2013 IL App (2d) 110785-U
No. 2-11-0785
Order filed June 3, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JOEL CHAVEZ, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of Du Page County. No. 12-CH-3812 Honorable George J. Bakalis Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Hutchinson and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in convicting defendant of first-degree murder because the evidence supported a finding of the mental state of knowledge of a strong probability of death or great bodily harm. Nor did the court err in denying defendant's motion to suppress or his motion *in limine*. Defendant's *Miranda* rights were not violated, and the State's medical examiner's report did not violate the Sixth Amendment confrontation clause, and the trial court did not sentence defendant excessively. We did find a clerical error in the judgment mittimus, and therefore affirmed as modified.

¶ 2 Defendant, Joel Chavez, was found guilty of first-degree murder of his infant daughter after a bench trial and sentenced to 28 years in prison with credit for time already served. Defendant timely appeals, arguing that the trial court erred by: (1) denying his motion to suppress statements

given in violation of *Miranda* to Aurora police officers, (2) denying his motion *in limine* to bar the medical examiner's report from evidence because it violated the confrontation clause, (3) convicting him of first-degree murder instead of the lesser offense of involuntary manslaughter because the evidence only supported a mental state of recklessness, (4) incarcerating him for a crime for which he was acquitted, according to the mittimus, and (5) sentencing him excessively. With the exception of ordering that the judgment mittimus be amended to reflect the proper statutory basis for conviction, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was born in Mexico and came to the United States when he was 17 years old. At the time of trial he was 28. Chavez married Lupe in December 2005, and the couple had two daughters together, Alexa and then Julyssa. Lupe also had a son, Eddie Espino, from a prior relationship, and he lived with Chavez and Lupe as Chavez's stepson. Chavez was the parent taking care of Julyssa the day she died.

¶ 5 A. January 12, 2009

¶ 6 Julyssa was taken by paramedics to the hospital while barely breathing on January 12, 2009. She was not quite six months (she was born July 14, 2008). That day, Lupe had awoken defendant and asked him to take care of the girls because she was taking Espino to a dentist appointment. Lupe testified that when she left that morning, Julyssa was happy and healthy. Defendant testified that when Lupe left, both Alexa and Julyssa were sleeping, and he spent about half an hour assembling the children's toys. According to defendant, he stopped doing so when he heard Julyssa crying in the bedroom. When he checked on her, she had a dirty diaper, which he changed. However,

Julyssa's crying did not stop. Defendant testified that he put her clothes back on, washed up, and then went to prepare her a bottle in the kitchen. Julyssa continued to cry during this time.

¶ 7 Defendant testified that usually a diaper change, a bottle, and a burp were enough to get Julyssa to stop crying. This day, however, she could not drink the bottle. Defendant was admittedly desperate to stop Julyssa's crying. He admitted to walking around with her held out in front of him for a few minutes, and when she would not stop crying, he testified that he tossed the baby onto the bed. Julyssa stopped crying, but she also became unresponsive. Defendant called Lupe multiple times, and Lupe was worried for Julyssa's health. Lupe told him an ambulance was on the way.

¶ 8 Defendant attempted to perform CPR on Julyssa. He admittedly used the adult method of CPR—use of two hands, pressing with the palm of one hand and covering that hand with the other hand—instead of the infant CPR method, which only uses two fingers to avoid injury to the ribs and other internal injuries, such as injury to the spleen or liver.

¶ 9 Defendant also admitted to shaking Julyssa. He claimed he did not believe shaking could injure Julyssa, and the reason he did it was to get her to react because she was unresponsive.

¶ 10 Paramedics arrived at the apartment around 9:45 a.m. The apartment was at 1038 Terrace lake in Aurora, Illinois. Aaron Garcia and Todd McChurch from the Aurora Fire Department were the paramedics to arrive at the residence in response to a dispatch for an "unconscious six-month-old barely breathing." Garcia testified that Julyssa was barely breathing when he and McChurch arrived, and therefore they immediately grabbed the baby and took her to the ambulance. When they removed Julyssa's clothes, Garcia noticed bruising on her ribs. Garcia also testified as to the difference in performing CPR on an adult versus on an infant, that is, use of only two fingers to make

compressions for an infant. Julyssa was taken to the Rush-Copley Medical Center in Aurora, arriving at 10:04 a.m.

¶ 11 Along with the paramedics, Aurora Police Officer Jeffrey Petersen was dispatched to the apartment at approximately 9:45 a.m. on January 12. When Officer Petersen arrived at the apartment, Julyssa was already in the ambulance. Petersen was in full uniform with standard law enforcement equipment. Officer Petersen testified that at the time, he did not have a suspicion that defendant was involved with Julyssa's condition. Because defendant was speaking to him in broken English, Officer Petersen called Officer Flores to come to the scene to interpret.

¶ 12 Defendant asked Officer Petersen for a ride to the hospital. Petersen acquiesced, and on the way to the hospital Petersen drove defendant to a family friend's home so that he could drop off Alexa. When they arrived at the friend's home, defendant walked Alexa to the door unaccompanied. He rode in the backseat of the squad car, which was equipped with a cage. The doors automatically locked, but defendant was not handcuffed or restrained in his movement. Officers Petersen and Flores arrived with defendant at the hospital after dropping Alexa off, and all three went to the family waiting room.

¶ 13 After Officer Petersen received the initial medical reports regarding Julyssa, he contacted Sergeant Tate and the decision was made to send detectives to the hospital for possible child abuse. Right around that time Lupe arrived at the hospital, and both Officer Petersen and defendant spoke with Lupe in the family waiting room. Officer Petersen was the only law officer present with defendant until the police detectives arrived. Once the investigators arrived, Officer Petersen had no further contact with defendant.

¶ 14 According to defendant, he met with two police detectives. Officer Trujillo of the Aurora Police Department met with defendant first. Trujillo met with defendant in the family waiting room and wore plain clothes, although he did carry a holstered weapon. He spoke to defendant in Spanish, telling him he was there to find out more about what had happened with Julyssa and to inquire about acquiring a search waiver for his apartment. He informed defendant that he was not under arrest, and he translated the search waiver into Spanish. Defendant agreed to sign the waiver, which Lupe had already signed. Trujillo also explained to defendant that the injuries sustained by Julyssa warranted this further investigation.

¶ 15 Officer Trujillo asked defendant if he would come to the police station. Defendant agreed. Trujillo asked whether defendant had driven to the hospital, and he said he had not. In response Trujillo offered to drive defendant to the police station, and he accepted. Defendant was not handcuffed or restained, and he carried his belongings. He sat in the back seat of the car and drove with Officers Trujillo and Reid. The car was an unmarked police car without a cage, but again the doors automatically locked when the car was driven.

¶ 16 Upon arrival at the police station, Officer Trujillo brought defendant to an interview room. Trujillo asked whether defendant needed to use the bathroom or if he would like a drink. Defendant requested a soda and received one.

¶ 17 Defendant remained in the interview room for several hours before Investigator Easton arrived to interview him. Officer Myint was charged with monitoring defendant until Easton arrived. During the time when Trujillo left defendant in the interview room and Easton arrived, the door to the interview room was left unlocked and no one else entered the room. At one point defendant attempted to leave and asked to speak to Trujillo. Officer Myint told him to remain in the room and

that he would look for Trujillo. Myint found Trujillo, who told him that investigators were coming to speak to defendant and to have him continue to wait. Myint relayed this information and gave defendant another soda and something to read. Myint said that defendant never asked to leave nor did he request an attorney.

¶ 18 Carmen Easton was an investigator with the Du Page County Children's Advocacy Center. When Easton arrived at the police station, she first went to the third floor to be briefed on the investigation. She then interviewed Lupe in a different interview room than defendant's. After this interview, which went from approximately 2:30 to 3:30 p.m., she called one of the paramedics who had handled Julyssa. After finishing this phone interview, she finally interviewed defendant at approximately 5:15 p.m.

