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2019 IL App (5th) 160266-U

NO. 5-16-0266

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE  
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Marion County.
	)	
v.	)	No. 15-CF-98
	)	
CHRISTINA D.N. THOMASON,	)	Honorable
	)	Mark W. Stedelin,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE BOIE delivered the judgment of the court.  
Justices Welch and Barberis concurred in the judgment.

ORDER

¶ 1 *Held*: In a direct appeal from a first degree murder conviction involving the suffocation death of a three-month-old child, the defendant failed to establish prejudicial error due to the admission of evidence that she tried to kill the child three months prior to her death when she was 24 weeks pregnant with the child, and the defendant failed to establish that she was denied her constitutional right to effective assistance of counsel.

¶ 2 A jury convicted the defendant, Christina D.N. Thomason, of first degree murder in the death of her three-month-old daughter, Aribella. It is undisputed that Aribella died by asphyxiation and that the defendant caused her asphyxiation by placing something on top of Aribella’s body that restricted her breathing. It is also undisputed that, prior to Aribella’s death, the defendant gave her a lethal dose of hydroxyzine, which would have

killed Aribella if she had not suffocated and which contributed to her suffocation. The factual dispute at the defendant's trial centered not on whether the defendant committed the acts that resulted in Aribella's death, but on the defendant's intent in performing the acts.

¶ 3 In this direct appeal of her conviction and sentence, the defendant raises several issues that, she argues, entitle her to a new trial. The issues she raises include: the improper admission of evidence of other bad acts; ineffective assistance of counsel due to her counsel's failure to move to suppress certain statements that she made during a police interrogation; ineffective assistance of counsel due to counsel's failure to redact other portions of the interrogation which, the defendant argues, exposed the jury to irrelevant and prejudicial information; and ineffective assistance of counsel due to defense counsel's failure to request a continuance, midtrial, to secure the testimony of a defense expert witness. For the following reasons, we affirm.

¶ 4 **BACKGROUND**

¶ 5 Evidence of the events leading up to Aribella's death was presented to the jury at the defendant's trial. The record of the defendant's trial establishes that, in early December 2014, the defendant was 22 years old and was the mother of two children, a son who had Down's syndrome and resided with her grandmother and a two-year-old daughter, Avianna, who resided with the defendant at her apartment. She was also pregnant with Aribella, who was her third child. Aribella was born 10 weeks prematurely on December 19, 2014, by an emergency C-section that was performed eight days after the defendant intentionally pierced her uterine membrane with a screwdriver. At birth,

Aribella weighed three pounds and eight ounces and spent the first month of her life in the intensive care unit of the hospital because of her premature birth. Aribella's father was not part of her life and never saw her after her birth.

¶ 6 After Aribella was released from the hospital, she lived with the defendant at her apartment. Aribella was colicky and screamed and cried for extended periods of time. On March 23, 2015, around 9 p.m., the defendant's uncle brought her some Pedialyte and Gripe Water to help with Aribella's upset stomach. He stayed at her apartment for 10 minutes. After he left, the only people at the defendant's apartment for the rest of the evening and into the next morning were the defendant, Avianna, and Aribella.

¶ 7 Sometime in the morning on March 24, 2015, Aribella suffocated to death. It is undisputed that the suffocation was caused by the defendant placing something, perhaps blankets, on top of Aribella's body which restricted her ability to breathe. Also, it is undisputed that, hours prior to her death, the defendant gave Aribella a lethal dose of hydroxyzine which would have killed her if she had not suffocated.

¶ 8 At 8:15 a.m. on the morning of Aribella's death, the defendant sent a text to her cousin as follows: "Hey, Tori, I have an emergency, Aribella isn't breathing. I've already called the ambulance, can you please get Ava." However, the defendant had not yet called for an ambulance when she sent the text. Instead, the defendant waited another four minutes and called 9-1-1 at 8:19 a.m.

¶ 9 At the defendant's trial, an audio recording of the defendant's 9-1-1 call was played for the jury. On the audio recording, the defendant is heard requesting an ambulance to come to her address because she did not think her "three-month-old is

breathing.” After the 9-1-1 operator dispatched an ambulance to the defendant’s apartment, he then instructed her on how to perform CPR on Aribella. The 9-1-1 call ended when a police officer arrived at the scene.

¶ 10 Officer Larry Kelly of the Salem Police Department responded to the defendant’s apartment and was the first person to arrive at the scene. He estimated that he arrived in about three minutes after being dispatched because he was in the area. He went inside the apartment and found the defendant in an upstairs bedroom kneeling over Aribella, who was on the floor. He described the defendant as having a few tears on her face but was “very unemotional.”

¶ 11 Officer Kelly told the defendant to move, picked up Aribella, and began CPR while holding her. He asked the defendant to clear off the top of a dresser so he could perform CPR on it. When the defendant began moving things off the dresser one piece at a time, Officer Kelly took his arm and brushed everything off with a sweep of his arm.

¶ 12 Officer Kelly noticed that Aribella was “extremely warm” and “even hot to the touch.” She showed no signs of life. As he performed CPR, he asked the defendant how long Aribella had not been breathing. The defendant told him that she had been in the shower for 35 minutes and that when she came out of the shower, she discovered that Aribella was not breathing. Officer Kelly observed that the defendant stood off to the side and was “very unemotional.” He continued with CPR until paramedics arrived a few minutes later.

¶ 13 Ashleigh Russell, a paramedic, arrived at the defendant’s apartment at 8:23 a.m. She immediately went upstairs and saw Officer Kelly performing CPR. Russell asked the

defendant what was going on, and the defendant stated that she laid Aribella down to take a shower and that when she came out of the shower approximately 20 minutes later, she found her not breathing. Russell noted that the defendant seemed “[v]ery calm, very standoffish” and showed no emotion.

¶ 14 Russell took over giving Aribella CPR. She noticed that Aribella was not breathing, was warm, and had bluing on her lips and fingertips. Other paramedics arrived at the scene and established an IV in Aribella’s leg, intubated her so they could get her air with a bag, and administered epinephrine to try to get her heart to start.

¶ 15 Russell continued CPR in the ambulance, arriving at the hospital at 8:37 a.m. She stayed with Aribella and took turns administering CPR with other paramedics until Aribella was pronounced dead in the emergency room at 9:21 a.m. She weighed 11 pounds at the time of her death. Once the doctors decided to stop their efforts, the defendant was brought into the room so she could say goodbye. Russell observed that the defendant was still “very calm.”

¶ 16 Less than two hours after Aribella was pronounced dead, Timothy Brown, a special agent with the Illinois State Police, and Bryan Green, a detective with the Salem Police Department, conducted an interview of the defendant at the Salem police station. They videotaped the interview, and the video recording was played for the jury at the defendant’s trial. The interview lasted a little less than one hour. At the time of the interview, neither Brown nor Green knew what caused Aribella’s death, and they did not know that Aribella had a lethal dose of hydroxyzine in her system when she died.

