THIRD DIVISION
NOVEMBER 27, 2013

No. 1-10-2318

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e).

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.	)	No. 09 CR 13471
	)	
ANTHONY BOYCE,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Hyman and Justice Mason concurred in the judgment

O R D E R

¶ 1 HELD: Defendant's conviction for the offense of attempted solicitation of murder affirmed; his mittimus is corrected to properly reflect that offense; and his sentence is vacated and the cause remanded for a new sentencing hearing.

¶ 2 Following a bench trial, defendant was convicted of attempted solicitation of murder and sentenced to 14 years' imprisonment. On appeal, defendant challenges his conviction and the sentence imposed thereon, arguing: (1) the trial court improperly denied his pre-trial motion to

suppress evidence; (2) he was convicted of a non-existent offense; (3) the State failed to establish his guilt beyond a reasonable doubt; (4) the court erred in failing to consider a presentence investigation report prior to imposing his sentence; and (5) his mittimus must be corrected to reflect the proper name and class of the offense of which he was convicted. For the reasons set forth herein, we affirm defendant's conviction and correct the mittimus; however, we vacate defendant's sentence and remand for a new sentencing hearing.

¶ 3 I. BACKGROUND

¶ 4 In 2003, defendant was convicted of first degree murder for the 2001 killing of Lorenzo Hamilton. The murder was part of an alleged insurance fraud plot. Eric Lindsay, an insurance policy salesman, provided significant testimony at defendant's trial, including the fact that members of defendant's family were beneficiaries of a $500,000 life insurance policy that had been taken out on Hamilton. After being found guilty of Hamilton's murder, defendant was sentenced to natural life imprisonment at the Illinois Department of Corrections. Beginning on November 19, 2008, while serving the aforementioned sentence, defendant attempted to mail a series of letters that were subsequently intercepted and opened by prison officials. Based on the contents of the letters, defendant was charged with one count of solicitation of murder and one count of attempted solicitation of murder. The State subsequently *nolle prosequied* the solicitation of murder charge and the cause proceeded on the attempt count.

¶ 5 Prior to trial, defendant filed a motion to suppress the letters, arguing that prison officials had insufficient articulable suspicion to warrant opening his mail since the envelopes were addressed to an attorney and identified as privileged legal mail. Specifically, he argued that

"[t]he officers' actions at the time of these searches were not reasonable, because the markings on the letters could not have reasonably raised sufficient suspicion to overcome [his] constitutional rights and expectations of privacy under the law." The court presided over a suppression hearing, which proceeded by way of stipulation. The parties stipulated that Officer Heather Cecil was working in the mailroom of the Lawrence Correctional Facility on November 19, 2008. During that time, Officer Cecil saw a letter in which defendant was identified as the sender. The envelope was marked "Legal Mail" and bore the following address:

> Jennifer Bonjean attorney at Law C. Davis
> P.O. Box #24433
> Chicago, IL 60624

Officer Cecil contacted the Illinois Attorney Registration and Disciplinary Commission (ARDC) to inquire about Bonjean. She learned that Bonjean was licensed to practice law in Illinois, but had a New York City address. Officer Cecil did not conduct any additional inquiries about the New York City address. Cecil also did not consult "Martindale Hubble" or any other source to determine whether any other addresses were associated with Jennifer Bonjean. According to www.martindale.com Bonjean had an Illinois address at 601 S. LaSalle Street, Suite 200, Chicago, Illinois. Although Officer Cecil knew that C. Davis was defendant's aunt, she did not know whether she was aware of their relationship before or after she forwarded the letters to the prison's Intelligence Unit.

¶ 6 Based on the fact that defendant's envelope was not addressed to Bonjean's New York City address as listed with the ARDC, but to a Chicago P.O. Box bearing a third-party's name on the envelope, Cecil concluded that defendant's letter was not actually "legal mail." Accordingly,

Cecil crossed out the words "legal mail" and "attorney at law" on the envelope, opened the envelope and read the contents contained within. Cecil found two notes within the envelope. One was undated and the other was dated November 18, 2008. Neither of the letters was directed to an attorney.

¶ 7 On December 8, 2008, while working in the Lawrence Correctional Facility's mailroom, Officer Cecil intercepted another letter from defendant. This letter was also identified as "legal mail" and bore the same address listed in previous letter. As she had done before, Officer Cecil excised the terms "attorney at law" and "legal mail" from the envelope. Because defendant's mail was being monitored due to the earlier incident, Officer Cecil passed the letter on to Rich Casburn, an officer with the prison's Intelligence Unit. This procedure was followed on all subsequent correspondence mailed by defendant.

¶ 8 After receiving defendant's letters, Officer Casburn obtained copies of defendant's visitor and telephone lists. On those lists, Bonjean's address was identified as 11 Broadway New York, NY 10004. Officer Casburn was aware that Bonjean was defendant's appellate lawyer. He did not check any other sources to determine whether there were additional addresses associated with Bonjean's name. Based on additional information contained in the lists, Officer Casburn also learned that C. Davis was defendant's aunt.

