2019 IL App (1st) 170374-U

No. 1-17-0374

Order filed September 26, 2019

Fourth Division

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 16 CR 08608
	)	
ANDRE CUMMINGS,	)	Honorable
	)	James Karahalios,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice Gordon and Justice Reyes concurred in the judgment.

ORDER

¶ 1 *Held*: We vacate defendant's convictions and sentence and remand the cause for a new trial where the trial court erred in denying defendant's motion to suppress his statements to police because we find that defendant was arrested prior to making the statements.

¶ 2 Following a bench trial, defendant, Andre Cummings, was found guilty of residential burglary and theft, then sentenced to a term of 12 years' imprisonment. On appeal, defendant contends that the court erred in denying his motion to suppress his statements to police officers, that the evidence presented was insufficient to establish his guilt of the charged offenses beyond

a reasonable doubt, and that he was deprived a fair sentencing hearing. For the reasons that follow, we find that the court erred in denying defendant's motion to suppress and, accordingly, vacate defendant's convictions and sentence and remand the cause for further proceedings.

¶ 3 I. BACKGROUND

¶ 4 The record shows that Daniel Kallman (Daniel) owned a firearm that he kept at his family home occupied by his mother, Karen Kallman (Karen). Daniel purchased the firearm and placed it in the closet of his bedroom at the Kallman residence in October 2012. Neither Karen nor Daniel noticed the gun was missing until they were contacted by the Chicago Police Department in March 2016. Karen informed the detective assigned to the case that the only individuals who were unescorted through the house during that four-year period were the family's house cleaner and a Comcast technician. The detective subpoenaed Comcast and learned that defendant was the Comcast technician Karen identified. Defendant voluntarily went to the police station where he was interviewed by detectives for several hours and submitted to a polygraph examination. Eventually, defendant admitted to taking the firearm from the Kallmans' home, but told the detectives that it was stolen out of his vehicle a few months after he took it. The State charged defendant with residential burglary, possession of a stolen firearm, and theft.

¶ 5 A. Motion to Suppress

¶ 6 Before trial, defendant filed a motion to suppress contending that his inculpatory statement to the police officers should not be admitted because he was illegally detained prior to making the incriminating statement and that his admission was not voluntary. In his motion, defendant contended that he met with detectives at the Cook County Sheriff's department on May 11, 2016. In response to the detectives' questions, defendant denied any wrongdoing. At the detectives' request, defendant submitted to a polygraph test and continued denying any

wrongdoing. According to the detectives, at around 7 p.m., after defendant had been in the police station for nearly eight hours, defendant made an oral statement implicating himself in the theft of the firearm. Detectives asserted that defendant memorialized that statement in writing the following morning. Defendant contended that the alleged incriminating statements were made in a custodial situation, were involuntary, and that his detention was not supported by probable cause.

¶ 7 At the hearing on the motion to suppress, Cook County Sheriff's Police Department Detective Elliot Reyes testified that in March 2016, he was assigned to investigate a residential burglary that took place in Palatine, Illinois. Upon arriving at the assigned address, Detective Reyes spoke with the homeowner, Karen. Karen told Detective Reyes that her son, Daniel, owned a firearm that was stored at the residence. The Kallmans made a police report regarding the weapon because they discovered it was missing after they "were contacted by [the Chicago Police Department] in reference to a shooting." Karen told Detective Reyes that the only people who were in the home since October 2012 were their house cleaner and four Comcast technicians.

¶ 8 Based on that information, Detective Reyes subpoenaed Comcast to determine the identities of the technicians who Comcast sent to the Kallman residence. Detective Reyes discovered that only three of the technicians entered the Kallman's house and only one of them was unescorted while in the house. Detective Reyes learned that one of the Comcast technicians who had visited the Kallman's house was defendant. Detective Reyes contacted defendant and requested that he come to the police station to "speak with us involving a matter." Defendant agreed to meet with the officers and, after missing the initial appointment, came to the police station voluntarily.

¶ 9 Defendant arrived at the police station around 11 a.m., and Detective Reyes escorted defendant to an interview room. The interview room was about 10 by 12 feet and windowless. In the room, there was a bench and a shackle to which a suspect could be handcuffed. Detective Reyes did not handcuff defendant and did not read him the *Miranda* warnings. Detective Reyes questioned defendant for about 45 minutes about his background. Detective Reyes then asked defendant if he would submit to a polygraph examination. Defendant agreed to take the polygraph test. Detective Reyes testified defendant would have been free to leave the police station before the polygraph examination, but he never told defendant that he was free to leave and defendant never asked to leave.