¶ 17 During the interview, the officers asked the defendant to go through the events leading up to her discovery that Aribella was not breathing. The defendant stated that Aribella had been running a slight fever and spitting up the night before. The next morning, she fed Aribella around 6 a.m., giving her four ounces of Pedialyte for her vomiting and some Gripe Water to help with her stomach issues. According to the defendant, she laid Aribella in a bassinet, with blankets rolled up to support her head and blankets on her side for support, and she went into the bathroom to take a shower at about 7:05 a.m. She said that she had a baby monitor in the bathroom with her and that she did not hear Aribella make any noise. She got out of the shower around 25 to 35 minutes later, got dressed, dressed Avianna, and then checked on Aribella. She told the officers that when she checked on Aribella, her face was tilted into the blanket that she had rolled up for a head rest. She stated that Aribella was on her back and that her head was tilted to her right side. She said Aribella was “kind of bluish” and did not respond when she poked her.

¶ 18 The defendant told the officers that she moved Aribella’s head out of the blanket, noticed that she did not seem to be breathing, shook her, called 9-1-1, and began performing CPR as instructed by the 9-1-1 dispatcher. The officers asked the defendant what she thought happened to Aribella, and she responded that she thought Aribella “suffocated in her blanket since her face was turned in to it.”

¶ 19 The defendant admitted that Aribella had been crying a lot since she had been home after her premature birth. She said that her fiancé, Kyle Lawson, had been helping

her with her children until the week before Aribella's death. She told the officers that her relationship with Lawson had ended and that he had "walked out."

¶ 20 Officer Brown told the defendant that his son had been a premature baby and had also cried a lot and that it was hard for him to handle. He said that it was normal for a single parent to get frustrated. He said that the autopsy had not been performed yet and that the autopsy would provide a lot of information concerning how Aribella died. He asked the defendant whether there would be any evidence that she shook her. The defendant said no and that she would never shake her.

¶ 21 Officer Green told the defendant that what "piqued" their interest was that she had help with Aribella until a week ago and that when her fiancé left she had a crying baby with no help. He acknowledged that a crying baby could get extremely frustrating and that they had seen parents reach their breaking point. Officer Brown added that when a baby dies lying on her back, it raises all kinds of questions. He stated that, if the pathologist determines that there was trauma, and you did not do it, then there had to be someone who did it. He told the defendant that if there was someone else that could have done something, they needed to know, stating that "babies just don't die on their back." He emphasized that they needed to know what happened because they were going to find out during the autopsy. The defendant again told the officers that Aribella laid in the bassinet and stopped breathing while she was in the shower.

¶ 22 After the interview, Officer Brown went with the defendant to her apartment and had her reenact the events of the morning. A video recording of the reenactment was played for the jury. On the video, the defendant showed the bassinet and how she

configured the blankets to support Aribella's head and sides, and she showed how she placed one blanket on top of her. With a doll, she demonstrated how Aribella was lying in the bassinet before she entered the shower.

¶ 23 A few hours after Officers Brown and Green interviewed the defendant, Dr. Scott Denton, a forensic pathologist with the Southern Illinois Children Death Task Force, performed an autopsy on Aribella. The autopsy occurred in the afternoon on March 24, 2015, approximately five hours after Aribella was pronounced dead. Officer Green attended the autopsy.

¶ 24 During the autopsy, Dr. Denton noticed that Aribella's postmortem lividity (settling of blood after death) was inconsistent with Aribella dying while on her back. Instead, Dr. Denton believed that the lividity was consistent with Aribella lying more on her right side than on her back. He also noticed pressure areas on her abdomen, left shoulder, legs, and the left side of her face that were consistent with pressure in those areas. He concluded that this evidence was consistent with something putting pressure on Aribella's abdomen or someone pressing down on her. Dr. Denton observed pressure areas on the left side of Aribella's face and redness from lividity on the right side of her face. He opined that this finding was consistent with something "pushing on the left side of her face" or the left side of her face "pushing against something."

¶ 25 Dr. Denton also noticed the presence of petechiae (ruptured small blood vessels) in various parts of Aribella's body, including her head, brain, heart, and lungs. He believed that this finding indicated "asphyxia or lack of blood flow or lack of oxygen in her brain." At the defendant's trial, he testified that his findings were "consistent with

compressional asphyxia or suffocation” and were “consistent with compressing the chest.” When asked how much pressure, he testified that it was “extremely variable.” He explained that there could be a lower amount of pressure for a longer period of time or a sudden amount of pressure that is greater in amount and causes sudden death. He believed that the weight would be about double of Aribella’s 11-pound body weight. He believed that the autopsy findings were not consistent with the defendant’s description of Aribella’s death.

¶ 26 During the autopsy, Dr. Denton took tissue samples that he sent off for toxicology testing. At the time of the autopsy, he did not know about the presence of hydroxyzine in Aribella’s system.

¶ 27 The investigation into Aribella’s death led investigators to questioning the defendant’s ex-boyfriend, Kyle Lawson. Investigators learned that Lawson and the defendant began dating in August 2014 when the defendant was already pregnant with Aribella. Lawson moved into the defendant’s apartment shortly after they began dating. Prior to Aribella’s birth, Lawson broke up with the defendant. The investigators learned that, shortly after Lawson broke up with the defendant and moved out of the defendant’s apartment, the defendant used a small screwdriver to pierce her uterine membrane. At that time, she was about 24 weeks into her pregnancy with Aribella. The defendant was taken to the hospital on December 10, 2014. Doctors at the hospital tried to delay Aribella’s birth and ultimately performed an emergency C-section on December 19, 2014. Therefore, due to the defendant piercing the uterine membrane, Aribella was born

10 weeks prematurely and remained in the intensive care unit at the hospital for a month after her birth.

¶ 28 Lawson informed the officers that, after Aribella's birth, the defendant asked him to move back in with her because she needed help with her newborn baby. Lawson agreed and moved back in with her. According to Lawson, while he lived at the defendant's apartment the second time, Aribella cried a lot. He helped with Aribella by walking her around the apartment when she was crying. When Aribella cried, he saw the defendant get "shaky" but he never saw her do anything inappropriate to her. He lived at the defendant's apartment for about a month and a half before deciding to break off his relationship with the defendant again.

¶ 29 In questioning Lawson, investigators learned that when he told the defendant that he was leaving her again and moving out of her apartment, the defendant became upset and asked him to stay because "she could not take care of newborns well." She told Lawson that Aribella's crying got on her nerves and that she could not handle it. According to Lawson, the defendant also told him that it was his fault that Aribella was born premature. When he asked her what she meant, she told him that when he left her the first time, "she took a screwdriver and shoved it up inside her and tried to kill Aribella while she was in the womb."

¶ 30 On March 25, 2015, after the autopsy and after interviewing Lawson, Officers Brown and Green conducted a second interview of the defendant at the Salem Police Department. The defendant's grandfather brought her to the station for the interview.

Again, the officers videotaped this second interview, and the video recording was played for the jury at the defendant's trial.

¶ 31 At the time of the second interview, the officers still did not have the toxicology test results; therefore, they did not know that the defendant had given Aribella a lethal dose of hydroxyzine prior to Aribella's death by suffocation.

¶ 32 At the beginning of the second interview, Officer Green told the defendant that he was locking the interview room's door so people would not interrupt them, but told her that the lock was on the inside of the door and that she was free to go. The defendant is seen on the recording smiling and saying "okay" in response. Officer Brown also added that the reason that they were locking the door was because they had been talking in the lobby with the defendant's grandfather present and that "it sounded like it was an issue."

