

No. 1-10-3447

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County
Plaintiff-Appellee,	)	
	)	
v.	)	No. 09 CR 364
	)	
SERGIO HERNANDEZ,	)	Honorable Kay Hanlon and
	)	Honorable Thomas P.
Defendant-Appellant.	)	Fecarotta,
	)	Judges Presiding.

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

**ORDER**

¶ 1 *Held:* The trial court's determination finding defendant voluntarily accompanied police to the police station is reversed. The matter is remanded for an attenuation hearing. The mittimus is corrected to reflect defendant's conviction.

¶ 2 Following a jury trial, defendant Sergio Hernandez was convicted of first degree murder for the shooting of his ex-girlfriend, Rocio Munoz-Ramos. The jury specially found defendant personally discharged a firearm that proximately caused the death for which he received a 25 year

enhanced sentence to run consecutively with the 30 year sentence for first degree murder. 720 ILCS 5/9-1(a)(1) (West 2008), 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2010). On appeal, defendant claims: (1) the trial court erred in denying defendant's motion to quash arrest and suppress evidence; (2) his counsel was ineffective for failing to present evidence at the suppression hearing as well as for failing to file a motion to suppress statements; and (3) the mittimus should be corrected to properly reflect defendant's sentence. For the following reasons, we reverse the decision of the trial court and remand for further proceedings consistent with this order.

¶ 3 BACKGROUND

¶ 4 In the evening hours of November 25, 2008, the victim, Rocio Munoz-Ramos, was found shot in the head while sitting in her car, which was parked on West Irving Park Road in Hanover Park, Illinois. Prior to trial, defendant filed a motion to quash arrest and suppress evidence. Lieutenant David Wermes of the Schaumburg police department and Officer Edgardo Lopez of the Hanover police department, both members of the Major Case Assistance Team (MCAT), gave testimony at the suppression hearing which established the following relevant facts.

¶ 5 After the homicide, officers from the Hanover Park police department and members of MCAT canvassed the area. They spoke with the victim's relatives and learned defendant was the victim's ex-boyfriend. The police also discovered that defendant had been involved in a domestic dispute during which he placed a knife to the throat of the victim earlier that same year.

¶ 6 On November 26, 2008, defendant called officer William Kirby of the Hanover Park police department and indicated he would speak with officers. Kirby, not fluent in Spanish, handed the phone to Lopez, who was able to speak to defendant in Spanish. Defendant provided

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driving directions to his home, which was located in a section of Aurora known to be a high-crime area. The officers did not obtain a warrant for defendant's arrest.

¶ 7 Approximately 24 officers, some in plain clothes and in unmarked vehicles, arrived at defendant's residence. When Lopez and Kirby arrived, between two to five officers had their weapons drawn. Defendant was standing next to the building with a group of three to five other individuals. As a safety precaution, the officers handcuffed all of the individuals and patted them down. No weapons were discovered and all of the individuals, including defendant, were then unhandcuffed. Wermes testified defendant "walked with officer Kirby" to Kirby's police vehicle. Kirby placed defendant in the backseat of his unlocked, unmarked police vehicle with no cage. An armed plain clothes officer sat next to defendant in the rear of the vehicle. All of the individuals, including defendant, were taken to the Hanover Park police station. At one point during the drive to the police station, defendant was transferred to a different police vehicle. No reason was provided in the record regarding why defendant was transferred.

¶ 8 Wermes testified during the suppression hearing that defendant was free to leave at the time he was first placed in the police vehicle. Lopez also testified at the suppression hearing when an individual is placed under arrest, one is handcuffed and placed in the back of a marked squad car with a cage before they are transported to the police station, unlike the manner in which defendant was transported to the police station. There was, however, no testimony or evidence presented at the suppression hearing as to any conversations the officers had with defendant once Lopez arrived at the scene. There was also no testimony as to any conversations the officers had with defendant as he was transported to the police station. The record was also

devoid of testimony regarding the circumstances surrounding the transfer of defendant to another police vehicle on the way to the police station. Defendant did not testify at the suppression hearing.

¶ 9 Based upon the foregoing facts, the trial court found defendant voluntarily accompanied the police to the Hanover Park police station to be questioned and was not under arrest when officers approached him at his home. The trial court found: (1) defendant called Kirby and spoke with Lopez, stating he would speak to them and provided them with directions to his home; (2) the location where defendant resided was a high-crime area; (3) officers had their weapons drawn because they did not know the situation they were getting into; (4) all of the individuals present, including defendant, were placed into handcuffs for the officer's safety, not because they were under arrest; (5) all of the individuals, including defendant, were then taken out of handcuffs; (6) defendant was asked if he would accompany the officers; (7) he was placed in an unmarked squad car with the doors unlocked; and (8) no weapons were drawn when defendant was placed in the vehicle. Ultimately, the trial court concluded defendant was not placed under arrest at that time based on the totality of the circumstances.

¶ 10 At trial, the following relevant facts were established. Officer Lopez testified once he arrived at defendant's home in Aurora, other officers had already approached defendant. Lopez did not speak with defendant once he arrived at the scene. Lopez also testified he was not present when defendant was transferred into another police vehicle on the way to the Hanover Park police station.

