FIFTH DIVISION
March 25, 2011

No. 1-08-1452

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County, Illinois.
	)	
v.	)	No. 05 CR 07411
	)	
NOEL DEJESUS,	)	Honorable
	)	Lawrence P. Fox,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE JOSEPH GORDON delivered the judgment of the court.
Justice Howse and Justice Epstein concurred in the judgment.

ORDER

HELD: Following a jury trial, defendant was convicted of first degree murder, attempted first degree murder with a firearm, and aggravated battery with a firearm. Defendant's conviction was based in part upon a confession he made after being brought to the police station and placed in an interview room for 12 hours. Under the circumstances, defendant's stay in that interview room constituted an illegal arrest, necessitating a remand for an attenuation hearing on the issue of whether defendant's confession was sufficiently attenuated from that illegal arrest so as to be properly admissible at trial.

Defendant Noel DeJesus appeals his conviction for the first degree murder with a firearm of Giovanni Parker (Gio), the attempted first degree murder with a firearm of Louis Allison, the attempted murder with a firearm of Curtis Parker, and aggravated battery with a firearm of Allison.

The State's theory at trial was that, in the early morning hours of February 21, 2005, Gio, Curtis, and Allison were walking on the sidewalk outside defendant's residence when defendant demanded that they go elsewhere. A verbal altercation ensued. Some time later, as Gio, Curtis, and Allison were walking away, defendant allegedly fired at all three of them, fatally wounding Gio and wounding Allison.

As shall be developed in detail below, an officer investigating the murder of Gio brought defendant to the police station, where defendant confessed to the shooting. Prior to trial, defendant moved to suppress that confession. His motion was denied. At trial, defendant recanted his confession, testifying that he had falsely confessed to detectives in order to protect his younger brother, Joel DeJesus, who was also in police custody at the time that defendant made his confession. Nevertheless, defendant was convicted of all charges and sentenced to 68 years in the Department of Corrections.

Defendant now appeals his conviction, raising nine contentions of error. The first three deal with the denial of his motion to suppress his confession and the subsequent introduction of the confession at trial. He contends that (1) his confession was obtained in violation of his Fourth Amendment rights since police detained him without probable cause, (2) his confession should not have been introduced at trial where the State failed to prove that he was given proper

Miranda warnings prior to his confession, and (3) he was denied his Sixth Amendment right of confrontation where the trial court sustained objections to various cross-examination questions asked by his counsel during the hearing on his motion to suppress. Defendant additionally raises six more contentions of trial error, namely, that (4) the trial court should have allowed him to submit a modified instruction to the jury regarding prior inconsistent statements, (5) the trial court erred in introducing evidence that his fingerprints were found on the magazines of a TEC-9 pistol that was found at his house but not used in the murder, since such evidence was both irrelevant and prejudicial, (6) the trial court erred in curtailing testimony that defendant's brother was "partially retarded," since such evidence would have been relevant to his defense that he falsely confessed in order to protect his brother, (7) the prosecutor should not have questioned defendant as to why he failed to recant his confession at various stages of the proceeding against him, (8) the trial court improperly limited defense counsel's closing argument to the jury, and (9) the trial court made improper comments regarding defense counsel.

For the reasons that follow, we reverse and remand.

I. BACKGROUND

It is undisputed that at approximately 2 a.m. on February 21, 2005, while Gio, Curtis, and Allison were walking in the vicinity of defendant's residence, an assailant opened fire on the three of them from behind, fatally wounding Gio and also wounding Allison. As shall be developed below, neither the surviving victims nor the other witnesses testified at trial that they saw the shooter. Instead, the State's case against defendant rested primarily upon three pieces of evidence, all of which shall be reviewed in greater detail during our discussion of the trial

testimony. First, with regard to motivation, it is undisputed that, shortly before the shooting, defendant got into a verbal dispute with the three victims wherein he told them not to stand in front of his house. Second, defendant's younger brother Joel testified that defendant left the house prior to the shooting, and after the shooting, defendant returned to the house, handed Joel a pistol, and told Joel to throw it away. Third, a forensic scientist working for the Illinois State Police, qualified as an expert in the field of firearms identification, testified that a Ruger 9mm pistol recovered from defendant's house on the day of the shooting was the weapon used to fire 10 cartridges that were recovered by police at the site of the shooting.

Although defendant confessed to the shooting while in police custody on January 21, 2005, he later recanted that confession. Prior to trial, defendant filed a motion to suppress his confession. In that motion, defendant asserted that he had been arrested without a warrant and without probable cause. He stated that he was handcuffed and taken against his will to the police station, where he was "constantly interrogated" concerning the murder of Gio and told that if he did not confess to the murder, his brother would be charged with the murder and his family's house would be seized and forfeited. He further asserted that he never made a knowing waiver of his Miranda rights.

The trial court held a hearing on defendant's motion to suppress. At that hearing, the State called three witnesses, namely, Officer Peter Milutinovic, who brought defendant to the police station on the morning of January 21, 2005, Detective John Fuller, who interviewed defendant at the police station later that morning, and Detective Daniel Gillespie, who interviewed defendant at the police station on the evening of that day, and to whom defendant

admitted his involvement in the shooting.

Officer Milutinovic testified that on the morning of February 21, 2005, he and his partner, Officer Darren Hoeger, were assisting detectives in investigating the shooting of Gio. They were looking for a suspect named Andre "Choco" Valasquez[1] as well as defendant's younger brother Joel DeJesus, whom they believed had been with Choco on the night of the shooting.

Officer Milutinovic received information that Choco and Joel might be in the vicinity of 2122 North Central Park driving tow trucks. He and his partner proceeded to that location, where he found a tow truck parked in an alley and parked his squad car next to it. After waiting for approximately one hour, a second tow truck, driven by defendant, pulled into the alley and stopped behind the squad car. Officer Milutinovic testified that he did not have any information regarding defendant at that time. He approached defendant and asked him if he had any information regarding the whereabouts of Choco and Joel. Defendant responded that he did not.

Officer Milutinovic testified that his partner called Detective Fuller to inform him of the situation. Detective Fuller instructed him to ask if defendant would be willing to come to the police station for questioning. Accordingly, Officer Milutinovic said, he asked defendant if he would be willing to come to the police station to answer questions regarding the whereabouts of Choco and Joel. Defendant allegedly agreed. He parked his tow truck and then entered the back seat of the squad car, whereupon Officer Milutinovic drove him to the police station.

Officer Milutinovic testified that defendant was not a suspect in any crime at that point

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[1] Andre Valasquez is variously referred to in the record as "Choco," "Choko," and "Chuko." We shall refer to him as "Choco."

and came to the police station voluntarily and freely. He further testified that he did not handcuff defendant, nor did he read him his Miranda rights. During cross-examination, he admitted that he did not specifically tell defendant that he was not required to come to the police station. Counsel for defendant then asked whether the doors of the squad car locked when defendant was in the back seat. "I think they lock automatically," Officer Milutinovic responded. He acknowledged that defendant would therefore not have been able to exit the squad car.

Upon his arrival at the police station, Officer Milutinovic stated, he informed detectives of who defendant was, and the detectives escorted defendant away. Officer Milutinovic did not see where they escorted him to, nor did he have any further contact with defendant.

Detective Fuller, one of the detectives who interviewed defendant at the police station, testified that on February 21, 2005, he was assigned to investigate the murder of Gio. The detectives were looking for Choco, who had been identified by two witnesses as being in a nearby alley prior to the shooting. Choco's girlfriend said that Choco was employed as a tow truck driver for Prestige Towing and that she had last seen him with his friend Joel. Detective Fuller passed this information on to a number of police officers.

Detective Fuller told the court that he subsequently received a phone call from Officer Hoeger stating that he had met with an individual by the name of Noel, who was driving a Prestige Towing truck and whom Officer Hoeger believed was related to Joel. Detective Fuller was hopeful that this individual would help lead them to Choco. He asked Officer Hoeger to inquire if the man would be willing to come to the police station so that Detective Fuller could speak with him.

Late that morning, Detective Fuller said, he spoke briefly with defendant in an interview room at the station. Detective Fuller stated that the interview room was unlocked and defendant was not handcuffed. He did not tell defendant that he was under arrest or place him under arrest, because he was not a suspect at that time. "My interest in speaking with Noel was merely as a means of hopefully finding [Choco]," he testified. When asked about Choco, defendant stated that Choco was a friend of his and that he had last seen Choco in the neighborhood at approximately 10 pm on the evening prior to the shooting.

Detective Fuller stated that he did not promise anything to defendant, nor did he threaten anything. In particular, he testified that he did not threaten or hear anyone threaten that if defendant did not confess, his brother would be imprisoned and his home would be seized. He further stated that defendant would have been free to leave at any time, though he admitted during cross-examination that he did not specifically tell defendant that he was free to leave.

The State also called Detective Gillespie, one of the detectives to whom defendant confessed his involvement in the shooting. Detective Gillespie testified that on February 21, 2005, he was working the day shift, beginning at 8:30 a.m. Prior to his arrival at work, defendant had been brought to the station and interviewed by Detectives Fuller and Thaxton regarding the whereabouts of Choco. Detective Gillespie stated that defendant was in one of the interview rooms and that the room was locked. "For his safety and the safety of others in the area," he explained, "we don't need people walking around the detective area freely." However, he said, defendant was not handcuffed, he was allowed to use the restroom, and he was provided with food and drink.

That evening, Detective Gillespie interviewed a man named Jose "Suave" Vasquez as part of the investigation of Gio's murder. Suave told Detective Gillespie that he was temporarily staying at the DeJesus residence, and on the night of the shooting, he was there with several friends and Joel, making music. Suave said that he could hear defendant on the front porch arguing with someone outside. He then saw defendant walk inside with an angry look on his face and exit through the rear door of the house. Approximately fifteen minutes later, Suave heard gunshots. He called 911. He then saw defendant enter the house through the back door, hand an object to Joel (Suave did not see what the object was), and tell Joel to put it somewhere. Joel went up to the attic and came back downstairs. Defendant then left the house. Perhaps an hour and a half later, Suave said, Joel told Suave that he had hidden a gun in the attic. Suave opined to Detective Gillespie that defendant was the shooter, that he had given a gun to Joel, and that Joel had then hidden that gun in the attic.

Based upon this interview, Detective Gillespie testified that for the first time, he considered defendant to be a suspect in the murder. Right after he interviewed Suave, he went to interview defendant, accompanied by two other detectives. It was approximately 7:30 p.m., around 12 hours after defendant first arrived at the police station. This was the first time that Detective Gillespie spoke with defendant. He stated that he read defendant his Miranda rights "from the FOP book" and defendant acknowledged his understanding of those rights. He then told defendant that "new information had developed" and provided some of that information, whereupon defendant admitted involvement in the shooting "almost immediate[ly]." He testified that nobody promised the defendant anything or threatened him with anything in his presence,

nor did defendant claim that anyone had threatened him. He specifically denied telling defendant that if defendant did not confess, his brother would be charged with the murder and his house would be seized.

Regarding the Miranda rights that he read to defendant, Detective Gillespie read them out loud in court from the FOP book, over the objection of defense counsel, who contended that he had to testify from memory as to what he said instead of reading from a book. He said that he told defendant that he had the right to remain silent, that anything he said could be used against him, that he had a right to talk to a lawyer before any questioning and to have a lawyer present during any questioning, that if he could not obtain a lawyer one would be appointed for him, and that if he chose to answer questions, he would retain the right to stop questioning at any time and consult a lawyer if he chose. Detective Gillespie testified that defendant acknowledged his understanding of each of these rights individually.