¶ 10 Detective Reyes left defendant in the interview room for about an hour because the detective who was assigned to conduct his polygraph test, Detective Devlin Gray, was not available. Detective Reyes offered defendant water during this hour, but he could not recall if defendant accepted the water. Detective Reyes testified that each time he left defendant in the room, he manually locked the door to the interview room because it was protocol. Detective Reyes testified that defendant could knock on the door to get the attention of an officer stationed outside the door if he needed anything, but Detective Reyes did not tell defendant he could do so. Detective Reyes testified that if defendant had knocked on the door and asked to leave the police station, he would have been free to go.

¶ 11 Detective Gray testified that before he administered the polygraph examination, he read defendant his *Miranda* rights and defendant voluntarily agreed to submit to the polygraph test. After the polygraph examination was completed, Detective Reyes spoke with Detective Gray who informed Detective Reyes that he was getting "deceptive readings" from defendant. Detective Reyes testified that defendant was still free to leave the police station after the

polygraph examination. Detective Reyes and Detective Gray then spoke with defendant again around 3 p.m., and defendant was read his *Miranda* rights. Defendant acknowledged that he understood his rights and agreed to continue speaking to the detectives. This second interview lasted about 15 to 20 minutes. During the interview, defendant told the detectives that he recognized the Kallman home in a photograph and recalled doing work there for Comcast, but did not make any admissions regarding committing a residential burglary at the home.

¶ 12 Defendant was then left in the interview room for several hours. Detective Reyes testified that defendant was free to leave from the locked interview room at that point, and that, during the three-hour period, defendant was offered food and drink and opportunities to use the restroom. Detective Sergeant Sajid Haidari testified that he first interviewed defendant around 4:30 p.m. Before interviewing defendant, Sergeant Haidari had spoken to Detective Gray about the results of defendant's polygraph examination and testified that "[a]t the point after the polygraph when he had made some deceptive statements to the detectives, we were going to continue that interview, so he was not free to leave." In response to defense counsel question that defendant was not free to leave, Sergeant Haidari testified "That's correct. He had been Mirandized already." During the interview with Sergeant Haidari, defendant denied any wrongdoing.

¶ 13 Sergeant Haidari left the interview room and then spoke with defendant again. During that interview, defendant made an admission regarding taking the firearm from the Kallman residence. Sergeant Haidari and Detective Reyes spoke to defendant again around 6 p.m. that evening and defendant again made an admission regarding taking the firearm from the Kallman residence. After defendant made the inculpatory statement, the detectives placed him in the lockup. Detective Reyes spoke to defendant again the next morning and defendant gave "further" admissions about the residential burglary. Detective Reyes attempted to obtain a written

statement from defendant later that day, but defendant requested an attorney, and Detective Reyes did not have any further conversations with defendant.

¶ 14 Following argument, the trial court found that defendant's statement was voluntary and that the officers had probable cause for the arrest. In finding that the officers had probable cause for the arrest, the court relied on *People v. Buschauer*, 2016 IL App (1st) 142766.[1] The trial court found that based on this court's ruling in *Buschauer*, the length of time defendant was at the police station was not coercive and that it was significant that defendant came to the police station voluntarily. The court also found that it was not coercive that defendant was placed in an interview room. The court also did not find that it was significant that the doors were locked because defendant could have knocked on the door and been allowed to leave. The court further found that it did not matter "what's in the mind of a police officer as far as whether or not someone is under arrest" because the standard is whether a reasonable person would believe that they are under arrest. The court determined that it therefore was irrelevant that Sergeant Haidari testified that defendant was not free to leave, but Detective Reyes testified that defendant could have left the police station if he had asked.

¶ 15 The court also noted that defendant was cooperative, consented to the polygraph test, and "repeatedly" waived his *Miranda* rights. The court observed that based on the information from the Kallmans, the police had two suspects for who could have taken the gun: defendant and the house cleaner. The court noted that although the results of the polygraph were not admissible, the officers could use it as an investigatory tool to focus their investigation. The court observed that defendant consented to further questioning after the polygraph exam. The court concluded that

[1] The record shows that the court stated the defendant's name in *Buschauer* was "Horshell," however, it is clear from the court's recitation of the facts that it was relying on this court's decision in *Buschauer*.

up until defendant made the admission to the detectives that he took the gun, defendant was not in custody, and once defendant made the admission, the officers had probable cause to make the arrest. Accordingly, the court denied defendant's motion to suppress.

