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2012 IL App (3d) 100693-U

Order filed September 5, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 12 th Judicial Circuit,
)	Will County, Illinois,
Plaintiff-Appellee,)	
)	
v.)	Appeal No. 3-10-0693
)	Circuit No. 08-CF-734
)	
TYRELL JACKSON,)	Honorable
)	Richard Schoenstedt,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Justice O'Brien concurred in the judgment.
Presiding Justice Schmidt dissented.

ORDER

¶ 1 *Held:* The trial court erred when it denied the defendant's motion to suppress because once the defendant indicated that he did not want to continue to speak with the interviewing officers, the officers should have stopped the interview. Thus, any statements the defendant made thereafter should have been suppressed. In addition, statements the defendant made to his mother and his written confession should have also been suppressed because they were the products of the illegally obtained initial confession.

¶ 2

FACTS

The State charged Tyrell Jackson, the defendant, with first degree murder, home invasion, and armed robbery in connection with the April 1, 2008, death of John Rosales. Prior to trial, the defendant filed a motion to suppress all of his oral, written and recorded statements, alleging that the police violated his right to remain silent, a statute requiring the recording of this custodial interrogation (725 ILCS 5/103-2.1 (West 2008)), and the eavesdropping statute (720 ILCS 5/14-1 (West 2008)).

¶ 3 The court conducted a hearing on the defendant's motion to suppress.

¶ 4 First Interview

¶ 5 The evidence adduced at this hearing indicated that Naperville Police detectives Elena Deuchler and Robert Lee initially questioned the defendant on April 2, 2008, around 12:30 a.m. The defendant received his *Miranda* warnings and waived them. During the interview, the defendant denied any involvement in Rosales's death. After approximately 45 minutes, the defendant indicated that he did not want to speak with the detectives, so they ended the interrogation. According to Deuchler, she understood the defendant's statement to indicate that he did not want to speak to her and Lee any longer. The record includes a DVD recording of this interview; however, the audio portion malfunctioned and is inaudible.

¶ 6 Second Interview

¶ 7 The defendant's confession

¶ 8 The defendant remained in custody, and Detectives James Griffith and Nick Liberio conducted a second interview of him around 7 p.m. or 7:45 p.m. that same day. The video and audio recording of this interview indicate that the defendant was given and waived his *Miranda* rights at

the commencement of the interrogation. The defendant again denied involvement in Rosales's death, and approximately 10 minutes into the interview, the defendant stated that he "don't wanna talk no more." The detectives told the defendant to "listen," and confronted him with statements of others that implicated him in the offense, but the defendant continued to deny any involvement. About eight minutes later, the defendant asked "can [he] be done" and requested to telephone his mother. One minute later, the defendant indicated that he "already told [the officers, he] ain't got nothing else to say[,]" and again stated that he "ain't got nothing else to say."

¶ 9 Nonetheless, the interview continued, and after about 15 minutes, the defendant stated "can [he] be done talking." The officers responded "no" and instructed the defendant to "sit there and listen," to which the defendant stated "okay." The officers then confronted the defendant with alleged evidence of the crime and statements of the others who were at the scene. Thirty minutes later, the defendant again asked to call his mother. The call did not occur at that time, but the interview continued, and shortly thereafter, the defendant began to cry and confessed to shooting Rosales.

¶ 10 The defendant's requests to call his mother

¶ 11 During the course of this interview, the defendant requested to telephone his mother at least six times. After one request, Liberio asked the defendant how his mother would feel to hear testimony about the defendant's role in the instant offense and that the defendant showed no remorse for the victim. Liberio stated to the defendant that it would break his mother's heart to hear such testimony. Liberio continued by asking the defendant whether he thought that his mother could sit at trial "and be proud of her son who stood up like a man and took responsibility and showed some kindness to a person that, that died; showed some kindness to a family who lost their son." Liberio

then stated that the defendant's mother was "gonna love [him] no matter what, and she[would] back [him] no matter what. But she[would] respect when [the defendant took] responsibility and respect[ed]" himself.

