2017 IL App (5th) 140162-U

NO. 5-14-0162

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 11-CF-684
	)	
	)	Honorable
LATOSHA A. CUNNINGHAM,	)	Michael N. Cook and
	)	Robert B. Haida,
Defendant-Appellant.	)	Judges, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Justices Cates and Barberis concurred in the judgment.

ORDER

¶ 1 *Held*: Where the defendant was given *Miranda* warnings before questioning, her statement that she had nothing to say about the murder charge did not represent an unequivocal assertion of her right to remain silent, and therefore the trial court's order denying defendant's motion to suppress her confession was correct. Where the trial court's judgment varies from the mittimus, we direct the circuit clerk to correct the mittimus.

¶ 2 Defendant, LaTosha A. Cunningham, directly appeals from her conviction of first-degree murder following a stipulated bench trial held on October 7, 2013. In this appeal, defendant alleges that although her confession was voluntary, it should nevertheless be suppressed because she invoked her right to silence and the investigating officers did not honor her request. The State contends that defendant failed to unambiguously invoke her right to remain silent, and thus by continuing on with the questioning, she waived her constitutional right to silence. We agree

with the State's position and affirm the trial court's judgment. We direct the circuit clerk to amend the mittimus to properly reflect the trial court's judgment finding defendant guilty of felony murder.

¶ 3 BACKGROUND FACTS

¶ 4 Defendant had a stipulated bench trial. Because there is no trial testimonial evidence, we include testimonial evidence from the pretrial hearing on defendant's motion to suppress for a more thorough analysis.

¶ 5 1. The Victim

¶ 6 Eighty-five year old Yoko Cullen, a Belleville resident, went to Collinsville to play bingo on May 18, 2011. At some point that evening, Ms. Cullen was kidnapped, placed in the trunk of her own car, driven to a rural part of East St. Louis, battered, and while in the trunk, her car was set on fire. The burned-out car was discovered the next morning by Special Agent Chris Blair, who was assigned to the Metro East Auto Theft Task Force. Agent Blair discovered charred human remains inside the car. DNA testing identified the remains as those of Yoko Cullen. Raj Nanduri, M.D., a forensic pathologist, performed an autopsy on the remains, and concluded that Ms. Cullen was alive when the car was set on fire because soot was found in her laryngotrachea, oropharynx, and esophagus.

¶ 7 2. The Defendant's Statement

¶ 8 Shortly after Cullen's murder, defendant became a suspect. She was brought in for questioning. On May 21, 2011, defendant was questioned by Detective Marcos Pulido of the Alton Police Department. Detective Pulido was a member of the Major Case Squad that investigated Yoko Cullen's murder. The first interview began at approximately 3 a.m. Detective Pulido read defendant her *Miranda* warnings, and she signed the form. Defendant's interrogation

was audio and video recorded. Detective Collins of the Belleville Police Department was also present in the interrogation room. Defendant originally denied any knowledge of Yoko Cullen's murder, and specifically denied using Cullen's credit card.

¶ 9 Thirteen hours later, defendant returned to the interrogation room. Detective Pulido read defendant her *Miranda* warnings a second time and she signed a second form. Detective Pulido again interrogated defendant. This interview began at 6:39 p.m. on the same date, May 21, 2011. This second portion of the interview was also audio and video recorded. Defendant continued to deny involvement in Yoko Cullen's murder. The officers told defendant that both DeMarcus Barnes and DaQuan Barnes had confessed. After hearing this statement, defendant opened up and began to tell the officers what happened that night.

¶ 10 Defendant acknowledged that she knew DeMarcus, but stated that she did not know DaQuan. Defendant stated that on the evening of May 18, 2011, she drove with DeMarcus and DaQuan in her car to Collinsville to pick up money from someone at the Wal-Mart parking lot.

