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.

REPLY BRIEF FOR PETITIONER-APPELLANT

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REPLY BRIEF FOR PETITIONER-APPELLANT

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.

The State makes no attempt to justify trial counsel's failure to stipulate to Moore's felon as trial strategy. Instead, the State maintains that "the majority below correctly found that Moore did not demonstrate *Strickland* prejudice." (St. Br. 9, citing *People v. Moore*, 2018 IL App (3d) 150736-U, ¶ 38) The State posits that even if counsel had offered to stipulate to Moore's prior murder conviction, Moore "likely would have suffered some prejudice resulting from jury speculation about the nature of his prior crime." (St. Br. 9) But the State mainly contends that Deputy Hannon's testimony, "which revealed defendant's admission to having a loaded gun in the car, foreclosed any reasonable probability that an offered stipulation would have led to a different outcome at trial." (St. Br. 10) In making this argument, the State, like the majority of the appellate court, disregards the seriousness of the felony that was unnecessarily disclosed here and improperly presents its one-sided view of the evidence, rather than analyzing the totality of the evidence presented to the jury. *Strickland v. Washington*, 466 U.S. 668, 695 (1984) (in determining prejudice, "a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury").

First, citing to pages 22 and 23 of Moore's Brief, the State asserts that "[c]ontrary to defendant's assertion, *People v. Walker*, 211 Ill. 2d 317, 341 (2004) does not demand a finding of prejudice" because its "very narrow holding" only obliges the State to accept an offered stipulation to a defendant's felon status. (St. Br. 10) The State advises that *Walker* "made no holding obligating defense

counsel to offer to stipulate to a prior felony, nor did it suggest that failing to offer a stipulation established *Strickland* prejudice." (St. Br. 10)

The State misapprehends Moore's argument. Nowhere in his Brief does he contend that *Walker's* holding in and of itself "demands a finding of prejudice" in this case. Rather, as Moore explained, effective assistance of counsel contemplates that counsel will use established rules of evidence and procedure to avoid the admission of prejudicial facts. (Def. Br. 15, citing *People v. Lucious*, 2016 IL App (1st) 141127, ¶ 32). The significance of *Walker's* holding is that a reasonably competent attorney would have used it to prevent the jury from learning that Moore was a convicted murderer in an unlawful possession of a weapon case. By not doing so here, counsel's performance was deficient.

At the same time, as Moore discussed in his Brief, the reasons for *Walker's* rule, which was adopted from *Old Chief v. United States*, 519 U.S. 172 (1997), support his argument that counsel's failure to prevent disclosing the nature of his prior conviction prejudiced him. (Def. Br. 18-21, 31-32) The State is noticeably silent about this part of Moore's argument and offers no response to it. But where the only purpose for introducing evidence of a defendant's prior felony conviction is to prove his felon status, admitting the name and nature of the conviction creates a risk that the defendant will be unfairly prejudiced. *Walker*, 211 Ill. 2d at 338. That is because "evidence of a defendant's prior criminal conduct always carries an inherent risk of being translated by the fact finder into a generalized notion that the defendant is of bad character and, thus, more likely to have committed the offense currently being charged." *Walker*, 211 Ill. 2d at 331, citing *Old Chief*, 519 U.S. at 180-181.

The State also ignores the high risk of prejudice stemming from the nature of the prior conviction in this case. As *Old Chief* noted, the risk would "vary from case to case" but would be "substantial" whenever the prior conviction "would be arresting enough to lure a juror into a sequence of bad character reasoning." *Old Chief*, 519 U.S. at 185. Here, Moore's prior murder conviction was for the most serious crime under Illinois law. Given its severity and its inherently violent nature, the jurors could have made the improper inference that, as a convicted murderer, Moore was a bad person who was more likely to possess a gun. Further, the nature of his prior conviction could have easily swayed the jury to convict him out of concern that he might use the gun to harm someone else rather than based on the evidence presented on the possession of a weapon charge. Indeed, as Moore noted in his opening Brief, such an inference appeared to sway the judge into giving him a harsh sentence of seven years in prison. (Def. Br. 22-23) The risk of prejudice, therefore, was substantial and unjustifiably tipped the scales against Moore. The State's failure to address or even acknowledge this aspect of the prejudice in this case undermines its argument that counsel's error caused no harm.