¶ 12 At another point during the interview, Liberio again asked the defendant to picture his mother sitting in the courtroom and hearing testimony that the defendant never apologized offense or took responsibility for his role in the instant offense. He asked the defendant if he thought "it[was] going to break [his mother's] heart that [he] had the opportunity to sit there and set it straight[.]" and also asked if his "mom want[ed him] to do the right thing[.]"

¶ 13 As the officers denied the defendant's requests to telephone his mother, Liberio also explained to the defendant that he would rather be the one to call his mother. According to Liberio, he could tell the defendant's mother either that the defendant was being "a stand up guy" or tell her "all the facts and details, show her some ugly pictures about what a terrible crime scene" and that the defendant "did not do the right thing."

¶ 14 In another exchange, the defendant requested to telephone his mother, and Liberio asked for the reason that the defendant wanted to speak with her. When the defendant answered that he "just wan[ted] to talk to [his mother]" Liberio stated "[n]o dude. I mean, you haven't given us anything. *** You haven't been honest in any way, in any shape or form. *** It's a two-way street. You've been here, we've fed you, *** and yeah, we'll let you talk to your mom. [He]'d like [the defendant] to tell [him] something, some acknowledgment." It was shortly after this statement that the defendant confessed. At that point, after the officers could not get a telephone to properly function in the interview room, they permitted the defendant to go into another room and call his mother.

¶ 15 The telephone call

¶ 16 The defendant's portion of the conversation was audio and video taped. During this conversation, the defendant told his mother the same information that he had just furnished to the detectives, acknowledging that he was involved in Rosales's death. The officers informed the defendant that they would be in the room during this telephone call, and the video tape indicates that at least one officer was in the room during this conversation.

¶ 17 The defendant's written confession

¶ 18 The defendant then returned to the original interview room, where he prepared a written confession. The defendant apologized for his actions, indicated that others convinced him to participate in the offense and that he never intended for anyone to get hurt during the robbery. The defendant specifically stated that the shooting was a mistake and that the "gun went off."

¶ 19 Griffith and Liberio testified at the suppression hearing. They acknowledged that during the interview the defendant stated that he did not want to speak with them. Griffith specifically acknowledged that he "ignored" the defendant's request to stop talking, and that he and Liberio "continued with [their] questions and [the defendant] continued." The defendant later asked if he could "be done talking to [the officers,]" to which Liberio told the defendant to "listen." Liberio testified that "twice [the defendant] made a statement" that he did not wish to speak with him, to which Liberio asked the defendant to listen, and the defendant acquiesced. The officers believed that they broke the defendant down and thus, he ultimately confessed.

¶ 20 The court denied the motion to suppress. The court found that the lack of audio recording of the defendant's first interview did not render his statements inadmissible because the issues with the audio equipment were not intentional and the defendant's statements were voluntarily given and

reliable. The court further found that the defendant's statements at the second interview were voluntary and made without compulsion or inducement. The court noted the defendant's statements to the effect that he did not wish to speak to the police officers, but also noted that the defendant was not physically abused or verbally threatened, no promises were made to him, and that the defendant had prior experience with the criminal justice system. The court also found that the defendant gave implied consent to the officers' surveillance of his telephone conversation with his mother because the defendant was informed that an officer would stay with him during this call, an officer was with him at all times and within "obvious listening distance."

¶ 21

Trial

¶ 22 The cause proceeded to a stipulated bench trial. At the outset, the State indicated that it was only going to proceed on one charge of first degree murder, and that it had agreed with the defendant to recommend a prison term of 49 years. The court asked the defendant if he "understood that the State capping, at least agreeing in their arguments for sentencing to cap at 49 years, does not necessarily restrict [the court] in imposing a sentence that [it] believed to be fair and just?" Defense counsel indicated that he informed the defendant that the court had the "ultimate discretion" but that "unless there[was] some compelling reason, [the court] generally does follow the State." Defense counsel noted that he "would make the representation, but that the court ha[d] the discretion to anything within the statute."