¶ 9 Despite the terminology used on the envelopes, it was apparent to Officer Casburn that none of the letters were directed to an attorney. In his letters, defendant instructed a friend named "Zay" to murder a "hype" and to frame Eric Lindsay, one of the witness's who testified at defendant's earlier trial, for the hype's murder.

¶ 10 After the initial searches of defendant's letters, correctional officers continued monitoring defendant's correspondence and intercepted four more letters. All of the letters were similarly addressed either to Bonjean or her firm and were marked as "Legal Mail." Officer Casburn determined that each of the letters were not really legal mail; rather, they were prohibited third-party letters. Each of the letters contained similar instructions to "Zay" about the murder of a "hype."

¶ 11 After hearing the aforementioned stipulated testimony and arguments of the parties, the court denied defendant's motion to suppress. The court reasoned:

> "I cannot find that they violated any constitutional right of [defendant], that he may have had. In fact, what he was doing, what it appears from this motion he was doing was using the words "legal mail" as a front, as a subterfuge, in an inartful way to try to get communications allegedly containing solicitations to kill somebody, to get those communications out to another person. Which he'd be prohibited from doing.
>
> He knew that and had been advised in the Illinois Department of Corrections that his mail is going to be read unless it was privileged. He tried to sneak that one by in the Department of Corrections. They did check it out thoroughly enough.
>
> I believe their inquiry to the ARDC showed enough investigation to at least take a look at the letter. They saw it and took further action.
>
> Motion to suppress is respectfully denied."

¶ 12 Following the court's denial of defendant's motion to suppress, the cause proceeded to a bench trial on the attempted solicitation of murder charge.

¶ 13 At trial, the parties stipulated to the testimony of Heather Cecil, the mail room employee at the Lawrence Correctional Center who intercepted and opened the initial letter sent by Boyce during his incarceration, and of Rich Casburn, the Intelligence Unit Officer to whom Cecil forwarded the letters. The stipulated testimony was substantially the same as the testimony provided at the earlier suppression hearing.

¶ 14 John Duffy, an Investigator with the Cook County State's Attorney's office, testified that on November 24, 2008, he was assigned to investigate letters that had been intercepted by the Illinois Department of Corrections. A letter dated November 18, 2008, provided as follows:

> "To Zay. Hopefully once you receive this letter, you will be in the highest form of health. This is the only way I can see the streets again. Get Donte to assist you in this. Don't never write me a letter or say anything on the phone. They're being monitored. This is the Theater Project. You just say theater, never say dates or times on the phone.
>
> And also, never go on a mission with a cell phone. GPS is popping people off. It's cameras around this place. Go out at night around 10:00, wear a mask, gloves and carry a Ziploc bag. Dig into a garbage can of this insurance company, 3708 West Roosevelt, Chicago 60604. Get something like a cup or a spoon or fork, drinking bottle, something with DNA, or a couple cigarette or cigars.
>
> Put it in a Ziploc bag. Leave, go get some writing paper and a pen, make sure the store you purchase that paper from isn't in walking distance. Make sure your DNA isn't on the paper or pen, such as hair, spit or fingernails.
>
> Go get a hype, make sure the hype was free on [April 21, 2001]. Got [*sic*] to a

vacant building, make sure you don't let anyone see you with that hype. Wear gloves, make the hype write this on paper [:]

[Line drawn across the page].

I refuse to remain silent any longer. I'm sending the proper authorities to your office. 3708 West Roosevelt. Eric Lindsay, you're culpable for helping kill Lorenzo Hamilton. Also falsely sent Anthony Boyce to the penitentiary for a crime that kid did not commit. I have a videotape to prove it, and your bisexual mistress Latoya.

[Line drawn across the page].

After he or she writes this, make them put it in their pocket, and what you took out of the trash can at the insurance place, take that out of the Ziploc bag, put it on the crime scene, push the hype shit back, get out of there, don't leave your fingerprints or hair or spit anywhere, or footprints. Once the crime scene investigators see the letter that they found in the victim's pocket, analyze it for DNA, a handwriting sample and it comes back along with the cup or what you get out of the trash can from the insurance company that matches some of Eric's DNA from the crime scene, I'm going home ASAP or someone DNA from the company proves that someone from that company was on the crime scene [Smiley face drawn].

Don't tell your mother or sister. It's time for us to be back on top. Just imagine if I was free. S[t]and on this for me ASAP. Make sure you take your time and do this always at night, after 10:00.

Love always"

¶ 15 In a second letter to Zay, dated December 5, 2008, defendant wrote: "Listen to what I'm saying. Stand on that situation. My whole existence is in your hands. P.S. I miss you. Stand on that Theater situation."

