No. 124538

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- LESLIE MOORE Petitioner-Appellant	))))))))))	Appeal from the Appellate Court of Illinois, No. 3-15-0736. There on appeal from the Circuit Court of the Twelfth Judicial Circuit, Will County, Illinois, No. 13-CF-1034. Honorable Edward A. Burmila, Jr., Judge Presiding.

BRIEF AND ARGUMENT FOR PETITIONER-APPELLANT

JAMES E. CHADD
State Appellate Defender

THOMAS A. LILIEN
Deputy Defender

YASEMIN EKEN
Supervisor
Office of the State Appellate Defender
Second Judicial District
One Douglas Avenue, Second Floor
Elgin, IL 60120
(847) 695-8822
2nddistrict.eserve@osad.state.il.us

COUNSEL FOR PETITIONER-APPELLANT

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Carolyn Taft Grosboll
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NATURE OF THE CASE

After a jury trial, Leslie Moore was convicted of unlawful possession of a weapon by a felon and was sentenced to seven years in prison.

This is a direct appeal from the judgment of the court below. No issue is raised challenging the charging instrument.

ISSUE PRESENTED FOR REVIEW

Whether trial counsel was ineffective for failing to stipulate to Leslie Moore's felon status, thereby allowing the jury to consider highly prejudicial evidence that Moore's prior conviction was for murder.

RULE INVOLVED

Illinois Supreme Court Evidence Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Adopted September 27, 2010, eff. January 1, 2011.

STATEMENT OF FACTS

Leslie Moore was charged with unlawful possession of a weapon by a felon. (C. 9) His prior felony was a 1990 murder conviction. (R. 309) The weapons charge stemmed from a traffic stop where, after the police pulled Moore over for failing to signal and speeding, they searched his car and found a gun in its closed center console.

Motion to Suppress Evidence

Moore filed a motion to suppress evidence alleging that the police lacked probable cause to stop him. He also alleged that they unreasonably prolonged the traffic stop. (C. 38-41)

At the hearing on the motion, Moore testified that at around 1:16 a.m. on May 16, 2013, he left his friend's house and was driving home. (R. 62) He activated his turn signal to turn left from Zarley Boulevard onto Chicago Street in Joliet. (R. 63) Deputy Hannon pulled him over on Chicago Street. (R. 62)

Hannon approached Moore and explained that he was stopped for speeding. (R. 63) Moore gave Hannon his driver's license and insurance card. (R. 64) He did not raise his hands over his head, but kept his hands on the steering wheel, except when he was retrieving his insurance card from the glove compartment. (R. 66, 80) He did not want to move or have the officer think he was doing anything. (R. 80)

Deputy Hannon went back to his squad car. (R. 77) When he returned, he gave Moore his license. (R. 78) He said he had observed Moore make a "furtive" movement and asked Moore to get out of the car. (R. 66, 78) At the hearing, Moore denied making a furtive movement. (R. 65-66)

Hannon directed Moore to stand behind his car and put his hands on the trunk. (R. 67) He handcuffed Moore, searched Moore, and then said that he was going to search the car. (R. 67) Moore did not give him permission to search it. (R. 67) Moore later learned that a gun was found in his car. (R. 68) He did not know about the gun and denied telling Hannon that there was a gun in his car. (R. 78-79) Although Hannon advised Moore that he was stopped for speeding, he only received a ticket for failing to signal. (R. 69)

The defense also called Deputy Hannon as a witness. He testified that he did not have a warrant when he searched Moore's car or arrested him. (R. 82-83) Hannon said that as he was pulling up behind Moore, Moore reached his right arm toward the center of the car. (R. 88) When Hannon approached Moore, he acted nervous. He put his hands in the air, his hands were shaking, and he was sweating. (R. 87) Hannon eventually recovered a gun from the front center console. (R. 88) The gun was a "Cobra .38" and was loaded with two rounds of ammunition. (R. 83)

The court found that Moore had failed to make a *prima facie* case that Hannon lacked probable cause for the traffic stop. (R. 93) However, the court found that Moore had shown that Hanson unreasonably prolonged the stop. (R. 93)

The State re-called Deputy Hannon. (R. 96) He testified that when he pulled behind Moore to initiate the traffic stop, he saw Moore reach toward the middle console area with his right arm. (R. 100) Hannon approached Moore but before Hannon said anything, Moore put his hands in the air. (R. 102) Moore's hands were shaking and he was sweating. (R. 102)

Hannon requested Moore's driver's license and proof of insurance and verified

that his license was valid. (R. 104) He approached Moore again and asked him why he was so nervous. (R. 104-105) He could not recall if he returned Moore's driver's license and insurance to him at that time. (R. 104) During direct examination, Hannon said Moore told him that there was a loaded gun in the car and therefore, he ordered Moore out of the car for his safety. (R. 105-106) On cross-examination, Hannon admitted that he told Moore to get out of the car because Moore was nervous and put his hands up, not because Moore said he had a gun. (R. 110) Only after Moore got out of his car did he tell Hannon about the gun. (R. 110)

Hannon handcuffed Moore and called for backup. (R. 106) Deputy Ambrosini arrived and retrieved the gun from the front center console where Moore said it was located. (R. 107, 111) Hannon ran the serial number of the gun and learned that Moore had a prior felony conviction. (R. 108) He arrested Moore for possession of a firearm by a felon. (R. 109)

The court found that given Officer Hannon's testimony about Moore's alleged furtive movement and his sweating and raising his hands up, the search was "appropriate under the Fourth Amendment." (R. 131) Accordingly, the court denied Moore's suppression motion. (R. 132)

Trial

Before jury selection, the court asked the State whether Moore's prior conviction for murder was "part of the proof beyond a reasonable doubt or a sentencing issue." (R. 140) The prosecutor replied, "It's part of proof beyond a reasonable doubt." (R. 140) Then the following discussion occurred:

THE COURT: I am going to advise the jury of the nature of the

> conviction or just the defendant is convicted?
>
> [ASSISTANT STATE'S ATTORNEY] HARVEY: I believe the nature of the conviction is what's told to the jury.
>
> THE COURT: Mr. Ooink, you agree with that?
>
> [DEFENSE COUNSEL] OOINK: Yes.
>
> THE COURT: That's my understanding of the law just so the record is clear. (R. 140)

The court subsequently advised the potential jurors that the charge alleged Moore had "committed the offense of unlawful use of a weapon by a felon" and "had been previously been convicted of a felony and that was a murder." (R. 143)

At trial, Deputy Hannon testified that on May 16, 2013, he was on patrol and parked in his marked squad car on east Zarley Street in Joliet. (R. 269) Hannon saw a car approaching an intersection at Chicago and Zarley Streets. Although the driver activated his turn signal when he reached the stop sign, the driver did not do so within 100 feet of turning as required by law. (R. 271) As Hannon started to follow the car for this traffic infraction, he noticed that he was driving 60 miles per hour in a 40 mile-per-hour zone in order to keep up with the car. (R. 271)

