. that he was "gonna fuck [him]self up," Exh. Q1, #368 at 00:31-00:35, and later comment after he started crying a short time later that he was "a beast, he don't care; he gonna try any goddamn thing in the book until he really hurt himself," *id.* at 04:02-04:09; and (3) her statement that she had "dragged [J.C.'s brother's] toy box out to the dumpster, and threw all his fucking toys away" because they had not had a working television for over four days and if she had no television to watch, he would have no toys to play with, then exclaimed that he was being "annoying as fuck," Exh. Q1, #606 (Clip 1) at 00:00-00:43, 01:56-02:07. Def. Br. 53. Counsel reasonably could have decided against moving to redact these statements on the ground that the first two are trivial and the third would have been admissible on rebuttal anyway. Defendant cannot show prejudice for the same reason. Certainly, none of these statements is at all like the evidence at issue in the cases defendant cites. *See People v. Moore*, 2020 IL 124538, ¶¶ 45-46 (evidence that defendant's prior conviction was for murder posed high risk of unfair prejudice in trial for unlawful possession of

weapon by felon); *Old Chief v. United States*, 519 U.S. 172, 191-92 (1997) (evidence of nature of prior felony conviction offered only to prove status as felon generally poses unacceptable risk of unfair prejudice).

There was no probability, reasonable or otherwise, that the jury would have acquitted defendant of first degree murder if only it had not heard her speak sharply to her children for being disruptive while she was having a stressful phone conversation. Nor was there any probability that the jury would have acquitted her had it not heard her warn J.C. he was going to hurt himself, then remark to J.C.'s father that their son was fearless and that his willingness to try anything led him into trouble.

The only statement with any potential prejudicial effect was defendant's statement that she had thrown out all of J.C.'s brother's toys to punish him for depriving her of television, but counsel could not have kept that statement from the jury. Even if counsel had successfully excluded it from the People's case-in-chief, it would have been admissible on rebuttal to rebut defendant's character evidence that she often "went without" because she prioritized her bills and her children's needs. R398. And in any event, there is no reasonable probability that defendant would have been acquitted but for the admission of the statement given the overwhelming evidence of her guilt. *See supra* § I.B.1.

CONCLUSION

This Court should affirm the judgment of the appellate court.

October 30, 2023

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RULE 341(c) CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 15.000 words.

/s/ Joshua M. Schneider
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PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On October 30, 2023, the foregoing **Brief of Plaintiff-Appellee People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the Court's electronic filing system, which provided service to the following:

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