¶ 11 Officer Lisa Koenen, a forensic technician for the Hoffman Estates police department,

testified she took photographs of the victim at the hospital and at the medical examiners's office. She further testified on November 26, 2008, she arrived at defendant's home at 8:30 p.m. to photograph the exterior and surroundings of defendant's residence. She testified defendant had already been transported earlier in the day to the Hanover Park police station.

¶ 12 Officer Alvaro Fernandez testified he gave defendant his *Miranda* warnings in Spanish at the police station and that defendant indicated he understood those rights and wanted to speak with him. Fernandez began questioning defendant in Spanish from 9:00 p.m. to 2:45 a.m. The questioning was not continuous; there were breaks as well as times when defendant used the restroom. Fernandez also testified defendant accompanied officers to Aurora the following day to search for the murder weapon.

¶ 13 The jury viewed a redacted version of the final 57 minutes of defendant's videotaped interview, which contained defendant's confession. The videotape viewed by the jury was edited to include English subtitles. The videotape depicted defendant submitting to a gunpowder residue test, which indicated he recently discharged a firearm. After defendant tested positive for gunshot residue, he admitted to purchasing a handgun and shooting the victim in the head. Defendant indicated, however, that the shooting was an accident, as the handgun had a "vulnerable" trigger and he just wanted to speak with the victim.

¶ 14 Following closing arguments and jury instructions, the jury deliberated and found defendant guilty of first degree murder. The jury also found the State had proved defendant personally discharged a firearm which proximately caused the victim's death. After hearing evidence in aggravation and mitigation of the offense, the trial judge sentenced defendant to a

total of 55 years in the Illinois Department of Corrections. This appeal followed.

¶ 15

## ANALYSIS

¶ 16

### I. Motion to Quash Arrest and Suppress Evidence

¶ 17 Defendant first contends the trial court erred in denying the motion to quash arrest and suppress evidence, arguing the trial court did not properly apply the manifest weight of the evidence standard, where the evidence reveals defendant was illegally arrested at his home. As a result, defendant claims his statements made after being arrested at his home should have been suppressed because they were not sufficiently attenuated from his illegal arrest. The State maintains the trial court used the correct standard in denying the motion to quash, and further the trial court's determination that defendant voluntarily accompanied police to the police station was supported by the evidence.

¶ 18 In reviewing a trial court's ruling on a motion to quash arrest and suppress evidence, we apply the two-part standard of review adopted by the Supreme Court in *Ornelas v. United States*, 517 U.S. 690, 699 (1996). *People v. Luedemann*, 222 Ill. 2d 530, 542-43 (2006). Under this standard, we give deference to the factual findings of the trial court, and we will reject those findings only if they are against the manifest weight of the evidence. *People v. Johnson*, 237 Ill. 2d 81, 88 (2010). “A judgment is against the manifest weight of the evidence only when an opposite conclusion is apparent or when findings appear to be unreasonable, arbitrary, or not based on evidence.” *Bazydlo v. Volant*, 164 Ill. 2d 207, 215 (1995). A reviewing court, however, “remains free to undertake its own assessment of the facts in relation to the issues,” and

we review *de novo* the trial court's ultimate legal ruling as to whether suppression is warranted. *People v. Cosby*, 231 Ill. 2d 262, 271 (2008). *De novo* consideration means we perform the same analysis that a trial court would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011). "[I]n reviewing the trial court's ruling on a motion to suppress, we may consider the entire record, including trial testimony." *People v. Robinson*, 391 Ill. App. 3d 822, 830 (2009).

¶ 19 "To quash an arrest as violative of the fourth amendment and to suppress evidence based upon the illegality of that arrest, the burden is on the defendant to show that an illegal seizure has occurred. [Citations.] To satisfy his burden he must prove two things: first, that a seizure occurred, and second, that the seizure was illegal. [Citation.]" *People v. Graham*, 214 Ill. App. 3d 798, 806 (1991). Here, defendant contends he was in fact illegally seized without probable cause at his home and without an arrest warrant to support his arrest. The State argues, instead, defendant was not in fact seized, but rather voluntarily accompanied officers to the police station for questioning.

¶ 20 A. Factual Findings

¶ 21 We first consider whether the trial court's factual findings were against the manifest weight of the evidence. *Luedemann*, 222 Ill. 2d at 542. In this case, the trial court based its legal ruling on the factual finding that defendant voluntarily accompanied the officers to the Hanover Park police station. Defendant contends this finding was against the manifest weight of the evidence.

¶ 22 When reviewing a trial court's determination of a motion to quash arrest and suppress evidence, there is typically testimony in the record surrounding how a defendant came to arrive at

the police station. See e.g. *People v. Gomez*, 2011 IL App (1st) 092185 ¶ 21 (detective testifying he asked defendant if he would come to the police station and he agreed); *People v. Jackson*, 391 Ill. App. 3d 11, 36 (2009) (defendant testified he voluntarily accompanied officers to the police station and did not feel he was required to do so); *People v. Anderson*, 395 Ill. App. 3d 241, 243-44 (2009) (detectives interviewed the defendant at home on his front porch and then asked the defendant to come to the police station for an interview to which the defendant agreed.); *People v. Myrick*, 274 Ill. App. 3d 983, 988 (1995) (detective testified the defendant never said he did not want to go to the police station, nor did he ask detectives if he could drive his own vehicle). When a court finds a defendant voluntarily accompanied police to the station there is also usually evidence in the record indicating the defendant was asked to accompany officers to the police station. See *People v. Nicholas*, 218 Ill. 2d 104, 109, 119-20 (2005) (the evidence in the record demonstrated the defendant agreed to accompany police to headquarters to help in the investigation twice); *Gomez*, 2011 IL App (1st) 092185, ¶ 60; *Anderson*, 395 Ill. App. 3d at 245. The record here contains no evidence officers requested defendant accompany them to the police station or that defendant voluntarily entered into the police vehicle.