Hannon activated his lights and curbed the car which was driven by Moore. (R. 272) Hannon said that when he pulled up behind the car, he saw Moore "dip" his right hand or shoulder toward the center console. (R. 272) When Hannon approached Moore, he raised his hands in the air. He appeared nervous; his hands were shaking and he was sweating. (R. 275)

Hannon advised Moore of his traffic infractions and told him to put his hands down and "relax." (R. 275) He asked Moore for his driver's license and proof of insurance. (R. 276) Hannon verified that Moore's license was valid and that the

car was registered to him. (R. 276)

When Hannon returned to Moore's car, he saw that Moore's hands were still shaking, he was sweating, and he was still acting nervous. (R. 277) Hannon asked Moore why he was so nervous, but could not recall how Moore responded. (R. 277) Hannon ordered Moore out of the car and directed him to stand behind it and in front of the squad car. (R. 277) Hannon again asked why Moore was so nervous and why he raised his hands when Hannon first made contact with him. (R. 278) According to Hannon, Moore said he had a loaded firearm in the car's center console. (R. 278) For safety reasons, Hannon handcuffed Moore and called for backup. (R. 279)

Deputy Ambrosini arrived a few minutes later. (R. 280) Hannon searched Moore's car, opened the front center console and found a silver, loaded .38 caliber Cobra. (R. 280-28) A criminal background check showed that Moore had a prior felony conviction. (R. 288-289) Hannon arrested Moore for unlawful possession of a weapon by a felon. (R. 289) He did not request that the gun be tested for fingerprints, because Moore had admitted that he knew it was in the car. (R. 290-291)

Hannon identified "State Exhibit 1" as a video-recording of the traffic stop. (R. 291) His car was equipped with video equipment, but the exterior audio component was not functioning. (R. 290) In other cases, Hannon had provided the State with both a video-recording and an exterior audio recording. (R. 296)

The video was played for the jury. (R. 291) Contrary to Hannon's testimony, the video showed Detective Ambrosini retrieved the gun from the car, not him. He explained that he initially found the gun, but he asked Ambrosini to get it

because he did not know how to unload it. (R. 292) Hannon also admitted that the video did not show Moore dipping his right shoulder down when Hannon pulled him over. He said Moore's movement was not accurately portrayed due to the video's poor quality. (R. 295)

The State moved to admit a certified copy of Moore's prior conviction and defense counsel had "no objection." (R. 309) The State told the jury that Moore had been convicted of murder in 1990. (R. 309)

For the defense, Sherry Walls testified that she lived in Joliet at the time of the offense. (R. 313-314) She and Moore had attended high school together and were best friends. (R. 314) On May 15, 2013, Walls used Moore's car to move some belongings from her Calumet Park home to her new address at 201 West Zarley in Joliet where her daughter and son-in-law lived. (R. 315-316, 319) After Moore picked her up, Walls dropped Moore off at his house and went to her Calumet Park address. (R. 316) Walls picked up some clothes and her two guns, a "Cobra" and a ".380." (R. 317) She put the .380 gun in the glove compartment and the Cobra in the center console of Moore's car. (R. 318)

Walls picked up Moore from his home, dropped him off at her daughter's home, and then continued using his car to run errands. (R. 318-319) When Walls returned, Moore and her son-in-law helped her carry groceries upstairs to the apartment. (R. 321-322) Walls grabbed her purse and ran to use the bathroom. (R. 322) The next day, she looked in her purse and saw that she only had the .380 gun. (R. 323) She did not tell Moore that she had left the other gun in his car. (R. 336)

Walls had purchased the Cobra on September 27, 2010. (R. 323) At trial,

she identified the receipt for that gun purchase. (Def. Ex. 1; R. 331) The receipt bore her signature and the gun's serial number. (R. 331-332) She also identified the gun that the police retrieved from Moore's car was the gun she had purchased. (St. Ex. 2; R. 336) The serial number on the receipt matched the serial number on the gun. (R. 283, 332)

Leslie Moore testified that he was 45 years old and lived in Chicago with his wife of 16 years. (R. 363) They had a 27-year old son. (R. 363) Moore worked at Jewel in the sanitation building maintenance department and had worked there for 14 years. (R. 364)

Moore testified that on May 15, he had loaned his car to Walls to move some things from her old address. (R. 370-371) She picked him up and they went back to her home at 201 West Zarley. (R. 371-372) Walls left in Moore's car. When she returned, Moore and Walls' son-in-law went downstairs to help her carry things into the house. (R. 373) He did not know that Walls had put her two guns in his car. (R. 374)

The next day, at around 1:15 a.m., Moore was driving his car and approached a stop sign at Chicago and Zarley. (R. 364) He signaled, and turned left onto Chicago. (R. 364) He saw police lights behind him and immediately pulled over. (R. 364) When Deputy Hannon approached him, Moore had his hands on the steering wheel at positions "10 and 2." (R. 365) He did not move toward the center console. (R. 377) Nor was he nervous, shaking, or sweating. (R. 379)

Moore rolled down his window and gave Hannon his driver's license, proof of insurance, and registration. (R. 366) Hannon returned Moore's documents to him and then asked Moore what he was doing in Joliet. (R. 366) Moore explained

that he had just left his friend's home after watching the Oklahoma City Thunder game. (R. 366)

Hannon told Moore to get out of the car and directed him to the back of the car. (R. 367) He asked Moore why he was acting nervous, but Moore denied being nervous. (R. 382) Hannon again asked Moore what he was doing on Zarley and then asked him if he had any weapons or drugs. (R. 367) Moore said he did not and repeated where he had been. (R. 367) He never told Hannon that there was a gun in the center console of his car. (R. 367)

Hannon handcuffed Moore and said he was doing it for safety reasons. (R. 370) After Detective Ambrosini arrived, Hannon searched Moore's car. (R. 384) Moore did not see where he searched. (R. 384) Ambrosini also searched the car and brought out a gun. (R. 384) Only then did Moore realize the gun was in his car. (R. 384-385)

Following closing arguments, the jury was given the definition and issues instructions for unlawful possession of a weapon by a felon. The definition instruction stated that "[a] person commits the offense of unlawful possession of a weapon by a felon when he having previously been convicted of the offense of murder, knowingly possesses a firearm." (R. 416) The issues instruction included as the second proposition that the State was required to prove that "the defendant had previously been convicted of the offense of murder." (R. 416-417) The jury was also given I.P.I. 3.13X which instructed that while "ordinarily evidence of a defendant's prior conviction of an offense may not be considered by you as evidence of his guilt of the offense with which he is charged," in this case, because the State was required to prove beyond a reasonable doubt that Moore had "previously been

convicted of murder," the jurors could consider evidence of the murder conviction "only for the purpose of whether the State has proven that proposition." (R. 416)

The jury found Moore guilty of unlawful possession of a weapon by a felon. (R. 421) Defense counsel filed a motion for a new trial, alleging that the trial court erred in denying Moore's motion to suppress and that the State failed to prove him guilty beyond a reasonable doubt. (C. 76) The court denied the motion. (R. 431)

Moore's Pre-sentence Investigation Report indicated that he had completed his prison sentence for murder in 1998. (IC. 15) Since 2001, Moore was employed full time at a Jewel warehouse. (IC. 15) He had been married for 17 years. (IC. 15) He had a good relationship with his son who was attending North Dakota State University. (IC. 15)

Several letters were submitted on Moore's behalf. Karyn Aguirre, a social worker who formerly worked for the Cook County State's Attorney's office, described Moore as "a dedicated husband" and "committed in doing what is right and just." (IC. 4) She said he had repeatedly expressed "how fortunate he was to have a second chance, how it changed his life and [how] thankful [he was] for the presence of positive people in his life including his wife, mentors, and [her]." (IC. 4) She said he engaged in "heartfelt and wrenching" conversations with her son and his friends and had spoken to her students at the Cook County Juvenile Detention Center "with the hopes of imparting wisdom of making positive choices and an understanding how 'that life' is not 'a life' for anyone with aspirations to succeed." (IC. 4) Given "his character and efforts to live as an honest and law abiding citizen," Aguirre was "stunned" and "in disbelief" about Moore's current situation.

