2020 IL App (1st) 190826-U

No. 1-19-0826

Order filed December 24, 2020

Fourth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 18 CR 2637
	)	
MARQUISE ALEXANDER,	)	Honorable
	)	Thaddeus L. Wilson,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE REYES delivered the judgment of the court.
Justice Lampkin concurred in the judgment.
Presiding Justice Gordon dissented.

ORDER

¶ 1 *Held*: Defendant's conviction for armed habitual criminal is affirmed over his contentions that (1) the State failed to prove that he knowingly possessed the firearm, and (2) his trial counsel was ineffective for failing to move to suppress his statement to police.

¶ 2 Following a jury trial, defendant Marquise Alexander was found guilty of being an armed habitual criminal and sentenced to seven years' imprisonment. On appeal, defendant argues (1) the State failed to prove he knowingly possessed a firearm and (2) his trial counsel was ineffective for

failing to move to suppress his statement to the police after they confronted him with the recovered firearm. For the following reasons, we affirm.

¶ 3 Defendant was charged with seven weapons offenses. The State nol-prossed six of the counts and proceeded to trial on a single count of armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2018)), which alleged that, on or about January 26, 2018, defendant knowingly possessed a firearm after having been convicted of robbery under case number 13 CR 18770 and aggravated robbery under case number 13 CR 18774.

¶ 4 At trial, Chicago police officer Michael Conroy testified that around 10:45 p.m. on January 26, 2018, he was on patrol in an unmarked vehicle with Officer Turner and Officer Duplechin. The officers were wearing civilian clothing under vests with their names, stars, and unit assignments. Turner was driving, Conroy was in the front passenger seat, and Duplechin was in the rear passenger seat. The officers received information about a person with a firearm, so they proceeded to the 7100 block of South Honore Street. Conroy described the block as having "ample streetlights," and stated the officers' vehicle had its headlights on.

¶ 5 When the officers turned south onto Honore, Conroy observed defendant, whom he identified in court, and another individual walking north. When defendant was about 35 feet from the officers' vehicle, he looked in their direction, opened his eyes wide, made an " 'O' shape" with his mouth, and turned his body away "to like hide." Based on his training and experience, Conroy interpreted defendant's behavior as "indicative" that he was "concealing something or trying to avoid contact with [the officers]." When the officers drove by, defendant turned back around and continued walking.

¶ 6 Conroy alerted Turner to his observation and Turner made a U-turn and drove north up Honore. Defendant and his companion crossed the street in the middle of the block, again looking in the officers' direction. As the officers approached, defendant walked through the gangway of a single-family house while his companion walked through a secondary gate into the same house. Conroy and Duplechin exited their vehicle and followed defendant down the gangway, where they were 12 to 15 feet from him. The gangway was dark, but Conroy used a flashlight to illuminate it. His view was clear and unobstructed, and he never lost sight of defendant.

¶ 7 From 8 to 10 feet away, Conroy observed defendant look over his shoulder towards Conroy. From six feet away, Conroy observed defendant reach the steps leading to the building's basement, turn around, remove a phone with his left hand, and lean with his left foot off the ground and his body angled so his right side was out of Conroy's vision. As defendant was leaning, Conroy heard a "heavy metal thud," which he described as the "very distinct" sound he had heard before of a metal object hitting concrete. The officers then briefly interacted with defendant before continuing through the gangway toward the rear of the residence. Defendant walked back the way he came, with his phone in his left hand.

¶ 8 Conroy continued walking towards the rear of the house to secure the backyard area. He explained,

> "[W]e had been in that area looking for a completely different individual who was supposed to be armed with a gun. So I didn't know if there was anybody else in the rear of that residence. If the object that had been thrown or dropped, I didn't know if it had been thrown far, if it had been thrown to someone, if it hit the ground and someone picked it up.

> I didn't want to take any safety risks to myself or my partner just assuming that everything was okay."

While Conroy secured the backyard, Duplechin walked down the basement steps, which were concrete. He alerted Conroy that he recovered a firearm, and asked where defendant was, as defendant had been the only person "back there." During his time in the gangway and backyard area, Conroy did not see anyone besides defendant.

¶ 9 Conroy thought defendant was in front of the house with Turner, but he was not. Conroy went to look for defendant and found him walking a few houses north. Conroy asked defendant to come towards him. Defendant complied, and Conroy handcuffed him. Defendant asked why he was in handcuffs, and Duplechin said they found a firearm by where defendant was standing. Defendant responded that he was not in the "back." Conroy asked defendant if he had a Firearm Owners Identification card or concealed carry license and defendant stated he was ineligible for both because he was a convicted felon. Conroy placed defendant in an unmarked vehicle while waiting for transport and confirmed defendant was a convicted felon.