¶ 11 Thereafter, as defendant and the two men were driving back towards East St. Louis, she saw a car driving on the road in the area of the Collinsville Fireman's Bingo Hall. The car pulled over to the side of the road, and the driver activated the emergency flashers. Defendant stated that she pulled her car over in order to help this driver. DeMarcus and DaQuan exited her car and approached the driver. Defendant identified a photograph of Cullen as the driver of that disabled car. She stated that she next heard DaQuan say, "I like this bitch," which defendant believed meant that he liked Cullen's car. Then, DeMarcus asked defendant for tire irons.[1] He took two tire irons from the trunk of her car. She acknowledged that she did not see any flat tire on

[1]Defendant refers to the tire irons as "jacks." For accuracy, we will refer to the "jacks" as tire irons throughout this order.

Cullen's car. DeMarcus then told defendant to go ahead and leave, and so she departed the area, leaving DeMarcus and DaQuan with Cullen.

¶ 12 As defendant was driving on Interstate 55/70 towards East St. Louis, she saw Cullen's car drive past her on the interstate. Defendant stated that she called DeMarcus on his cell phone and he confirmed that they were in that car. She then followed Cullen's car until it stopped at the area in East St. Louis where it was later recovered by Agent Blair. Defendant exited her car and walked to the area where Cullen's car was located. She stated that she saw Cullen's trunk open and saw DaQuan hit Cullen with a tire iron. She saw DeMarcus holding a tire iron, but did not observe him also hit Cullen. Defendant stated that she then ran back to her car and waited. Eventually, DeMarcus and DaQuan walked back to her car and got inside.

¶ 13 Defendant drove the two men to the BP gas station located across from the East St. Louis Police Department. DaQuan went into the BP store, and exited with a gas container. He put gas into the container. Defendant stated that she drove both men back to where they left Cullen's car. DeMarcus told her that they were going to get rid of the car because they had been inside of it. She then dropped both men back off at the location of Cullen's car.

¶ 14 Later, defendant stated that she was present with DeMarcus at the U.S. Bank ATM near Kenneth Hall Hospital in East St. Louis and that they tried to use Cullen's credit card. DeMarcus put the card in backwards, and she took the card from him and correctly inserted it into the ATM. Defendant identified a photo of them taken on the U.S. Bank security camera.

¶ 15 3. BP Gas Station Video

¶ 16 The Major Case Squad investigators obtained video from the BP gas station where defendant stated that the men obtained gas. The video established that DaQuan purchased a gas

container on the night of the murder, and went to a gas pump next to defendant's car. DaQuan put gas in the container. DeMarcus and defendant were standing next to the car while he did so.

¶ 17 4. Chase Card Services

¶ 18 The Major Case Squad investigators contacted Chase Credit Card Services and confirmed that Cullen had a Chase card and that several attempts were made to use the card on May 19, 2011, and on May 20, 2011. Additionally, the investigators learned that someone made several telephone inquiries about Cullen's card. The cell phone numbers used to contact Chase Card Services were associated with DeMarcus and with defendant.

¶ 19 5. Statements of Brittney Stevenson

¶ 20 Brittney Stevenson was DeMarcus's girlfriend in May 2011. Brittney is also defendant's niece. She gave two statements to the Major Case Squad. Brittney stated that defendant and DeMarcus frequently play bingo together; that defendant had a credit card with Cullen's name on it on May 19, 2011; and that on May 19, 2011, Brittney heard defendant and DeMarcus talking about ATMs and pin numbers that would not work.

¶ 21 6. Forensic Evidence

¶ 22 Major Case Squad investigators recovered two tire irons from defendant's car. Both contained blood samples that matched Cullen's DNA. Additionally, the State Police Crime Lab was able to identify a latent fingerprint that matched DaQuan on one of the two tire irons.

¶ 23 For all items tested, there were proper chains of custody maintained at all times. Testing was conducted by experts in compliance with commonly accepted practices in the scientific community, and the conclusions of the forensic experts were within a reasonable degree of forensic scientific certainty.