(IC. 4)

The bishop of Moore's church wrote that Moore was a "respectable and caring person" who "has spent the past number of years working hard at building a life and home for he and his family." (IC. 7) His physician, Dr. Monica Peek, explained that she had been treating Moore for more than 10 years. He was one of her favorite patients because of "his kindness, empathy, and humor." (IC. 8) She had only recently become aware of Moore's murder conviction and "would never have imagined that part of his history." (IC. 8) She said Moore was "a completely different man than the one who made a (serious) mistake in his past." (IC. 8) He had a "strong moral compass," "was always looking to help others," and "put others' interests before his own." (IC. 8) He was a "committed husband, caring son, and wonderful friend to many." (IC. 9) Dr. Peek "beg[ged]" the court for leniency, stating that "[s]ociety, in general, and the Chicago community in particular, benefit from having Leslie in our community, helping others, rather than behind bars." (IC. 9)

In pronouncing its sentence, the court stated, "This procedure is not a referendum on Mr. Moore's character." (R. 441) The court observed that "49 people [were] shot in the city of Chicago" during the previous weekend and then commented, "and the reason that those people were shot was the prevalence of unlawful firearms in our community." (R. 441) The court sentenced Moore to seven years in prison. (R. 442) Moore's motion to reconsider sentence was denied. (R. 462)

On appeal, Moore raised three issues: 1) that the circuit court erred in denying his motion to suppress; 2) that counsel was ineffective for failing to renew the suppression motion at trial; and 3) that counsel was ineffective for failing to stipulate to Moore's felon status, thereby allowing the jurors to learn that he had

previously been convicted of murder. The appellate court rejected all three issues, but Justice Holdridge disagreed with the majority's conclusion that Moore was not prejudiced by counsel's failure to stipulate to Moore's felon status and dissented as to that issue. *People v. Moore*, 2018 IL App (3d) 150736-U, ¶¶ 21-46.

After unsuccessfully petitioning for rehearing on the third issue, Moore timely petitioned for leave to appeal. This Court granted leave to appeal on May 22, 2019.

ARGUMENT

Trial counsel was ineffective for failing to stipulate to Leslie Moore's felon status, thereby allowing the jury to consider the highly prejudicial evidence that he had previously been convicted of murder.

STANDARD OF REVIEW

Where as here, an ineffective assistance of counsel claim was not raised in the trial court, the claim is subject to *de novo* review. *People v. Lofton*, 2015 IL App (2d) 130135, ¶ 24.

ARGUMENT

Leslie Moore was charged with unlawful possession of a weapon by a felon. (C. 9) When the only purpose for admitting evidence of a defendant's prior conviction is to prove his felon status, a jury should not learn the name and nature of the conviction because it is too prejudicial. *People v. Walker*, 211 Ill. 2d 317, 338 (2004). Accordingly, if trial counsel offers to stipulate to the defendant's felon status, the trial court must accept the stipulation. *Walker*, 211 Ill. 2d at 338. As this Court explained, "Simply stated, the prosecution has no entitlement or right to present evidence that is unfairly prejudicial when equally probative, non-prejudicial evidence is available and will serve the same purpose." *Id*. at 339.

In this case, Moore's prior conviction was for murder. Given the prior conviction's severity and highly prejudicial nature, defense counsel should have stipulated to Moore's felon status to exclude the details of the conviction. Instead, counsel agreed with the State that the jury should learn that Moore was a convicted murderer. (R. 140) Counsel's failure to stipulate

to Moore's felon status was professionally unreasonable and prejudiced Moore. As a result, he was deprived of his constitutional right to the effective assistance of counsel. Therefore, this Court should reverse his conviction and remand for a new trial.

A. Given this Court's decision in *Walker*, counsel was ineffective for failing to stipulate to Moore's felon status.

A criminal defendant has a constitutional right to the effective assistance of counsel. U.S. Const., Amends VI, XIV; Ill. Const. 1970, Art. I, § 8; *Strickland v. Washington*, 466 U.S. 668, 685-687 (1984); *People v. Albanese*, 104 Ill. 2d 504 (1984). Counsel is not effective if his performance falls below an objective standard of reasonableness and prejudices the defendant by denying him a fair trial. *Strickland*, 466 U.S. at 687. To show ineffective assistance of counsel, a defendant must demonstrate that his attorney's representation was deficient and that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. *Strickland*, 466 U.S. at 694; *People v. Simpson*, 2015 IL 116512, ¶ 35.

The primary duties of a defense attorney are to advocate for the defendant's cause and use his skill and knowledge to make the trial a reliable adversarial testing process. *People v. Jackson*, 318 Ill. App. 3d 321, 326 (1st Dist. 2000). Effective assistance contemplates that counsel will use "established rules of evidence and procedure to avoid when possible[,] the admission of incriminating statements, harmful opinions, and prejudicial facts." *People v. Lucious*, 2016 IL App (1st) 141127, ¶ 32 (internal quotation

marks and citations omitted). While counsel's conduct is afforded a strong presumption that it constitutes sound trial strategy, "this presumption may be overcome where no reasonably effective criminal defense attorney, confronting the circumstances of the defendant's trial, would engage in similar conduct." *People v. Fillyaw*, 409 Ill. App. 3d 302, 312 (2nd Dist. 2011).

As for prejudice, the defendant must show that there is a reasonable probability that but for counsel's errors or omissions the results of the proceedings would have been different. *Strickland*, 466 U.S. at 694. A reasonable probability means a probability sufficient to undermine confidence in the outcome of the case. *Id.* Ultimately, in assessing prejudice, the focus is on the fundamental fairness of the trial. *Id.* at 696.

