2018 IL App (3d) 150736-U

Order filed December 14, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois.
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-15-0736 Circuit No. 13-CF-1034
LESLIE MOORE,	)	
Defendant-Appellant.	)	Honorable Edward A. Burmila Jr., Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justice Wright concurred in the judgment.
Justice Holdridge, concurred in part and dissented in part.

ORDER

¶ 1 *Held*: The trial court did not err in denying defendant's pretrial motion to suppress.

¶ 2 Defendant, Leslie Moore, appeals his conviction for unlawful possession of a weapon by a felon, arguing: (1) the circuit court erred in denying the motion to suppress as the officer unlawfully extended the traffic stop. Counsel neither (2) renewed the suppression motion at trial, nor (3) stipulated to defendant's felon status, rendering trial counsel's representation constitutionally ineffective. We affirm.

¶ 3 FACTS

¶ 4 The State charged defendant with unlawful possession of a weapon by a felon. 720 ILCS 5/24-1.1(a) (West 2012). He filed a motion to suppress evidence, alleging that the police officer lacked probable cause to stop him and unreasonably prolonged the stop. Before the court heard the motion to suppress, defense counsel introduced a motion seeking to bar introduction of the squad car videotape. The State agreed to proceed without introducing the videotape.

¶ 5 Defendant testified that on May 16, 2013, around 1:16 a.m. he was traveling from a friend's house to his home in Chicago when a police officer pulled him over. He was obeying all traffic laws. He had just made a left turn, used his left turn signal and was not speeding. The officer pulled him over, asked for his license, registration, and insurance, and said that he had been speeding. Defendant produced a valid driver's license and proof of insurance. He did not make any furtive movements toward the center console or dip his shoulder down, other than to retrieve his license and insurance. Once stopped, he placed his hands on the steering wheel and never moved them. He did not raise his hands over his head. He did not recall whether or not he was sweating. The officer took defendant's license back to his squad car. When the officer returned to defendant's vehicle, he told defendant he had observed him make a furtive movement. The officer asked defendant to step out of the vehicle and told him to place his hands on the trunk while he searched the vehicle. Defendant never told the officer there was a firearm in the vehicle. The officer found a firearm. Defendant did not know there was a firearm in the vehicle. He did not give the officer permission to search the car. The officer handcuffed defendant and searched him, but did not find anything. The officer had told defendant he pulled him over for speeding, but the ticket said failure to signal.

¶ 6 Deputy Thomas Hannon testified that he was employed by the Will County Sheriff's Department. He was on patrol in the early hours of May 16, 2013, when he pulled defendant over. Hannon stated, "When I first observed [defendant], he immediately raised his hands in the air. I observed that his hands were shaking, that he appeared nervous. He was sweating." Hannon had not ordered defendant to place his hands in the air prior to making contact with him. Immediately after pulling defendant over, Hannon stated that he "observed [defendant] reach his right arm down to either the ground or middle—the center area of the vehicle." He recovered a firearm from the vehicle's center console.

¶ 7 The State moved for a directed verdict. The court granted the motion as to the lawfulness of the traffic stop, finding that the traffic stop was lawful, but denied the motion in regard to the prolongation of the traffic stop. The State then had the burden of proving the officer did not unlawfully prolong the stop.

¶ 8 The State recalled Hannon who testified that he pulled defendant over on May 16, 2013, at approximately 1:16 a.m. for failure to signal and speeding. His squad car was equipped with a working camera; however, the audio function had malfunctioned. After pulling defendant over, but before exiting the squad car, Hannon "observed [defendant] reach down with his right arm to the middle—center console area." He approached the driver's side of the vehicle, advised him the reason for the stop, and requested his license and insurance. Hannon stated, "Immediately as I walked up to the vehicle, before I even said anything, the [defendant] immediately [raised] his hands and—both of his hands in the air, and I could see that they were shaking. He appeared nervous as he was sweating also." He said the temperature that night "was reasonably cool." Hannon took defendant's license to the squad car to run his information and then re-approached defendant's vehicle about two minutes later. Hannon asked defendant why he was nervous.

Hannon then asked defendant to step out of the vehicle for Hannon's safety based on the fact that defendant was acting nervous, was sweating, had his hands in the air, and had made a furtive movement. Hannon stated:

> "One of the main reasons [I asked him to step out of the vehicle] is specifically is when he raised his hands in the air, I've had two prior incident[s] to this while my service pistol was not—or I did not ask him to raise their hands, that when I made contact with subjects and they immediately rose their hands in the air, both subjects either had a firearm on their person or inside the vehicle."

