FOURTH DIVISION
March 22, 2018

No. 1-15-2458

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 CR 507 (01)
	)	
CESAR RUIZ,	)	Honorable
	)	Stanley J, Sacks,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Justices McBride and Gordon concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's first-degree murder conviction affirmed. Forfeited confrontation error was reviewable under second prong of plain-error rule. Admission of non-testifying codefendant's statements accusing defendant of the offense violated defendant's sixth-amendment right of confrontation. But error did not require reversal, as statements, at most, played minimal role in State's case against defendant.

¶ 2 Defendant Cesar Ruiz was convicted of first-degree murder for his role in beating four-year-old Christopher Valdez to death. Christopher's mother, Crystal Valdez, was jointly indicted with defendant but tried separately. At defendant's jury trial, the State presented evidence that Crystal had twice accused defendant of hitting or killing Christopher—first to her relatives, when they discovered Christopher's body in the bed Crystal shared with defendant; and then later to the police, during her custodial interrogation. Defendant contends that Crystal's accusations were

hearsay, and in the latter instance, testimonial hearsay, and that the State's use of them deprived him of a fair trial and violated his sixth-amendment right of confrontation. Defendant acknowledges forfeiting these errors by not objecting at trial or in a posttrial motion, but he claims that these unpreserved errors amount to second-prong plain error. Although we agree with defendant that the use of Crystal's custodial accusation violated his sixth-amendment right to confrontation, and that the error is reviewable under the second-prong of the plain-error rule, we hold that the error did not deprive defendant of a fundamentally fair trial and therefore does not warrant reversal. We affirm defendant's conviction.

¶ 3 I. BACKGROUND

¶ 4 Christopher was murdered sometime on the night of November 24, 2011 (Thanksgiving), or early in the day on November 25, 2011 (his fourth birthday). At that time, Crystal lived in a small, one-bedroom coach house on the southwest side of Chicago. Defendant had moved in with her a few months before, after they started dating. Before that, he lived in the front house on the property, with his cousin, Fernando Ruiz, and Fernando's girlfriend, Marilu Romo. Crystal's parents lived across the alley from the coach house with Crystal's two older children. Her two younger children—Christopher, age 4, and Christine, age 5—lived with Crystal and defendant in the coach house. Crystal's brother, Joseph Valdez, and sister-in-law, Katrine Santiago-Valdez, frequently visited her and the kids. Joseph, Katrine, Fernando, and Marilu all testified for the State as occurrence witnesses.

¶ 5 A. Lay Witness Testimony

¶ 6 On Thanksgiving evening, Fernando and Marilu hosted defendant, Crystal, Christopher, and Christine for dinner in the front house. Although it was hot from the cooking, Christopher wore a hooded sweatshirt, with the hood pulled down to partially cover his face. At one point,

defendant pulled Christopher's hood down even farther. Marilu suggested to defendant that he remove Christopher's sweatshirt, because it was too hot. Defendant said no. Before defendant adjusted the hood, Marilu saw a bruise on the left side of Christopher's face, but not a black eye. Fernando initially testified that he did not see any injuries on Christopher's face; he later acknowledged telling detectives that Christopher had a swollen eye.

¶ 7 Christopher did not speak or eat anything. When defendant was present, Christopher sat quietly with his head down; when defendant left to retrieve something from the coach house, he perked up somewhat and played with toys. While defendant was out, Crystal showed Marilu bruises on Christopher's back and chest. Marilu had seen Crystal hit Christopher and pull out his hair, but she had never seen defendant strike either of the children. Marilu testified that the chest injuries depicted in post-mortem photos of Christopher were the same injuries that she saw, but that the photos depicted more injuries to Christopher's face than she had initially observed.

¶ 8 At some point during dinner, Christopher vomited. Upon returning from the coach house, defendant said, "Now what did he do?," and took Christopher back to the coach house. Fernando and Marilu never saw Christopher again.

¶ 9 The next morning, Marilu called Katrine and told her about the previous evening. Katrine called DCFS. Around 2 p.m., Katrine and Joe went to the coach house to check on Christopher, bringing his birthday gift to provide a pretext for their visit. They knocked on the door and called Crystal's name for upwards of 15 minutes, with no answer. Eventually, Joe reached in through the window to unlock the door. As he was about to enter, Crystal appeared, fully dressed and wearing makeup, but stretching and yawning—as if feigning to have been asleep. Crystal did not invite them in, as she normally would. Katrine asked where the children were. Crystal said they

were at Cesar's mother's house, but Katrine knew that was not true. Katrine and Joe pushed their way past Crystal and went inside.

¶ 10 The house, which Crystal usually kept clean and tidy, was in disarray. Plastic totes filled with clothing, including defendant's, were strewn about. Katrine saw defendant laying down on the bed. Crystal said he was taking a nap and blocked the bedroom doorway. Defendant came out of the bedroom. He feigned sleep, in the same way Crystal had, and said to Joe, "had a long night, bro."

¶ 11 Crystal did not respond when Joe asked where Christopher was. Katrine pushed her way into the bedroom, and Joe followed. Christopher's body was rolled up "like a burrito" in a blanket on the bed. He was covered in bruises and non-responsive. He appeared dead.

¶ 12 Joe punched Crystal in the face. Katrine asked, "What did you do?" Crystal answered, "It was him" (according to Joe) or "He did it" (according to Katrine). Defendant immediately replied, "And so did you," to which Crystal, in turn, said, "No it was you." Defendant then said, "You helped me" and "She hit him first."

¶ 13 Joe grabbed defendant, pushed him into the wall, and punched him until he fell to the floor. As Joe hit him, defendant said he was sorry, and that it was an accident. This made Joe hit defendant even harder. Katrine intervened when Joe started to choke defendant. Joe relented, called 911, and blocked the door to prevent defendant from leaving.