¶ 16 Investigator Duffy testified that he was familiar with the term "hype," and explained that it was most commonly used in reference to "an intravenous drug user" or "a narcotics addict." He was also familiar with the phrase "push the hype shit back," and indicated that it "means murder. That the person referred to, in that, is usually a murder victim." Investigator Duffy testified that after receiving copies of the letters, he analyzed its contents and identified some people referred to in the letter. He explained that "Zay" was a nickname for defendant's cousin, Xavier Tripp. Lorenzo Hamilton was the homicide victim who defendant was convicted of killing and Eric Lindsay was an insurance agent who worked at the Roosevelt address indicated in defendant's letter. Lindsay had testified against defendant during his trial for Hamilton's murder.

¶ 17 After receiving defendant's initial letters, Investigator Duffy and his partner "came up with a plan for investigation." They copied defendant's letters but substituted the contact information. Instead of instructing Zay to contact Donte, they changed the letters and instructed Zay to contact Drea, who was actually an undercover narcotics investigator for the Cook County Sheriff's Office. Investigator Duffy also included a phone number for Drea and their plan was to see if Zay called the number and took the "Theater Project to another step." The altered letters were then sent to C. Davis, defendant's aunt, and they expected her to forward the correspondence on to Zay. The plan, however, was subsequently aborted because there was

concern for the safety and well-being of Eric Lindsay and the unspecified narcotics addict. No phone call was ever made to the undercover number before the operation was ultimately terminated.

¶ 18 Investigator Duffy and his partner then went to interview defendant at the Lawrence Correctional Center on January 20, 2009. After ensuring that defendant was aware of his *Miranda* rights, Investigator Duffy presented him with Xeroxed copies of the letters that had been intercepted. Defendant acknowledged that his handwriting appeared in the letters, but when Investigator Duffy's partner began asking him about the "Theater Project" described in the letters, defendant's breathing became labored and he then "fainted, head first, onto the table" in the interview room. After defendant "came to," he invoked his right to remain silent and did not provide any detail regarding his intent in sending the letters or the content of those letters.

¶ 19 On cross-examination, Investigator Duffy acknowledged that when he sent the substitute letters to defendant's aunt, he was not sure how she or Zay would react. He explained: "That was part of our investigation, to see if the people on the outside, they were being contacted by [defendant], who would take it a step further and offer the solicitation." He confirmed that Zay never made a phone call to the undercover narcotics officer, whose contact information he included in defendant's letter, before he elected to terminate the operation. Instead, Investigator Duffy elected to contact Zay Tripp and Donte Boyce and request them to cooperate with his investigation. On December 23, 2008, both men voluntarily came to his office for questioning. Donte denied having any knowledge about a "Theater Project" and indicated that defendant had never requested him to do anything on his behalf. Zay also denied having any knowledge of any

murder plot and suggested that defendant's reference to a "theater project" might have something to do with an actual movie theater. Zay indicated that he had not received any letters from defendant and informed Investigator Duffy that he had not heard from his cousin since March 2008.

¶ 20 Investigator Duffy denied that he ever heard the phrase "push the hype shit back" used in reference to anything other than murder. He specifically denied that the phrase could be used to refer to any other crime such as battery or rape. He emphasized: "Every time I've heard that phrase used by people on the street, people in the jail, people in the interview room, it is always referred to as a murder."

¶ 21 At the conclusion of Investigator Duffy's testimony, the State rested its case. Defense counsel urged the court to dismiss the attempt solicitation charge, arguing that it was not an offense since attempt and solicitation are both inchoate offenses and cannot be "stack[ed]" together to create a double inchoate offense. In the alternative, counsel urged the court to enter a finding of not guilty, arguing that the State failed to present sufficient evidence that defendant committed a substantial step necessary to be convicted of an attempt under Illinois law. The court rejected both arguments and the defense rested without presenting any evidence.

¶ 22 After hearing the closing arguments of the parties, the court found defendant guilty of the offense of attempted solicitation of murder. The court explained its ruling as follows:

> "The court has reviewed the evidence. The facts of the case are not particularly in dispute. What is in dispute is what the facts constitute and whether they show proof beyond a reasonable doubt of the attempted–attempt solicitation to commit murder.

I will note that, first of all, I do believe based on law that I've read in part of this case, in researching the Defense's attempts to dismiss the indictment in its entirety, that courts throughout the land–not Illinois but other courts, when confronted with issues similar to this one–have found that there is to be an offense of attempt solicitation to commit the offense of murder.

It can be–there can be two inchoate offenses as part of one criminal act.

What we have here is, Mr. Boyce is in a very tough spot, very difficult predicament. He's serving a life sentence which, as we all know and as he knew, under Illinois law, means natural life, without the possibility of parole.

He has had much time to contemplate his plight, and somehow, in perhaps a twisted way of thinking about things, thought that a possible solution to get him back on the streets, which he indicated in his letter was the only way to get back on the streets would be to discredit the person that testified and apparently was a key witness against him at his trial.