¶ 23 Whether defendant was given an option to transport himself to the police station has also been an indicator of voluntariness. See *People v. Vega*, 203 Ill. App. 3d 33, 41-42 (1990) (noting defendant was not given the choice of arranging his own transportation); see also *Myrick*, 274 Ill. App. 3d at 989 ("A police officer can drive a person to the police station for a consensual interview."). In the present case, there is no evidence in the record which establishes whether defendant was given the option of driving himself to the station.

¶ 24 Another indicator of voluntariness is what transpired during defendant's transportation to the police station. See *People v. Seawright*, 228 Ill. App. 3d 939, 963 (finding defendant was not arrested when placed unhandcuffed in an unmarked police vehicle and defendant was allowed to stop at a gas station to purchase cigarettes unaccompanied). Here, the record is silent as to what occurred when defendant was transported to the police station, including the circumstances surrounding his transfer to a different police vehicle.

¶ 25 In the present case, the record contains evidence regarding defendant's initial contact with police. Lopez testified regarding the conversation he had with defendant on the phone prior to arriving at his home:

"Q. Can you tell us what he said to you and what you said to him during that phone conversation?

A. I first started saying hello. And he said, 'This is Sergio. I understand you're looking for me.' And I said, 'Yes, we are. We'd like to talk to you about something that happened the other day. Is it okay if we come and talk to you?'

Q. And what did he say?

A. He said, 'Sure. I'm at my house right now.'

Q. And did he tell you where that house was?

A. Yes, he did. I initially asked him, 'Well, can we come over there and, you know, go talk to you?' He said yes. I asked him, 'Well, how do we get there?' And he started explaining to me how to get there."

When Lopez asked, "Well, can we come over there and, you know, go talk to you?," defendant responded affirmatively and gave Lopez directions to his home. The record does not indicate whether Lopez informed defendant he wished to speak with him outside of his home or at the police station. Lopez further testified defendant was outside his home when he arrived. This behavior is consistent with defendant's conversation with Lopez, in which defendant indicated he was willing to speak with officers at his home. Wermes did not testify to a conversation with

defendant at his home, if any occurred at all.

¶ 26 The only evidence in the record which indicated some voluntary action by defendant was that defendant contacted Kirby and Lopez and agreed to speak with them at his home.

Thereafter, the record reflects defendant was placed in handcuffs, patted down, taken out of handcuffs, and then escorted to Kirby's unmarked police vehicle. The record demonstrates the doors of the automobile were unlocked and an armed officer sat next to defendant until he was transferred to another vehicle. At some point during the transportation of defendant to the station, defendant was moved to another police vehicle. The record does not contain any evidence indicating whether the doors to the second police vehicle were unlocked. The record further fails to indicate whether the second police vehicle was unmarked or whether defendant was alone in the back of the second police vehicle. The record is devoid of any conversations the officers had with defendant or what defendant said to the officers. After reviewing the entirety of the record, we find the determination of the trial court, namely, that defendant was asked to voluntarily accompany officers to the police station, was against the manifest weight of the evidence, because the record is devoid of any evidence to support that conclusion. See *Robinson*, 391 Ill. App. 3d at 830.

¶ 27 B. Legal Conclusion

¶ 28 We next consider the trial court's legal ruling that defendant voluntarily accompanied the police officers to the police station for questioning. Defendant contends suppression of his confession was warranted because he was illegally seized at his residence in violation of his fourth amendment rights. In support of this claim, defendant states he was apprehended by

multiple officers, some with guns drawn, and was placed in an unmarked police vehicle with an armed officer next to him. Defendant maintains no reasonable person would feel they were free to leave under the circumstances. Consequently, defendant contends because he was illegally seized, the fruits of that illegal arrest – his subsequent confession – should have been suppressed.

¶ 29 The State maintains the trial court properly denied the motion to quash arrest and suppress evidence under a totality of the circumstances standard. The State contends defendant voluntarily went with police to the station as evidenced by the fact he initiated contact with police. The State points specifically to the fact, even though approximately 24 officers arrived at defendant's home, there is no indication as to how they were positioned or if they exited their vehicles. Further, the use of weapons during this encounter was not menacing, since defendant lived in a high-crime area. Lastly, there was no indicia of a formal arrest, as defendant was not handcuffed while being transported to the police station. There is also nothing in the record to indicate he was fingerprinted and photographed once he arrived at the station.

