FOURTH DIVISION
April 26, 2018

No. 1-15-1961

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	Nos. 09 CR 14350;
	)	09 CR 60999
	)	
DONALD SMITH,	)	Honorable
	)	Luciano Panici,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Justice McBride and Justice Gordon concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court erred in ruling that defendant lacked "standing" to move to suppress evidence where he claimed officers planted it during traffic stop. Error at trial in refusing to allow defendant to testify to "threats" by officer that allegedly induced confession was harmless. Remanded for trial court to determine whether officers had reasonable suspicion for traffic stop.

¶ 2 A jury convicted defendant Donald Smith of armed violence, aggravated unlawful use of a weapon, and possession of MDMA (i.e., ecstasy), a controlled substance. Defendant had been pulled over for driving an SUV with (allegedly) tinted windows. At a suppression hearing, one of the officers testified that the interior of defendant's car smelled like burnt cannabis. The officers searched the car's interior and defendant's pockets; they found, in various locations, cannabis, ecstasy pills, and a handgun. Defendant denied that any such items were found in his possession.

But he moved to suppress them as the fruits of an illegal traffic stop, contending that the stop was not based on reasonable suspicion, because his SUV did not, as the officer claimed, have illegally tinted windows. The trial court ruled that defendant lacked "standing" to move to suppress the drugs or the gun, since he did not admit that any of this evidence was found in his possession. The trial court denied the motion on this basis alone, without determining whether defendant's car had illegally tinted windows, and so without deciding whether the traffic stop and ensuing searches were justified.

¶ 3 Defendant contends that the trial court erred in denying his motion to suppress. We agree that the trial court's "standing" ruling was error. We reverse the denial of defendant's motion to suppress and remand for the trial court to determine, in the first instance, whether the police officers had reasonable suspicion for the traffic stop.

¶ 4 Defendant testified at trial that his custodial statement—in which he had admitted, among other things, that he had drugs and a gun in his car—was false, and that he made the statement only because an officer threatened him. But the trial court barred defendant, on hearsay grounds, from telling the jury what the officer said that he construed as a threat. That ruling was also error, but we find that error harmless and thus not warranting a new trial. But if the proceedings on remand result in a new trial, and defendant chooses to testify, the trial court shall permit him to testify to the specifics of the officer's alleged threats.

¶ 5 I. BACKGROUND

¶ 6 A. Suppression Hearing

¶ 7 A few basic facts were undisputed at the suppression hearing. Defendant was pulled over by Lansing police officers Lazowski and Tatgenhorst on May 14, 2009. It was around 8:00 p.m., and starting to get dark. Defendant was driving his grey or silver 2005 GMC Envoy. Officer Lazowski approached the driver's side; Officer Tatgenhorst approached the passenger's side.

Defendant handed Officer Lazowski a valid driver's license and proof of insurance. Beyond that, defendant and Officer Lazowski, the only witnesses at the hearing, gave very different accounts of the traffic stop.

¶ 8 Defendant testified that Officer Lazowski took his license and insurance and walked back to the squad car. When he returned, he put a gun to defendant's head, yanked him out of his car, put him in the back of the squad car, and drove him to the station.

¶ 9 Defendant identified five photos of his car that he took sometime after he posted bail in November 2009. The car was parked in front of his aunt's house in Calumet City, which was visible in the photos. One of the photos showed the car's license plate (which matched the plate number recorded by the officers during the traffic stop). Defendant testified that the photos fairly and accurately depicted the way his car looked when he was stopped. Defendant bought the car used, and there was no tint on either of the front windows; the rear windows had a "factory tint" that came with the car. Defendant never purchased any aftermarket tint for any of the windows. He acknowledged, on cross-examination, that window tint can be removed.

¶ 10 After this—initial—testimony, the defense rested. The State moved for a directed finding, arguing that the defense did not identify "any evidence that needs to be suppressed in this case." Defense counsel argued that it was enough for the defense to move, generally, to suppress any evidence that was obtained as a result of the allegedly illegal traffic stop; it was not the defense's burden to provide a "laundry list" of that evidence. The trial court agreed that the defense needed to identify, with specificity, the evidence it sought to suppress. Over the State's objection, the court allowed the defense to reopen its case for this purpose.

¶ 11 Defendant was recalled to the stand. He denied that he had any cannabis, ecstasy, a gun, or ammunition in the car. He denied that he had smoked cannabis in the car earlier that day, that he told the officers during the stop that he had done so, or that the car smelled of burnt cannabis.

¶ 12 The State renewed its motion for a directed finding. Based on defendant's testimony, the State argued, he "ha[d] no standing" to move to suppress anything.