¶ 24 7. Arguments of Counsel and Verdict

¶ 25 The State argued that it believed it had proven defendant guilty of first-degree murder under a theory of felony murder accountability with the predicate forcible felonies of robbery and kidnapping. The State contended that the strongest support for conviction was from defendant's own statements. While she initially denied any involvement or knowledge, she later admitted to driving with DeMarcus and DaQuan and stopping at Cullen's vehicle by the bingo hall. She gave the tire irons to DeMarcus. Although she left the scene, she saw the car drive past her and confirmed that the men were in the vehicle. She did not contact the police, but instead followed the car to the rural area. She then exited her car and saw DaQuan hit Cullen with a tire iron and saw DeMarcus holding the other tire iron. Again she did nothing. Then, she gave DeMarcus and DaQuan a ride to the gas station where they obtained a gas can and filled it with gas. She drove the men back to Cullen's car and knew that they were going to get rid of the car because they had told her so. Later, she was with DeMarcus when they unsuccessfully tried to use Cullen's credit card at an ATM. Defendant's statements were corroborated by the videos taken at the gas station and at the bank ATM.

¶ 26 In contrast, defendant's attorney argued that the stipulated evidence was insufficient to find her guilty.

¶ 27 The trial court found that the State had met its burden of proof beyond a reasonable doubt that defendant was guilty of first-degree murder by accountability due to the robbery. The court declared defendant guilty of first-degree murder.

¶ 28 8. Sentence

¶ 29 On December 10, 2013, the trial court sentenced defendant to a 60-year term of imprisonment followed by 3 years of mandatory supervised release. On January 9, 2014,

defendant filed a motion to reconsider her sentence, arguing that the court did not consider any mitigating factors such as her remorse and character. On April 2, 2014, the trial court denied the motion.

¶ 30 9. Hearing on Motion to Suppress

¶ 31 The trial judge stated on the record that he had reviewed both of defendant's audio and video recorded statements.

¶ 32 A. *Detective Marcos Pulido*

¶ 33 Detective Marcos Pulido was called to testify. He initially met with defendant on May 20, 2011, at her home, and asked her to come to the police station to be interviewed. She agreed, and Detective Pulido drove her back to the Belleville Police Department. He testified that Detective Collins of the Belleville Police Department was also in the interview room. The interview began at about 2:45 a.m. That interview ended after about 90 minutes. After an approximate 12-hour break, the second interview began later that same date. During the second interview, East St. Louis Detective Orlando Ward was present instead of Detective Collins. The State introduced the form signed by defendant before each of the interviews, memorializing her understanding of the *Miranda* warnings.

¶ 34 Detective Pulido testified that during the first interview defendant never invoked her right to remain silent; did not ask for an attorney; and never said that she did not want to talk with the detectives. At the end of the interview, defendant indicated that she was having issues with her blood pressure–that she had a headache. Paramedics were called and defendant was transported to an area hospital. At some time during that day, defendant was brought back to the Belleville Police Department.

¶ 35 The second interview began at approximately 5 p.m. on May 20, 2011. It was during this second interview that defendant made incriminating statements. Detective Pulido testified that defendant did not appear to have health issues at the beginning of the second interview; did not ask for an attorney; and never said that she did not want to talk with the detectives. Furthermore, Detective Pulido stated that he and Detective Ward did not make any threats or promises in order to convince defendant to give her statement. Detective Pulido testified that defendant was emotional during portions of this interview, but she continued to answer the questions asked. Defendant never informed the detectives that her medical condition in some way interfered with her ability to understand what was occurring during the interview.