¶ 10 Conroy was equipped with a body-worn camera that night, which he activated when Duplechin informed him he found a firearm. Conroy identified People's Exhibit 1 as a DVD containing footage from his and Duplechin's body-worn cameras. The footage from Conroy's camera was played for the jury. Our review of Conroy's body camera footage shows him walking down a dark gangway past concrete steps leading to a basement area. An officer appears from the stairway area, shows Conroy a firearm, and they exit the gangway. Conroy calls for someone who is walking down the sidewalk to come back, which the man does. Conroy says, "I thought you were waiting on your buddy," and the man replies, "this is my buddy's house." Conroy handcuffs

the man and calls for transport. The man asks why he is being arrested. An officer says, "look what I found right where you were standing" and shows him a firearm. The man says, "I never went to the back." Conroy asks if he has a concealed carry license, and the man says he does not.

¶ 11 Conroy identified a still photograph from his body-worn camera showing the gangway after defendant walked away, including the area where defendant was standing when "he hid part of his body" and Conroy heard the sound. Conroy also identified a still photograph from his body-worn camera of Duplechin showing him the recovered firearm and a photograph of the Honore house during the day.

¶ 12 On cross-examination, Conroy testified that the incident occurred in a "high-crime neighborhood." The report he received was not regarding the Defendant. After the police drove past, defendant and his companion did not walk fast or run. Conroy did not call out to defendant while following him because, in his experience, that causes people to run. Conroy could not see defendant raise his arm by the basement stairs because the house hid that side of defendant's body. When Conroy heard the thud of metal on cement, he was "pretty sure" there was a weapon but he still walked past defendant in the gangway. Based on Conroy's alerting Turner to what he had seen, he thought Turner detained defendant, but Turner did not detain defendant. Instead, Conroy subsequently found defendant walking a few houses away.

¶ 13 Conroy flashed his light down the basement stairs to see if there was another person there. He did not see a firearm, but he did see other objects. Conroy did not see Duplechin pick up the firearm, but Duplechin told him he found it on a ledge by the stairs. The ledge was less than 10 feet from the gangway and defendant "would have had to toss the gun down there." Conroy did

not see a firearm or an outline of a firearm on defendant at any time, and defendant never ran away from the officers.

¶ 14 Conroy acknowledged a case incident report did not include information about defendant looking surprised or turning away when he saw the officers, although Conroy considered those to be pertinent facts. The report also did not indicate how far Conroy was from defendant throughout the incident.

¶ 15 On redirect examination, Conroy testified that multiple reports were generated for this incident. In one documented narrative, he included that defendant turned to avoid contact with the officers when they drove past.

¶ 16 Duplechin testified similarly to Conroy regarding seeing defendant walking north on Honore, noticing the officers, and looking surprised. Defendant's surprised look made Duplechin "more alert" because, in his experience, it indicated there was "something going on" that defendant did not want them to see. Duplechin and Conroy followed defendant through the gangway because it seemed like he was trying to "get out of [the officers'] area," and Duplechin did not think it was a "normal behavior" for him to have separated from his companion by going to "the back." In the gangway, Duplechin saw defendant "dip down with the right side of his body" towards the basement of the Honore house and heard a noise that sounded like metal striking concrete.

¶ 17 Conroy instructed defendant to come towards the officers. Duplechin stopped defendant and performed a protective pat down because he intended to send defendant "to the front", *i.e.*, behind the officers. It was dark and Duplechin could not see if there were any weapons on defendant, so he checked defendant's waistband for weapons. He found no weapons and sent defendant "on back." Defendant then proceeded to the front of the house. To determine what the

noise he heard was, Duplechin shone a flashlight down the basement stairs and immediately saw a firearm lying on a "concrete wall." There was nothing else in the area that he believed could have made the sound that he heard, and he did not hear or see anyone else in the gangway.

¶ 18 Duplechin's body-worn camera footage from People's Exhibit 1 was played for the jury. Duplechin testified that the video was taken after he performed a protective pat down of defendant, and shows him observing the firearm from the top of the stairs and recovering it. He testified it then shows him in front of the house flashing his flashlight to ensure no one else was coming. He then goes back to where he recovered the firearm. Our review of the video shows Duplechin walking through the gangway behind another officer as defendant walks by them in the opposite direction, Duplechin walking down stairs, recovering a firearm, and saying, "grab whoever that is."