¶ 13 The trial court allowed the defense to call Officer Lazowski. He testified that he stopped defendant because the Envoy had dark tinted windows in the front, on both the driver's side and passenger's side. When he approached, "an odor of burnt cannabis" wafted from the car, but he did not see any "remnants" of burnt cannabis at first glance. He ordered defendant to get out, and the officers searched the interior. They found "a green leafy residue and stems" on the center console; a fully loaded Smith & Wesson handgun and a blunt in the rear pocket of the front passenger's seat; and a clear plastic bag with a green leafy substance and one purple tablet somewhere—it was not clear where—in the interior. Officer Lazowski also testified that a "search incident to arrest" was performed, but he did not give any further details of that search or say what, if anything, the officers found.

¶ 14 Defense counsel showed Officer Lazowski the photos defendant took of his car. Officer Lazowski testified that he could not tell whether the windows were in the same condition as they were at the time of the traffic stop because of the lighting conditions. It appeared to him that the front windows may have had (at most) a light tint, but it was not the same as the dark tint that was present at the time of the traffic stop—that tint was so dark, he said, that he could only see a shadow of Officer Tatgenhorst on the other side of the car when he looked through the front windows. In any event, Officer Lazowski testified (correctly, as defendant concedes in his reply brief) that in 2009, Illinois law did not permit any tint at all on the front windows. Lastly, he also claimed that he could not even tell if all of the photos depicted the same vehicle, since the license plate was only visible in one of them.

¶ 15 On redirect, defendant testified that he never had any tint removed from the windows of his car, and he reiterated that the car in the photos—all of the photos—was his. He also claimed that in one of the photos, his dog Princess can be seen sitting in the back seat.

¶ 16 The parties rested, and defense counsel argued that the traffic stop was illegal because the front windows of the car were not tinted. Thus, "anything that was found subsequent to the stop" should be excluded.

¶ 17 The State acknowledged that there was conflicting evidence as to whether the front windows were tinted. But either way, the State argued, defendant did not have "standing" to file a motion to suppress, because he did not "claim any possessory ownership of the items in the car" or admit that those items were found in his car in the first place. Defendant could not "have it both ways"—if he wanted any evidence suppressed, he had to admit that the evidence was his, or at least found in his possession.

¶ 18 The trial court ruled that defendant "ha[d] no standing" because he "denied that there was any evidence found in his car that he wanted to be suppressed." The trial court denied the motion on that basis alone.

¶ 19 B. Trial

¶ 20 Defendant's first trial ended in his acquittal on the charge of possession of a controlled substance with intent to deliver. But the jury was unable to reach a verdict on any other counts. At his retrial, the State proceeded on three remaining charges: armed violence; possession of a controlled substance (MDMA); and aggravated unlawful use of a weapon.

¶ 21 Officer Lazowski's trial testimony was consistent with his testimony at the suppression hearing. But he added that when he asked defendant to step out of the Envoy, he asked defendant if he had anything on him or in the vehicle. Defendant said he had some ecstasy and cannabis and a gun behind the passenger's seat. Lazowski also testified that he frisked defendant and

found three clear plastic bags in his coat pocket. Two of the bags contained 10 multi-colored pills each; the third bag had five.

¶ 22 Officer Tatgenhorst testified that he found suspect cannabis residue on the center console and a blunt, a loaded revolver, a tablet, and more suspect cannabis elsewhere in the interior of the car. He identified State's Exhibit 1 as the gun and six bullets that he found in the car. The gun was not submitted for fingerprinting, and no photographs of the gun were taken at the scene. He did take one photo—of the loose suspect cannabis on the console—but the hard drive on which it was stored had crashed sometime before trial, and he did not know if the photograph was saved. After that photograph was taken, defendant's car was towed from the scene. Officer Tatgenhorst testified that window tint can be removed by a layperson.

¶ 23 A few hours after defendant was arrested, Officer Lazowski interviewed him at the station. Officer Lazowski testified that defendant agreed to talk to him and to have his statement reduced to writing. Officer Lazowski wrote a summary of the statement, and defendant signed it. The statement, which was admitted into evidence and published to the jury, says that defendant had tinted windows; that he had smoked cannabis in his car before he was pulled over; and that he had ecstasy, cannabis, and a gun in the car.

¶ 24 Allan Greep, a forensic scientist with the Illinois State Police, tested the tablets recovered from defendant's car and found that they contained a total of 5.2 grams of MDMA. The green leafy substances recovered contained a total of 4.7 grams of cannabis.

¶ 25 Defendant's mother, Joyce Smith, testified that she paid to get defendant's car back from the towing company. She brought it to her house and parked it in the garage, where defendant normally kept it. The rear windows were tinted, but the front windows were not. There was no maintenance done to remove any tint from any of the windows.