¶ 23 The evidence indicated that sometime after midnight on April 1, 2008, co-defendants Courtney Mayes and Cherrod Moore, and two other men, Michael Barry and Eric Smith, were at Rosales's apartment at 2511 Sheehan Drive in Naperville playing video games. Mayes received three telephone calls, and after the last one, two masked African-American males with guns kicked in the

door of the apartment. Barry described one of the intruders as tall and slim, wearing a black knit cap, a black "doo rag" across his face, a red short-sleeved t-shirt, and brandishing a silver revolver. The men ordered everyone to get down, and told Rosales to turn over money, marijuana and cocaine. Rosales handed the men some money and then got off the couch to lie on the floor. As he did, the intruder with the silver revolver shot Rosales in the neck. This intruder then asked Rosales for more money, but Rosales did not have any more. Smith believed that Rosales also gave the men some drugs that were on the floor. After the intruder shot Rosales, he held the gun to Barry's head and went through his pockets. He found Barry's passport and threw it to the ground. The intruders then fled. Rosales also left the apartment in his own vehicle, but was located deceased a short distance away. The fatal shot came from a .32-caliber handgun. The record indicates that the defendant was 5'11" tall and weighed 160 pounds.

¶ 24 The stipulations of Justin Harper, another co-defendant, and his girlfriend Margit Dunai indicated that the defendant, Moore, Mayes, and Reginald Chandler-Martin made a plan to rob an individual in Naperville of his drugs and money. The men did not plan to shoot anyone in the course of the robbery. On March 31, 2008, Harper put his .22-caliber handgun in a sock and gave it to the defendant, who was dressed in a red t-shirt. Moore's .32 caliber-handgun was also used to commit the offense. Sometime during the afternoon of April 1, 2008, Chandler-Martin came to Harper's home and handed him a bag with a .32-caliber handgun wrapped in a towel and a .22-caliber handgun wrapped in an orange bandana. He asked Harper to "get rid of it." Harper subsequently informed police of the location of the guns, which was in the home he shared with his mother. The State initially charged Harper with first degree murder, but he later pled guilty to aggravated robbery and received a five-year term of imprisonment. The defendant presented a later affidavit from

Harper indicating that he never gave any firearms to the defendant, nor did he receive any firearms after the offense. Additionally, Harper averred that he had never heard any discussions about the murder or robbery of Rosales.

¶ 25 Lee's stipulation indicated that he searched Harper's home on April 1, 2008, pursuant to the consent of Harper and his mother. Among other things, Lee found a .22-caliber revolver wrapped in an orange bandana, and a black bag containing a blue towel and white sock with a .32-caliber revolver inside of it. Later forensic evidence indicated that the bullet recovered from Rosales was fired from the .32-caliber gun found at Harper's home.

¶ 26 The court subsequently convicted the defendant of first degree murder. 720 ILCS 5/9-1(a)(2) (West 2008). The defendant filed a motion for a new trial and for judgment notwithstanding the verdict, alleging, among other things, that the court erred when it denied his motion to suppress. The trial court denied this motion and set the cause for sentencing.

¶ 27 The court sentenced the defendant to a 70-year term of imprisonment, noting that the applicable sentencing range was 20-60 years, plus a 25-year enhancement because the defendant fired the weapon that resulted in Rosales's death. The defendant filed a motion to reconsider his sentence, which the trial court denied. The defendant appeals.

¶ 28 ANALYSIS

¶ 29 On appeal, the defendant first contends that the trial court erred when it denied his motion to suppress because the police failed to "scrupulously honor" his invocation of his right to remain silent. The defendant further argues that this error was not harmless beyond a reasonable doubt because his subsequent confession was the only evidence to place him at the scene of the shooting. The defendant asks for the suppression of his oral confession, the statements he made to his mother

during the telephone call, and his written confession. The State, on the other hand, asserts that the defendant's statements purporting to invoke his right to remain silent were equivocal and even if the court erred, the error was harmless because there was sufficient evidence to prove the defendant guilty beyond a reasonable doubt.