The State's attempts to minimize the prejudicial impact of informing the jury that Moore had been convicted of murder also fails. The State notes that his murder conviction was mentioned "a single time" during the State's case and that during closing argument, the State referenced it "only while discussing the jury instructions and proof of his prior felony conviction." (St Br. 10-11) The State misses the point. Once the jurors were informed about Moore's prior murder conviction, the damage had been done. The nature of his conviction had little or no probative value but because of its highly inflammatory nature, it likely tainted the jury's

consideration of the evidence presented on the charged conduct. See *People v. Lindgren*, 79 Ill. 2d 129, 142-143 (1980) (the defendant has a right to trial by an unbiased jury, uncontaminated by irrelevant other-crimes evidence).

Further, contrary to the State's assertion, the prosecutor went beyond merely pointing out Moore's prior conviction as proof of his felon status. Instead, the prosecutor told the jurors that it had proved "beyond a reasonable doubt that [Moore] was previously convicted of murder" and that the jurors should consider that fact "when you deliberate." (R. 397-398) The prosecutor also advised the jury that although it approved of "America's second amendment right to bear arms," the law prohibited Moore from possessing a gun because he was a convicted murderer. (R. 403) The State thus consistently reminded the jurors that when they considered Moore's guilt for possession of a weapon, they should also remember that he was previously convicted of murder.

Also, the jury instruction did not mitigate the prejudice here. (St. Br. 10-11) The jurors were 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," it could consider evidence of the murder conviction "only for the purpose of whether the State has proven that proposition." (R. 416)

This instruction might be appropriate for a different case, but not this one. It still directed the jurors to consider the nature of Moore's prior murder conviction, which is precisely the basis of counsel's error. Had counsel offered to stipulate

to Moore's felon status, the jury would not have consider this fact at all. So telling the jury that it could consider Moore's prior conviction insofar as it proved he had "previously been convicted of murder" did not cure the error here.

The State lastly contends that Moore was not prejudiced because "the evidence at trial supported defendant's guilt." (St. Br. 11) The State implies that the sufficiency-of-evidence standard applies, but it does not. This Court rejected the same argument in *People v. Sebby*, when the State argued that the evidence was not closely balanced because "it presented ample, persuasive evidence of the defendant's guilt." 2017 IL 119445, ¶ 60. As this Court explained, the issue was not "the sufficiency of close evidence but rather the closeness of sufficient evidence." *Sebby*, 2017 IL 119445, ¶ 60.

Whether the evidence was sufficient to sustain Moore's conviction is also not the standard for assessing prejudice under *Strickland*. *People v. Moore*, 279 Ill. App. 3d 152, 160 (5th Dist. 1996) ("sufficiency of the evidence is not the touchstone for decision under *Strickland's* test of prejudice"). Moore had to only demonstrate a reasonable probability that but for counsel's failure to stipulate to his felon status, the outcome of the proceedings would have been different. *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. And a "reasonable probability" may exist even where the chance of a different result is significantly below fifty percent. *People v. McCarter*, 385 Ill. App. 3d 919, 935 (1st Dist. 2008); see also *Strickland*, 466 U.S. at 694 ("[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have

determined the outcome").

Along with applying the wrong standard, the State ignores the evidence presented by Moore to support his version of events. First, the State contends that Moore and Deputy Hannon gave similar accounts of the traffic stop. That is not true. Hannon testified that after he stopped Moore and pulled up behind Moore's car, he saw Moore "dip his right hand or shoulder toward the center console." (R. 272) Moore denied making any such movements and said his hands were on the steering wheel at positions "10 and 2." (R. 365, 377) Hannon claimed that when he approached the driver's side of the car, Moore raised his hands in the air, appearing nervous, and that Moore's hands were shaking and he was sweating. (R. 275) In fact, Hannon claimed Moore's demeanor was what precipitated his questioning of Moore. (R. 277-278) But Moore denied raising his hands in the air and said he was not nervous, shaking, or sweating. (R. 379)

Most significantly, Hannon said that when he asked why Moore was nervous, Moore immediately volunteered that he had "a loaded firearm in the car's center console." (R. 278) Moore denied making this statement. (R. 367) Moore said that Hannon asked him what he was doing, where he had been, and if he had any weapons or drugs. (R. 367) Moore replied that he had been at a friend's house and that he did not have any contraband. (R. 367) Their opposing versions of events bore directly on the issue of Moore's knowledge of the gun in the car and showed that the evidence was closely balanced on that issue. *People v. Naylor*, 229 Ill. 2d 584, 608 (2008) ("Of course this evidence was closely balanced. The evidence boiled down to the testimony of the two police officers against that of defendant").