¶ 19 Defendant testified that before anything was recorded, he asked for an attorney but that Easton told him he did not need an attorney because she was going to help him, but if he were to talk to an attorney, he would be arrested and his daughter taken to a children's home. On cross-examination, however, defendant testified that he did not ask for an attorney and that he believed Easton was there to help him and that he did not believe he was under arrest. Defendant had been arrested before.

¶ 20 Easton read defendant his *Miranda* warnings in Spanish, he initialed each section of the waiver form, and he signed the bottom of the form. Easton, who speaks Spanish, spoke with defendant for about an hour and a half. Investigator Fencl witnessed the signing of the waiver in addition to Easton. Defendant did not ask for an attorney at any point during his conversation with Easton. Easton told him, in Spanish, that she had spoken with doctors who had been caring for Julyssa and that the girl was in poor condition with fractures to her head. Defendant believed her.

Easton testified that defendant told her that he had picked Julyssa up and shook her when he thought she had fainted. He also demonstrated how he did it. He admitted he had a temper and that he and Lupe had been considering a separation. He also told Easton that he "did grab her and throw her hard onto the bed." When asked whether her head hit the wall, defendant replied "Maybe." He said Julyssa did not cry or scream after he threw her. By the end of the interview, defendant agreed with Easton to go back to his residence and perform a reenactment of what had happened.

¶ 21 Easton accompanied defendant to his apartment that evening where he did perform reenactments of throwing the child with a 1.5 pound doll. Before beginning, Easton went over his *Miranda* rights again, and at no time did defendant ask for an attorney. The reenactments were recorded on video. Easton gave defendant prompts to throw the doll harder and closer to the wall, and defendant performed four different tosses. Once the reenactments were finished, defendant and Easton returned to the Aurora Police Department, and that is where defendant remained.

¶ 22 B. January 13, 2009

¶ 23 Julyssa was transferred to Loyola University Medical Center in Maywood, Illinois, where she died. Lupe was at Loyola when she was told that Julyssa had died. Defendant was not informed that his daughter had died on January 13.

¶ 24 C. January 14, 2009

¶ 25 On January 14, Easton returned to the Aurora Police Department to meet with and interview defendant again. After providing *Miranda* warnings, defendant asked Easton, "The only thing I want to know is how is my daughter? I want to ask you, is she out of the hospital?" Easton told him it was bad, and that the injuries that Julyssa sustained were serious and "we know what type of beating it takes to do that to the head *** what it takes to do that type of damage."

¶ 26 Not too far into the interview, defendant asked for an attorney. Specifically he said: "If it's like the paper says and I have the right to talk to an attorney then I am demanding my right to talk to any attorney." Easton immediately responded that he was correct and "I can't talk to you anymore." Defendant tried to interject, but Easton continued: "At the moment you say that you want to speak to an attorney, I have to go." Defendant persisted, however, stating to Easton: "But I don't know why they're trying to blame me for things that I have nothing to do with." Easton continued the conversation by explaining that she was trying to convey to him what the doctors had conveyed to her—that there is medical evidence of severe injuries to Julyssa that included bruised and broken ribs. The interrogation continued, covering ground that they had discussed before. Defendant admitted that he thought Julyssa hit the wall when he threw her, but he was not certain at the time because his stress level was already high, he was mad, and he was "doing very bad." He also admitted to shaking Julyssa for about two minutes after she had become unresponsive in an effort to wake her up or get her to respond. The interrogation lasted approximately one hour.

¶ 27 D. Procedural Background

¶ 28 On January 15, 2009, Easton signed a complaint against defendant alleging that he committed first-degree murder by acts causing the death of his daughter, Julyssa. On February 5, 2009, a Grand Jury returned a seven-count indictment against defendant. The first three counts were for first-degree murder charged under section 9-1(a)(1) of the Criminal Code of 1961 (Code) (720 ILCS 5/9-1(a)(1) (West 2008)), alleging that defendant intended to kill or do great bodily harm, or knowing that such acts will cause death to that individual. Counts four and five were for first-degree murder charged under section 9-1(a)(2) of the Code (720 ILCS 5/9-1(a)(2) (West 2008)), alleging defendant knew his actions created a strong chance of death or great bodily harm. Counts six and seven were for

aggravated battery against a child under section 12-4.3(a) of the Code (720 ILCS 5/12-4.3(a) (West 2008)). At the subsequent bench trial, the court found defendant guilty under counts four, five, and six but not under counts one, two, three, or seven. Counts four and six merged into count five. The proceedings and trial that lead to the finding of guilty are detailed below.

¶ 29 E. Motion to Suppress

¶ 30 Defendant filed his motion to suppress statements on January 27, 2010, for all statements he made to members of the Aurora Police Department. The motion alleged that all of defendant's statements were made while in custody without benefit of an attorney, without being warned of his rights under *Miranda*, and without understanding his rights. On April 28, 2010, the trial court denied defendant's motion. It set out its reasoning in a memorandum opinion, and its reasoning is as follows.

¶ 31 The court walked through the events of the three-day period step-by-step, beginning with the police officer's arrival at defendant's apartment on January 12. The trial court found that at no time while the officers were at defendant's apartment, or while he was in the squad car driving from his apartment to the hospital, was he in custody. Therefore, no *Miranda* warnings were required. The officers asked only general questions, made no threats, displayed no weapons, and defendant requested the ride to the hospital. Defendant also testified that he did not feel he was in custody or compelled to accompany the police to the hospital.

¶ 32 The trial court found that defendant was in no way restrained at the hospital, and he again testified that he did not feel as if he could not leave. There were no threats, and defendant was left alone for periods of time in the family waiting room. Given the totality of circumstances, he was still not in custody.

¶ 33 When the police investigators arrived at the hospital, they informed defendant that he was not under arrest and they only needed to speak to him more about what happened with Julyssa. The investigators asked defendant to come to the police station, and he agreed. Defendant again testified that he did not feel compelled to accompany the officers. There were no displays of weapons, and defendant was never physically restrained with handcuffs or otherwise. Therefore the trial court reasoned again that there was no custody and therefore no *Miranda* warnings were required.

¶ 34 After arriving at the police station, defendant was placed in an interview room, monitored by video and by Officer Myint. He remained in the room for several hours. When he tried to leave, Officer Myint met him at the door and instructed him to stay. At this point the trial court found that defendant was in custody.

¶ 35 When Easton arrived to interview defendant on January 12, she read him his *Miranda* warnings in Spanish and asked whether he understood them. He said yes and initialed each warning on a printed sheet. At one point he said he did not understand one of his rights, so Easton told him to read it again and asked him if he now understood it, to which he said yes. The same procedure was followed in the second interview on January 14. This satisfied the trial court that defendant understood his *Miranda* rights.

¶ 36 Defendant claimed that before his second interview with Easton, he requested an attorney and that Easton threatened him that his children would be taken away if he did not cooperate. However, Easton denied this and there is no recording of this conversation. The trial court saw this as a battle of credibility of witnesses, and it found defendant's credibility undermined by at least two points: first, that defendant did not request an attorney again right away after receiving his *Miranda*

warnings once the recording started, and second that defendant first testified that he had never been arrested before, yet later admitted he had been arrested on multiple occasions.

¶ 37 It was undisputed that during his January 14 interrogation with Easton, defendant invoked his right to an attorney. Easton immediately stopped questioning and prepared to leave the room. The issue was whether defendant reinitiated the conversation that followed. The trial court found that he was the one to reinitiate the conversation when he said, "But I don't know why they're trying to blame me for things that I have nothing to do with." The trial court found this statement to relate sufficiently to the investigation that it was a reinitiation of interrogation.