¶ 33 The defendant agreed that she was at the interview voluntarily. She nodded her head and smiled when Officer Brown noted that the interview was being recorded and when he said "you were free to go yesterday, and you're free to go today." Brown took off his jacket and stated that they were not wearing any weapons. Officer Green offered the defendant water or soda. She declined the offer, stating that she had not yet brought herself to eat or drink.

¶ 34 Officer Green asked the defendant to again go over the events leading up to her discovery of Aribella's death. The defendant repeated the events that she described the day before, including taking a shower at around 7 a.m., getting dressed in the bathroom, and then going straight to Avianna's bedroom to dress her. She said that her shower lasted about 35 minutes and that it took her 10 minutes to get herself dressed and about 8

minutes to get Avianna dressed. She told the officers that she then went to check on Aribella, discovered that she was not breathing, and called 9-1-1. She said that she did not call or text anyone before calling 9-1-1 and that, after she got off the phone with the 9-1-1 dispatcher, she texted her cousin and asked her to come and get Avianna.

¶ 35 Officer Brown explained to the defendant that they had been talking to people, that they had information that she had problems with caring for small children, and that they knew that she “ended up in the hospital in Centralia.” He told the defendant that now was the time for her to do some “soul searching” and think about telling the truth. He told her that she had not been honest with them and that they needed her to start being honest. He said that she had not told them what happened because what she told them did not make any sense. The defendant paused in silence for 15 to 20 seconds and then responded, “I don’t know what happened. I told you guys what I know.” Brown responded, “That’s not true,” and the defendant responded, “I seriously do not know.”

¶ 36 Officer Brown asked the defendant, “do you know that we know that you stuck a screwdriver up you? Do you know we know that?” The defendant responded, “Okay, which means you talked to my ex-fiancé.” After further questioning, the defendant admitted that she taped a small screwdriver to her finger and “poked it in” to break her water in an attempt to induce labor. She stated that she had also taken some laxative pills to try to induce labor, and when that did not work, she used the screwdriver. She said that the screwdriver broke her water and that she felt Aribella’s head with her finger when she did it.

¶ 37 Officer Brown asked the defendant, “why did you do that?” and she responded, “because I tried to kill myself and have her be born early where I could just go away.” She said that she had wanted to kill herself since fourth grade because she had been sexually assaulted. She admitted later during the interview that she was also upset about breaking up with Lawson and that she “just wanted to be done.” Brown asked the defendant, “when you tried to kill yourself with a screwdriver, were you trying to get back at [Lawson]?” The defendant responded, “a little bit.”

¶ 38 Officer Green asked the defendant how she thought she could kill herself with the screwdriver. She answered that she hoped it would make her “body unhealthy” and give her an infection. Green asked her whether she was sure it “wasn’t about the baby?” The defendant shook her head no, stating that she did not think it would hurt Aribella because she knew of people giving birth at 21 weeks and that their babies were fine. She denied telling Lawson that Aribella would have been normal if he had not broken up with her the first time.

¶ 39 Officer Green told the defendant that he was at the autopsy and that she needed to tell them what happened. Officer Brown added that the pathologist told them what happened, which was why they wanted her to come back for another interview. He told her that “keeping it to yourself must be a burden” and encouraged her to tell them what happened. He asked her to go through it “just one time” and that he “needed to hear it” from her.

¶ 40 Officer Brown then asked, “was she crying?” The defendant nodded and said “yes.” He asked her, “what did you do?” The defendant responded, “throw my blankets

on top of her and walked out.” When asked why she did that, the defendant said that her screams were making her want to hit her. She explained that she put the blankets on Aribella around 6:45 or 7 a.m. because she had been screaming and crying for the previous 45 minutes. She told the officers that she put four thick blankets on top of Aribella’s face. She said that she did not know that would kill her, that she just wanted the crying to be “drowned out,” and that she thought Aribella was still breathing. She denied doing anything to Aribella because of her breakup with Lawson.

¶ 41 The defendant told the officers that, after putting the blankets on top of Aribella, she went into the bathroom and just sat in there to calm herself down. She then took a shower. She said that Aribella quit crying sometime when she was in the shower. She stated that she got out of the shower, got dressed about 10 minutes later, and got Avianna dressed. She said that Aribella was still not making any noise while she dressed Avianna and agreed that she was probably dead at that point but did not know it.

¶ 42 The defendant told the officers that, after dressing Avianna, she went to check on Aribella, removed the blankets that were on top of her, threw them onto her bed, and discovered that she was dead. She said that she poked her and felt her chest to see if she was moving. She told the officers that she started crying for about 10 minutes and that, while she cried, Avianna repeatedly told her, “it’s okay mommy.” Officer Brown told the defendant that he noticed that she was very calm when she called 9-1-1. The defendant stated that she took 10 minutes to calm herself prior to dialing 9-1-1 and agreed that she did that so it did not look like she had done anything wrong.

¶ 43 Officer Brown asked the defendant about sharing a link on Facebook at 7:31 a.m. The defendant told him that she did that while she was in the shower. She said that she reached for her phone while still in the shower and told the officers that she often checked her phone and Facebook while in the shower.

¶ 44 Toward the end of the interview, the defendant acknowledged that no one forced her to say anything during the interview and that she knew that she had been free to go. Officer Brown read the defendant her *Miranda* rights, and the defendant wrote her initials after each right. On the same day, at the conclusion of this second interview, the State charged the defendant with first degree murder stemming from Aribella's death by suffocation.

¶ 45 Sometime after the State charged the defendant with murder, investigators received the toxicology test results and learned, for the first time, of the presence of hydroxyzine in Aribella's blood and liver "at an extremely elevated concentration." The record establishes that hydroxyzine is an antihistamine used for itching and allergies which also lowers blood pressure. An adult who takes a normal dose of hydroxyzine, at its peak level, should have 43 nanograms of the drug per milliliter of blood. The toxicology testing found that Aribella had a level of hydroxyzine in the amount of 2076 nanograms per milliliter in her blood and 8928 nanograms in her liver.

¶ 46 The defendant had access to hydroxyzine because it had been prescribed for Avianna's eczema. The nurse practitioner who prescribed the medicine told the defendant that the drug had sedative properties that would make Avianna sleepy.

¶ 47 After reviewing the toxicology findings, Dr. Denton concluded that Aribella “ingested an extremely large amount of hydroxyzine medication” shortly prior to her death. He also concluded that the level of hydroxyzine in Aribella’s system was toxic. He believed that if Aribella had not died by asphyxiation, she would have eventually died from the toxic level of the hydroxyzine in her body.

¶ 48 At the defendant’s trial, Dr. Denton told the jury that, based on the autopsy findings and the toxicology report, he believed that the main cause of Aribella’s death was suffocation and that the hydroxyzine in her system would have made it easier for her to suffocate. According to Dr. Denton, because hydroxyzine lowers blood pressure, it also decreases blood circulation. Therefore, if someone was not getting enough oxygen from compressional asphyxia, the brain would suffer death more quickly than if the person did not have hydroxyzine in their system.