¶ 36 On cross-examination by defendant's attorney, Detective Pulido denied having a heated exchange with defendant towards the end of the first interview, but acknowledged that he stepped out of the room at that time. He also confirmed that just before he left the room, in response to his question about whether she had anything else to say about the murder investigation, defendant stated that she had "nothing to say about no murder." Detective Pulido testified that this particular statement by the defendant was nothing more than a continuation of her denials that she had no information about the murder. Detective Pulido concluded that defendant was not exercising her right to silence, based upon the context of that answer along with her body language. In other parts of the interview, Detective Pulido stated that defendant was shaking her head, as if to say "no," but testified that this was when she was being informed of the shocking facts of Cullen's murder. A couple of minutes after he exited the room, Detective Ward entered and resumed questioning.

¶ 37 Detective Pulido testified that paramedics were also called during the second interview. Like the first time, defendant claimed she was having problems with high blood pressure.

¶ 38 On redirect examination, Detective Pulido testified that at the end of the first interview, after 90 minutes of defendant denying that she had any knowledge of the murder, he stood up in preparation to leave the room. He agreed with the characterization that he was exasperated with defendant, and in closing he asked her if she had anything else that she wanted to tell him. Defendant answered that question in the negative–that she had "nothing to say about no murder." Detective Pulido testified that after he left the room, defendant continued to answer questions directed at her by Detective Ward without hesitation. In addition, defendant was told several times that the officers could not force her to talk, but that they wanted to learn her side of the story.

¶ 39 B. *Detective Orlando Ward*

¶ 40 Detective Orlando Ward was called by defendant's attorney to testify at the hearing. He testified that it is typical to switch officers during an interrogation if the initial officer was not successful in obtaining needed information. He acknowledged that paramedics were called during the second interview after defendant "broke down" and was crying. Because he was not medically trained, Detective Ward testified that the paramedics were needed to determine if defendant was having a medical problem.

¶ 41 Detective Ward testified that he encouraged defendant to tell her side of the story, including telling her that she should be a good example to her children in being truthful. However, he testified that at no time did defendant say that she did not want to talk.

¶ 42 During the State's cross-examination, Detective Ward testified that he did not threaten or promise defendant anything in order to obtain her statement.

¶ 43 C. *Court's Ruling on Motion to Suppress*

¶ 44 At the conclusion of the hearing, the court denied defendant's motion to suppress stating:

"The Court in considering the testimony of the witnesses does first find that the best evidence is the videotaped statements. And the Court in looking at the context of the statement the defendant made to Detective Pulido at no time invoked her Miranda right to remain silent.

And in looking at the totality of the circumstances, finds that the statements that she made were all voluntary."

¶ 45 LAW AND ANALYSIS

¶ 46 1. Motion to Suppress

¶ 47 We are presented with the issue of admissibility of defendant's confession obtained during the second interview. Defendant is not contending that her confession was involuntary. Instead, she argues that she unequivocably asserted her right to remain silent, and that her assertion was not honored. Immediately after defendant made this assertion, she requested and was allowed a bathroom break, and while she was in the bathroom, a different detective took over the interrogation role. As the detectives resumed the interrogation, defendant claims that her assertion of her constitutional right to remain silent was not scrupulously honored.

¶ 48 If there are no factual and/or witness credibility issues, review of a trial court's ruling on a motion to suppress is *de novo. People v. Mitchell*, 165 Ill. 2d 211, 230, 650 N.E.2d 1014, 1023 (1995). If there are factual findings in dispute, we will reverse those findings only if they are contrary to the manifest weight of the evidence. *People v. James*, 163 Ill. 2d 302, 310, 645 N.E.2d 195, 199-200 (1994); *People v. Cosby*, 231 Ill. 2d 262, 271, 898 N.E.2d 603, 608 (2008). Finally, a reviewing court must maintain the ability to make its own conclusions based upon its review of the facts and the issues raised. Accordingly, we review the trial court's ultimate legal

ruling on whether suppression is appropriate on a *de novo* basis. *People v. Luedemann*, 222 Ill. 2d 530, 542-43, 857 N.E.2d 187, 195-96 (2006).