¶ 19 Duplechin identified still photographs from his body-worn camera that showed defendant and Conroy in the gangway. To his knowledge, no fingerprints were found on the firearm.

¶ 20 On cross-examination, Duplechin testified that other than defendant's surprised look, there was nothing unusual about defendant and his companion. The officers followed defendant down the gangway because it seemed "suspicious" that he looked surprised, he and his companion crossed the street, and one of them then went "upstairs" while the other went toward "the back." Duplechin did not see defendant wave his arm like he was tossing something, but he agreed that defendant would have had to toss the firearm at least four to five feet for it to land where on the ledge. Duplechin did not know how many people were in the house or if anyone opened the basement door before he got there, but while he was in the gangway he did not hear any doors.

Duplechin believed that after he patted defendant down, defendant was with Turner. Defendant did not run away from the officers, and when Conroy called for him, he complied.

¶ 21 On redirect examination, Duplechin testified he did not hear defendant talking to anyone on the cellphone he was holding. Other objects were behind the firearm on the ledge where it was found. On recross examination, Duplechin testified that the sound he heard was a firearm hitting concrete. On redirect examination, Duplechin testified that the sound was distinct to him because he often hears people tossing firearms. On recross examination, Duplechin testified that he did not see "anything of a similar make up" that would have made the sound that he heard.

¶ 22 The State entered two written stipulations. People's Exhibit 5 provided that if called, evidence technician Matthew Savage would testify that he analyzed the recovered firearm for fingerprints, which he did not find. He would further testify that touching a firearm does not always leave fingerprints, and whether fingerprints are left depends on several factors. People's Exhibit 6 provided that defendant had previously been convicted of two qualifying felony offenses.

¶ 23 The defense called Diandre Reynolds, who testified he was defendant's friend and, on January 26, 2018, was with defendant all day, starting around 11 a.m. That evening, Reynolds and defendant left Reynolds's girlfriend's house and walked north on Honore towards Reynolds's grandmother's house, where Reynolds lived. As they walked, Reynolds saw an unmarked police SUV and then he and defendant crossed the street.

¶ 24 Reynolds told defendant to use the back entrance because his grandmother did not like his friends using the front door. Reynolds then entered the front door, went to the basement, and opened the back door. Defendant was not there, so Reynolds went upstairs to see what was going on. From the front porch, Reynolds saw defendant exiting the gangway. A female police officer

pointed at Reynolds as if directing him to "go back in the house." Reynolds looked out the window and saw officers call defendant back from down the street. Reynolds did not see defendant with a firearm at any point that day.

¶ 25 On cross-examination, Reynolds testified that he did not speak to any officers that night. On October 16, 2018, an investigator from the State's Attorney's office met Reynolds at his house, but he refused to be interviewed.

¶ 26 Defendant testified that around 11 a.m. on January 26, 2018, he met Reynolds at Reynolds's girlfriend's house. At some point, they left to go to Reynolds's grandmother's house. As they walked north on Honore on the side of the street across from Reynolds's grandmother's house, defendant spoke on the phone with his brother. Defendant testified that he noticed an unmarked police SUV drive by, but denied he looked surprised.

¶ 27 After the police vehicle drove past, defendant and Reynolds crossed the street to go to Reynolds's grandmother's house. The police vehicle turned around and drove behind them. Reynolds went through the front of his house and defendant went through the "side" towards the back because Reynolds's grandmother did not like his company using the front door. Defendant walked slowly to the back door to give Reynolds time to open it.

¶ 28 When defendant entered the gangway, it was "[v]ery dark." Halfway through the gangway, he heard Conroy yell "police," so he turned around. Defendant testified that he never made it to the rear of the house. Defendant then walked "right past" two officers standing behind him. Neither of the officers stopped or patted him down. He "was just trying to get out of their way so they could do their job." Defendant remained on the phone with his brother the entire time. Defendant denied ever having a firearm on him.

¶ 29 On cross-examination, defendant testified that Reynolds's bedroom was in the basement. After the officers yelled to defendant in the gangway, he walked north on Honore towards his home. When the officers found him again and said they recovered a firearm, defendant said he did not go in the "back." At that point, defendant did not know where the officers recovered the firearm. On redirect examination, defendant testified because the officers "proceeded towards the back of the house" after he passed them in the gangway, he assumed that was where they found the firearm.