"When [Hannon] was asking [defendant] about his nervous actions, [defendant] advised [Hannon] that there was a loaded firearm inside the vehicle." Defendant advised Hannon that the firearm was in the center console. Hannon then questioned defendant at the rear of defendant's vehicle and placed defendant in handcuffs, for Hannon's safety. He then waited for backup to arrive before proceeding. Deputy Ambrosini arrived approximately one minute later. Hannon retrieved the firearm from the center console of the vehicle. Hannon then checked the serial number of the firearm and also checked to see whether defendant could possess a firearm. He was advised by dispatch that defendant had been previously convicted as a felon. He then placed defendant under arrest.

¶ 9 In closing arguments, defense counsel argued that defendant testified credibly that he only dipped his shoulder to get his license and proof of insurance. The State argued that while defendant made a furtive movement prior to Hannon approaching his vehicle, it was "the furtive movement along with the defendant sweating profusely, shaking and putting his hands up" which raised the suspicion necessary to prolong the stop. The court stated:

> "[The State's] evaluation of the circumstances that are critical to the resolution of this case are the correct ones. If it was just the issue of the furtive movement, then the question would only be one of credibility, either the defendant's or the police officer's. But there's more to it from a testimonial perspective, and that is how does the officer interpret his observations, if he's credible, that the defendant raised his hands, was nervous, sweating and the other observations that the officer made, and that's the critical part in resolving the case."

The court then took the matter under advisement. At the next court date defense counsel withdrew his supplemental motion. The court denied the motion to suppress, stating:

> "I've had an opportunity to review the appropriate case law, my notes and the testimony from the case. And given the testimony regarding the furtive movement, the alleged sweating composure of the defendant, his subjective nervousness, and the testimony about his hands up, the Court denies the motion and finds that the search was appropriate under the Fourth Amendment."

¶ 10 The case was set for a jury trial. Before jury selection the following conversation occurred:

> "THE COURT: *** [T]he charge in here is unlawful use of a weapon by a felon. In reading the indictment to the jury, is the defendant's felony conviction part of the proof beyond a reasonable doubt or a sentencing issue?

[STATE:] It's part of proof beyond a reasonable doubt.

THE COURT: I am going to advise the jury of the nature of the conviction or just the defendant is convicted?

[STATE:] I believe the nature of the conviction is what's told to the jury.

THE COURT: [Defense attorney], you agree with that?

[DEFENSE ATTORNEY]: Yes.

THE COURT: That's my understanding of the law just so the record is clear."

The court informed the prospective jurors:

> "[T]he indictment in the case reads as follows: It's alleged on May 16, 2013, that [defendant] committed the offense of unlawful use of a weapon by a felon and that he, being a person who had been previously convicted of a felony, and that was a murder, he knowingly possessed on or about his person or on his land or his own abode or fixed place of business possessed a cobra .38 caliber handgun."

¶ 11 Hannon testified at trial that he had been employed with the Will County Sheriff's Department for 7½ years and was on patrol on May 16, 2013, at 1:15 a.m. He observed a vehicle driven by defendant fail to activate its turn signal within 100 feet of turning, as required by statute. Instead, defendant activated his turn signal once he reached the stop sign. Hannon pulled behind the vehicle. The speed limit was 40 miles per hour. While following the vehicle, he observed that defendant was traveling at approximately 60 miles per hour and pulling away from

him. After he noticed how fast defendant was driving, he activated his overhead lights and conducted a traffic stop. Once stopped, he called in the traffic stop to dispatch. While doing so he "observed [defendant] make some movements. He dipped his right hand or shoulder down to the middle front center console area." Hannon approached the driver's side of the vehicle and made contact with defendant. Defendant was the only occupant of the vehicle. "I observed [defendant] raise both of his hands in the air. I observed [defendant's] hands were shaking, he appeared nervous, and I observed [defendant] appeared to be sweating." He had not told defendant to place his hands in the air. He informed defendant of his infractions and advised him to place his hands down and relax. He then asked for defendant's license and proof of insurance. Once defendant provided his license and insurance, Hannon went back to his squad car to run a driver's license check of defendant.

