FOURTH DIVISION
March 12, 2015

No. 1-12-3482

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.	)	99 CR 6194
	)	
JERRY CLAY,	)	Honorable
	)	John J. Moran, Jr.,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's convictions and sentence are affirmed. The trial court did not err in admitting defendant's two oral inculpatory statements where the police established probable cause for defendant's arrest after his illegal arrest but before the inculpatory statements were made; defendant's case was not prejudiced by the prosecutor's statements during closing and rebuttal arguments; the trial court did not abuse its discretion when it read instructions on accountability and the presumption of innocence to the jury prior to opening statements or where it held a simultaneous but separate jury trial for defendant and one of his codefendants.

Defendant's 50-year imprisonment sentence for first-degree murder was not excessive.

¶ 2 Following a remand for a new trial, the circuit court determined defendant's illegal arrest was attenuated by intervening events and, therefore, the oral statements he made after the arrest and the cash found in his pocket after the arrest were properly admissible at trial. After retrial, defendant was found guilty of first-degree murder and armed robbery and he was sentenced to serve concurrent terms of 50 years' and 30 years' imprisonment for the first-degree murder and armed robbery convictions, respectively. Defendant now appeals his convictions and sentence. For the reasons that follow, we affirm the judgment of the trial court.

¶ 3 Background

¶ 4 Defendant Jerry Clay, along with codefendants Clyde Williams, Tony Williams, and Roosevelt Clay, was charged by indictment with three counts of the first-degree murder of Terrence Madden and one count of armed robbery. Following a jury trial, defendant was found guilty of first-degree murder and armed robbery and was subsequently sentenced to concurrent terms of 50 years' and 30 years' imprisonment, respectively.

¶ 5 Defendant challenged his convictions on direct appeal in *People v. Jerry Clay*, 349 Ill. App. 3d 24 (2004). In that appeal, this court found that the police lacked probable cause to arrest defendant and that written statements made by defendant after a visit by his attorney were illegally obtained and should have been suppressed at trial. This court remanded the matter to the trial court for an attenuation hearing to determine "whether intervening circumstances served to attenuate defendant's oral statements from the illegal arrest." *Jerry Clay*, 349 Ill. App. 3d at 35. This court also found that the trial court erred when it introduced improper other crimes evidence regarding defendant's participation in the armed robbery of another currency exchange. *Id*.

¶ 6 Following remand, the trial court determined that defendant's oral statements were sufficiently attenuated from his illegal arrest such that they were admissible at the retrial. After the retrial, defendant was found guilty of first-degree murder and armed robbery. The trial court sentenced defendant to concurrent terms of 50 years' and 30 years' imprisonment for the first-degree murder and armed robbery convictions, respectively.

¶ 7 Attenuation Hearing

¶ 8 On remand, the following evidence was elicited at the attenuation hearing. Chicago Police Detective Patricia Pedroza testified that on December 22, 1998, she and her partner, Officer Kenneth Fowler, were investigating a shooting at the 21st and Ashland currency exchange. They learned from other officers who had interviewed the employees at the currency exchange that there were four offenders involved in the shooting and robbery and that they were all described as black males. While Officer Pedroza was standing on the sidewalk in front of the currency exchange, she noticed a wallet lying on the sidewalk, near the victim's body. Crime lab personnel recovered the wallet and found that it contained a birth certificate and social security card with defendant's name. The wallet also contained a vehicle registration for a van that was registered to Theodis Coleman at 929 North Willard.

¶ 9 At approximately 11:30 a.m., Officers Pedroza and Fowler drove to 929 North Willard, where they observed a van that matched the registration found in the wallet. Officers Pedroza and Fowler along with another unmarked police car set up surveillance at 929 North Willard. At 1:00 p.m., Officer Pedroza saw a white Ford Mustang park in front of 929 North Willard; two black males and one black female exited the car and entered 929 North Willard. One of the men, who was later identified as Roosevelt Clay, removed a car seat from the Mustang and placed it in the van that was registered in Theodis Coleman's name before entering 929 North Willard.

¶ 10 At 1:30 p.m., Officer Pedroza saw a brown Cutlass make a U-turn and park directly across the street. Three black males exited that car and walked into either 929 or 933 North Willard. At 1:50 p.m., three black males, later identified as Roosevelt Clay, David Cook, and David Clay, got into the Cutlass. A few minutes later, another person, later identified as defendant, exited the same residence, walked up to the Cutlass, and spoke with the people inside the Cutlass for a few minutes. When the Cutlass drove away, Officer Pedroza radioed the other surveillance car that the Cutlass was driving away.

¶ 11 Between 2:30 and 2:45 p.m., Officer Pedroza saw defendant exit 929 North Willard Court with a black female and child and drive away in a small, brown car. The small, brown car was then pulled over and defendant was transported to the police station.

¶ 12 On December 22, 1998, Chicago Police Lieutenant Dominick Rizzi was a detective at Area 4. At 6:45 p.m., he and Detective James Smith met defendant inside an interview room at the police station. They introduced themselves and then read defendant his *Miranda* rights. Defendant stated that he understood his *Miranda* rights and agreed to waive them. The detectives then asked defendant if he had his wallet with him, and defendant responded that he had lost his wallet about two weeks ago on the Dan Ryan L train. When defendant gave this answer, the detectives were already aware that defendant's wallet, with his birth certificate, social security card and a vehicle registration for Theodis Coleman, had been found near the victim's body. The detectives then left the interview room.

¶ 13 At 9:15 p.m., the detectives interviewed defendant a second time. Defendant was again advised of his *Miranda* rights, and he again agreed to waive them. After speaking with the detectives for a few minutes, defendant agreed to take a polygraph test. Defendant left Area 4 between 10:30 p.m. and 11:30 p.m. to take the polygraph test. Before leaving that station,

defendant was given a sandwich to eat. While transporting defendant to take the polygraph test, Detective Rizzi received a page and learned that a United Armored Services duffel bag had been recovered from the Eisenhower Expressway by the Illinois State Police. The bag contained binding straps for money linked to the currency exchange, the victim's lock bag, and a letter addressed to Veronica Clay at 4805 West Superior.

¶ 14 Once at the station for the polygraph test, defendant was again given his *Miranda* rights after which he signed a written consent. Following the two-hour polygraph test, the polygraph technician informed Detective Rizzi that defendant was being deceptive. Once back at Area 4, defendant was placed in an interview room and, after a few minutes, he was given his *Miranda* rights and interviewed for a third time. Defendant was told that his polygraph test "indicated deception" and that a duffel bag with currency exchange papers and a letter addressed to Veronica Clay had been found. Upon hearing this information, defendant identified Veronica Clay as his sister and expressed concern for his family's safety because he knew the identity of the shooter. He said the shooter came to his house, carrying a green Armored Services bag and said that he had just committed a robbery. Defendant told the detectives that he needed some time to think. The detectives left the room to continue their investigation.

¶ 15 Detective Rizzi, along with some other police officers, went to 4805 West Superior to locate Veronica Clay. One of the tenants in the apartment building opened the exterior door for the officers. The door to Veronica Clay's apartment was slightly ajar when the officers knocked on her door. After receiving no response, they entered the apartment to find it unlit and cold. When they looked around to see if Veronica Clay was home, the officers saw a large key ring with several keys resting on a shelf in plain view. Attached to the keys were tags with the

addresses of different currency exchange locations, including a tag for the currency exchange location at 21st and Ashland. The officers recovered the keys and left the apartment.

¶ 16 Upon leaving the apartment, Detectives Rizzi and Smith noticed a blue Honda parked nearby with no rear license plate. They had previously received information that the car used by the offenders was a blue, foreign car, possibly made by a Japanese manufacturer, either Nissan or Honda. The detectives had also been given a partial license plate number, 035, for the car used by the offenders. Detective Smith ran the license plate of the blue Honda and found that it was registered to Suk Fong Lee. The detectives then left the area where the car was located to look for Veronica Clay at her place of employment.

¶ 17 The detectives returned to Area 4 around noon on December 23rd. Defendant was given food to eat and was again advised of his *Miranda* rights. During this interview, defendant told the detectives that he did not want his sister to be involved. Defendant then admitted that he and Roosevelt Clay went to Veronica Clay's apartment to divide up the money from the robbery. While at that address, Roosevelt Clay ripped the license plate off his blue Honda and removed a baby seat from the car. At that point, the officers informed defendant that he was under arrest.