¶ 49 The United States Constitution and the Illinois Constitution provide an accused with the right to remain silent during an interrogation. U.S. Const., amend. V; Ill. Const. 1970, art. I, § 10. To ensure that the accused is aware of his constitutional rights, police are required to provide *Miranda* warnings prior to interrogations. *Berghuis v. Thompkins*, 560 U.S. 370, 385 (2010) (citing *Moran v. Burbine*, 475 U.S. 412, 427 (1986)). An accused's statement will not be admissible at trial if the police failed to provide the *Miranda* warnings before the statement is given. *Id.* at 388; *Miranda v. Arizona*, 384 U.S. 436, 471 (1966).

¶ 50 If the investigating officers provided the *Miranda* warnings before an accused's statement, the court next considers whether the accused expressly or impliedly waived his constitutional right to remain silent. *Berghuis*, 560 U.S. at 388 (citing *Miranda*, 384 U.S. at 476). The State bears the burden to establish that the accused waived his constitutional rights by a preponderance of the evidence. *Id.* at 384 (citing *Colorado v. Connelly*, 479 U.S. 157, 168 (1986)). The State must also prove that the accused understood the *Miranda* warnings provided. *Id.* When the State produces proof that the *Miranda* warnings were provided and establishes that the accused understood the warnings, the accused's statement "establishes an implied waiver of the right to remain silent." *Id.*

¶ 51 If an accused expresses his desire to remain silent during a custodial interrogation, the officers involved must cease all interrogation efforts, and if the individual provides a statement, the statement cannot be used because it was obtained compulsively. *Miranda*, 384 U.S. at 473-74.

¶ 52 When an accused invokes his right to remain silent, the invocation must be clear and unambiguous. *People v. Polk*, 407 Ill. App. 3d 80, 93-94, 942 N.E.2d 44, 56 (2010) (citing *Berghuis*, 560 U.S. at 381). The determination of whether the invocation is clear and unambiguous is dependent upon how a reasonable police officer would perceive the suspect's words. *Davis v. United States*, 512 U.S. 452, 459 (1994); *Berghuis*, 560 U.S. at 381-82. If the invocation is verbal, then the words chosen must be specific. *People v. Hernandez*, 362 Ill. App. 3d 779, 785, 840 N.E.2d 1254, 1259-60 (2005); see also *People v. Troutman*, 51 Ill. App. 3d 342, 344, 366 N.E.2d 1088, 1090 (1977) (where the defendant's statement that she was not going to make a confession lacked the specificity and unambiguity required for the court to conclude that this was an invocation of her right to silence); *People v. Milner*, 123 Ill. App. 3d 656, 660, 463 N.E.2d 148, 152 (1984) (where the appellate court held that the defendant's statement that he could not answer anything more was insufficient to invoke his right to silence).

As verbal invocations require specificity, nonverbal invocations are more difficult to establish. See *People v. Kronenberger*, 2014 IL App (1st) 110231, ¶¶ 35-37, 7 N.E.3d 769 (where head movements, even when coupled with the verbal, "yeah," in response to the detective's question as to whether a defendant was done speaking, were insufficient to establish that the defendant invoked his right to silence).

¶ 53 In all cases, it is important that the court examine the defendant's statement in its factual context. *Milner*, 123 Ill. App. 3d at 660, 463 N.E.2d at 152.

¶ 54 We first review the *Miranda* warnings provided to defendant before her two interviews. Here, there is no question that defendant received *Miranda* warnings. The documents are included in the record on appeal, and from the video, we know that the rights were read to her before she initialed and signed the form. Furthermore, from the video, we know that defendant

understood the *Miranda* warnings and her constitutional rights. Defendant received her General Education Diploma. She indicated that she could read, write, as well as understand the English language. Defendant stated that she was not under the influence of alcohol, drugs, or anything that would affect her judgment. She did not report any past mental health issues. She did not report any visual impairment. Defendant knew her home address and phone number. From the video, we also know that defendant confirmed that she was not threatened, coerced, or promised anything by the detectives. She was familiar with the *Miranda* warnings process because of past experience in a different case. Finally, defendant does not argue that she failed to understand her constitutional rights.