¶ 30 A citizen is seized when, by means of physical force or show of authority, his or her freedom of movement is restrained. *People v. Lopez*, 229 Ill. 2d 322, 345 (2008); *People v. Brownlee*, 186 Ill. 2d 501, 517 (1999). For the purposes of the fourth amendment, a seizure is an arrest. *Lopez*, 229 Ill. 2d at 346. In determining whether a seizure occurred, we consider whether, in light of all the circumstances surrounding the incident, a reasonable person would believe they were free to leave. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980); *Brownlee*, 186 Ill. 2d at 517 (1999). The standard to determine whether a seizure occurred, therefore, is an objective one. *People v. Ortiz*, 317 Ill. App. 3d 212, 219-20 (2000) (citing

*Florida v. Royer*, 460 U.S. 491, 501-02 (1983)). To determine whether a seizure occurred in a particular case, we consider the totality of the circumstances.<sup>1</sup> *People v. Williams*, 303 Ill. App. 3d 33, 40 (1999). The factors we consider include: (1) the time, place, length, mood, and mode of the encounter between the defendant and the police; (2) the number of police officers present; (3) any indicia of formal arrest or restraint, such as the use of handcuffs or drawing of guns; (4) the intention of the officers; (5) the subjective belief or understanding of the defendant; (6) whether the defendant was told he could refuse to accompany police; (7) whether the defendant was transported in a police car; (8) whether the defendant was told he was free to leave; (9) whether the defendant was told he was under arrest; and (10) the language used by officers. *People v. Washington*, 363 Ill. App. 3d 13, 24 (2006); *People v. Willis*, 344 Ill. App. 3d 868, 875 (2003); *People v. Wallace*, 299 Ill. App. 3d 9, 17-18 (1998). We consider the trial court's legal ruling *de novo*. *Ornelas*, 517 U.S. at 698-99; *People v. Sorenson*, 196 Ill. 2d 425, 431 (2001).

¶ 31 Accordingly, we turn to consider the totality of the circumstances as indicated by the case law. *Williams*, 303 Ill. App. 3d at 40. The record presented to the trial court lacked sufficient evidence as to many of the circumstances. Though the record does state the encounter occurred

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<sup>1</sup>Defendant contends the trial court used the improper standard when denying the motion to quash arrest and suppress evidence. The trial court stated it viewed the facts under the totality of the circumstances and considered the relevant factors. In this regard, we conclude the trial court did use the appropriate standard when denying defendant's motion.

at defendant's invitation and at his home in the evening<sup>2</sup>, the record is silent as to the time, duration and mood of the encounter. *Id.* Second, the record is devoid of any evidence which indicates the subjective belief of the defendant, since the defendant did not testify at the suppression hearing. *Id.* Third, there is nothing in the record which addresses whether defendant was advised he could refuse to accompany police, whether defendant was informed he was free to leave, or whether defendant was notified he was under arrest. *Id.* Indeed, the record completely lacks any evidence of communication by or to defendant. Fourth, there is nothing in the record which indicates the tone or type of language used by the officers. *Id.* As previously noted, the record in this cause is silent as to what, if any, conversations defendant had with officers once they approached him at his home. For these reasons, we cannot determine whether these factors weigh for or against defendant's contention he was arrested at his residence.

¶ 32 We do, however, have some evidence in the record as to other circumstances, those being: the number of officers present; indications of formal arrest or restraint, such as the use of handcuffs or drawing of guns; whether the defendant was transported in a police car; and the intentions of two of the officers, Lopez and Wermes. As to the number of officers present and indicia of formal arrest, Lopez and Wermes testified between 20 and 24 officers came to

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<sup>2</sup>There is no clear evidence in the record as to when officers arrived at defendant's home. Wermes and Lopez testified that they arrived in the evening. Officer Lisa Koenen testified that she arrived at defendant's home at 8:30 p.m. on November 26, 2008, and that defendant had been located earlier in the day.

defendant's home and between two and five officers had their weapons drawn. Defendant cites *People v. Berrios*, 178 Ill. App. 3d 241, 250 (1988), and *People v. Beamon*, 213 Ill. App. 3d 410, 426 (1991), for the proposition that three and five officers, respectively, confronting a defendant is indicative of a showing of authority that would reasonably lead a person to believe their movement was restrained. Although not one factor is determinative, this particular circumstance weighs, in some degree, in favor of defendant.

¶ 33 Defendant contends his movement was restrained when he was handcuffed and patted down and this is indicative of a formal arrest. The individuals who were congregating with defendant next to the apartment building were also restrained when they were placed in handcuffs and patted down. The State asserts the number of officers and the use of weapons was required because defendant resided in a high-crime area and the weapon used in the murder had not been recovered.

¶ 34 An officer may conduct a weapons frisk, but the officer must have reason to believe that “ ‘the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others.’ ” *People v. Flowers*, 179 Ill. 2d 257, 263 (1997) (quoting *Terry v. Ohio*, 392 U.S. 1, 24 (1968)). “The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.” *Sorenson*, 196 Ill. 2d at 433 (citing *Terry*, 392 U.S. at 27). Wermes and Lopez testified defendant's home was located in a high-crime area and the handgun used in the murder had not yet been recovered. The trial court found the officers restrained all of the individuals in handcuffs for officer safety, not

because they were under arrest. The record supports this determination.