¶ 18 Detective Rizzi then arranged to have the blue Honda towed. He also contacted the car's registered owner. During this time, while the police were questioning Roosevelt Clay, they recovered $8,100.00 from inside of Roosevelt Clay's jacket. The detectives then searched defendant and recovered $2,365.00 from his front pants pocket.

¶ 19 The detectives again met with defendant on December 23rd at about 9:00 p.m. After advising him of his *Miranda* rights, defendant offered to show the detectives where Tony Williams hung out. During their two-hour search for Tony Williams, the detectives purchased

two sandwiches for defendant. When they arrived back at the police station, it was sometime between 11:00 p.m. and 12:00 a.m. and defendant went to sleep in the interview room.

¶ 20 Detectives Rizzi and Smith spoke with defendant again at 9:00 a.m. on December 24th. Prior to this interview, detectives learned that the blue Honda had been sold to Roosevelt Clay, defendant's cousin. After making sure that defendant was fed and allowing him to use the bathroom, the detectives again advised defendant of his *Miranda* rights and they interviewed him for one to two hours before learning that an attorney had arrived to represent him. A police officer then recovered the cash that had been found in defendant's pocket earlier and also recovered a set of keys. Veronica Clay later identified the keys as belonging to her.

¶ 21 Chicago Police Lieutenant Dennis Keane testified at the hearing that during the evening of December 22nd, he and Sergeant Jerry Mahon spoke with Jean Clay at 929 North Willard. The detectives saw a 1988 Chevrolet van parked in front of that building. Jean Clay identified Theodis Coleman as her cousin and stated that neither Theodis nor defendant lived with her. Both Theodis and defendant owned the white van that was in front of her house.

¶ 22 Detective Keane's investigation continued into December 23rd when he learned that a backpack had been found along the Eisenhower Expressway, which contained a spent .357 shell casing, miscellaneous papers, money straps from the currency exchange, and a letter addressed to Veronica Clay. He also learned that a mid-eighties, dark blue, four-door Nissan or similar-type car had been seen leaving the scene of the shooting. When he went to the 4800 block of West Superior that day around 2:00 p.m., he saw a mid-eighties, dark blue, four-door Honda parked at that address. The rear license plate was missing, but the front license plate read B915058. When he ran the license plate, he found that the car was owned by Suk Fong Lee. According to Ms. Lee, she had sold the car on November 14, 1998 to Kevin Clay, but she had conducted the

transaction with Roosevelt Clay. Roosevelt Clay gave her partial payment for the car and she left the license plates on the car when she sold it. Sergeant Mahon also testified that on December 24th, around noon, he recovered $2,365.00 from defendant's front pants pocket.

¶ 23 At the conclusion of the testimony, the trial court concluded that the prosecution had established each of the four attenuating factors sufficient to admit defendant's oral confessions at the retrial. Specifically, the trial court found that defendant was repeatedly informed of his *Miranda* rights, there was an extensive passage of time between the arrest and the subsequent incriminating statements, there were intervening circumstances between the illegal arrest and the inculpatory statements, and there was no purposeful or flagrant police misconduct during that time. Accordingly, the trial court concluded: "[c]onsidering the totality of the circumstances, this Court finds that by clear and convincing evidence that the tainting of the illegal arrest was purged by the time the defendant gave his statement, therefore, the attenuation motion is denied."

¶ 24 Trial

¶ 25 On December 22, 1998, Sonia Boyar and Lisa Francis were working as tellers at the 21st and Ashland currency exchange. At approximately 10:00 a.m., three black men entered the currency exchange. One of the men asked Sonia Boyar for change and went to use the pay phone, while the other two men left the currency exchange. The man using the pay phone then also left. A few minutes later, one of these men came back into the currency exchange and asked Lisa Francis for change. Lisa Francis gave the man $20.00 in change, but did not get a good look at the man's face. The man then walked over towards the pay phone when the victim entered the currency exchange. The man that had been standing by the pay phone then walked over in front of the victim. Sonia Boyar saw this man point a gun at the victim and fire the gun

at the victim's face. Lisa Francis did not see the shooting, but looked up and saw the man who had asked her for change holding a silver gun.

¶ 26 On December 22, 1998, Robert Kaeseberg was a driver for Armored Services and was working on the same armored truck as the victim. Both Kaeseberg and the victim were armed with guns. When Kaeseberg approached the currency exchange at 21st and Ashland, he parked close to the front door and saw the victim walk towards the currency exchange door. As the victim walked in, he was holding a small green bag, called the lock bag, which had $60,000.00 in it.

¶ 27 A few second later, Kaeseberg heard a gunshot come from inside the currency exchange. He saw a male, holding the green bag, exit the front door of the currency exchange. He did not see the man's face, but noticed he was wearing a heavy, athletic Starter jacket. The man then walked across the street and entered the rear driver's side seat of a blue, four-door Honda sedan, which already had two other people in the car. The car made a right-hand turn and headed eastbound on 21st. When Kaeseberg entered the currency exchange, he saw the victim on the floor with a gunshot wound to his forehead. The victim's gun was still in its holster.

¶ 28 At the time of the shooting, Robert Anthony was parking his car on Ashland Avenue, facing 21st Street, as he was on his way to a tailor shop that was directly across the street from the currency exchange. While he was getting items from his trunk, Anthony heard a popping sound from behind him. When he turned around, he did not see anything. He then crossed the street, and while looking over his shoulder, he saw a man walking away from the currency exchange wearing a ski mask and a heavy coat. The man was trying to stuff a black gun into his pocket and had a green bag under his arm. Anthony got into the tailor shop and saw the masked

man get into a blue, four-door car and drive off. There were already two others in the car; Anthony was only able to get a partial license plate number due to the snow.

¶ 29 At the time of the shooting, Carl Boyd was selling drugs on the north side of Chicago when he got a page from Theodis "Oatmeal" Coleman. Boyd called Coleman and then went to Tony Williams' apartment. Boyd and Coleman talked, and Boyd drove his van to an apartment at Superior and Cicero. Around 12:00 or 12:30 p.m., Boyd knocked on the door of the first-floor apartment. When the door opened, Boyd saw defendant, Clyde Williams, Roosevelt Clay, Tony Williams, Monica Clay and Patricia Edwards Clay inside the apartment. Defendant, Clyde Williams, Roosevelt Clay and Tony Williams were counting money—approximately $30,000.00 to $40,000.00—while seated around a table. The victim's money bag was on the table where they were counting. Each of the men offered Boyd $1,000.00, but Boyd refused.

¶ 30 Boyd, Clyde Williams and Tony Williams left the apartment together and stopped at a clothing store and then an appliance store, before heading to 929 North Willard. While driving, Boyd saw Tony Williams open the sliding passenger door of the van and throw a black bag out along the Eisenhower Expressway, near the Ashland Avenue exit. As they approached Willard Court, they saw police cars in the area. Boyd pulled a U-turn and dropped Clyde Williams and Tony Williams off at their respective residences. Boyd had been interviewed by the Chicago police on December 30, 1998, but he did not tell them what happened because he did not want to cooperate or testify.

¶ 31 At about 10:00 a.m. on December 22, 1998, Chicago Police Officers Kenneth Fowler and Patricia Pedroza arrived at the currency exchange and found the victim with a gunshot wound to his head. Officer Fowler noticed a wallet on the sidewalk next to the door of the currency exchange. Chicago Police Forensic Investigator William Moore recovered the wallet and found

that it contained defendant's social security card and birth certificate, a vehicle registration for Theodis Coleman at 929 North Willard, a pawn shop receipt with defendant's name, and a hospital consent form with defendant's name.

¶ 32 At 11:30 a.m., Officers Fowler and Pedroza conducted surveillance of 929 North Willard, while two other officers were inside a surveillance car parked one block away. At 1:00 p.m., Officer Fowler saw a white Ford Mustang with a black female driver and two black male passengers park in front of the residence. One of the males, who was subsequently identified as Roosevelt Clay, exited the car, removed a child seat and placed it into the van that was behind the officers. All three people then entered 929 North Willard.