¶ 16 B. Trial

¶ 17 At trial, Karen testified that on October 9, 2015, Comcast sent a technician to her home to update her cable boxes. The cable boxes were located in the family room, the living room, and the three bedrooms. Karen testified that one of the cables boxes was in her son Daniel's room. Daniel no longer lived at the house, but he kept some of his belongings in the room. She testified that there would be no reason for the technician to enter the closet in Daniel's bedroom to work on the cable box. Karen testified that the technician was in her home for three or four hours and she did not escort him around the house. The technician updated three of the five cable boxes and another technician had to come out to update the remaining boxes, one of which was in Daniel's bedroom. Karen testified that she was not aware of any firearms Daniel kept in the room, but knew he had a firearm safe under the desk.

¶ 18 Daniel testified that in March 2016, he received a phone call from the Chicago Police asking him if he owned a firearm with a specific serial number. Daniel testified that he purchased the firearm in 2012 and kept it in his closet in his bedroom in the Kallman residence. The firearm was autographed by an actor. After being contacted by the Chicago police, Daniel attempted to locate the firearm in his closet, but could not find it.

¶ 19 Detective Reyes testified consistently with his testimony at the suppression hearing regarding his course of investigation and his interactions with defendant. Detective Reyes testified that defendant told him that while he was installing the Comcast boxes in the Kallman residence, he observed a black handgun on a "dresser/table" in one of the bedrooms. Defendant

put the handgun in his bag, left the residence, and placed the handgun in his vehicle. Defendant indicated that he wanted to use the handgun in a music video. A few months later, someone broke into defendant's vehicle and stole the gun.

¶ 20 Following closing argument, the court found that the State had failed to prove defendant guilty of possession of a stolen firearm beyond a reasonable doubt. With regard to the residential burglary count, the court acknowledged that several people were in and out of the Kallman residence after defendant was there on October 9, 2015. The court found, however, that once defendant made an admission that he took the gun, it did not matter how many other people had been to the house. The court found that defendant's statement was the only evidence presented regarding the identity of the perpetrator. With regard to defendant's authority to remain in the house, the court found that the intent to steal can be formed in an instant. The court determined that "the minute that that [*sic*] intent is formed and you're still there, you're there without authority." The court found that as soon as defendant formed the intent to steal the handgun, he exceeded his authority as a business invitee. The court therefore found that the State had proved the elements of residential burglary beyond a reasonable doubt. The court also found that defendant had been proved guilty of theft beyond a reasonable doubt.

¶ 21 At defendant's sentencing hearing, in aggravation, the State published victim impact statements from Daniel and Karen. In mitigation, defense counsel noted that defendant had no criminal background, was a high school graduate, and the offense was not premeditated. In sentencing defendant, the court found that the "gravity of Defendant's actions are monumental." The court noted that although defendant intended to use the gun in a music video, the gun was stolen from his vehicle and used by a "person who tried to murder three police officers." The

court observed that it was defendant who "placed that gun into the stream of illegal weapons that have flooded Chicago." The court continued:

> "One only needs to look at today's news to see that October was the second bloodiest month in Chicago, that to date I think that the violent crimes of guns have escalated more than 25 percent of last year. This past weekend alone, there were almost 60 people shot, 17 died and 42 survived. Chicago's number of shooting victims thus far this year are over 3,600. The gun violence in Chicago is a national disgrace. The news today said that the superintendant proclaimed that over 7,000 illegal guns have been recovered so far this year and that that's one an hour. Think of it. One illegal gun every hour recovered in the City of Chicago."

The court found that defendant was responsible for bringing this gun into Chicago that was used to try to "murder three police officers." The court found that the magnitude of defendant's crime "far overshadow[ed]" the factors in mitigation. The court therefore sentenced defendant to a term of 12 years' imprisonment with two years of mandatory supervised release. This appeal follows.

¶ 22 II. ANALYSIS

¶ 23 On appeal, defendant contends that the court erred in denying his motion to suppress where he was illegally detained prior to making the incriminating statement. Defendant also contends that the State failed to prove him guilty beyond a reasonable doubt and that he was deprived of a fair sentencing hearing. Because we find that the court erred in denying defendant's motion to suppress, we need not reach defendant's other contentions.

¶ 24 A. Motion to Suppress

¶ 25 Defendant argues that the trial court erred in denying his motion to suppress because the evidence presented showed that he was under arrest without probable cause prior to making the

inculpatory statement to the detectives that he stole the firearm. Defendant points out that he was locked in an interview room for several hours, was read his *Miranda* rights twice, was subjected to a polygraph examination, and Sergeant Haidari testified that defendant was not free to leave the police station. Defendant asserts that although he voluntarily went to the police station, the detectives' actions after he arrived resulted in an unconstitutional arrest. In his motion, defendant contended that his admission should be suppressed both because it was involuntary and because he was unconstitutionally arrested prior to the admission. On appeal, however, defendant solely contends that the court erred in denying his motion to suppress because he was arrested without probable cause prior to making the admission.