The defense called Detective Deborah Thaxton as its sole witness at the suppression hearing. Detective Thaxton testified that, early in the morning of February 21, 2005, she interviewed defendant for approximately five minutes in an interview room. She was accompanied by Detective Fuller. She questioned defendant as to whether he knew the suspect Choco and whether he knew Choco's whereabouts. Defendant was not a suspect at that time, and she did not read him his Miranda rights. On cross-examination by the State, Detective Thaxton stated that she did not ask defendant about the murder – not if he was involved, nor even if he was a witness. She further testified that defendant was not handcuffed and that the interview room was unlocked.

After hearing the arguments of counsel, the court denied defendant's motion to suppress his confession. It found that, according to the uncontradicted testimony of Officer Milutinovic, defendant was not initially a suspect and went to the police station freely and voluntarily. It further found that, prior to defendant's confession to Detective Gillespie at 7:30 p.m., he was never questioned for any length of time and was only asked two questions, namely, whether he knew Choco and whether he knew of Choco's whereabouts. The court stated that a reasonable person in his shoes would not have believed himself to be under arrest. Finally, the court found that, at the time defendant confessed to Detective Gillespie, probable cause to arrest him had arisen.

The case proceeded to a jury trial. The State called five people as witnesses to the events on the day of the shooting, namely, the two surviving victims, Curtis and Allison, defendant's brother Joel, and two musicians who were at defendant's house on the evening of the murder, Wallder Gorgas and Manuel Estevan Aponte.

Curtis testified that on the night of February 20, 2005, he was at a party at his friend Deon Carter's apartment, located at 2123 North Central Park. Also present at the party were his cousin Gio, Allison, and a man named Selmer "Boo" Phillips. During the party, there was an altercation between Boo and Carter that resulted in Boo being arrested. After the altercation, Gio, Curtis, and Allison left the party together in order to find a man they knew named Choco.

Curtis said that as he, Gio, and Allison were walking, they encountered defendant, who told Gio to "get the f--k from in front of my f---ing house." (Later testimony established that defendant's residence was at 2122 North Central Park, across the street from Carter's apartment

building.) Gio told defendant that they were leaving. There was no physical fight between them, nor did defendant issue any threats.

Curtis testified that he, Gio, and Allison later encountered Choco. They had a brief conversation, and then Choco punched Curtis in the jaw. (Curtis did not explain what they spoke about or why Choco punched him.) Choco and Curtis engaged in a brief fistfight. Choco then said that he wanted to fight Gio, so he and Gio fought one-on-one. Choco helped Gio to his feet, and then Choco and Allison fought one-on-one. Once that fight was over, Curtis said, they asked Choco if he was all right, helped him find his glasses, and shook his hand. "I thought he was cool by us shaking hands," Curtis said.

As the three of them were walking away from Choco, Curtis heard three gunshots being fired from behind them. Curtis, Gio, and Allison ran toward Carter's apartment building. While they were running, Gio said that he had been hit. Curtis turned around to look back at him. At that point, he testified, he saw "[f]ire, like sparks" in the direction that they were running from. During direct examination, he said that he did not see Choco when he turned around. During redirect examination, however, Curtis said that he did see Choco when he turned around, and Choco was standing in a different location than the location from which the shots were being fired. He admitted during cross-examination that he never saw who fired any of the shots and he never saw defendant with a gun.

Curtis stated that he and Allison, who received gunshot wounds to the back, were able to reach Carter's apartment building. Gio, however, collapsed on the threshold of the building, half of his body in the hallway, the other half outside on the curb.

Allison, the other testifying victim, gave a similar account of events on the night of the murder. He testified that on the evening of February 20, 2005, he attended a party with his cousins Curtis and Gio. During the party, Boo got into an argument with Curtis' girlfriend, so Allison, Curtis, and Gio decided to leave. When they went outside, Allison said, they saw defendant and Choco exiting defendant's house. Defendant told Allison, Curtis, and Gio to get away from the front of his house. However, defendant did not threaten any of them.

Allison, Curtis, and Gio walked away from the defendant's house and then stopped to talk to Choco. Choco fought with Curtis, then with Gio, and then with Allison. After the series of fights, Allison said, he shook Choco's hand and helped him to find his glasses.

While they were walking away from Choco, Allison heard shots being fired from behind them. Without looking back, he ran to the apartment building where the party was taking place. Curtis was in front of him, and Gio was behind. During cross-examination he admitted that he never saw defendant firing a gun.

Joel, the defendant's younger brother, also testified on behalf of the State regarding the events that occurred on the night of the murder. Joel stated that on February 20 to 21, 2005, he resided at 2122 North Central Park with his brother and Suave, a music producer. On the night of February 20, 2005, Suave, several musicians, and Joel were at the dining room in the middle of the house, performing music. The defendant was also home that evening.

Joel testified that while they were performing music, and before the shooting occurred, he saw blue lights from a police car at the front of the house.[2] He and all of the musicians went to

[2] Apparently, the arrival of the police at this time was unrelated to any action of

the window at the front of the house. Joel saw police outside as well as three men standing in front of the house and arguing. Joel knew that one of the men was named Louis, though he did not know his last name.

According to Joel, defendant told the three men that he did not want them standing in front of the house. They swore at him in response. Defendant then told Joel to return to playing music. Joel and the other musicians complied, returning to the dining room. Defendant was with them.

At some point, Joel said, defendant left the house. Joel did not see him leave. It was around the time that defendant usually left to go to work. When Joel noticed that his brother was gone, he decided to go to the front door so that he could say goodbye to his brother as he was leaving. While he was at the front of the house, he heard approximately six gunshots coming "from around by the side of the house." He "hit the floor" and then called the police.

Approximately 15 minutes later, Joel saw his brother entering the house through the back door. Joel said that his brother appeared nervous. He passed Joel a gun, telling Joel to "wrap it," which Joel said meant to throw it away. "I got scared," Joel said. He threw the gun into a hole in the ceiling of the second floor of the house. He then took another gun, a TEC-9 pistol in a bag, and also threw it into the hole.

Subsequently, Joel said, defendant left the house. Not long thereafter, defendant called

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defendant. Rather, it would seem that the police arrived because of the altercation between Boo and Carter at the party which the three victims were attending, as was previously testified to by Curtis.

Joel on his cell phone and asked Joel what was going on. Joel said that he thought someone had been shot. Defendant told Joel that he loved him and that he should take care. After that conversation, police arrived at the house and took Joel to the police station. On redirect examination, it was clarified that the police did not take Joel into custody for the shooting but, rather, because they recovered a rifle in the house (a different weapon from the two weapons that Joel threw into the hole in the ceiling) that they were not supposed to have.

As noted, the State also called to the stand two musicians named Gorgas and Aponte who were at defendant's house when the shooting occurred. Gorgas testified that, as a hobby, he plays reggaeton music, which he described as "Latin pop type reggae/rap music." On the night of February 20, 2005, Gorgas and several friends who also play reggaeton music went to defendant's house because their producer, Suave, was staying there at the time. They sat down with Suave in the dining room in the middle of the house and began making music together. Gorgas said that Joel was at the house that night. He was not asked about, nor did he comment on, defendant's whereabouts at any time on that night.

While he and his friends were making music, Gorgas said, they saw flashing lights, like from a police squad car, coming from outside. He did not get up to see what was going on, but the others did. Approximately 20 minutes later, he heard gunshots, and Suave called the police. He was not sure whether Joel was with them in the room at the time he heard the gunshots, but he saw Joel in the living room approximately five minutes later.

Aponte similarly testified that on the night of February 20, 2005, he was at defendant's house with several other friends who play reggaeton music. While they were playing music, he

noticed flashing lights outside and went to see what was going on. He saw that it was "some issue that was going on across the street." He returned, told his friends that it was nothing serious, and they continued playing. Later, they heard gunshots outside. Several of them, including Aponte and Joel, went to the front window to see what was going on. Aponte testified that he saw a teenager lying half inside and half outside an apartment building across the street, as if he had fallen. The teenager did not get up.

The State called four witnesses regarding the recovery of physical evidence in this case, namely, Detective Thomas Conley, Officer Paul Malachesen, forensic investigator Donald Fanelli, and assistant medical examiner Dr. Ponni Arunkumar.

Detective Conley, a violent crimes detective with the Chicago Police Department, testified that he went to 2123 North Central Park in the early morning hours of February 21, 2005, to investigate the shooting of Gio and Allison. He observed ten cartridge cases on the ground and notified evidence technicians of this discovery. Officer Malachesen, an evidence technician with the Chicago Police Department, recovered these cartridge cases, placed them in sealed envelopes, and sent them to the crime lab.

Fanelli, a forensic investigator with the Chicago Police Department, testified that on February 21, 2005, he recovered two firearms from defendant's house. The first, a Ruger 9mm pistol, was inside an access panel to the attic on the second floor of the house. The second, a TEC-9 pistol, was outside on the roof in a black cloth bag. Also in the bag were two magazines. Fanelli testified that he submitted both of the recovered guns for fingerprint testing.

Dr. Arunkumar, an assistant medical examiner at the Cook County medical examiner's

office, was called as an expert in the field of forensic pathology. He performed an autopsy of Gio and concluded that he died of multiple gunshot wounds. He recovered two bullets from Gio's body, which he photographed and placed in envelopes which were given to the Chicago Police Department.

The State then called two experts to testify about the analysis of the foregoing recovered physical evidence. The first such witness, Kurt Zielinski, a forensic scientist working for the Illinois State Police, was called as an expert in the field of firearms identification. He testified that all 10 of the recovered cartridges, as well as the two spent bullets received from the medical examiner's office, had been fired from the Ruger pistol.

The second such witness, Jeanne Hutchinson, a member of the Illinois State Police Division of Forensic Sciences, was called as an expert in fingerprint identification. She testified that the defendant's fingerprints were found on the magazines found with the TEC-9 pistol. However, she said, no fingerprints were found on the Ruger pistol or on any of the other recovered evidence.

The State finally called Detective Jose Cardo and Assistant State's Attorney Cathleen DeWald to testify regarding their meetings with the defendant. Detective Cardo testified that, as part of his investigation of the murder of Gio, he interviewed Suave. After that interview, he met with defendant at the police station at approximately 7:15 p.m., and once he had advised defendant of his rights, defendant spoke with him with regard to his investigation. As a result of speaking with defendant, Detective Cardo learned that the murder weapon was at defendant's house and requested permission to search his house to find the weapon. Detective Cardo

testified that defendant agreed and signed a consent form to authorize the search.

At the time that Detective Cardo spoke with defendant, Joel had also been arrested on an unrelated matter, namely, being in possession of a .22 caliber rifle. On cross-examination, Detective Cardo said that he did not remember whether he told defendant that Joel was in custody, but he "probably could have."

ASA DeWald testified that she was assigned to assist police in their investigation of the murder of Gio. At approximately 5:15 a.m. on February 22, 2005, she met defendant, accompanied by Detectives Gillespie, Burke, and Cardo. (This was after defendant made his initial confession on the previous evening.) ASA DeWald testified that she introduced herself, explained that she was a prosecutor and not his lawyer, and read him Miranda warnings.

According to ASA DeWald, defendant gave the following account of events on the night of the shooting: Defendant heard a commotion outside and saw Gio running from police with a gun in his waistband. A short time later, he heard another commotion and saw Gio, Curtis, and Allison standing by his front gate. He asked them to leave, and Gio and Curtis started "talking s–t" to him. Defendant went back into his house, where Joel and the other musicians were. He was angry. Not long after, he went outside, heard the voices of Gio, Curtis, and Allison, and fired seven or eight shots in their direction. He went back home and gave the gun to Joel, telling him to wrap it. He then left for work.