¶ 35 Though everyone, including defendant, was later taken out of handcuffs, they were all transported in police vehicles to the Hanover Park police station. Being approached by officers in front of one's friends or family is typically not coercive. See *Myrick*, 274 Ill. App. 3d at 989 ("Two officers in an area near friends are not unduly threatening in such a manner as to make a request to accompany them to a police station coercive."). In this instance, however, everyone who was with defendant was initially handcuffed, unhandcuffed and then taken away by police. These circumstances could weigh in favor of defendant.

¶ 36 We next consider the manner in which defendant was transported to the police station. Wermes and Lopez testified defendant was placed in an unmarked police vehicle, with no cage and the doors were unlocked. Defendant sat next to an armed plain-clothes police officer during the first portion of the drive. The trial court found no weapons were drawn when defendant was placed in the squad car. There was, however, no evidence presented as to the language used by police officers or their tone of voice when speaking with defendant as he was placed in the squad car. We also do not know what the other officers were doing in relation to defendant as he was being placed in the squad car, except that some were placing the other individuals into police vehicles for transport to the same police station where defendant was brought.

¶ 37 Though he was not handcuffed, an armed police officer sat next to defendant in the back seat. The officers testified the doors to the squad car were unlocked, but there was no evidence presented that this information was communicated to defendant or that defendant was aware he could freely exit the vehicle. A reasonable person in defendant's position would not believe he

could voluntarily leave the vehicle under such circumstances. To further compound this issue, defendant was then removed from the vehicle in which he was initially placed and transferred to a different police vehicle while en route to the police station. We do not know whether the vehicle defendant was moved to was unmarked, unlocked, or was equipped with a cage.

¶ 38 Lastly, we consider the subjective intent of the officers. Wermes testified he believed defendant was free to leave and that no guns were drawn when defendant was placed in Kirby's vehicle. However, "[e]ven if a defendant was not told that he was under arrest, not touched by a police officer, not handcuffed, fingerprinted, searched, or subjected to any other arrest procedures, he may have been illegally detained if he was not told that he could leave and he did not feel free to leave." *People v. Reynolds*, 257 Ill. App. 3d 792, 800 (1994) (citing *People v. Holveck*, 141 Ill. 2d 84, 92 (1990)). Here, there is no evidence defendant was told he was under arrest and no evidence he was told he was free to leave. Additionally, a single officer's subjective intent alone may not be sufficient to warrant defendant's seizure. See *id.* ("No factor is dispositive. A determination will vary with all of the circumstances surrounding the detention in each case."). Lopez testified if someone was under arrest they would be handcuffed and placed in the back of a marked police vehicle with a cage and doors locked. This also indicates an officer's subjective intent. Yet Lopez testified once he arrived at the scene, other officers had already approached defendant and their conversation ended. Defendant was placed in the back of an official police vehicle and may not have been familiar with police procedure. Though two officers indicated their subjective intent was that defendant was not under arrest, the record fails to show the nature of their involvement once they arrived at defendant's home.

¶ 39 The cases cited by the State are inapposite. In *Anderson*, the defendant argued an illegal arrest occurred at the police station after he was given his *Miranda* warnings. *Anderson*, 395 Ill. App. 3d at 247-49. In *Myrick*, police officers with guns drawn approached defendant at a gas station and he voluntarily went with officers to the police station. *Myrick*, 274 Ill. App. 3d at 989. It is apparent the facts in this case provide a completely different set of circumstances under which to judge whether defendant was illegally detained at his home on the night of November 26, 2008.

¶ 40 All the cases cited by defendant are distinguishable.<sup>3</sup> In *People v. Cole*, 168 Ill. App. 3d 172 (1988), the defendant was 16 years old and we have readily distinguished cases involving juveniles and those of adults when it involves illegal arrests. See *id.* at 179; see also *Vega*, 203 Ill. App. 3d at 43 (1990) (defendant was 16). In *Beamon*, five detectives woke the defendant from his bed and after arguing and yelling, transported the defendant to the police station. *Beamon*, 213 Ill. App. 3d at 419-20. *People v. Vasquez*, 388 Ill. App. 3d 532 (2009), contains completely inapposite facts; there we considered the defendant to be illegally arrested when he was confronted by police at a gas station, placed in a squad car, and his vehicle was driven away by police. *Id.* at 550. Defendant cites *Berrios* for the proposition that three officers is a showing of force. *Berrios*, 178 Ill. App. 3d at 250. In that case, however, we considered the "showing of force" included not only the number of officers but also their conduct when they took the

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<sup>3</sup>It should be noted that the standard of review changed in 1996 to the two part test we use today. Defendant cites many cases that were decided prior to 1996.

defendant in for questioning. *Id.* Defendant cites *Graham* for the same proposition, but that case also included other circumstances that indicated a show of force, such as the fact four officers surrounded the defendant on the sidewalk, grabbed his arm, led him into the car, and officers commanded the defendant to "come with me." *Graham*, 214 Ill. App. 3d at 808.