¶ 30 (A) The second interview

¶ 31 A statement made by a defendant during a custodial interrogation is admissible at his subsequent trial if, after being advised of his *Miranda* rights, including the right to remain silent, the defendant voluntarily waives his rights prior to making the statement. *Miranda v. Arizona*, 384 U.S. 436 (1966). Thus, to protect a defendant's constitutional right not to be a witness against himself, an interrogation must stop if a defendant states in any manner and at any time prior to or during a custodial interrogation that he wants to remain silent. *Miranda*, 384 U.S. 436 (1966). Consequently, "[a]ny statement taken after the [defendant] invokes his privilege cannot be other than the product of compulsion, subtle or otherwise." *Miranda*, 384 U.S. at 474. Under these circumstances, the statements are not admissible at trial against the defendant. See *People v. R.C.*, 108 Ill. 2d 394 (1985).

¶ 32 In an instance where the defendant invokes his right to remain silent, but the interrogation resumes and the defendant gives subsequent incriminating statements, "the admissibility of statements after the person in custody has decided to remain silent depends under *Miranda* on whether [the defendant's] 'right to cut off questioning' was 'scrupulously honored.'" *Michigan v. Mosley*, 423 U.S. 96, 104 (1975). In determining if a defendant's invocation of the right to remain silent has been honored, relevant factors include whether: (1) a significant amount of time had elapsed between interrogations; (2) the subsequent interrogation was by a different officer; (3) the

subsequent interrogation was prefaced by a fresh set of *Miranda* warnings; and (4) the interrogation involved a matter unrelated to the subject of the first interrogation. *Mosley*, 423 U.S. 96.

¶ 33 In *R.C.*, 108 Ill. 2d 349, our supreme court held that the trial court properly granted that 15-year-old defendant's motion to suppress where, after police informed the defendant of his *Miranda* rights, he stated that he did not want to speak to the police, but one interrogating officer continued to inform the defendant of evidence against him, after which the defendant confessed to the offense. The supreme court concluded that the defendant's right to remain silent had not been "scrupulously honored," and stated that:

"[u]nder [the *Mosley*] test, it is clear that [the defendant's] right to remain silent was not 'scrupulously honored'; in fact, it was not honored at all. Both the interrogating officer and [the defendant] testified that after he had been read his *Miranda* warnings, [the defendant] stated that he did not wish to talk to the officer. Rather than terminating the interrogation immediately, which is what *Miranda* requires, the officer told the defendant that he had been identified. This was an obvious effort to persuade [the defendant] to make a statement." *R.C.*, 108 Ill. 2d at 354.

¶ 34 A defendant may invoke his right to remain silent either verbally or through conduct that clearly indicates his desire to cease all questioning. *People v. Hernandez*, 362 Ill. App. 3d 782 (2005). If the defendant verbally invokes this right, his demand to end the questioning must be specific. *Hernandez*, 362 Ill. App. 3d 782. An equivocal or unclear request to remain silent does not sufficiently invoke this right, and any subsequent statements may properly be admitted against

the defendant. See *People v. Pierce*, 223 Ill. App. 3d 423 (1991). In an appeal from a trial court's denial of a motion to suppress, we review the trial court's findings of fact to determine whether they are against the manifest weight of the evidence, but we employ a *de novo* review for the ultimate determination of whether the evidence should be suppressed. *People v. Absher*, 242 Ill. 2d 77 (2011).

¶ 35 Based on this record, it is clear that the defendant invoked his right to remain silent during his second interview. Specifically, approximately 10 minutes into the interview, the defendant stated that he "don't wanna talk no more." Such a statement is an unequivocal and specific invocation of the defendant's right to remain silent. However, at that point, the detectives did not end the interview. Rather, they told the defendant to "listen," confronted him with purported evidence against him, and continued the interview. This procedure contravenes the mandate of *Miranda*, which provides that an interrogation must stop once a defendant invokes his right to remain silent; consequently, the interview of the defendant should have stopped at this point. Because we have concluded that the defendant invoked his right to remain silent with this statement, we need not consider whether any of the defendant's subsequent statements also invoked his right to remain silent.