¶ 30 In rebuttal, Duplechin testified that, during processing, defendant said he lived at an address on the 7300 block of South Hoyne Avenue. The address was located south of the Honore address, so when defendant left the gangway and walked north, he was heading away from his home.

¶ 31 The jury found defendant guilty of being an armed habitual criminal. Defendant filed a motion for a new trial, and later an amended motion for new trial or acquittal, which the trial court denied. The court sentenced defendant to seven years' imprisonment.

¶ 32 On appeal, defendant first argues we should reverse his conviction because the State failed to present sufficient evidence that he knowingly possessed the firearm. Specifically, defendant asserts that the officers' testimonies that they saw him lean and heard metal hitting concrete, which they associated with a firearm, are inconsistent with them subsequently allowing him to leave the scene, and thus, the evidence was "too improbable and unsatisfactory" to meet the State's burden of proof. Defendant adds that even accepting the officers' testimonies, the State failed to show defendant had actual or constructive possession of the firearm recovered on the ledge.

¶ 33 The State responds that defendant's claim should be rejected where the evidence established that defendant acted to conceal something when first observed by the police, two officers saw him lean around the corner of a house and heard the distinct sound of a firearm hitting concrete, and moments later they recovered a firearm a few feet away. Further, when defendant was questioned at the scene, he said he did not go to the "back," referring to the rear of the house where the firearm was found. Additionally, while he claimed to be on his way home when the police stopped him, defendant was walking in the opposite direction.

¶ 34 In reviewing a challenge to the sufficiency of the evidence, we ask whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Our function is not to retry the defendant (*People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011)), or to seek out "all possible explanations consistent with innocence" (*People v. Wheeler*, 226 Ill. 2d 92, 117 (2007)). Further, because the trier of fact is in a superior position to assess witness credibility, weigh witness testimony, and draw reasonable inferences from the evidence, we will not substitute our judgment on those matters. *People v. Wright*, 2017 IL 119561, ¶ 70. We will not reverse a conviction "unless the evidence is so unreasonable, improbable or unsatisfactory" that it raises a reasonable doubt of defendant's guilt. *Id.*

¶ 35 A person commits the offense of being an armed habitual criminal if he possesses any firearm after having been convicted a total of two or more times of certain enumerated felonies. 720 ILCS 5/24-1.7(a) (West 2018). At trial, the parties stipulated that defendant was previously convicted of two qualifying felony offenses. Thus, the only issue on appeal is whether the State met its burden to prove that defendant possessed the recovered firearm.

¶ 36 Possession may be either actual or constructive. *People v. Faulkner*, 2017 IL App (1st) 132884, ¶ 39. Actual possession is established where "the defendant exercised some form of dominion over the firearm, such as that he had it on his person, tried to conceal it, or was seen to discard it." *People v. Jones*, 2019 IL App (1st) 170478, ¶ 27. Still, actual possession does not require "present personal touching of the illicit material." *People v. Givens*, 237 Ill. 2d 311, 335 (2010). Constructive possession is established where the defendant (1) knew of the presence of the firearm, and (2) exercised immediate and exclusive control over the area where it was found. *Jones*, 2019 IL App (1st) 170478, ¶ 27. Constructive possession is often proved entirely through circumstantial evidence. *People v. Wright*, 2013 IL App (1st) 111803, ¶ 25.

¶ 37 The State argues the evidence established defendant had both actual and constructive possession of the recovered firearm. We need not determine if defendant had actual possession where we find the evidence was sufficient to prove constructive possession. Officer Conroy and Officer Duplechin testified that defendant looked surprised when he saw their vehicle. Conroy saw defendant look surprised to see the officers and turn away, and believed his behavior indicated he was "concealing something." When the police turned their vehicle around, defendant and Reynolds crossed the street and Reynolds entered the house while defendant walked alone down the gangway, which Duplechin found "suspicious." Conroy and Duplechin exited their vehicle and followed defendant into the gangway, aided by a flashlight that provided Conroy with a clear and unobstructed view of defendant. When defendant reached the stairway to the house's basement, he leaned towards it. As he leaned the right side of his body behind the house, hiding it from the officers' view, and lifted off his left foot, the officers heard a thud they recognized as the sound of a metal hitting concrete.