¶ 26 Defendant's testimony about the traffic stop was consistent with his testimony from the suppression hearing. He reiterated that he did not have any drugs or weapons in the car, and that the photos of his car (which were published to the jury) accurately depicted the windows as they looked when he was stopped. No window tint was removed between the time of his arrest and the time he took the photos.

¶ 27 At the police station, defendant was handcuffed to a wall. After 90 minutes or so, Officer Lazowski took him to a back room, questioned him, and ultimately presented him with a written statement to sign. Defendant did not write the statement and did not agree with what it said. But he signed it because he was "pressured and threatened" to do so. Defense counsel asked him to explain why he felt threatened. The State objected that this testimony would be hearsay: Because it was offered "to show that the police said this to him," the State argued that it was offered "for the truth of the matter asserted." The trial court sustained the objection. Counsel later asked if defendant believed that anyone else was being threatened. He answered, "My mother," but the trial court sustained the State's objection that the question called for speculation.

¶ 28 The jury found defendant guilty of armed violence, possession of a controlled substance, and aggravated unlawful use of a weapon. The trial court merged the convictions and sentenced defendant to 15 years in prison for armed violence. This appeal followed.

¶ 29 II. ANALYSIS

¶ 30 A. Motion to Suppress

¶ 31 Defendant filed a motion to suppress, contending that he was stopped without reasonable suspicion; that the ensuing searches of his car and clothing were illegal; and that the fruits of the illegal stop should be suppressed. (According to defendant, those fruits include the ecstasy pills, the handgun, and his written statement. The officers also claimed to have found cannabis in the car, but defendant was not charged with possession of cannabis.) At the suppression hearing,

defendant testified that the drugs and gun allegedly found during the traffic stop were not his—that the officers planted them. Based on this testimony, the trial court ruled that defendant "ha[d] no standing" to contest the legality of the search, because he "denied that there was any evidence found in his car." The trial court denied defendant's motion on this basis alone, without resolving a key factual dispute about the basis for the stop (whether the police officers had a reasonable belief that defendant had tinted front windows in his car) and thus without deciding whether the officers had reasonable suspicion for the traffic stop.

¶ 32 Because the Fourth Amendment confers "personal rights" that may not be "vicariously asserted," there is always a threshold question "whether the proponent of a motion to suppress is entitled to contest the legality of a search and seizure." *Rakas v. Illinois*, 439 U.S. 128, 133-34, 140 (1978). But the trial court mischaracterized this threshold inquiry. In *Rakas*, the Supreme Court "dispens[ed] with the rubric of 'standing'" as the framework for this inquiry. *Id.* at 138-40; *Minnesota v. Carter*, 525 U.S. 83, 87 (1998) (*Rakas* "expressly rejected" fourth-amendment standing doctrine); *People v. Johnson*, 237 Ill. 2d 81, 89 (2010) (following *Rakas*, Illinois Supreme Court "no longer uses the rubric of 'standing' when analyzing fourth amendment claims"). Whether defendant had "standing" was the wrong question for the trial court to ask.

¶ 33 To invoke the Fourth Amendment's exclusionary rule, a defendant carries the burden of demonstrating (1) "that he or she personally has an expectation of privacy," either "*in the place searched* or the property seized," and (2) that society recognizes that expectation as "legitimate" or "reasonable." *People v. Rosenberg*, 213 Ill. 2d 69, 77 (2004) (emphasis added); *Johnson*, 237 Ill. 2d at 90; *Rakas*, 439 U.S. at 140. The factors we consider in determining whether a defendant has established a reasonable expectation of privacy in the place searched include: "(1) property ownership, (2) whether the defendant was legitimately present in the area searched, (3) the defendant's possessory interest in the area searched or the property seized, (4) prior use of the

area searched or property seized, (5) ability to control or exclude others' use of the property, and (6) a subjective expectation of privacy in the property." *Rosenberg*, 213 Ill. 2d at 78. This is a question of law we review *de novo*. *Id.* at 77.

¶ 34 Officer Lazowski testified at the suppression hearing that he and Officer Tatgenhorst searched the interior of defendant's car. Their search uncovered a handgun in the rear pocket of the front passenger's seat and one ecstasy pill somewhere—he did not say exactly where—in the interior. Officer Lazowski also testified at the hearing that a "search incident to arrest" was performed, but he did not say what, if anything, was recovered. Later, at trial, he testified that he "patted [defendant] down" and found three plastic bags in his coat pocket, containing a total of 25 ecstasy pills.