¶ 41 In sum, examining the totality of the circumstances, we conclude: (1) defendant's encounter with the police occurred at his residence, however, we cannot say how long the encounter lasted, when the police officers arrived, or what the general mood of the encounter was as that evidence was not in the record; (2) 20 to 24 officers were present when Lopez arrived at defendant's home; (3) some weapons were drawn and all of the individuals, including defendant, were placed in handcuffs, patted down, then unhandcuffed; (4) the subjective intent of Wermes was that defendant was free to leave and Lopez's subjective intent was that defendant was not under arrest; (5) defendant did not testify at the suppression hearing, making his subjective belief or understanding unknown; (6) evidence is absent in the record as to whether defendant was informed he could refuse to accompany police; (7) defendant was transported in an unmarked police vehicle accompanied by an armed police officer, but then transferred to another undescribed police vehicle of which there is no evidence in the record; (8) the record is silent as to whether defendant was advised he was free to leave; (9) the record is barren regarding whether defendant was informed he was under arrest; and (10) the record is devoid of evidence regarding the language or tone used by the officers.

¶ 42 When viewed in their totality, the circumstances surrounding this encounter indicate defendant was arrested at his residence, as a reasonable person in defendant's position would not

feel free to leave. Defendant initially invited two officers to come speak with him at his home. As he waited for the two officers outside his home, 20 to 24 police officers, some with weapons drawn, arrived instead. Defendant and his companions were handcuffed, patted down, unhandcuffed, placed into police vehicles and taken to the police station. An armed officer sat next to defendant in the back seat during the first portion of the drive to the police station. Then, defendant was removed from the squad car and placed into another police vehicle. Under these circumstances, a reasonable person in defendant's position would have believed they were not free to leave. Even though defendant initially contacted the police and indicated a willingness to speak with them, merely initiating police contact does not justify the seizure of defendant that occurred without a warrant. For the reasons stated, we find the totality of the circumstances demonstrates defendant was illegally detained at his residence on November 26, 2008.

¶ 43

#### C. Attenuation

¶ 44 Our finding that defendant was subject to an illegal arrest does not, however, answer the question of whether the statements, and subsequent confession, made by defendant at the police station were admissible at trial. *People v. Foskey*, 136 Ill. 2d 66, 85 (1990). A confession obtained following an illegal arrest may be admissible if the confession was sufficiently an act of the defendant's free will. *People v. White*, 117 Ill. 2d 194, 222 (1987). The relevant inquiry is whether the confession was obtained by exploitation of the illegal arrest or was obtained "by means sufficiently distinguishable to be purged of the primary taint" of the illegal arrest. *Wong Sun v. United States*, 371 U.S. 471, 488 (1963). Factors to be considered in determining whether a confession was the product of an illegal arrest include: (1) the proximity in time between the

arrest and the confession; (2) whether *Miranda* warnings were given; (3) the purpose and flagrancy of the police misconduct; and (4) the presence of intervening circumstances. *Brown v. Illinois*, 422 U.S. 590, 603-604 (1975); *Foskey*, 136 Ill. 2d at 85-86. The burden of demonstrating attenuation between the illegal arrest of the defendant and his confession is on the State. *Brown*, 422 U.S. at 604; *White*, 117 Ill. 2d at 222-23.

¶ 45 In the present case, the trial court determined defendant voluntarily accompanied the police to the station. Thus, the trial court never considered the question of attenuation. In order to determine the appropriate course of action, "we must consider whether the record before us is sufficiently complete to allow an independent determination on the issue of attenuation." *People v. Ollie*, 333 Ill. App. 3d 971, 985 (2002). Accordingly, we must turn to examine the factors set forth in *Brown*.

¶ 46 The first factor at issue is the temporal proximity of defendant's illegal arrest to his statements and subsequent confession. "The temporal proximity between an arrest and a confession is often an ambiguous factor, the significance of which will depend upon the particular circumstances of a particular case." *White*, 117 Ill. 2d at 223-24. In order to determine temporal proximity, facts must be in the record which indicate the time defendant was illegally arrested. There is nothing in the record indicating exactly when officers converged on defendant's home. Wermes and Lopez testified they arrived at defendant's home in the evening hours of November 26, 2008. Both officers also testified it was dark outside when they approached defendant. Officer Lisa Koenen, however, testified she went to defendant's home to photograph the scene at 8:30 p.m. on November 26, 2008, and that defendant had been located

earlier in the day. Based on the record, we do not know exactly when defendant was arrested. The record does, however, indicate defendant was interviewed at the police station at 9:00 p.m. on November 26, 2008, and ended shortly before 2:45 a.m. on November 27, 2008, after defendant confessed. Accordingly, though we are able to determine when the confession occurred, we are unable to determine whether the temporal proximity was sufficient to remove the taint of the illegal arrest.

¶ 47 We next consider whether defendant was advised of his constitutional rights prior to being questioned. Officer Alvaro Fernandez testified defendant was given his *Miranda* warnings in Spanish at the commencement of the interview, defendant understood those rights and wanted to speak with him. Fernandez, however, was not asked if defendant affirmatively waived his rights. A transcript of the videotape was submitted in the record on appeal. This transcript, however, was never published to the trier of fact. A review of the transcript demonstrates defendant responded, "hmm-hmm" many times while Fernandez was administering the *Miranda* warnings. The record here does not reveal whether defendant affirmatively waived his rights. The administration of *Miranda* warnings alone is not sufficient to find defendant's confession was attenuated from his illegal arrest. *Foskey*, 136 Ill. 2d at 86. The reviewing court must also consider the circumstances surrounding the waiver of rights. See *Brown*, 422 U.S. at 602 ("If *Miranda* warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted."). This is not a factor we can consider on appeal, as the record here is incomplete.