¶ 38 F. Motion *in Limine* #2

¶ 39 Defendant, in his "Motion *In Limine* #2," sought to ban Julyssa's medical examiner's report as violating the confrontation clause of the Sixth Amendment. The trial court eventually denied the motion. Defendant only appeals the court's denial of its second of four motions *in limine*.

¶ 40 G. Trial

¶ 41 1. State's Case

¶ 42 After a waiver of trial by jury, a bench trial commenced. The State's first witness was Lupe, who testified as follows. She and defendant had an argument on December 2, 2008, which resulted in him pushing her to the ground while she was holding Julyssa. On December 31, 2008, Lupe informed defendant that their relationship was not going to work anymore. On January 11, 2009, Lupe asked defendant to watch the girls the next day so she could take Eddie to the dentist. He did not want to watch the girls, and he demanded a *quid pro quo* to do so. He wanted to use the car to drive to a friend's house to watch soccer that evening. Lupe was reluctant to loan him the car

because he did not have a driver's license. Despite her reluctance, she agreed. Defendant went to watch soccer, and he stayed home the next morning to watch the children.

¶ 43 The last time Lupe saw Julyssa she was happy and healthy, although she did say Julyssa had a cold and was crying the night of January 11. She did not, however, call a pediatrician that night. On January 12, she received a call from defendant in which he told her something was wrong with Julyssa. After the call dropped he called back. He sounded nervous and said that Julyssa had fainted. Lupe told him she was going to call 9-1-1, and she did.

¶ 44 Lupe also testified that defendant had spoken to her about splitting up the family; he would leave with Alexa for Mexico and Lupe would stay in the United States with Julyssa. Lupe denied ever witnessing defendant hit or beat one of their daughters.

¶ 45 The State next called Aaron Garcia, one of the firefighter paramedics who responded to the 9-1-1 call. He testified as follows. He had responded to the 9-1-1 call the morning of January 12. When he arrived, Julyssa was barely breathing and when her clothes were removed, Garcia noticed bruising on her ribs. He also testified as to the difference between adult and infant CPR. For infants, CPR should be performed with only two fingers so as to avoid internal injuries to the infant.

¶ 46 Officer Petersen testified for the State as follows. He responded to the 9-1-1 call on January 12, and he observed defendant at the apartment. Petersen found him to be calm and without much emotion that morning. He gave defendant a ride to the hospital in his squad car, stopping once to allow him to drop off Alexa at a friend's home. Petersen took defendant to the hospital and remained until Aurora Police detectives arrived.

¶ 47 Detective Guillermo Trujillo testified next for the State as follows. He met with defendant at the hospital and requested that he sign a search waiver for the apartment. He told defendant that

he was not under arrest and explained the search waiver in Spanish. Defendant told Trujillo that Julyssa was having problems sucking and/or swallowing when he tried to give her a bottle that morning. He asked Trujillo about the status of his daughter, to which he responded that she was still being treated and she was scheduled to be transferred to another hospital. Trujillo told defendant that investigators wanted to speak to him at the police station and asked if he would come to the station. He agreed, and Trujillo gave him a ride to the station. Trujillo likewise found defendant to be exhibiting little emotion.

¶ 48 Officer Flores testified as follows. He was called to defendant's residence on January 12 to interpret. Defendant told Flores that he gave Julyssa the "breath of life," in reference to his attempt at CPR. Flores went to the hospital, but once defendant was done speaking to Petersen in the waiting room, he left because he was no longer needed to interpret. Flores reiterated other officers' testimony that defendant did not appear to be very emotional about the situation.

¶ 49 Next to testify was Carmen Easton. She went to the Aurora Police Department on January 12 on a call to investigate about an injured child. After providing *Miranda* warnings, she questioned defendant and had the meeting recorded. She had defendant accompany her to the apartment and demonstrate what he had done with Julyssa using a 1.5 pound doll. Defendant was six foot one and about 204 pounds, whereas Julyssa, a not-quite six-month old, was only around 11 pounds. He told Easton that he shook the baby for about one minute and threw the baby onto the bed from about four feet away. Afterward, he took her to the living room and tried to perform CPR to no avail.

¶ 50 2. Medical Testimony

¶ 51 Dr. Reda Kilani, Julyssa's pediatrician, testified as follows. The doctor had last seen Julyssa on December 16, 2008. A few days prior to the visit, Julyssa had been hit by a TV remote control.

Dr. Kilani did not notice other bruises or significant marks that day; Julyssa was congested with a cold but otherwise was in good health. Dr. Kilani was shown pictures of Julyssa from the hospital after her January 12, 2009, injuries. She had not noticed any of the bruising in the pictures during Julyssa's last visit. She admitted that such bruises could have been caused by attempting adult CPR on an infant.

¶ 52 Dr. Christopher Hwang testified as follows. Dr. Hwang worked at Rush Copley Medical Center as an emergency room physician and was working the day Julyssa arrived at the ER. Dr. Hwang was tendered and accepted as an expert in emergency medicine. He provided treatment to Julyssa on January 12, 2009, and he noted that when she arrived she was in full respiratory and cardiac arrest—a rarity for a child. Julyssa was intubated and given shots of Epinephrine to attempt to bring her abnormal heart beat to a normal rhythm. The second dose of Epinephrine stabilized her heart rhythm.

¶ 53 Julyssa's temperature at the ER was only 93 degrees Fahrenheit. This indicated to Dr. Hwang that her heart had not been functioning properly to perfuse blood for approximately half an hour. Her pupils were also fixed and dilated—a sign of diminished brain activity. She was unresponsive with a lack of movement and muscle tone.

¶ 54 Due to her condition, Dr. Hwang ordered a CT scan of Julyssa's brain, which revealed a subdural hematoma, that is, bleeding between the brain and the lining of the brain. The CT scan could not indicate whether the brain was in fact being pressured by the subdural hematoma or whether it was improving or worsening. However, it was a serious issue because it could expand, which would cause pressure to the brain, and this radiological finding demonstrated that there had been a significant amount of trauma to Julyssa's brain, explaining why she arrested. Short periods

of shaking can cause subdural hematomas, although the shaking must be rigorous. Usually some other contact force to the head is required to cause the hematoma.

¶ 55 The CT scan also revealed a fracture to the skull on the back-right side. The fracture occurred, in his opinion, in the last 24 to 48 hours. A significant amount of force is required to cause a skull fracture, such as dropping a baby four or five feet onto a hard surface. Hitting a soft surface, such as a mattress on a bed, would not be sufficient to cause a skull fracture or subdural hemotoma. He could not say whether the two injuries—the skull fracture and the subdural hematoma—occurred at the same time.

¶ 56 Dr. Hwang ordered further x-rays of Julyssa's entire skeletal system, which revealed more fractures. There was one fracture on the radial bone near her left wrist. There were multiple fractures to the right forearm. These fractures were severe and the bone was broken in several pieces and displaced. Such an injury requires significant force and is very uncommon for a non-ambulatory child—in fact, Dr. Hwang had never seen an injury in a child who was not yet walking. Additionally, Julyssa had multiple fractures to her ribs—three ribs on her right side and two on her left. It is possible that improper, adult-style CPR on an infant can cause rib fractures.

¶ 57 Lastly, the State called Dr. Afsoon Karimi. Dr. Karimi is a pediatrician and was an attending physician at Loyola University Medical Center, where Julyssa was transferred to from Rush Copley. She had been the Associate Director for the Child Abuse Division at University of Illinois and the Director of the Child Abuse Division at Loyola University of Medicine. She was tendered and accepted as an expert witness in pediatric medicine.