ASA DeWald testified that after defendant told her about what happened on the night of the shooting, she asked the detectives to leave and spoke alone with defendant. She asked him how he had been treated by police, and he said he had been treated well. He denied being

threatened or being promised anything to speak, and he said he had been given food and drink.

The sole witness for the defense was the defendant. Defendant testified that, on the night of the shooting, he did not shoot at anyone, he did not possess a gun, and he did not give a gun to his brother. As far as he could recall, he said, he had never seen the murder weapon or the TEC-9 before. In fact, he said, when he was speaking with detectives on February 21 and 22, 2005, he did not even know what a TEC-9 was.

Defendant admitted that, after he was arrested, he gave a statement to the police in which he claimed that he was responsible for the shooting. However, he said, he made that statement in order to protect his brother. "He ain't smart," defendant explained. "He's got mental problems." He testified that before he made his admission, he was told by police that his brother had also been arrested. Defense counsel then asked him, "What was your feelings about what might happen to your brother?" Counsel for the State objected to this question, and the objection was sustained.

Defendant gave the following account of events on the morning that the shooting occurred. He said that he saw Gio, Curtis, and Allison outside his house and requested that they leave, explaining that his father did not like people standing around in front of the house. Although he spoke nicely and did not swear, they responded by swearing at him. After speaking with them, defendant testified that he left for work. He was not at home when the shooting occurred.

After defendant's testimony, the defense rested. The jury found defendant guilty of all charges. Defendant was sentenced to 68 years in the Department of Corrections. He now

appeals.

II. ANALYSIS

As previously noted, defendant raises nine contentions of error on appeal, the first three of which deal with his motion to suppress his confession. Each of these contentions was broadly described at the outset. We consider them in turn.

A. Claimed Violation of Defendant's Fourth Amendment Rights

Defendant first argues that his confession should have been excluded because it was the product of an illegal detention, where detectives took him to the police station and held him there in a closed interview room for twelve hours without having probable cause for his arrest. The State does not dispute that, as of the time that defendant initially arrived at the police station, it lacked probable cause for his arrest. Nevertheless, it argues that defendant's confession was properly admitted for two reasons. First, the State contends that defendant was not in custody at the time he initially came to the station but, rather, voluntarily agreed to accompany police for questioning. According to the State, defendant remained free to leave until nearly 12 hours later, when detectives learned that, shortly after the shooting occurred, defendant returned to his house with a gun which he asked his brother to put away. Thus, the State argues, defendant was not under arrest for fourth amendment purposes during those 12 hours. Second, the State argues that, even if this court were to find that defendant's stay at the police station constituted an arrest and would therefore be illegal due to lack of probable cause, defendant's confession was not tainted by any such illegality where police acquired probable cause through their interview of Suave before defendant gave his confession.

Both the Illinois Constitution and the Constitution of the United States protect individuals from unreasonable searches and seizures. U.S. Const, amend. IV; Ill. Const. 1970, art. I, sec. 6. For purposes of the fourth amendment, an arrest is considered a seizure and, in the absence of probable cause or a warrant based upon probable cause, it violates the protections of the fourth amendment. *People v. Melock*, 149 Ill. 2d 423, 436 (1992). As noted, the State does not dispute defendant's contention that it lacked probable cause to arrest defendant at the time that he agreed to come with Officer Milutinovic to the police station, or for the ensuing time period, nearly 12 hours, before Suave made his statement implicating defendant in the shooting. Rather, the issue in controversy between the parties is whether defendant's being brought to the police station and left there in an interview room for 12 hours constitutes an arrest within the meaning of the fourth amendment.

A person is considered to have been arrested when his freedom of movement has been restricted, either by means of physical force or by a show of authority. *Melock*, 149 Ill. 2d at 437. The relevant inquiry in determining whether a suspect has been arrested is whether a reasonable person in such circumstances would conclude that he was not free to leave. *People v. Eddmonds*, 101 Ill. 2d 44, 61 (1984).

As noted, in the present case, the evidence adduced at the suppression hearing indicated that on the morning after the shooting, defendant arrived at the police station at approximately 7:30 a.m. and was escorted to an interview room by detectives. He then remained in that interview room for the next 12 hours. The evidence at the hearing was conflicted as to whether the interview room was locked; Detective Gillespie stated that it was locked "[f]or his safety and

the safety of others in the area," but Detective Fuller testified that it was unlocked when he spoke with defendant that morning, as did Detective Thaxton. During defendant's 12-hour stay in that interview room, defendant was interviewed twice. He was first interviewed "briefly" in the morning by Detective Fuller, who was accompanied by Detective Thaxton. Detective Fuller testified that his sole interest in defendant at the time was as a means of finding Choco, and he also testified that defendant would have been free to leave at any time, but he admitted that he did not inform defendant of this fact. Detectives Fuller and Thaxton both testified that they never advised defendant that he was free to leave, although Detective Fuller averred that defendant would, in fact, have been free to leave. In any event, it is undisputed that defendant remained in that interview room until approximately 7:30 p.m. that evening, when Detective Gillespie, having obtained a statement from Suave implicating defendant in the shooting, came to interview defendant. At that time, Detective Gillespie read defendant his Miranda rights, and then defendant confessed involvement in the shooting.

Our review of the record leads us to conclude that the instant case is analogous to *People v. Walls*, 220 Ill. App. 3d 564, 579 (1991), and *People v. Young*, 206 Ill. App. 3d 789 (1990), both cases in which the court concluded that a defendant's detention at the police station constituted an illegal arrest. In *Walls*, police investigating a shooting asked defendant to accompany them to the police station for questioning. *Walls*, 220 Ill. App. 3d at 568. It was undisputed that the State lacked probable cause to arrest him at this time. *Walls*, 220 Ill. App. 3d at 568. Defendant complied and then remained at the police station overnight in a small interview room without a bed. *Walls*, 220 Ill. App. 3d at 578. The *Walls* court found that, under

the circumstances, the defendant was not under arrest at the time that he was initially brought to the police station, since he was not singled out for questioning but was one of several others brought to the station for questioning regarding the shooting incident, a fact of which he was apparently aware. *Walls*, 220 Ill. App. 3d at 578. Notwithstanding this finding, the *Walls* court additionally held that the passage of time transformed defendant's stay at the police station into an illegal arrest, explaining:

> "We are not unsympathetic to the plight of the police in investigating crimes of this sort. Yet we cannot condone the infringement of constitutional rights and find it difficult to believe, as the State must necessarily contend, that citizens typically agree to spend extended periods of time at police stations, kept in small windowless rooms, waiting for the police to conduct their investigations and obtain probable cause for their arrest." *Walls*, 220 Ill. App. 3d at 579.

Likewise, in *Young*, 206 Ill. App. 3d at 801, defendant agreed to accompany police to the police station for questioning. *Young*, 206 Ill. App. 3d at 801. He was there placed in a small interview room where he remained overnight for a period of approximately 12 hours, without ever being told that he was free to leave, before the police obtained information sufficient to provide probable cause for his arrest. *Young*, 206 Ill. App. 3d at 803. The *Young* court found that this constituted an arrest, since a reasonable person in such a position would conclude that he was not free to leave. *Young*, 206 Ill. App. 3d at 801. The court explained: "[T]he State impliedly asks us to believe that defendant voluntarily chose to spend a lengthy time period in an interrogation room at the police station. *** [W]e reject such a notion." *Young*, 206 Ill. App. 3d

at 801; see also *People v. Sturdivant*, 99 Ill. App. 3d 370, 372 (1981) (holding that defendant's nine-hour stay in police station constituted an arrest and rejecting State's implicit contention that defendant "freely chose" to remain there).

The facts in the instant case are highly similar to those in *Walls* and *Young*. The State's implicit contention is that defendant, of his own free will, chose to spend 12 hours in an interview room at the police station so that police could question him about the whereabouts of Choco and his brother Joel. We do not find such contention to be credible, particularly where Detective Gillespie indicated that defendant would not have been permitted to exit the interview room, and the testimony of Detectives Fuller and Thaxton would indicate that defendant was apparently never informed by police that he was free to leave.

The State argues that defendant cannot claim to have been seized by police when the evidence indicates that he voluntarily agreed to accompany Officer Milutinovic to the police station. They cite the testimony of Officer Milutinovic, who stated that, at the time he brought defendant to the station, defendant was not a suspect in any crime, was not handcuffed, was not read his Miranda rights, and came voluntarily and freely. However, "the fact that a defendant initially accedes to a police request to accompany them to the police station does not legitimize the treatment of defendant after he arrived at the station." *Young*, 206 Ill. App. 3d at 801; see *Walls*, 220 Ill. App. 3d at 579 (a defendant's stay at police station, even if not initially an illegal arrest, "may become an illegal detention with the passage of time"); *People v. Wallace*, 299 Ill. App. 3d 9, 16 (1998) (holding that, even where defendant did not dispute trial court finding that he voluntarily accompanied police to the station, his presence at the station "escalated into an

involuntary seizure prior to his formal arrest" where he was held in a closed interview room for eight hours without ever being informed that he was free to go). Thus, despite the fact that the *Young* defendant voluntarily accompanied police to the stationhouse and agreed to wait for questioning, the *Young* court nevertheless found that he was involuntarily detained where he remained at the stationhouse in an interrogation room for the following 12 hours. *Young*, 206 Ill. App. 3d at 801. Similarly, in *Wallace*, 299 Ill. App. 3d at 16, defendant voluntarily accompanied police to the police station, where he was held in a closed interview room for eight hours without ever being informed that he was free to go. The court held that under these facts, notwithstanding his initial acquiescence, defendant's stay in the police station "escalated into an involuntary seizure prior to his formal arrest." *Wallace*, 299 Ill. App. 3d at 16.

It is telling that, in its brief, the State acknowledges *Walls*, *Young*, and *Wallace* but makes no attempt to distinguish them from the case at hand. Instead, the State cites *People v. Perez*, 225 Ill. App. 3d 54 (1992), and *People v. Mason*, 274 Ill. App. 3d 715 (1995), as examples of cases where a defendant's extended stay at the police station was held not to constitute an arrest. However, *Perez* and *Mason* are both distinguishable, because in each of those cases, there were special circumstances, not present in the instant case, which indicated that the defendants in those cases were actively cooperating with police investigations and elected to remain at the police station during that time for their own safety. In *Perez*, defendant was brought to the police station as part of an ongoing murder investigation. *Perez*, 225 Ill. App. 3d at 56. Over the next 48 hours, he provided information on multiple occasions to police which led them to the discovery of other individuals. *Perez*, 225 Ill. App. 3d at 64. There was testimony to indicate

that defendant did not want these other individuals to know that he was cooperating in the investigation and therefore remained at police headquarters for his own protection. *Perez*, 225 Ill. App. 3d at 64-65. Moreover, on one occasion, defendant accompanied police to the residence of a suspect named Earl-16. *Perez*, 225 Ill. App. 3d at 65. On the return trip to headquarters, by defendant's own testimony, he was allowed to leave the presence of the police to purchase food at a gas station and did not run away because he was trying to "assist" them. *Perez*, 225 Ill. App. 3d at 65. The court therefore concluded that the evidence reflected "a defendant who was cooperating with the police in an ongoing and dangerous murder investigation," rather than someone who was being held against his will. *Perez*, 225 Ill. App. 3d at 65.