The way to discredit that person was to have that person framed and set up for a murder he didn't commit. He was going to have his cousin murder some unknown person, put in that unknown person's pocket some information about Anthony Boyce, and threats to go forward against this witness with information he knew about Anthony Boyce, and had collected some DNA and have some DNA spread over the body of this deceased person.

A little bit of a convoluted and twisted plot, perhaps not particularly realistic, but

it was real, real in so far as that's what Mr. Boyce had set out to try to do.

I am particularly mindful of the fact that Mr. Boyce had to get this letter to someone who might be willing to go along with his plan, and in order to do that, he put up the subterfuge and ruse of suggesting that the letter was legal mail. He put the name of an appellate lawyer, Jennifer Bonjean, on the envelope, and put a slash, a different person's address that turned out to be a relative of his. Put the relative's post office box there, but he sent it out as legal mail, ostensibly to attorney Jennifer Bonjean, which it wasn't.

That to me shows consciousness of his seriousness, consciousness of his guilt, consciousness of his efforts to have this letter received by his intended recipient, not Jennifer Bonjean, whose name appeared on the letter, but the person who would get it from the post office box, from the relative that also had their name on the envelope. It was not legal mail.

In the letter, it talks about his plan and gives specific instructions about DNA; about not going out at night; about how this ought to be done; what the letter ought to say that's in this person's pocket that was killed. Doesn't know exactly who it is he's trying to kill, but he's desperately [sic] to discredit the person that testified against him at his own trial.

* * *

I will note also that the entire plan may have been a bit remote, but there's got to be some sanctions somewhere for trying to set things like this in motion. Even crazier

things may have happened.

I find, in its totality, the Government has met their burden of proof beyond a reasonable doubt as to Count 2, attempt solicitation to commit murder. He will be found guilty of that."

¶ 23 The court subsequently sentenced defendant to 14 years' imprisonment to be served consecutively to his natural life sentence. The sentence was imposed in the absence of a presentence investigation and report. This appeal followed.

¶ 24 II. ANALYSIS

¶ 25 A. Motion to Suppress

¶ 26 On appeal, defendant first argues that the court erred in denying his pre-trial motion to suppress evidence. He argues that because the letters were marked as "legal mail," he had a "reasonable expectation of privacy in the written contents of the letters." Although defendant acknowledges that the letters were not actually legal mail, he further asserts that prison officials lacked a reasonable basis to suspect that the envelopes did not contain privileged legal mail. Accordingly, he asserts that prison officials violated his constitutional right against unreasonable searches and seizures by reading his letters and argues that those letters should have been suppressed.

¶ 27 The State, in turn, responds that the trial court properly denied defendant's motion to suppress evidence because "prison officials had reasonable suspicion that defendant's letters were not actually legal mail and were therefore subject to inspection."

¶ 28 As a general rule, a circuit court's ruling on a motion to suppress is subject to the two-

prong standard of review. *Ornelas v. United States*, 517 U.S. 690, 699 (1996); *People v. Johnson*, 237 Ill. 2d 81, 88 (2010). Pursuant to this standard, a reviewing court will afford great deference to the circuit court's factual findings and will disregard those findings only where they are against the manifest weight of the evidence. *Johnson*, 237 Ill. 2d at 88; *People v. Lopez*, 2013 IL App (1st) 111819, ¶ 17. The circuit court's ultimate legal finding as to whether suppression is warranted, however, is subject to *de novo* review. *People v. Bartelt*, 241 Ill. 2d 217, 234 (2011).

¶ 29 The fourth amendment to the United States Constitution protects "the right of the people to be secure in their persons, houses, papers, and effects against unlawful searches and seizures." U. S. Const., amend. IV; accord Ill. Const. 1970, art. I, § 6. "The 'essential purpose' of the fourth amendment is to impose a standard of reasonableness upon the exercise of discretion by law enforcement officers to safeguard the privacy and security of individuals against arbitrary invasions." *People v. McDonough*, 239 Ill. 2d 260, 266-67 (2010), quoting *Delaware v. Prouse*, 440 U.S. 648, 653-55, 99 S. Ct. 1391, 1396, 59 L. Ed. 2d 660, 667 (1979); see also *In re Lakisha M.*, 227 Ill. 2d 259, 264 (2008), quoting *Terry v. Ohio*, 392 U.S. 1, 19 (1968) (recognizing that the "touchstone" of any fourth amendment analysis is " ' reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security' "). A "search" occurs " 'when an expectation of privacy that society is prepared to consider reasonable is infringed.' " *Bartelt*, 241 Ill. 2d at 226, quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). For purposes of fourth amendment analysis, the relevant inquiry is whether the person claiming protections of the fourth amendment had a legitimate expectation of privacy in the property

searched. *Johnson*, 237 Ill. 2d at 90. A defendant bears the burden of establishing the unreasonableness of a search of seizure. *People v. Kidd*, 175 Ill. 2d 1, 22 (1996). What is reasonable depends " 'on the balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.' " *Lakisha M.*, 227 Ill. 2d at 264, quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975).

