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2020 IL App (3d) 170301-U

Order filed July 17, 2020

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2020

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois
Plaintiff-Appellee,)	
v.)	Appeal No. 3-17-0301 Circuit No. 14-CF-81
ORLANDO MATHEWS,)	Honorable Kevin W. Lyons Albert L. Purham Jr.
Defendant-Appellant.)	Judges, Presiding

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Carter and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred in not suppressing weapons recovered during a warrant search. Conviction for unlawful possession of a weapon by a felon reversed outright because State cannot sustain a conviction without the weapons.

¶ 2 Defendant Orlando Mathews was convicted by a jury of first degree murder and unlawful possession of a weapon by a felon and sentenced to concurrent 40- and 3-year terms of imprisonment. He appeals his conviction. We vacate defendant's conviction in part, reverse in part, and remand for further proceedings.

FACTS

¶ 3

¶ 4 Defendant Orlando Mathews was charged with three counts of first degree murder and one count of unlawful possession of a weapon by a felon. 720 ILCS 5/9-1(a)(1), (2), (3) (West 2014); 720 ILCS 5/24-1.1(a) (West 2014). The charges arose from a murder and alleged armed robbery in Peoria outside a multi-building apartment complex. Mathews was found in the apartment of his girlfriend, Aries Morris, and arrested. Two other men, Duane Simmons and Denzel Gayton, who were in the apartment were also arrested.

¶ 5 Prior to trial, Mathews filed a motion to quash his arrest and suppress evidence which he asserted was obtained as the result of an illegal and warrantless entry into Morris's apartment. He also sought suppression of the weapons that were seized after the police later searched the apartment pursuant to a warrant. At the suppression hearing, the parties agreed to include transcripts from the suppression hearing of Simmons. In that hearing, the following evidence was presented.

¶ 6 Justin Sinks, a Peoria police officer, testified that on February 5, 2014, he received a report of a shooting and arrived at the apartment complex at approximately 11:37 a.m. He was told by eyewitnesses that the two offenders were black males with dreadlocks and wearing dark coats who fled the scene on foot into one of the apartment buildings. Around noon, he conversed with Morris, who was present outside her apartment building waiting for a grocery delivery. He explained there had been a shooting and law enforcement was canvassing the apartment buildings searching for witnesses and suspects. She stated she had no information about the shooting and told him the apartment number where she lived. Morris returned to her apartment after their conversation ended.

¶ 7 The police canvassed door-to-door in Morris's building asking residents if they had seen or heard anything related to the shooting and if anyone was in their apartments. Sinks entered the building at 729 N. Hightower and saw officers knocking on Morris's door but no one was answering. When he yelled her name, Morris cracked the door 6-to-12 inches and spoke with the police. There were five to seven officers outside her door. Morris inquired what was happening and he told her they were searching for the shooting suspects. In response to his inquiry whether anyone was in her apartment, she said no. He then asked if the officers could enter the apartment to look for themselves. In his opinion, Morris was very nervous and her demeanor was different than when they talked earlier. He became suspicious although he did not observe anything illegal. He did not seek a warrant at that time. Morris did not ask about a warrant. When Sinks asked Morris if the officers could come into her apartment, she "flung the door open, walked away" and gestured with her palms up and arms extended. He interpreted her gesture as an invitation to enter the apartment. Morris did not verbally consent to the search. When asked whether Morris fully opened the door, Sinks said, "I held the door open, yes." He was then able to see a black male with short hair sitting on the couch. He did not smell burnt cannabis and would have put it in his report if he had.

¶ 8 Sinks and three other armed officers then entered the living room and asked Morris repeatedly if anyone else was in the apartment. She said the person on the couch was her friend. He was later identified as Mathews. She also said her children were present. Another officer, Corey Miller, heard noises and saw shadows in the back of the apartment. Sinks again inquired if anyone else was there and whether they could look around the apartment. Morris said she would have her children come out and a child came out from the bedroom. The other officer went to the back of

the apartment and saw a black male with dreadlocks lying on the bed in one of the bedrooms. The man in the bedroom was identified as Gayton.