¶ 36 Due to this conclusion, we must next ascertain whether the trial court properly admitted the defendant's confession following the invocation of this right. This determination centers on whether the interviewing detectives "scrupulously honored" the defendant's right to remain silent. Under the *Moseley* factors, we conclude they did not. Specifically, the questioning of the defendant did not stop when the defendant first invoked his right to remain silent, but it continued and the officers listed the evidence that they had gathered against the defendant up to that point. Such statements were an

obvious attempt to provoke the defendant into making an incriminatory statement. Additionally, no time at all passed between the defendant's statement that he did not want to talk "no more" and the officers' continued interrogation of him, and the defendant was not given a fresh set of *Miranda* warnings after he invoked his right to remain silent. Furthermore, at all times, the questioning concerned the murder of Rosales, and not different crimes. Thus, none of the *Moseley* factors weigh in favor of finding that the detectives "scrupulously honored" the defendant's right to remain silent.

¶ 37 Consequently, the trial court's finding that the defendant's initial oral confession was voluntary and therefore admissible is against the manifest weight of the evidence. This conclusion is not changed because the officers refrained from abusing the defendant or because the defendant had prior experience with the criminal justice system. Instead, once the defendant invoked his right to remain silent, the officers had a duty to scrupulously honor this request and they should have ceased the interview at that point. Thus, the trial court erred by denying the motion to suppress.

¶ 38 (B) The defendant's telephone call to his mother and written statement

¶ 39 In its appellate brief, the State asserts that the statements the defendant made to his mother after his oral confession but before his written confession are admissible independent of this court's ruling on the admissibility of the defendant's oral confession because the police did not use the defendant's mother in an attempt to interrogate him. The defendant, on the other hand, contends that throughout the interrogation the police consistently used the defendant's love for his mother as a reason "take responsibility" for this role in the instant offense, that the defendant's statements to his mother cannot be separated from the interrogation, and that the taint from the illegally obtained confession had not attenuated at the time the defendant made the statements to his mother.

¶ 40 A defendant's statements to someone who is not a law enforcement officer are admissible

even if the police did not give, and the suspect did not waive, his *Miranda* rights. See *People v. Brooks*, 51 Ill. 2d 156 (1972). Specifically, statements that were not induced by police, or an agent of the police, are admissible without compliance with *Miranda*. *Brooks*, 51 Ill. 2d 156; see also *People v. Hawkins*, 53 Ill. 2d 181 (1972).

¶ 41 In *Hawkins*, 53 Ill. 2d 181, the supreme court affirmed the admissibility of a defendant's confession to his father at a police station and in the presence of a police officer. *Hawkins* concerned a situation where a police officer arrested the 16-year-old defendant in connection with an allegation of sexual assault. After taking the defendant to the police station and informing him of his constitutional rights, the defendant made an incriminating statement, which was subsequently suppressed. In the meantime, in order to comply with the relevant state law, the police notified the defendant's parents of his arrest and they came to the police station. The interviewing officer advised the defendant's parents of his constitutional rights in the defendant's presence, and when the defendant's father asked the defendant about the offense, the defendant confessed to his father that he committed the offense. The police officer was present during this confession.

¶ 42 The *Hawkins* court concluded that the defendant's confession to his father was admissible. The court noted that confessions made by a suspect to private citizens are admissible notwithstanding whether the defendant has received or waived his *Miranda* rights. *Hawkins*, 53 Ill. 2d 181. The court also noted that statements that are not induced by the police or an agent thereof are admissible without compliance with *Miranda*. There, the facts indicated that the police neither initiated the conversation between the defendant and his father nor did they use the defendant's father as their own instrumentality. Thus, there was no evidence to support the defendant's contention that the police used his father to interrogate him, and the trial court properly admitted that confession.