¶ 26 1. *Arrest*

¶ 27 The fourth amendment to the United States Constitution guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const., amend. IV. "Statements given during a period of illegal detention are inadmissible even though voluntarily given if they are the product of the illegal detention and not the result of an independent act of free will." *People v. Wead*, 363 Ill. App. 3d 121, 138 (2005) (citing *People v. Reynolds*, 257 Ill. App. 3d 792, 805 (1994)). In reviewing a trial court's ruling on a motion to suppress evidence, we apply a two-part standard of review. *People v. Pitman*, 211 Ill. 2d 502, 512 (2004). We will reverse the trial court's factual findings only if they are against the manifest weight of the evidence, but we review *de novo* the trial court's ultimate ruling as to whether suppression is warranted. *People v. Williams*, 2016 IL App (1st) 132615, ¶ 32. The defendant, not the State, bears the burden of proof on a motion to suppress. See, *e.g.*, *People v. Cregan*, 2014 IL 113600, ¶ 23. At a hearing on a motion to suppress evidence, the trial court is responsible for determining the credibility of the witnesses, weighing the evidence, and drawing

reasonable inferences therefrom. *Williams*, 2016 IL App (1st) 132615, ¶ 32 (citing *People v. Ballard*, 206 Ill. 2d 151, 162 (2002)).

¶ 28 Here, there is no disagreement regarding the facts presented at the suppression hearing. The court heard the testimony of Detective Reyes, Detective Gray, and Sergeant Haidari. Defendant voluntarily came to the police station at Detective Reyes' request and was interviewed for several hours by both Detective Reyes and Sergeant Haidari. Defendant also submitted to a polygraph examination conducted by Detective Gray. The officers read defendant his *Miranda* rights twice, once before the polygraph test and once after. While he was not being questioned by the police officers, defendant was kept in a locked interview room. Detective Reyes testified that defendant was offered water and could knock on the locked interview room door if he needed to use the restroom or needed food or water. After Detective Gray noted that defendant had provided deceptive answers on the polygraph examination, Sergeant Haidari testified that defendant was no longer free to leave the police station. Detective Reyes testified, however, that, at that point, defendant still would have been free to leave the police station if he had asked to do so. After several hours at the police station, defendant admitted to the detectives that he took the gun from the house.

¶ 29 Our supreme court has identified three types of police-citizen encounters: "(1) consensual encounters, which involve no coercion or detention and thus do not implicate fourth amendment interests; (2) brief investigative detentions (commonly referred to as *Terry* stops), which must be supported by a reasonable, articulable suspicion of criminal activity; and (3) arrests, which must be supported by probable cause." *People v. Vasquez*, 388 Ill. App. 3d 532, 546-47 (2009) (citing *People v. Luedemann*, 222 Ill. 2d 530, 544 (2006)). Here, the State contends that until defendant made the inculpatory statement to the detectives implicating himself in the theft of the gun, the

encounter was consensual and did not implicate fourth amendment interests. Defendant contends, however, that after he arrived at the police station, but before he made the inculpatory statement, the consensual encounter converted into an arrest not supported by probable cause.

¶ 30 A person is arrested when his freedom of movement is restrained by physical force or a show of authority. *People v. Washington*, 363 Ill. App. 3d 13, 23 (2006). "In determining whether an arrest has occurred, this court must determine whether, in light of the surrounding circumstances, a reasonable innocent person would have considered himself free to leave." *Vasquez*, 388 Ill. App. 3d at 549 (citing *Washington*, 363 Ill. App. 3d at 23-24). This court has identified 10 factors to consider in determining whether an arrest has occurred: "(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 the 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." *Vasquez*, 388 Ill. App. 3d at 549. In analyzing these factors, "[c]ourts must examine the totality of circumstances to determine whether an arrest has been made." *People v. Prince*, 288 Ill. App. 3d 265, 273 (1997).

¶ 31 Here, the totality of the circumstances indicates that defendant was improperly under arrest without probable cause prior to making the inculpatory statement to the police officers. Considering the factors outlined above, defendant was locked in a windowless interrogation room for several hours and questioned by three different police officers. Although Detective Reyes testified that it was protocol to lock the door to the interview room and that defendant

could have left the police station if asked to do so, defendant was never given that information. In addition, both Detective Gray and Detective Reyes read defendant his *Miranda* rights prior to defendant's admission. An officer reading a person his *Miranda* rights "could indicate to a reasonable person that he was in custody on suspicion of criminal activity." *People v. Townes*, 91 Ill. 2d 32, 37 (1982).