¶ 9 Loren Marion, a Peoria police captain, testified. He participated in the canvas and was behind Sinks as he talked to Morris at her apartment door. He could hear Sinks but not Morris. Sinks asked if anyone else was in the apartment and whether they could come in and look. When Morris opened the door wider, Marion was able to see a man on the couch. Sinks stated that Morris had said no one else was there and asked to check the apartment. Morris backed up and further opened the door. Sinks went in and Marion followed. Marion never heard Morris consent to the search.

¶ 10 Brian Grice, a Peoria police officer, testified that he also entered the apartment with the other officers. He found the bathroom door was locked and heard a male say, “just a minute.” The door then opened and he saw a man on the toilet without a shirt, wearing his underpants with his jeans at his ankles. The man stood up and attempted to flush the toilet. Grice saw a shell casing in the toilet bowl, which he was able to retrieve. The man was removed from the bathroom and arrested. Grice identified the man as Simmons.

¶ 11 Shawn Curry, a Peoria detective, testified that Morris gave the officers verbal consent to search her apartment but the officers opted to also obtain a search warrant. Upon his entry into the apartment, Curry saw Simmons run for the bathroom.

¶ 12 Simmons testified that he was in the bathroom in Morris’s apartment when he heard the police at the apartment door. In response to their inquiry, Morris identified all the people in the apartment. The police asked for her consent to search the premises and she refused. An officer then told her they did not need a warrant and Simmons heard the police enter the apartment. They came into the bathroom with their guns drawn, snatched him off the toilet and arrested him.

¶ 13 The trial court found the officers had consent to enter Morris's apartment and denied the motion to suppress the entry and Simmons's arrest. Simmons filed a motion for reconsideration and another hearing was held at which Morris testified. She stated as follows. Mathews was her boyfriend and he, Simmons, and Gayton spent the night at her apartment, where they all sat around and smoked cannabis, except Simmons, who did not smoke. The following morning, she heard a knock on her apartment door, looked through the peephole and saw approximately 10 officers, which made her nervous. The officers said there were two people in her apartment that matched the description of the shooting suspects in that they had long dreadlocks. She cracked the door six to eight inches. Officers then saw Mathews sitting on her couch, pushed the door open and entered her apartment. She did not consent or do anything that would suggest consent. The officers basically just came into her apartment. She motioned with her hands for her children to step out of the way of the police. The officers then made her remain in the hallway, where she was able to see them take Simmons and Gayton out of her apartment in handcuffs. She, too, was taken to the police station and remained there for approximately eight hours. On reconsideration, the trial court granted Simmons's motion to suppress, finding that it was not a reasonable inference that Morris invited the officers into her apartment. The court suppressed Simmons's cell phone, jacket and money. The court later added the shell casing from the toilet to the list of suppressed items.

¶ 14 The following additional evidence was submitted at Mathews's hearing. Morris testified. She lived in the apartment. Mathews, who was her boyfriend, had been staying with her. Mathews had short hair while Simmons and Gayton had dreadlocks. When the police were at her door, she did not invite them in. The police said she lied about who was in her apartment but she told them her children, Mathews and two friends were there. When she stepped to the side so the police could

look in, Sinks moved the door and two officers walked in. Morris admitted she regularly smoked cannabis, had smoked some that morning and her apartment probably smelled of cannabis.

¶ 15 The court reviewed the transcripts from Simmons’s hearing and incorporated them into its ruling. The trial court found that the State “basically concede[d]” that the officers’ entry into Morris’s apartment was unlawful; found Mathews had standing to challenge the search; and in accord with the prior rulings by the court in Simmons’s case, found that there was no consent for the officers to enter the apartment. The court granted Mathews’s motion to suppress regarding entry into the apartment, finding it was not lawful.