¶ 43 *Hawkins* does not control the disposition of the instant case. We acknowledge that like the defendant in *Hawkins*, the instant defendant confessed to a private citizen in the presence of a police officer. However, the similarities end there. Here, the defendant made repeated requests to telephone his mother during the interview and prior to his initial oral confession. All of those requests were refused and the defendant was only permitted to make this call after he confessed. During the interrogation, the police persistently used the defendant's love for his mother and his desire to make him proud of her as an instrumentality to secure his confession. Also, the defendant's mother did not personally arrive at the police station pursuant to a state law permitting her presence. Rather, the defendant was at the police station alone, and the police used the defendant's desire to speak with his mother as a means to secure his confession. These facts are not present in the *Hawkins* case.

¶ 44 Thus, this instance is not one where the defendant's mother came to the police station to support him and he spontaneously confessed to her. Instead, knowing that the defendant wanted to speak with his mother, the officers denied all of his requests until after he confessed. Consequently, this case differs from *Hawkins* in too many important respects for that decision to dictate the disposition of this case. Instead, we determine the admissibility of the defendant's second confession to his mother in light of our conclusion that his first oral confession was illegally obtained and therefore, inadmissible.

¶ 45 Our supreme court has long recognized the problems with the admissibility of a second confession after a first confession was obtained by illegal means. See *People v. Sweetin*, 325 Ill. 245 (1927). In such an instance, the State must show that through the lapse of time or other means, the influence of the first illegally obtained confession had been removed by the time of the second

confession. *Sweetin*, 325 Ill. 245. The supreme court has also recognized that the second confession is presumed to be the product of the same influence that brought forth the first illegal confession. *People v. Taylor*, 33 Ill. 2d 417 (1965).

¶ 46 In *People v. Riszowski*, 22 Ill. App. 3d 741 (1974), the defendant was arrested, given his *Miranda* warnings at the scene of the arrest, and made an inculpatory statement. The arresting officer transported the defendant to the police station where he was given and waived his *Miranda* rights, and he gave a second incriminating statement. On appeal, the court concluded that the defendant's arrest was illegal and that his first confession must be suppressed because it was a product of the illegal arrest. Concerning the defendant's second confession, the court also determined that it was inadmissible. In so concluding, the court considered the following three factors: (1) the lapse of time between the two confessions; (2) whether the confessions were made to the same authority; and (3) the continuousness of the defendant's custody. *Riszowski*, 22 Ill. App. 3d 741; see also *People v. Raddatz*, 91 Ill. App. 2d 425 (1968). In that case, the court noted that the second confession was made shortly after the first, the statements were made to the same authority, and the defendant remained in continuous custody.

¶ 47 Based on the evidence in this case, the defendant's statements to his mother should also be suppressed. It seems clear to us that, rather than two separate events, the interrogation with the oral confession and the phone call made up a single virtually seamless occurrence. Defendant plainly invoked his right to remain silent and it was not honored. The interrogation proceeded as if he had said nothing. Because of the actions of the officers, defendant's mother was a continuing, albeit intangible, presence in the interrogation room and she was a tool used in securing the initial illegal confession. Only when the officers had finally secured an oral confession was defendant allowed

to speak with his mother. The call was placed from an adjoining room, only because the phone in the interrogation room was not working. Defendant was taken to the second room even before the oral confession was reduced to writing. One of the officers actually dialed defendant's mother, at least one remained in the room with him at all times, and his side of the conversation was both audio and videotaped. The content of the call was a reiteration of defendant's illegally-obtained oral confession. There is no evidence that, but for the wrongful actions of the officers, the defendant would have asked at all to speak with his mother or that he would have "confessed" to her. Nor was he of an age where, as in *Hawkins*, the presence of a parent was mandatory. Immediately after completing the call, defendant was returned to the original interview room to provide a written confession.

¶ 48 Thus, the phone call was essentially part of a single interrogation during which the police secured an oral confession, heard the defendant confess to his mother, and then reduced the oral confession to writing. Also, the police held the defendant in continuous custody between the time of his first confession and his statements to his mother. Therefore, based on these factors, the court erred when it did not suppress the defendant's statements to his mother. For these very same reasons, *i.e.*, the short lapse of time between the defendant's oral confession, the statements to his mother and his written confession, that the confessions were made to the same authority, and the defendant was in continuous custody, the defendant's written confession is also inadmissible.