¶ 12 After determining defendant's license was valid, he returned to defendant's vehicle and noticed that defendant "still appeared apparently nervous. His hands were still shaking and he appeared to be still sweating." He asked defendant why he was so nervous and had defendant step out of the vehicle. They went to the rear of defendant's vehicle. He asked defendant why he was nervous and why he raised his hands in the air when Hannon made initial contact. Defendant stated that he had a loaded firearm in the center console of the vehicle. Hannon handcuffed defendant and placed him in temporary custody for his safety. He then called for backup. Ambrosini arrived in two minutes or less. Ambrosini took custody of defendant while Hannon found the firearm in the center console. The firearm was loaded. Ambrosini unloaded the firearm. Hannon ran a background check on defendant and determined that he had been previously convicted of a felony. He then placed defendant under arrest.

¶ 13 Hannon testified that the video-recording equipment in his squad car worked, but the audio had not been operational for a couple days. He did not send the firearm to the lab for fingerprint testing because defendant had admitted to the location of the firearm. It was the evidence department that was in charge of sending the evidence to be fingerprinted if they found it necessary. The videotape was played in court. After watching the videotape, Hannon stated that Ambrosini had actually retrieved the firearm from the vehicle because "at the first look [Hannon] was unsure how to make the gun safe to make sure the rounds were out of there, so [he] had Deputy Ambrosini take a look just so [they] could take that firearm into *** custody as fast as possible." On cross-examination, defense counsel stated that the videotape did not show defendant dip his right arm or shoulder down. Hannon stated, "Yes, you cannot see it in the video. That video is not the best quality and that part of it was not accurately portrayed in the video, as you can see."

¶ 14 The State moved to admit the certified copy of defendant's felony conviction stating, "Judge, People's Exhibit 4 is a certified conviction. It shows that on August 6th of 1990, the defendant was convicted of murder[.]" Defense counsel did not object.

¶ 15 Sherry Walls testified for the defense. She stated that she and defendant were best friends. On May 15, 2013, she borrowed defendant's vehicle to move some of her belongings, including two firearms, to her new address. She placed the Cobra in the center console and the other firearm in the glove compartment in defendant's vehicle. When she removed her belongings from the vehicle, she thought she had placed both of the firearms into her purse. The next day she looked in her purse and saw that she only had one firearm. She had purchased the Cobra in Arizona at a pawn shop. She had the receipt for the firearm, which she had signed. She

had a valid FOID card, but she did not have a conceal carry permit. She did not tell defendant she had transported her firearms in his vehicle or had left a firearm in his vehicle.

¶ 16 Defendant testified that on the night of the incident, he had activated his turn signal, looked both ways, and then made his turn. After turning, he was pulled over. He did not make any movements after he was pulled over. When the officer approached, he had his hands on the steering wheel at "two and ten." The officer never told defendant he had improperly turned. Instead, the officer only stated that defendant was driving too fast. He was not nervous, shaking, or sweating. The officer asked him why he was acting nervous, and defendant stated that he was not nervous. He gave the officer his license and insurance and then the officer went back to the squad car. When the officer returned, he handed defendant his license and insurance. He asked defendant what he was doing in Joliet since defendant was from Chicago. Defendant said he had been watching a game at a friend's house. He eventually asked defendant to exit the vehicle, and they went to the rear of the vehicle. Defendant said that when they were at the rear of the vehicle, the officer asked him whether he had any weapons or drugs. Defendant denied having either weapons or drugs. Defendant never told the officer that there was a firearm in the center console. He did not know that Walls had placed a firearm in the center console. The officer handcuffed defendant and told defendant it was for both their safety. He had lent his vehicle to Walls the day before. He never knew that a firearm had been transported in his vehicle. Defendant stated that he had never seen that firearm until it was shown to him in court that day.

¶ 17 The jury found defendant guilty of unlawful possession of a weapon by a felon. Defendant filed a posttrial motion, alleging, *inter alia*, that the court erred in denying the motion to suppress. The court denied the motion. The trial court sentenced defendant to seven years' in the Illinois Department of Corrections.

¶ 18 ANALYSIS

¶ 19 On appeal, defendant argues: (1) the circuit court erred in denying the motion to suppress as the officer unlawfully extended the traffic stop, (2) counsel failed to renew his suppression motion at trial because the videotape of the traffic stop made the motion meritorious, (3) counsel ineffectively failed to stipulate to defendant's felon status thereby allowing the jury to hear that defendant is a convicted murderer.