Before *voir dire*, the trial court asked the parties if, when reading the indictment, it should inform the jury of the nature of Moore's prior conviction or "just [that] the defendant is convicted." (R. 139-140) The prosecutor responded, "I believe the nature of the conviction is what's told to the jury." (R. 140) Defense counsel agreed. (R. 140) The judge subsequently advised the venire, "it's alleged on May 16, 2013, that [Moore] committed the offense of unlawful possession of a weapon by a felon" and that he "had been previously convicted of a felony, and that was a murder." (R. 143) At trial, a certified copy of Moore's prior conviction was admitted into evidence and the State told the jury that the copy showed that in 1990, Moore "was convicted of murder." (R. 309)

The jury was again reminded that Moore was a convicted murderer when during closing argument, the prosecutor referred to the definition and

issues instruction for unlawful possession of a weapon by a felon and said that the "second proposition" it needed to prove was "that defendant had previously been convicted of murder." (R. 397) The prosecutor also told the jury that it had heard that "[Moore] was convicted of murder back in 1990" and the jury could "consider *that* when you deliberate." (R. 398) These facts, according to the State, proved "beyond a reasonable doubt that [Moore] was previously convicted of murder as well." (R. 398) In its rebuttal argument, the prosecutor approved "America['s] second amendment right to bear arms," but warned "there's some people who can't possess firearms or weapons" and highlighted that Moore was one such person because "based on his prior conviction for murder, he loses that right." (R. 403)

Allowing the jury to hear the name and nature of Moore's prior felony conviction was unnecessary and highly prejudicial. The prejudice is the same as what derives from other-crimes evidence. Such evidence is generally inadmissible because it tends to over persuade the jury that the defendant is a bad person deserving punishment. *People v. Thingvold*, 145 Ill. 2d 441, 452 (1991); *People v. Lindgren*, 79 Ill. 2d 129, 137 (1980). This type of evidence "carries an overwhelming ability to dominate decision making, swaying people to convict, regardless of what the actual evidence to support the charged conduct can establish." *People v. McMillin*, 352 Ill. App. 3d 336, 346 (5th Dist. 2004).

In *Walker*, this Court addressed the problem with admitting other-crimes evidence of a prior conviction in the same context as this case where its only purpose was to prove the defendant's felon status. In doing so, this

Court examined the United State Supreme Court's decision in *Old Chief v. United States* and then applied it to Illinois law. *Walker*, 211 Ill. 2d at 330-340.

The defendant in *Old Chief* was charged under a federal statute making it unlawful for a felon to possess a firearm. Before trial, he offered to stipulate to the fact of his prior conviction to avoid revealing its name and nature. *Old Chief*, 519 U.S. at 175-176. The government refused to join in the stipulation and the trial court allowed it to introduce the order of judgment and commitment for the defendant's prior felony conviction of "assault resulting in serious bodily injury." *Old Chief*, 519 U.S. at 177.

The issue before the Court was whether the trial court could permit the State to refuse to accept a defendant's stipulation in place of his record of conviction. The Supreme Court resolved the issue by applying Federal Rule of Evidence 403. That rule provides that "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by the danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403.

Under this rule, *Old Chief* held that when the government only needs to prove the defendant's felon status, evidence of the name and nature of the prior conviction should generally be excluded, because it has no probative value and presents a danger of unfair prejudice. *Id.* at 185-192. Otherwise, the jury could consider the defendant's prior "bad act" as "raising the odds" that he committed the offense charged. *Id.* at 180-181. The name and nature

of the prior conviction could "lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *Id.* at 180.

Moreover, the risk of prejudice outweighed any probative value in admitting the name and nature of the prior felony conviction. *Old Chief* stated that "the [Fed. R. of Evid. 403] 'probative value' of an item of evidence, as distinct from its [Fed. R. of Evid. 401] 'relevance,' may be calculated by comparing evidentiary alternatives." *Id.* at 184. It opined that a trial court's evaluation of an evidentiary item's probative value and potential for undue prejudice should be guided "by placing the result of that assessment alongside similar assessments of evidentiary alternatives." *Id.* at 184-85. It found that, in dealing with the prior-conviction element of the statute at issue, "there can be no question that evidence of the name or nature of the prior offense generally carries a risk of unfair prejudice to the defendant." *Id.* at 185. And less prejudicial means of proof – such as a stipulation or admission to the defendant's felon status – could establish the defendant's felon status. *Id.* at 185-186.

Walker adopted *Old Chief's* reasoning and holding. Also, subsequent to *Walker*, Illinois has adopted the Illinois Rules of Evidence, and the pertinent Rule is virtually the same as the Federal Rule at issue in *Old Chief*. Ill. R. Evid. 403 (eff. Jan. 1, 2011) ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence").

In *Walker*, this Court agreed with *Old Chief* that in cases requiring proof of felon status, disclosing the nature of a defendant's prior conviction created a risk that he would be unfairly prejudiced. 211 Ill. 2d at 338, 341. Because the only purpose of such evidence was to establish felon status, the name and nature of the prior conviction was "unnecessary surplusage without any evidentiary significance." *Walker*, 211 Ill. 2d at 338.

Here, in accordance with *Old Chief* and *Walker*, had counsel offered to stipulate to Moore's prior conviction, the trial court would have been obliged to accept the stipulation. And given the high risk of prejudice inherent in disclosing Moore's prior conviction, counsel's failure to stipulate to his felon status was objectively unreasonable. Informing the jury that Moore had been convicted of murder could hardly benefit him. Cf. *Old Chief*, 519 U.S. at 185, fn. 8 (the nature of some prior convictions, such as "an extremely old conviction for a relatively minor felony," may help the defendant). Moore's prior conviction was more serious than the charge for which he was on trial and involved the most violent and serious felony under Illinois law. See *Kennedy v. Louisiana*, 554 U.S. 407, 438 (2008), quoting *Coker v. Georgia*, 433 U.S. 584, 598 (1977) ("'in terms of moral depravity and of the injury to the person and to the public,' [non-homicide offenses] cannot be compared to murder in their 'severity and irrevocability'"). There was no reasonable strategy for not stipulating merely that Moore had a prior conviction for an unspecified felony.

Furthermore, counsel's error prejudiced Moore. The analysis for assessing prejudice under *Strickland* is similar to the one for the closely-

balanced prong of plain-error inquiry. *People v. White*, 2011 IL 109689, ¶ 133 ("[p]lain-error review under the closely-balanced-evidence prong of plain error is similar to an analysis for ineffective assistance of counsel based on evidentiary error insofar as a defendant in either case must show he was prejudiced"). Here, the evidence was close. The State claimed that Moore constructively possessed the gun found in his car. Thus, to prove Moore guilty, the State had to show that Moore knew the gun was in his car and he had immediate and exclusive control over the area where the gun was found. *People v. Hampton*, 358 Ill. App. 3d 1029, 1031 (2nd Dist. 2005).