¶ 35 We begin with the interior of the car, where the gun and one of the pills were found. There is no dispute that defendant was the owner of the car. Ownership of the property searched is principal among the factors we consider in determining whether a defendant had a legitimate expectation of privacy. See *Rosenberg*, 213 Ill. 2d at 78. And while property ownership is not necessary, it is usually sufficient to create that expectation. *Rakas*, 439 U.S. at 143, n.12 ("one who owns *** property will in all likelihood have a legitimate expectation of privacy by virtue of [his or her] right to exclude" others from it").

¶ 36 The Fourth Amendment guarantees, at a minimum, that each person "has the right to be secure against unreasonable searches and seizures in *his own* *** effects." *Minnesota v. Carter*, 525 U.S. 83, 92 (1998) (Scalia, J., concurring) (emphases in original). "[A] vehicle is an 'effect' as that term is used in the Amendment." *United States v. Jones*, 565 U.S. 400, 404 (2012). The Fourth Amendment thus protects "a motorist's privacy interest in *his* vehicle." *Arizona v. Gant*, 556 U.S. 332, 345 (2009) (emphasis added). That privacy interest generally extends to the "car's interior as a whole." *New York v. Class*, 475 U.S. 106, 114-15 (1986); see *United States v. Stone*,

866 F.2d 359, 363 (10th Cir. 1989) ("People have a reasonable expectation of privacy in the interiors of their automobiles."); *People v. Taylor*, 245 Ill. App. 3d 602, 611 (1993) (passenger on long-distance road trip acquired legitimate expectation of privacy in car's interior).

¶ 37 There is nothing in the record that would distinguish this case from the well-settled general rule that the owner of a vehicle has a legitimate expectation of privacy in the interior of his or her vehicle. Nothing in the record indicates, for example, that defendant had loaned his car to someone else or that he shared the automobile with a number of other people. In fact, defendant specifically testified that nobody else drove his vehicle. Nor did the trial court make any findings that would permit a deviation from this general rule of fourth amendment jurisprudence. The trial court's ruling had nothing to do with the vehicle itself or defendant's relationship to it; the court simply reasoned that, because defendant denied that any drugs were found in the car, he could not simultaneously claim that the search that uncovered the drugs was unconstitutional.

¶ 38 Defendant testified that he owned the vehicle that was stopped, and that he had a valid driver's license, registration, and insurance on the vehicle. He was driving the vehicle on a local road. His possessory interest in the car is unquestioned, and he was operating it in the typical and ordinary way. If defendant does not have a legitimate expectation of privacy in the interior of the car in these circumstances, then it is hard to imagine how anyone ever would. Defendant can thus contest the legality of the officers' search of his car, and so move to suppress the gun and the ecstasy pill found during that search.

¶ 39 We next turn to defendant's person and clothing, as Officer Lazowski testified that another 25 ecstasy pills were found in defendant's coat pocket. For present purposes, we need not decide whether those pills were found during a search incident to arrest (as he implied at the suppression hearing) or during a pat-down (as he testified at trial). See *Minnesota v. Dickerson*,

508 U.S. 366, 375-78 (1993) (recovering object from suspect's clothing is a search, not a frisk, unless incriminating character of object is immediately evident from initial pat-down). Either way, defendant had a legitimate expectation of privacy in his own person and the clothing he was wearing. See, *e.g.*, *People v. Davis*, 187 Ill. App. 3d 265, 268 (1989) ("There can be no question here" that "defendant had a legitimate expectation of privacy in the clothing he wore on his body."). Thus, he can also challenge the pat-down or search, as the case may be, that yielded the 25 ecstasy pills.

¶ 40 The State's arguments on appeal all rest on two basic errors. First, the State's contention that defendant must show a possessory interest *in the ecstasy and the gun* is wrong as a matter of law. As we have explained, defendant can contest the legality of the searches that (allegedly) yielded these items if he had a legitimate expectation of privacy "in the place[s] searched." *Rosenberg*, 213 Ill. 2d at 77; *Johnson*, 237 Ill. 2d at 90. The State pays lip service to this settled principle of law in the boilerplate sections of its brief but then ignores it completely in its actual arguments. As a result, the State altogether dodges defendant's claim that he had a legitimate expectation of privacy in his clothing and the interior of his car. For the reasons we have given, he did have such an expectation.

¶ 41 Second, echoing the trial court's ruling, the State contends that defendant cannot contest the searches without *admitting* that he had the ecstasy pills and the gun that the officers claimed to find in his possession. We rejected this contention in *Davis*, 187 Ill. App. 3d 265. In that case, Davis moved to suppress the drugs that—according to an officer—were found in his shirt pocket during a search. *Id.* at 266. At his suppression hearing, however, Davis testified that he did not have any drugs on his person and thus "the police did not confiscate any drugs from him." *Id.* at 266-67. We rejected the State's argument that Davis could not challenge the search because he "denied ownership or possession of the contraband." *Id.* at 267. As we explained, that denial did

not mean that Davis "disclaimed his expectation of privacy in his person and in the clothing he wore on his body." *Id.* at 268.