¶ 33 At 1:30 p.m., Officer Fowler saw a brown Cutlass park in front of the residence. Three black males, later identified as Roosevelt Clay, David Clay and David Cook, exited that car and entered 929 North Willard. Fifteen minutes later, those same three men exited the residence and got back into the brown Cutlass. Another black male, later identified as defendant, came out of the residence, approached the car, had a brief conversation with the men inside the car and then went back into the residence. The other surveillance car stopped the brown Cutlass after it pulled away.

¶ 34 Between 2:30 and 2:45 p.m., defendant along with a woman and child exited the residence and got into a small, brown car. The other surveillance officers stopped this car, asked defendant to get out of the car, and then placed him under arrest.

¶ 35 Chicago Police Detective Dominic Rizzi and his partner, Detective James Smith, were assigned to investigate the victim's murder. The detectives learned about the wallet with defendant's identification being found near the victim's body, and they spoke with defendant's mother, Jean Clay. At approximately 6:45 p.m., the detectives met with defendant inside an

interview room at Area 4. After defendant was advised of his *Miranda* rights, Detective Rizzi asked him about his wallet and defendant told him he had lost it two weeks earlier while he was riding the Dan Ryan L train.

¶ 36 At 9:00 p.m., after re-advising defendant of his *Miranda* rights, the detectives spoke with defendant again. During this conversation, defendant agreed to go to 11th and State for a polygraph test, and they left to take the test between 10:30 p.m. and 11:00 p.m.

¶ 37 Meanwhile, around 9:10 p.m., Illinois State Trooper Randall Shelton received a call of a body in the roadway on the eastbound exit ramp of the Eisenhower Expressway at Ashland Avenue. When he arrived, he picked up a black backpack that was partially blocking traffic and found a green money bag along with numerous documents inside. Investigator Shader was then called to the scene. Investigator Shader looked inside the black backpack and found a United Armored Express bag containing miscellaneous documents and a torn white cloth bag with a lock and Ashland 21st Street currency exchange printed on the side of the bag. There was also a Smith and Wesson .357 magnum cartridge case, coin wrappers, and a letter addressed to Veronica Clay at 4805 West Superior inside the backpack.

¶ 38 Detective Rizzi received a page about the evidence that was recovered from the Eisenhower Expressway while they were on their way to 11th and State for defendant's polygraph test. Defendant and the detectives left the station at 11th and State at approximately 1:00 a.m. and went back to Area 4. Defendant was then given food.

¶ 39 At 1:30 a.m., Detectives Rizzi and Smith spoke to defendant after advising him of his *Miranda* rights. Detective Rizzi told defendant about the recovery of the backpack and its contents, including the letter addressed to Veronica Clay at 4805 West Superior. At that point, defendant said that Veronica was his sister and, while he knew the identity of the shooter, he did

not want to disclose this fact because he was fearful for his family's safety, as well as his own safety. Defendant stated that in the morning or around noon, the shooter had come to his home and told him that he had just committed a robbery and got some money. The shooter also showed him a green money bag. Defendant told the detectives he wanted to cooperate, but he needed some time to think. At the time that defendant told the detectives that the money bag was green, the detectives had not yet seen the bag or known the color of the bag.

¶ 40 Around 2:00 p.m., Detectives Rizzi and Smith along with some other detectives went to 4805 West Superior. When they knocked on the apartment complex door, one of the residents opened the front door for them. Veronica Clay's apartment door was slightly ajar. The detectives knocked, and when they received no response, they went inside. They noticed that the apartment was dark and cold. They turned on the lights and looked for Veronica. On a bedroom shelf, they saw a large key ring with keys, each key marked with the address of a different currency exchange. After being in the apartment for 15 minutes, they took the key ring and left. While inside, they noticed a pay stub for Veronica Clay, which indicated her place of work.

¶ 41 As the detectives were leaving Veronica Clay's apartment, they saw a blue, four-door Honda with no rear license plate parked out front. They took down the license plate number on the Honda, checked for Veronica at work and then returned to Area 4. Defendant was sleeping when they returned, so the detectives went home.

¶ 42 The detectives returned to Area 4 at approximately 12:00 p.m., and offered defendant food and drink. At 1:00 p.m., the detectives had an hour-long conversation with defendant. After waiving his *Miranda* rights, defendant stated that they went to Veronica's house to split up the money. When asked to explain this, defendant stated that Veronica was his sister, that she was not involved, he did not want her to be involved, and that he was very concerned about her.

Defendant admitted that at 9:00 a.m., he, Tony Williams, Clyde Williams and Roosevelt Clay were at Clyde Williams' girlfriend's house at 66th and Wolcott when Tony was talking about a robbery. All of them got into Roosevelt's car and drove to 21st and Ashland. Tony got out of the car and walked into the currency exchange. After defendant got a page, he walked into the currency exchange to make a phone call. Defendant then exited the currency exchange and walked across the street to a taco stand so he could act as a lookout for police. He saw an armored truck pull up and the guard entered the currency exchange. Defendant walked across the street to the back of the armored truck when he heard a gunshot. When he looked over, he saw Tony leaning over the victim's body with a chrome revolver in his hand. He then saw Tony pick up the guard's green bag and throw his black cotton gloves to the ground.

¶ 43 Defendant then stumbled over the curb and may have dropped his wallet at that point. Defendant jumped into the front seat of the car while Tony got into the backseat. They drove directly to 4805 West Superior in order to split up the money. Defendant had the key to Veronica's apartment and knew that no one else would be there. As they arrived at the apartment, Roosevelt removed the rear license plate from the Honda, took the child seat out of the Honda and brought them inside the apartment. They counted the money after separating it from its paper bindings. Defendant received $900.00 for being the lookout man and Roosevelt received $500.00 for being the driver. Defendant stated that he removed the guard's key ring from the green bag and placed it on a shelf. Tony removed the expended bullet casing and threw it on the bed. Defendant then picked up the casing as well as the other papers that were on the bed and put them into the green bag. He then put all of these items into a brown backpack because he wanted to make sure he did not leave any evidence at his sister's apartment. Tony made a phone call, and then he and Clyde left, taking the backpack and the rest of the money.

Roosevelt called Patricia Edwards Clay for a ride a short time later, and she dropped defendant and Roosevelt off at 929 North Willard. Roosevelt took the child seat and the license plate and put these items in the van parked on the street. At the conclusion of this statement, defendant was formally placed under arrest.

¶ 44 Roosevelt Clay, who had been formally placed under arrest, was searched by Detective Smith and was found to have $8,100.00 inside the lining of his coat. At 4:30 p.m., the detectives found $2,365.00 in defendant's pants pocket. The detectives allowed defendant to keep the money for the time being. Defendant was fed between 5:00 p.m. and 5:30 p.m.

¶ 45 A 9:00 p.m., Detectives Rizzi and Smith met with defendant again. Defendant again waived his *Miranda* rights. After a short conversation with the detectives, they all drove to various locations looking for Tony, which was defendant's idea. They were unsuccessful and returned to Area 4 at around midnight.

¶ 46 Meanwhile, at approximately 9:40 p.m., Chicago Police Detective Robert Hartmann and some other detectives executed a search warrant for a 1988 blue Chevrolet van parked in front of 929 North Willard. While they were trying to gain entry, Veronica Clay asked the detectives what they were doing. They gave her a copy of a search warrant. Inside the van they found a child car seat, an Illinois license plate, and a Honda repair manual. Forensic investigators conducted a further search of the van for fingerprints and also found insurance paper for a Honda car with a handwritten correspondence with Suzette Lee.

¶ 47 At 11:00 p.m., Chicago Police Forensic Investigator Leonard Stocker processed a 1988 Chevrolet van and a 1985 Honda Accord for fingerprints.

¶ 48 On the morning of December 24th, the detectives conversed with defendant at 9:00 a.m. for about an hour. Defendant told the detectives that when they were at Clyde Williams'

girlfriend's house the night before the shooting, Tony Williams was talking about "doing a lick." The next morning, Tony gave a loaded .32 caliber pistol to defendant and Tony kept a chrome .357 revolver. They got into the car and Tony directed them to the currency exchange, where defendant tried to make a call from a pay phone. He put his sleeve over his hand so he wouldn't leave any fingerprints. He exited the currency exchange and walked across the street to a taco stand so he could watch for the police and be back up for Tony in case anything went wrong.