¶ 32 The State points out that defendant voluntarily came to the police station. This court has found, however, that a defendant who voluntarily goes to the police station for questioning does not implicitly consent to remain there while the police investigate in search of probable cause for an arrest. *People v. Barlow*, 273 Ill. App. 3d 943, 950 (1995). Although the fact that defendant spent a long time in the interview room is not determinative in establishing whether defendant was seized (*Prince*, 288 Ill. App. 3d at 273), as the length of person's presence at the police station grows, the voluntariness with which the person first arrived may diminish (see *People v. Young*, 206 Ill. App. 3d 789, 801 (1990) ("the fact that a defendant initially accedes to a police request to accompany them to the police station does not legitimize the treatment of defendant after he arrived at the station")). Furthermore, defendant had to wait in the interview room for nearly an hour before the polygraph test commenced, after already being at the police station for more than an hour, and waited in the interview room for several hours after the polygraph test. Detective Reyes testified that Detective Gray was not available initially to administer the polygraph examination, but there was no testimony as to why defendant was left in the interview room alone for several hours after the polygraph examination. We observe that defendant was not given the option of leaving the station and returning at a later time. See *Young*, 206 Ill. App. 3d at 801-02 (finding that State failed to provide adequate explanation of why defendant was not

given option of going home and returning at later time when officer would be available to interview him).

¶ 33 Although the detectives in this case did not employ any formal indicia of restraint, such as handcuffs or drawn guns, this court has recognized that a determination of whether a reasonable person would consider himself under arrest depends on the circumstances of each case. *See Reynolds*, 257 Ill. App. 3d at 800 ("Even 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" (emphasis added)). Here, we find it significant that, after interviewing defendant, and subjecting him to the polygraph examination, the detectives did not tell the defendant that he was free to go even though, having questioned the defendant and hearing defendant's denial of any wrongdoing, "the police had ostensibly accomplished their articulated purpose for bringing defendant to the police station." *Young*, 206 Ill. App. 3d at 800. Instead, the detectives returned defendant to the interview room. Indeed, Sergeant Haidari testified that, at that point, defendant was not free to leave the police station, despite Detective Reyes' contrary testimony that he was. Although both the State and the trial court downplayed this testimony, we observe that the intention of the officers is one of the factors this court has identified in determining whether an arrest has occurred. We find that, after defendant had been returned to the interview room following the polygraph test, a reasonable innocent person, having been advised of his *Miranda* rights, having denied any wrongdoing, and having been returned to the interview room rather than released, would not have believed that he was free to leave. *People v. Ollie*, 333 Ill. App. 3d 971, 984 (2002) (citing *People v. Centeno*, 333 Ill. App. 3d 604, 617-618 (2002) and *Young*, 206 Ill. App. 3d at 800-01). Accordingly, we conclude that

defendant was under arrest no later than the time at which he was placed back into the interview room following the polygraph examination.

¶ 34 We further find the trial court's reliance on *Buschauer*, 2016 IL App (1st) 142766 misplaced. In *Buschauer*, Frank Buschauer's wife died at their home in the master bathroom. *Id.* ¶ 1. Buschauer called police after finding his wife unresponsive having drowned in the bathtub. *Id.* Detectives interviewed the wife's friends and learned that Buschauer and his wife had marital difficulties and that Buschauer had threatened her with physical violence. *Id.* ¶ 7. A doctor who reviewed the wife's autopsy opined that the wife's injuries were inconsistent with an accidental drowning. *Id.* ¶ 8. In March 2000, about a week after the incident, at the police officers' request, Buschauer voluntarily drove to the South Barrington police station, left his vehicle, and then rode with detectives to the Hoffman Estates police station for an interview. *Id.* ¶ 10. Two detectives interviewed Buschauer in an unlocked interview room for more than 13 hours. *Id.* ¶ 11. Buschauer denied any involvement in his wife's death, but his responses to the detectives' questions were inconsistent. *Id.* ¶¶ 11-13. The detectives read Buschauer his *Miranda* rights, Buschauer waived the rights, agreed to continue speaking to the detectives, and offered to take a polygraph test. *Id.* ¶ 13. Later that night, Buschauer signed a voluntary consent form to search his home. *Id.* ¶ 14. Buschauer was allowed to leave the police station and agreed to return the next morning. *Id.* Buschauer returned the next morning, but told the detectives that he did not want to speak to them without an attorney present. *Id.* ¶ 15. The death investigation was concluded, but then reopened nearly a decade later. *Id.* ¶ 17. In April 2013, 13 years after the incident, Buschauer was arrested in Wisconsin where he gave a statement to the sheriff's office and was formally arrested and charged with murder. *Id.* ¶ 18.