In *Mason*, 274 Ill. App. 3d at 717, although defendant remained at the stationhouse for 48 hours as part of a murder investigation, such stay did not constitute an arrest where there was testimony to indicate, and the trial court held, that "defendant's fear of retaliation from members of his own gang for his cooperation with police was the basis of his voluntarily staying in the safety of the stationhouse." In particular, detectives testified that defendant implicated a ranking gang member named Wesson in the murder and told police that he did not want to leave the station until Wesson had been taken into custody. *Mason*, 274 Ill. App. 3d at 718.

The common element in both *Perez* and *Mason* is that, in both cases, there was evidence to indicate that defendants had an incentive to remain at the police station while the investigation was ongoing, since they feared for their own safety if they were to leave. Moreover, the *Perez* defendant specifically testified that he was trying to "assist" police in their investigation. *Perez*, 225 Ill. App. 3d at 65. No such indicia of cooperation appear in the present case. Accordingly,

Perez and *Mason* do not weigh against our decision in the instant case, namely, that defendant's 12-hour stay in an interview room at the police station constituted an illegal arrest.

However, our finding that defendant was subject to an illegal arrest does not, by itself, render defendant's confession inadmissible at trial. Under the attenuation doctrine, a confession made by a suspect in custody following an illegal arrest admissible if it was obtained " 'by means sufficiently distinguishable to be purged of the primary taint.' " *People v. White*, 117 Ill. 2d 194, 222 (1987), quoting *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963). In order to establish this, the State bears the burden of showing that the statement was a product of the defendant's "free will" and was independent of any taint of the illegal arrest. *People v. Simmons*, 372 Ill. App. 3d 735, 742 (2007); see *Wong Sun*, 371 U.S. at 486 (relevant inquiry is whether statement "was sufficiently an act of free will to purge the primary taint of the unlawful invasion"). The central question, therefore, is whether the statement was obtained through exploitation of the illegal arrest. *People v. Foskey*, 136 Ill. 2d 66, 85 (1990); see *Walls*, 220 Ill. App. 3d at 580 (where defendant's inculpatory statement was obtained subsequent to his illegal arrest, hearing was required to determine whether his statement was sufficiently attenuated from that illegal arrest). In answering this question, courts consider four factors: (1) whether the defendant received Miranda warnings, (2) the length of time between the arrest and the confession, (3) the existence of intervening circumstances, and (4) the purpose and flagrancy of the official misconduct. *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975); *Simmons*, 372 Ill. App. 3d at 742. Of these factors, the existence of intervening circumstances and the flagrancy of police misconduct are considered the most important. *Simmons*, 372 Ill. App. 3d at 742.

In the present case, we believe that there is no compelling indication to preclude the possibility of attenuation. The facts as presented leave open that possibility, insofar as Suave's statement to police would arguably constitute an intervening circumstance that would weigh in favor of a finding of attenuation, especially in light of the fact that the conditions under which defendant was detained were not overly harsh, in that he was not handcuffed and was given food, drink, and the opportunity to use the restroom. See *People v. Jennings*, 296 Ill. App. 3d 761, 766 (1998) (an intervening circumstance, untainted by illegality, serves to break the connection between the defendant's incriminating statement and the prior illegal arrest); *People v. Allen*, 249 Ill. App. 3d 1001, 1014-15 (1993) (intervening acquisition of probable cause can serve as an intervening circumstance). Whether there was attenuation under these circumstances is best determined at the trial court level. See *Walls*, 220 Ill. App. 3d at 580 (remanding for trial court to conduct attenuation hearing); *Young*, 206 Ill. App. 3d at 803-05 (remanding for attenuation hearing upon finding that defendant had been illegally arrested where he was segregated in an interview room for approximately 12 hours without probable cause); *Wallace*, 299 Ill. App. 3d at 21 (remand for attenuation hearing appropriate where defendant's inculpatory statement followed his illegal arrest but trial court made no explicit finding as to attenuation); *People v. Washington*, 363 Ill. App. 3d 13, 27 (2006) (appellate court's holding that defendant's inculpatory statement was obtained after an illegal arrest did not automatically necessitate exclusion of her statement but, rather, necessitated a remand for the trial court to conduct an attenuation hearing). In this case, because the trial court found that defendant was not illegally arrested, it did not consider whether sufficient attenuating circumstances existed so as to break the causal connection

between defendant's illegal arrest and his subsequent confession. We therefore remand for the trial court to determine this issue.

Nevertheless, in the interest of judicial economy, we shall proceed to consider defendant's remaining contentions of error, because, in the event that the trial court should find that defendant's confession was sufficiently attenuated from his illegal arrest that it should not be held inadmissible on such grounds, defendant's remaining contentions of error would still require resolution.

B. Claimed Failure to Issue Miranda Warnings to Defendant

Defendant next contends that his confession should not have been admitted at trial because the State failed to show that he was given proper Miranda warnings prior to his confession. As noted, Detective Gillespie, the detective to whom defendant made his confession, testified at the suppression hearing that he read defendant his Miranda rights. However, Detective Gillespie did not recite those rights from memory. Instead, over defense counsel's objection, he read them to the court from a copy of the FOP book. Defendant claims that this testimony constituted inadmissible hearsay and, in its absence, there was no testimony to show that defendant was properly Mirandized.

We disagree. In context, the Miranda warnings read by Detective Gillespie from the FOP book did not constitute hearsay. Hearsay is defined as an out-of-court statement offered for the truth of the matter asserted. *People v. Carpenter*, 28 Ill. 2d 116, 121 (1963). Conversely, where an out-of-court statement is not offered for the truth of the matter asserted, but only to prove that the statement was in fact made, it does not qualify as hearsay. *People v. Simms*, 143 Ill. 2d 154,

173 (1991); M. Graham, Cleary & Graham's Handbook of Illinois Evidence §801.5 (7th ed. 1999). In the present case, the Miranda warnings that Detective Gillespie gave to defendant would constitute verbal acts, in that the very fact that they were stated to defendant has legal significance. *State v. Lassor*, 555 A.2d 339, 348 (1989) ("The giving of Miranda admonitions is a verbal act. Testimony of a declarant who heard the Miranda admonitions is not introduced for the truth of the matter asserted but only to indicate that the words of admonition were given"); *State v. McClain*, 220 Kan. 80, 81-82, 551 P.2d 806, 807-08 (1976) (because the giving of Miranda warnings constitutes a verbal act, it was not hearsay for an officer to testify that he heard another, nontestifying officer read Miranda warnings to defendant). Accordingly, Detective Gillespie's reading of those warnings from the FOP book was not offered to demonstrate the truth of any factual content contained in those warnings but only to show that those warnings were given. See *McClain*, 220 Kan. at 82, 551 P.2d at 808 ("Clearly the state was not attempting to prove the truth of the matter stated, viz., the Miranda warnings. The evidence was offered for the purpose of establishing that the warnings were stated and explained to the defendant prior to the interview").

C. Limitation of Cross-Examination During Suppression Hearing

Defendant next contends that the trial court denied him his Sixth Amendment right of confrontation during the hearing on his motion to suppress when it limited his cross-examination of State witnesses by sustaining State objections to his counsel's questions. He specifically asserts that the trial court improperly limited three lines of inquiry on his part. First, the trial court restricted questioning regarding the number of law enforcement personnel visible to the

defendant when he was first approached by Officer Milutinovic. As shall be developed below, Officer Milutinovic testified that he and his partner were accompanied by two plainclothes officers when he encountered defendant on the morning after the shooting. Regarding those two plainclothes officers, counsel for defendant was not permitted to ask Officer Milutinovic, "Were they visible to the defendant?" Second, the trial court restricted questioning of Detective Gillespie regarding police interviews with the defendant and with the owner of the tow truck company which defendant worked for, at which Detective Gillespie was not present. Third, the trial court restricted questioning regarding various factors impacting the credibility of Suave's statement that implicated defendant in the shooting. The State responds with regard to each of these three contentions of error that defendant was not denied his rights where the questions at issue violated the rules of evidence.

We consider defendant's three contentions of error in turn. As shall be developed below, we find that defendant's right of cross-examination was not improperly curtailed by the trial court. In conducting our analysis of this issue, we are mindful that, although a criminal defendant's right to confrontation under the Sixth Amendment includes the right to cross-examine witnesses against him, the defendant's rights under the Confrontation Clause are not absolute. *People v. Kirchner*, 194 Ill. 2d 502, 536 (2000). Rather, " 'the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' " *Kirchner*, 194 Ill. 2d at 536, quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985). The scope and manner of cross-examination are within the sound discretion of the trial court, and its decision in this regard will

not be reversed unless there is a clear abuse of discretion resulting in manifest prejudice to the defendant. *People v. Enis*, 139 Ill. 2d 264, 295 (1990); *People v. Guyon*, 117 Ill. App. 3d 522, 532-33 (1983); *People v. Williams*, 230 Ill. App. 3d 761, 783 (1992).

1.

As previously noted, the first question which defendant contends was improperly curtailed was a question directed to Officer Milutinovic as to what defendant saw when Officer Milutinovic first approached him. In response to questioning from defense counsel, Officer Milutinovic stated that he and his partner were accompanied by two other officers, both in plainclothes, who were by their unmarked squad car parked approximately three or four feet in front of Officer Milutinovic's squad car. Counsel for the defendant then asked, "Were they visible to the defendant?" The State's objection to this question was sustained. Defendant contends that this was in error because the answer would have been relevant to his state of mind as to whether the encounter with Officer Milutinovic was a casual encounter from which he would have felt free to leave, or whether Officer Milutinovic's "request" was, in fact, one that he was not at liberty to refuse, which, in turn, would be relevant to whether he was under arrest as of that time. Although this issue has been rendered moot by our finding that, regardless of the circumstances under which defendant originally came to the police station, his subsequent 12-hour stay constituted an illegal arrest, we nevertheless consider defendant's contention of error because the circumstances under which he was brought to the station might have some bearing upon the purpose and flagrancy of official misconduct, which the court would need to consider on remand as part of its attenuation analysis. *Brown*, 422 U.S. at 603.

Although the question asked by defendant's counsel – "Were they visible to the defendant?" – could be construed in two ways, namely, as a question about this specific defendant's individual perception or as a question about whether a person at defendant's location would have been able to see the officers, we find that the question would be inadmissible under either interpretation. If, on the one hand, counsel for defendant was asking Officer Milutinovic to comment on defendant's subjective perception, that is, whether defendant actually saw the plainclothes officers, such information would be inadmissible as beyond Officer Milutinovic's knowledge. M. Graham, Cleary & Graham's Handbook of Illinois Evidence §602.1 (7th ed. 1999) ("Admissible testimony is limited to matters of which the witness has personal knowledge through her own senses"); see *Enis*, 139 Ill. 2d at 294-95.