¶ 58 On January 12, 2009, Dr. Karimi treated and assessed Julyssa at Loyola University Medical Center. An opthamalogist report showed extensive hemorrhaging in all three layers of the retina in

both eyes, and it showed the retina had folded. These retinal symptoms were consistent with shaken baby syndrome. As to the skull fracture, Dr. Karimi could not say whether it was acute or not, that is, whether it was a recent injury or not. She did opine, however, that the subdural hematoma was acute. There was extensive swelling of the brain, which would require severe shaking to cause. The swelling or herniation was enough to cause death in any person because it causes a person to stop breathing and can disrupt normal vital functions of the body.

¶ 59 Dr. Karimi also testified as to the rib and arm fractures. The arm fractures were such to be caused by shaking or pulling a limb with great force. The arm fractures, however, appeared to her to have taken place at different times. The number of fractures to the ribs—24 in the report that Dr. Karimi had—were too many to be caused by chest compressions. Julyssa also had a grade two spleen laceration—a type normally seen in car accidents.

¶ 60 Dr. Karimi, when taking all the injuries together, opined that Julyssa suffered from shaken baby syndrome. Only 30 seconds or less of shaking are needed to cause the symptoms that Julyssa presented. The radiological findings and Julyssa's physical presentation at the ER as unresponsive, not breathing, and limp, supported Dr. Karimi's opinion. Dr. Karimi could not pinpoint the precise cause of death because Julyssa had multiple potentially fatal injuries.

¶ 61 The trial court also allowed the a postmortem examination report, prepared by Dr. Tera Jones as evidence of Julyssa's cause of death. The State chose not to call Dr. Jones although she was available to testify.

¶ 62 3. Character Witnesses for Defendant

¶ 63 After the State rested, the Defense called five character witnesses on defendant's behalf. Jose Zepeda, defendant's cousin, testified that defendant was not violent and that he was a loving father.

Karla Perez, defendant's sister-in-law, testified that she did not believe he had it in him to be violent to his children. She had witnessed him playing and caring for his daughters just the Saturday before Julyssa's death. She said he had seemed happy when he found out that Lupe was pregnant with Julyssa. Lorena Contreras, from defendant's home town, knew him for about 15 years. It was her opinion that he was not violent and was happy to find out that Lupe had become pregnant with Julyssa. Evangelina Acevedo, defendant's cousin, testified the same—that he does not have a violent character and was happy when Lupe became pregnant with Julyssa. Finally, Eddie Espino, defendant's step-son, testified. He had never witnessed defendant hit either daughter, nor had he hit him. He did not believe defendant would hit his children.

¶ 64 4. Defendant's Testimony

¶ 65 Defendant testified as follows. When he found out that Lupe was pregnant with Julyssa, he said "Don't tell me that." He admitted he had a temper and had thought about seeking help for it. Although at first denying that he had ever spanked Alexa, he later admitted that he had in fact done so and his previous answer was untrue. He and Lupe were separated by January 12, 2009.

¶ 66 On January 12, 2009, Lupe woke defendant so that he would watch their daughters. That morning, Julyssa began to cry. He made her a bottle, but she would not drink it; she just kept crying. He carried her for about 10 minutes to try to calm her down. When asked once, he said he was angry. When asked later, he denied being angry. After carrying her for a while but unable to get her to stop crying, defendant let Julyssa "fall to the bed." Later he admitted he had to throw her a bit to get her to the bed. Once she hit the bed, she stopped crying. He could not say whether she hit the wall or not. Defendant, purportedly worried that she had had the wind knocked out of her, went over to the bed and shook her to try to get a response. It did not work. That is when he decided to call

Lupe. He denied ever intending to hurt Julyssa in any way, and he accused the State of putting things into his interview transcripts that he had not said. He did not tell the detectives at the hospital about shaking or throwing the baby. He initially told Easton he did not throw the baby, but he later admitted to doing so and accompanied her to the apartment for a demonstration using a 1.5 pound doll.

¶ 67 H. Conviction and Sentence

¶ 68 The court found defendant guilty of first degree murder under section 9-1(a)(2) of the Code (720 ILCS 5/9-1(a)(2) (West 2008)). The trial court did not find intent to cause death, but did find that defendant knew that his acts created a strong probability of death or great bodily harm, inferred from the circumstances of the case. The court found that the child began crying uncontrollably, would not take a bottle, and defendant became angered and stressed with the situation. It found that the State established that defendant shook Julyssa violently and threw her onto the bed, after which she went limp. Although there was evidence that defendant performed CPR improperly, the court did not find that the injury to the spleen was the main cause of death. The damage to her brain was not done in an attempt to revive her, and the cause of death was hemorrhaging and brain swelling.

¶ 69 The People asked for a 50-year sentence, and the defense asked for the statutory minimum of 20 years. The trial judge found the fact that defendant was the victim's father—a position of trust and supervision—was a factor in aggravation. Factors in mitigation included his lack of criminal history and the lack of deterrence. Defendant was sentenced to 28 years' imprisonment with credit for time served. His motion to reconsider his sentence was denied on July 11, 2011.

¶ 70 Defendant timely appealed on August 5, 2011.

¶ 71 II. ANALYSIS

¶ 72 Defendant raises five issues on appeal, and we address each in turn.

¶ 73 1. Motion to Suppress

¶ 74 While we give great deference to the trial court's determinations of fact and credibility on motions to suppress (*People v. Slater*, 228 Ill. 2d 137, 149 (2008)), we ultimately review the legal ruling on a motion to suppress *de novo* (*People v. Luedemann*, 222 Ill. 2d 530, 542 (2006)).

¶ 75 Defendant contends that the trial court erred in denying his motion to suppress statements made between January 12 and January 14, 2009, to Aurora Police Department officers. Defendant argues as follows. He argues that he was under arrest, or at least in custody for *Miranda* purposes, for the entire time he was in the presence of police officers from January 12 to January 14, 2009. He was in the constant and continuous presence of law enforcement officers, which began with Officer Petersen at the apartment with Julyssa the morning of January 12. He was escorted by police to the hospital in the backseat of a locked police vehicle, and he was taken to the police station after the hospital, where he was kept within an interview room for hours. He then met with Carmen Easton. She obtained his *Miranda* waiver only after denying his request for an attorney, a phone call, and his request to speak to his family. She also threatened to have him arrested and his children taken by DCFS if he did not cooperate, and she promised him lenience for cooperating, in the form of assistance with the State's Attorney. Accordingly, any statements that Easton obtained were in violation of *Miranda* and should have been suppressed.

¶ 76 Defendant again asked for an attorney when the interview was being taped. Easton stopped the interview, and it is undisputed that defendant reinitiated contact by asking, "But I don't know why they're trying to blame me for things that I have nothing to do with." However, defendant argues that his case is analogous to the situation is *People v. Olivera*, 164 Ill. 2d 382, 390-91 (1995),

where the defendant's initial question of "What happened?" was insufficient to evince a willingness or desire for generalized discussion about the investigation. Under the totality of circumstances, defendant argues he did not knowingly and intelligently waive his right to counsel when he reinitiated contact with Easton.

¶ 77 We disagree with the conclusions that defendant draws from the facts in this case. First, we note that defendant has not identified specific statements he wishes to suppress; rather, he seeks a blanket suppression of any and all statements he made to the police. However, given our analysis as set out below—that there were no violations of *Miranda*, no improper threats or promises of leniency, and he waived his right to counsel by reinitiating interrogations—there are no particular statements he could point to that the court should have suppressed.