¶ 14 Paramedics and police soon arrived. The paramedics noted that rigor mortis and lividity had set in to Christopher's body, which indicated that he had been dead for at least two hours, and probably longer than that. Both the paramedics and the responding officers testified that many of his bruises were covered with what appeared to be a flesh-toned makeup. Katrine found

two bottles of cover-up makeup when she went back to clean the coach house, and she turned them over to Detective Carr.

¶ 15 Defendant and Crystal were arrested at the coach house. Detectives Carr and Murphy interrogated Crystal, and then defendant, later that day. A videotape and transcript of defendant's custodial interrogation were admitted into evidence and published to the jury.

¶ 16 B. Defendant's Custodial Interrogation

¶ 17 Early in the interrogation, defendant said it had been "an ongoing ordeal" with Crystal. "Finally I lost it," he said, and "I don't even recall doing as much as what I did."

¶ 18 But defendant initially denied striking Christopher. What looked like a bruise around his eye was actually a "blood blister" that turned red after defendant "popped it" for him. The other bruises evident on Thanksgiving, which were already healing, were inflicted sometime earlier by Crystal. Some days before, when defendant came home from work, Crystal had said to him, "I had to choke this f***ing little kid." Defendant noticed a mark on Christopher's forehead.

¶ 19 During Thanksgiving dinner, defendant took Christopher home. He had been vomiting for a couple of days, and he continued to complain of stomach pain at home. Defendant laid down with him in bed, and they watched television together. Defendant occasionally took him to the bathroom to vomit.

¶ 20 Crystal came home later that evening. She was angry and frustrated—at Christopher, at Marilu, and at defendant. Crystal "bl[ew] up" at defendant, as she was prone to do. They argued, and defendant "lost a little control." He punched (and broke) the bedroom wall, so as not to take his own frustration out on anyone else, and threw Crystal's cell phone into a bucket of water.

¶ 21 Amidst the commotion, Christopher got out of bed. Defendant initially said that he grabbed Christopher by the arm, "spanked his bottom," and said, "I thought you were sick go to

bed." Christopher cried but went right back to bed. Later in the interrogation, defendant admitted that he "might've grabbed [Christopher] kind of tight in the arm" and "pulled his hair from the back" when spanking him. But defendant denied striking Christopher in the face. Asked whether he hit Christopher in the stomach, defendant said that he "might have" but did not remember. Later, defendant admitted that he hit Christopher on the right side of his ribcage, but denied that he used a closed fist. He demonstrated how he hit Christopher with multiple underarm swings. He said that he went "too far," and that he "didn't hit [Christopher] with all [his] might, but it wasn't a soft tap either." Defendant lifted Christopher by the arms and put him back to bed. He denied ever punching Christopher with a closed fist, kicking him, or choking him.

¶ 22 Defendant said that Christopher was awake all night and early in the morning, talking, and asking for water and candy. Defendant was planning to take him to a movie or to Navy Pier for his birthday. But Christopher's stomach still hurt, so, defendant initially said, they stayed in bed until Katrine and Joe came by in the afternoon. Later, defendant said that when they were getting ready to go out, he put makeup on Christopher's face to cover his bruises, so that neither he nor Crystal would get in trouble. Defendant also said, however, that he was not aware of any bruises on Christopher's body, although he also claimed that he did not check.

¶ 23 When Katrine and Joe came by, Crystal did not want to let them in. She was having problems with her parents, and had already decided to move away. Defendant told her to open the door. Christopher was still alive and awake, but he was not very active, at that time. Defendant claimed that he never realized how badly Christopher was hurt.

¶ 24 Twice during the interrogation, the detectives confronted defendant with the information Joe and Katrine had given them. After finding Christopher wrapped up in the bed, Katrine "said my husband turns he cracks Crystal and *she's like it wasn't me it was him* and all you said was

man I'm sorry." (Emphases added). Defendant agreed that "she was yelling it's not me—it's not me, it was him," but he denied apologizing. Later, the detectives asked defendant, "Why would the brother tell us when he hit her she said it wasn't me, it was him?," mentioning that Joe said he thought Crystal was "involved too."

¶ 25 The detectives also confronted defendant with a statement Crystal made during her own custodial interrogation. She told the detectives that she heard defendant striking Christopher: "She heard [detective makes smacking sound] shut up [smacking sound]. Then she said what's going on. And she said you were like shut the f*** – get the f*** out of here go back to your room." The detectives repeated the accusation twice more during the interrogation, telling defendant again that Crystal "heard you hitting him," and that "she even said that she heard smacking [detective makes smacking sound] that's how she described it, okay."

¶ 26 After the detectives left, defendant sat alone in the interrogation room and said to himself, "F***. What the f*** is wrong with me."

¶ 27 C. Medical Testimony

¶ 28 Dr. Moser-Woertz, an assistant medical examiner, performed a post-mortem exam of Christopher's body on November 26, 2011. She testified, as an initial matter, that Christopher was significantly underweight for his age, as a result of malnutrition and associated dehydration. His death was caused by a total of 54 blunt-force injuries, both internal and external, which she attributed to child abuse.

¶ 29 Externally, Dr. Moser-Woertz found diffuse bruises and abrasions all over Christopher's face and body. Most, but not all, of the injuries were recent—Christopher would have sustained them within hours or perhaps a few days of his death. Some of his injuries, including those on his face and buttocks, were covered over with a substance that appeared to be makeup. On the upper

right side of his back, he suffered bruising and abrasions that were equally distributed over his ribcage, which could have resulted from being thrown against a wall. Multiple bruises on his chest and abdomen were blunt-force injuries. A series of fingertip-size bruises on the right side of his abdomen could have been imprints left when someone grabbed him forcefully in that area. Bruises and scrapes behind his ear were consistent with having his hair or ear forcefully pulled. The injury to his right eye was not a popped blister.