¶ 49 Prior to the defendant’s trial, her attorney filed several motions *in limine*, including a motion *in limine* seeking to prevent the State from presenting evidence that she had intentionally perforated her uterine membrane with a screwdriver while she was pregnant with Aribella. The defense attorney argued that there was a dispute concerning whether the defendant did so intending to terminate her fetus or intending to induce an early birth. The defense attorney also argued that the defendant’s actions had no bearing on whether she intentionally caused Aribella’s death three months later and that the introduction of the evidence would only serve to inflame the jury and would be unduly prejudicial. In response, the State argued that the issue was relevant because the trial was

going to come down to intent, and the incident was probative of the defendant's intent to murder Aribella.

¶ 50 After conducting a hearing on the motion, during which the circuit court questioned the attorneys extensively on the issue, the circuit court denied the motion as follows:

“My initial reaction, but for the involvement of Mr. Lawson, was that this is obviously inflammatory and had very little probative value, because lacking the contact with Mr. Lawson it's an unrelated incident, clearly. However, with Mr. Lawson's involvement both at the time of—the effort to abort or initiate early birth and the subsequent occurrence that resulted in the child's death, I'm going to find—and, again, it's reluctantly, but for Mr. Lawson's involvement I'd rule otherwise. But I'm going to deny the motion *in limine*.”

¶ 51 After the denial of the motion *in limine*, the defendant's attorney was faced with the task of presenting a defense knowing that the State would present evidence that Aribella's death occurred shortly after the defendant's relationship with Lawson ended, that Aribella suffocated due to something being placed on top of her body, that the defendant was the only person in the apartment who could have caused Aribella's death, that Aribella also had a lethal dose of hydroxyzine in her system when she died, that the defendant was the only person that could have given her the lethal dose of the medicine, and that, as evidence of intent, Lawson would testify that the defendant attempted to kill Aribella while the defendant was pregnant by inserting a screwdriver inside her. During opening statements, the defense attorney began laying the groundwork for the defense's

strategy, which focused not on whether the defendant caused Aribella's death, but her intent in performing the acts that caused the death.

¶ 52 During his opening statement, the defendant's attorney conceded to the jury that the evidence would show that Aribella died because of the "things that [the defendant] did." He told the jury, however, that the evidence would show that the defendant "did not intend for Aribella to die," that "she did not want Aribella to die," and that "she did not know that Aribella was going to die." He told the jurors that they would view videotapes of interviews of the defendant during which the defendant stated that she placed blankets over Aribella "not to try to kill her, but to stop the crying." The defendant's attorney also emphasized that the videotapes would show that she was cooperative throughout the investigation, including talking to the investigators when she did not have to do so. He concluded by telling the jury that "[t]he evidence will show she's careless, she's foolish, perhaps reckless, but that's all."

¶ 53 Near the end of the trial, prior to closing arguments, the circuit court conducted a jury instruction conference. The defendant's attorney tendered an instruction on the lesser-included offense of involuntary manslaughter. In arguing for the instruction to be given, the attorney noted that "the State's case rest[s] largely on statements of the defendant wherein she eventually indicated that she placed blankets over the baby, but she did so only to muffle the sound of the crying. That she did not expect that to cause the baby to die. That she believed that her acts would not cause death." After considerable argument from both parties and over the State's objection, the circuit court allowed the instruction.

¶ 54 During closing arguments, the defendant's attorney told the jury that they had three verdict options: (1) not guilty, (2) guilty of first degree murder, or (3) guilty of involuntary manslaughter. Counsel emphasized to the jury that they could not find the defendant guilty of first degree murder unless they found that she knew that her acts would cause or created a strong probability of Aribella's death or great bodily harm. The defendant's attorney again emphasized, among other things, that the defendant was being cooperative by agreeing to the videotaped interviews and that the defendant said that she did not intend to kill Aribella but was "just trying to keep her quiet." The defendant's attorney argued that the evidence did not establish the defendant's guilt of murder because the State had to prove that the defendant acted with the requisite intent. He stated the reasonable inferences from the evidence included:

“[That the defendant] acted irrationally out of frustration based by [*sic*] her inability to handle crying and screaming children. That she acted out of ignorance. I thought it would take much longer. I thought you'd have to put pressure on, a lot of pressure. \*\*\* That she acted out of poor understanding, she acted out of poor judgment. That she acted carelessly, even foolishly.”

¶ 55 Defense counsel told the jurors that the evidence established the defendant's guilt of involuntary manslaughter if they concluded “that her actions, although committed irrationally or out of ignorance or poor understanding or judgment or carelessness or foolishness, amount to recklessness.” The defendant's attorney also told the jurors that they should find the defendant “not guilty” if they concluded “that in acting out of that irrationality had a poor judgment that ignorance, everything else, that that doesn't amount

to recklessness. It amounts to carelessness, even stupidity. But it's not—doesn't reach that level of recklessness.”

¶ 56 At the conclusion of the trial, the jury found the defendant guilty of first degree murder. The circuit court subsequently sentenced the defendant to 45 years in the Illinois Department of Corrections and 3 years of mandatory supervised release. The defendant now appeals her conviction and sentence.

¶ 57

## ANALYSIS

¶ 58

### I. Admissibility of Evidence of Other Bad Acts

¶ 59 On appeal, the defendant first challenges the circuit court's denial of her motion *in limine* in which she asked the court to bar the admission of evidence that she intentionally pierced her uterine membrane with a screwdriver while pregnant with Aribella. The defendant argues that the circuit court abused its discretion in allowing the admission of this evidence. We disagree.

¶ 60 “Generally, a decision on an evidentiary motion, such as a motion *in limine*, is committed to the trial court's discretion and a reviewing court will not disturb that decision absent an abuse of discretion.” *People v. Nelson*, 235 Ill. 2d 386, 420 (2009). An abuse of discretion occurs when the trial court's decision is “arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it.” *People v. Rivera*, 2013 IL 112467, ¶ 37.

¶ 61 The defendant argues that the evidence that she pierced her uterine membrane constitutes evidence not of other crimes, but of other bad acts which should have been barred because (a) the evidence was not relevant concerning whether she was guilty of

first degree murder, (b) the State failed to meet its threshold burden for establishing the admissibility of the evidence, and (c) the unfair prejudice of the evidence outweighed its probative value. We will address each contention in turn.

¶ 62 (a) Relevancy

¶ 63 As a general rule, evidence of crimes, wrongs, or acts by the defendant aside from the crime for which she is being tried is inadmissible if the prior conduct is relevant solely to establish the defendant's propensity to commit an offense. *People v. Gumila*, 2012 IL App (2d) 110761, ¶ 37. Courts generally prohibit the admission of other bad acts evidence because the jury should not convict a defendant on the basis that she is a bad person deserving punishment; instead, guilt or innocence should be evaluated solely on the basis of the charged crime. *People v. Donoho*, 204 Ill. 2d 159, 170 (2003).