¶ 78 *Miranda* prohibits the use of statements made during custodial interrogation unless proper warnings are given, that is, the right to remain silent, that anything said can and will be used as evidence against one, the right to the presence of an attorney, and the right to have an attorney appointed. *People v. Patel*, 313 Ill. App. 3d 601, 604 (2000). However, *Miranda* warnings are not required unless there is *custodial* interrogation—no *Miranda* warnings are required for general on-the-scene investigation by police officers. *Id.* Rather, the determination we must make for custody is, after considering the totality of the circumstances of the interrogation, whether a reasonable person would have felt free to terminate the interrogation and leave. *People v. Beltran*, 2011 IL (2d) 09085, ¶ 37. Factors relevant, but not dispositive, to this determination include: 1) location, time, length, mood and mode of questioning; 2) the number of police officers present; 3) the presence or absence of friends or family members; 4) any indicia of formal arrest, such as showing of weapons, physical restraint, booking or fingerprinting; 5) how the individual arrived at

the place of questioning; and 6) the age, intelligence, and mental makeup of the accused. *People v. Slater*, 228 Ill. 2d 137, 150 (2008).

¶ 79 We agree with the trial court that, given the circumstances of this case, defendant was not in custody until he was taken to the interview room at the Aurora Police Department. Officer Petersen's arrival at the apartment on January 12, 2009, was not to arrest or in any way investigate defendant for a crime. He asked defendant general questions. He did not brandish a weapon. Defendant requested a ride to the hospital, and Officer Petersen agreed. The only "restraint" would have been the automatically locking doors of the squad car that defendant drove in. Considering the totality of the circumstances, including that they dropped Alexa off at a friend's house and defendant walked her to the door alone, we cannot say that a reasonable person would not have felt free to leave at any time at the apartment or in the car on the way to the hospital.

¶ 80 Even at the hospital, defendant remained in the family waiting room. He talked with Officer Petersen, but there is no evidence of restraint or any reason to believe defendant reasonably felt he had to remain there; to the contrary, the evidence suggests that he wanted to be there. Even when Detective Trujillo arrived to ask him questions and have him sign a search waiver, Trujillo told defendant he was not under arrest and defendant readily acquiesced to Trujillo's requests. He also voluntarily accepted Trujillo's offer to drive to the police station. Trujillo was in plain clothes, and the car they rode in was not a marked police car and had no cage. In no way was defendant physically restrained, no weapons were brandished, and he carried his own belongings.

¶ 81 The evidence shows that once at the station and in the interview room, defendant was in custody. He remained there for several hours, and when he tried to leave, an officer met him at the door and asked him to remain. Given that he was alone at a police station, sitting in an interrogation

room, and was stopped from leaving the room by an officer when he walked to the door, a reasonable person would not have felt at liberty to leave, and therefore defendant was in custody at that point.

¶ 82 However, when Easton met with him in the interview room, she gave defendant his *Miranda* rights in Spanish, and he indicated he understood them and signed and initialed the *Miranda* form. Easton met with defendant twice, first on January 12 and again on January 14. Defendant claimed that Easton threatened him and promised leniency; Easton denied it, as did all the other officers, and the transcript of the January 12 interview reflects Easton asking defendant whether she threatened or promised him anything, and defendant answering no to both. Moreover, we accord deference to a trial court's determination of credibility. *Slater*, 228 Ill. 2d at 149. The trial court did not find defendant credible. Although he denied ever having been arrested in his direct examination, he later admitted on cross-examination that he had been arrested multiple times. He also testified at trial that he never asked Easton for an attorney at the January 12 interview. Furthermore, in the January 14 interview, defendant claimed to have asked for an attorney before the recording of the interview began, yet he waited over 10 minutes into the recorded interview to ask for an attorney again. The interview began with Easton providing defendant with his *Miranda* rights—after which defendant did not invoke his right to counsel—and then telling him that things were "doing very badly" with Julyssa. Only after they began talking about the events of January 12 again did defendant say, "I already made a statement and believe me, I'm not making another statement. I don't know what else happened. If it's like the paper says and I have the right to talk to an attorney then I am demanding my right to talk to an attorney." The tone of the conversation and its turn toward a request for an attorney only after cursory and cordial dialogue raises doubts as to whether defendant really requested and was denied his right to an attorney before the conversation began.

¶ 83 As to defendant's assertion that Easton promised leniency in the form of general help with the State's Attorney: not only did Easton deny making such promises, but even if she had, promises of help with the State's Attorney as suggested by defendant would not constitute promises of leniency. See *People v. Pinkham*, 139 Ill. App. 3d 554, 559 (1985) (requiring *specific* promises of special treatment to constitute promises of leniency). Therefore, even if such general promises were made, the promises alleged would not constitute inappropriate promises of leniency.

¶ 84 Finally, there is the issue of reinitiation of the interrogation by defendant at the January 14 interview with Easton. There is a two-part inquiry to determine whether a defendant's statements are admissible after he invoked his right to counsel. First, the defendant must have initiated further discussion after invoking his right to counsel, indicating a willingness to engage in further generalized discussion about the investigation. *People v. Crotty*, 394 Ill. App. 3d 651, 661 (2009). Second, the waiver of the right to counsel must be knowing and intelligent, as determined by a totality of the circumstances and including the fact that the defendant initiated the further conversation. *People v. Wooley*, 178 Ill. 2d 175, 199 (1997).

¶ 85 Defendant concedes that he initiated further conversation with Easton when he said: "But I don't know why they're trying to blame me for things that I have nothing to do with." Easton had stopped the interview immediately upon defendant's clear and unambiguous request for an attorney. She was preparing to leave the interview room and told him she could not talk to him any more once he asked for an attorney. Defendant argues, however, that his question had nothing to do with a generalized discussion about the investigation. Defendant analogizes his question to the defendant's question of "What happened?" in *Olivera*, 164 Ill. 2d at 390-91. The defendant in *Oilvera* was in police custody and was put in a lineup, where he was positively identified. *Id.* at 327. After the

lineup had been conducted, defendant asked the detective, "What happened?" *Id.* The *Olivera* court found this question too limited to evince a willingness or desire to continue general discussions about the investigation; "to ascribe such significance to this limited question would render virtually any remark by a defendant, no matter how offhand or superficial, susceptible of interpretation as an invitation to discuss his case in depth." *Id.* at 391. Furthermore, the detective in *Olivera* answered the defendant's question without first providing any warning or reminder that the defendant did not need to talk to him because he had requested an attorney. *Id.*

¶ 86 Although defendant's question here was not as clearly related to the investigation as in *People v. Bell*, 217 Ill. App. 3d 985, 997 (1991) ("[W]hat are the charges against me?"), his question evinced a willingness to continue in a discussion of the investigation at least as much as in *Oregon v. Bradshaw*, 462 U.S. 1039, 1045 (1983) ("Well, what is going to happen to me now?"). In *Bradshaw*, the defendant was arrested and invoked his right to an attorney. *Id.* at 1041-42. Either right before or during his transfer from the police station to the local jail, he asked, sufficiently to reinitiate interrogation, "Well, what is going to happen to me now?" and the officer responded, "You do not have to talk to me. You have requested an attorney and I don't want you talking to me unless you so desire because anything you say * * * has to be of your own free will." *Id.*

¶ 87 Here, defendant persisted after Easton told him she could not speak to him. Easton, immediately upon defendant's invocation, stopped the conversation, saying "Okay, that's right. I can't talk to you anymore." When defendant tried to interject, she again stopped him because he had invoked his right to an attorney. She specifically iterated, "At the moment you say that you want to speak to an attorney, I have to go." But defendant continued, "But I don't know why they're blaming me for things that I have nothing to do with." He wanted to know why he was being *blamed* for

what had happened; he was not asking about the status of his daughter or how long before he could leave, but rather he was inquiring into why he was being investigated and, as he perceived it, accused of hurting his daughter. This evinced not only a willingness but also a desire to engage in generalized discussion of the investigation. Unlike "What happened?" in *Olivera*, we see no danger that defendant's question here would render almost any question posed by a defendant as an initiation to begin discussion of a pending investigation.