¶ 30 Defendant acknowledges that as a convicted incarcerated felon, he had a diminished expectation of privacy at the time of the officers' search of his letters. See *People v. Peppers*, 352 Ill. App. 3d 1002, 1007 (2004) ("Incarcerated felons have a substantially diminished expectation of privacy"); see also *People v. Wilson*, 228 Ill. 2d 35, 41 (2008) (recognizing that the United States Supreme Court and the Illinois Supreme Court have both "held that probationers and parolees enjoy a greatly diminished expectation of privacy due to their status as probationers and parolees" and that government bodies have a salient interest "in preventing recidivism and protecting society from future crimes"). However, defendant cites to several provisions of the Illinois Administrative Code outlining the treatment of mail sent by inmates of correctional facilities, and argues that based on these provisions, he had a reasonable expectation that his letters would not be subject to a search by prison officials. The provisions relied upon by defendant provide as follows:

> " [§ 525.130]
>
> This Section applies to all correctional facilities within the Department.
>
> (a) Offenders shall be permitted to send privileged and non-privileged letters at their own expense. * * *

(b) Offenders must clearly mark all outgoing mail with their name and in adult facilities with their institutional number. Mail that is not properly marked, including privileged mail, shall be opened and returned to the sender if the sender's identity can be determined. If the sender's identity cannot be determined, the mail shall be destroyed.

(c) Outgoing privileged mail must be clearly marked as 'privileged' and sealed by the offender. Outgoing mail which is clearly marked as privileged and addressed to a privileged party may not be opened for inspection except as provided in subsection (d) of this Section.

* * *

(d) In adult facilities, outgoing privileged mail shall be examined for dangerous contraband, using an x-ray, fluroscope, or other similar device. Such examination may be conducted in juvenile facilities. Outgoing privileged mail may be inspected for dangerous contraband by other means which do not damage the mail and which do not permit the mail to be read. Except in an emergency, outgoing privileged mail shall not be opened, unless there is a reasonable suspicion that dangerous contraband is contained therein, legal services is consulted, and the mail is opened in the offender's presence.

* * *

(g) Outgoing non-privileged mail shall be inspected for contraband. If a letter from an offender is confiscated because it contains contraband, the offender shall be notified promptly in writing.

(h) Department employees may spot check and read non-privileged mail. Outgoing non-

privileged mail or portions thereof may be reproduced or withheld from delivery if it presents a threat to security or safety * * *." 20 Ill. Adm. Code 525.130 (a), (b), (c), (d) (West 2010).

¶ 31 The Administrative Code defines the term"privileged mail" to include "legal mail,"which in turn, is defined as "mail to and from: (1) Registered Attorneys who provide direct legal representation to offenders; (2) State's Attorneys; (3) The Illinois Attorney General; (4) Judges or magistrates of any court or the Illinois Court of Claims Judges; and (5) Any organization that provides direct legal representation to offenders, but not including organizations that provide referrals to attorneys, such as bar associations." 20 Ill. Adm. Code § 525.110(g) (2001).

¶ 32 Notwithstanding defendant's attempts at subterfuge, we further find that Officer Cecil had reasonable suspicion that defendant's correspondence was not privileged when she intercepted his first letter on November 19, 2008. Based on these provisions of the Administrative Code, defendant maintains that he had a "reasonable expectation *** that a sealed letter which was addressed to a licensed attorney and clearly labeled as legal mail would not be open or read by prison officials." We disagree. There is no dispute that the contents of his letters were not privileged communications to an attorney. Non-privileged communications sent by inmates may be spot-checked and read by prison officials. Given that the communications were not privileged and defendant, as a prison inmate, had a diminished expectation of privacy, we do not find that he had a reasonable expectation that his letters would not be searched.

¶ 33 When evaluating the conduct of law enforcement officials for purposes of fourth amendment analysis, the reasonableness of a search depends upon the facts and circumstances of

each case and the evaluation of the objective facts known to the officer at the time of the search. *People v. Moss*, 217 Ill. 2d 511 (2005). It is well-established that "[m]ere hunches and unparticularized suspicions' do not rise to the level of a reasonable, articulable suspicion of criminal activity' " that is required to justify a warrantless search. *People v. Davenport*, 392 Ill. App. 3d 19, 28 (2009), quoting *People v. Ruffin*, 315 Ill. App. 3d 744, 748 (2000).

¶ 34 The evidence presented at the hearing on defendant's motion to suppress included the stipulated testimony of Officer Cecil, who received defendant's first letter in the mail room on November 19, 2008. At that time, Officer Cecil observed that defendant had addressed a letter to "Jennifer Bonjean, attorney at law," and labeled the envelope "legal mail." She noted that a third-party's name, "C. Davis" also appeared on the envelope and that defendant directed his correspondence to a P.O. Box. Davis was not identified as an attorney on the envelope and the parties stipulated that although Officer Cecil did not know who "C. Davis" was or her exact relationship with defendant, she was nonetheless aware that Davis was a third-party.