¶ 49 Defendant then saw the armored truck park. When he walked across the street, he heard a loud gunshot. He stumbled and dropped his wallet. He saw Tony standing over the victim's body holding a gun in his hand. Tony then took the victim's bag, removed his gloves and threw them down. Defendant got into the front seat of the car and Tony got into the back. Roosevelt was driving the car and Clyde Williams was in the back seat. Clyde yelled at Tony, "What the f*** did you do?" Tony responded, "I did what I had to do, it was him or me." They drove to 4805 West Superior to count the money. Tony took the expended cartridge out of the gun and threw it on the bed. Defendant took the key ring out of the bag and placed it on the shelf with the intent to dispose of it later but forgot to retrieve it. Defendant returned the .32 caliber pistol to Tony. The shell casing was thrown into the green bag and placed inside a black backpack. Defendant was given $6,500.00 from the proceeds of the robbery and Roosevelt was given $5,000.00. Clyde and Tony left with the backpack and guns. Roosevelt called Patricia Edwards Clay for a ride. She drove a Mustang. Roosevelt removed the license plate from the car along with a child seat. He later put these items into a van.

¶ 50 At approximately noon on December 24th, Chicago Police Sergeant Gerald Mahon recovered $2,365.00 in cash from defendant, which had been removed from defendant's right front pants pocket.

¶ 51 Doctor Adrienne Segovia conducted an autopsy of the victim's body and determined that he died of a gunshot wound to the right side of his forehead and that the manner of death was homicide. Firearms identification expert Lisa Peloza examined the fired cartridge case recovered from the backpack and the two bullet fragments recovered from the scene. She determined that the fired cartridge was a .357 caliber. One of the fired bullet fragments was unsuitable for comparison, but the other was consistent with a .38 or a .357 caliber fired bullet. She was unable to determine whether the fired cartridge case and fired bullet fragment were fired from the same firearm.

¶ 52 Fingerprint expert Julie Wessel determined that defendant's fingerprint was found on the letter addressed to Veronica Clay. Defendant's fingerprints were also found on the passenger exterior side of the passenger front door and the interior right front door of the 1985 Honda. Tony Williams' fingerprint was found on the lock to the money bag. Tony Williams' and Clyde Williams' fingerprints were found on an envelope found inside the backpack.

¶ 53 During the investigation, detectives spoke with Suzette Lee. Lee explained that in November of 1998, she brought her 1985 blue Honda Accord to her mechanics' shop where she showed it to Roosevelt Clay to purchase. Roosevelt gave her some money up front for the car, with the understanding that he would receive title to the car once he paid for it in full. She never received the rest of the money from him.

¶ 54 Theodis Coleman, cousin to both defendant and Tony Williams, testified that in the summer of 1998, defendant bought a white Chevrolet van, but the van was registered in Coleman's name because defendant did not have identification at that time. Defendant mainly drove the van but Coleman used it sometimes. The van was registered to the address at 929 North Willard, Coleman's grandmother's address, Jean Clay. Coleman explained that his

grandmother lived at 929 North Willard and other relatives lived at 933 North Willard. On the day of the shooting, Coleman testified that the white van was parked outside his grandmother's home, but it was not working.

¶ 55 Veronica Clay, defendant's sister, testified that in December of 1998, she was living in a first-floor apartment at 4805 West Superior with her three children. On December 17th, she left to stay at her mother's house at 929 North Willard. She locked the door when she left her apartment and put her keys, which were the only ones she had, into her pocket. The next day, she could not find her keys. She never gave anyone permission to take her keys. Veronica testified that defendant sometimes stayed with their mother, but she could not recall if he had been there during the time when she was looking for her keys.

¶ 56 On the afternoon of December 22, 1998, Veronica heard a whistle outside her mother's house. When she looked outside she saw Roosevelt Clay whistling and motioning for her to come down. When she opened the door, defendant and Roosevelt Clay came into her mother's house. Veronica previously testified that they arrived to her mother's between 11:00 a.m. and 12:00 p.m. The next morning, while still at her mother's house, she saw police officers searching the white van that was parked outside her mother's house. Later in that evening, Veronica went to the police station. She told police she had never seen the letter that was addressed to her or the large key ring.

¶ 57 Patricia Edwards Clay, the wife of defendant's stepbrother, denied that she lived at 933 North Willard and did not previously remember telling a police detective that that was her address. She testified that her sister, Diane Clay, lived at that address while Jean Clay lived at 929 North Willard. While many other relatives lived with Jean Clay, she could not recall if defendant lived there. While she recalled driving a white Ford Mustang on December 22, 1998,

she did not recall if she drove that car to Veronica Clay's apartment or if she saw defendant at Veronica's apartment that day. She also could not recall if she told Decretive Rizzi that she drove to Veronica's apartment on the 22nd around noon, that she rang the door bell, that defendant answered the door, told her Veronica was not there and then asked for a ride. She also did not remember telling the detective that defendant and Roosevelt walked outside with her and Roosevelt was carrying a car seat. She could not remember giving Roosevelt and defendant a ride to 929 North Willard. After being reminded of her testimony at a previous proceeding, Patricia Clay then recalled that she drove over to Veronica's apartment around noon on the 22nd of December because she went over there to socialize with Veronica, not because someone called her over there. She also denied having a six-minute telephone conversation with anyone at Veronica's address starting at 10:57 a.m. on December 22nd.

¶ 58 Cook County Assistant State's Attorney Maria Kuriakos testified that Patricia Clay previously testified that on December 22, 1998, at around noon, she stopped at Veronica Clay's apartment at noon, rang the doorbell, and defendant opened the door. She asked if Veronica was there and he said no. As she turned around to leave, she heard defendant talking to someone. Roosevelt Clay and defendant then followed her to her car, with Roosevelt carrying a baby seat. Defendant then asked her to drop them both off at his mother's house.

¶ 59 After the evidence concluded, the jury found defendant guilty of first-degree murder and armed robbery. The trial court subsequently sentenced defendant to concurrent sentences of 50 years' imprisonment for the first-degree murder conviction and 30 years' imprisonment for the armed robbery conviction.

¶ 60 Analysis

¶ 61 I. Attenuation of Oral Statements from Illegal Arrest

¶ 62 Defendant first argues that the trial court erred when it found that his two oral inculpatory statements along with the cash found in his pocket at the police station were sufficiently attenuated from his illegal arrest such that the evidence was admissible at his retrial. Specifically, defendant argues that the evidence the trial court relied on as the basis for attenuating his inculpatory statements and cash from his illegal arrest was evidence that could have tied Veronica Clay or Roosevelt Clay to the crime, but not defendant to the crime, thereby failing to establish probable cause for his arrest. Defendant further argues that there was "no intervening event that provided a sufficient motivation for Jerry's statements such that those statements could be considered attenuated from the illegal arrest" and that "the continuous pattern of intentional misconduct by police throughout their initial investigation of this case provides further reasons to suppress this evidence." Overall, defendant argues that because evidence of his oral inculpatory statements and cash should have been suppressed at his retrial, we should reverse defendant's convictions and remand for a new trial.

¶ 63 "The fact of an illegal arrest, standing alone, does not make a subsequent confession inadmissible." *People v. Wright,* 294 Ill. App. 3d 606, 612 (1998). In general, evidence garnered by illegal means must be suppressed if the evidence has been obtained by exploitation of the initial illegality and not "by means sufficiently distinguishable to be purged of the primary taint." *People v. White*, 117 Ill. 2d 194, 222 (1987) (citing *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963)). In the case of a confession following an illegal arrest, the confession must be "sufficiently an act of free will to purge the primary taint of the unlawful invasion." *White*, 117 Ill. 2d at 222 (citing *Wong Sun*, 371 U.S. at 486). Under *Brown v. Illinois*, 422 U.S. 590 (1975), factors to be considered in determining whether a confession was the product of the illegal arrest are: (1) the proximity in time between the arrest and the confession, (2) the presence

of intervening circumstances, (3) the purpose and flagrancy of the police misconduct, and (4) whether *Miranda* warnings were given. *Brown,* 422 U.S. at 603-04; *White,* 117 Ill. 2d at 222. It is the burden of the prosecution to show by clear and convincing evidence that the confession was "a product of the defendant's free will, independent of any taint of the illegal arrest." (Internal quotation marks omitted.) *Wright,* 294 Ill. App. 3d at 612 (quoting *People v. Pierson,* 166 Ill. App. 3d 558, 563 (1988)).