¶ 88 Our inquiry does not end here because we must also inquire whether defendant's waiver of his right to counsel was knowing and intelligent. Whether defendant's waiver of his right to counsel was knowing and intelligent depends on the circumstances of the particular case, taking into account his background, experience, and conduct. *Edwards v. Arizona*, 451 U.S. 477, 482 (1981). A knowing and intelligent waiver of *Miranda* rights means that the accused had full awareness of the right being abandoned and the possible consequences following his decision to abandon it. See *People v. Bernasco*, 138 Ill. 2d 349, 355-56 (1990).

¶ 89 Defendant had been, to this point, fully advised of his *Miranda* rights three times, the last of which was only about 10 minutes before invoking his right to counsel. He knew he had the right to an attorney as reflected in his invocation of his right to counsel. Easton immediately stopped the interrogation, and she reminded him that she could not talk to him after he invoked his right to an attorney—functioning as a reminder of his right to an attorney, or at least an affirmation of his right—and yet he wanted to continue talking with her. Nor was this the first time that defendant had been arrested by police; this was not even his first interrogation with Easton. Where, as here, defendant had been warned three separate times with his *Miranda* rights, including only 10 minutes prior to his invocation of his right to counsel; had repeatedly indicated he understood his rights; had

been arrested before; had evinced knowledge of his right to an attorney through his invocation of the right; had been the one to request a continuation of the discussions about the investigation, despite being twice admonished by Easton that his invocation meant they could not speak anymore, we find a knowing and intelligent waiver of defendant's right to counsel. While it may have been prudent for Easton to have re-warned defendant of his *Miranda* rights before continuing their dialogue, further *Miranda* warnings were neither necessary nor dispositive to whether defendant's waiver was knowing and intelligent. See *Wyrick v. Fields*, 459 U.S. 42, 48 (1982) (no *Miranda* warnings were necessary to question defendant who had an attorney, voluntarily acquiesced to a polygraph test, and was aware of his right to stop questioning); *Bradshaw*, 462 U.S. at 1042, 1046 (finding defendant initiated further contact and that police did not violate his rights despite no repeated *Miranda* warnings after defendant's reinitiation); *People v. Denby*, 102 Ill. App. 3d 1141, 1148 (1981) ("Although it may be preferable procedure to read the defendant a complete set of *Miranda* warnings upon reinterrogation, it is not required."); *cf. People v. Wiggins*, 239 Ill. App. 3d 260, 271 (1993) (reading defendant his rights and defendant stating he understands his rights does not alone assure knowing and intelligent waiver). Other jurisdictions have found that *Miranda* re-warnings or reminders are not necessary for a knowing and intelligent waiver of the right to counsel. See *State v. Quinones*, 248 P. 3d 336, 342-43 (2010) (no violation of *Miranda* where defendant knocked on door of officer to reinitate conversation about one hour after invoking right to counsel, but was not re-warned with *Miranda* rights; critical inquiry was whether he was still aware of his *Miranda* rights when contact is resumed); *Biddy v. Diamond*, 516 F. 2d 118, 122 (1975) (repeated warnings are not necessary to find knowing and intelligent waiver of *Miranda* rights when circumstances show defendant had full knowledge of his rights). Re-warnings or reminders may help assure that a

defendant has full knowledge of the right he is about to forgo, but the essential inquiry is defendant's awareness of the right waived, not whether a rote warning procedure is followed.

¶ 90 We also emphasize the relatively contemporaneous nature of the defendant's *Miranda* warnings, his invocation of his right to counsel, and his reintiation of interrogation. Here, defendant was *Mirandized* for his third time only 10 minutes prior to invoking his right to counsel, and there was no break between his invocation and his reinitiation. Easton affirmed defendant's right to counsel by immediately saying "Okay, that's right. I can't talk to you anymore." It was defendant who continued to inquire about the investigation. In the circumstances of this case, we find it unnecessary for Easton to have specifically re-warn defendant, "You have the right to consult with an attorney," in order to find a knowing and intelligent waiver. Her acknowledgment that his invocation was correct and that she could no longer speak to him, which served to remind defendant of his right to counsel, coupled with defendant having been fully advised of his *Miranda* rights for a third time only 10 minutes prior to his invocation, sufficiently militated against any danger that defendant did not knowingly or intelligently waive his right to counsel when he continued to ask about the investigation.

¶ 91 What is clear from the circumstances of this case is that defendant knew he did not have to speak to Easton without an attorney, yet sought, of his own volition, to continue to do so without any cajoling, badgering, or other disfavored efforts on the part of law enforcement. Therefore we find no violation of defendant's *Miranda* rights upon his reinitiation of interrogation.

¶ 92 Accordingly, we do not find the trial court erred in denying the motion to suppress.

¶ 93 2. Confrontation Clause

¶ 94 Defendant next argues that the trial court erred in denying his second motion *in limine* because admitting the medical examiner's report violated his right to confront witnesses against him as guaranteed by the Sixth Amendment. The report contained a conclusion as to the cause of death of Julyssa made by a forensic physician of the Cook County Office of the Medical Examiner, Tera Jones, MD, who found the cause of death to be homicide due to multiple injuries by blunt force trauma due to child abuse. The examination took place on January 14, 2009, one day after the date of death. The trial court accepted the report as a public record exception to the hearsay rule.[1] See Ill. R. Evid. 803(8) (eff. Jan. 1, 2011). The State contends that the report did not contain testimonial statements because the purpose of its creation was not to create evidence for a future criminal trial, therefore not implicating the confrontation clause. The State did not call Tera Jones as a witness at trial. Defendant argues that because the report was admitted as *prima facie* evidence of the cause of death—admitted to prove the truth of the matter asserted—it was testimonial, thereby implicating the confrontation clause.

[1]The State in its brief points out that the report was properly admitted under section 115-5.1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-5.1 (West 2010)). Section 115-5.1 allows duly certified medical examiner reports kept in the ordinary course of business at the coroner's office to be admissible as competent evidence. *Id.* Defendant in his brief states that the report was accepted by the court as a business record, although no citation to the record supports this claim. Regardless of the hearsay exception used, defendant does not challenge whether the report was hearsay; he challenges whether the report, hearsay or not, violated his right to confront witnesses.

¶ 95 We review claims that the Sixth Amendment right to confront witnesses was violated *de novo*. *People v. Lovejoy*, 235 Ill. 2d 97, 142 (2009). The threshold question for a confrontation clause analysis is whether the statements at issue were testimonial. *Id.* at 138. The confrontation clause has no application to non-testimonial statements. *People v. Stechly*, 225 Ill. 2d 246, 279 (2007). If the statement is testimonial, the next question is whether the declarant will testify. *Id.* If so, the confrontation clause is not implicated; if not, the declarant must be unavailable and the defendant must have had a prior opportunity to cross-examine the declarant. *Id.* 279-80. Our analysis therefore begins—and in this case ends—with whether the medical examiner's report is testimonial.