¶ 42 Likewise, in *Gardner v. United States*, 680 F.3d 1006, 1007, 1010 (7th Cir. 2012), trial counsel refused to file a motion to suppress the gun allegedly found during a search of Gardner's person, because Gardner claimed that the police had planted the gun on him. Gardner's trial counsel believed that he "had to admit to actual possession of the gun to challenge its seizure." *Id.* at 1010. But that thinking was incorrect; Gardner could challenge the seizure of the gun because he had a privacy interest in his person, and the officer claimed to find the gun in his pocket. *Id.* at 1010-11. This clear "misapprehension of law" by trial counsel—the same mistake made by the trial court and the State in this case—rendered counsel's representation of Gardner ineffective. *Id.* at 1012.

¶ 43 The State argues that *Davis* and *Gardner* are distinguishable because, unlike defendant, Davis and Gardner admitted, if nothing else, that they were searched (see *Davis*, 187 Ill. App. 3d at 266; *Gardner*, 680 F.3d at 1008), whereas here, defendant did not testify to an actual search of his vehicle—he said he was taken away from the scene and later presented, at the police station, with the drugs and firearm—nor did he testify that his person and clothing were ever searched. That factual difference is immaterial. Cases like *Davis* and *Gardner* stand for the following principle: When a defendant moves to suppress evidence, he does not need to admit that the officer found that evidence as the officer claims. The defendant may argue that, *if the court believes the officer in this regard*, then the search and resulting seizure of evidence infringed on the defendant's protected privacy interest, and therefore required an adequate justification under the Fourth Amendment.

¶ 44 Like defendant, Davis and Gardner claimed that the police planted contraband on them. *Davis*, 187 Ill. App. 3d at 266; *Gardner*, 680 F.3d at 1008. But to press their Fourth Amendment

defenses, they had to show that the contraband at issue was discovered in areas in which they had legitimate expectations of privacy. The only way they could do that, given their denials of possession, was to base their defenses on the officers' testimony, rather than their own, about the searches and resulting seizures of evidence. See *Davis*, 187 Ill. App. 3d at 266; *Gardner*, 680 F.3d at 1007-08 (both detailing officers' testimony). Defendant did the same here; that is obviously why defense counsel called Officer Lazowski at the suppression hearing. Here, as in *Davis* and *Garner*, the court was being asked to consider the fourth-amendment question in light of the officers' testimony, despite the defense's contention that the police testimony was untrue.

¶ 45 At bottom, this analysis is nothing more than an application of the basic principle that a defendant is free to assert alternative or conflicting defenses. The State denied this principle in the trial court, arguing that defendant could not "have it both ways"—if he wanted evidence suppressed, he had to admit that it was found in his possession. But defendant *can* have it both ways. He has the right "to present as many defenses as he had or thought he had," even if some of those defenses "conflict[ed]" with each other or were "inconsistent with [his] own testimony." *People v. Everette*, 141 Ill. 2d 147, 155-56 (1990) (quoting *People v. Jersky*, 377 Ill. 261, 267 (1941)).

¶ 46 That is all defendant has done: He has argued that Officer Lazowski lied; but, alternatively, if the officer's testimony is to be believed, then defendant's privacy interests were invaded during the traffic stop, resulting in suppression of the evidence allegedly uncovered in the search. The State offers no good reason why defendant should not be permitted to argue in the alternative, and we find none.

¶ 47 It is true, as the State points out, that if a defendant admits to possessing contraband in his suppression-hearing testimony, that admission cannot be used at trial as substantive evidence of his guilt. *Simmons v. United States*, 390 U.S. 377, 394 (1968). Thus, says the State, a defendant

could admit to the possession of contraband at the suppression hearing while denying it at trial. There are many problems with this position. First, while an admission to possession at the suppression hearing cannot be used as substantive evidence against a defendant at trial, it *may* be used as impeachment if a defendant testifies at trial that the contraband was planted on him. *Rosenberg*, 213 Ill. 2d at 80-81; *Harris v. New York*, 401 U.S. 222, 225-26 (1971); *Gardner*, 680 F.3d at 1011. And second, if a defendant's sworn testimony is that police officers fabricated evidence and planted contraband on him, it would be perverse indeed to hold that he could only assert a fourth amendment violation by testifying to the *very opposite* at the suppression hearing.