¶ 35 After observing the writing on the envelope, Officer Cecil then placed a call to the Illinois Attorney Registration and Disciplinary Committee (ARDC), and learned that although Bonjean was licensed to practice law in Illinois, the address that she provided to the ARDC when she completed her yearly registration was a New York City address. See S. Ct. R. 756 (a), (c) (eff. September 14, 2006) ("Every attorney admitted to practice law in [Illinois] shall register and pay an annual registration fee to the Commission" *** and must "notify the Administrator or any change of address within 30 days of the change"). Based on the information that Officer Cecil received from the official regulatory body for Illinois attorneys as well as the presence of a third-

party's name on the envelope (see *In re Himmel*, 125 Ill. 2d 531, 542 (1988) (recognizing that the presence of a third-party vitiates attorney-client privilege)), we find that she had reasonable suspicion to conclude that defendant's letter was not actually privileged legal mail. Accordingly, the search of defendant's initial letter did not violate his constitutionally protected right against unreasonable searches and seizures. See generally *Beahringer v. Roberts*, 334 Ill. App. 3d 622, 628 (2002) (recognizing that a prisoner's rights are not violated when prison officials open a letter designated "legal mail" where the letter does not met the criteria for legal mail under the Administrative Code). Moreover, given the propriety of the search of the initial letter, we further reject defendant's argument that the evidence obtained in the subsequent letters must be suppressed as "fruit of the poisonous tree." See *People v. Lovejoy*, 235 Ill. 2d 97, 130-31 (2009) (recognizing that where evidence is not obtained as a result of an illegal search or seizure, it need not be suppressed as fruit of the poisonous tree). Accordingly, we conclude that the trial court properly denied defendant's pre-trial motion to suppress.

¶ 36 B. Non-Offense

¶ 37 Next, defendant asserts that his conviction must be vacated because "the offense of attempt solicitation of murder does not exist in the State of Illinois." He observes that the offenses of attempt and solicitation of murder are both inchoate offenses, and argues that two separate inchoate offenses cannot be "combined to create a new class of hybrid inchoate offenses." Defendant argues that doing so contradicts the legislature's intent and ultimately leads to "manifestly absurd results."

¶ 38 The State, in turn, maintains that attempted solicitation of murder is a viable criminal

offense. Specifically, the State argues that "[a]pplication of the general attempt statute is not precluded by the inclusion of an inchoate crime in the definition of the more specific offense, such as solicitation of murder."

¶ 39 Section 8-4 of the Code is the general attempt statute, which provides as follows: "A *** person commits an attempt when, with intent to commit a specific offense, he does any act which constitutes a substantial step toward the commission of that offense. 720 ILCS 5/8-4(a) (West 2010). Illinois courts have repeatedly held that "[t]he general attempt statute applies to all offenses, unless there is manifest a legislative intent to exclude it from the statute." *People v. Patton*, 230 Ill. App. 3d 922, 930 (1992); see also *People v. Wallace*, 57 Ill. 2d 285, 291 (1974); *People v. Wishard*, 396 Ill. App. 3d 283, 286 (2009); *People v. Taylor*, 314 Ill. App. 3d 943, 945 (2000). Courts have repeatedly held that legislative intent to exclude the general attempt statute is shown by the inclusion of specific "attempt" language in the definition of the more specific offense. See*, e.g., People v. Patten*, 230 Ill. App. 3d 922, 930-31 (1992) (finding that the legislature manifested its intent not to apply the general attempt statute to the offense of child abduction because that offense was defined to include both the actual "lur[ing]" of a child as well as the "attemp[ed]" luring of a child); *People v. Harding*, 401 Ill. App. 3d 482, 487 (2010) (same); *Wishard*, 396 Ill. App. 3d at 287-89 (finding evidence that the legislature intended to exclude the application of the general intent statute to the offense of disarming a peace officer based on the plain language of that statute, which explicitly includes "both attempts to disarm a peace officer as well as the completed act of disarming a peace officer"). Where, however, attempt language is not included in the definition of a specific offense, courts have concluded

that the lack of such language was indicative of the legislature's intent for the general attempt statute to apply to the more specific offense. See *People v. Wallace,* 57 Ill. 2d 285, 292 (1974) (concluding that the legislature manifested its intent for the general attempt statute to apply to the offense of bribery because no attempt language was included in the definition of the bribery statute).