¶ 30 Internally, damage to multiple organs and the connective tissues of the intestines caused bleeding in Christopher's abdomen. These injuries were consistent with an adult forcefully striking Christopher on his right side. Since the blood in Christopher's abdomen was unclotted, these injuries were inflicted near the time of death, but Dr. Moser-Woertz could not be certain of the exact time. Christopher had bruising on his scalp, brain swelling, and bleeding in his spinal column. There were other possible causes of the spinal bleeding, but Dr. Moser-Woertz opined that it was likely caused by trauma to the back.

¶ 31 When asked by the State, Dr. Moser-Woertz testified that, in her opinion, all of these injuries contributed to Christopher's death.

¶ 32 D. Defendant's Testimony

¶ 33 Defendant took the stand in his own defense. He denied ever hitting, slapping, or abusing Christopher or Christine. Defendant testified that he although he lived with Crystal and the kids in the coach house, he was rarely there because he worked long shifts as a forklift operator. After he moved in, Crystal started acting more aggressively toward the children and verbally abusing them. She would spank Christopher and pull his hair, ears, and arms. Her abuse of Christopher often caused defendant and Crystal to argue.

¶ 34 On Thanksgiving, Christopher appeared sluggish, kept his head down, and vomited a few times. His forehead was bruised over his right eye, and he had a lump on his head that was new. Defendant denied that he caused these injuries. At dinner, Christopher did not eat, and he would not answer when defendant asked if he was okay. Defendant went to the coach house to retrieve some food; when he returned, Crystal was yelling at Christopher. Defendant asked, "what'd he do?" Crystal said he was getting sick all over the place, so defendant took him home, cleaned him up, and laid down in bed with him to watch television. Defendant denied punching or slapping Christopher during this time.

¶ 35 Crystal returned home with Christine later that evening. Crystal was yelling and Christine was crying. Crystal was angry and "tired of everything," especially her family and Marilu, who were always on her back. She threatened to kill herself and said she did not care if she went back to jail. Defendant and Crystal started to argue. Defendant said he wanted to leave and started packing his things, laying them out in totes in the kitchen. Crystal yelled at defendant and threw his belongings all over the house. Defendant became angry and punched the wall. He testified that when he told the detectives during his interrogation that he had lost control, he was referring to punching the wall.

¶ 36 Christopher came into the kitchen during the argument. Defendant said "I thought you were sick"; grabbed his arm; spanked him, with three swats, on his right buttock; and told him to go back to bed. Defendant testified that the spanking did not involve a "full force" hit. On cross-examination, defendant acknowledged that he also pulled Christopher's hair, yanked his arm, and told him (as Crystal conveyed to the detectives during her interrogation) to "get the f*** out of here and go back to your room." Defendant packed some more and went back to the bedroom,

where he watched television with Christopher until they both fell asleep. Defendant denied hitting Christopher during the night.

¶ 37 Despite packing his belongings, defendant did not leave because he had promised to take Christopher out for his birthday. The next morning, defendant and Christopher both woke up around 10 a.m. Defendant denied that Christopher was injured as severely as the post-mortem photos depicted at that time. But he did notice bruises on Christopher's eye and forehead. And he acknowledged, on cross-examination, that he put makeup on Christopher's face to hide those bruises, in preparation for taking Christopher out. He had seen Crystal apply makeup to Christopher's injuries before; and he did not want any trouble for himself or for Crystal, who already "had a case" involving battery and child endangerment. Defendant denied applying makeup to Christopher's buttocks or anywhere on his body other than his face. He believed that most of the injuries depicted in the post-mortem photos, which he did not observe on Christopher that morning, must have been inflicted between 10 a.m and 2 p.m. that day.

¶ 38 Defendant and Crystal argued again over breakfast. Defendant went outside to smoke a cigarette and to ask Fernando if he could store his things in his house while he looked for a new place to stay. When Fernando did not answer the door, defendant went back to the coach house. Crystal was still yelling and refused to answer when defendant asked what she was doing. In the bedroom, he found Christopher still in bed, rolling around and crouched over in apparent pain. Defendant reminded Christopher that he would take him out for his birthday and went to take a shower. When he returned to the bedroom, Christopher appeared to be asleep. Defendant laid down and fell asleep next to him.

¶ 39 Soon after defendant woke up that afternoon, he heard knocking on the door. After 15 minutes, defendant got out of bed to answer the door because Crystal refused to. As he reached

for the door, Joe and Katrine entered, asked where the children were, and started walking toward the bedroom. Crystal tried to block the doorway to the bedroom, but Katrine went in anyway and started screaming. Defendant and Joe ran into the bedroom, where defendant saw Katrine roll Christopher over. Defendant denied that Christopher was wrapped up in a blanket in the manner Katrine described.

¶ 40 Joe hit Crystal in the face, and then pushed defendant against the wall after he tried to restrain Joe. Joe called the police and said they were both going to jail. A police officer and fire department personnel soon arrived, and defendant was arrested.

¶ 41 Defendant's jury was instructed on first-degree murder, based on alternative theories of intentional and strong-probability murder. See 720 ILCS 5/9-1(a)(1)-(2) (West 2012). The jury also received the pattern instructions on accountability, and the State argued that defendant was guilty either as a principal or because he was accountable for Crystal. The jury returned a general verdict of guilty on one count of first-degree murder. The trial court found defendant eligible for an extended-term sentence, because Christopher was under 12 years of age, and sentenced him to 75 years in prison.