¶ 20 I. Motion to Suppress

¶ 21 Defendant first contends that the circuit court erred in denying his motion to suppress. Specifically, defendant contends that Hannon unlawfully extended the stop.

¶ 22 In reviewing a circuit court's decision regarding a motion to suppress, we use a two-part standard of review: we accord great deference to the circuit court's factual findings and credibility assessments and reverse those findings only if they are against the manifest weight of the evidence, but we review *de novo* the ultimate finding with respect to probable cause or reasonable suspicion. *People v. Gherna*, 203 Ill. 2d 165, 175 (2003).

¶ 23 "A seizure for a traffic violation justifies a police investigation of that violation." *Rodriguez v. United States*, 135 S. Ct. 1609, 1614 (2015). "[M]ost traffic stops resemble, in duration and atmosphere, the kind of brief detention authorized in *Terry* [*v. Ohio*, 392 U.S. 1 (1968)]." *Berkemer v. McCarty*, 468 U.S. 420, 439, n.29 (1984). "*Terry* established the legitimacy of an investigatory stop 'in situations where [the police] may lack probable cause for an arrest.' [Citation.] When the stop is justified by suspicion (reasonably grounded, but short of probable cause) that criminal activity is afoot *** the police officer must be positioned to act instantly on reasonable suspicion that the persons temporarily detained are armed and dangerous." *Arizona v. Johnson*, 555 U.S. 323, 330 (2009) (quoting *Terry*, 392 U.S. at 24). A

seizure that is justified at its inception may become unlawful if it is unduly prolonged. *People v. Harris*, 228 Ill. 2d 222, 242 (2008) (citing *Muehler v. Mena*, 544 U.S. 93, 100-01 (2005)). Where a seizure is unduly prolonged, additional fourth amendment justification is necessary for the prolongation of the stop. See *id.*

¶ 24 At the outset, we note that on appeal defendant does not challenge the validity of the traffic stop. This was a probable cause stop originally, and then a *Terry* stop. The initial stop of the vehicle was based on the officer's observation that defendant had committed traffic violations. Therefore, the initial stop was supported by probable cause.

¶ 25 Once Hannon stopped defendant, he approached the vehicle, received defendant's license and insurance, and returned to his squad car. Hannon then approached defendant's vehicle again, gave him the ticket and his license, and asked him to exit the vehicle and to stand at the rear of the vehicle. "[O]nce a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures." *Pennsylvania v. Mimms*, 434 U.S. 106, 111 n.6 (1977). Hannon testified that once they were at the rear of the vehicle, he asked defendant why he was nervous. Defendant stated that there was a gun in the vehicle. "An officer's inquiries into matters unrelated to the justification for the traffic stop *** do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop." *Johnson*, 555 U.S. at 333 (citing *Muehler*, 544 U.S. at 100-01). Here, there was no indication that the stop was "measurably extended" by Hannon's question. *Id.* The testimony at the suppression hearing indicated that, in rapid succession, (1) Hannon asked defendant to step out of the vehicle, (2) Hannon asked defendant why he was nervous, and (3) defendant stated that there was a firearm in the vehicle. As Hannon's inquiry did not

measurably extend the stop, it was not necessary for Hannon to have additional suspicion to justify defendant's continued seizure.

¶ 26 Even if we were to accept that the stop was prolonged, we find that Hannon did have reasonable suspicion to prolong the stop. Here, Hannon had been an officer with the Will County Sheriff's Department for 7½ years. When he pulled defendant over just after 1 a.m., he saw defendant make a furtive movement toward the center console of the vehicle. Hannon approached the vehicle and noticed that defendant had his hands raised, and appeared to be nervous as he was shaking and sweating despite it being a cool evening. Hannon stated that on two prior occasions "when [he] made contact with subjects and they immediately rose their hands in the air, both subjects either had a firearm on their person or inside the vehicle." Considering the totality of the circumstances, including (1) the time of day (*People v. Moore*, 341 Ill. App. 3d 804, 811 (2003); *People v. Day*, 202 Ill. App. 3d 536, 541 1990), (2) the furtive movement, (3) defendant's raised hands, (4) the visible shaking and sweating, and (5) the officer's experience, we find that the officer's reasonable suspicion justified any prolonging of the traffic stop.