¶ 64 However, such evidence is admissible to show knowledge, intent, absence of mistake or accident, and absence of an innocent mind frame or the presence of criminal intent. *Id.*; see also Ill. R. Evid. 404(b) (eff. Jan. 1, 2011) (with certain specified exceptions, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith, but such evidence may be admissible for other purposes, such as proof of intent or absence of mistake or accident). Evidence of other bad acts must have a tendency to make the existence of a fact that is of consequence in the case more probable or less probable than it would be without the evidence. *People v. Boyd*, 366 Ill. App. 3d 84, 90 (2006); Ill. R. Evid. 401 (eff. Jan.1, 2011). Also, evidence of other acts must not become the focal point of the trial. *Boyd*, 366 Ill. App. 3d at 94.

¶ 65 The other-acts evidence need not be of acts identical to the crime charged in order to be admitted; it only needs to be relevant to some permitted purpose. *People v. Abraham*, 324 Ill. App. 3d 26, 34 (2001). When other-acts evidence is offered to prove intent or the absence of an innocent mental state, a general similarity will suffice. *Id.* Like other evidentiary matters, whether to admit other-acts evidence lies within the sound discretion of the trial court. *Gumila*, 2012 IL App (2d) 110761, ¶ 37.

¶ 66 Applying these standards in the present case, we cannot say that the circuit court abused its discretion in admitting the disputed evidence. The circuit court carefully considered the issue of whether to admit this evidence, noting that the evidence, by itself, was inflammatory and had little probative value. However, the court also recognized that when the evidence was considered in light of Lawson's testimony, the evidence became highly relevant to the disputed factual issue of the defendant's intent in suffocating Aribella. We agree.

¶ 67 At the trial, the defense conceded that the acts taken by the defendant resulted in Aribella's death. The central factual issue that the defense disputed at the trial was the defendant's intent in performing the acts. With respect to the defendant's intent, the State had to prove that the defendant (1) intended to kill or do great bodily harm to Aribella, (2) knew that her acts would cause Aribella's death, or (3) knew that her acts created a strong probability of Aribella's death or great bodily harm to Aribella. 720 ILCS 5/9-1(a) (West 2014). A criminal defendant's mental state is usually proven by circumstantial evidence because direct evidence is often not available. *People v. Lissade*, 403 Ill. App. 3d 609, 613 (2010).

¶ 68 Here, Lawson broke up with the defendant in December 2014, and, a few days later, the defendant committed the wrongful act at issue, *i.e.*, she pierced her uterine membrane with a screwdriver. Although the defendant's intent in doing so was disputed, Lawson testified that the defendant told him that she performed this act with the specific intent of killing Aribella because he broke up with her. Under these circumstances, this evidence was relevant with respect to the acts the defendant committed three months later that resulted in Aribella's death because the defendant committed the acts causing Aribella's death shortly after Lawson broke up with the defendant a second time. As the circuit court correctly observed, Lawson's involvement both at the time of the defendant's attempt to abort Aribella or initiate her early birth and the subsequent occurrence that resulted in the Aribella's death made the evidence relevant with respect to the defendant's intent.

¶ 69 For these reasons, we agree with the circuit court that the evidence was probative on the defendant's intent when she performed the acts that killed Aribella. Under the abuse of discretion standard, we cannot reverse this evidentiary ruling.

¶ 70 (b) The State's Threshold Burden

¶ 71 As an additional ground for excluding the evidence, the defendant argues that the State failed to meet its threshold burden of proving her intent when she pierced her uterine membrane. In *People v. Thingvold*, 145 Ill. 2d 441, 455 (1991), the supreme court held that, before a trial court can admit other crimes evidence, the State must first show that a crime took place and that the defendant committed it or participated in its commission. In the present case, the evidence does not involve other crimes evidence, but

the relevancy of the evidence concerns the defendant's intent. The defendant notes that the evidence was conflicting with respect to her intent when she pierced her uterine membrane, arguing that she did so only to induce an early birth, not to harm Aribella. She concludes that the State failed to meet its threshold burden because the State established only the "mere suspicion" that she was attempting to kill Aribella when she performed the act. We disagree with the defendant's argument.

¶ 72 Again, like other evidentiary rulings, we will not reverse the circuit court's determination of this threshold question absent a clear abuse of discretion. *Id.* at 452-53. We cannot find that the circuit court abused its discretion in this case because the State established more than a mere suspicion that the defendant committed the other act with the relevant intent. Whether the defendant actually performed the act at issue was not disputed. Also, according to Lawson, the defendant specifically told him that "she took a screwdriver and shoved it up inside her and tried to kill Aribella while she was in the womb" and that she did so because he broke up with her. This evidence amounts to more than a mere suspicion that the defendant intended to kill Aribella when she pierced her uterine membrane—it was *direct* evidence of her intent to do so.

¶ 73 Although the defendant denied intending to kill Aribella during questioning by Officers Brown and Green, her mere denial did not preclude the State from meeting its threshold burden for the admissibility of evidence of the act. The State was not obligated to establish the defendant's intent when she committed the December 2014 act with proof beyond a reasonable doubt. *Id.* at 456. Certainly, the jury was not obligated to find that the defendant intended to kill Aribella when she pierced the uterine membrane, but the

conflicting evidence of her intent was not a basis for excluding the evidence from the jury's consideration. Instead, the circuit court properly instructed the jury that it was to determine whether defendant was involved in the other-act conduct and, if so, what weight should be given to this evidence on the issue of intent. See Illinois Pattern Jury Instructions, Criminal, No. 3.14 (4th ed. 2000) (hereinafter IPI Criminal 4th).

¶ 74 Any deficiencies with respect to Lawson's testimony or conflicts in the evidence with respect to the defendant's intent went to the weight of the other-act evidence, not its admissibility. See, e.g., *People v. Nash*, 2013 IL App (1st) 113366, ¶ 21 ("The impeachment of [the other-crimes witness] on some of the details of the incident affected the weight to be given to her testimony [citation], but the account she provided \*\*\* sufficiently established more than a mere suspicion that the crime had occurred and that [the defendant] was involved in it [citation].").

¶ 75 In support of her argument that the State failed to meet its threshold burden, the defendant cites *People v. Gugliotta*, 81 Ill. App. 3d 362, 363 (1980). That case is distinguishable. In *Gugliotta*, the defendant was charged and convicted of aggravated arson arising from a fire in an apartment building. *Id.* at 366. The fire started about 10 to 15 minutes after the defendant was thrown out of a party in one of the units in the building. At the defendant's trial, the State presented evidence of other fires, but the *Gugliotta* court held that the evidence was inadmissible because the State failed to show that the other fires had been set by the defendant or their incendiary origin.

¶ 76 By contrast, in the present case, the State presented direct evidence that the defendant intended to kill Aribella when she pierced her uterine membrane with a

screwdriver. For the reasons we have explained, this evidence of the defendant's intent was more than the "mere speculation" in *Gugliotta*. Although there were deficiencies in the State's other-acts evidence, those deficiencies were not a basis for excluding the evidence but were for the jury to consider in determining the weight of the evidence. For those reasons, we cannot find that the circuit court abused its discretion in determining the State met its threshold burden for the admission of the evidence.