If, on the other hand, counsel for defendant was seeking to elicit an opinion from Officer Milutinovic as to whether he thought a person at defendant's location would have been able to see the officers, such opinion would have been superfluous, since he was able to testify as to the facts underlying any such opinion on his part. Lay witnesses may testify as to opinions where "the facts could not otherwise be adequately presented or described to the fact finder in such a way as to enable the fact finder to form an opinion or reach an intelligent conclusion." *People v. Novak*, 163 Ill. 2d 93, 102 (1994), abrogated on other grounds by *People v. Kolton*, 219 Ill. 2d 353 (2006); see, *e.g.*, *People v. Reed*, 333 Ill. 397, 401 (1929) (where defendant was charged with destroying property by means of dynamite, witnesses who were familiar with the odor were properly allowed to opine that they smelled dynamite at the scene of the crime, under the reasoning that "Most persons would probably find it difficult to describe the odor of a rose,

whisky, beer, or limburger cheese, but this difficulty could scarcely be regarded as affecting the value of their testimony that they were familiar with and recognized the particular odor"); *People v. Peter*, 220 Ill. App. 3d 626, 631 (1991) (customs agent allowed to testify that a flash of panic crossed defendant's face when agent was about to re-inspect canister containing contraband, since "[e]xpressions on a person's face are certainly difficult, if not impossible, to explain or reproduce and we are generally accustomed to, and capable of, understanding and interpreting such expressions in our everyday life"). By contrast, where the underlying facts can be described, such that the finder of fact can draw its own conclusions from those underlying facts as well as the witness can, the opinion of the witness becomes superfluous and is properly excluded. *People v. Linkogle*, 54 Ill. App. 3d 830, 833 (1977) (improper for mother to testify as to what her daughter meant when she said she saw defendant "wriggle his thing"); see M. Graham, Cleary & Graham's Handbook of Illinois Evidence §701.1 (7th ed. 1999) ("Opinions interpreting an event that can be interpreted equally well by the trier of fact are not helpful.").

The instant case falls into this latter category, because the underlying facts upon which Officer Milutinovic's opinion would be based are directly accessible to the finder of fact by description. As previously stated, defense counsel was allowed to elicit testimony from Officer Milutinovic that the plainclothes officers were by their car only three or four feet away from Officer Milutinovic's car, which in turn was right in front of defendant's truck. Given this testimony, the finder of fact would not be in an inferior position to Officer Milutinovic in drawing a conclusion as to the visibility of the officers. Officer Milutinovic's opinion as to the visibility of the officers would not convey any information to the court that would not otherwise

be describable. Accordingly, the trial court did not abuse its discretion in excluding such opinion. See *Novak*, 163 Ill. 2d at 102.

2.

Defendant further appeals from the court's refusal to permit questioning of Detective Gillespie regarding interviews that were conducted by other police outside of Detective Gillespie's presence. As noted, defendant arrived at the police station at approximately 7:30 a.m., but Detective Gillespie did not personally interview defendant until approximately 12 hours later, at which point he gave defendant Miranda warnings and then defendant confessed. During defendant's cross-examination of Detective Gillespie, the following colloquy occurred:

"Q. And you know that [Detectives Thaxton and Fuller] interviewed Noel at sometime prior to you ever interviewing Noel, correct?

A. Correct.

***

Q. And they questioned the defendant as to where he was at the time of the homicide?

MR. WILLIAMS: Objection.

THE COURT: Sustained.

Q. They questioned him relative to the homicide?

MR. WILLIAMS: Objection.

THE COURT: Sustained."

Defendant contends that the trial court's exclusion of this questioning was in error, because, in

his words, "the inquiry was relevant to whether he was interrogated about the murder before he was given Miranda warnings" at a time when, defendant claims, he was in custody. We consider this issue here because it is likely to arise on remand, since one of the factors relevant to the attenuation analysis is the purpose and flagrancy of official misconduct (*Brown*, 422 U.S. at 603), to which police questioning of defendant regarding the murder prior to their acquisition of probable cause would be relevant. See *People v. Klimawicze*, 352 Ill. App. 3d 13, 23 (2004) (finding no evidence of flagrant police misconduct where murder suspect was not "incessantly interrogated" about the murder during her illegal detention and was not mistreated but was given food, drink, and opportunity to use the restroom).

However, Detective Gillespie was not present when Detectives Thaxton and Fuller interviewed defendant and therefore had no firsthand knowledge as to what transpired during that interview. See *Enis*, 139 Ill. 2d at 294-95 (admissible testimony limited to that of which witness has personal knowledge). Consequently, in all likelihood, Detective Gillespie could not lay a foundation to show that he learned what transpired during that interview, either through conversation with the other detectives or through reading their reports, either of which would have shown his knowledge to be based upon inadmissible hearsay. *Carpenter*, 28 Ill. 2d at 121; *People v. Shinohara*, 375 Ill. App. 3d 85, 113 (2007) (police reports not admissible under business records exception to rule against hearsay).

Moreover, in any event, there is little, if any, likelihood that any prejudice could have resulted to defendant from the trial court's decision to limit the questioning of Detective Gillespie in this regard, because Detectives Fuller and Thaxton, both of whom had personal

knowledge as to what happened during their interview of defendant, testified as to the contents of that interview. Detective Fuller testified that he only asked defendant questions as to Choco's whereabouts and further stated that "My interest in speaking with Noel was merely as a means of hopefully finding Andre [Choco]." Defendant had full opportunity to cross-examine him on these statements. Similarly, Detective Thaxton, who was called to the stand by defendant, testified that the subject of the interview was whether defendant knew Choco and if he knew where Choco might be found. In light of this testimony, defendant has no basis to claim that the curtailment of his questioning of Detective Gillespie regarding the interview conducted by Detectives Fuller and Thaxton caused him any prejudice.

Along similar lines, defendant also contends that the trial court erred in preventing him from eliciting testimony from Detective Gillespie regarding an interview, outside of Detective Gillespie's presence, between a fellow officer and the owner of the tow truck company that defendant worked for. Specifically, defendant objects to the exclusion of the following question:

> "Q. He [the owner of the tow truck company] was questioned concerning whether the defendant had been working all that previous night, correct?
>
> MR. WILLIAMS: Objection.
>
> THE COURT: Sustained."

However, defendant does not explain what relevance the answer to this particular question might have had. Moreover, in any case, this question is inadmissible for the same reasons as the previous one, namely, that Detective Gillespie was not present at the interview in question and therefore could not testify to it as a matter within his personal knowledge, nor could he have

testified as to what he might have learned regarding that interview from other officers, insofar as such testimony would have constituted inadmissible hearsay.

3.

Defendant's final contention of error concerns various questions he asked regarding Suave, whom Detective Gillespie interviewed prior to interviewing defendant and who made a statement that implicated defendant in the shooting. As noted, Detective Gillespie testified that Suave was in custody at the time for a matter unrelated to the shooting, that is, the fact that an unregistered weapon had been found at the DeJesus residence where he was staying. Defendant sought to argue at the suppression hearing that Suave's statements lacked sufficient reliability to provide probable cause for defendant's arrest. To advance this argument, counsel for defendant asked a series of questions that the State managed to block, namely, if Detective Gillespie knew whether Suave had a criminal record, if Detective Gillespie knew whether Suave was a credible person, how long Suave had been in custody when Detective Gillespie interviewed him, whether Suave had been charged with possession of the weapon, and what the basis was for putting Suave in custody for possession of the weapon. Defendant argues that the exclusion of all of these questions was erroneous, since they are relevant to the issue of whether the police had reason to trust Suave's statement and whether Suave had an incentive to falsely implicate defendant.

This issue must be addressed because of its significance to the attenuation analysis on remand. As noted, in considering whether a confession made by a suspect in custody is admissible notwithstanding an earlier arrest, one factor that courts consider is the existence of intervening circumstances that would "break the taint" of the illegal arrest. *Simmons*, 372 Ill.

App. 3d at 743; see *Brown v. Illinois*, 422 U.S. at 603-04. The State contends that Suave's statement to Detective Gillespie constitutes such an intervening circumstance, because, according to the State, it created probable cause for defendant's arrest. Illinois courts have found that the emergence of probable cause, when it arises after defendant's illegal arrest, but from a source independent of that illegal arrest, is a factor weighing heavily in favor of attenuation. *People v. Morris*, 209 Ill. 2d 137, 159 (2004) (explaining that intervening probable cause weighs heavily in favor of attenuation because "it would place an unreasonable burden on the police to require officers to release an illegally arrested defendant and then, based upon probable cause obtained after the illegal arrest, arrest him again when he reached the sidewalk"), overruled in part on other grounds, *People v. Pitman*, 211 Ill. 2d 502, 513-14 (2004); *People v. Salgado*, 396 Ill. App. 3d 856, 861 (2010) (the discovery of new evidence against a defendant who was originally illegally detained "may purge the taint of an illegal arrest by providing the probable cause that was previously lacking"); *Klimawicze*, 352 Ill. App. 3d at 20-21 (acquisition of probable cause a significant factor in attenuation analysis); *People v. Pierson*, 166 Ill. App. 3d 558, 564 (1988) ("where the police acquire probable cause after an arrest but before a statement is given, 'one could question the wisdom of requiring police to go through the formality of releasing [the defendant], only to rearrest him outside the jailhouse door' "), quoting *People v. Lekas*, 155 Ill. App. 3d 391, 414 (1987). Defendant, on the other hand, contends that Suave's statement failed to provide probable cause because, under the circumstances, Suave was not a credible informant. Defendant further argues that the line of questioning excluded by the trial court would be relevant in ascertaining Suave's credibility and, therefore, to the issue of probable

cause.

It is axiomatic that the requirement of probable cause is met where " 'a reasonable and prudent man, having the knowledge possessed by the officer at the time of the arrest, would believe the defendant committed the offense.' " *People v. Tisler*, 103 Ill. 2d 226, 237 (1984), quoting *People v. Wright*, 41 Ill. 2d 170, 174 (1968). Information relied upon to establish probable cause must be supported by some indicia of reliability. *People v. James*, 118 Ill. 2d 214, 224 (1987); see *People v. Armstrong*, 318 Ill. App. 3d 607, 612 (2000) (anonymous phone calls identifying defendant as the culprit lacked the indicia of reliability required for a finding of probable cause). In cases where police are acting upon information that has been supplied to them by an informant, such as the present case, the standard to be applied is "whether the information, taken in its totality, and interpreted not by technical legal rules but by factual and practical commonsense considerations, would lead a reasonable and prudent person to believe that the person stopped had committed an offense." *People v. Adams*, 131 Ill. 2d 387, 396-97 (1989); see also *Illinois v. Gates*, 462 U.S. 213, 239 (1983) (the existence of probable cause is not susceptible to any rigid test but, rather, is a "practical, common-sense decision" based upon the totality of the circumstances, including the veracity of persons supplying hearsay information). In articulating this totality of the circumstances test, the *Adams* court rejected any bright-line distinction between citizen informants and paid informants. *Adams*, 131 Ill. 2d at 397. Although the court acknowledged that such a distinction could be relevant in determining the reliability of an informant, insofar as greater credibility has traditionally been accorded to informants who are witnesses to crimes and act out of the desire to aid the police in law

enforcement rather than the desire for personal gain, the court stressed that, in the end, the existence of probable cause must be "based on an evaluation of *all* of the information available, including the source of the information." (Emphasis added.) *Adams*, 131 Ill. 2d at 398.