¶ 27 In coming to this conclusion, we note that defendant cites case law for the proposition that neither furtive movements nor nervous behavior provide an "independent basis" for prolonging the stop. See *People v. Brown*, 190 Ill. App. 3d 511, 513 (1989); *People v. Penny*, 188 Ill. App. 3d 499, 503 (1989). In those cases, the movement or the nervous behavior was the *only* fact supporting the officer's extension of the duration of the stop. See *id.* As outlined above and noted by the trial court, nervousness was not the only fact supporting the officer's suspicion.

¶ 28 II. Failure to Renew Suppression Motion

¶ 29 Defendant next contends trial counsel ineffectively failed to renew his suppression motion after trial as the videotape shown at trial made the motion meritorious. Because the poor quality videotape did not conclusively show whether defendant made a furtive movement or raised his hands, the motion had no merit. Therefore, counsel's failure to renew the motion was not ineffective.

¶ 30 To succeed on a claim of ineffective assistance of counsel, a defendant must show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687-89 (1984). Because we ultimately find that defendant cannot show prejudice, we need not determine whether counsel's performance was deficient. *People v. Albanese*, 104 Ill. 2d 504, 527 (1984) (" '[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. *** If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.' " (quoting *Strickland*, 466 U.S. at 697)).

¶ 31 To satisfy the second prong, the "defendant must establish that the unargued suppression motion was 'meritorious,' *i.e.*, it would have succeeded, and that a reasonable probability exists that the trial outcome would have been different without the challenged evidence." *People v. Henderson*, 2013 IL 114040, ¶ 12.

¶ 32 Here, our view of the videotape shows that the entire encounter, from the time Hannon pulled defendant over to the point that the firearm was removed from the vehicle was only seven minutes. We cannot say, and defendant cites no case law to support, that a seven-minute traffic stop is an extended stop. Therefore, the videotape actually confirms that defendant's stop was not

unduly prolonged and would not have helped defendant at the motion to suppress. Perhaps that is why defense counsel objected to its introduction at the pretrial hearing on the motion to suppress.

¶ 33 Moreover, at trial Hannon testified, as he did at the motion to suppress, that defendant made a furtive movement when Hannon pulled him over and had his hands in the air when Hannon approached his vehicle. The jury viewed the videotape. After the videotape played, Hannon stated, "[Y]ou cannot see [defendant make a furtive movement or raise his hands] in the video. That video is not the best quality and that part of it was not accurately portrayed in the video, as you can see." Upon our review of the videotape, we agree with Hannon that it "is not the best quality." The videotape contains a significant amount of glare, and when Hannon pulls defendant over and approaches the vehicle, the only portion of defendant that can be seen is the top of his head. The videotape does not show defendant's arms or hands and does not show whether or not defendant made a furtive movement or raised his hands. As the videotape neither confirms nor contradicts Hannon's statement, we find no reasonable probability that defendant would have prevailed had he renewed his suppression motion at trial. Defendant cannot establish prejudice.

¶ 34 III. Failure to Stipulate to Felon Status

¶ 35 Lastly, defendant argues that defense counsel ineffectively failed to stipulate to his felon status and, instead, allowed the jury to hear that defendant was a convicted murderer. Upon review, defendant was not prejudiced by counsel's failure to stipulate.

¶ 36 As stated above (*supra* ¶ 30), to succeed on a claim of ineffective assistance of counsel, a defendant must show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687-89. For the first prong, a defendant must overcome the "strong presumption that the challenged action of counsel was the

product of sound trial strategy and not of incompetence." *People v. Barrow*, 133 Ill. 2d 226, 247 (1989).

¶ 37 At the outset, we note that we cannot definitively state that counsel's decision to require proof of defendant's felon status was not "a product of sound trial strategy." *Id.* Instead, we ponder whether it is more prejudicial to tell the jury that he was convicted of murder or to tell them he was a felon and allow them to think the worst. In relation to convictions for impeachment purposes, our supreme court said, the

> "bare announcement [of a defendant's conviction] unavoidably invites jury speculation about the nature of the prior crime. There is a potential danger that the jury would speculate that the defendant was previously convicted of a more serious crime. Consequently, [such] approach may result in unfair prejudice to the defendant arising from jury speculation as to the nature of the prior unnamed crime." *People v. Atkinson*, 186 Ill. 2d 450, 459 (1999).