The evidence on the issue of Moore's knowledge pitted the credibility of Deputy Hannon against Moore and his witness, Sherry Walls. Hannon testified that during the traffic stop, Moore told him that there was a loaded gun in the car's center console. (R. 278) When Hannon searched the car, he discovered the gun inside the console's closed compartment. (R. 280-281)

Walls, however, testified that the gun was hers, and a receipt verifying her purchase of it was admitted into evidence at trial. (R. 317, 331-332) She also explained that the day before Moore was stopped by Hannon, she had put the gun in the center console of Moore's car and forgotten about it. (R. 318-323) She never told Moore that she had put the gun in his car and Moore testified that he did not know it was there (R. 335-336, 374) Moore also denied telling Hannon that he knew about the gun. (R. 367)

Given this testimony, the jurors had to decide whether Deputy Hannon's version of events or Moore's was more believable. Because Walls was Moore's "best friend" (R. 314), the jury may have found her to be biased

in his favor, but Hannon's testimony could be reasonably be viewed with skepticism as well. He claimed that Moore volunteered his incriminating statement about the gun. Yet the statement was not recorded, despite the capability to do so, because Hannon chose not to fix the malfunctioning audio-recorder. (R. 295) Furthermore, although Hannon admitted that the gun could be tested for fingerprints, he chose not to submit it for such testing. (R. 290-291, 306) Therefore, no physical evidence corroborated his testimony. In any event, the testimony of Moore and Walls was no less plausible than Hannon's and was not contradicted by any extrinsic evidence. See *People v. Sebby*, 2017 IL 119445, ¶ 62 (evidence was close, involving a credibility contest between the State's witnesses who were deputies from the sheriff's department and the defendant's witnesses who were his family members and friends); see also *People v. Naylor*, 229 Ill. 2d 584, 608 (2008) (evidence was close where the trier of fact "was faced with two different versions of events, both of which were credible," and no extrinsic evidence corroborated or contradicted either version of events).

Because the evidence was close, a reasonable probability exists that the results of the trial would have been different absent counsel's error. The erroneous admission of highly prejudicial other crimes evidence generally requires reversal of a conviction. *Lindgren*, 79 Ill. 2d at 140. Disclosing Moore's murder conviction could have improperly influenced the jury and tipped the scales against him, as a bad person deserving of punishment. *Walker*, 211 Ill. 2d at 342 (where the evidence against the defendant was not overwhelming, "it is possible the prior-conviction evidence tipped the scales

against the defendant").

In fact, the trial court itself seemingly made such an inference. Despite an extraordinary amount of evidence showing Moore's upstanding character and the honorable life led by him in the 17 years since being released from prison, the court imposed a sentence of seven years imprisonment based on "49 people [being shot] in the city of Chicago" during the previous weekend. (R. 441) The court thus equated Moore's conviction for possession of a weapon with using the weapon to harm someone to justify its harsh sentence. If the jurors had any doubts about Moore's guilt for the offense charged, they could have improperly used his prior murder conviction to similarly infer that he was a bad person who would not only be more likely to possess a gun, but also might use it to commit another crime.

Also, in a case that hinged on the witnesses' credibility, Moore's testimony could only have been negatively and unfairly impacted by the failure to exclude the nature of Moore's prior conviction. The State could not use Moore's prior conviction for impeachment, because it was too old. (R. 388); *People v. Montgomery*, 47 Ill. 2d 510 (1971) (a prior conviction is not admissible for impeachment if more than 10 years has elapsed since the date of conviction). Yet, the prejudice of informing the jury of Moore's prior conviction was similar to a *Montgomery* violation; evidence that Moore "had been convicted of a felony involving the taking of a life may have played an important, even crucial, part in the jury's evaluation of his credibility." *People v. Norwood*, 164 Ill. App. 3d 699, 703 (1st Dist. 1987)(reversing defendant's conviction and remanding for a new trial where the State improperly used

defendant's prior involuntary manslaughter conviction, which was too remote in time, for impeachment); see also *People v. Sanchez*, 404 Ill. App. 3d 15, 18-19 (1st Dist. 2010) (counsel's failure to object to the admission of defendant's prior conviction that was more than ten years old constituted deficient performance and prejudiced the defendant where the evidence was close and amounted to a credibility contest between the defendant and the State's police officer witness).

In sum, it was unnecessary and highly prejudicial for the jury to learn that Moore was a convicted murderer. Trial counsel acted unreasonably when he failed to stipulate to Moore's felon status to shield the jury from considering this evidence. Consequently, Moore was denied his right to the effective assistance of counsel and a fair trial. His conviction should be reversed and his case remanded for a new trial.

B. Although a majority of the appellate court found that counsel's failure to stipulate to Moore's felon status was deficient, it misapplied this Court's precedent and wrongly found that he was not prejudiced by counsel's performance.

A majority of the appellate court decided that counsel was not ineffective for failing to stipulate to Moore's felon status. The majority acknowledged that under *Walker*, "if the defendant actually agrees to stipulate to his felon status, the court must allow the stipulation." *People v. Moore*, 2018 IL App (3d) 150736-U, ¶ 37. But rather than applying *Walker's* analysis and reasoning to assess counsel's performance, the majority relied on *People v. Atkinson*, 186 Ill. 2d 450, 459 (1999), where, in relation to the use of convictions for impeachment purposes, this Court rejected the "mere-

fact" method of informing the jury that the defendant had a prior conviction, without revealing the name and nature of the conviction. In doing so, this Court stated that the "bare announcement" of the defendant's conviction could result in unfair prejudice to the defendant by inviting the jury to speculate as to the nature of the unnamed crime. *Atkinson*, 186 Ill. 2d at 459. Based on this statement, the majority concluded that "[i]t could very well be trial strategy to choose to allow proof of the crime" rather than to have the jury speculate as to what the crime is. *Moore*, 2018 IL App (3d) 150736-U, ¶ 37.

Nevertheless, the majority ultimately concluded that counsel's failure to stipulate to Moore's felon status in this case was deficient. *Moore*, 2018 IL App (3d) 150736-U, ¶ 37. The majority then used the above-mentioned reasoning from *Atkinson* to find that counsel's error did not prejudice Moore. The majority declared that "[t]he jury still would have heard that he was a felon" and "still could have speculated that he had been convicted of the most serious crime." *Id*. ¶ 38. Justice Holdridge dissented, finding that there was no strategic reason not to stipulate to Moore's felon status and that given the closeness of the evidence, there was a reasonable probability that had counsel stipulated, the result of the trial would have been different. *Id*. ¶¶ 43-45 (Holdridge, J., dissenting).

The fundamental problem with the majority's decision is that it analyzed the issue under *Atkinson* to find that erroneously informing the jury about Moore's prior murder conviction was not prejudicial. The issue here involves using a prior conviction to prove the element of a crime, not for

impeachment purposes. For that reason, *Walker* resolves this issue, not *Atkinson*.

As noted above, in *Walker*, this Court followed the reasoning of *Old Chief v. United States*, 519 U.S. 172 (1997), to find that in cases requiring proof of felon status, disclosing the nature of a defendant's prior conviction created a substantial risk that he would be unfairly prejudiced. 211 Ill. 2d at 338, 341. In *Atkinson*, which predated *Walker*, this Court found that *Old Chief* did not apply because "*Old Chief* involved neither the admission of a prior conviction as impeachment evidence nor a general discussion of Federal Rule of Evidence 609 (governing the admissibility of prior convictions to impeach the credibility of a witness)." *Atkinson*, 186 Ill. 2d at 461. *Walker* also made this distinction, noting that its decision to reject the mere-fact method of impeachment in *Atkinson* was "not in conflict with the logic and reasoning in *Old Chief*" because "admission of prior-conviction evidence to impeach a defendant's credibility is a purpose beyond that of proving a defendant's felon status." *Walker,* 211 Ill. 2d at 341.