¶ 48 Suppose, in a hypothetical case, that a defendant's testimony is true and the police really planted contraband on him. Would the law make him choose between (i) committing perjury and admitting to possession, just so he can raise a fourth amendment objection, or (ii) forfeiting his fourth amendment argument so that he can testify at trial that the evidence against him was planted? Of course not. As the court in *Gardner* wrote:

> "To avoid perjury and impeachment, the defendant's only alternative would be to forfeit a challenge to the search and rest his hopes on the jury's believing his testimony that the police planted [the evidence]. The law is not that harsh. A defendant with two legitimate defenses to a possession charge is not forced to pick just one—indeed, he is entitled to present inconsistent positions if he wishes." *Gardner*, 680 F.3d at 1011.

¶ 49 In sum, the law should not and does not place a defendant in the trick box of having to choose between asserting his fourth amendment rights and asserting a viable trial defense. There are compelling reasons to permit a defendant to assert a fourth-amendment defense *and* to maintain, at a suppression hearing, that the contraband he allegedly possessed was not found where, when, or how the officer(s) claimed. The trial court should have permitted defendant to

do just that, instead of ruling that this defense strategy deprived him of "standing." Denying the motion to suppress on that basis was error.

¶ 50 We turn now to the merits of defendant's motion. Defendant challenges the legality of the traffic stop. (He does not challenge the legality of the ensuing searches on any other grounds.) Traffic stops are subject to the Fourth Amendment's reasonableness requirement; they must be based on (at least) reasonable suspicion that the defendant has committed a traffic offense. *People v. Hackett*, 2012 IL 111781, ¶ 20. Officer Lazowski testified that he stopped defendant for only one reason: the front windows in his car were tinted. At the time, Illinois law did not permit any tint on the front driver's or passenger's side windows. 625 ILCS 5/12-503(a) (West 2009). If defendant's front windows were tinted, then Officer Lazowski had reasonable suspicion for the traffic stop, and there is no basis for suppressing any of the evidence that was garnered as a result of the stop. But defendant denied that his windows were tinted.

¶ 51 We do not know if defendant's front windows were tinted. Nor do we know if the trial court believed that they were, or if the officers had a reasonable belief they were tinted. The trial court denied defendant's motion without resolving this disputed question of fact, and thus without determining whether there was reasonable suspicion for the traffic stop. We find that the record as it stands does not permit us to definitively answer these questions in the first instance.

¶ 52 In the trial court, and again on appeal, defendant has relied on several photographs that he took of his car, sometime after he posted bond in November 2009, to show that there was no tint on the front windows. We do not find these photos definitive. As Officer Lazowski testified when viewing the photos, the lighting conditions make it difficult to tell for sure whether the front windows are truly untinted, or only slightly tinted—in the latter case, they still would have been illegal when he stopped defendant, since the statutory amendment permitting a slight tint

had not yet taken effect. See 625 ILCS 5/12-503(a-5)(4) (added by P.A. 96-1056, eff. July 14, 2010). So we are not able to resolve this question simply by viewing the photos.

¶ 53 The photos are also the subject of unresolved factual disputes. Defendant acknowledged that window tint can be removed, but he testified that he did not remove any, and that the photos truly and accurately depicted the condition of the front windows at the time of the stop. But Officer Lazowski testified that they did not—whether they showed windows with no tint or a slight tint, they did not accurately depict the dark tint he saw before stopping defendant. This is obviously a credibility contest between defendant and Officer Lazowski. The trial court did not make the necessary credibility assessments, and it should have the first opportunity to do so.

¶ 54 For these reasons, we reverse the denial of defendant's motion to suppress. We remand for the trial court to determine whether the traffic stop was supported by reasonable suspicion.

¶ 55 B. Defendant's Trial Testimony

¶ 56 We next consider an evidentiary hearsay ruling that defendant claims constituted reversible error. Despite our ruling above on the motion to suppress, it is appropriate to consider this trial issue as well. If the trial court ultimately concludes, on remand, that its original ruling on the motion to suppress stands, then it will reinstate the judgment on the jury's finding of guilt, and defendant would be forced to appeal this trial issue at *that* time—hardly a good use of judicial resources, considering the issue is fully briefed before us now. Conversely, if the trial court reaches a different conclusion on remand and suppresses the evidence, the court would have to order a new trial without the suppressed evidence (assuming the State chose to go forward with a retrial), and the disputed evidentiary issue will inevitably recur. See *People v. Janis*, 139 Ill. 2d 300, 321 (1990).

¶ 57 In a written statement that was admitted into evidence and published to the jury, defendant admitted that his car had tinted windows; that he had smoked cannabis before he was

pulled over; and that he had ecstasy pills, cannabis, and a gun in his car. Officer Lazowski testified that he wrote out a summary of defendant's statement, and defendant signed it. Defendant, the officer said, had agreed to talk to him at the station and to have his statement reduced to writing. Lazowski testified that he never threatened or pressured defendant to make or sign the statement.