¶ 55 We next review the actual words used and the overall context of her statement to determine if defendant unambiguously invoked her right to remain silent. Defendant's claimed invocation occurred during the first interview, and she argues that her invocation caused the detectives to stop the interview. She also alleges that the detectives did not scrupulously honor her invocation.

¶ 56 Approximately one hour into the interview, Detective Collins began to gather up his paperwork and placed it into a folder. There is no transcript of the videotaped interview. What follows is a recitation of the interactions just before and immediately after defendant's claimed invocation of her right to silence. Throughout this exchange, defendant held her head in her hands, and generally avoided eye contact with the detectives.

> "Q. [Detective Pulido]: Unfortunately you're caught up in a murder investigation; you're sitting on the hot seat and we are asking you and trying to provide several explanations for you that you are not providing at all. You're not even wanting to be

honest about anything, even about what you saw, because there ain't no doubt you were there. Okay, he's saying you did it all. [Unintelligible]

[Defendant]: There's no way.

Q. [Detective Collins]: We'll just have to go with that then. We'll just have to go with that.

Q. [Detective Pulido]: I'm giving you one last chance, would you like anything else to say because this is your last chance?

A. No.

Q. Nothing else?

I have nothing to say about no murder.

Q. Okay, got you, got you.

A. Can I use the bathroom?

Q. Absolutely, hold on for one second, let me get a female *** but I have a feeling you're gonna regret this the rest of your life.

[Detective Collins and Detective Pulido left the interview room. Two minutes later, Detective Ward entered the room.]

Q. [Detective Ward]: Tosha, Tosha, Tosha.

A. [unintelligible] go to the bathroom?

[After a two minute and two second bathroom break, the interview resumed.]"

¶ 57 At issue is how a reasonable police officer would have perceived defendant's phrase that she had "nothing to say about no murder." Here, although Detective Pulido testified that he did not believe that defendant invoked her right to remain silent, we must construe the statement in the context of a reasonable police officer's perception.

¶ 58 We find that a review of statements used by defendant, both before and after this claimed invocation, is helpful in determining a reasonable officer's perspective. Defendant repeatedly denied any knowledge or involvement in this murder, in statements such as: "I am not a murderer"; "I never did anything to anybody"; "I did not do anything to anybody"; "I'm not a killer"; and "I didn't kill nobody." Additionally, it is important to analyze the context of defendant's statement in terms of what precipitated it. At the beginning of this interview, the detectives were attempting to obtain information about the events and observations leading up to Cullen's murder. Defendant had admitted seeing Cullen that night, and admitted that she was present, but stated that she had no idea what the two men may or may not have done to Cullen. Shortly before the statement at issue, the detectives informed defendant that one of the two men was claiming that she murdered Cullen. Defendant's statement was made during this exchange as the detectives were preparing to exit the room: "Q. [Detective Pulido]: I'm giving you one last chance, would you like anything else to say because this is your last chance? A. [Defendant]: No. Q. Nothing else? A. I have nothing to say about no murder." We find that defendant's statement was in direct contextual response to the questions asked by Detective Pulido. Furthermore, defendant's statement was a continuation of her denials throughout the interview. *Davis*, 512 U.S. at 459; *Berghuis*, 560 U.S. at 381-82.

¶ 59 Equally important to an analysis of defendant's statement is the body language used by defendant both before and after this claimed invocation. She frequently held her head in her hands–both during questioning and during breaks. Her hands were positioned towards the front of her face. And, she did not make eye contact with the officers who were interrogating her. Defendant argues that her body language was indicative of her intent to invoke her right to remain silent. We disagree. Use of this particular body language basically changed little

throughout the interrogative process, and she maintained the same posture when there was no questioning. Therefore, holding her head in her hands and failing to make eye contact at the precise moment of her claimed invocation was identical to what she had been doing throughout the interview and did not in any way convey to the officers that she was changing her stance on continued questioning.