Applying the totality-of-the-circumstances test articulated in *Adams* to the present case, we find that the questions excluded by the trial court as to whether Suave had a criminal record, the length of time that he had been in custody, whether he had been formally charged, and the basis for putting him in custody for possession of the weapon could have been relevant to the issue of probable cause and, therefore, that it was error to exclude them. With respect to defendant's question as to whether Suave had a criminal record, courts consider the criminality of an informant to be a relevant factor, though not a decisive one, in the probable cause analysis. *People v. Hood*, 262 Ill. App. 3d 171, 175-76 (1994) (one factor weighing in favor of probable cause finding was the fact that informants, unlike those in case cited by defendant, were citizen-informants instead of informants "from the criminal milieu"). Moreover, the length of time that Suave had been in custody, whether he had been formally charged, and the basis for putting him in custody could all have been relevant to the question of whether Suave believed he would benefit personally from cooperating with police, which, in turn, would impact upon the reliability of his statement.[3] See *People v. Nitz*, 371 Ill. App. 3d 747, 752 (2007) (information could be

[3] We note that, although the trial court excluded defendant's question as to the length of time that Suave had been in custody, it did allow other testimony from which the answer to that question could be inferred. According to Detective Gillespie, Suave was brought to the police station at approximately 11 a.m. on February 21, 2005. Suave gave his statement to Detective

viewed as less reliable where it came from a person who had recently been arrested "and had reason to believe that supplying information to the police might redound to his benefit in any criminal proceedings against him"); *People v. Hall*, 164 Ill. App. 3d 770, 776 (1987) (acknowledging that the fact that informant was an inmate, while not dispositive as to the reliability of his statement, could arguably render his motive for cooperating with police "questionable"); but see also *Lekas*, 155 Ill. App. 3d at 410 ("The mere fact that an informant is himself a suspect in a homicide investigation, which would give him an incentive to cooperate with the police, does not automatically destroy the reliability of his statements implicating another [citation]; rather, it is simply a factor to be considered in assessing the totality of the circumstances").

In this regard, we find it significant that the State offers no explanation or argument as to why this line of questioning by defendant would not be relevant to the issue of Suave's credibility as an informant. Rather, the State's response on this issue is to distinguish *Armstrong*, 318 Ill. App. 3d at 612, the sole case cited by defendant, in which the court found that an anonymous and uncorroborated phone call by an informant was insufficient to constitute probable cause. The State points out that Suave, unlike the informant in *Armstrong*, was not anonymous but was a known person in custody. However, this fact is not, by itself, dispositive of his credibility as an informant; such rigid distinctions were rejected by our supreme court in

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Gillespie at approximately 7:15 p.m. on the evening of that same day. It would therefore appear that Suave had been in custody for roughly eight hours. Thus, the trial court's error in excluding defendant's initial question upon this point would, in any event, have been harmless.

Adams. Rather, as noted, courts are required to take the totality of the circumstances into account, and an informer's criminality and incentive to cooperate with police for personal gain are significant circumstances in this determination. See *Hood*, 262 Ill. App. 3d at 175; *Nitz*, 371 Ill. App. 3d at 752; *Lekas*, 155 Ill. App. 3d at 410.

However, we find no error in the trial court's exclusion of defendant's query as to whether Detective Gillespie believed Suave to be a credible person. Detective Gillespie's subjective opinion as to Suave's credibility would not be controlling, because the probable cause standard is objective; that is, it hinges upon what a reasonable officer in Detective Gillespie's shoes would have believed, not upon Detective Gillespie's actual beliefs at the time. See *Tisler*, 103 Ill. 2d at 237; *Adams*, 131 Ill. 2d at 396-97.

In any event, to the extent that the trial court erred in excluding the foregoing line of questioning at the suppression hearing, such error does not require any change in our disposition of the case, because we have already found that the court's ruling at that suppression hearing cannot stand, insofar as it was premised upon its erroneous finding that defendant was not subject to an illegal arrest. However, as noted, this issue will in all likelihood arise on remand, since it impacts Suave's credibility as informant, which, in turn, impacts upon whether there was probable cause which would help to purge the taint of defendant's illegal arrest. *Morris*, 209 Ill. 2d at 159; *Salgado*, 396 Ill. App. 3d at 861; *Klimawicze*, 352 Ill. App. 3d 13; *Pierson*, 166 Ill. App. 3d at 564; *Lekas*, 155 Ill. App. 3d at 414. Thus, on remand, we instruct the trial court to permit questioning that would be relevant to the reliability of Suave's statement and, therefore, to the issue of whether that statement created probable cause, to the extent that such questioning

otherwise comports with the rules of evidence.

D. Rejection of Defendant's Modified Jury Instruction on Prior Inconsistent Statements

Defendant next contends that the trial court erred by refusing to submit to the jury a modified jury instruction tendered by defendant on the subject of prior inconsistent statements. As discussed, we consider this issue, as well as the other issues of trial error raised by defendant because, if the court should find on remand that his confession was sufficiently attenuated from his illegal arrest to be admissible at trial, then defendant's claims of trial error would require resolution.

The instruction tendered by the court on this issue was the standard Pattern Instruction, IPI 3.11:

> "The believability of the witness may be challenged by evidence that on some former occasion he made a statement that was not consistent with his testimony in this case. Evidence of this kind ordinarily may be considered by you only for the limited purpose of deciding the weight to be given the testimony you heard from the witness in this courtroom." Illinois Pattern Instruction (Criminal), no. 3.11 (4th ed. 2000).

The modified instruction requested by defendant was as follows:

> "The believability of the witness may be challenged by evidence that on some former occasion he *failed to make a statement when he had the opportunity*. Evidence of this kind may be considered by you only for the limited purpose of deciding the weight to be given the testimony you heard from the witness in this courtroom." (Emphasis added.)

Defendant argues that this was a proper instruction because it would aid the jury in their

interpretation of his brother Joel's testimony. As noted, Joel testified at trial that, after the shooting, defendant entered the house, handed him a gun, and told him to "wrap it." However, during cross-examination, Joel admitted that when police first came to his house following the shooting, Joel did not tell them that his brother handed him a gun, nor, in fact, did he tell them anything about his brother. It was only after he was arrested that he made statements implicating his brother in the shooting. Defendant therefore contends that the jury needed to be specifically instructed regarding Joel's failure to make a statement to police regarding defendant when the police first arrived at his house.

The standard for determining the adequacy of jury instructions is whether those instructions fully, fairly, and adequately informed the jury of the relevant legal principles. *Thompson v. Abbott Laboratories*, 193 Ill. App. 3d 188, 200 (1990). However, the giving of jury instructions is entrusted to the discretion of the trial court, and the court's decision to give or withhold a certain instruction will not be overturned on appeal absent an abuse of that discretion. *Schultz v. Northeast Illinois Regional Commuter Railroad Corp.*, 201 Ill. 2d 260, 273 (2002); *Trimble v. Olympic Tavern, Inc.*, 239 Ill. App. 3d 393, 401 (1993). Such an abuse only occurs where the trial court's faulty instructions clearly misled the jury and caused serious prejudice to the appellant. *Schultz*, 201 Ill. 2d at 273; *Thompson*, 193 Ill. App. 3d at 200; *Tabe v. Ausman*, 388 Ill. App. 3d 398, 409 (2009) (circuit court abused its discretion in granting new trial to plaintiff as a result of allegedly faulty instruction where plaintiff made no showing that he was prejudiced by that instruction).

Supreme Court Rule 451(a) states that a trial court "shall" use the current IPI when it is

applicable in a criminal case, unless the court determines that it is not an accurate statement of law. 177 Ill. 2d R. 451(a). Our supreme court has applied this rule to hold that, where the applicable IPI instruction would have stated the law both clearly and accurately with respect to the issues under consideration, the trial court erred by giving a non-IPI instruction. *People v. Durr*, 215 Ill. 2d 283, 300 (2005). The *Durr* court explained, "Trial judges should not take it upon themselves to second-guess the drafting committee where the instruction in question clearly applies." *Durr*, 215 Ill. 2d at 300. This is because Illinois pattern instructions have been " 'painstakingly drafted *** so as to clearly and concisely state the law.' " *People v. Pollock*, 202 Ill. 2d 189, 212 (2002), quoting *People v. Haywood*, 82 Ill. 2d 540, 545 (1980). Thus, where both the IPI instruction and a tendered non-IPI instruction are correct statements of the law, the court should give the IPI instruction where it adequately instructs the jury on the theory of the case and does not unduly highlight any particular testimony. *People v. Monroe*, 366 Ill. App. 3d 1080, 1089 (2006); see *Durr*, 215 Ill. 2d at 300.

In the present case, defendant does not assert that IPI 3.11 is an incorrect statement of law with regard to Joel's omission of any statement implicating his brother in his first encounter with the police after the shooting. Nor would we agree with any such assertion, since an omitted statement may be the equivalent of a contradictory statement, under the principle that, if a person fails to make a statement at a time when it would be natural for him to do so if it were true, its deletion is tantamount to an attestation that such statement is not true. See *People v. Henry*, 47 Ill. 2d 312, 320-21 (1970) (if a witness asserts a fact at trial, but failed to assert it at an earlier time when it would have been natural for him to do so, that omission may be used as a prior

inconsistent statement for purposes of impeachment). Defendant nevertheless contends that his proposed modified instruction is superior with regard to the facts of the instant case, because it explicitly mentions omissions and would therefore focus the jury's attention on Joel's omission. However, while defendant's tendered instruction may be more specific in this regard, that specificity is also its drawback, because it would act to create more emphasis on Joel's omission than it would otherwise be entitled to in the eyes of the jury. See *Monroe*, 366 Ill. App. 3d at 1089 (defendant's tendered instruction, while more specifically tailored to the facts of the case, was properly rejected where it would have unduly highlighted testimony favorable to defendant). Defendant has offered no cases supporting the proposition that he is entitled to a non-IPI instruction where the standard IPI instruction adequately covers the relevant legal principles, albeit with less detailed specificity than the proposed modified instruction tendered by defendant, and our research has not disclosed any. Accordingly, we find that, under Rule 451(a), the trial court did not abuse its discretion in giving the IPI instruction instead of the variation submitted by defendant. 177 Ill. 2d R. 451(a) (trial court "shall" use current IPI instruction where it is an accurate statement of law); *Durr*, 215 Ill. 2d at 300.

Defendant, however, asserts that "The court is required to give an instruction if the instruction asserts a proper proposition of law." In support, he cites *People v. Robinson*, 14 Ill. App. 3d 135 (1973). Yet *Robinson* does not so hold. Indeed, *Robinson* supports the State's position. The defendant in *Robinson*, who was charged with murder, contended that the trial court erred in rejecting her tendered non-IPI instruction on self-defense and in giving the IPI instruction instead. *Robinson*, 14 Ill. App. 3d at 140. The *Robinson* court disagreed, explaining,

"The given instruction on self-defense clearly, concisely and impartially stated the applicable law; moreover, it was the pertinent Illinois Pattern Instruction which was required to be given under Rule 451." *Robinson*, 14 Ill. App. 3d at 140. Thus, contrary to defendant's contention, even though it would appear from the *Robinson* decision that the defendant's non-IPI instruction in that case was a correct statement of law, the trial court acted correctly in refusing that instruction and, in its place, giving the IPI instruction pursuant to Rule 451(a).

E. Testimony That Defendant's Fingerprints Were on TEC-9 Pistol Not Used in Shooting

Defendant contends that the trial court erred in admitting testimony that his fingerprints were found on the magazines of the TEC-9 pistol recovered by police at his house on the day of the shooting, because, he argues, such testimony was both irrelevant and prejudicial.

As noted, police recovered two pistols from defendant's house on that day. The first was a Ruger pistol found inside an access panel to the attic on the second floor of the house. Forensic testimony at trial indicated that this Ruger pistol was the weapon used to fire 10 cartridges found at the crime scene and bullets recovered from Gio's body during his autopsy. However, defendant's fingerprints were not found on that weapon. The second was a TEC-9 pistol found inside a bag on the roof of the house. There was no allegation that this pistol was used in the shooting, yet the court allowed testimony that defendant's fingerprints were found on its magazines. It is this testimony which defendant now claims should have been excluded.