¶ 96 We find *People v. Leach*, 2012 IL 111534, controlling in this case. *Leach* instructs that in order to determine whether a forensic report is testimonial for purposes of the confrontation clause, we apply an objective primary purpose test to the report. *Id.* at ¶ 120. However, the *Leach* court recognized there is no majority concurrence from the U.S. Supreme Court about how to interpret and apply the primary purpose test: a pluarlity in *Williams v. Illinois*, 132 S. Ct. 2221 (2012), endorsed a definition whereby the report is testimonial if it is prepared for the primary purpose of *accusing the individual*, whereas the dissent endorsed a test of whether the primary purpose is for *providing evidence in a criminal case*. *Leach*, 2012 IL 111534, ¶ 122. Regardless of the definition used, the *Leach* court held that an autopsy report was not testimonial in nature, and therefore did not implicate the confrontation clause, when, in a first-degree murder case, the report was created by a medical examiner's office—not by a law enforcement agency nor at law enforcement's request—and was prepared in the normal course of operation of the medical examiner's office to determine the cause and manner of death, pursuant to state law. *Id.* ¶ 126-30. The *Leach* court went so far as to say that

even if the doctor preparing the report suspected it may be used in a future trial, that did not mean the function of creating the report was primarily evidence for a future criminal trial. *Id.* ¶ 125, 129. In fact, a coroner or medical examiner is required by Illinois law to perform an investigation into the cause of death when, such as here, the death was sudden or violent, whether suicidal, homicidal, or accidental in nature. *Id.* ¶ 126; see 55 ILCS 5/3-3013 (West 2010). The medical examiner is further required to report his findings and deliver specimens to the police if the cause of death is determined to be a homicide. *Leach*, 2012 IL 111534, ¶ 128; see 55 ILCS 5/3-3013 (West 2010).

¶ 97 The *Leach* court distinguished a medical examiner's report from a forensic DNA test, which could identify a defendant as the perpetrator of a crime. *Leach*, 2012 IL 111534, ¶ 132. A medical examiner's report merely indicates the cause of death, and there must be other links, such as the defendant's own actions or statements, that connect the defendant to the crime. *Id.* An autopsy may just as well reveal a deceased died of natural causes, thus exonerating a suspect, as confirming foul play. *Id.* ¶ 126. Medical examiner reports, the court held, should be "deemed testimonial only in the unusual case in which the police play a direct role *** and the purpose of the autopsy is clearly to provide evidence for use in a prosecution." *Id.* ¶ 133. Under whichever primary purpose test formulation proposed by the U.S. Supreme Court, "autopsy reports prepared by a medical examiner's office in the normal course of its duties are nontestimonial." *Id.* ¶ 136. Moreover, such a report is not rendered testimonial "merely because the assistant medical examiner performing the autopsy is aware that police suspect homicide and that a specific individual might be responsible." *Id.*

¶ 98 Defendant argues that the medical examiner's report is testimonial and cites *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), for the proposition that forensic reports that certify incriminating test results are testimonial in nature and implicate the confrontation clause. In

Melendez-Diaz, police directed that laboratory analysts test a substance taken from the defendant at the time of his arrest for the purpose of determining whether the substance was cocaine, and the specific purpose of the test was for use against the criminal defendant at trial. *Id.* at 324. The results of the test were, in the Court's view, clearly affidavits. *Id.* at 310. The certificates prepared by the analysts were prepared to establish the fact that the substance in the defendant's possession was, in fact, cocaine—the same testimony the analysts would have given at trial had they been called. *Id.* at 310. Not only were the affidavits prepared under circumstances where it would be objectively reasonable to anticipate later use at a criminal trial but also—and more telling—the controlling Massachusetts law stated that the sole purpose of the affidavits was to provide *prima facie* evidence about the characteristics and composition of the analyzed substance. *Id.* at 311. In fact, the affidavits themselves stated that they were prepared for this purpose. *Id.* Clearly, in *Melendez-Diaz*, the primary purpose of the laboratory testing was to provide evidence at trial and therefore the reports were testimonial.

¶ 99 Defendant also cites *Bullcoming v. New Mexico*, __ U.S. __, at __, 131 S. Ct. 2705 (2011), which found that a blood-alcohol analysis report was testimonial so as to implicate the confrontation clause. Following *Melendez-Diaz*, the Court held that a document created solely for evidentiary purpose, made in aid of a police investigation, is testimonial. *Id.* at __, 131 S. Ct. at 2717. It did not matter in *Bullcoming* that the report was "unsworn." *Id.* What mattered was, like in *Melendez-Diaz*, the police provided seized evidence to a state laboratory, required by law to aid police in an investigation. The lab then tested the evidence and prepared a report that was formalized, signed, and contained a legend for the court's rules for admission of a blood-alcohol analysis. *Id.*

¶ 100 The medical examiner's report here is virtually identical to that in *Leach*: prepared in the ordinary course of operation by a medical examiner for the purpose of ascertaining the cause of death pursuant to state law. There is no evidence, nor does defendant argue, that the report was in any way prepared at the special request of law enforcement. Unlike *Melendez-Diaz* and *Bullcoming*, the medical examiner's report was not prepared at the request of law enforcement for the purpose of either targeting an individual suspect or to prepare evidence for a criminal trial. Not only is the *Leach* rationale persuasive, but also we are bound by the holdings of the Illinois Supreme Court, and we find no salient, distinguishing basis for the medical report here relative to the report in *Leach*. Therefore, we find that the report was not testimonial and the confrontation clause not implicated. The trial court did not err in denying defendants second motion *in limine*.

¶ 101 We further note that even if the medical report were testimonial and the confrontation clause ultimately violated—which we have not concluded—such admission would be harmless beyond a reasonable doubt. See *People v. Dobbey*, 2011 IL (1st) 091518, ¶ 67 (harmless error analysis applied to *Crawford* claims). The trial court here found that the only issue was defendant's mental state, not whether defendant committed the acts that lead to Julyssa's death, and, indeed, defendant admits this is the only substantive issue on appeal (see, *infra*, defendant's argument that he should have been convicted only of involuntary manslaughter, but not arguing that he was innocent of any crime). The record contains defendant's admissions of actions that lead to Julyssa's death, as well as medical testimony from various experts whose opinion was not predicated upon the medical examiner's report but rather upon their own investigations and observations as treating physicians. The trial court did not rely on the medical examiner's report in its memorandum opinion. Moreover, the medical examiner's report is evidence that a violent death occurred at the hands of another, but it

does not speak in any direct manner to the mental state with which the injuries were inflicted. The report opines that the cause of death was homicide, which would include first-degree murder or involuntary manslaughter. A very weak inference, if any reasonable inference at all, can be made as to whether the mental state was knowledge of a strong probability of death or great bodily harm versus mere recklessness, merely by reading the report. The trial court's verdict was based on witness testimony and uncontroverted circumstances, and the medical examiner's report is clearly a superfluous piece of evidence to what was truly at issue in this case and on appeal, namely, the *mens rea* with which defendant acted.

¶ 102 3. Conviction of Murder

¶ 103 We review a challenge to the sufficiency of the evidence in the light most favorable to the prosecution, and ask whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985).

¶ 104 Defendant argues that the trial court erred by finding him guilty of first-degree murder instead of involuntary manslaughter because the evidence only supports the mental state for involuntary manslaughter. He concedes the evidence is sufficient to support a conviction of involuntary manslaughter under section 9-3(a) of the Code (720 ILCS 5/9-3(a) (West 2008)). He argues as follows. The evidence is inconsistent with a finding that defendant *knew* that his actions with Julyssa created a strong probability of death or great bodily harm. The key difference between first-degree murder and involuntary manslaughter is the mental state: acting while *knowing* of a strong probability of death or great bodily harm versus acting *recklessly*. *Compare* 720 ILCS 5/9-1(a)(2) (West 2008) (first degree murder), *with* 720 ILCS 5/9-3(a) (West 2008) (involuntary manslaughter). Recklessness is a mental state that is satisfied when "[a] person *** consciously disregards a

substantial or unjustifiable risk *** and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." 720 ILCS 5/4-6 (West 2008).