¶ 64 The purpose of *Brown* is to deter blatantly unlawful arrests which produce inculpatory statements through police exploitation instead of the arrestee's exercise of free will. *In Interest of R.S.*, 93 Ill. App. 3d 941, 945-46 (1981). Thus, the degree of the illegality at the time the statement was made, as measured by (1) the extent of police misconduct and (2) the presence of intervening circumstances which enable the arrestee to make a voluntary statement as an act of free will, will usually determine whether the statement was tainted by a fourth amendment violation. *Id*.; see also *People v. Wilberton*, 348 Ill. App. 3d 82, 85 (2004). For this reason, "[c]ourts have especially emphasized the importance of intervening circumstances and police misconduct" (*People v. Roosevelt Clay*, 349 Ill. App. 3d 517, 523 (2004)), when making an attenuation determination.

¶ 65 Here, following the appellate court's finding that defendant was arrested without probable cause, the trial court ruled that events subsequent to defendant's illegal arrest sufficiently attenuated the effect of the illegal police conduct from defendant's later oral confessions and the finding of a large amount of cash in defendant's pocket. We apply a mixed standard of review in resolving whether the trial court correctly found that defendant's incriminating statements were admissible despite his illegal arrest. *People v. Pitman,* 211 Ill. 2d 502, 512 (2004). The trial court's findings of fact will not be reversed unless they are against the manifest weight of the

evidence. *Id*. However, "a reviewing court remains free to undertake its own assessment of the facts in relation to the issues presented and may draw its own conclusions when deciding what relief should be granted." *Id*. Accordingly, we review *de novo* "the ultimate question of whether the evidence should be suppressed." *People v. Salgado,* 396 Ill. App. 3d 856, 860 (2009) (citing *Pitman,* 211 Ill. 2d at 512). Applying the facts of this case to the *Brown* factors, we find defendant's incuplatory statements and the cash found in his pocket following those statements were attenuated from his illegal arrest such that they were made as a result of defendant's own free will as opposed to any police exploitation. See *Wright*, 294 Ill. App. 3d at 606.

¶ 66 Temporal Proximity of Arrest and Statement

¶ 67 The first *Brown* factor we will review is the temporal proximity between the illegal arrest and the subsequent inculpatory statements. The trial court found that the 11 hours between the illegal arrest and the inculpatory statement that occurred in this case weighed in favor of attenuation. As she stated in her oral ruling: "11 hours is not so long as to compel the defendant to confess and 11 hours is long enough to allow the defendant to reflect on the situation which the defendant did do, he was given time to do and he did reflect on what his situation was, so it was not a hurried situation in regard to his decision." We agree with the trial court judge's assessment that the temporal proximity between the illegal arrest and the inculpatory statements in this case weighs in favor of attenuation.

¶ 68 "The temporal proximity between an arrest and a confession is often an ambiguous factor, the significance of which will depend upon the particular circumstances of a particular case." *White,* 117 Ill. 2d at 223-24. A lapse of time may dissipate the taint of an illegal arrest by allowing the accused to reflect on his situation. *Wilberton*, 348 Ill. App. 3d at 86; *People v. Ollie,* 333 Ill. App. 3d 971 (2002). Here, the record shows that defendant was illegally arrested

at approximately 2:45 p.m. on December 22, 1998. Defendant took a polygraph test at 11:00 p.m. on the 22nd. Between 1:30 and 2:00 a.m. on the 23rd, the police informed defendant that his polygraph "indicated deception" and that they had recovered a backpack that contained the victim's money bag, items from the currency exchange that was robbed and a letter addressed to Veronica Clay. In response, defendant stated that Veronica Clay was his sister and that he knew the identity of the shooter, but that he need time to think about it. At this point, approximately 11 hours had passed since defendant's illegal arrest. At noon on the 23rd, after giving defendant some time to think, the police came back to speak with defendant and informed him that the victim's keys had been recovered from Veronica Clay's apartment. In response, defendant gave his first inculpatory statement. Following that inculpatory statement, defendant was searched and the police found $2,365.00 in cash in his pants pocket. At the point defendant gave the inculpatory statement and $2,365.00 in cash was found in his pants pocket, approximately 21 hours had passed since his illegal arrest. Defendant gave a second inculpatory statement on December 24th at 9:00 a.m. that was consistent with his first statement, but included additional facts about weapons that were used during the crime. From the time that defendant was illegally arrested on December 22nd at 2:45 p.m. until he gave his second inculpatory statement at 9:00 a.m. on December 24th, defendant was adequately fed, allowed to sleep, and he was not interrogated incessantly during that time. He was also left alone when he asked for time to think. As such, we find, like the trial court judge found, that defendant's confession was neither rushed nor prolonged, and during the time between the illegal arrest and the confession, defendant was treated properly.

¶ 69 Further, "where intervening circumstances are present, a long period between arrest and confession may support the inference that it was the intervening circumstance, and not the illegal

arrest, which prompted the confession. However, where no intervening circumstances are present, a long and illegal detention may in itself impel the defendant to confess." *White*, 117 Ill. 2d at 224. Because we also find that there were intervening circumstances in this case (see below), those intervening circumstances further support our conclusion that temporal proximity between the illegal arrest and the inculpatory statements in this case favor attenuation.

¶ 70 Intervening Circumstances

¶ 71 Here, the trial judge found that when defendant was confronted with evidence the victim's money bag was found with currency exchange papers that were commingled with a letter addressed to his sister, these intervening circumstances were sufficient to purge the taint of the illegal arrest. The State argues that even if this court were to find that recovery of the backpack and its contents did not amount to intervening probable cause, the additional discovery of the victim's key ring further supports the conclusion that the police had probable cause to arrest defendant before he made his incriminating statements. We find that the letter leading to the discovery of keys belonging to the victim in an apartment belonging to a party police inevitably would have discovered to be defendant's sister gave police probable cause to arrest defendant where his wallet was found near the murder victim. We further find that the confrontation of defendant with new information--the recovery of keys belonging to the victim in defendant's sister's apartment--produced a voluntary desire in defendant to confess. "An intervening circumstance is one that dissipates the taint of unconstitutional police conduct by breaking the causal connection between the illegal conduct and the confession." *Wilberton*, 348 Ill. App. 3d at 86 (2004) (citing *People v. Austin*, 293 Ill. App. 3d 784, 788 (1997)). "Intervening acquisition of probable cause is 'an important factor in the attenuation analysis,' even though it does not always assure the police did not exploit a Fourth Amendment violation."

Id. at 87 (citing *People v. Morris*, 209 Ill. 2d 137, 157-58 (2004)). "[T]he development of independent probable cause weighs heavily in favor of finding that the taint of defendant's illegal arrest had been purged prior to the time he gave his statements to the police." *Id*. (citing *Morris*, 209 Ill. 2d at 159-61). "[I]t would place an unreasonable burden on police * * * to release an illegally arrested defendant and then, based on probable cause obtained after the illegal arrest, arrest him again when he reached the sidewalk." *People v. Klimawicze*, 352 Ill. App. 3d 13, 20 (2004) (citing *Morris*, 209 Ill. 2d at 159). Illinois courts repeatedly have found intervening probable cause supports attenuation. *Wilberton*, 348 Ill. App. 3d at 86; *Wright*, 294 Ill. App. 3d at 613; *Pierson*, 166 Ill. App. 3d at 564. "The confrontation of an arrestee with new information, untainted by the illegal arrest, has been identified as an intervening circumstance that may produce a voluntary desire to confess and thereby support admission of in-custody statements. [Citation.]" (Internal quotation marks omitted.) *Austin*, 293 Ill. App. 3d at 788.