In considering defendant's contention, we are mindful that evidentiary rulings are entrusted to the sound discretion of the trial court, and they will not be disturbed on appeal absent an abuse of that discretion. *People v. Harvey*, 211 Ill. 2d 368, 392 (2004). The standard

for finding an abuse of discretion is high; an abuse of discretion occurs only where no reasonable person would take the view adopted by the trial court. *In re Leona W.*, 228 Ill. 2d 439, 460 (2008). Moreover, even where an evidentiary ruling constitutes an abuse of discretion, it will not warrant reversal unless the record indicates that it has caused "substantial prejudice affecting the outcome of the trial." *Leona W.*, 228 Ill. 2d at 460.

In this case, defendant objects to the introduction of the evidence regarding his fingerprints on the TEC-9 pistol on grounds of relevancy. Evidence is relevant if it tends to make any fact that is of consequence to the determination of the action more probable than it would be without that evidence. *People v. Lewis*, 165 Ill. 2d 305, 329 (1995). However, even relevant evidence may be excluded if, in the discretion of the trial court, its probative value is substantially outweighed by its prejudicial effect. *Lewis*, 165 Ill. 2d at 329.

We note in passing that the testimony that defendant complains of could arguably be relevant to the issue of defendant's credibility. During cross-examination by the State, defendant testified that he could not recall ever having seen the TEC-9 pistol recovered by police at his house, and, in fact, at the time he made his inculpatory statements to detectives on February 21 and 22, 2005, he did not know what a TEC-9 pistol was. The fact that defendant's fingerprints were found on the TEC-9 pistol could therefore be considered relevant to defendant's credibility, though it would seem to violate the rule that extrinsic evidence cannot be introduced to impeach a witness on a collateral matter.

However, we need not resolve this issue, because even if the introduction of this evidence was in error, any such error was harmless in light of the overwhelming evidence of defendant's

guilt adduced at trial. See *Leona W.*, 228 Ill. 2d at 460 (reversal of judgment due to evidentiary ruling not warranted unless defendant can show substantial prejudice affecting the outcome of the trial). Defendant was linked to the crime not only by the testimony of his brother, but by the murder weapon that was recovered by detectives from defendant's home. It was undisputed that, on the night of the shooting, defendant got into a verbal dispute with the three victims wherein he told them not to stand in front of his house. Defendant's brother Joel testified that, some time after this dispute, he realized that his brother had left the house, and shortly thereafter, he heard gunshots being fired from around the side of the house. Joel then testified that his brother appeared at the back door of the house, looking nervous and holding a gun, which he gave to Joel, instructing him to "wrap it," that is, get rid of it. Joel stated that he threw the gun into a hole in the ceiling of the second floor of the attic. This account is corroborated by the testimony of forensic investigator Fanelli, who recovered a Ruger pistol from an access panel to the attic on the second floor of defendant's house. Forensic scientist Zielinski testified that this pistol was the same weapon used to fire ten spent cartridges found at the scene of the shooting, as well as two bullets recovered from Gio's body by the Cook County medical examiner's office during his autopsy. In light of this body of incriminating evidence, we cannot say that the testimony regarding defendant's fingerprints on the TEC-9 pistol caused substantial prejudice that would have affected the outcome of the trial.

This case is analogous to the case of *People v. Maldonado*, 240 Ill. App. 3d 470, 479 (1993), where the appellate court held that the improper admission of a weapon unrelated to the crime did not warrant reversal. In *Maldonado*, defendant was charged with first degree murder

for the shooting death of the victim. *Maldonado*, 240 Ill. App. 3d at 473. At trial, the State offered into evidence not only the murder weapon, but a rifle found in the same bag as the murder weapon. *Maldonado*, 240 Ill. App. 3d at 478. The appellate court found that the admission of the rifle was improper, since there was no evidence that would suggest that the rifle was connected to the murder. *Maldonado*, 240 Ill. App. 3d at 479. Nevertheless, the Maldonado court held that this error did not warrant reversal, stating: "Although it was error to admit the rifle and its accessories, in light of the overwhelming evidence against defendant, we believe that the error was harmless because his conviction would stand even absent the improper admission of the rifle and its accessories." *Maldonado*, 240 Ill. App. 3d at 479. Likewise, in the present case, even if the introduction of the testimony that defendant's fingerprints were found on the TEC-9 was in error, any such error would be harmless and not grounds for reversal.

Defendant, however, contends that, in his words, "evidence of other crimes is very prejudicial," citing *People v. Lindgren*, 79 Ill. 2d 129 (1980). However, *Lindgren* is inapposite. In *Lindgren*, defendant was on trial for armed robbery and murder, but the trial court allowed "extensive testimony" regarding an arson that was allegedly committed by defendant. *Lindgren*, 79 Ill. 2d at 137. The *Lindgren* court found that this extensive evidence of a collateral crime was error requiring reversal, because it might have induced the jury to "convict him only out of a belief that he deserves punishment." *Lindgren*, 79 Ill. 2d at 141.

The complained-of testimony in the instant case is distinguishable in two ways. First, it does not constitute other crimes evidence; there was no suggestion at trial that defendant committed any crime with the TEC-9 pistol on which his fingerprints were found. Second, it

was a minor part of the evidence presented by the State and therefore unlikely to influence the jury in light of all the other evidence adduced at trial, unlike the improper evidence in *Lindgren* which was characterized by the court on appeal as "extensive." Accordingly, we do not find *Lindgren* to be controlling in the instant case.

F. Limitation of Defendant's Testimony Regarding His Brother Joel

Defendant contends that the trial court erred by not allowing him to fully develop his defense that he falsely confessed in order to protect his brother. As noted, defendant testified at trial that, at the time he made his confession, he was aware that his brother Joel was in police custody. His theory of defense, as developed in his brief, was that he feared that his brother, when pressured by police, would confess to the crime, since his brother was "partially retarded." To forestall such an outcome, defendant asserts that he falsely confessed to the crime before his brother could.

During trial, defendant's counsel attempted to elicit testimony to this effect from defendant as follows:

"Q. Did you ultimately when you were arrested give a statement to the police admitting the shooting?

A. Yes.

Q. Why did you do that?

A. To protect my brother.

Q. What is your brother's general condition as to being smart, the general situation?

MR. BUTINAS [counsel for the State]: Objection.

THE COURT: Sustained.

Q. Why did you want to protect your brother?

A. He ain't smart. He's got mental problems.

MR. BUTINAS: Objection.

THE COURT: I'll let the answer stand.

***

Q. Did you have a conversation with any police officer before you made the admission?

A. Yes.

Q. What were you told, if anything, about your brother?

MR. BUTINAS: Objection.

THE COURT: Overruled. He be [*sic*] answer.

A. That he was also arrested.

Q. What was your feelings about what might happen to your brother?

MR. BUTINAS: Objection.

THE COURT: Sustained."

Defendant argues that the trial court's exclusion of questions during this exchange was improper because it prevented him from adequately developing his theory of defense. The State, on the other hand, argues that exclusion was within the court's discretion because the two questions that it objected to were ambiguous and vague and because defendant was afforded

adequate opportunity to present his theory to the jury. We agree with the State.

As noted above, we review the trial court's evidentiary rulings on an abuse of discretion standard (*Harvey*, 211 Ill. 2d at 392), and, even where the trial court has abused its discretion, such abuse only warrants reversal where it has caused substantial prejudice to defendant (*Leona W.*, 228 Ill. 2d at 460).

In the present case, the first question excluded by the court was, "What is your brother's general condition as to being smart, the general situation?" Defendant cannot claim any prejudice from the exclusion of this question, because defense counsel was then allowed to rephrase his question in order to elicit testimony from defendant that his brother "ain't smart" and had "mental problems." See *Leona W.*, 228 Ill. 2d at 460 (defendant seeking reversal due to evidentiary ruling must show prejudice resulting therefrom).

The second question excluded by the trial court – "What was your feelings about what might happen to your brother?" – was both vague and ambiguous. The trial court may disallow a question where it is "ambiguous, imprecise, and necessarily calls for a vague answer." *People v. Ward*, 19 Ill. App. 3d 833, 839 (1974); see also *People v. Gacy*, 103 Ill. 2d 1, 77 (1984) (not error for trial court to preclude asking of question that was "vague and ambiguous"). Thus, for instance, in *Ward*, the trial court did not err in excluding the opinion of a lay witness as to whether defendant was "acting like he was crazy" at the time of the offense. *Ward*, 19 Ill. App. 3d at 839. Although defendant argued that such testimony would have been pertinent to his defense of insanity, the *Ward* court found the question to be excessively vague. *Ward*, 19 Ill. App. 3d at 839. It further noted that defense counsel did not attempt to clarify or rephrase the

question. *Ward*, 19 Ill. App. 3d at 839. Likewise, in the present case, if defense counsel sought to elicit testimony that defendant feared that his brother might falsely confess to police, counsel could have asked a more precise question than defendant's "feelings" as to "what might happen to your brother," which could encompass a wide range of answers depending on how it was interpreted. See *Gacy*, 103 Ill. 2d at 77 ("It was not improper for the circuit court to preclude the asking of the question which might require a variety of answers depending on how it was interpreted"). We therefore cannot say that the trial court abused its discretion in disallowing this question.

Moreover, we note that, even if such exclusion were in error, there would be no resultant prejudice to defendant, since counsel for defendant was allowed to develop his theory of defense during closing argument based upon the facts in evidence. As has been discussed, defendant was allowed to testify that he desired to protect his brother, who "ain't smart" and had "mental problems," and whom he was aware was being held in the police station at the time of defendant's interview with Detective Gillespie. Defense counsel was able to use these facts in evidence during his closing words to the jury to argue that defendant made a false confession for his brother's sake:

> "[Defendant] is called by his brother and he is told that somebody has been shot. He knows his brother's not too smart and not completely all there. He does a macho thing, my Hispanic client. He says, I'm going to take the heat. I'm going to protect my brother.
>
> ***

> Why would a man who's been told he can keep his mouth shut and protect himself, why would he talk to the police and make an admission to a murder unless the reason is just as he said when he got on the stand here, he was taking the heat to protect my brother."

Since defendant was freely allowed to argue his brother's mental infirmities and his desire to protect him as an explanation for his prior confession, we cannot say that defendant was prejudiced by the complained-of exclusion.

G. Claimed Improper Questioning of Defendant by Prosecutor

Defendant claims that it was error for counsel for the State to question him about his failure at various stages of the proceeding against him to assert that his confession was false.

The complained-of questions are as follows. During his cross-examination of defendant, counsel for the State asked defendant whether, after he confessed involvement in the shooting to detectives at the police station, he then told those detectives that it was a false confession and that he was covering for his brother. Defendant said that he did not. Counsel for the State asked whether he said anything about the falsity of his confession to the judge at his bond hearing or the judge presiding over his arraignment. Defendant again said that he did not. Counsel for the State then asked him whether this was the first time that he was standing up in court to assert that he was innocent, and defendant said that it was.[4]

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[4] Counsel for the State also asked defendant whether he previously told his attorney that his confession was false. However, defense counsel objected on grounds of attorney-client privilege, and his objections were sustained. The propriety of this specific line of questioning is

However, counsel for defendant made no objection to these questions at trial. Any objection to the propriety of such questions is therefore forfeited. It is well established that in order to properly preserve an issue for review, defendant is required to raise an objection at trial and in a written posttrial motion, and failure to do so will result in forfeiture of that issue on appeal. *People v. Allen*, 222 Ill. 2d 340, 350 (2006), citing *People v. Enoch*, 122 Ill. 2d 176, 186 (1988); see *People v. Herron*, 215 Ill. 2d 167, 175 (2005) ("The so-called waiver principle encourages the defendant to raise issues before the trial court, allowing the court to correct its own errors before the instructions are given, and consequently disallowing the defendant to obtain a reversal through inaction").