¶ 40 Here, section of the 8-1(b) of the Code details the elements of the offense of solicitation of murder and states: "A person commits the offense of solicitation of murder when he or she commits [the offense of] solicitation with the intent that the offense of first degree murder be committed." 720 ILCS 5/8-1(b) (West 2010). The Code further provides that a person "commits the offense of solicitation when, with the intent that an offense be committed * * * he or she commands, encourages, or requests another to commit that offense." 720 ILCS 5/8-1(a) (West 2010). As the State correctly observes, there is no specific attempt language included within the statutory definitions of solicitation and solicitation of murder. As explained above, the lack of such language is indicative of the legislature's intent for the general attempt statute to apply to the offense of solicitation of murder. See *Wallace,* 57 Ill. 2d at 292. Although the solicitation and general attempt statutes both fall within the domain of "inchoate offenses," we disagree with defendant that the categorization is sufficient to override the presumption that the general attempt statute is applicable to all specific offenses unless there is explicit legislative intent to the contrary. Given the lack of such intent in this case, we conclude that defendant was not convicted of a non-existent offense.

¶ 41 C. Sufficiency of the Evidence

¶ 42 Defendant next asserts that the State failed to prove him guilty of the charged offense beyond a reasonable doubt. Although defendant "does not contest that the note marked 'to Zay' contained a solicitation to commit murder," he argues that the State "fail[ed] to establish that [he] took a substantial step toward soliciting Zay to commit murder" given that his letter was mailed to his aunt, "C. Davis," and there was no evidence that she would have, or could have, passed defendant's solicitation letter to Zay. Accordingly, because the State failed to present sufficient evidence to satisfy the requisite "substantial step" element of the offense of attempt, defendant argues his conviction for attempted solicitation of murder should be reversed.

¶ 43 The State disputes defendant's challenge to the sufficiency of the evidence, arguing that the evidence demonstrated that defendant "took a substantial step to ensure that Zay would receive his request to commit the offense of first degree murder with the intent that Zay actually commit murder." Accordingly, because all the requisite elements were satisfied, the State maintains that defendant's conviction must be affirmed.

¶ 44 Due process requires proof beyond a reasonable doubt to convict a criminal defendant. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). In reviewing a challenge to the sufficiency of the evidence, it is not a reviewing court’s role to retry the defendant; rather, we must view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found each of the essential elements of the crime beyond a reasonable doubt. *People v. Ward*, 215 Ill. 2d 317, 322 (2005); *People v. Hayashi*, 386 Ill. App. 3d 113, 122 (2008). The trier of fact is responsible for evaluating the credibility of the witnesses, drawing reasonable inferences from the evidence, and resolving any inconsistencies in the evidence

(*People v. Bannister*, 378 Ill. App. 3d 19, 39 (2007)), and a reviewing court should not substitute its judgment for that of the trier of fact (*People v. Sutherland*, 223 Ill. 2d 187, 242 (2006)). Ultimately, a reviewing court will not reverse a defendant's conviction unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to his guilt. *People v. Carodine*, 374 Ill. App. 3d 16, 24 (2007).

¶ 45 In Illinois, "[a] person commits an attempt when, with intent to commit a specific offense, he does any act which constitutes a substantial step toward the commission of that offense." 720 ILCS 5/8-4 (West 2010). What constitutes a "substantial step" depends upon the unique facts and circumstances of each case. *People v. Smith*, 148 Ill. 2d 454, 459 (1992); *People v. Perkins*, 408 Ill. App. 3d 752, 758 (2011). Illinois courts have repeatedly held that "mere preparation" does not satisfy the "substantial step," requirement of the general attempt statute; however, the State is not required to prove that the defendant completed the "last proximate act" in order to sustain a conviction for an attempt. *People v. Terrell*, 99 Ill. 2d 427, 433 (1984); *Smith*, 148 Ill. 2d 454, 459 (1992); *People v. Hawkins*, 311 Ill. App. 3d 418, 423 (2000). Accordingly, whether a defendant committed an attempt depends on where his actions fall "on the continuum between preparation and perpetration." *Terrell*, 99 Ill. 2d at 434. This determination has been recognized to be " ' one of the most troublesome problems' in the area of inchoate offenses." *Id*. at 433, quoting Ill. Ann. Stat., ch. 38, par. 8-4(a), Committee Comments, at 512 (Smith-Hurd. 1972). Because of this difficulty, Illinois courts have looked to the Model Penal Code for guidance in determining whether a defendant has taken a substantial step toward the commission of a crime. *Terrell*, 99 Ill. 2d at 435-36; *Perkins*, 408 Ill. App. 3d at 758; *Hawkins*, 311 Ill. App. 3d at 424.

Under the Model Penal Code, an attempt occurs when a person, acting with the requisite intent, "purposely does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime." Modern Penal Code § 5.01(1)(c) (1985). In addition, the Modern Penal Code sets forth a list of acts, which may considered to constitute a substantial step, as long as the act is strongly corroborative of the defendant's criminal purpose. *Terrell*, 99 Ill. 2d at 435-36; *Perkins*, 408 Ill. App. 3d at 758. These acts include:

> "(a) lying in wait, searching for or following the contemplated victim of the crime;
>
> (b) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;
>
> (c) reconnoitering the place contemplated for the commission of the crime;
>
> (d) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed." Modern Penal Code § 5.01(2) (1985).