¶ 42 II. ANALYSIS

¶ 43 On appeal, defendant contends that Crystal's out-of-court accusations against him were inadmissible hearsay and, in some instances, testimonial hearsay that violated both the Illinois Rules of Evidence and the Confrontation Clause of the Sixth Amendment. Defendant further contends that these unpreserved errors are reviewable under the second prong of the plain-error rule because they were serious enough to deprive him of a fair trial, regardless of the evidence of his guilt.

¶ 44 Although defendant's hearsay and confrontation arguments overlap, the two analyses are significantly different: A statement may be admissible under state hearsay rules but barred by the Confrontation Clause, and vice versa. *Crawford v. Washington*, 541 U.S. 36, 51 (2004); *People v. Spicer*, 379 Ill. App. 3d 441, 449 (2007). Our first task, then, is to isolate the various statements at issue and the errors—constitutional or non-constitutional—that defendant alleges with respect to each. As defendant notes in his reply brief, Crystal's statements accusing him of hitting and killing Christopher fall into two distinct groups.

¶ 45 The first group comprises Crystal's statements to Joe and Katrine when they discovered Christopher's body and confronted Crystal at the coach house. Crystal accused defendant, saying "It was him" (according to Joe) or "He did it" (according to Katrine). Joe and Katrine conveyed Crystal's on-the-scene accusations to the police, who, in turn, confronted defendant with those accusations during his custodial interrogation. As the detectives told defendant, Katrine had said to them, "my husband turns he cracks Crystal and *she's like it wasn't me it was him* and all you said was man I'm sorry." (Emphases added). Later, the detectives asked, "Why would the brother tell us when he hit her she said it wasn't me, it was him?," mentioning that Joe said he thought Crystal was "involved too." Crystal's on-the-scene accusations were thus put before the jury through the testimony of Joe and Katrine, and again through the video and transcription of defendant's interrogation.

¶ 46 Defendant contends that these statements were offered for their truth, that they do not fall under any recognized hearsay exception, and hence that they were inadmissible under the Illinois Rules of Evidence. But defendant never argues that these statements were testimonial; indeed, he concedes in his reply brief that they were not. This concession is well taken: Crystal's heat-of-the-moment statements to her own family were hardly the kind of "solemn" statements, made

"for the purpose of establishing or proving some fact," that characterize the statements of one who "bears testimony" for purposes of the Confrontation Clause. *Crawford*, 541 U.S. at 51; see also *Ohio v. Clark*, __ U.S. __, 135 S. Ct. 2173, 2182 (2015) ("Statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements give to law enforcement officers."). Because these statements were not testimonial, the use of them at trial cannot violate the Confrontation Clause. *Davis v. Washington*, 547 U.S. 813, 821-22 (2006). Thus, with respect to Crystal's on-the-scene accusations, defendant's challenge is necessarily limited to non-constitutional evidentiary error.

¶ 47 The second group comprises Crystal's statement to the police, during her own custodial interrogation, that she heard defendant strike Christopher. The detectives also conveyed this statement to defendant during his interrogation: "She heard [detective makes smacking sound] shut up [smacking sound]. Then she said what's going on. And she said you were like shut the f***—get the f*** out of here go back to your room." The detectives repeated the accusation twice more during the interrogation, telling defendant again that Crystal "heard you hitting him," and that "she even said that she heard smacking [detective makes smacking sound] that's how she described it, okay."

¶ 48 Defendant contends that Crystal's statement to the police, like her statement to Joe and Katrine, was hearsay and inadmissible under the Illinois Rules of Evidence. But unlike those statements, her statement to the police was also testimonial. And because Crystal was not available for cross-examination, either at trial or in a previous forum, defendant argues that the State's use of her testimonial statement violated his sixth-amendment right of confrontation.

¶ 49 At first blush, defendant thus seems to present two distinct grounds for reversal: non-constitutional evidentiary error, based on the admission of improper hearsay; and a constitutional

error, based on a violation of the Confrontation Clause. Ordinarily, we would review the hearsay question first, and reach the sixth-amendment question only if we find that the alleged admission of improper hearsay was not reversible error on non-constitutional grounds. See *People v. Melchor*, 226 Ill. 2d 24, 34-35 (2007). But a full review of the hearsay issue is not necessary here, because we must also factor in the question of forfeiture.

¶ 50 When, as the State claims and defendant concedes, defendant forfeits an issue, it is defendant's burden to show that the forfeited error is reviewable, and ultimately reversible, under one or both prongs of the plain-error rule. *People v. Lovejoy*, 235 Ill. 2d 97, 148 (2009) (burden of persuasion in plain-error review lies with defendant); *People v. Williams*, 193 Ill. 2d 306, 348 (2000) (forfeiture is affirmative defense State must raise and prove). The plain-error doctrine permits "a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

¶ 51 Here, defendant does not argue for first-prong plain-error review—he does not attempt to claim that the evidence was closely balanced—instead claiming that second-prong plain error occurred here. But defendant cites no case law for the proposition that a *non-constitutional* hearsay error is subject to redress under the second prong, affecting the "integrity of the judicial process." *Id*. Although defendant peppers his plain-error arguments with broad terms like "evidentiary error" or "inadmissible hearsay statements," the specific arguments he makes in this context all turn on a narrower issue: the alleged violation of his sixth-amendment right of

confrontation. The plain-error cases he relies on (which we will discuss in due course) all concern a violation of that right. Defendant does not cite any case in which non-constitutional evidentiary errors—simple hearsay, as opposed to a confrontation error—were reviewed and found to provide a basis for reversal under the second prong of the plain-error rule. In sum, the crux of his plain-error argument is simply this: confrontation errors—and especially those that violate the rule of *Bruton v. United States*, 391 U.S. 123 (1968)—deprive a defendant of a fundamental constitutional right and a fair trial, and for this reason amount to second-prong plain error.