¶ 16 Mathews then moved to quash the search warrant and suppress the evidence seized pursuant to the warrant, arguing suppression was necessary because the warrant was obtained based on information the police discovered as a result of their unlawful entry. The warrant provided, in part, that responding officers found a man shot outside in the apartment complex and that witnesses described two offenders as black men with long dreadlocks and wearing black clothing. Footprints lead from the victim to one of the apartment buildings. Officers then conducted a canvas of the building. Officers knocked on Morris’s door and she spoke with Sinks, with whom she had earlier spoken about the incident. The warrant application further provided:

“Officer Sinks began to speak with Morris about the conversation they had prior about the incident at the apartment complex. Officer Sinks asked Morris if there was anybody inside her apartment. Morris stated only her [*sic*] and her kids were inside. As Morris opened the door further, Officer Sinks could see a black male sitting on a couch. Morris then stated she had a friend inside the apartment as well. *Morris [sic] Officer Sinks asked her again if there was anybody else inside the apartment and she started to stutter and state only her kids. Officer Sinks stated Morris began to act nervous and kept*

stuttering as she was talking to Officer Sinks. Officer Sinks believed Morris was being evasive in her answers. Officer Sinks observed Morris look back toward the back of the apartment on several occasions. Officer Sinks continued to ask Morris about any other people inside her apartment. Morris kept stuttering and saying, 'Uh, Uh, my kids.' As Officer Sinks was speaking with Morris, Officer Miller stated he could see shadows moving about toward the back of the apartment. Officer Miller stated he could hear sounds coming from the back of the apartment. It should be noted Officer Sinks and Officer Miller were standing in the living room as they were speaking with Morris.”
(Emphasis added to indicate portion trial court found to be the tainted).

¶ 17 The search warrant application further stated that Miller went down the hallway and saw a black male on the bed with long hair in dreadlocks, who matched the description of the suspects. He was identified as Gayton. As a result of finding Gayton, the officers searched the rest of the apartment. Officers Grice and Bradley Hutchinson found another black male in the bathroom, who also matched the description in that he also had long hair in dreadlocks. The man in the bathroom was identified as Simmons, who had a prior conviction for aggravated unlawful use of a weapon. Simmons was trying to flush an empty .357 caliber shell casing down the toilet. The officers notified Curry and asked that all three men and Morris be transported to the Peoria police station.

¶ 18 At the hearing on Mathews's motion, the parties agreed that the italicized portion of the search warrant was tainted due to the illegal entry and asked the court to decide if the warrant provided sufficient probable cause if the tainted information was not considered. The trial court believed the tainted portion started with the sentence, "Officer Miller stated he could hear sounds coming from the back of the apartment" and noted it would not consider Miller's statement that he saw shadows. The court expressed concern over the police pushing their way into the apartment

but found the warrant complaint was sufficient to establish probable cause. The court considered that Morris was nervous and looking back into the apartment when talking to the officers at her door. Through the open door, they saw a black male despite Morris's claims that only she and her children were in the apartment. The court stated Morris gave inconsistent answers, was evasive and withheld information. It denied Mathews's motion to suppress the weapons seized during the warrant search, finding the warrant application provided independent probable cause.

¶ 19 A jury trial ensued. The parties stipulated that Mathews "has been convicted of a felony offense in the State of Illinois." The stipulation was read to the jury and admitted into evidence.

¶ 20 Ashley Davis testified that she was dating the victim. He was in her apartment when she heard him talking on the phone. He went outside, she heard gunshots and looked out the window to see him lying on the ground outside the apartment building. Shanekia Todd also lived in the apartment building and testified that a bullet came through her window. She looked outside, saw a man falling and two guys running away. She could not identify them. A bullet hole was observed in Todd's apartment window and a bullet was recovered from the attic ceiling in the apartment. Terrence Paige testified he was in the parking lot of the complex and saw a man talking with someone and walk away. He saw the man again and noticed him "tussling" with two other men. He heard gunshots and saw the two men flee. He could not identify them.

¶ 21 Paul Tuttle, an officer in the Peoria crime scene investigation unit, testified that he responded to the scene and found the victim's body, a stocking cap, a plastic bag, two shell casings and \$54 in the snow near the body.

¶ 22 Sinks testified he helped canvas the apartment buildings and knocked on Morris's door. Through the open door, he could see a black man with short hair sitting on the couch. He was able to see the man when the door was opened "to the extent that it was." He identified Mathews as the

man. He arrested Mathews and saw officers arrest two other black men in the apartment, both of whom had long hair styled in dreadlocks. Marion testified the three men were taken from the apartment so they could be questioned at the police station. Curry testified Mathews was placed in an interrogation room which was furnished with video capability. However, the audio malfunctioned. John Williams, a Peoria police officer, testified that around 2:30 p.m., he was told to take swabs of the three men to see if they had gunshot residue on their hands. Mathews consented to the swab. Williams also participated in the apartment search after the police obtained a warrant. The State played a two-minute video showing Mathews in the interrogation room wiping his hands on his pants just prior to the swab.