¶ 60 There are several cases that have determined that statements similar to the defendant's statement were ineffective to invoke the suspect's right to silence. The State has relied upon *People v. Walker*, 2 Ill. App. 3d 1026, 279 N.E.2d 23 (1971), in support of its argument. In *Walker*, an officer asked the defendant what he had to say about the incident under investigation, to which the defendant replied, "I have nothing to say about it." *Id.* at 1033, 279 N.E.2d at 28-29. The appellate court concluded that the statement was nothing more than an answer to the question asked. *Id.* "He continued to respond to questions when they were asked and in no way manifested any desire to terminate the questioning." *Id.* Defendant attempts to distinguish *Walker* in that the defendant in *Walker* continued to respond without further prodding by the officers, whereas here defendant asked to leave the room to use the bathroom. We do not find that factual difference to be remarkable. After the two-minute bathroom break, defendant returned to the room and continued to answer questions posed. See also *Troutman*, 51 Ill. App. 3d at 344, 366 N.E.2d at 1090; *Kronenberger*, 2014 IL App (1st) 110231, ¶¶ 35-37, 7 N.E.3d 769; *Milner*, 123 Ill. App. 3d at 660-61, 463 N.E.2d at 152.

¶ 61 Here, there is no question that defendant was read the mandatory *Miranda* warnings. There also is no question that she understood those warnings. Although defendant argues that her statement that, "I have nothing to say about no murder," was intended to invoke her right to silence, we find that the statement is not unambiguous in light of the factual context of the

statement relative to the question asked and her body language before, during, and after that statement. We conclude that a reasonable police officer would not have construed defendant's statement as an invocation of her right to remain silent. Unless the statement is clear and unambiguous, "the police are not required to end the interrogation [citation] or ask questions to clarify whether the accused wants to invoke his or her *Miranda* rights." *Berghuis*, 560 U.S. at 381 (citing *Davis*, 512 U.S. at 459). As the Supreme Court explained in *Berghuis*: "If an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused's unclear intent and face the consequence of suppression 'if they guess wrong.' " *Id.* at 382 (quoting *Davis*, 512 U.S. at 461). The Court further explained that if the court suppressed a voluntary confession under those circumstances, that suppression "would place a significant burden on society's interest in prosecuting criminal activity." *Id.*

¶ 62 Defendant also contends that her departure from the interview room in order to use the bathroom supports her claim that she invoked her right to silence. We do not agree with this claim. The break was just over two minutes in duration. Defendant returned to the interview room and resumed her interaction with Detective Ward without complaint.

¶ 63 Alternatively, defendant argues that the change in detectives after her bathroom break signified that the detectives had relinquished control, and thus when the interview resumed it was the beginning of a new interrogation. From our review of the videotape, it is clear that the detectives were preparing to exit the room before defendant made her statement. Additionally, at the hearing on the motion to suppress, Detective Pulido testified that he was preparing to leave the room before defendant said, "I have nothing to say about no murder." Thus, the departure was not a recognition that she invoked her right to silence. In addition, defendant argues that the

introduction of Detective Ward was improper, and also signified a relinquishment of control. However, Detective Ward, who testified in defendant's case, stated that changing detectives during an interrogation is not unusual.