¶ 52 We can thus proceed directly to the alleged confrontation error. That error, as we have noted, is based on Crystal's *custodial* accusations against defendant, as defendant concedes that her *on-the-scene* accusations were not testimonial statements. Our question, then, is whether the use of Crystal's custodial accusations against defendant, when she was not subject to cross-examination, violated his right of confrontation.

¶ 53 The Sixth Amendment's Confrontation Clause provides: "In all criminal prosecutions, the accused shall enjoy the right *** to be confronted with the witnesses against him ***." U.S. Const., amend. VI. The clause applies to state-court prosecutions. *Pointer v. Texas*, 380 U.S. 400, 403 (1965). It prohibits the admission of a testimonial hearsay statement against a criminal defendant if the witness who made the statement was unavailable at trial, and the defendant did not have a prior opportunity to cross-examine the witness. *Davis v. Washington*, 547 U.S. 813, 822 (2006); *Crawford*, 541 U.S. at 68. The clause "is quite properly an almost total ban on the introduction of accusations against the accused by persons not present for cross examination." *Ray v. Boatwright*, 592 F.3d 793, 796 (7th Cir. 2010). We review *de novo* the constitutional

question of whether a defendant's right of confrontation was violated. *People v. Barner*, 2015 IL 116949, ¶ 39.

¶ 54 A. Waiver of Right of Confrontation

¶ 55 Before we get into whether a confrontation violation occurred, we address the State's argument that defendant waived his right to confront Crystal by making a "tactical" use of her accusations in his defense. It is true, generally, that counsel can waive a defendant's right of confrontation. *People v. Campbell*, 208 Ill. 2d 203, 211 (2003). Counsel ordinarily effects a waiver by agreeing to stipulate to the testimony of an unavailable state witness. See *id.* at 212-17. Counsel may only enter into the stipulation if the defendant does not object, and the decision to stipulate is a matter of trial tactics and strategy. *Id.* at 217. There is a strong presumption against the waiver of a constitutional right. *Id.* at 211. For a waiver to be effective, "it must be clearly established that there was an intentional relinquishment or abandonment of a known right or privilege." *Id.* (quoting *Brookhart v. Janis*, 384 U.S. 1, 4 (1966)).

¶ 56 The State says that counsel made "an affirmative and tactical choice" to use Crystal's out-of-court accusations to argue that it was Crystal, not defendant, who beat Christopher to death. To this end, the State says, counsel told the jury in opening statement that no witness will testify that defendant struck Christopher. Counsel then elicited the following testimony: that Crystal's family members knew she beat Christopher; that Crystal never told anyone that defendant beat Christopher; that Katrine gave Crystal's name, not defendant's, to DCFS; that Joe immediately suspected Crystal had killed Christopher; and that Crystal did not accuse defendant until Joe and Katrine accused her. Counsel returned to these themes in closing, arguing that no witness saw defendant strike Christopher; and that Crystal's accusation in the presence of Joe and Katrine was belated, coming only after they voiced suspicion that she had killed Christopher.

¶ 57 We disagree with the State; none of these actions clearly shows that counsel intentionally relinquished defendant's right to confront Crystal. Commenting on the absence of eyewitnesses certainly did not. Neither did eliciting testimony that Crystal's family suspected her of abusing, even killing, Christopher. The only "tactic" that is even arguably relevant to the question of waiver is counsel's argument, based on testimony counsel elicited in cross-examination, that Crystal accused defendant to Joe and Katrine only after they confronted her, face to face, in highly incriminating circumstances. But that argument was directed toward Crystal's on-the-scene statements; and as we have said, defendant does not argue that those statements were testimonial.

¶ 58 Because the State's use of those statements could not have violated defendant's right to confront Crystal, any "tactical" use that counsel may (or may not) have made of those statements could not possibly "waive" defendant's right to confront Crystal either. That right, if it was violated at all, was violated by the State's use of Crystal's *custodial* statement. And the State does not explain how counsel made any "tactical" use of *that* statement at trial.

¶ 59 Even if we were talking about Crystal's custodial statement, we still could not accept the State's "tactical choice" argument. If Crystal's accusations against defendant were in evidence *anyway*, as they were, any good lawyer would attempt to discredit them, which is nearly impossible to do without first referencing them. Attempting to explain away damaging evidence against your client is surely tactical in one sense, but by no means is it akin to affirmatively waiving an objection to the initial admission of that evidence. If it were, then a defense lawyer would be stuck with the heads-you-win, tails-I-lose choice of either challenging the admission of evidence but never again mentioning it or discrediting it, or going all in and waiving an objection to the admission of the evidence so that the lawyer could try to discredit it before the factfinder.

The law does not require a defendant to make that choice; to the contrary, a defendant is perfectly free to challenge the admission of evidence but, if unsuccessful, to attempt to discredit that evidence, mitigate it, or even turn it to his advantage. *People v. Williams*, 161 Ill. 2d 1, 34-35 (1994).

¶ 60 The State does not cite, and we have not found, any case in which counsel effected a waiver by any means other than stipulating to the testimony of a witness who was not available for cross-examination. A stipulation can operate as a waiver because it manifests an intentional "decision not to challenge the testimony" of the unavailable witness, or in other words, to forego cross-examination of the witness. See *People v. Phillips*, 217 Ill. 2d 270, 284 (2005); *Campbell*, 208 Ill. 2d at 213-17. It also affords the defendant a clear opportunity to raise any objections to counsel's decision with the trial judge, outside the presence of the jury. See *id.* at 208.