Atkinson's analysis of the prejudicial impact from disclosing the nature of a prior conviction for impeachment purposes is different than *Walker's*. Before a prior conviction is admitted for impeachment, the trial court must conduct a balancing test to weigh its probative value against its prejudicial nature. Under the "*Montgomery* rule," the court considers the nature of the prior conviction, the nearness or remoteness of that crime to the present charge, the subsequent career of the person, the length of the witness' criminal record, and whether the crime was similar to the one charged.

People v. Montgomery, 47 Ill. 2d 510, 517-518 (1971). As *Atkinson* noted, under this rule, "the possibility of resulting prejudice to the defendant from revealing the nature of the prior conviction is controlled by the judicial balancing test set forth in the third prong of *Montgomery*." *Atkinson*, 186 Ill. 2d at 459. Thus, if, after applying that test, the prejudice to the defendant substantially outweighs the probative value of admitting the impeachment evidence, the prior conviction must be excluded. *Atkinson*, 186 Ill. 2d at 459.

Here, the above *Montgomery* factors weighed against admitting Moore's prior conviction. Since his 1990 conviction for murder, he had not been arrested or convicted for any other offense. (IC. 13-14) And at the time of his arrest for this case, he had lived a law-abiding life, had been gainfully employed at the same place for 12 years, supported his family, and had made significant contributions to his community. (R. 363-364; IC. 3-15) Thus, his criminal history and his subsequent career showed that the prior conviction's prejudicial impact far outweighed any probative value in admitting it.

More importantly, under the *Montgomery* rule, less than 10 years must have elapsed since the date of conviction of the prior crime or release of the witness from confinement, whichever is later. *Montgomery*, 47 Ill. 2d at 516. A conviction older than 10 years is inadmissible because it has no bearing on credibility. *People v. Naylor*, 229 Ill. 2d 584, 601 (2008) (quoting *People v. Medreno*, 99 Ill. App. 3d 449, 451 (3rd Dist. 1981) ("'[t]he philosophy underlying this time limitation is that 10 years of conviction-free living demonstrates sufficient rehabilitation in the witness' credibility to attenuate any probative value, thus making those prior convictions *per se*

inadmissible'"). Thus, Moore's 1990 murder conviction was not admissible for purposes of impeachment because it was too old. Yet, for that same reason, the trial court never conducted the *Montgomery* balancing test to determine whether it should be excluded as unfairly prejudicial.

Indeed, because counsel made no attempt to exclude the name and nature of the prior conviction, the probative-vs-prejudice balancing test that was applicable under Rule 403 was also not employed. Yet, had counsel offered to stipulate to Moore's felon status, under that rule, the name and nature of his prior conviction would have automatically been barred. See Graham's Handbook of Illinois Evidence § 403.1 (2019)(in evaluating the probative value of proffered evidence under Rule 403, an offer to stipulate is not determinative of whether it will be excluded with one exception: the court must approve the defendant's offer to stipulate to his felon status, over the prosecution's objection since "it is improper for the State to disclose the nature of any underlying felony because of the risk of unfair prejudice").

In contrast to *Atkinson*, *Walker* held that in cases requiring proof of felon status, such as here, there is no probative value in revealing the name and nature of the prior conviction; those facts are "unnecessary surplusage without any evidentiary significance." *Walker*, 211 Ill. 2d at 338. *Walker* concluded that "[o]n balance, then, the probative value of the record of conviction is outweighed by the risk of unfair prejudice." *Walker*, 211 Ill. 2d at 338. Thus, while *Atkinson* found that the nature of a prior conviction might help the jury's assessment of a witness's credibility for purposes of impeachment, that rationale does not exist when the sole purpose for

introducing evidence of a defendant's prior felony conviction is to prove his status as a convicted felon. Instead, under *Walker*, "the probative value of the name and nature of the prior conviction is outweighed by the risk of unfair prejudice and, thus, should be excluded." *Id.* at 341.

Although the majority ultimately concluded that counsel performed deficiently by failing to stipulate to Moore's felon status, at the same time, it stated that it could not "definitively state that counsel's decision to require proof of defendant's felon status could not be '"a product of sound trial strategy."' *Moore*, 2018 IL App (3d) 150736-U, ¶ 37, quoting *People v. Barrow*, 133 Ill. 2d 226, 247 (1989). It "pondered" whether counsel might have considered the prejudicial impact of Moore's conviction and strategically allowed its admission under the rationale of *Atkinson. Id.* The majority concluded, "It could very well be trial strategy to choose to allow proof of the crime." *Id.*

It could be. Under a different set of facts, defense counsel might strategically choose not to stipulate to a defendant's felon status because counsel reasonably believes that allowing the jury to hear the name and nature of the prior conviction helps the defense. See *Old Chief*, 519 U.S. at 185, n. 8 ("an extremely old conviction for a relatively minor felony. . . might strike many jurors as a foolish basis for convicting an otherwise upstanding member of the community of otherwise legal gun possession" and could result in jury nullification). For instance, in *People v. Anderson*, 2013 IL App (2d) 111183, the defendant was charged with unlawful delivery of less than one gram of heroin and attempted unlawful possession of a firearm by a felon.

The defendant was arrested after delivering heroin to an undercover officer in exchange for a firearm and ammunition. *Anderson*, 2013 IL App (2d) 111183, ¶ 1. The defendant's prior conviction was for unlawful possession of a controlled substance. *Id.* ¶ 14. On appeal, the defendant argued that counsel was ineffective for failing to stipulate to his felon status and for allowing the jury to learn the name and nature of his prior conviction. *Id.* ¶ 76.

The appellate court found that although the defendant would have been entitled to a stipulation to his felon status, defense counsel's decision not to offer a stipulation was a matter of trial strategy. The court noted that "the State presented evidence that defendant was caught red-handed in a heroin-for-gun transaction with an undercover narcotics agent," and that "[p]art of defense counsel's strategy was to argue that the agents framed defendant, who they knew had a history of drug-related criminality." *Id.* ¶ 78. Given these facts, the court decided that counsel's failure to object to evidence about the name and nature of defendant's prior felony conviction and allowing the jury to hear that the conviction was for unlawful possession of a controlled substance "was consistent with defense counsel's trial strategy of portraying defendant as a vulnerable victim of the police." *Id.*

Here, unlike *Anderson*, the appellate court did not identify a sound strategy based on the facts of this case for counsel's failure to prevent the jury from learning that Moore was a convicted murderer. And the record affirmatively contradicts that there was one. It was the prosecutor who, in response to the court's question of whether it should inform the jury of the nature of Moore's prior conviction or "just [that] the defendant is convicted,"

told the court that "the nature of the conviction is what's told to the jury." (R. 140) Defense counsel then simply agreed with the prosecutor's statement. (R. 140) Counsel never articulated any strategy for informing the jury that Moore had previously been convicted of murder.