¶ 58 Defendant, on the other hand, testified that Officer Lazowski presented him with a written statement; that defendant did not agree with what it said; and that he signed it only because the officer "pressured and threatened" him into doing so. Defense counsel asked him to explain why he felt threatened. The State objected that this question called for hearsay: Because defendant's testimony would be offered "to show that the police said this to him," the State argued that it would be offered "for the truth of the matter asserted." The trial court sustained this objection.

¶ 59 Defendant contends that his testimony would not have been hearsay. And by excluding it, the trial court prevented him from explaining to the jury why the circumstances of his confession rendered it unworthy of belief. The trial court's ruling, he claims, thus deprived him of a fair opportunity to present his defense.

¶ 60 " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ill. R. Evid. 801(c); see *People v. Caffey*, 205 Ill. 2d 52, 88 (2001). In most instances, we review evidentiary rulings for an abuse of discretion. *Id.* at 89. But whether a given statement is hearsay is a legal question if the determination does not involve fact-finding or weighing the credibility of witnesses. *People v. Kent*, 2017 IL App (2d) 140917, ¶ 132; *People v. Steele*, 2014 IL App (1st) 121452, ¶ 34; *People v. Aguilar*, 265 Ill. App. 3d 105, 109 (1994). In these circumstances, we review the trial court's ruling *de novo. Id.*

¶ 61 Defendant's testimony would not have been hearsay. Counsel asked defendant to tell the jury what Officer Lazowski allegedly said to him that made him feel threatened or pressured into signing the written statement. When an out-of-court statement is offered "to prove its effect on the listener's state of mind or to show why the listener acted as she did, it is not hearsay." *People v. Quick*, 236 Ill. App. 3d 446, 453 (1992); see also *In re Estate of Michalak*, 404 Ill. App. 3d 75, 94 (2010) ("Out-of-court statements offered for some independent purpose, rather than the truth of the matter asserted, are not hearsay."). Thus, evidence of a threat made to the defendant is not hearsay when it is offered to show "the reasonableness of [the defendant's] apprehension of danger" or to "provide a reason for [the defendant's] conduct." Michael H. Graham, Cleary & Graham's Handbook of Illinois Evidence (9th ed.), § 801.5, at 703. Here, defendant's testimony was offered for precisely these purposes—to show why he believed he was being threatened by Officer Lazowski, and so to explain why he signed a false confession.

¶ 62 In other words, defendant's testimony was not being offered to show the truth of anything that Officer Lazowski allegedly said to defendant. In fact, since we do not know *what* the officer allegedly said, we cannot conclude that he said anything that was true or false at all. As we noted recently in *People v. James*, 2015 IL App (1st) 143391, ¶¶ 117-18, 132, threats often take the form of non-declarative speech—utterances that do not assert anything, that make no claim about any matter of fact, that do not say anything that is either true or false. For example, if the officer said to defendant, "You better sign this statement," it would be nonsense to maintain that his words were being offered for the truth of the matter they asserted, for the obvious reason that they asserted nothing. (To be clear, we do not mean to imply that Officer Lazowski did threaten defendant in this, or any other, way.) What was relevant was simply the fact that the officer allegedly said the words at issue—whatever they were—and that defendant responded to them by signing an allegedly false confession. That is not hearsay.

¶ 63 The State's arguments to the contrary, both at trial and on appeal, all turn on an elementary error. The State says that defendant's testimony was inadmissible because it was offered to show the truth of what *defendant* asserted—that is, to show the truth of his testimony that he only signed the confession "because of the specific threats actually made by Officer Lazowski." But a statement is hearsay only if it is offered to show the truth of what *the declarant* asserted. The declarant was Officer Lazowski, not defendant.

¶ 64 Defendant was entitled to offer testimony to convince the jury that he signed a false confession because of threats allegedly made by the police. That testimony was not hearsay, for the reasons we have explained.

¶ 65 What's more, it was testimony about the circumstances in which defendant's confession was elicited, and which allegedly rendered the confession unworthy of the jury's belief. The United States Constitution affirmatively guarantees defendant's right to present that testimony. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986); *People v. Melock*, 149 Ill. 2d 423, 458 (1992); see U.S. Const. amends, VI, XIV. And Illinois has codified that federal constitutional right in the Code of Criminal Procedure. 725 ILCS 5/114-11(f) (West 2015) ("The circumstances surrounding the making of [a] confession may be submitted to the jury as bearing upon the credibility or the weight to be given to the confession.").