¶ 35 At his trial, Buschauer filed a motion to suppress his statements to the detectives in March 2000 and the statements he made after his arrest in Wisconsin in April 2013. *Id.* ¶ 20. Buschauer further sought to suppress evidence seized in the search of his home in March 2000. *Id.* The trial court granted the motion to suppress the March 2000 statements finding that Buschauer was under arrest and subjected to custodial interrogation when he accompanied detectives in the police vehicle from the South Barrington police station to the Hoffman Estates station. *Id.* ¶¶ 20-21.

¶ 36 On appeal, this court identified six factors in assessing the circumstances of the interrogation which were substantially similar to the 10 factors identified by the court in *Vasquez*. *Id.* ¶ 26; see *Vasquez*, 388 Ill. App. 3d at 549. In reversing the trial court's ruling, this court found that the factors weighed in favor of finding that Buschauer was not formally arrested during the March 2000 interrogation. *Buschauer*, 2016 IL App (1st) 142766, ¶ 36. The court found that the detectives read Buschauer his *Miranda* warnings as a "precautionary measure," which did not "transform an investigative interrogation into a custodial interrogation." *Id.* The court determined that although Buschauer was interviewed for an extended period of time, there were "multiple breaks including for lunch and dinner" and no "extended uninterrupted periods of time occurred." *Id.* ¶ 29. The court also found that the record showed the "tone" of the interviews was " 'conversational' " and there was no indication in the record regarding the size of the interview room or whether it had windows or whether the door to the room was opened or closed. *Id.* ¶ 30. The court observed that the detectives testified that Buschauer was free to leave and would not have been prevented from doing so. *Id.* ¶ 36. The court concluded that:

> "Examining the factors of the intent of the officers; the understanding of the defendant; whether the defendant was told he was free to leave or that he was under

> arrest; whether the defendant would have been restrained if he had attempted to leave; the length of the interrogation; and whether *Miranda* warnings were given, we find that a reasonable individual, innocent of wrongdoing, would have felt free to leave." *Id.* ¶ 36.

¶ 37 We find the circumstances present in this case readily distinguishable from those considered by the court in *Buschauer*. Crucially, in this case, Sergeant Haidari testified that after the polygraph examination, defendant was not free to leave unlike the detectives in *Buschauer* who testified that Buschauer was free to leave. This suggests that defendant would have been restrained if he had attempted to leave. The court in *Buschauer* also noted that there was little evidence in the record concerning the interview room where Buschauer was questioned by the detectives and "[n]othing in the record indicates the positions of the investigators in the interview room, the room's size, whether the room had windows, or whether the door was always open or closed." *Id.* ¶ 30. In contrast, here, the record shows that defendant was questioned in a windowless, 10 by 12 room with a bench and a shackle in it. The record also shows that not only was the door closed while defendant was in the interview room, but the door was manually locked by the detectives. Perhaps most importantly, Buschauer was actually permitted to leave the police station and return the next day. This is undeniable evidence that Buschauer was free to leave at any point during the questioning. Defendant, on the other hand, waited in the interview room for an hour after agreeing to take the polygraph test because Detective Gray was not available and waited several hours after taking the polygraph test to speak with the detectives again rather than being allowed to leave the police station like Buschauer. Accordingly, we find the court's reasoning in *Buschauer* is not applicable to the circumstances before us and the circuit court erred in relying on that case in denying defendant's motion.

¶ 38 We also find the circumstances present here distinguishable from *People v. Anderson*, 395 Ill. App. 3d 241 (2009), which the State relies on in contending that we should affirm the trial court's ruling. In *Anderson*, detectives interviewed defendant on the porch of his home after learning that defendant might have information regarding a shooting death. *Id.* at 243-44. After the interview, defendant agreed to accompany the detectives in their police vehicle to the police station. *Id.* at 244. Defendant was placed in a windowless interview room, but the door was not locked. *Id.* The officers read defendant his *Miranda* rights and defendant agreed to speak with the officers. *Id.* Later that night, defendant agreed to take a polygraph examination, but the examination did not take place until the following morning. *Id.* at 245. After the polygraph examination, defendant made inculpatory statements to the detectives and defendant was placed under arrest. *Id.* The trial court denied defendant's motion to quash the arrest finding that the police were involved in a legitimate investigation while interrogating defendant at the police station. *Id.* at 246.