¶ 48 "The flagrancy of police misconduct, or lack thereof, and the presence or absence of intervening circumstances have emerged as the key factors in determining whether a statement obtained subsequent to an illegal arrest is sufficiently purged of the taint of that arrest to be admissible." *Ollie*, 333 Ill. App. 3d at 986. The record before us is incomplete; therefore we cannot determine whether there was a lack or flagrancy of police misconduct at the police station. The only evidence of how defendant was treated at the police station is a videotape which details the last 57 minutes of the interview<sup>4</sup> and Fernandez's testimony. Fernandez testified at trial that defendant's interview included many pauses and bathroom breaks. He further testified defendant was comfortable and given food to eat. No further testimony was elicited from Fernandez regarding police conduct during the interview. Moreover, very little testimony was elicited from Fernandez regarding defendant's treatment at the police station. Additionally, Lopez, who was also present during defendant's interrogation, did not testify regarding police conduct during the interview. Therefore, we cannot say whether there was any flagrancy of police conduct, or lack thereof based on the record before us.

¶ 49 The last factor to consider is whether there were any intervening circumstances which served to purge defendant's confession of the taint of his illegal arrest. *Foskey*, 136 Ill. 2d at 86. The confrontation of a defendant with new legally obtained information is one possible intervening circumstance, which may produce a voluntary desire to confess and thus render the statement admissible. See *People v. Jennings*, 296 Ill. App. 3d 761, 766 (1998); *People v.*

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<sup>4</sup>As previously noted, defendant's interrogation was conducted in Spanish.

*Turner*, 259 Ill. App. 3d 979, 993 (1994). The final 57 minutes of the videotaped interview admitted into evidence contains the administration of a gunpowder residue test with defendant's consent. The gunpowder residue test indicated defendant recently fired a weapon. Without a complete record, including the entire videotaped interview, and further testimony from the police officers, we cannot determine whether there were any intervening circumstances which would sufficiently purge the taint of the illegal arrest.

¶ 50 We hold that, based on the insufficiency of the record, we cannot make an independent determination of the admissibility of defendant's confession. Whether there was attenuation under these circumstances is best determined at the trial court level. See *Washington*, 363 Ill. App. 3d at 26 (appellate court's holding that defendant's inculpatory statement was obtained after an illegal arrest did not automatically necessitate exclusion of her statement but, rather, necessitated a remand for the trial court to conduct an attenuation hearing); *Wallace*, 299 Ill. App. 3d at 21 (remand for attenuation hearing appropriate where defendant's inculpatory statement followed his illegal arrest but trial court made no explicit finding as to attenuation); *People v. Walls*, 220 Ill. App. 3d 564, 580 (1991) (remanding for trial court to conduct attenuation hearing); *People v. Young*, 206 Ill. App. 3d 789, 804-05 (1990) (remanding for attenuation hearing upon finding that defendant had been illegally arrested where he was segregated in an interview room for approximately 12 hours without probable cause). The appropriate course of action is to reverse defendant's conviction and remand this cause with directions to conduct a hearing to determine whether defendant's statements at the police station were sufficiently attenuated from his illegal arrest to render it admissible. Should the trial court

find defendant's confession was sufficiently attenuated from his illegal arrest, we direct the court to reinstate defendant's conviction. In the alternative, if the trial court determines that no such attenuation exists to purge the confession from the taint of defendant's illegal arrest, we direct the trial court to suppress the confession and conduct further proceedings consistent with this opinion. See *People v. Bramlett*, 341 Ill. App. 3d 638, 651-52 (2003); *Ollie*, 333 Ill. App. 3d at 985; *Wallace*, 299 Ill. App. 3d at 21.

¶ 51 II. Ineffective Assistance of Counsel

¶ 52 Defendant contends defense counsel was ineffective for failing to file a motion to suppress statements as well as for failing to introduce evidence at the suppression hearing of police conduct while defendant was being interviewed at the police station. Each of these contentions involves what occurred at the Hanover Park police station after defendant was transported there by officers.

¶ 53 To establish a claim of ineffective assistance of counsel, a defendant must prove both (1) deficient performance by counsel and (2) prejudice to defendant. *People v. Smith*, 195 Ill. 2d 179, 187-88 (2000) (citing *Strickland v. Washington*, 466 U.S. 668, 686-87 (1984)). To satisfy the first prong of the *Strickland* test, a defendant must show that his counsel's performance fell below an objective standard of reasonableness, as measured by prevailing norms. *Smith*, 195 Ill. 2d at 188. In considering whether counsel's performance was deficient, a court must indulge a strong presumption that the challenged action, or inaction, was the result of sound trial strategy. *Id.* at 188. To satisfy the second prong, a defendant must establish a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been

different. *Id.* (citing *Strickland*, 466 U.S. at 694). A probability rises to the level of a “reasonable probability” when it is sufficient to undermine confidence in the outcome or the proceeding. *Smith*, 195 Ill. 2d at 188. Counsel's deficient performance must have rendered either the outcome unreliable or the proceeding fundamentally unfair. *Id.*

¶ 54 In order for defendant to establish he was prejudiced by trial counsel's failure to file a motion to suppress his statements, "the defendant must demonstrate that the unargued suppression motion is meritorious, and that a reasonable probability exists that the trial outcome would have been different had the evidence been suppressed." *People v. Henderson*, 2013 IL 114040, ¶ 15. Determining whether or not to file a motion to suppress is a matter of trial strategy, and thus, counsel's decision is given great deference and is generally immune from claims of ineffective assistance. *People v. Martinez*, 348 Ill. App. 3d 521, 537 (2004).