¶ 64 Finally, defendant claims that the State did not present testimony about defendant's medical condition during the two interviews that resulted in two trips to the emergency room. First, we note that defendant's medical condition at the time of her statement goes to the issue of voluntariness. See *People v. Strickland*, 129 Ill. 2d 550, 558, 544 N.E.2d 758, 761-62 (1989). In her brief on appeal, defendant specifically states that she is not claiming that her statement was involuntary. Instead, she argues that the State's failure to produce medical testimony supports her claim that the detectives did not honor her invoked right to remain silent during the 13 hours between the two interviews. Thus, her argument is based upon her claim that she invoked her right to remain silent. Defendant cites no authority mandating that the State produce this type of evidence. She cites to *People v. Williams*, 181 Ill. 2d 297, 310-11, 692 N.E.2d 1109, 1117-18 (1998), and *People v. Dennis*, 373 Ill. App. 3d 30, 46-47, 866 N.E.2d 1264, 1278-79 (2007), in support of her theory, but we find that both cases are distinguishable. In both cases, the interviews occurred at a time when the defendants were being treated for gunshot wounds. *Williams*, 181 Ill. 2d at 310-11, 692 N.E.2d at 1117-18 (in the ambulance on the way to the hospital); *Dennis*, 373 Ill. App. 3d at 46-47, 866 N.E.2d at 1278-79 (at the hospital). Furthermore, in both cases, the defendants were not provided their *Miranda* warnings. *Williams*, 181 Ill. 2d at 308-09, 692 N.E.2d at 1116; *Dennis*, 373 Ill. App. 3d at 46, 866 N.E.2d at 1278. Here, defendant was taken to the emergency room during both interviews due to elevated blood pressure. From the video, defendant stated that she was given medication for the condition by the hospital staff. Although defendant did not contest the voluntariness of her statement, we find that

the detectives acted appropriately regarding her medical condition and were not required to inquire further during the second interview. We conclude that defendant voluntarily gave her resulting statement.

¶ 65 We find that defendant was provided her *Miranda* warnings before each interview; that she understood those warnings; that she did not clearly and unambiguously invoke her constitutional rights; that she waived her constitutional right to remain silent; and that her statement of involvement in the crime was voluntary. The trial judge had the opportunity to hear testimony of Detective Pulido and Detective Ward and to assess their credibility. The trial judge also stated that he reviewed the videotaped interviews. Based upon our review of the videotape and with deference to the trial judge who assessed the credibility of the witnesses, we do not find that the denial of defendant's motion to suppress was against the manifest weight of the evidence.

¶ 66 2. Amendment to the Mittimus

¶ 67 Defendant also states that the mittimus does not conform to the trial court's judgment, and asks this court to order its correction. *People v. Mitchell*, 234 Ill. App. 3d 912, 921, 601 N.E.2d 916, 922 (1992). Because this presents a legal question, review is *de novo*. *People v. Smith*, 233 Ill. 2d 1, 15, 906 N.E.2d 529, 537 (2009).

¶ 68 During trial, the trial court stated that defendant's conviction was based upon felony murder–"the fact that there was a robbery ongoing." However, the mittimus indicates that defendant was convicted of first-degree murder with intent to kill.

¶ 69 The State agrees that defendant is technically correct in that the trial court's finding was that the murder charge was with a predicate felony of robbery. However, the State notes that defendant was never charged with robbery. Additionally, the State contends that first-degree

murder is a single offense, even if the State indicts the accused for first-degree murder using multiple theories. *Smith*, 233 Ill. 2d at 14-16, 906 N.E.2d at 537-38 (citing *Schad v. Arizona*, 501 U.S. 624, 631-32 (1991)). "The different theories embodied in the first[-]degree murder statute are simply differing ways to commit the same crime of first[-]degree murder." *People v. Braboy*, 393 Ill. App. 3d 100, 106-07, 911 N.E.2d 1189, 1195-96 (2009) (citing *Smith*, 233 Ill. 2d at 16, 906 N.E.2d at 537).

¶ 70 Although we find that there is but one conviction in this case, we direct the clerk of the circuit court to correct the mittimus to reflect that defendant's conviction is based upon first-degree murder under a theory of felony murder pursuant to section 9-1(a)(3) of the Criminal Code of 1961 (720 ILCS 5/9-1(a)(3) (West 2010)).

¶ 71 CONCLUSION

¶ 72 Based upon the foregoing, we affirm the judgment and conviction of the court, but direct the circuit court to correct the mittimus as outlined in this order.

¶ 73 Affirmed; mittimus corrected.