¶ 39 In affirming the trial court's ruling, this court acknowledged that "[c]ases assessing whether an initial voluntary presence at the police station for an interview transforms into an illegal seizure list a variety of factors to be considered under the totality-of-the-circumstances standard." *Id.* at 251. The court noted that during his interviews with the detectives, defendant identified people who could corroborate his noninvolvement in the shooting and "remained at the police station to allow corroboration of his version of events." *Id.* at 254. The court observed that defendant identified several individuals who would corroborate his story and that his "aim" was to end his involvement in the investigation. *Id.* at 252. The court concluded that, under the totality of the circumstances, defendant was not seized prior to his formal arrest. *Id.* at 255.

¶ 40 As the court correctly observed in *Anderson*, courts must examine the totality of the circumstances in determining whether an arrest has been made. *Id.* at 248 (citing *Prince*, 288 Ill. App. 3d at 273). As noted, there are circumstances present in this case that were not present in *Anderson* that would lead a reasonable person to believe that they were not free to leave. Crucially, the detective who testified at Anderson's suppression hearing did not testify that Anderson was not free to leave before making the inculpatory statement as Sergeant Haidari did here. Furthermore, the record shows that defendant was not identifying individuals who could corroborate his version of the events and then choosing to remain at the police station while those individuals were interviewed, but was rather categorically denying his involvement in the theft of the gun. Accordingly, we find the circumstances present in this case distinguishable from those present in *Anderson* and find that the totality of the circumstances here would lead a reasonable person to believe that he was under arrest prior to defendant's inculpatory statement.

¶ 41 2. *Probable Cause*

¶ 42 Having found that defendant was arrested prior to his inculpatory statement, we now must determine whether the officers had probable cause to do so. "Probable cause to arrest exists when the facts known to the officer at the time of the arrest are sufficient to lead a reasonably cautious person to believe that the arrestee has committed a crime." *People v. Grant*, 2013 IL 112734, ¶ 11 (citing *People v. Wear*, 229 Ill. 2d 545, 563 (2008)); see also *In re Edgar C.*, 2014 IL App (1st) 141703, ¶ 110 (there is probable cause "where the facts and circumstances known to the arresting officer at the time of the arrest would lead a reasonable person to believe that a crime had occurred and the suspect had committed it"). The existence of probable cause is an objective determination that must be made on a case-by-case basis and depends upon the totality of the circumstances at the time of the arrest. *Grant*, 2013 IL 112734, ¶ 11 (citing *Wear*, 229 Ill.

2d at 564). "Whether probable cause exists is governed by commonsense considerations, and the calculation concerns the probability of criminal activity, rather than proof beyond a reasonable doubt." *People v. Hopkins*, 235 Ill. 2d 453, 472 (2009).

¶ 43 Here, defendant contends that the detectives did not have probable cause to arrest him prior to his inculpatory statement because the circumstances known to the officers at the time would not lead a reasonably cautious person to believe that defendant had committed a crime. The record shows that prior to his inculpatory statement, the facts known the officers were that: (1) a firearm that had been used in an unrelated incident was missing from the Kallman's home; (2) the firearm went missing sometime between October 2012 and March 2016; (3) defendant was one of only a few people who had unescorted access to the room where the gun was kept during that period; and (4) defendant denied taking the gun. The State argues that these circumstances, taken together with the fact that defendant provided deceptive answers to a polygraph examination, were sufficient to establish probable cause. It is well-settled, however, that "a probable cause determination may not be based upon the results of a polygraph examination." *People v. Booker*, 209 Ill. App. 3d 384, 394 (1991) (citing *People v. Jones*, 157 Ill. App. 3d 1006 (1987)); see also, *People v. Baynes*, 88 Ill. 2d 225 (1981).

¶ 44 Notably, the officers in this case did not read defendant his *Miranda* rights until before his polygraph examination, suggesting that they did not believe they had probable cause to arrest defendant at the time he arrived at the police station. After the polygraph examination, the detectives read defendant his *Miranda* rights again and Sergeant Haidari testified that defendant was not free to leave the police station and was thus under arrest as discussed above. The officers had no more information regarding defendant's involvement in the theft of the gun at that point than they did when defendant arrived at the station aside from the results of defendant's

polygraph examination, which, as noted, cannot be used to establish probable cause. At the time, the officers had little more than suspicions that defendant was responsible for the theft of the firearm. "Suspicions, no matter how reasonable, do not add up to probable cause to arrest." *People v. Bunch*, 327 Ill. App. 3d 979, 983-84 (2002) (citing *Alabama v. White*, 496 U.S. 325, 330 (1990)). As the trial court noted in finding defendant guilty of the charged offense, the only evidence presented regarding the identity of the person who stole the gun was defendant's statement. Accordingly, we find that the officers lacked probable cause to arrest defendant prior to his inculpatory statement.