¶ 23 Erin Barisch, a Peoria police officer, testified that he participated in the warrant search, noticed some missing paint around a vent in Morris's apartment, took off the vent and discovered guns in the duct, including a .357 revolver and a .380 handgun. He replaced the vent cover and then repeated the search while it was recorded. The video was played for the jury.

¶ 24 A forensic pathologist testified the victim died from two fatal gunshot wounds. A firearms expert testified that the two shell casings found near the victim's body were fired from the .380 handgun. The bullet found in Todd's apartment was fired from the .357 revolver.

¶ 25 Ellen Chapman, an expert in trace analysis and gunshot residue, testified. In analyzing a sample, she looks for particles known as tri-component particles, which are specific but not exclusive to guns. She concluded that the swab of Mathews's right hand contained the tri-component particles but there were none on his left hand. The results indicated that Mathews had discharged a gun, came into contact with a residue-related item or was in the environment of a discharged gun. The samples from the other men did not reveal gunshot residue. She opined that they either did not fire a gun, the residue was removed by activity, or was not deposited or detected.

Wiping the surface could remove the residue and handwashing was effective at removal. Particles could be on a person's hand even if they had not fired a gun, as they could transfer from person to person, for example, through a handshake. In addition, if one person had residue and shook the hand of another person, who then shook a third person's hand, the third person could have transferred residue. It was optimal to perform gunshot residue testing within six hours of gun use because normal activity caused the particles to fall off.

¶ 26 The State rested and the defense moved for a directed verdict. The court denied the motion. The defense rested without presenting any evidence. It renewed its directed verdict motion, which the court again denied. The jury found Mathews guilty of first degree murder, returning a general verdict, and unlawful possession of a weapon by a felon. The court sentenced him to a 40-year term of imprisonment on the first degree murder charge and a concurrent 3-year term on the possession of a weapon by a felon charge. He moved to reconsider his sentence, which the trial court denied. Mathews timely appealed.

¶ 27 ANALYSIS

¶ 28 Mathews submits six issues for our review: whether the evidence was sufficient to convict him of first degree murder and unlawful possession of a weapon by a felon; whether the evidence was sufficient to establish that he had been convicted of a felony when the instant offenses were committed; whether the trial court should have suppressed the firearms; whether defense counsel was ineffective where he failed to seek to suppress the interrogation room video and results of the gunshot residue test; whether counsel was ineffective for failing to sever the charges; and whether the trial court erred in showing the video in the courtroom during jury deliberations.

¶ 29 We first address whether the trial court erred when it denied Mathews's motion to suppress the weapons discovered during the warrant search. Mathews argues that the complaint for the

search warrant for Morris’s apartment relied in part on information uncovered during the illegal entry and search. According to Mathews, the information gained from the illegal conduct informed the search warrant application and the trial court should have suppressed the guns as fruit of the illegal entry and search.

¶ 30 Physical entry into a home is “ ‘the chief evil’ ” the fourth amendment is designed to prevent. *People v. Carter*, 284 Ill. App. 3d 745, 752 (1996) (quoting *Payton v. New York*, 445 U.S. 573, 585 (1980)). “ ‘At the very core of the [fourth amendment] stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion.’ ” *Id.* (quoting *Payton*, 445 U.S. at 590). The United States and Illinois Constitutions require that searches be reasonable and that search warrants be supported by probable cause. *People v. Manzo*, 2018 IL 122761, ¶ 28. Probable cause exists when the totality of the facts and circumstances known to the applicant when seeking a search warrant was such that a reasonably cautious person would believe that a crime was committed and evidence of the crime may be found at the location to be searched. *Id.* ¶ 29 (citing *People v. Griffin*, 178 Ill. 2d 65, 77 (1997)). Where improper information is included in a warrant application, the warrant is valid so long as properly included information is sufficient to establish probable cause for the warrant. *People v. Chambers*, 2016 IL 117911, ¶ 93. However, where the search is unlawful, the exclusionary rule provides that evidence improperly obtained must be suppressed. *People v. Rojas*, 2013 IL App (1st) 113780, ¶ 15.