¶ 66 In *Crane*, 476 U.S. at 690, the Court held that, even if a confession is found to be voluntary and thus admissible (a threshold legal determination that is made by the trial judge), a defendant still has a constitutional right (under either the Due Process Clause or the Sixth Amendment) to present evidence to the jury that affects the confession's credibility or weight, or that challenges its reliability or truth. As the Court explained, evidence concerning "the manner in which a confession was secured" is often critical to the defendant's attempt to cast doubt upon its "credibility," minimize its "probative weight," or show that it was "insufficiently corroborated

or otherwise unworthy of belief." *Id.* at 689; see also *Melock*, 149 Ill. 2d at 458-59 (defendant's case "may stand or fall on his ability to persuade the jury that the manner in which the confession was obtained casts doubt on its credibility"). Indeed, if a defendant could not put this evidence before the jury, he would be "effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt?" *Crane*, 476 U.S. at 689.

¶ 67 The trial court erred in not permitting defendant to testify to Officer Lazowski's alleged threats. Defendant's testimony would have aided the jury in determining whether his confession, given the circumstances in which it was made, was worthy of belief. Because of the trial court's erroneous evidentiary ruling, defendant was left to baldly assert that his confession was induced by police threats, without being able to offer any testimony that would help the jury assess the credibility of his allegation. Defendant's right to present his defense, under *Crane*, permitted him to do more. The trial court denied him that right.

¶ 68 But a denial of this right, as defendant acknowledges, may be harmless error. *Crane*, 476 U.S. at 691; *People v. Jackson*, 303 Ill. App. 3d 583, 587 (1999). Because the issue was preserved, it is the State's burden to prove the error harmless beyond a reasonable doubt. *Jackson*, 303 Ill. App. 3d at 587; *Chapman v. California*, 386 U.S. 18, 24 (1967). An error is harmless if the jury would have reached the same verdict even without the error. *People v. Herron*, 215 Ill. 3d 167, 181-82 (2005).

¶ 69 We find the trial court's error harmless beyond a reasonable doubt. To begin, we note that defendant failed to make an offer of proof as to the content of the excluded testimony. Cf. *Crane*, 476 U.S. at 686 (defendant made offer of proof regarding excluded testimony). As a result, we do not know what defendant would have said on the stand about the officer's alleged threats, which makes it impossible for us to assess the impact of the purported testimony. We

acknowledge that the burden of persuasion lies with the State on this issue (see *Chapman*, 386 U.S. at 24), but the burden of making a record sufficient to permit meaningful review of a claim necessarily lies with defendant. And that, he has failed to do.

¶ 70 Second, unlike in *Crane*, defendant was not *completely* barred from presenting his theory of defense. See 476 U.S. at 686. The jury heard defendant's (admittedly unexplained) testimony that his confession was elicited by police threats, and defense counsel was permitted to cross-examine Officer Lazowski on this issue. This does not mean there was no error at all, as the State contends; but it does mitigate, to some extent, the prejudice that the error could have caused defendant. The jury did not have all the evidence that could have helped it assess the credibility of this defense, but it was not completely in the dark, either.

¶ 71 And even assuming that defendant's testimony would have convincingly showed why his confession should not be believed, we still would not find that the exclusion of this testimony alone warrants a new trial. In *Crane*, 476 U.S. at 685, the prosecution's case "rested almost entirely on [the defendant's] confession." Similarly, in *Melock*, 149 Ill. 2d at 430, "[e]vidence of defendant's guilt consisted largely of his confession." Not so here. Regardless of whether the jury believed defendant's confession, the ecstasy pills and handgun that he was convicted of possessing were also in evidence. And we do not see how anything defendant might have said about the circumstances of his confession would have convinced the jury to disregard *that* evidence. Thus, we cannot conclude that the outcome of the trial would have been any different had defendant been permitted to testify fully to the circumstances of his allegedly false confession.

¶ 72 In sum, we find that this error alone does not warrant a new trial. But it was an error. Thus, if the proceedings on remand result in a new trial, and if defendant chooses to testify at the

retrial, we instruct the trial court to permit him to testify to the specifics of the officer's alleged threats and to any other circumstances of his confession that may bear on its credibility.

¶ 73 III. CONCLUSION

¶ 74 For the reasons we have given above, we reverse the denial of defendant's motion to suppress. We remand for the trial court to determine whether the traffic stop was supported by reasonable suspicion. If the trial court finds that it was, the court may enter judgment based on the jury's finding of guilt. If the trial court finds that it was not, it shall suppress all evidence that it finds to have been acquired as a result of the illegal stop and conduct further proceedings as appropriate.

¶ 75 Reversed in part; remanded with instructions.