Instead, it appears that like the appellate court, both parties and the trial court wrongly applied *Atkinson* and proceeded under the misapprehension that the law required informing the jury of the name and nature of the prior conviction. Making tactical decisions under a misapprehension of the law is professionally unreasonable. See *People v. Wright*, 111 Ill. 2d 18, 27 (1986). And where the record shows that counsel's strategy – or lack thereof – was unreasonable, the appellate court should not attempt to conjure up a valid one in hindsight. See *People v. Popoca*, 245 Ill. App. 3d 948, 959 (2nd Dist. 1993) ("just as a reviewing court should not second-guess the strategic decisions of counsel with the benefit of hindsight, it should also not construct strategic defenses which counsel does not offer").

Because the majority relied on *Atkinson's* probative-vs-prejudicial analysis rather than *Walker's*, it also incorrectly concluded that Moore was not prejudiced by counsel's failure to stipulate to Moore's felon status. The majority did not believe the results of the proceedings would have been different because "the jury still would have heard that he was a felon" and "[t]he jury still could have speculated that he had been convicted of the most serious crime." *Moore*, 2018 IL App (3d) 150736-U, ¶ 38. But under this reasoning, the erroneous admission of the name and nature of a defendant's prior conviction to prove his felon status would never be prejudicial error. In

fact, the exact opposite is true; admitting the name and nature of the prior conviction is presumptively more prejudicial than stipulating to the defendant's felon status. As explained in *Walker*, "'[w]hile there is obviously some risk of prejudice inherent in establishing that a defendant is a convicted felon, our concern here is in dealing with the additional and unnecessary risk of prejudice that comes with disclosure of the number or nature of the prior conviction.'" *Walker*, 211 Ill. 2d at 334 (quoting *Brown v. State*, 719 So.2d 882, 888-889 (Fla.1998)). Under these circumstances, "'the admission of the type and nature of the prior crime can *only* prejudice the jury.'" *Walker*, 211 Ill. 2d at 335 (quoting *State v. Lee*, 266 Kan. 804, 813-815 (1999))(emphasis added).

The majority's conclusion that Moore was not prejudiced is also undermined by its disregard of the seriousness of the felony that was unnecessarily disclosed here. As Justice Holdridge found in his dissent, "[t]here are few worse things for which the defendant could have been convicted" and "informing the jury the defendant had been convicted of murder could hardly benefit him." *Moore,* 2018 IL App (3d) 150736-U, ¶ 44 (Holdridge, J., dissenting).

Finally, without any discussion of the evidence, the majority wrapped up its prejudice discussion by summarily referring to only Deputy Hannon's "testimony" as showing that the result of the proceedings would not have been different had counsel stipulated to the defendant's felon status. *Moore*, 2018 IL App (3d) 150736-U, ¶ 38. In so doing, the majority ignored the totality of the evidence and failed to conduct a qualitative, commonsense

analysis of it within the context of the case. *Strickland*, 466 U.S. at 695 (in determining prejudice, "a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury"); *Sebby*, 2017 IL 119445, ¶ 53 (in determining whether the evidence adduced at trial was close, "[a] reviewing court's inquiry involves an assessment of the evidence on the elements of the charged offense or offenses, along with any evidence regarding the witnesses' credibility").

By contrast, in his dissent, Justice Holdridge properly assessed the evidence on the elements of the charged offense, along with evidence regarding the witnesses' credibility, and found that the evidence was close. *Moore*, 2018 IL App (3d) 150736-U, ¶¶ 45-46. Justice Holdridge pointed out the inconsistencies in Hannon's testimony and noted that the videotape of the traffic stop did not corroborate his testimony and without audio, there was no corroboration for Moore allegedly admitting that the firearm was in the car as Hannon claimed. *Id*. ¶ 45 (Holdridge, J., dissenting). Justice Holdridge also found significant that both Walls and Moore testified the gun belonged to her, that Walls had a receipt verifying its purchase, and that she had borrowed Moore's car and not told him the gun was in it. *Id.*

Based on the totality of this evidence, a substantial risk existed that the jury would have improperly considered Moore's prior murder conviction as proof that he was someone who was more likely to have knowingly possessed a gun. As Justice Holdridge found, disclosing Moore's murder conviction "could have tipped the scales against him" and "therefore, there [was] a reasonable probability that the result of the trial would have been

different had counsel stipulated to his felon status." *Id.* ¶ 45 (Holdridge, J., dissenting). Consequently, counsel's ineffective assistance denied Moore his right to a fair trial. For all these reasons, this Court should reverse the appellate court's decision affirming Moore's conviction and sentence and reverse and remand for a new trial.

CONCLUSION

For the foregoing reasons, Leslie Moore, petitioner-appellant, respectfully requests that this Court reverse his conviction and remand for a new trial.

Respectfully submitted,

THOMAS A. LILIEN
Deputy Defender

YASEMIN EKEN
Supervisor
Office of the State Appellate Defender
Second Judicial District
One Douglas Avenue, Second Floor
Elgin, IL 60120
(847) 695-8822
2nddistrict.eserve@osad.state.il.us

COUNSEL FOR PETITIONER-APPELLANT

CERTIFICATE OF COMPLIANCE

I, Yasemin Eken, certify that this brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this brief, excluding pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 35 pages.

/s/Yasemin Eken
YASEMIN EKEN
Supervisor

APPENDIX TO THE BRIEF

Leslie Moore No. 124538

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STATE OF ILLINOIS UNITED STATES OF AMERICA COUNTY OF WILL

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT

PEOPLE OF THE STATE OF ILLINOIS
VS.
LESLIE MOORE

Case Number 2013CF001034

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ONE EXHIBIT ENV.

3-15-0736

IN THE CIRCUIT COURT OF Will COUNTY, ILLINOIS
TWELFTH JUDICIAL CIRCUIT

PEOPLE OF THE STATE OF ILLINOIS)
) Case No. 13CF1034
Vs.)
)
Leslie Moore)
Defendant

Date of Sentence 5/19/15
Date of Birth 8/15/69
(Defendant)

AMENDED

JUDGMENT – SENTENCE TO ILLINOIS DEPARTMENT OF CORRECTIONS

WHEREAS the above-named defendant has been adjudged guilty of the offenses enumerated below; IT IS THEREFORE ORDERED that the defendant be and hereby is sentenced to confinement in the Illinois Department of Corrections for the term of years and months specified for each offense.

COUNT	OFFENSE	DATE OF OFFENSE	STATUTORY CITATION	CLASS	SENTENCE	MSR
1	UUW By Felon	5/16/13	720 ILCS 5/24-1.1(a)	2	7 Yrs. 0 Mos.	2 Yrs.

To run (concurrent with) (consecutively to) count(s)_____ and served at (50%), 75%, 85%, 100% pursuant to 730 ILCS 5/3-6-3

_____ _____ _____ _____ _____ Yrs. _____ Mos. _____ Yrs.
To run (concurrent with) (consecutively to) count(s)_____ and served at 50%, 75%, 85%, 100% pursuant to 730 ILCS 5/3-6-3

_____ _____ _____ _____ _____ Yrs. _____ Mos. _____ Yrs.
To run (concurrent with) (consecutively to) count(s)_____ and served at 50%, 75%, 85%, 100% pursuant to 730 ILCS 5/3-6-3

This Court finds that the defendant is:

_____Convicted of a class _____ offense but sentenced as a Class X offender pursuant to 730 ILCS 5/5-4.5-95(b).

The Court further finds that the defendant is entitled to receive credit for time actually served in custody (of 80 days as of the date of this order) from (specify dates) 5/16/13-5/17/13, 3/3/15-5/19/15. The defendant is also entitled to receive credit for the additional time served in custody from the date of this order until defendant is received at the Illinois Department of Corrections.