¶ 61 Here, counsel did not stipulate to Crystal's testimony; the State elicited her custodial accusation against defendant by publishing a video and transcription of defendant's interrogation in its case-in-chief. If Crystal's statement that defendant hit Christopher was testimonial hearsay, then counsel should have objected to admitting and publishing the video and transcription to the jury without redacting the detectives' reprises of that statement. The failure to object is a forfeiture. But it is not a waiver. See *Douglas v. Alabama*, 380 U.S. 415, 420-21 (1965) (counsel's failure to object to State's use of nontestifying party's hearsay statement implicating defendant was not a waiver of right of confrontation); *People v. Hughes*, 2015 IL 117242, ¶ 37 ("While waiver is the voluntary relinquishment of a known right, forfeiture is the failure to timely comply with procedural requirements."); *People v. Cregan*, 2014 IL 113600, ¶ 15 (to avoid forfeiture, party ordinarily must make contemporaneous objection and raise issue in posttrial motion). The presumption against waiver of a constitutional right is not overcome.

¶ 62 B. Testimonial Hearsay

¶ 63 Having found that defendant did not waive his right of confrontation, we must determine whether Crystal's statement to the police, in which she accused defendant of hitting Christopher, was testimonial hearsay. We hold that it was.

¶ 64 First, Crystal's statement to the police was hearsay. Hearsay evidence is an out-of-court statement offered to prove the truth of the matter asserted. Ill. R. Evid. 801; *Jura*, 352 Ill. App. 3d at 1085. Generally, a nontestifying party's statement implicating the defendant in a crime is hearsay. *Id.*; *People v. Feazell*, 386 Ill. App. 3d 55, 66-67 (codefendant's statements implicating defendant and introduced through testimony of detective were inadmissible hearsay); see also *Crawford*, 541 U.S. at 38-40 (statement of defendant's wife used to rebut defense was hearsay; use at trial violated Confrontation Clause even though statement was admissible under state hearsay rules). When an out-of-court statement is admitted into evidence, and no limiting instruction is given as to its use, we presume that the jury considered the statement for the truth of the matter asserted. *Jura*, 352 Ill. App. 3d at 1093.

¶ 65 The State argues that Crystal's statement to the police was not offered for its truth but rather to provide the "context" necessary for defendant's own statements to be intelligible. The Seventh Circuit rejected precisely this argument in *Ray*, 592 F.3d 793.

¶ 66 In *Ray*, the government introduced statements of non-testifying co-defendants implicating Ray through the testimony of the detective who took Ray's own written statement. *Id.* at 795. In testifying, the detective primarily read from Ray's statement, including the portion where the detective told him that his codefendants had implicated him. *Id.* The government argued that the codefendants' statements were introduced not as substantive evidence but to provide the context of Ray's reaction to their statements. *Id.* at 796. The Seventh Circuit held that "[h]owever

cleverly presented," the codefendant's statements were still hearsay; that the jury would take them for their truth in the absence of a limiting instruction; and that the government's use of this hearsay evidence violated Ray's right of confrontation. *Id.* at 795-97.

¶ 67 We find *Ray* persuasive and directly on point. The State introduced Crystal's statements in essentially the same way, and the jury was not instructed to limit its consideration of her statement to the purported purpose identified by the State.

¶ 68 What's more, the record does not support the State's context argument. The detectives conveyed Crystal's statement to defendant three times during the interrogation. In one instance, he responded that she must have been referring to the spanking. In another, he responded that he might have hit Christopher in the chest, but not with a closed fist. But defendant admitted to spanking Christopher and hitting him in the chest with an open hand several times during his interrogation. And in the third instance, the detectives garnered no response from defendant. Instead, after reminding defendant that "she heard you hitting him," the detectives immediately posed another question—"When did you put makeup on him?"—before defendant said anything at all. Crystal's statement added nothing to the jury's understanding of defendant's own statements or admissions. The only use the jury could have made of her accusation was to consider it for its truth. Thus, her statement was hearsay.

¶ 69 Second, Crystal's statement to the police during her interrogation was also testimonial. Although the Supreme Court has yet to provide a comprehensive definition of the term, the Court held in *Crawford* that "some statements qualify under any definition," including those "taken by police officers in the course of interrogations." 541 U.S. at 52; see also *id.* at 68 (testimonial requirement "applies at a minimum to *** police interrogations"); *Davis*, 547 U.S. at 822 (statements made by non-testifying witness to police during investigation of past crime were

testimonial). Here, as in *Crawford*, the statement at issue was made while the declarant was in police custody as a suspect herself, so there is no question that it was testimonial. See *Davis*, 547 U.S. at 822 (citing *Crawford*, 541 U.S. at 53 n.4); see also *Feazell*, 386 Ill. App. 3d at 66 (codefendant's statements to police during interrogation were "clearly testimonial"). Indeed, while the State argues that Crystal's on-the-scene statements to Joe and Katrine were not testimonial, the State never disputes that her custodial statement to the police was.

¶ 70 In sum, Crystal's statement during her interrogation that defendant struck Christopher was testimonial hearsay. The State's use of that statement at trial, where Crystal was not subject to cross-examination because she could not be compelled to testify, violated defendant's sixth-amendment right of confrontation.

¶ 71 C. Plain Error

¶ 72 Defendant concedes that the confrontation error was forfeited, but he argues that it may be reviewed, and ultimately warrants reversal, as second-prong plain error. Thus, defendant must show that a clear or obvious error occurred, and that the error was so series that it undermined the fairness of the trial and the integrity of the judicial process. See, *e.g.*, *Piatkowski*, 225 Ill. 2d at 565; *People v. Smith*, 2016 IL 119659, ¶ 39.