At the same time, as Justice Holdridge pointed out, other evidence called

into question Hannon's credibility. *Moore*, 2018 IL App (3d) 150736-U, ¶ 45 (Holdridge, J., dissenting). Moore's alleged admission was not recorded, despite the capability to do so, because Hannon chose not to fix the malfunctioning audio-recorder. (R. 295) And "[w]ithout audio there was no corroboration for [Moore] admitting the firearm was in the vehicle." *Moore*, 2018 IL App (3d) 150736-U, ¶ 45 (Holdridge, J., dissenting). Further, Hannon admitted that the videotape did not show Moore reaching toward the console as he had described. (R. 295) Hannon explained this inconsistency as being due to the video not having the "best quality" and claimed this particular part of the stop was "not accurately portrayed in the video." (R. 295) Also, 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 extrinsic evidence corroborated his testimony.

By contrast, Moore presented evidence that corroborated his version of events. He testified that the day before the incident, he had loaned his car to Sherry Walls so she could move some things from her old address. (R. 370-371) At trial, Walls testified that the gun found in Moore's car was hers, and a receipt verifying her purchase of it was admitted into evidence. (R. 317, 331-332) She also explained that when she borrowed Moore's car, she had put the gun in the center console of Moore's car and forgotten about it. (R. 318-323) She had not told Moore that the gun was in it. (R. 335-336) In arguing that the evidence was not close, the State does not challenge the credibility of Walls' testimony. In fact, the State does not mention her testimony at all. In this way, the State's prejudice analysis fails to take into account "the totality of the evidence" that was before the jury as required under *Strickland*. *Strickland*, 466 U.S. at 695.

Instead, the State, like the majority, offers only Hannon's one-sided version of events and then relies on opposing inferences from the evidence to argue that Hannon's testimony was corroborated and that therefore, this case was not close. What the State fails to recognize is that its argument actually proves the opposite. Where there is evidence from which alternative inferences can be drawn, the case is considered closely balanced. *People v. Reeves*, 314 Ill. App. 3d 482, 489 (1st Dist. 2000)("'[c]losely balanced' assumes the presence of some evidence from which contrary inferences can be drawn").

The State first questions why Hannon would have handcuffed Moore based on concerns for his safety if Moore had not told him that there was a gun in the car. (St. Br. 11) But Moore testified that Hannon told him he was handcuffing him for both their safety. (R. 370, 382-383) Given their opposing testimony, this evidence simply involved another credibility assessment for the jury to make. Thus, Hannon's act of handcuffing Moore did not prove that Moore admitted to having a gun in the car.

Also, Hannon's claim that after being pulled over for a minor traffic violation, Moore voluntarily incriminated himself for felony gun possession could be viewed with skepticism. Under the Fourth Amendment, Moore's alleged statement was the only basis that justified the search of the car; Hannon's testimony about Moore's purported "furtive" movement and nervousness would not. *People v. Creagh*, 214 Ill. App. 3d 744, 747 (1st Dist. 1991)("looks, gestures, and movements" are "insufficient" to justify a search or seizure because such actions may be innocent); *People v. Reed*, 37 Ill. 2d 91, 94 (1968)(the defendant's "nervous behavior" following his stop for traffic violations did not justify the police search of his vehicle); *People*

v. Smith, 2015 IL App (1st) 131307, ¶ 36 (defendant's "furtive" movement toward the rear pouch of passenger seat did not give an officer a reasonable basis to search his car).

Hannon's testimony was akin to "dropsy" testimony where "'a police officer, to avoid the exclusion of evidence on fourth-amendment grounds, falsely testifies that the defendant dropped the [contraband] in plain view.'" *People v. Campbell*, 2019 IL App (1st) 161640, ¶ 20, quoting *People v. Ash*, 346 Ill. App. 3d 809, 816 (4th Dist. 2004). "Dropsy" cases arose out of the decision in *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) where the exclusionary rule barring the admission of unlawfully obtained evidence at trial was extended to the states. *Campbell*, 2019 IL App (1st) 161640, ¶ 22. After *Mapp*, "the police made the great discovery that if the defendant drops the [contraband] on the ground, after which the policeman arrests him, the search is reasonable and the evidence is admissible," leading police officers to "l[ie] about their encounters with citizens to ensure that the evidence they unlawfully obtained would nonetheless be admitted later." *Id.*, ¶ 23 (internal citations and quotation marks omitted).