¶ 49 (C) Harmless Error

¶ 50 The defendant further contends that the improper admission of his confessions was not harmless beyond a reasonable doubt because the defendant's own confession was a powerful piece of evidence, and the only evidence placing him at the scene of the offense. The State, on the other

hand, maintains that based on the other evidence presented, any rational trier of fact could have found the defendant guilty of Rosales's murder beyond a reasonable doubt.

¶ 51 A court may decline to reverse a conviction where the improper admission of evidence is harmless beyond a reasonable doubt. An error is deemed harmless when the reviewing court can conclude beyond a reasonable doubt that the error did not contribute to the defendant's conviction. *People v. Dennis*, 373 Ill. App. 3d 30 (2007). In determining whether a constitutional error is harmless beyond a reasonable doubt, the court should focus on "the character and quality of the illegally obtained evidence as it relates to the other evidence bearing on the same issue and the court should appraise the possible impact upon the jury of the improperly obtained evidence." *People v. Back*, 52 Ill. 2d 544 (1973), cert. denied 411 U.S. 967 (1973). Our supreme court has recognized that "a confession is the most powerful piece of evidence the State can offer, and its effect on the jury is incalculable." *R.C.*, 108 Ill. 2d at 356.

¶ 52 In this case, we cannot deem the error of improperly admitting the defendant's confessions as harmless beyond a reasonable doubt. We acknowledge that the other evidence adduced at trial indicated that the defendant planned to participate in the instant robbery, that he went to Harper's home and retrieved a gun the day before the murder and was wearing a red shirt at the time, that one of the intruders was wearing a red shirt, and that a co-defendant gave the murder weapon to Harper shortly after the shooting and police subsequently found the murder weapon at Harper's home. Although this evidence is unfavorable to the defendant, he correctly points out that none of this evidence placed him at the scene of the offense. Only his illegally obtained confessions place him at the scene. Therefore, not only are the confessions powerful evidence, here, they were a foundational part of the State's case. The fact that this cause was a bench trial rather than a jury trial

does not change our conclusion, as any trier of fact would be reasonably swayed by the power of a defendant's confession. Accordingly, we cannot properly conclude that the admission of the defendant's confession was harmless beyond a reasonable doubt.

¶ 53 In sum, the trial court erred when it denied the defendant's motion to suppress because the interviewing officers did not scrupulously honor the defendant's right to remain silent and his statements to his mother and in writing were not sufficiently removed from the initial illegally obtained confession to render them admissible. This error was not harmless beyond a reasonable doubt. Consequently, we must remand the cause to the trial court for a new trial. As a result, we need not consider the defendant's argument concerning his sentence.

¶ 54 CONCLUSION

¶ 55 For the foregoing reasons, the judgment of the circuit court of Will County is reversed, and the cause remanded for a new trial consistent with this order.

¶ 56 Reversed and remanded.

¶ 57 PRESIDING JUSTICE SCHMIDT, dissenting.

¶ 58 I respectfully dissent.

¶ 59 The majority concludes that defendant's assertion of his right to remain silent was unequivocal and, as such, his initial statements to the police should have been suppressed as they were obtained in violation of that right. *Supra* ¶ 35. Accepting that, I still find admission of the statements at trial did not equate to reversible error. Defendant's statements to his mother, in the presence of a police officer, were not the result of police interrogation.

¶ 60 The majority's attempt to differentiate *Hawkins* is unconvincing. *Supra* ¶¶ 41-44. The *Hawkins* court noted:

"We are concerned with whether or not the confession [to the father] was the product of custodial police interrogation. By custodial interrogation, we mean questioning initiated by law enforcement ***. [Citation.] In numerous cases, it has been held in this court and in other jurisdictions that confessions or admissions made by a suspect in response to interrogation by private citizens are admissible in evidence although the suspect has not been warned or has not waived his rights as required by Miranda. [Citations.] ***

The facts of this case are readily distinguishable from the line of cases where police have attempted to interrogate by use of third persons, or attempted to induce confessions through fraud or trickery. [Citation.] The police did not initiate this conversation between parent and child ***. The father's testimony does not reveal his being used as a police instrumentality." (Internal quotation marks omitted.) *Hawkins*, 53 Ill. 2d 184-85.