¶ 73 Defendant cites *People v. Hood*, 2014 IL App (1st) 113534, ¶ 20, *reversed on other grounds*, 2016 IL 118581, in which another panel of this Court concluded that a defendant can carry his burden under the second prong of the plain-error rule simply by showing that his right of confrontation was violated, without a showing of prejudice. That result was held to follow directly from "the constitutional and substantial nature" of this "fundamental" right. *Id*. Thus, *Hood* held that a confrontation error is not only reviewable as second-prong plain error, but also

automatically reversible, based on a presumption of prejudice that follows from the nature and importance of the right itself.

¶ 74 In a dissent, Justice Connors disagreed that a confrontation error was in that "very limited class" of second-prong plain errors requiring automatic reversal, which typically were reserved for the following errors: " 'a complete denial of counsel, trial before a biased judge, racial discrimination in the selection of a grand jury, denial of self-representation at trial, denial of a public trial, and a defective reasonable doubt instruction[.]' [citation]" *Id.* ¶ 71 (Connors, J., dissenting). "Notably absent from this list," the dissent wrote, "is a defendant's right to confront the witnesses against him." *Id.* ¶ 71 (Connors, J., dissenting). (The Illinois Supreme Court, we note, reversed on a different ground, holding that a confrontation error did not occur in the first place, because the defendant had been provided the opportunity to cross-examine the witness while he testified at the deposition that was admitted into evidence. See *People v. Hood*, 2016 IL 118581, ¶¶ 26-28.)

¶ 75 Even if it could be said that the appellate decision in *Hood* remained good law for the specific proposition for which defendant cites it, we would disagree with that proposition and instead agree with the *Hood* dissent's view that, while some second-prong errors are so fundamental to the integrity of a trial that they warrant automatic reversal without a showing of prejudice, confrontation errors have never been considered part of that class. "[T]he denial of the opportunity to cross-examine an adverse witness does not fit within the limited category of constitutional errors that are deemed prejudicial in every case." *Delaware v. Van Arsdall*, 475 U.S. 673, 682 (1986). Thus, even fully preserved confrontation errors are subject to harmless-error review. *People v. Patterson*, 217 Ill. 2d 407, 428 (2005) ("we conclude that *Crawford* violations are subject to harmless-error analysis.").

¶ 76 It would be illogical—even perverse—if a *preserved* confrontation error could be found harmless beyond a reasonable doubt, but the same error, when *forfeited*, required automatic reversal. A confrontation error is a trial error, and like nearly all trial errors, it warrants reversal only upon a showing that it jeopardized the fairness of the trial. *Id.*

¶ 77 We think the correct rule is the one we applied in *Feazell*, 386 Ill. App. 3d 55, another case defendant relies on. In *Feazell*, we held that a forfeited confrontation error was a serious enough error to warrant our *review* under the second prong of the plain-error rule; but in reviewing the error, we reversed Feazell's conviction only after concluding (for reasons we will soon discuss) that the error was not harmless. See *id.* at 64-67. The importance of the confrontation right, in other words, excused Feazell's forfeiture, but it did not automatically warrant a new trial.

¶ 78 We adhere to the analysis we applied in *Feazell*. To be entitled to a new trial, defendant must show not only that he was denied an important constitutional right—that, we agree, is enough to excuse his forfeiture—but also that this particular confrontation error, in the context of the evidence adduced at trial, was serious enough to render his trial fundamentally unfair. Unlike in *Feazell*, we do not think defendant has carried that burden.

¶ 79 Feazell and her codefendant, Banks, were tried separately for aggravated vehicular hijacking, armed robbery, and murder. *Feazell*, 386 Ill. App. 3d at 60. Feazell testified that she drove Banks to a mall, where he stole a car at gunpoint and shot and killed one of the car's occupants in the course of that offense. *Id.* at 57. Feazell denied that she participated in the hijacking or that she knew Banks had a gun when she drove him to the mall. *Id.* A detective testified for the State that he conveyed Banks's statements to Feazell during her interrogation. *Id.* at 62-63. Those statements implicated Feazell in the hijacking, as well as a prior hijacking in

which they stole the car they drove to the mall. *Id.* at 60-61, 63. And most importantly, Banks said that Feazell, whom he was dating at the time, knew that he had a gun with him. *Id.*

¶ 80 We held that the State's use of Banks's statements violated Feazell's confrontation right, and that the error was not harmless because Banks's statements were "an integral part" of the State's case. *Id.* at 67. They provided the only evidence that contradicted Feazell's version of the events in general. *Id.* In particular, they provided the only direct evidence that Feazell knew that Banks had a gun, evidence that was "particularly damaging" to Feazell because she was charged with knowing murder. *Id.* Given the importance of Banks's statements to the State's case, denying Feazel her right to test their reliability by cross-examination was highly prejudicial to her defense. Thus, "the error was so serious as to deny her the fundamental right to a fair trial," and reversing her conviction was therefore necessary "to preserve the integrity of the judicial process." *Id.*

¶ 81 Here, in contrast, Crystal's statements were not the only evidence that defendant struck Christopher, and they were not central to the State's case. Throughout his interrogation, defendant admitted, little by little, to hitting Christopher in various parts of his body, each time trying to downplay the force of his blows. It is telling, however, that Christopher sustained significant injuries to the same areas defendant admitted hitting. There were "defects" on Christopher's buttocks, where defendant admitting hitting him, that were covered with makeup. Defendant admitting hitting Christopher with a blow that "wasn't a soft tap" in his right side or ribcage, and Christopher suffered significant bruising in that area, consistent with being forcefully grabbed, struck, and pushed against a wall. Defendant admitted that he "may have" hit Christopher in the stomach; in that area, Christopher sustained damage to multiple organs and significant internal bleeding. Christopher's right arm was bruised where defendant grabbed him,

and his scalp was bruised where defendant pulled his hair. This was the heart of the State's case against defendant as a principal—the correspondence between his own admissions and the evidence of Christopher's injuries that was later garnered during his post-mortem exam.