¶ 31 Under the independent source rule, where a prior illegal entry was made, a subsequent search pursuant to a warrant is independent of the illegal entry where (1) the illegality did not influence the officer in seeking the warrant, and (2) the information gleaned from the illegal entry did not inform the judge’s decision to issue the warrant. *Carter*, 284 Ill. App. 3d at 752 (citing *People v. Bielawski*, 255 Ill. App. 3d 635, 641 (1994)). See *Murray v. United States*, 487 U.S. 533,

542 (1988). The independent source rule allows evidence to be admitted that was initially discovered during an illegal entry or search but later independently obtained from conduct that was untainted by the unlawful conduct. *Murray*, 487 U.S. at 537. When considering a motion to suppress, the reviewing court defers to the trial court's factual findings unless they are against the manifest weight of the evidence and reviews the ultimate question regarding suppression *de novo*. *Manzo*, 2018 IL 122761, ¶ 25.

¶ 32 The warrant application here contained the general information that Matthew Lane, a Peoria police officer, sought the warrant to search Morris's apartment to seize various items, including firearms; that he was familiar with the facts supplied by other officers, including that those officers responded to the apartment complex at 11:37 a.m. and found the victim, who had been shot and was later pronounced dead; that the officers canvassed the apartment buildings and saw footprints in the snow leading to 729 N. Hightower, one of the buildings in the complex; that footprints were long strides indicating the person was running; that the officers knocked on doors in the building searching for two black males described by witnesses as having long dreadlocks and wearing black clothing; that Sinks knocked on the apartment door of Morris, with whom he had had a prior conversation; and that Sinks could smell burnt cannabis.

¶ 33 The warrant application presented the paragraph that included the information that was improperly discovered as a result of the officers' illegal entry. That information included that Sinks again questioned Morris about who was in her apartment; that she began to act nervously and stutter; that he believed she was being evasive in answering his questions; that he repeatedly asked her if anyone else was in her apartment; that Morris continued to stutter and reply only her children were present; that Miller could see shadows and hear sounds in the back of the apartment; and that the officers were standing in Morris's living room during the conversation.

¶ 34 The court determined the following information was not the result of the illegal entry. Miller walked down the apartment hallway and saw two children leaving a bedroom; he gathered the children and noticed a black male lying on the bed who matched the witnesses' description in that he had long dreadlocks; due to finding this man and because Morris lied to Sinks, the officers searched the rest of the apartment; they noticed the bathroom door was locked; another officer knocked on the door and a third black male unlocked it. He was sitting on the toilet with black pants and his underwear pushed down his thighs; he complied with the officers' orders to get off the toilet; as he was reaching to flush the toilet, an officer looked in the toilet bowl and saw an empty .357 caliber shell casing; the officer reached into the toilet bowl and grabbed it before it flushed down the toilet; the officer stated the water in the toilet bowl was clear and without urine, feces or toilet paper; the man on the toilet also had long hair styled in dreadlocks; all three men were arrested and taken to the police station; and that the complaining officer believed evidence involving the murder and armed robbery would be discovered in Morris's apartment.

¶ 35 Without the information discovered as a result of the initial unlawful entry and search of Morris's apartment, the warrant application provided that Sinks and Morris had a prior conversation about the robbery and murder; that when he knocked on her apartment door, he asked her if anyone else was in her apartment to which she replied, only herself and her children; that when Morris opened the door further, Sinks could see a black man sitting on the couch, to which Morris stated she also had a friend in the apartment. The trial court also considered the portion of the application that stated that Sinks observed Morris look toward the back of her apartment on several occasions. Also considered by the court was all the information that was revealed after the officers searched the apartment after Miller's discoveries after he went down the hallway.

¶ 36 The trial court found that the initial entry into Morris's apartment was unlawful and the State does not dispute that finding. The application for the search warrant stated that Miller relied on shadows he saw and noises he heard while he was standing in the living room to further search Morris's apartment. To investigate the shadows and noises, Miller went to the back of the apartment, entered a bedroom and discovered Gayton, who matched the description of the suspects. Finding Gayton prompted a further search, which uncovered Simmons in the bathroom. He also matched the description of the suspects. Miller saw shadows and heard noises when he was unlawfully standing in Morris's living room after he illegally gained entry to it. The illegal entry and ensuing search uncovered Simmons and Gayton and resulted in their arrest and Mathews's arrest. Had the officers not illegally entered Morris's apartment, they arguably would not have seen Mathews and would not have discovered Simmons and Gayton. In our view, the illegal entry and search informed the officers' determination to seek a warrant.