¶ 72 In this case, defendant's confessions were attenuated from his illegal arrest because (1) between the time that he was illegally arrested and the time he made the inculpatory statements, intervening circumstances established probable cause for his arrest; and (2) new evidence free from the taint of the illegal arrest prompted defendant to confess. Initially, police were aware that defendant's wallet was found near the victim's body immediately following the shooting and robbery. They were also aware from witnesses to the shooting and robbery that the crime was carried out by four offenders who were all described as black males. Based on this information alone, the police illegally arrested defendant. Once at the police station, defendant informed the police officers that he had lost his wallet about two weeks earlier on the Dan Ryan L train. Later that night, the police learned that a United Armored money bag had been recovered from the Eisenhower Expressway by the Illinois State Police along with a letter addressed to a Veronica

Clay. When defendant was informed about the discovery of the bag, he told the police that Veronica was his sister and that he knew the identity of the shooter. Defendant has not challenged the admissibility of that statement. After obtaining this information and before defendant made his first inculpatory statement, police recovered keys belonging to the victim from Veronica's apartment. Police, armed with the discovery of defendant's wallet at the scene, a letter addressed to defendant's sister that was found with property taken during the robbery, and keys belonging to the murdered victim found in defendant's sister's apartment, had probable cause to arrest defendant. Further, when police came back from Veronica's apartment after being led there by the letter, they informed defendant that the victim's keys had been recovered from the apartment. It was at that point defendant gave his first inculpatory statement.

¶ 73 "Probable cause exists when the totality of the facts and circumstances known to the officers is such that a reasonably prudent person would believe that the suspect is committing or has committed a crime." *People v. Montgomery*, 112 Ill. 2d 517, 525 (1986). Here, following the legal discovery of the backpack, the statements defendant made upon learning of the backpack, and the discovery of the victim's keys, the police had the following information: (1) defendant's wallet was found near the victim's body even though defendant claimed that he had lost the wallet on public transportation several weeks earlier; (2) according to witnesses, four black males had been involved in the robbery and shooting; (3) a backpack that contained papers from the currency exchange that had been robbed was found with a letter addressed to Veronica Clay; (4) Veronica Clay is defendant's sister; (5) defendant knew the identity of the shooter; and (6) items taken from the victim were found in defendant's sister's apartment. Once police possessed all this information, obviously, the discovery of defendant's wallet near the victim's body immediately following the shooting was much more than a mere coincidence and the police had

probable cause to arrest defendant. "Had the officers decided at this time that defendant's initial detention was illegal, they could have released him and then, based upon the probable cause that developed independently of his initial arrest, immediately arrested him again. Under this scenario, there would be no question that defendant's statements and confession would be admissible. It follows, then, that the probable cause that would support a second arrest only minutes after defendant's first arrest also serves to break the causal connection between defendant's first illegal arrest and the statements ***." *People v. Johnson*, 237 Ill. 2d 81, 94 (2010) (quoting *Morris*, 209 Ill. 2d at 159. Thus, because police had probable cause to arrest defendant after his illegal arrest, but before he made inculpatory statements, the intervening circumstances factor weighs in favor of attenuation. *Klimawicze*, 352 Ill. App. 3d at 20 (quoting *Morris*, 209 Ill. 2d at 159 ("[I]t would place an unreasonable burden on police *** to release an illegally arrested defendant and then, based on probable cause obtained after the illegal arrest, arrest him again when he reached the sidewalk.")).

¶ 74 Then, after probable cause arose, police confronted defendant with the keys found in Veronica's apartment and defendant made his first statement implicating himself in the currency exchange robbery. That the confrontation with new information untainted by the illegal arrest prompted defendant's confession also weighs in favor of attenuation. *People v. Lekas*, 155 Ill. App. 3d 391, 414 (1987) ("The confrontation of an arrestee with new information, untainted by the illegal arrest, has been identified as an intervening circumstance that may produce a voluntary desire to confess and thereby support admission of in-custody statements."). The *Lekas* court cited *People v. Finch*, 86 Ill. App. 3d 493 (1980), in which the court held that even if police did not have probable cause to arrest the defendant, his statements were properly admitted where, with regard to the intervening circumstances factor, "the confession was prompted in part

by his having been advised by officers that a gun was missing from his sister's apartment and that there were discrepancies between his statements and those of other persons as to his whereabouts." *Id.* at 415 (citing *Finch*, 86 Ill. App. 3d at 497). This case is similar to *Finch* in that, in addition to the significant time gap between the arrest and the confession and the giving of *Miranda* warnings (*Finch*, 86 Ill. App. 3d at 497), defendant in this case also confessed when confronted with information about evidence related to the offense.

¶ 75 We note that defendant makes several arguments relating to the fact that defendant's polygraph test was tainted and therefore could not serve as a basis for finding attenuation. While confronting a suspect with polygraph results is not an intervening circumstance by itself (*People v. Franklin*, 115 Ill. 2d 328, 334 (1987)), this case involved other intervening events: (a) the discovery of the backpack that contained the victim's money bag, papers from the currency exchange, and a letter addressed to defendant's sister, along with the discovery of keys belonging to the victim in defendant's sister's apartment, all of which gave police probable cause to arrest defendant; and (b) the confrontation of defendant with evidence of the crime located in his sister's apartment, which prompted defendant to confess. Regardless, the polygraph itself did not taint any statements. While defendant may have been informed about the money bag and the results of his polygraph test at the same time, defendant's response—that Veronica was his sister and that he knew the identity of the shooter—was made in direct response to the finding of the money bag with the letter addressed to his sister.

¶ 76 Defendant argues that police found the victim's keys in Veronica's apartment as the result of an illegal search and seizure and, therefore, the keys cannot be used to purge the taint of the illegal arrest for attenuation purposes. Defendant argues that illegally obtained evidence cannot be used for attenuation purposes and argues that, because the keys in this case were found

during an "illegal search" of an apartment, he can challenge the use of the keys for purposes of attenuation although he may be unable to challenge the admissibility of the keys at trial. Defendant cites several Illinois appellate court cases in support. In this regard, our supreme court's decision in *Johnson*, 237 Ill. 2d 81, is highly instructive. In *Johnson*, the defendant contended that police arrested him without probable cause when they handcuffed him while they searched a vehicle in which the defendant had recently been a passenger. *Johnson*, 237 Ill. 2d at 85-86. After police found a gun in the vehicle they formally arrested the defendant and he subsequently confessed he had used the gun to shoot at the victim. *Id.* at 86. The trial court denied the defendant's motion to quash his arrest and to suppress the handgun and his confession. *Id.* at 86-87. Our supreme court first determined that the gun obtained from the vehicle was not obtained as a result of the arrest because the arrest did not lead to the search. *Id.* at 92-93. Turning to the motion to suppress the defendant's statements made after the formal arrest, our supreme court held that "the statements were sufficiently attenuated from the alleged arrest so as to remove any possible 'taint.' " *Id.* at 93. The *Johnson* court agreed that the gun found in the vehicle provided intervening probable cause that weighs in favor of attenuation and noted that "[a]lthough the presence of intervening probable cause does not assure attenuation in every case, it is an important factor in the attenuation analysis." *Id.* at 94. Nonetheless the court held that the development of independent probable cause weighed heavily in favor of attenuation. *Id*. The court examined all of the attenuation factors and held that neither the search of the vehicle nor the defendant's statements were tainted by the allegedly illegal arrest. *Id*. at 96. Johnson argued that the gun was found during an illegal search. However, our supreme court determined that Johnson could not establish that the search of the vehicle was illegal because Johnson could not establish he had an expectation of privacy in the vehicle.