¶ 82 The evidence showed that defendant was with Christopher more or less continuously—with short breaks for a shower and a cigarette—from the time they left Thanksgiving dinner until Christopher was found dead the next day. Dr. Moser-Woertz testified that most of Christopher's injuries were recent, and many were sustained very near the time of his death. So it is virtually inconceivable that defendant was not present—at a bare minimum—when many of those injuries were inflicted. And apart from admitting his own role in causing (some of) Christopher's injuries, defendant also acknowledged that he tried to hide (some of) Christopher's injuries by covering them in makeup. He knew that Crystal beat Christopher, but he did nothing about it because he did not want her to go to jail. Lastly, defendant (and Crystal) were packing their belongings and preparing to move out while Christopher's dead body was rolled up "like a burrito" in their bed.

¶ 83 The State relied on this powerful combination of admissions and highly incriminating circumstances to argue that defendant was guilty, if not as a principal, then at the very least on a theory of accountability. But the State never argued to the jury that Crystal's statements should be taken as evidence of defendant's guilt. Crystal's statements, in short, played little or no role in the State's case against defendant. We cannot say that the introduction of those statements, while improper, denied defendant a fundamentally fair trial or challenged the integrity of the judicial process. *Piatkowski*, 225 Ill. 2d at 565.

¶ 84 We are not persuaded otherwise by defendant's argument that "[Crystal's] hearsay pervaded [his] trial." Crystal's *testimonial* hearsay—the proper basis of his confrontation argument—was minimal.

¶ 85 And just as importantly, even if defendant could bootstrap Crystal's on-the-scene statements into his sixth-amendment argument (which we find improper), that would not change the result we reach: Those statements were largely cumulative of her custodial statements, and thus equally unimportant to the State's case. The repetition of improper evidence does, undoubtedly, have the potential to amplify its prejudicial effect with a jury; but here, that improper evidence was swamped by defendant's own self-incriminating admissions and played no role in the theory of guilt presented to the jury. Repeated or not, we find the improper use of Crystal's statements did not deny defendant his fundamental right to a fair trial or undermine the integrity of the judicial process.

¶ 86 In reaching that conclusion, we reject defendant's contention that the confrontation error in this case posed a heightened risk of prejudice because it was a *Bruton* violation. See *Bruton*, 391 U.S. 123. "[T]he Confrontation Clause is uniquely threatened" by *Bruton* violations. *Lee v. Illinois*, 476 U.S. 530, 541 (1986). In *Bruton*, 391 U.S. at 126, a confession made by Evans, a non-testifying co-defendant, was admitted at a joint trial. Evans's confession implicated Bruton, but the jury was instructed not to consider it in deciding whether Bruton was guilty. *Id.* The Court held that the use of Evans's confession violated Bruton's sixth-amendment right to cross-examine Evans, because it would be unreasonable to expect the jury to disregard Evans's confession while deliberating about Bruton. *Id.*

¶ 87 As our own supreme court has often observed, "a confession is the most powerful piece of evidence the State can offer, and its effect on a jury is incalculable." *People v. Simpson*, 2015

IL 116512, ¶ 36. Thus, a codefendant's "incriminations [are] devastating to the defendant," even though "their credibility is inevitably suspect," given the codefendant's "recognized motivation to shift blame onto others." *Bruton*, 391 U.S. at 136. At a joint trial, when the admissible confession of one defendant inculpates the other, the jury cannot be expected to "segregate" such powerful evidence into "separate intellectual boxes," as would be necessary to conclude that "a confession is true insofar as it admits that A has committed criminal acts with B and at the same time effectively ignore the inevitable conclusion that B has committed those same criminal acts with A." *Id.* at 131. That is why separate trials are ordinarily required when one co-defendant has confessed: It is the only way to ensure that a jury does not consider evidence as powerful as a confession against a defendant who cannot compel the declarant to testify and thus challenge the statement's credibility through cross-examination.

¶ 88 These dangers were not present in this case. Defendant and Crystal were tried separately, and Crystal's statements were not confessions, or even self-incriminating partial admissions; they were statements accusing defendant, and defendant only, of beating Christopher. Thus, it is not *Bruton*, but *Crawford*, that provides the proper analytical framework. *People v. Czapla*, 2012 IL App (2d) 110082, ¶ 10 (where defendant and codefendant tried separately, and codefendant's hearsay statements were accusations against defendant but not *self*-incriminating, their use at defendant's trial was governed by *Crawford*, not *Bruton*). To the extent that defendant relies on cases finding *Bruton* violations, based on the use of a codefendant's self-incriminating statement at a joint trial, we find those cases inapposite. See *People v. Fillyaw*, 409 Ill. App. 3d 302, 317-20 (2011); *People v. Fort*, 147 Ill. App. 3d 14, 17, 22-23 (1986). The heightened threat of prejudice in those cases was not present here.

¶ 89 In sum, defendant was denied his sixth-amendment right to cross examine Crystal about her testimonial statements accusing him of beating Christopher. But that forfeited error does not require reversal, given the—at best—peripheral role those statements played in the State's case against defendant. Because defendant was not denied a fundamentally fair trial, nor did the error challenge the integrity of the judicial process, we will not reverse his conviction under the second prong of the plain-error rule.

¶ 90 For these reasons, we affirm defendant's conviction and sentence for first-degree murder.

¶ 91 Affirmed.