Campbell found that "[c]ritical whenever an officer testifies that the defendant dropped contraband in plain view is this question: would the officer's detention or search of the defendant have violated the fourth amendment if he or she had *not* seen the defendant drop the contraband in plain view?" *Id.*, ¶ 27. If not, then "there is far less reason to doubt the credibility of the officer's testimony because the officer has nothing to gain by lying about the drop." *Id.* However, if the officer's search would have violated the fourth amendment but for that fact, then "both trial courts and courts of review should take care to analyze the credibility of the

officer because the incentive to lie to avoid suppression of the evidence is at its highest." *Id.*

Here, Officer Hannon's sole justification for searching Moore's car was Moore's alleged admission that there was a gun in the center console. This alleged statement essentially made the gun in "plain view" and gave Hannon lawful grounds for searching his car. At the same time, Moore consistently denied knowing about the gun or telling Hannon that there was a gun in the car, both at the hearing on his motion to suppress and at trial. (R. 68, 78-79, 367, 374, 385-385) Thus, applying *Campbell,* Hannon's incentive to lie was at its highest.

Further, Fourth Amendment violations, of course, involve unlawful conduct by the police. Although under the law, police must have a reasonable belief that someone is armed and dangerous before handcuffing them during a traffic stop, that does not necessarily stop the police from doing so absent such a belief. See e.g., *People v. Wells*, 403 Ill. App. 3d 849, 857-861 (1st Dist. 2010) (concerns for officer safety can, in certain limited circumstances, justify handcuffing during a brief investigatory stop but not in this case where officers did not have a reasonable belief that defendant was armed and dangerous); *People v. Brown*, 190 Ill. App. 3d 511, 515 (2nd Dist. 1989) (after stopping the defendant for a traffic infraction and without any evidence that officer safety was at issue, the police searched the defendant, handcuffed him, and then searched his car in violation of the fourth amendment). And so Hannon's testimony that he handcuffed Moore because Moore allegedly admitted having a gun was not unassailable. It is equally plausible that Hannon gave Moore the false impression that he was authorized to handcuff Moore for "officer safety" and then search his car as Moore testified.

Finally, contrary to Justice Holdridge's finding, the State claims that the video corroborates Hannon's testimony. (St. Br. 11); see *Moore*, 2018 IL App (3d) 150736-U, ¶ 45 (Holdridge, J., dissenting)("The videotape does not corroborate Hannon's testimony."). The State notes that after Hannon handcuffed Moore and Deputy Ambrosini arrived as backup, Hannon "opens the car door, leans over the driver's seat for approximately twelve seconds, and returns to [Detective] Ambrosini, who then removes a gun from the car." (St. Br. 12) The State concludes, "That Hannon was in the car for such a short period of time supports an inference that he knew to go directly to the center console to retrieve the gun because the defendant had told him that it was there." (St. Br. 12)

First, the view of Hannon searching the car is obstructed by Ambrosini who is standing behind the car and in front of the video camera. (St. Ex. 1 at 1:22:37 to 1:23:30) In any event, Moore agrees that Hannon is seen leaning toward the driver's seat but the video does not show where in the car he is searching. More importantly, the 12 seconds referred to by the State starts when Hannon has already opened the driver's side door and is searching the car's front area. If Moore had told Hannon that the gun was in the center console and Hannon had gone directly to that location, it would not have taken as long as 12 seconds to retrieve it. At best, the video, therefore, is evidence from which contrary inferences can be drawn. And that fact only provides further support for finding that the evidence was close. *Reeves*, 314 Ill. App. 3d at 489.

In sum, the State does not dispute that counsel's failure to stipulate to Moore's felon status constituted deficient performance. Instead, the State argues only that Moore was not prejudiced by counsel's error. In making this argument, the State

disregards the substantial risk of prejudice stemming from the nature of Moore's prior murder conviction. The State also ignores evidence corroborating Moore's version of events and the inconsistencies in Hannon's testimony and misconstrues the video of the traffic stop as corroborating Hannon's claim that Moore allegedly admitted having a gun in the car. All in all, the State's prejudice argument fails because it is not based on the totality of the evidence or a qualitative, common sense analysis of it. *Strickland*, 466 U.S. at 695; *Sebby*, 2017 IL 119445, ¶ 53. A proper assessment of the evidence shows that it was closely balanced where it turned on how the jurors resolved a credibility contest between Deputy Hannon and Moore and his witness, Sherry Walls. Given these circumstances, disclosing the highly prejudicial evidence of Moore's prior murder conviction could have tipped the scales against him. Therefore, there was a reasonable probability that, but for counsel's error, the result of the trial would have been different. 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 and those advanced in Appellant's Brief, Leslie Moore, petitioner-appellant, respectfully requests that this Court reverse his conviction and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Yasemin Eken, certify that this reply brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this reply brief, excluding pages containing the Rule 341(d) cover, the certificate of service, and the Rule 341(c) certificate of compliance is 13 pages.

/s/Yasemin Eken
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No. 124538

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NOTICE AND PROOF OF SERVICE

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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 October 18, 2019, the Reply Brief 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 Reply Brief to the Clerk of the above Court.

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