¶ 46 This list is not exhaustive; rather it simply "manifests the Modern Penal Code's emphasis on the nature of the steps taken, rather than on what remains to be done to commit a crime." *Perkins*, 408 Ill. App. 3d at 758. Ultimately, a substantial step "should put the accused in a 'dangerous proximity of success.' " *Perkins*, 408 Ill. App. 3d at 758, quoting *Hawkins*, 311 Ill. App. 3d at 423-24.

¶ 47 Here, we find that there was sufficient evidence to support the circuit court's verdict. Defendant's letters reveal that he had the specific intent to commit solicitation of murder and that took substantial step toward the commission of that crime. In his letters to Zay, defendant

requested that he "push the hype shit back," a phrase Investigator Duffy testified was commonly used to refer to murder. Defendant provided a covert name for the murder plot, dubbing it the "Theater Project" and ordered Zay to use this phrase in all further communications since defendant's letters and phone calls were "being monitored." In addition, defendant provided detailed instructions about the time of day and the location where the murder should be committed: "around 10 [p.m.]" at a "vacant building." Defendant also admonished Zay to be careful of leaving his fingerprints or DNA around the crime scene, advised him not to use his cell phone to avoid GPS detection, and to keep their plan a secret from other family members. In addition, defendant took efforts to conceal the contents of the letters from prison officials by attempting to categorize his letters as "legal mail." Although defendant's letters were intercepted by prison officials and were not received by his intended recipient, this does not change the fact that defendant took a substantial step in committing solicitation of murder. See *Hawkins*, 311 Ill. App. 3d at 424 (recognizing that "it is no defense to an attempt charge that because of a misapprehension of circumstances it would have been impossible for the accused to commit the offense attempted"). Similarly, the fact that defendant's letters were addressed to his aunt's post-office box and contained instructions for her to forward them on to Zay does not render his efforts inconsequential. Although defendant argues that the State failed to prove that his aunt would have forwarded on his letters to Zay and that he had the "assistance necessary" to effectuate the solicitation, we note that the offense of solicitation is "based on a unilateral theory, which only requires actual agreement by one of the parties." *People v. Cuadrado*, 341 Ill. App. 3d 703, 715 (2003). Here, defendant's actions cannot be considered mere preparation. He took

all actions that were available to him as a prison inmate to solicit the murder of a "hype." Accordingly, we affirm his conviction for attempted solicitation of murder.

¶ 48 D. Sentence

¶ 49 Defendant next argues, and the State agrees, that he is entitled to a new sentencing hearing because he was sentenced for a felony without a presentence investigation (PSI) report.

¶ 50 Section 5-3-1 of the Illinois Unified Code of Corrections details the presentence investigative procedure to be followed by the circuit court. 730 ILCS 5/5-3-1 (West 2010). In pertinent part, that statutory provision provides as follows: "A defendant shall not be sentenced for a felony before a written presentence report is presented to and considered by the court." 730 ILCS 5/5-3-1 (West 2010). The purpose of a presentence investigation and report is to enlighten the court and assist in the determination of a proper sentence. *People v. Youngbey*, 82 Ill. 2d 556, 565 (1980). Given the important purpose that a PSI serves, our supreme court has held that "the presentence investigation and report is a *mandatory* legislative requirement" (Emphasis added). *Id*. at 561. Since defendant was convicted of a felony, a presentence investigation report was required prior to sentencing. 730 ILCS 5/5-3-1 (West 2010). This is true despite the parties' agreement to proceed without one. Because defendant was sentenced absent consideration of a report, his sentence is hereby vacated and the cause is remanded for a presentence investigation and report as well as a new sentencing hearing. *Youngbey*, 82 Ill. 2d at 565.

¶ 51 E. Mittimus

¶ 52 Finally, defendant argues, and the State agrees, that his mittimus must be amended to reflect the proper name and class of the offense of which he was convicted. Defendant's mittimus

currently indicates that he was convicted of solicitation of murder, a Class X felony; however, defendant was actually convicted of attempted solicitation of murder, a Class 1 felony. See 720 ILCS 5/8-4 (West 2010). Pursuant to Supreme Court Rule 615(b), a reviewing court has the authority to correct an offender's mittimus without remanding the cause to the circuit court. Ill. S. Ct. R. 615(b) (eff. Aug 27, 1999); *People v. Pryor*, 372 Ill. App. 3d 422, 438 (2007). Accordingly, we correct the mittimus to reflect a conviction for attempted solicitation of murder, a Class 1 felony.

¶ 53 III. CONCLUSION

¶ 54 For the aforementioned reasons, we affirm defendant's conviction for the offense of attempted solicitation of murder and correct his mittimus; however, we vacate his sentence and remand the cause for presentencing investigation and report in accordance with section 5-3-1 of the Unified Code of Corrections and a new sentencing hearing.

¶ 55 Affirmed in part; vacated in part; cause remanded with instructions.