¶ 37 Mathews's presence sitting in the living room was insufficient to establish probable cause that the suspects were in the apartment. Morris's children could have created the shadows and noises that prompted Miller to further search the premises. However, there were no claims the children were involved in the shooting, Morris admitted they were present and their presence could not establish probable cause. The warrant application focuses on Sinks's description that Morris was nervous and stuttering. Stuttering is a speech disorder that does not indicate the stutterer is hiding information from the police and should not constitute probable cause that criminal activity is underfoot. The application further provides that Sinks smelled burnt cannabis. Morris admitted she smoked cannabis that morning and that the apartment would smell of it, which would cause her to be nervous when officers were at her door. We note that although the warrant application

included a statement that Sinks smelled cannabis at Morris's door, he denied that he did during his testimony. We further note and emphasize that Mathews did not fit the description of the suspects.

¶ 38 Based on the facts, it is improbable that the illegal entry did not influence the police in seeking a warrant or inform the judge's decision to issue the warrant. In *Carter*, 284 Ill. App. 3d at 748, the police entered the defendant's apartment after the maintenance man called them when he discovered cannabis plants after entering the apartment to fix a leak. Although the tenants were not home, the police searched the apartment and waited in it for the residents to return. *Id.* When the defendant arrived home several hours later, he refused to consent to a search, and when his mother arrived home later, she, too, refused to consent to a search. *Id.* at 748-49. The court considered that although the officers could see the cannabis plants through a window, their illegal entry influenced their decision to seek a warrant. *Id.* at 754. The officers did not apply for a warrant when they saw the plants through the window; rather, they waited until the residents refused to consent to the search to seek a warrant. *Id.*

¶ 39 Like the officers in *Carter*, the officers here could not unsee Mathews, Simmons and Gayton, who they discovered and arrested as a result of their illegal entry and search. Had they not illegally entered the apartment, they would not have heard the sounds and seen the shadows prompting their further entry into the apartment. Arguably, had Sinks not pushed open the door, he would not have seen Mathews, who we reiterate did not match the description of the suspects. They would not have discovered the two black men with long dreadlocks who matched the descriptions of the suspects, there would have been no arrests, and Mathews would not have been subjected to a gunshot residue test. Without the warrant, the guns would not have been discovered. In our view, both the warrant application and the judge's decision to issue it were informed by what the officers discovered from their illegal entry. We find the trial court erred when it failed to

suppress the weapons discovered as a result of the search warrant and Mathews is entitled to a new trial as a result.

¶ 40 Mathews also argues that the interrogation video and the results of the gunshot residue test should have been suppressed and his trial counsel was ineffective for failing to seek their suppression. He also puts forth an ineffective assistance of counsel claim based on counsel's decision not to seek to sever the charges. We agree that the video and gunshot residue test results should have been suppressed as the result of the officers' illegal entry and search. However, since we are reversing and remanding because we have determined there was insufficient probable cause for the issuance of the warrant, we need not address Mathews's ineffective assistance claims.

¶ 41 We next consider Mathews's claim that the State failed to prove him guilty beyond a reasonable doubt of first degree murder and unlawful possession of a weapon by a felon. Mathews argues that the evidence was insufficient to prove him guilty of either offense.

¶ 42 To sustain a conviction for intentional murder, the State must prove the defendant intended to kill or do great bodily harm to the victim or another or knows that his acts will cause death. 720 ILCS 5/9-1(a)(1) (West 2014). To sustain a conviction for knowing murder, the State must prove the defendant knew that his acts created a strong probability of death or great bodily harm to the victim. 720 ILCS 5/9-1(a)(2) (West 2014). To sustain a conviction for felony murder, the State must prove the defendant killed the victim while "attempting or committing a forcible felony other than second degree murder." 720 ILCS 5/9-1(a)(3) (West 2014). To prove murder under an accountability theory, the State must establish that the defendant was legally responsible for another's conduct in that, "before or during the commission of an offense, and with the intent to promote or facilitate that commission, he or she solicits, aids, abets, agrees, or attempts to aid that other person in the planning or commission of the offense." 720 ILCS 5/5-2(c) (West 2014). A

person commits armed robbery when he is armed with a firearm while committing a robbery. 720 ILCS 5/18-2(a)(2) (West 2014).