¶ 77 (c) Probative Value Weighed Against Unfair Prejudice

¶ 78 Finally, the defendant argues that the circuit court erred in admitting the wrongful act evidence because the prejudicial effect of the evidence outweighed its probative value. Evidence of other wrongful acts that is relevant for a proper purpose may be, nonetheless, inadmissible if the danger of unfair prejudice it poses substantially outweighs its probative value. *Donoho*, 204 Ill. 2d at 170; Ill. R. Evid. 403 (eff. Jan. 1, 2011). Again, the balancing of evidence's probative value against its risk of unfair prejudice lies with the discretion of the circuit court. *People v. Roman*, 2013 IL App (1st) 110882, ¶ 23 ("It is the function of the trial court to weigh the probative value of the evidence against the risk of unfair prejudice it carries; we will not overturn a court's decision on that balancing process absent a clear abuse of that discretion."). Here, we cannot say that the circuit court abused its discretion in determining that the probative value of the evidence outweighed the risk of unfair prejudice.

¶ 79 As we have explained, the State sought to introduce evidence that the defendant pierced her uterine membrane when she was pregnant with Aribella to prove her intent when she smothered Aribella three months later. The defendant's intent was the central

disputed issue in the case. As we have set out above, direct evidence that the defendant attempted to kill Aribella days after breaking up with Lawson the first time was highly relevant to the defendant's intent when she successfully killed Aribella after breaking up with Lawson the second time. Therefore, the evidence had significant probative value for the State with respect to the disputed factual issue at the center of the defendant's trial.

¶ 80 As to the risk of unfair prejudice, at the hearing on the admissibility of this evidence, the State conceded that the evidence of defendant's December 2014 attempt to kill Aribella was more prejudicial because Aribella was not yet born when it occurred. However, the State correctly observed that, in any other murder trial, there would be no question concerning the admissibility of evidence that a defendant had tried to kill an already-born victim three months before he or she succeeded in doing so. We agree with the State's observation. "Many cases have held that prior attacks upon the victim of a crime of which a defendant stands accused are probative of both intent and motive." *People v. Abraham*, 324 Ill. App. 3d 26, 34-35 (2001) (citing multiple cases). Although Aribella was still in the womb when the defendant made the first attempt to end her life, the reasoning set out in *Abraham* and the cases it cited apply equally in allowing the evidence under the facts of the present case.

¶ 81 We recognize that there was some risk that the jury would hear the evidence and use that evidence for an improper purpose. In addition, the circuit court did not provide a limiting instruction at the time the evidence was presented to the jury. Nonetheless, at the end of the trial, the circuit court instructed the jury that "[a]ny evidence that was received for a limited purpose should not be considered by you for any other purpose." In addition,

with respect to the act at issue, its relevancy centered on the defendant's stated intent in performing the act as testified by Lawson, *i.e.*, whether she told Lawson that she intended to kill Aribella because of their breakup. The jurors were instructed that it was for them "to determine whether the defendant made the statements, and if so, what weight should be given to the statements." Finally, the circuit court instructed the jurors that they had received evidence "that the defendant had been involved in conduct other than that charged in the information." The court told them that the evidence was received on the issue of the defendant's intent that they could consider the evidence "only for that limited purpose." They were instructed to determine whether the defendant "was involved in that conduct and, if so, what weight should be given to this evidence on the issue of intent." See IPI Criminal 4th No. 3.14; *People v. Heard*, 187 Ill. 2d 36, 60-61 (1999) ("[T]he trial court properly instructed the jury after closing arguments, in accordance with Illinois Pattern Instruction for criminal cases No. 3.14 \*\*\*. This instruction informed the jury of the limited purpose for which it could consider the other-crimes evidence."); *People v. Illgen*, 145 Ill. 2d 353, 376 (1991) ("The trial judge here specifically instructed the jury that the evidence regarding other assaults could be considered for the sole and limited purpose of establishing the defendant's intent and motive. Such an instruction limited and substantially reduced any prejudicial effect created by the admission of the prior-offense evidence."). Faith in the ability of a properly instructed jury to separate issues and reach a correct result is the cornerstone of the jury system. *People v. Foster*, 76 Ill. 2d 365, 378 (1979).

¶ 82 In addition, in the present case, the State made no attempt to use the wrongful act evidence to draw any improper inferences. The State did not try to inflame the jury by characterizing the defendant's first attempt to kill Aribella as an attempted "abortion." During closing arguments, the State's comments on the evidence were confined to the limited purpose for which the evidence was admitted.

¶ 83 The record establishes that the circuit court was keenly aware of the potential for unfair prejudice, and it carefully and thoughtfully weighed the risk of unfair prejudice against the probative value. It allowed the admission of the evidence only after a meaningful assessment of its admissibility, during which it closely questioned the parties about the timing of Lawson's breakups relative to defendant's December 2014 and March 2015 acts, inquiring about evidence of the defendant's conflicting statements about her intent, and after exploring the potential effectiveness of limiting jury instructions. Based on the record before us, there is no basis for us to second-guess the circuit court's balancing of these competing factors. Accordingly, we cannot say that the trial court acted unreasonably or arbitrarily in determining that any risk of unfair prejudice did not substantially outweigh the significant probative value of the other-act evidence.

¶ 84 II. Ineffective Assistance of Counsel

¶ 85 Next, the defendant argues that she was denied her constitutional right to effective assistance of counsel due to: (a) her attorney's failure to move to suppress her statements that she made during the second recorded police interrogation, (b) her counsel's failure to move to redact certain statements she made in both interviews, and (c) her counsel's failure to ask for a continuance midtrial to secure expert testimony. Again, we disagree

with the defendant's argument and conclude that she failed to establish that she was denied her constitutional right to effective assistance of trial counsel.

¶ 86 We evaluate a defendant's claim of ineffective assistance of counsel under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted by the supreme court in *People v. Albanese*, 104 Ill. 2d 504 (1984). *People v. Moore*, 356 Ill. App. 3d 117, 121 (2005). "Under this test, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness, and a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v. Henderson*, 2013 IL 114040, ¶ 11. "This means the defendant must show that counsel's errors were so serious, and his performance so deficient, that he did not function as the 'counsel' guaranteed by the sixth amendment." *People v. Perry*, 224 Ill. 2d 312, 342 (2007).

¶ 87 "To establish deficient performance, the defendant must overcome the strong presumption that counsel's action or inaction was the result of sound trial strategy." *Id.* at 341-42. "A defendant's failure to establish either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel." *Henderson*, 2013 IL 114040, ¶ 11. In addition, "[i]f it is easier to dispose of an ineffective assistance claim on the ground that it lacks sufficient prejudice, then a court may proceed directly to the second prong and need not determine whether counsel's performance was deficient." *People v. Givens*, 237 Ill. 2d 311, 331 (2010). In analyzing a claim of ineffective assistance of counsel, we defer to the trial court's findings of facts unless they are against the manifest weight of the

evidence, but we assess the ultimate legal question of whether counsel was ineffective *de novo*. *People v. Manoharan*, 394 Ill. App. 3d 762, 769 (2009).

¶ 88 (a) Defense Counsel’s Failure to Move to Suppress Statements the Defendant Made During the Second Police Interview

¶ 89 The defendant first argues that she was denied effective assistance of counsel because her attorney failed to move to suppress the parts of the second police interview where she admitted to placing blankets on top of Aribella, resulting in Aribella suffocating to death. She argues that, had her attorney filed a motion to suppress, the motion would have been successful because she made the statements during a custodial interrogation and prior to her waiving her rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). The defendant also argues that a motion to suppress would have been successful had her attorney argued that her statements during the second interview were involuntarily made.