It could very well be trial strategy to choose to allow proof of the crime. Moreover, a court may only give a jury instruction regarding the limited use of a defendant's prior convictions if requested by defense counsel as it is up to the defense to determine whether the instruction would be beneficial or serve to accentuate his criminal record. *People v. Fultz*, 2012 IL App (2d) 101101, ¶ 71. Similarly, the supreme court has stated that if the defendant actually agrees to stipulate to his felon status, the court must allow the stipulation. *People v. Walker*, 211 Ill. 2d 317, 341 (2004). Defendant cites no case law in which counsel has been found to be ineffective for failing to enter into such a stipulation. See *id.* Nonetheless, for purposes of this appeal, we

will assume that counsel's failure to stipulate rendered his performance deficient. We thus turn to the question of whether defendant was prejudiced by counsel's deficient performance.

¶ 38 We do not believe that the result of the proceedings would have been different had counsel stipulated to defendant's felon status. *Albanese,* 104 Ill. 2d at 525. The jury still would have heard that he was a felon. The jury still could have speculated that he had been convicted of the most serious crime. Taking this together with Hannon's testimony, we cannot reasonably find that the result of the proceedings would have been different.

¶ 39 CONCLUSION

¶ 40 For the foregoing reasons, we affirm the judgment of the circuit court of Will County.

¶ 41 Affirmed.

¶ 42 JUSTICE HOLDRIDGE, concurring in part and dissenting in part.

¶ 43 The majority upholds the defendant's conviction, finding that (1) the court did not err in denying the motion to suppress, (2) trial counsel was not ineffective for failing to renew the suppression motion after trial, and (3) trial counsel was not ineffective for failing to stipulate to the defendant's felon status. I agree that the motion to suppress was properly denied. I also agree that counsel was not ineffective for failing to renew such motion. I, therefore, concur in that portion of the analysis. I disagree, however, with the majority's conclusion that the defendant was not prejudiced by trial counsel's failure to stipulate to his felon status. Instead, I believe that there was a reasonable probability that the result of the proceedings would have been different if the jury had not heard that the defendant had been convicted of murder. Therefore, I respectfully dissent as to the third issue.

¶ 44 Ultimately, the majority correctly acknowledges that counsel's failure to stipulate rendered his performance deficient and thus satisfied the first prong of the *Strickland* test. *Supra*

¶ 37. However, the majority initially finds that they "cannot definitively state that counsel's decision to require proof of defendant's felon status was not 'a product of sound trial strategy.' " *Id.* (quoting *Barrow*, 133 Ill. 2d at 247). They "ponder whether it is more prejudicial to tell the jury that [the defendant] was convicted of murder or to tell them [the defendant] was a felon and allow them to think the worst." *Id.* I cannot find any strategic reason for counsel's failure to stipulate. By failing to stipulate, the jury heard that the defendant was convicted of murder. There are few worse things for which the defendant could have been convicted. Informing the jury the defendant had been convicted of murder could hardly benefit him.

¶ 45 In order to satisfy the second prong of the *Strickland* test, a defendant must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A 'reasonable probability' is defined as 'a probability sufficient to undermine confidence in the outcome.' " *People v. Simpson*, 2015 IL 116512, ¶ 35 (quoting *Strickland*, 466 U.S. at 694). Here, there were inconsistencies in Officer Hannon's testimony at trial. Originally Hannon stated that he found the firearm in the vehicle and removed it, but after watching the videotape, he stated that Officer Ambrosini had retrieved the firearm. Hannon knew that the audio recording equipment in his car had not been functional for a couple of days, but had not had it fixed. He did not send the firearm for fingerprint testing because he stated that the defendant had admitted the firearm was there. The videotape does not corroborate Hannon's testimony. Without audio, there was no corroboration for the defendant admitting the firearm was in the vehicle. Hannon also admitted that the "video [was] not the best quality" and that one could not observe the defendant dip his arm or shoulder down in the videotape, stating "that part of it was not accurately portrayed in the video." Moreover, both Walls and the defendant testified that the firearm belonged to Walls,

Walls had a receipt verifying the purchase, she had borrowed the defendant's car, and she had not told him the firearm was in the vehicle. Because the evidence was close, disclosing the defendant's murder conviction could have tipped the scales against him. Therefore, there is a reasonable probability that the result of the trial would have been different had counsel stipulated to the defendant's felon status. I would thus find counsel ineffective, vacate the defendant's conviction, and remand for a new trial.

¶ 46 For these reasons, I respectfully concur in part and dissent in part.