¶ 77 This case is similar to *Johnson* because Clay had no expectation of privacy in the apartment where the keys were found. The search of Veronica's apartment was not tainted by defendant's illegal arrest because the arrest did not lead to the search of her apartment. Police were lead to her apartment because they found a letter bearing its address with a money bag taken during the offense. The presence of keys taken from the victim in an apartment belonging to the sister of an individual whose wallet police found at the scene of the crime gave police probable cause to arrest that individual--defendant. The development of this intervening probable cause was independent of defendant's arrest for the reasons we have already explained. See *Johnson*, 237 Ill. 2d at 94. Each of the cases cited by defendant for the proposition that the discovery of the keys cannot serve to attenuate his confession from his arrest can be distinguished. In those cases the accused were confronted with evidence which a court had determined was discovered as a result of a violation of another person's constitutional rights. In *Roosevelt Clay*, 349 Ill. App. 3d at 525, the court held that the prosecution could not use a handwritten statement by a codefendant as an intervening circumstance attenuating the connection between the defendant's illegal arrest and his statements. In that case, the court had made a judicial determination that a violation of the relevant individual's fourth amendment right had occurred--that is, the right of the party who had the evidence suppressed in a separate proceeding, not the right of the defendant in *Roosevelt Clay* who complained of its use by police to confront him. *Roosevelt Clay*, 349 Ill. App. 3d at 528.

¶ 78 In *Austin*, 293 Ill. App. 3d at 787, the trial court found that the confrontation of the defendant with statements by three parties provided an intervening circumstance sufficient to purge the taint of the defendant's illegal arrest. The appellate court reversed. *Austin*, 293 Ill. App. 3d at 791. Like *Roosevelt Clay*, the *Austin* court was confronted with an attenuation

argument based on certain evidence where the parties who provided the evidence had asserted their individual fourth amendment rights with regard to the evidence. *Id.* at 786. However, one party who gave police information police used to confront the defendant had not been arrested and had not asserted his individual fourth amendment right with regard to his statement. The State asked the *Austin* court to look to "prior decisions in which the courts looked to the acquisition of probable cause to be an intervening factor." *Id.* at 790. The *Austin* court based its decision on the prohibition against using evidence illegally obtained from a codefendant to serve as evidence of attenuation (*Austin*, 293 Ill. App. 3d at 789-91) despite the use of some untainted evidence in the confrontation that lead to the defendant's statement at issue in that case. *Id.* at 793 (Quinn, J., specially concurring) ("When a defendant is confronted with legally obtained evidence *** and with tainted evidence ***, it is the State's burden to prove that the tainted evidence was not a factor in his decision to confess. [Citations.] The State has not met this burden in this case."). Accord *People v. Avery*, 180 Ill. App. 3d 146, 156 (1989) ("Confronting defendants with statements from each other and Stofer, *all of whom were illegally arrested*, did not constitute an intervening event which purged the taint of the illegal arrests." (Emphasis added.)). Similarly, in *People v. Beamon*, 255 Ill. App. 3d 63 (1993), codefendants had filed motions to suppress their confessions on the ground that their confessions were the result of illegal arrest. *Beamon*, 255 Ill. App. 3d at 64. The *Beamon* court held that the codefendant's statement could not be relied upon as an intervening circumstance because the codefendant's conflicting statement was the result of the codefendant's illegal arrest. *Id.* at 69-70.

¶ 79 The preceding cases are inapposite because here police did not obtain the evidence at issue illegally within the meaning of the fourth amendment and no one with a legitimate basis to do so has claimed that they did. Not every search without a warrant violates the fourth

amendment. "Fourth-amendment rights are personal, and the government violates a defendant's fourth-amendment rights by invading the defendant's *own* legitimate expectation of privacy." (Emphasis in original.) *People v. Ferris*, 2014 IL App (4th) 130657, ¶ 43 (citing *United States v. Payner*, 447 U.S. 727, 731 (1980)). In *People v. James*, 118 Ill. 2d 214, 226 (1987), our supreme court held that the defendant "may be aggrieved by the admission of the product of someone's illegal arrest, but his personal privacy rights have not been violated." *James*, 118 Ill. 2d at 226 (citing *Wong Sun*, 371 U.S. at 492). In order for an individual to claim a violation of his or her fourth amendment rights the individual must establish that he or she had an expectation of privacy in the place that was searched. *Johnson*, 237 Ill. 2d at 90 ("The defendant challenging a search has the burden of establishing that he had a legitimate expectation of privacy in the searched property."). In this case, there has been no assertion of any fourth amendment rights by anyone with a legitimate expectation of privacy in the apartment and the discovery of the keys was not tainted by defendant's illegal arrest. Although defendant alleges the search was illegal there has been no judicial finding that the search itself was illegal. Defendant did not argue that he had a legitimate expectation of privacy in Veronica's apartment and accordingly no hearing was held on that issue in the trial court and no judicial determination was made that the search was illegal. We find that defendant failed to meet his burden to establish he had a legitimate expectation of privacy in the searched property; therefore, defendant may not challenge on appeal the search of Veronica's apartment. See *Id.* Accordingly, we find that the intervening circumstances factor weighs heavily in favor of finding attenuation in this case.

¶ 80 Moreover, we note that there is a point at which the "detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost." *Brown*, 422 U.S. at 609 (Powell, J., concurring). Here, the bag that was found

on the expressway was legally obtained and had absolutely no link to defendant's illegal arrest. Rather, after a report was made that there was a dead body on the expressway, the Illinois State Police recovered the victim's money bag. When the state police were notified, they learned that the backpack contained the victim's money bag, papers from the currency exchange that had been robbed and a letter addressed to Veronica Clay. As such, it should be noted that in this case there was nothing about defendant's illegal arrest that lead to the discovery of the money bag, his wallet, witnesses' testimony that four black men were involved in the shooting/robbery, the letter, or the stolen keys, for that matter, which ultimately provided probable cause for defendant's arrest.

¶ 81 Purpose and Flagrancy of Police Misconduct

¶ 82 Next we consider the purpose and flagrancy of any police misconduct. "[A]ttenuation is less likely to be found where the police misconduct in bringing about the illegal arrest is flagrant. 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 hope that some incriminating evidence (such as the very statement obtained) might be found." *People v. Jennings*, 296 Ill. App. 3d 761, 765 (1998) (citing *People v. Foskey*, 136 Ill. 2d 66, 86 (1990)).

¶ 83 Here, although the initial arrest was found to have been without probable cause, we do not see how the police were flagrant towards defendant during that arrest or at any time thereafter leading up to the point in time he made his oral confessions. The police did not mistreat defendant during his detention, they provided him with food and drink throughout his detention, they allowed him to sleep, and they read him his *Miranda* rights each time they spoke with him. Further, defendant was not relentlessly interrogated after his arrest. "Although their

conduct fell just short of probable cause when they arrested defendant, the police officers did not exploit the illegality when obtaining defendant's statement." *Wilberton*, 348 Ill. App. 3d at 89. As properly stated by the trial court judge, "The law requires the police officers to act reasonably in making judgments based on the circumstances, common sense and the law. Those judgments may be found in hindsight to be erroneous as is the situation here. In this case the error in judgment does not, however, rise to the level of purposeful and flagrant misconduct."

¶ 84 While defendant argues that he was arrested solely to conduct "fishing expeditions," which was held to be purposeful and flagrant police behavior in *Brown* (*Brown*, 422 U.S. at 590), we do not agree. Here, although there may not have been probable cause to initially arrest defendant, at the time of his illegal arrest, the police were aware that defendant's wallet had been found near the victim's dead body immediately following the shooting. As such, while the wallet alone may not have been enough to establish probable cause for the initial arrest, it was sufficient to show that the police were not on a mere "fishing expedition" when they arrested defendant since there was at least some evidence potentially linking him to the robbery and shooting at the time of his illegal arrest.

¶ 85 Further, while defendant argues that this court already found that the police officers' behavior was flagrant with respect to his illegal arrest, and cites to *Roosevelt Clay*, 349 Ill. App. 3d 517 in support of that argument, we find that argument to be misleading. As pointed out by the State, the flagrant behavior that was indicated by the appellate court in defendant's earlier appeal occurred *after* defendant gave the two incuplatory oral statements that are at issue here. As noted above, there was no evidence of any flagrant police conduct—conduct carried out in such a manner to cause surprise, fear, and confusion—from the time defendant was arrested illegally through the time that defendant gave two oral inculpatory statements and when

$2,365.00 in cash was found in his pocket. Furthermore, defendant has not alleged any flagrant police behavior during that time. As such, because there was no allegation of and no evidence of flagrant police conduct from the time that defendant was illegally arrested to the time he gave two incuplatory statements and the police discovered $2,365.00 in cash in his pocket, we find that this factor weighs in favor of attenuation.