It is true that, under the plain error doctrine, as codified in Supreme Court Rule 615(a), "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." 134 Ill.2d R. 615(a)); see *People v. Whitehead*, 116 Ill. 2d 425, 448 (1987) (under the plain error doctrine, issues that would ordinarily be waived may be raised on appeal where the evidence is closely balanced or the error is of such magnitude that defendant was denied a fair trial). However, defendant makes no attempt in his briefs on appeal to argue that the plain error doctrine should apply to the instant case. Supreme Court Rule 341(h)(7) provides, with regard to appellate briefs, that "Points not argued are waived ***." 210 Ill. 2d R. 341(h)(7). Accordingly, we need not reach this issue. See *People v. Ferral*, 397 Ill. App. 3d 697, 715-16 (2009) (holding that issue was forfeited where defendant failed to raise it in the trial court and, on appeal, did not address his failure to raise it in the trial court or ask the

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not raised by the parties on appeal.

appellate court to review it for plain error).

H. Limitation of Defense Closing Argument

Defendant contends that reversal is required because the trial court improperly limited defense counsel's closing argument to the jury. He cites two statements to which the trial court sustained objections. The first statement, concerning the alleged murder weapon, was as follows:

> "We don't know if there were fingerprints of the defendant's brother on this weapon, because for some unexplainable reason, for some unexplainable reason, the police department and the State's Attorney's office failed in their obligation."

The second statement was as follows:

> "When you go back to the jury room and you deliberate and you think of the State's burden to prove the defendant guilty beyond a reasonable doubt, if you have a question, I can't come and answer it. But one of you, I will ask you, stand up on my behalf. *** I'd ask you to make the arguments you think I would have made."[5]

Defendant asserts in his brief, with no further argument, that "[t]he arguments made by defense counsel were proper." We disagree.

In a criminal trial, defense counsel must be given an opportunity to argue his cause. *People v. Crawford*, 343 Ill. App. 3d 1050, 1059 (2003); *People v. Heiman*, 286 Ill. App. 3d 102,

[5] We note in passing that counsel for the defense appeared to concede the point with regard to this second exclusion, since after the trial court sustained the State's objection, counsel for the defense stated, "I'm wrong for making those arguments. I apologize."

112 (1996). Arguments and statements are within the proper scope of closing argument where they are based upon facts in evidence or reasonable inferences that may be drawn from that evidence. *People v. Brown*, 275 Ill. App. 3d 1105, 1114 (1995). However, the court should exclude arguments which introduce irrelevant and prejudicial matters, or those which otherwise tend to confuse the jury. *U.S. ex rel. Shaw v. DeRobertis*, 581 F.Supp. 1397, 1408 (1984). The character and scope of closing argument are within the discretion of the trial court, and "every reasonable presumption must be indulged in that the trial judge has performed his duty and properly exercised the discretion vested in him." *People v. Smothers*, 55 Ill. 2d 172, 176 (1973). Absent an abuse of discretion, the trial court's ruling shall not be reversed. *Guyon*, 117 Ill. App. 3d at 533. The reasoning behind this rule has been explained by our supreme court as follows: "The general atmosphere of the trial is observed by the trial court, and cannot be reproduced in the record on appeal. The trial court is, therefore, in a better position than a reviewing court to determine the prejudicial effect, if any, of a remark made during argument ***." *Smothers*, 55 Ill. 2d at 176.

In this case, we cannot say that the trial court abused its discretion in sustaining objections to these two statements issued by defendant's counsel during closing argument, because they were not based upon the evidence or upon reasonable inferences arising from that evidence. The first statement, that it was not known whether Joel's fingerprints were on the murder weapon because the People "failed in their obligation," was contrary to the evidence, since forensic scientist Hutcherson testified that, when the murder weapon was examined for prints, none were found. The second statement was not related to the evidence. Rather, it was an

invitation by defense counsel for the jury to "make the arguments you think I would have made" during deliberations, effectively placing themselves in the role of defense counsel advocating for his client. As this request to the jury was not based upon facts of record, it was not an abuse of discretion for the trial court to exclude it. In any event, this would not preclude the jury under IPI 1.01 from being free to exercise their own judgment in light of their own observations and experience in life. See Illinois Pattern Instruction (Criminal), no. 1.01 (4th ed. 2000).

The case of *Crawford*, 343 Ill. App. 3d 1050, cited by defendant, is distinguishable. The *Crawford* court held that the trial court improperly curtailed defense counsel's closing argument and revealed bias against the defendant where it repeatedly interrupted most of defense counsel's closing argument, challenging him at every turn, accusing him of misrepresenting the evidence, and telling him that it was not his job to lie about the evidence. *Crawford*, 343 Ill. App. 3d at 1057-58. Our review of the record in this case does not disclose any such improper curtailment. Although the court sustained isolated objections to defense counsel's argument, defense counsel was, for the most part, allowed to speak freely and without interruption, and the court did not cast aspersions upon his honesty or his character during his closing argument. *Crawford* is therefore inapposite.

I. Trial Court Comments Regarding Defense Counsel

Defendant finally contends that reversal of his conviction is required because, during trial and in the presence of the jury, the court made inappropriate and prejudicial remarks about defense counsel which implied, in defendant's words, that defense counsel was "not being fair."

The complained-of statements occurred during the testimony of State witness Detective

William Burke, one of the detectives who was present on February 22, 2005, when defendant admitted involvement in the shooting. Detective Burke testified to the substance of defendant's confession. During cross-examination, Detective Burke stated that his testimony was based upon his memory as well as a report that he had reviewed prior to his testimony. The following exchange then occurred:

"Q. Do you have that report with you?

A. No, I don't.

Q. Where is that report?

MR. BUTINAS [counsel for the State]: Objection.

THE COURT: You mean the one you were tendered in discovery that I think you have somewhere?

MR. COHN [counsel for defendant]: I don't think it's appropriate for your Honor to make such a comment.

THE COURT: You are implying that you don't have that report.

MR. COHN: I never implied that at all, and based on your Honor's interference, I move for a mistrial.

THE COURT: Denied. I don't want the jury to have the perception that you never received that report.

MR. COHN: I never made that assertion.

THE COURT: Okay. I just want to make sure that you're not–

MR. COHN: I think it's inappropriate for your Honor to interfere.

THE COURT: Fine. Go ahead. Proceed with your questions."

Defendant now claims that this exchange denied him a fair trial.

Because of the trial judge's great influence over the jury, the judge must take care to remain impartial and avoid displaying prejudice or favor toward any party. *People v. Heidorn*, 114 Ill. App. 3d 933, 936 (1983); see *People v. Lewerenz*, 24 Ill. 2d 295, 301 (1962) ("Jurors are quick to perceive any leaning of the court and place great reliance upon what he says and does, so that his statements and intimations are liable to have the force of evidence and be most damaging to an accused"). Although the judge has wide discretion in the conduct of trial, the judge must not make comments that would reveal his opinion as to the credibility of a witness or the arguments of counsel. *Heidorn*, 114 Ill. App. 3d at 936. However, for such comments to constitute reversible error, the defendant must not only show that such comments are improper, but also that he has been thereby prejudiced. *People v. Wells*, 106 Ill. App. 3d 1077, 1086 (1982); see *Heidorn*, 114 Ill. App. 3d at 937-38 (court's improper remarks were harmless error and did not warrant reversal where, in view of the total circumstances of the case, they had no effect on the jury's verdict). The defendant bears the burden of proof to demonstrate prejudice. *Wells*, 106 Ill. App. 3d at 1086.

With regard to the case at hand, we find that it would be best for a judge under such circumstances to exercise restraint rather than intervene. See *Heidorn*, 114 Ill. App. 3d at 936 (stressing the need for a judge to avoid appearance of partiality). However, even if the judge's intervention started out as improper, the colloquy which followed would have substantially dissipated any threat of prejudice, where the judge explained that he merely wished to clarify the

fact that counsel for defendant had, in fact, received the report being relied upon by Detective Burke. See *Bebb v. Yellow Cab Co.*, 120 Ill. App. 3d 454, 466 (1970) (trial judge has discretion to attempt to clarify confusing trial testimony); *Willson v. Pepich*, 119 Ill. App. 3d 552, 559 (1983) (trial court did not err by making remarks during witness testimony for purposes of clarifying that testimony). Moreover, during the rest of the trial, there were no further incidents of this nature. We are therefore unable to find that defendant has met his burden of demonstrating that the trial court abused its discretion in this regard or that he was prejudiced by the complained-of comments.

Defendant cites three cases in which reversal was required because of prejudicial remarks made by the court in the presence of the jury during trial. However, these three cases are all distinguishable from the case at hand, because in all three of these cases, the trial court consistently conveyed a hostile attitude toward defense counsel and defense witnesses through numerous statements.

Our supreme court in *Lewerenz*, 24 Ill. 2d at 300-01, held that defendant was deprived of a fair trial where the trial court "constantly disparage[d]" and "berate[d]" defense counsel during trial. On at least 16 occasions, when defense counsel raised objections to evidence, the court characterized his objections as "speeches" and sometimes admonished defense counsel not "to make any speeches to me before the jury." *Lewerenz*, 24 Ill. 2d at 301. In holding that such remarks constituted reversible error, our supreme court explained that this "constant repetition could not have done other than to convey to the jury a hostile attitude toward the defense." *Lewerenz*, 24 Ill. 2d at 301. No such repetition occurred in the present case, nor, as has been

previously discussed, do we find that the single clarification complained of in the instant case evinced a hostile attitude toward defense counsel.

Similarly, in *People v. Mitchell*, 228 Ill. App. 3d 167, 169-71 (1992), the trial court displayed bias against the defense by repeatedly disparaging defense evidence and theories, making multiple comments that effectively served as testimony for the State, and questioning defendant in an openly hostile and mocking manner. The appellate court found that any single one of these remarks might not be sufficient to demonstrate prejudice, but when taken together, the trial court's remarks were "so pervasive" as to deny defendant a fair trial. *Mitchell*, 228 Ill. App. 3d at 171. The defendant in the instant case has not shown any such pervasive pattern of hostility from the trial court.

Finally, in the third case cited by defendant on this issue, *People v. Sprinkle*, 27 Ill. 2d 398, 401-03 (1963), our supreme court found that defendant, accused of burglary, was denied a fair trial where the trial judge indicated on multiple occasions that he believed defendant to be guilty of the crime and otherwise disparaged defendant. When the woman whose house had been burglarized took the stand, the judge referred to her as "marvelous" and told her "God bless you"; he also questioned her as to whether she remembered anything about "the man who beat you at your house." *Sprinkle*, 27 Ill. 2d at 401. Moreover, when the defendant's father took the stand to testify that the defendant had been at home when the burglary occurred, the trial court asked him numerous questions that implied that his son was a frequent lawbreaker and that the father was therefore well acquainted with trial procedure. *Sprinkle*, 27 Ill. 2d at 401-02. By contrast, in the present case, the trial court did not disparage defense witnesses, nor did it display

favoritism toward prosecution witnesses. Therefore, *Sprinkle*, like the other cases cited by defendant in this regard, is distinguishable.

In light of the foregoing analysis, we reverse defendant's conviction and remand this case to the trial court for an attenuation hearing regarding defendant's confession. If the trial court finds that his confession was sufficiently attenuated from his illegal arrest, then we direct the trial court to reinstate his conviction. If the trial court finds that no such attenuation exists, then we direct the trial court to suppress the confession and conduct further proceedings consistent with this opinion.

Reversed and remanded.