¶ 43 The State must prove every element of an offense beyond a reasonable doubt to sustain a conviction. *People v. Bensen*, 2017 IL App (2d) 150085, ¶ 18. The State may prove its case by direct or circumstantial evidence. *People v. Shaw*, 133 Ill. App. 3d 391, 404 (1985). When presenting circumstantial evidence, it must offer some evidence that gives rise to a reasonable inference that the defendant is guilty. *People v. Laubscher*, 183 Ill. 2d 330, 335-36 (1998). The State may not rely on conjecture or assumption to prove its case. *Id.* When considering a challenge to the sufficiency of the evidence, we review whether the evidence, viewed in a light most favorable to the State, establishes every element of the offense beyond a reasonable doubt. *People v. Pollock*, 202 Ill. 2d 189, 217 (2002) (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). A conviction should not be set aside unless the evidence is so unsatisfactory or inconclusive that a reasonable doubt remains regarding the guilt of the defendant. *People v. Collins*, 214 Ill. 2d 206, 217 (2005).

¶ 44 Generally, when a defendant successfully appeals his conviction, retrying him on remand does not implicate double jeopardy. *People v. Ortiz*, 196 Ill. 2d 236, 253 (2001). However, where the reversal is based on insufficient evidence, a subsequent retrial is barred for double jeopardy purposes. *Id.* Although we have ruled that much of the evidence collected in this case was inappropriately presented at trial, when reviewing the sufficiency of the evidence for double jeopardy purposes, we must consider all the evidence presented at trial, including any improper evidence, to determine whether a rational trier of fact could find Mathews guilty beyond a reasonable doubt. See *People v. Smith*, 2015 IL App (1st) 122306, ¶ 47. We must consider this

evidence in a light most favorable to the State. *People v. Drake*, 2019 IL 123734, ¶ 28. Where the evidence is sufficient to sustain the conviction, retrial is the proper remedy. *Id.* ¶ 21.

¶ 45 The following evidence is relevant to the first degree murder conviction. The police were conducting a canvas of the apartment building in which Morris lived, searching for the perpetrators of a shooting that took place outside the building. When officers knocked on her door, she initially did not answer, which was deemed suspicious because Sinks knew that she was returning to her apartment after their conversation outside. When Morris eventually answered the door, Sinks found her demeanor to be different from during their earlier conversation, describing that Morris was acting nervous. Officers noticed Mathews sitting on a couch in Morris's apartment, despite her claims that she was home alone or home with her children. Two other men who matched the descriptions of the offenders were also in Morris's apartment. One of the men tried to flush a shell casing down the toilet. After his arrest, Mathews was told the police were going to do a gunshot residue test on him. He wiped his hands on his jeans prior to the administration of the test. The tests revealed that Mathews had gunshot residue on his right hand. He wiped his hands on his pants prior to the gunshot residue test. The subsequent search of Morris's apartment resulted in the discovery of weapons hidden in a vent. The guns were matched with shell casings found near the victim's body and with the bullet found lodged in the nearby apartment ceiling. Based on what was presented at trial, including the improperly admitted evidence, we find for double jeopardy purposes that a rational trier of fact could have found the State proved that Mathews committed the offense of first degree murder as charged. *People v. Thompson*, 2017 IL App (3d) 160503, ¶ 17 (citing *Smith*, 2015 IL App (1st) 122306, ¶ 46). We thus find that double jeopardy does not bar the State from retrying Mathews on the first degree murder charge.