¶ 38 Based on their experience, the officers suspected the object was a weapon that hit the concrete. Almost immediately thereafter, Duplechin recovered a firearm from a ledge inside the concrete stairway toward which defendant had been leaning. The officers did not see or hear anyone else in the area where the firearm was recovered. When the officers told defendant they found a firearm near where he was standing, he said he was not in the "back," demonstrating he knew where the firearm was found. When viewed in a light most favorable to the State, the evidence sufficed to allow a rational trier of fact to conclude that defendant was carrying the firearm when he saw the police and, in an attempt to hide the contraband weapon from the officers, went into the dark gangway and threw the firearm into the stairwell, where it landed on the ledge.

¶ 39 Still, defendant asserts that the officers' testimonies were incredible, improbable, and contrary to human experience where they claimed they saw him lean over the stairs and then heard a metal object they suspected was a firearm hit concrete, but subsequently allowed him to walk away. The jury heard this same argument and, given its guilty finding, necessarily rejected it. See *People v. Ortiz*, 196 Ill. 2d 236, 267 (2001) ("a fact finder need not accept the defendant's version of events as among competing versions"). We defer to the jury's credibility determination. *Wright*, 2017 IL 119561, ¶ 70.

¶ 40 Conroy testified that, after hearing the sound he associated with a weapon dropping, his first concern was not to detain defendant but to secure the area. Specifically, he testified he did not know how far the object had been thrown and whether someone else was "back there" to pick it up, noting the officers were already in the area looking for someone else with a firearm. Further, Conroy thought that Officer Turner was behind Duplechin and detained defendant as he walked back up the gangway to the front of the house. A reasonable trier of fact could have found that the

officers' failure to immediately detain defendant was sufficiently explained at trial and we do not substitute our judgment for that of the jury on this finding. *Id.* We do not find the officers' testimony so unreasonable or improbable that it raises a reasonable doubt of defendant's guilt.

¶ 41 In defendant's reply brief, he adds that his surprised look when he saw the officers was an insufficient reason to suspect him of committing an offense. However, the officers did not detain defendant simply because he looked surprised. In fact, the officers did not detain defendant until they found a firearm in the same area where they saw him lean and lift off his foot, heard the sound of a weapon hitting the ground, and saw no one else who might have dropped it. As such, defendant's argument is unpersuasive. It may be that there is an innocent explanation for defendant's actions that night. But the trier of fact is not required to disregard all inferences that normally flow from the evidence, or search for all possible explanations consistent with innocence. *Wheeler*, 226 Ill. 2d at 177. We find the evidence, taken in the light most favorable to the State, supports the rational conclusion that defendant possessed the firearm recovered from the ledge and was, therefore, guilty of armed habitual criminal.

¶ 42 Defendant next argues trial counsel was ineffective for failing to move to suppress the custodial statement he made to the police after they confronted him with the recovered firearm.[1] When Duplechin showed defendant the firearm he found and stated it was near where defendant was standing, defendant responded that he did not go to the "back." He argues that, because he was handcuffed, in custody, under interrogation, and without the benefit of *Miranda* warnings when he made the statement, defense counsel should have moved to suppress the statement.

[1] On September 7, 2018, defendant filed a motion to quash arrest and suppress evidence, which his counsel later withdrew.

¶ 43 To establish an ineffective assistance claim, a defendant must demonstrate both (1) that his counsel's performance was deficient, and (2) that he was prejudiced by the deficiency. *People v. Ross*, 2019 IL App (1st) 162341, ¶ 25. A reviewing court need not consider whether counsel's performance was deficient before examining whether defendant was prejudiced by the alleged deficiency. *Strickland v. Washington*, 466 U.S. 668, 697 (1984). Moreover, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, *** that course should be followed." *Id.*

¶ 44 In *Miranda v. Arizona*, 384 U.S. 436, 444 (1966), the Supreme Court held that, before conducting a custodial interrogation, police officers must administer warnings sufficient to inform a defendant of his privilege against self-incrimination. Generally, counsel's decision regarding whether to file a motion to suppress based on a *Miranda* violation is considered a matter of trial strategy, which is afforded great deference. *Ross*, 2019 IL App (1st) 162341, ¶¶ 26-27. To establish prejudice based on counsel's failure to file such a motion, a defendant must show that (1) the motion would have been meritorious, and (2) a reasonable probability exists that the outcome of the trial would have been different had the evidence been suppressed. *Id.* ¶ 26. We review ineffective assistance of counsel claims *de novo. Id.*