¶ 90 In *Miranda*, the United States Supreme Court “conditioned the admissibility at trial of any custodial confession on warning a suspect of his rights: failure to give the prescribed warnings and obtain a waiver of rights before custodial questioning generally requires exclusion of any statements obtained.” *Missouri v. Seibert*, 542 U.S. 600, 608 (2004) (plurality op.). With respect to the voluntariness of the statements, the U.S. Constitution requires that a defendant’s confession must be the product of “a rational intellect and a free will.” (Internal quotation marks omitted.) *People v. Foster*, 168 Ill. 2d 465, 475-76 (1995).

¶ 91 In the present case, in evaluating the defendant's claim of ineffective assistance of counsel, we need not determine whether the defendant's statements during the second interview were made in violation of *Miranda* or were otherwise given involuntarily. This is true because the record establishes that the defendant's attorney had sound strategy reasons for allowing the admission of the statements.

¶ 92 “[T]he decision of whether to file a motion to suppress is generally a matter of trial strategy and not subject to a claim of ineffective assistance of counsel.” *People v. Brickhouse*, 2018 IL App (3d) 150807, ¶ 40. “Counsel has the ultimate authority to direct trial strategy and we will generally not sustain a claim of ineffectiveness of counsel based on inadequate trial strategy except where counsel entirely fails to conduct any meaningful adversarial testing.” (Internal quotation marks omitted.) *People v. Segoviano*, 189 Ill. 2d 228, 248 (2000).

¶ 93 In the present case, the defendant's argument fails because her attorney had a sound strategy reason for allowing the admission of the defendant's statements during the second interview. The admission of the defendant's statements during the second interview subjected the State's case to meaningful adversarial testing with respect to the defendant's intent.

¶ 94 In analyzing this issue, we note that the defendant does not challenge the admission of her statements that she made during her first police interview. During the first interview, the defendant told the investigators that she found Aribella unresponsive in her bassinet, on her back, and with her face turned in to a roll of blankets that served as Aribella's head support. The defendant said that she immediately called 9-1-1 upon

discovering that she was not breathing and told the officers that she believed that Aribella died by suffocation when she turned her head in to her blanket and could not breathe. The pathologist, however, determined that Aribella suffocated from something with weight being placed on top of her body or something being pressed against her body. He concluded that Aribella could not have suffocated by merely turning her head in to a blanket while on her back as the defendant claimed.

¶ 95 The State's evidence also established that the defendant lied to her cousin and to police about calling 9-1-1 immediately upon finding that Aribella was not breathing. Instead, the defendant first texted her cousin that Aribella was not breathing and waited another four minutes before she called 9-1-1. The evidence also established that Aribella was poisoned with a lethal dose of hydroxyzine before she died, that the defendant had access to hydroxyzine because it had been prescribed for Avianna, that she knew that the drug caused drowsiness, and that she was the only person who could have given Aribella the lethal dose of the drug. No other adult had access to Aribella when she was poisoned and later suffocated. The State's evidence that the defendant committed the acts that caused Aribella's death and her motivation for performing these acts were compelling.

¶ 96 The defense strategy was to challenge the State's evidence with respect to the crucial element of the defendant's intent. In doing so, the defendant's counsel used the defendant's statements in the second recorded interview to argue she was not guilty of first degree murder because she lacked the requisite intent. In addition, counsel used the videotaped interview to highlight and emphasize the defendant's full cooperation with the investigation, thereby hoping to add to her credibility when she told the officers during

the second interview that she did not intend to harm Aribella when she performed the acts that caused her death.

¶ 97 The State had significant evidence of the defendant's guilt separate from the defendant's statements in her second interview. Defense counsel's trial strategy to allow the admission of the second videotaped interview allowed the defense to challenge the State's case on the issue of intent. The strategy brought the issue before the jury without having to call the defendant to testify, which would have risked the possibility of the defendant making inculpatory statements or the impeachment of her credibility during vigorous cross-examination. The defendant's attorney requested and received an involuntary manslaughter instruction over the State's objection largely based on the admission of defendant's statements in the second interview that she did not intend to kill Aribella or believe that her actions would cause her death. In addition, in the second interview, the defendant contradicted Lawson's testimony that she attempted to kill Aribella when she used a screwdriver to pierce her uterine membrane. Accordingly, the second videotaped interview allowed the defense to challenge the weight of the State's other-acts evidence.

¶ 98 For these reasons, we believe it to be sound trial strategy for defense counsel to allow the admission of and to use the defendant's statements in the second interview as part of the defense given the strength of the State's evidence of her guilt without the statements. Although the defendant was ultimately found guilty of first degree murder, "[t]he reasonableness of counsel's actions must be evaluated from counsel's perspective at the time of the alleged error, and without hindsight, in light of the totality of

circumstances, and not just on the basis of isolated acts.” *People v. Nowicki*, 385 Ill. App. 3d 53, 82 (2008).

¶ 99 Therefore, in the present case, defense counsel’s failure to file a motion to suppress did not deny the defendant her constitutional right to effective assistance of counsel. See *People v. Diaz*, 377 Ill. App. 3d 339, 348 (2007) (counsel’s decision to allow the statement constituted legitimate trial strategy because he argued that consuming only two beers was insufficient to impair the defendant’s ability to drive); *Brickhouse*, 2018 IL App (3d) 150807, ¶ 47 (counsel was not ineffective in failing to file a motion to suppress statement where counsel chose not to file the motion because the statement was “beneficial to defendant’s case in that it corroborated defendant’s alibi defense”).

¶ 100 Because sound trial strategy justified defense counsel’s failure to file a motion to suppress, the defendant fails to establish the first prong of the *Strickland* standard, and the defendant is not entitled to a new trial due to counsel’s failure to file a motion to suppress. As a result, we decline to address the merits of a motion to suppress had one been filed.

¶ 101 Although we do not address the issue of whether the police officers violated *Miranda*, as a word of caution, we believe the better practice in this case would have been for the officers to obtain the defendant’s waiver of her *Miranda* rights at the beginning of the second interview, not at the end. The officers requested the defendant to return to the police station for the second interview after Aribella’s autopsy because they had strong reason to believe that she caused Aribella’s death. Although the officers told the defendant that she was free to leave, they locked her in the interrogation room and

continued asking her questions after she denied having done anything that would have caused Aribella's death.

¶ 102 In *Miranda*, the United States Supreme Court held:

“[W]hen an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. \*\*\* He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney[,] one will be appointed for him prior to any questioning if he so desires.” *Miranda*, 384 U.S. at 478-79.

¶ 103 Here, obtaining the defendant's waiver of her *Miranda* rights at the beginning of the interview, rather than at the end of the interview, would have been a better practice because it would have ensured that the defendant's privilege against self-incrimination was not jeopardized and it would have made it clearer that her statements were voluntarily given.

¶ 104 (b) Defense Counsel's Failure to Redact  
Portions of the Video Recorded Interviews

¶ 105 Next, the defendant argues that her attorney was ineffective for failing to move to redact some of the other statements that she and the officers made during both of the police interviews. She argues that the statements were irrelevant and prejudicial.