¶ 46 The State's evidence regarding the felony murder and accountability counts, albeit more limited than the evidence above, could also have formed the bases for his convictions. Regarding the conviction for felony murder, the State presented its theory that the victim was killed during an armed robbery. A bullet entered a nearby apartment and was found lodged in the ceiling. The tenant looked outside and saw two men running away. Another eyewitness saw the victim tussling with two men, heard gunshots and saw the men flee. The police discovered shell casings and \$54 in cash laying in the snow by the victim's body. According to the victim's girlfriend, she saw him leave the apartment while on the phone and then heard the gunshots. From this evidence, one could infer that the phone call lured the victim outside where the offenders were waiting to rob him. A rational trier of fact could have determined that the two offenders intended on robbing the victim, he rejected their attempts and tussled with them, and one of the offenders shot the victim in an attempt to secure the robbery proceeds. The State had to prove that Mathews killed the victim while attempting to rob him. Considering this evidence in a light most favorable to the State, we determine a rational trier of fact could have found the evidence sufficient to prove that an armed robbery took place and that Mathews participated in it. Thus, retrial on this charge is not barred by double jeopardy.

¶ 47 The evidence supporting the State's accountability theory established that Mathews, Gayton and Simmons spent the night at Morris's apartment, visiting with each other and smoking cannabis. The following morning, a man was shot outside Morris's apartment building. Footsteps from the victim lead to Morris's building. All three men were discovered in Morris's apartment immediately after the murder took place. Guns matching the casings near the victim and the bullet that entered Todd's apartment were discovered in Morris's apartment. Gayton and Simmons matched the description of the offenders and Mathews had gunshot residue on one hand. As noted

above, the victim left his apartment while talking on the phone. It follows that one of the offenders called the victim while the other men proceeded with their roles in the plan. To sustain a conviction under an accountability theory, the State had to prove Mathews aided and abetted Gayton and Simmons in planning the armed robbery and murder. A rational trier of fact could have inferred that Mathews, Gayton and Simmons spent the prior evening concocting a robbery and murder plan and stayed together afterwards to split the robbery proceeds and hide the murder weapons. Because we find the evidence, including the improper evidence, was sufficient to convict Mathews of murder under an accountability theory, retrial on this charge is not barred by double jeopardy. *Id.* (citing *Smith*, 2015 IL App (1st) 122306, ¶ 46). As stated above, on retrial, the video, gunshot residue test results and the guns must be suppressed.

¶ 48 In light of our ruling suppressing the guns, it is unnecessary to consider Mathews's remaining arguments challenging the sufficiency of the evidence for the charge of unlawful possession of a weapon by a felon. The elements of unlawful possession of a weapon by a felon are (1) the defendant had a prior felony conviction, and (2) knowingly possessed a firearm. 720 ILCS 5/24-1.1(a) (West 2014); *People v. Adams*, 388 Ill. App. 3d 762, 766 (2009). As discussed above, the weapons discovered during the search of the apartment must be suppressed. Without the weapons, the State cannot sustain the elements necessary to convict Mathews on this charge and the appropriate remedy is an outright reversal of his conviction for unlawful possession of the weapon by felon. See *People v. Leigh*, 341 Ill. App. 3d 492, 497 (2003) (conviction for unlawful possession of a weapon by a felon reversed outright where the State could not prevail on remand without the suppressed firearm).

¶ 49 Mathews's final issue on appeal is whether the trial court erred when it played the interrogation video in the courtroom for the jury during deliberations. Mathews submits it was

error for the court to order the jury to watch the video in the courtroom in the presence of the judge, two attorneys representing the State, defense counsel, Mathews and members of the public. Mathews did not preserve this issue for appeal but argues that this court should review it for plain error. Because we are reversing Mathews's convictions on other grounds, we will not reach the merits of this argument.

¶ 50 We reverse defendant's conviction for unlawful possession of a felon because the State cannot prove a necessary element of the offense, namely that Mathews possessed a weapon. We vacate the trial court's ruling that the complaint for warrant contained sufficient, untainted facts to support a finding of probable cause for the issuance of the warrant and thus reverse the trial court's ruling declining to suppress the weapons. Therefore, we vacate the defendant's conviction for first degree murder and remand this matter to the trial court for further proceedings consistent with this ruling.

¶ 51 CONCLUSION

¶ 52 For the foregoing reasons, the judgment of the circuit court of Peoria County is reversed in part, vacated in part, and the cause remanded.

¶ 53 Reversed in part and vacated in part.

¶ 54 Cause remanded.