¶ 45 We find that defendant was not prejudiced by counsel's failure to file a motion to suppress his statement to police. First, the motion would not have been meritorious. *Miranda* requires an individual who is subjected to custodial interrogation must be informed of certain rights before questioning. *Id.* ¶ 27. The State does not challenge that defendant was in custody when he made the statement, so we ask only whether defendant's statement was the product of an interrogation. "Interrogation refers to both express questioning and to words and actions on the part of the police

that the police should know are reasonably likely to elicit an incriminating response from [a] suspect." (Internal quotation marks omitted.) *Id.* In determining if defendant was subject to an interrogation, our focus is on defendant's perception, and not on the intent of the officers. *Id.*

¶ 46 Here, neither Conroy nor Duplechin asked defendant any questions in an attempt to elicit a response. Instead, defendant asked the officers why he was being arrested, and Duplechin merely answered the question by showing defendant the firearm and telling him he found it "right where" defendant had been standing. Duplechin's response did not "seek or require" a response from defendant, and defendant's decision to reply to it did not transform the exchange into a police interrogation. See *id.* ¶¶ 28-30 (finding a police officer's statement that he knew why the defendant was running did not constitute an interrogation because he did not ask the defendant any questions, the comment did not seek or require a response, and the comment was "informational"). Because there is nothing in the record to suggest that Duplechin should have known that answering defendant's question as to why he was being arrested would elicit an incriminating response, we cannot say that defendant was subjected to an interrogation. See *id.* ¶ 30.

¶ 47 Furthermore, even if defendant's statement was the result of a custodial interrogation, there was not a reasonable probability that the outcome of his trial would have been different had the statement been suppressed. The officers were drawn to defendant's behavior when they saw him look surprised and turn his body away from them on the street, which Conroy believed indicated he was "concealing something." The officers then saw defendant and Reynolds separate, which Duplechin found "suspicious," and caused the officers to follow defendant into the dark gangway. In the gangway, the officers saw defendant lean over an open stairway, partially hidden from their view by the side of the house, and heard the distinct and familiar sound of a metal hitting concrete,

which they suspected was a weapon being dropped. Duplechin shortly thereafter recovered a firearm from inside that same stairway. Thus, even without defendant's statement to police, there was ample circumstantial evidence from which a rational trier of fact could find defendant possessed a firearm, which he threw onto the ledge when the police followed him into the alley. Accordingly, defendant was not prejudiced by trial counsel's failure to move to suppress his statement to police, and his ineffective assistance of counsel claim fails.

¶ 48 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 49 Affirmed.

¶ 50 PRESIDING JUSTICE GORDON, dissenting:

¶ 51 I must respectfully dissent because when defendant was arrested and placed in handcuffs, he was not given his *Miranda* warnings and he did not waive them. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). The arresting officer showed the recovered revolver to defendant and said, "Look what I found. Right where you were standing." This statement by the officer assumed defendant's guilt by linking his previous location to the area where the recovered revolver was found and was reasonably likely to elicit a response. When defendant responded that he was not in the back of the residence, that statement proved that defendant had placed the revolver there because the officer never told defendant where he found the gun. Defendant's statement incriminated him and gave to the jury the conclusive evidence that defendant had actual possession of the revolver, and when he dropped that gun, that actual possession became constructive possession. Without that statement, the only evidence that the gun belonged to defendant was circumstantial evidence from testimony of the two police officers that defendant looked like he was hiding something from the expressions on defendant's face, some hand gestures, and the officer's testimony that they heard a noise as if

something hit the concrete. There was evidence by the police officers that the area where the crime occurred was a "high crime area"; however, the people who live in high-crime areas have the same constitutional rights as those people who live in low-crime areas. Furthermore, in today's world (2020), no areas in the city of Chicago are not subject to crimes. The gun did not produce any fingerprints, and the jury could have reasonably concluded that the revolver the police found could have been left in the backyard by someone else, but the defendant's incriminating statement took away that inference. The failure to file the motion to suppress could not be harmless under the facts of this case. The admission by defendant that he was not in the backyard was strong evidence that defendant dropped the revolver onto the concrete in the backyard to avoid being found with the weapon upon his person.

¶ 52 Defendant's statement was inadmissible and subject to a motion to suppress, and his trial counsel's failure to present that motion was ineffective assistance of counsel because defendant has shown both that (1) his "counsel's performance fell below an objective standard of reasonableness," and (2) a reasonable probability exists that, but for counsel's unprofessional error, the result of the trial could have been different. *People v. Henderson*, 2013 IL 114040, ¶ 11; *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The motion to suppress would have been successful.

¶ 53 The trial court cannot be blamed for counsel's ineffectiveness here because the trial judge did not have the opportunity to rule on that claim, which was first argued in the appellate court. As a result, I would reverse the conviction and grant defendant a new trial.