¶ 61 The majority claims *Hawkins* is distinguishable as the defendant herein made repeated requests to telephone his mother during the interview, was only allowed to call her after he confessed, and his mother did not "personally arrive at the police station pursuant to a state law permitting her presence." *Supra* ¶ 43. The majority notes that "the defendant was at the police station alone, and the police used the defendant's desire to speak with his mother as a means to secure his confession." *Supra* ¶ 43. The *Hawkins* court's analysis renders these facts irrelevant.

¶ 62 Again, as noted by the passage from *Hawkins* quoted above, our concern is whether the confession to his mother was the product of custodial interrogation. That is, was the "questioning initiated by law enforcement"? *Id.* It was not. Moreover, just as "the police did not initiate [the] conversation between parent and child" in *Hawkins*, they did not initiate the conversation between defendant and his mother in this instance. *Id.* at 185. There is no evidence that the mother was "being used as a police instrumentality." *Id.*

¶ 63 While the majority belabors the point that it was defendant's mother that he wished to and ultimately did call, I question what import that has to our analysis? Defendant was an adult. The police were under no obligation to allow him to speak to his mother. Also, there is no parent-child confidentiality doctrine at issue in this matter, as the State of Illinois does not recognize such a privilege. *People v. Sanders*, 99 Ill. 2d 262, 269 (1983). The police were under no greater obligation to grant defendant's request to speak to his mother than they would be to grant a request to speak to his barber or his girlfriend. The defendant's request is immaterial. What is material is whether the police used the mother to interrogate the defendant. *Hawkins*, 53 Ill. 2d at 186. On the record before us, there is no evidence that they did.

¶ 64 Our supreme court noted long ago that "what a person knowingly exposes to the public is not a subject of fourth amendment protection." *People v. Brooks*, 51 Ill. 2d 156, 160 (1972); see also *Katz v. U.S.*, 389 U.S. 347, 351 (1967). This 22-year-old's statements to his mother in which he confessed to this crime, made in front of a police officer, are not subject to fourth amendment protection. The defendant was well aware that the officer could hear his statements. The defendant knowingly made these statements to his mother. There is no evidence that she was acting as a shell for the police and, therefore, an agent of the police. As such, I find that defendant's statements to

his mother were properly admitted into evidence. Therefore, any error committed by admitting defendant's other inculpatory statements was harmless beyond a reasonable doubt. Defendant acknowledges that there were no substantial variations in what he told the police and what he told his mother. A "reviewing court" may find harmless error when improperly admitted evidence is "merely cumulative or duplicates properly admitted evidence." *People v. Becker*, 239 Ill. 2d 215, 240 (2010).

¶ 65 Finally, I believe that the trial court did not abuse its discretion when sentencing defendant to 70 years' incarceration for first degree murder. A trial court's sentencing decision is entitled to great deference. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). A sentence will be deemed an abuse of discretion where it is "greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *Id.*

¶ 66 The base sentencing range for defendant's first degree murder conviction was 20 to 60 years' imprisonment. 730 ILCS 5/5-8-1(a)(1)(a) (West 2008). Additionally, defendant was subject to a 25-year sentencing enhancement based on the fact that he personally discharged a firearm that caused death. 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2008). The trial court arrived at the 70-year sentence by imposing a 45-year sentence for the murder and adding the 25-year mandatory add-on. Given the defendant's extensive criminal background and the fact that he was on MSR at the time of the instant offense, I cannot say no reasonable person would agree with the trial court's decision, that it is in great variance with the spirit or purpose of the law or that it is manifestly disproportionate to the nature of the offense. I would affirm.