¶ 45 3. *Admissibility of D's Statement*

¶ 46 Our conclusion that defendant was subject to an illegal arrest does not prevent the legal admission of his confession. *People v. Hopkins*, 363 Ill. App. 3d 971, 983 (2005) " 'Evidence collected following an illegal arrest may be admissible if it is sufficiently attenuated from any illegality.' " *Id.* (quoting *People v. Klimawicze*, 352 Ill. App. 3d 13, 19 (2004)). To determine whether the confession was sufficiently attenuated from the illegal arrest, we consider: "(1) the temporal proximity between the arrest and the confession; (2) the existence of intervening circumstances; (3) the purpose and flagrancy of the police misconduct; and (4) whether the defendant received *Miranda* warnings." *Barlow*, 273 Ill. App. 3d at 953. The presence or absence of intervening circumstances and the flagrancy of the police misconduct are the most relevant factors in assessing the admissibility of a statement obtained subsequent to an illegal arrest. *People v. Simmons*, 372 Ill. App. 3d 735, 742 (2007). The State bears the burden of demonstrating sufficient attenuation between the illegal arrest and the confession so that the confession can be rendered admissible. *Barlow*, 273 Ill. App. 3d at 953.

¶ 47 Here, although the court did not hold an attenuation hearing, we can address the factors based on the evidence presented at defendant's suppression hearing. See *Hopkins*, 363 Ill. App. 3d at 983. The record shows that defendant was read his *Miranda* warnings twice, which weighs in favor of attenuation. *Simmons*, 372 Ill. App. 3d at 743. We note, however, that the repeated *Miranda* warnings did not serve to legitimize the otherwise unlawful arrest. The record also shows that about three or four hours elapsed between defendant's illegal arrest and the confession. A lapse of time " 'may serve to amplify the coercion latent in the custodial setting' or 'may help to purge the taint of a prior illegality by allowing the accused to reflect on his situation, particularly when attended by other factors ameliorating coercion, such as *Miranda* warnings.' " *Simmons*, 372 Ill. App. 3d at 743 (quoting *People v. Lekas*, 155 Ill. App. 3d 391, 414 (1987)). Here, we find that this factor both weighs in favor of and against attenuation. *Simmons*, 372 Ill. App. 3d at 743. The record also reflects no intervening circumstances. "Intervening circumstances are those that break the causal connection between the taint of unconstitutional police conduct and the defendant's confession," such as new information that is untainted by the illegal arrest. *Hopkins*, 363 Ill. App. 3d at 983. Here, the officers did not present defendant with any new information and there were no other circumstances to break the causal connections. Thus, this factor weighs against attenuation. Finally, we consider the purpose and flagrancy of the police misconduct. "Police action is flagrant where the investigation [was] carried out in such a manner to cause surprise, fear, and confusion, or where it otherwise has a quality of purposefulness, *i.e.*, where the police embark upon a course of illegal conduct in the hope that some incriminating evidence *** might be found." (Internal quotation marks omitted.) *In re K.M.*, 2019 IL App (1st) 172322, ¶ 45 (quoting *People v. Jennings*, 296 Ill. App. 3d 761, 765 (1998)). Here, the record does not suggest that the police conduct in this case was flagrant,

but it was purposeful. Despite defendant's repeated denials of any wrongdoing, the detectives kept defendant in a locked interrogation room and asked him to submit to the polygraph examination. This thus suggests that the police embarked upon a course of conduct in the hope of finding some incriminating evidence. This factor thus weighs against attenuation. Thus, the two most relevant factors (*Simmons*, 372 Ill. App. 3d at 742) weigh in favor of suppressing the evidence. Accordingly, we find that there was no attenuation between the illegal arrest and defendant's statement, and that the illegal arrest prevents the admission of defendant's statement.

¶ 48 B. Remand

¶ 49 Having found that the court erred in admitting defendant's inculpatory statement, we reverse the trial court's ruling, vacate defendant's convictions and sentence, and remand the matter for a new trial.

¶ 50 III. CONCLUSION

¶ 51 For the foregoing reasons, we reverse the judgment of the circuit court of Cook County and remand for further proceedings.

¶ 52 Reversed and remanded with directions.