¶ 105 Defendant directs us to cases where the court found the defendant guilty of involuntary manslaughter. First, in *People v. Lefter*, 38 Ill. 2d 216 (1967), a man was convicted of involuntary manslaughter of his infant daughter. The main issue on appeal, however, was whether the father's statements that he "squeezed her" and "wanted her to stop crying" were admissions for which the voluntariness of the admission needed to be determined. *Id.* at 220-21. The supreme court reversed and remanded for a new trial because the trial court erred by not holding a preliminary hearing to determine the voluntariness of the admissions. *Id.* at 221. The case does not address the difference in mental state between first-degree murder and involuntary manslaughter.

¶ 106 Defendant also cites *People v. Turner*, 193 Ill. App. 3d 152 (1990), where the issue on appeal was whether the evidence supported a finding of involuntary manslaughter, for which the defendant was convicted in the trial court. The trial court affirmed. *Id.* at 159. This case is inapposite to ours because the issue was whether the facts supported involuntary manslaughter, while defendant concedes that the facts of his case do. In *People v. Brown*, 83 Ill. App. 2d 411 (1967), again the appeal was an appeal of involuntary manslaughter that was affirmed, and is therefore no more helpful or applicable here than *Turner*.

¶ 107 We note first that a finding of a mental state may be inferred from the particular facts of a given case. See, *e.g.*, *People v. Weeks*, 2012 IL (1st) 102613, ¶ 35. This includes a determination of whether the defendant acted knowingly or with intent, and we may infer the mental state from the defendant's actions, the circumstances surrounding the incident, and the nature and severity of the

victim's injuries. *People v. Coleman*, 311 Ill. App. 3d 467, 473 (2000). Furthermore, a finding of a "higher" mental state, such as intent or knowledge, implies or satisfies a finding of a lower mental state, *i.e.*, recklessness or negligence. We find the evidence sufficient to support the conclusion that defendant knew his actions created a strong probability of death or great bodily harm for Julyssa.

¶ 108 "Circumstantial evidence, including medical testimony regarding the severity of the injuries imposed, is sufficient to prove that the injuries were intentionally or knowingly inflicted, even where a defendant testifies that he did not intend to injure the victim." *People v. Ripley*, 291 Ill. App. 3d 565, 569 (2000). We are persuaded here that the medical testimony as to the extent and severity of Julyssa's injuries is sufficient to sustain a conviction for first-degree murder by a finding of knowledge that defendant's acts would likely cause death or great bodily harm.

¶ 109 First, we note that defendant is over six feet tall and weighs over 200 pounds; Julyssa was a not-quite six-month-old baby. It is not unreasonable to infer that an adult, throwing and shaking a baby, who is less than 1/10th his size, had to know that his actions carried a strong risk of great bodily harm. Julyssa sustained various severe injuries. She had a skull fracture—an uncommon injury for a non-ambulatory infant. Dr. Hwang testified it would take great force to cause such a fracture. Merely hitting a mattress would not be enough. Defendant could not recall if Julyssa's head hit the wall, but he could not deny it either. Dr. Hwang also found that she had a subdural hematoma, which would have required rigorous shaking and/or whipping the head back and forth.

¶ 110 Dr. Karimi, a medical expert, testified that Julyssa's injuries were consistent with shaken baby syndrome. Defendant admits both to shaking the baby and to throwing her on the bed. Julyssa's brain had extensive swelling, which would have required severe shaking. She also had

multiple fractures, both to her ribs and to her arms. While it is possible some of the rib fractures were caused by improper CPR in an attempt to revive her, the arm fractures would not have been.

¶ 111 Defendant did not at first tell anyone he had shaken the baby or tossed her. It was not until a more in-depth interview with Easton that he admitted to such actions after first denying having performed them. It can be inferred that he knew such actions were wrongful and could cause great harm to Julyssa. He also admitted that he was mad and stressed and that he had "screwed up." A bad temper is no excuse for violence and does not reduce a mental state from knowledge to recklessness. *People v. Rodriguez*, 275 Ill. App. 3d 274, 285 (1995). The documented, severe medical injuries indicated that the throw and the shaking were violent. It is reasonable to infer that defendant was consciously aware of a substantial probability that his actions could cause great harm to an infant. See 720 ILCS 5/4-5(a) (West 2008) ("Knowledge of a material fact includes awareness of the substantial probability that the fact exists."). What would be unreasonable would be to think that throwing a baby onto a bed and shaking her for a minute to wake her up were safe, or at least not gravely dangerous, actions to take. Injuries that lead to a diagnosis of shaken baby syndrome, even when the defendant tells police the shaking was in an attempt to revive the baby and friends testified that the defendant did not abuse his children and was a caring father, can be enough to support the mental state required for first-degree murder. See *People v. Radar*, 272 Ill. App. 3d 796, 804-07 (1995). The severity of the violence necessary to cause the injuries can sustain an inference of knowledge of a strong probability of death or great bodily harm. *Id.*

¶ 112 The evidence, especially the uncontroverted medical testimony and defendant's admissions that he did throw and shake the baby, support the trial court's finding of knowledge of a strong probability of death or great bodily harm. The trial court did not need to find, and in fact did not

find, that defendant intended Julyssa's death. All that was required, and the evidence was sufficient to prove beyond a reasonable doubt, was that defendant knew that his actions risked causing serious bodily harm to Julyssa. We therefore disagree that the trial court erred in finding defendant guilty of first-degree murder instead of involuntary manslaughter.

¶ 113 4. Clerical Error

¶ 114 Defendant contends that he is incarcerated for a crime for which he was acquitted. Although the trial court found him guilty of first-degree murder under section 9-1(a)(2) of the Code (720 ILCS 5/9-1(a)(2) (West 2008)), the judgment reflects that he was convicted under section 9-1(a)(1) of the Code (720 ILCS 5/9-1(a)(1) (West 2008)). This is clearly a clerical error, and nothing should or will change except the mittimus to reflect a conviction under section 9-1(a)(2) instead of 9-1(a)(1). We exercise our power under Illinois Supreme Court Rule 366(a)(1) (eff. Feb. 1, 1994) to amend the judgment order to state the proper statutory section for conviction.

¶ 115 5. The Sentence

¶ 116 Defendant challenges his sentence as excessive. He argues, very briefly, that the only reason that the trial court went beyond the statutory minimum of 20 years to sentence him to 28 years was because he was in a position of trust as Julyssa's father. He contends this was "greatly at variance with the spirit and purpose of the law."

¶ 117 We will not disturb a sentence falling within the statutory limits absent an abuse of discretion. *People v. Stroup*, 397 Ill. App. 3d 271, 274 (2010). As even defendant cites in his brief, the trial court is the proper forum to decide a defendant's sentence, and we accord its decision great weight and deference. *People v. Perruquet*, 68 Ill. 2d 149, 154 (1977). Here, the statutory range for sentencing was 20 to 50 years. The trial court considered a factor in aggravation, that is, defendant's

position of trust and supervision as the girl's father; and it considered factors in mitigation, namely his lack of criminal history and the lack of a deterrent effect. The trial court arrived at a sentence of 28 years, which is much closer to 20 than 50 years. There was no affirmative showing by the defendant that the sentence was in error. See, *e.g.*, *People v. Burnette*, 325 Ill. App. 3d 792, 809 (2001). Any disturbance of the sentence would be to impose our view in place of that of the trial court's, which we must not do, and we do not find the trial court abused its discretion. Accordingly, we affirm the trial court's imposition of the 28-year sentence with credit for time already served.

¶ 118 III. CONCLUSION

¶ 119 For the following reasons, the trial court did not err in denying defendant's motion to suppress, denying his motion *in limine*, or finding him guilty of first-degree murder. Neither do we agree that the trial court's sentence was excessive. We do find a clerical error in the judgment sheet and amend it to reflect the proper statutory subsection that defendant was convicted under, namely, section 9-1(a)(2).Not modifying anything else, the judgment of the Du Page County court is affirmed as modified.

¶ 120 Affirmed as modified.