¶ 55 In the present case, we cannot say whether the motion to suppress statements would have had a reasonable probability of success, as the record is insufficient to support a claim for ineffective assistance of counsel. The record is also insufficient to support a finding that trial counsel's decision not to present evidence at the suppression hearing or to subsequently file a motion to suppress statements was a matter of trial strategy. The record on appeal does not contain any evidence that the first five hours of defendant's police station interview was reviewed by the trier of fact. A redacted version of the transcript of the interview was in the record on appeal, however it was never published to the jury. The entire videotape was never admitted into evidence at any point during the trial court proceedings.

¶ 56 Defendant contends the first five hours of the videotape, which were never reviewed by

the trier of fact, support a finding of ineffective assistance of counsel. Our supreme court holds, however, where the record is insufficient because it has not been precisely developed for the object of litigating a specific claim of ineffectiveness of counsel, the matter is inappropriate for direct appeal. *People v. Ligon*, 239 Ill. 2d 94, 105 (2010). Here, the evidentiary basis for the ineffective assistance claim is *dehors* the record, and therefore cannot be considered. *People v. Whitehead*, 169 Ill. 2d 355, 372 (1996). As previously addressed, we are remanding this matter for an attenuation hearing at which what transpired at the police station may be addressed. See *Ollie*, 333 Ill. App. 3d at 986 (one of the key factors in determining attenuation is the flagrancy of police misconduct or lack thereof). To the extent the attenuation hearing does not fully address defendant's ineffective assistance of counsel claims, those claims may be raised under the Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-8 (West 2010)). *People v. Bew*, 228 Ill. 2d 122, 135 (2008).<sup>5</sup> Further, depending on what is entered into the record on remand, ineffectiveness may be so apparent from the record that it could be addressed on direct appeal. See *United States v. Massaro*, 538 U.S. 500, 508 (2003); *Bew*, 228 Ill. 2d at 135. This disposition "allows both defendant and the State an opportunity to develop a factual record bearing precisely on the issue." *Bew*, 228 Ill. 2d at 135.

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<sup>5</sup>Recently, in *Henderson*, our supreme court reaffirmed its holding in *Bew*. *Henderson*, 2013 IL 114040, ¶ 20; *Bew*, 228 Ill. 2d at 135. Unlike the case at bar which contains a wholly insufficient record, the State in *Henderson* conceded the trial record was sufficient and the supreme court agreed. *Henderson*, 2013 IL 114040, ¶ 22.

¶ 57

III. Correction of the Mittimus

¶ 58 Defendant contends, and the State agrees, the mittimus should be corrected to reflect defendant was charged with, convicted of and sentenced for one count of first degree murder in violation of section 9-1(a)(1) of the Criminal Code of 1961 (Code) (720 ILCS 5/9-1(a)(1) (West 2010) and personally discharging a firearm that proximately caused death under section 5-8-1(a)(1)(d)(iii) of the Code of Criminal Procedure (730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2010)). The mittimus incorrectly states defendant was convicted of two murder charges: "Murder/Intent to Kill/Injure" pursuant to "720 ILCS 5/9-1(a)(1)" and "Murder/Strong Prob Kill/Injure" pursuant to "720 ILCS 5/9-2(a)(2)." It further states the sentence under section 9-1(a)(1) of the Code (720 ILCS 5/9-1(a)(1) (West 2010)) is for 30 years, and the sentence under section 9-2(a)(2) of the Code is for 25 years (720 ILCS 5/9-2(a)(2) (West 2010)). At sentencing, the trial judge stated, "\*\*\*\* on the first degree murder [defendant], is sentenced to 30 years in the Illinois Department of Corrections and he's sentenced to an additional 25 years for the personal discharge of the handgun, for a total of 55 years in the Illinois Department of Corrections." "In a criminal proceeding, the pronouncement of the sentence is the judicial act which comprises the judgment of the court. The entry of the sentencing order is a ministerial act and is merely evidence of the sentence." *People v. Williams*, 97 Ill. 2d 252, 310 (1983). Therefore, should the trial court find defendant's confession was sufficiently attenuated from his illegal arrest, we direct the court to reinstate defendant's conviction and correct the mittimus in case number 09 CR 364 to reflect that the conviction under section 9-1(a)(1) of the Code (720 ILCS 5/9-1(a)(1) (West 2008)) with a sentence of 30 years and enhancement under section 5-8-1(a)(1)(d)(iii) of the Code of Civil

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Procedure (730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2010)) for 25 years. See Supreme Court Rule 615(b)(1) (eff. August 27, 1999); see also *People v. Polk*, 407 Ill. App. 3d 80, 111 (2010).

¶ 59

#### CONCLUSION

¶ 60 In sum, we reverse the trial court's decision to deny defendant's motion to quash arrest and suppress evidence. We reverse defendant's conviction and remand the matter to the trial court to conduct an attenuation hearing as instructed.

¶ 61 Reversed and remanded with instructions.