¶ 106 The defendant argues that her attorney should have suppressed statements by Officers Green and Brown in the first videotaped interview in which they told the

defendant that they were part of a Child Death Investigative Task Force and that they provided a voice to child victims who could not speak for themselves. We do not believe that her attorney's failure to move to redact these statements entitles her to a new trial.

¶ 107 In the videotape of the first interview, the officers described the task force to the defendant for the purpose of explaining to her why they were interviewing her following Aribella's death. We believe that the admission of these brief statements was not improper and, more importantly, was not prejudicial. Accordingly, the failure to redact these statements does not support a claim of ineffective assistance of counsel. At the trial, both officers testified that they were members of the task force, and on cross-examination, the defendant's attorney elicited more evidence of Brown's experience on the task force.

¶ 108 As we explained, part of the defense strategy at trial was to highlight the defendant's cooperation with investigators to bolster the credibility of her statements to the officers that she did not intend to kill Aribella. As part of that strategy, the defendant's attorney emphasized the officers' training and experience, noted the techniques they used during the interview, and suggested that the defendant surely gave truthful answers with respect to her lack of intent in the face of the persistent questioning by skilled interrogators. We are confident that the officers' statements in the first videotaped interview that they were members of a task force did not change the outcome of the defendant's trial.

¶ 109 The defendant also argues that her attorney was ineffective for not seeking to redact other statements in the videotaped interviews, including: (a) remarks about her

demeanor; (b) the officers' statements that pathologists were smarter than regular doctors, that a pathologist could tell with certainty what happened to Aribella, and that babies did not just die on their backs; (c) Brown's statements concerning the defendant having a "shitty life" and being a 23-year-old mother and dealing with different men; (d) Brown's statements during the first interview that he was praying for her and Aribella and for an explanation to the situation; (e) questions asked by the officers after the defendant stated that she could feel Aribella's head when she pierced her uterine membrane; and (f) statements that the defendant struck her other two children when they screamed or cried.

¶ 110 Some of these statements are cumulative of other evidence, such as the defendant's age and dealing with different men in her life. Statements regarding the defendant's demeanor were used by both parties to support their theories of the case. With respect to some of Brown's statements during the interview, at the trial, he told the jury that the things he said were not true. For example, he told the jury that, contrary to what he said during the recorded interview, he believed that sometimes babies did just die. He told the jury that a pathologist could not tell them what happened with 100% certainty. He described his statements during the videotaped interviews as interrogation techniques, not statements of his beliefs.

¶ 111 With respect to the defendant's statement that, when she could not handle her children crying, she hit them on their stomach with her open hand, the defendant's attorney used this evidence during closing arguments as part of his strategy to challenge the State's case with respect to the defendant's intent. The defendant told the officers that

she covered Aribella with blankets because she was afraid she was going to hit Aribella because she was crying and that she did not want to hit her. During closing argument, defense counsel argued:

“[The defendant] knew from experience that this crying and screaming would drive her to the point where she might strike her. That she struck her other children with her open hand on the stomach. She didn’t want to do that. If she didn’t want to hit her, she certainly didn’t want to kill her.

\* \* \*

When she mentioned that she had struck her other children, what did [Officer Brown] do? He made a fist, pounded the table, why? Because to make it look like it was something really horrible and tough and mean. She corrected him and said, no, it was my open hand on the stomach. Now, that doesn’t make it right, but she acknowledged that wasn’t right, that’s why she was trying not to do it.”

¶ 112 As we have explained above, “[c]ounsel has the ultimate authority to direct trial strategy and we will generally not sustain a claim of ineffectiveness of counsel based on inadequate trial strategy except where counsel entirely fails to conduct any meaningful adversarial testing.” (Internal quotation marks omitted.) *Segoviano*, 189 Ill. 2d at 248. Here, the defendant’s counsel conducted a meaningful adversarial testing of the issue of intent, and we believe this strategy was sound in light of the overwhelming evidence that the defendant smothered Aribella and gave her a lethal dose of hydroxyzine.

¶ 113 Also, after a thorough review of the record of the trial proceeding, we are confident that none of these suggested piecemeal redactions would have changed the

outcome of the defendant's trial. Accordingly, the defendant has failed to establish the second prong of the *Strickland* standard which requires a showing of prejudice. The defendant committed the acts that caused Aribella's death, and the disputed issue of fact at the trial centered on the defendant's credibility when she told the investigators that she did not intend to kill Aribella. The jury was properly instructed on this disputed issue, the State's evidence was compelling, and we are certain that none of the suggested redactions would have changed the jury's finding of guilt.

¶ 114 (c) Counsel's Failure to Request a Continuance Midtrial

¶ 115 The final argument the defendant raises on appeal is that her attorney was ineffective for failing to request a continuance during her trial. Prior to the trial, the defense hired Dr. Nancy Jones to review Dr. Denton's autopsy report. The record established that Dr. Jones reported that she had no basis to contradict Dr. Denton's conclusions that Aribella's cause of death was suffocation. Accordingly, the defendant's attorney did not plan on calling Dr. Jones as a witness. At the trial, Dr. Denton testified that Aribella's physical findings were consistent with pressure suffocation. In her posttrial motion, the defendant argued that Dr. Denton's autopsy report did not disclose this opinion. At the hearing on the posttrial motion, the defendant's counsel stated that, upon learning of Dr. Denton's opinion from the State's opening statement, he called Dr. Jones, who told him that she disagreed with that opinion but that she was unavailable for trial. On appeal, the defendant now argues that her attorney was ineffective for failing to seek a continuance to secure Dr. Jones's testimony.

¶ 116 We agree with the general proposition that counsel's performance may be constitutionally deficient when he or she fails to call a known witness whose testimony may exonerate the defendant. *People v. Brown*, 2017 IL App (3d) 140921, ¶ 32. Based on the record before us, however, we cannot conclude that counsel's failure to seek a continuance to secure Dr. Jones's testimony amounted to ineffective assistance of counsel. We cannot reach this conclusion because we do not know specifically what Dr. Jones would have testified to had she been called as a witness. Based on the record before us, without an affidavit from Dr. Jones, we do not have the ability to discern what specifically Dr. Jones would testify had she been called as a witness. Accordingly, we cannot know whether the outcome of the proceeding was affected by her failure to testify.

¶ 117 The defendant's attorney argued that Dr. Jones disagreed with Dr. Denton's opinion that Aribella suffocated from pressure on her body. However, there is no explanation concerning the basis of her alleged disagreement or with what specifically she disagreed about his opinion. The record does not establish what Dr. Jones's opinion would be with respect to the mechanism of Aribella's suffocation death or whether her difference of opinion, if any, would be relevant with respect to proving the defendant's intent when she caused Aribella's death. Based on the record before us, we cannot reverse the defendant's conviction and remand for a new trial due to counsel's failure to move for a continuance to secure Dr. Jones's testimony. See *People v. Veach*, 2017 IL 120649, ¶ 46 (claims for ineffective assistance should be reviewed on direct appeal unless "the record is incomplete or inadequate for resolving the claim").

¶ 118

## CONCLUSION

¶ 119 For the foregoing reasons, we affirm the defendant's conviction and sentence.

¶ 120 Affirmed.