_____The Court further finds that the conduct leading to conviction for the offenses enumerated in counts _____ resulted in great bodily harm to the victim. (730 ILCS 5/3-6-3(a)(2)(iii)).

_____The Court further finds that the defendant meets the eligibility requirements for possible placement in the Impact Incarceration Program. (730 ILCS 5/5-4-1(a)).

_____The Court further finds that offense was committed as a result of the use of, abuse of, or addiction to alcohol or a controlled substance and recommends the defendant for placement in a substance abuse program. (730 ILCS 5/5-4-1(a)).

_____The defendant successfully completed a full-time (60-day or longer) Pre-Trial Program ____Educational/Vocational ___ Substance Abuse ___ Behavior Modification ___ Life Skills ___ Re-Entry Planning – provided by the county jail while held in pre-trial detention prior to this commitment and is eligible for sentence credit in accordance with 730 ILCS 5/3-6-3(a)(4). THEREFORE IT IS ORDERED that the defendant shall be awarded additional sentence credit as follows: total number of days in identified program(s)_____ x 1.50 (1.25 for program participation before August 11, 1993) = _____ days, if not previously awarded.

_____The defendant passed the high school level test for General Education and Development (GED) on _____ while held in pre-trial detention prior to this commitment and is eligible to receive Pre-Trial GED Program Credit in accordance with 730 ILCS 5/3-6-3(a)(4.1). THEREFORE IT IS ORDERED that the defendant shall be awarded 60 days of additional sentence credit, if not previously awarded.

_____IT IS FURTHER ORDERED the sentence(s) imposed on count(s) _____ be (concurrent with) (consecutive to) the sentence imposed in case number _____ in the Circuit Court of _____ County.

X IT IS FURTHER ORDERED that THIS ORDER ENTERS NUNC PRO TUNC TO May 19th, 2015

The Clerk of the Court shall deliver a certified copy of this order to the Sheriff. The Sheriff shall take the defendant into custody and deliver defendant to the Department of Corrections which shall confine said defendant until expiration of this sentence or until otherwise released by operation of law.

This order is (X effective immediately) (_____ stayed until _____).

DATE: 10/23/15 ENTER: _____

EDWARD A. BURMILA JR
(PLEASE PRINT JUDGE'S NAME HERE)

FILED
2015 OCT 23 AM 11:12
CLERK OF THE CIRCUIT COURT
WILL COUNTY, ILLINOIS

Approved by Conference of Chief Judges 6/20/14

2018 IL App (3d) 150736-U

Order filed December 14, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

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

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

ORDER

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

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

¶ 3 FACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[DEFENSE ATTORNEY]: Yes.

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

The court informed the prospective jurors:

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

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

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

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

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

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

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

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

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

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

¶ 18 ANALYSIS

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

¶ 20 I. Motion to Suppress

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

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

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

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

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

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

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

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

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

¶ 28 II. Failure to Renew Suppression Motion

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

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

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

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

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

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

¶ 34 III. Failure to Stipulate to Felon Status

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

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

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

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

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

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

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

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

¶ 39 CONCLUSION

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

¶ 41 Affirmed.

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

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

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

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

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

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

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

NOTICE OF APPEAL

APPEAL TAKEN FROM THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT IN WILL COUNTY, ILLINOIS

APPEAL TAKEN TO THE APPELLATE COURT, THIRD JUDICIAL DISTRICT, ILLINOIS

The People of the State of Illinois

Plaintiffs-Appellees,
-vs-
Leslie Moore (B05205)
Defendant-Appellant

Case No. 13 CF 1034

FILED
15 OCT 26 PM 2:40
WILL COUNTY, ILLINOIS

☐ Joining Prior Appeal / ☑ Separate Appeal / ☐ Cross Appeal
(Mark One)

An appeal is taken from the Order of Judgment described below:

(1) Court to which appeal is taken is the Appellate Court.

(2) Name of Appellant and address to which notices shall be sent.
NAME: Leslie Moore (B05205)
ADDRESS: Dixon Correctional Center 2600 N Brinton Avenue
Dixon, IL 61201

(3) Name and address of Appellant's Attorney on appeal.
NAME: Peter A. Carusona, Deputy Defender
Office of the State Appellate Defender
Third Judicial District
770 E. Etna Rd.
Ottawa, Illinois 61350
If Appellant is indigent and has no attorney, does he/she want one appointed?
Yes

(4) Date of Judgment or Order: 05/19/2015
(a) Sentencing Date: 05/19/2015
(b) Motion for New Trial: 05/19/15
(c) Motion to Vacate Guilty Plea:
(d) Other:
Motion to reconsider sentence - denied (10/23/15)

(5) Offense of which convicted:
Unlawful Possession of a Weapon by Felon, Class 2 Felony

(6) Sentence:
7 years Illinois Department of Corrections, fines and costs

(7) If appeal is not from a conviction, nature of order appealed from:

(8) If the appeal is from a judgment of a circuit court holding unconstitutional a statute of the United States or of this state, a copy of the court's findings made in compliance with Rule 18 shall be appended to the notice of appeal.

(Signed) Pamela J. McGuire / cltr
(May be signed by appellant, attorney, or clerk of circuit court.)
PAMELA J. McGUIRE
Clerk of the Circuit Court
NOAPL

cc: State's Attorney
Attorney General

No. 124538

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- LESLIE MOORE Petitioner-Appellant	))))))))))	Appeal from the Appellate Court of Illinois, No. 3-15-0736. There on appeal from the Circuit Court of the Twelfth Judicial Circuit, Will County, Illinois, No. 13-CF-1034. Honorable Edward A. Burmila, Jr., Judge Presiding.

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, 100 W. Randolph St., Chicago, IL 60601, eserve.criminalappeals@atg.state.il.us;

Mr. Thomas D. Arado, Deputy Director, State's Attorneys Appellate Prosecutor, 628 Columbus, Suite 300, Ottawa, IL 61350, 3rddistrict@ilsaap.org;

James Glasgow, Will County State's Attorney, 121 N. Chicago St., Joliet, IL 60432;

Mr. Leslie Moore, 8129 S. Michigan Avenue, Apt. 3B,, Chicago, IL 60619

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On July 30, 2019, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system. One copy is being mailed to the Will County State's Attorney and one copy to the petitioner in envelopes deposited in a U.S. mail box in Elgin, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

/s/Vinette Mistretta
LEGAL SECRETARY
Office of the State Appellate Defender
One Douglas Avenue, Second Floor
Elgin, IL 60120
(847) 695-8822
Service via email will be accepted at
2nddistrict.eserve@osad.state.il.us