¶ 86 *Miranda* Warnings

¶ 87 Last we assess whether defendant was given proper *Miranda* warnings before making his inculpatory statements. Here, there is no dispute that the police gave defendant *Miranda* warnings each time they spoke with him. "Although police cannot dissipate the taint of an illegal arrest simply by giving *Miranda* warnings, the presence of the warnings prior to interrogation carries some weight." *Wilberton*, 348 Ill. App. 3d at 85. As such, this factor would weigh, at least slightly, in favor of attenuation.

¶ 88 Our assessment of the *Brown* factors as applied to the facts of this case reveals that all four factors weigh in favor of attenuation. The police had probable cause for defendant's arrest following the discovery of the money bag and the keys. Defendant's oral confessions and the cash found in his pocket were properly admitted at his retrial. Although defendant argues that it was "inconceivable" that the police did not find the cash earlier, there are no facts in the record to support that accusation. According to the record, the cash was found after defendant's first oral confession. Accordingly, we find that the trial court did not err when it found that defendant's oral inculpatory statements, which lead to the discovery of a large amount of cash in his pocket, were all admissible at his retrial because they were sufficiently attenuated from defendant's illegal arrest.

¶ 89 II. Fair Trial

¶ 90 Defendant next claims that he was denied a fair trial because the prosecutors allegedly committed multiple instances of misconduct during closing and rebuttal arguments that caused prejudice to his case. Defendant breaks the alleged errors down into three categories: misstatements of the evidence and the law; denigration of the defense theory, defense counsel and the defendant; and improper appeal to the jury's emotions. With respect to misstatements in the law and evidence, defendant argues that the prosecutor improperly stated that circumstantial evidence was just as good as direct evidence, improperly informed the jury to hold Patricia Edwards' forgetfulness against defendant; improperly stated that evidence of the wallet or the phone records on their own were enough to convict defendant; and improperly supplemented the record with additional facts including: speculation that someone was checking Veronica Clay's mail, speculation as to the reasons for the phone calls being made, that defendant handed out money like Santa Claus, the extent of defendant's knowledge of the law when he was arrested, and that defendant made Detective Rizzi aware of the shell casing that was found in the backpack from the expressway. With respect to the denigration of the defense, defense counsel, and defendant, defendant argues that the prosecutor improperly referred to the defense theory as a "fantasy" or implied that it was unbelievable, improperly referred to defendant as a "genius" and "Mr. Cool", improperly suggested that the defense counsel thought a witness was a liar, and improperly implied that defense counsel did not believe Tony Williams and Clyde Williams were involved in the crime. With respect to playing to the jurors' emotions, defendant argues that the prosecutor improperly commented that the jury should validate the victim or his partner's courage in the matter and improperly made comments aimed to arouse sympathy over the loss of the victim.

¶ 91 "[A] prosecutor is allowed considerable leeway in making closing and rebuttal arguments, and is entitled to argue the evidence and reasonable inferences drawn from that evidence." *People v. Gutirrez*, 205 Ill. App. 3d 231, 261 (1990); *People v. Armstrong*, 183 Ill. 2d 130, 145 (1998) ("Prosecutors, however, are afforded wide latitude in closing argument, and even improper remarks do not merit reversal unless they result in substantial prejudice to the defendant."). This court has held that it is entirely proper for a prosecutor to denounce a defendant's wickedness, engage in some degree of invective, and draw inferences unfavorable to the defendant if such inferences are based upon the evidence. *Gutirrez*, 205 Ill. App. 3d at 261; *People v. Bunting*, 104 Ill. App. 3d 291, 296 (1982). Further, in closing argument, the prosecution may base its argument on the evidence presented or reasonable inferences therefrom; respond to those comments by defense counsel which clearly invite or provoke a response; comment on the credibility of the defense witnesses; denounce the activities of defendants and urge that justice be administered; highlight inconsistencies in defendant's argument; and comment on defendant's absence at trial. *People v. Morrison*, 137 Ill. App. 3d 171, 184 (1985).

¶ 92 In reviewing comments made in closing arguments, this court asks whether or not the comments engender substantial prejudice against a defendant such that it is impossible to say whether or not a verdict of guilt resulted from them. *People v. Nieves*, 193 Ill. 2d 513, 533 (2000); *Gutirrez*, 205 Ill. App. 3d at 261-62 ("The dispositive question *** is whether the prosecutor's closing and rebuttal argument resulted in substantial prejudice to defendant, constituting a material factor in his conviction without which the jury's verdict might have been different."). Misconduct in closing argument is substantial and warrants reversal and a new trial if the improper remarks constituted a material factor in a defendant's conviction. *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007); *People v. Linscott*, 142 Ill. 2d 22, 28 (1991). If the jury

could have reached a contrary verdict had the improper remarks not been made, or the reviewing court cannot say that the prosecutor's improper remarks did not contribute to the defendant's conviction, a new trial should be granted. *Wheeler*, 226 Ill. 2d at 123. In determining whether a prosecutor's closing comments are prejudicial, reference must be made to the context of the language used, its relation to the evidence and the effect of the argument on the rights of the accused to a fair and impartial trial. *Gutirrez*, 205 Ill. App. 3d at 261-62.

¶ 93 There is some dispute about what standard of review applies when a reviewing a prosecutor's comments during closing or rebuttal arguments. See *Armstrong*, 183 Ill. 2d at 145 (the propriety of the prosecution's remarks is generally left to the discretion of the trial court which determination shall be followed absent a showing of abuse of discretion); but see *Wheeler*, 226 Ill. 2d at 121 ("Whether statements made by a prosecutor at closing argument were so egregious that they warrant a new trial is a legal issue this court reviews *de novo*."). However, because we cannot say that any of the comments made by the prosecutor during closing and rebuttal arguments contributed to the defendant's conviction such that, without them, the jury could have reached a contrary verdict under either standard of review, we need not determine that issue here. See *People v. Johnson*, 385 Ill. App. 3d 585, 603 (2008) ("we do not need to resolve the issue of the appropriate standard of review at this time, because our holding in this case would be the same under either standard.").

¶ 94 Here, despite any of the comments made by the prosecutor during closing and rebuttal arguments, the jury heard evidence of two inculpatory statements made by defendant, wherein he admits to his involvement in the crimes. The jury also heard evidence that defendant's wallet was found near the victim's dead body immediately following the shooting, that a backpack was found on the expressway that contained papers from the currency exchange that was robbed, the

victim's green money bag and a letter addressed to defendant's sister, which had defendant's fingerprints on it, that the victim's keys were found in defendant's sister's apartment, and that defendant had $2,365.00 in cash on him at the time he was arrested. Based on all this evidence we cannot say that any of the comments made by the prosecutor during closing and rebuttal arguments contributed to the defendant's conviction such that, without them, the jury could have reached a contrary verdict. *Wheeler*, 226 Ill. 2d at 123. The evidence of defendant's guilt was overwhelming such that, even if the prosecutor's remarks were improper, there is no basis upon which the jury might have reached a not guilty verdict. See *People v. Flax*, 255 Ill. App. 3d 103, 111 (1993) (where there was "overwhelming evidence of defendant's guilt, there is no basis for concluding that the jury might have reached a verdict of not guilty had the State's Attorney not made the improper remarks."); see also *People v. White*, 192 Ill. App. 3d 55, 61-62 (1989) (where "the complained-of remarks were improper and prejudiced defendant, we do not believe that it can be said that the jury's verdict would have been different had these remarks not been made in light of the overwhelming evidence of defendant's guilt.").

¶ 95 III. Jury Instructions and Simultaneous Trials

¶ 96 Next, defendant argues that the trial court erred when it gave the jury partial jury instructions prior to opening statements, which improperly emphasized a part of the State's case. Prior to the attorneys giving opening statements, the trial court judge agreed to instruct the jury on the law of accountability prior to opening statements. Defense counsel's objection to this was overruled. Defense counsel then requested that the trial court judge read all the jury instructions to the jury prior to opening statements, but the trial court judge refused. However, the trial court judge agreed to re-admonish the jury on the presumption of innocence at the same time he instructed the jury on the law of accountability. As such, prior to opening statements in the

matter, the trial court judge instructed the jury on the law of accountability as well as the presumption of innocence. Defendant argues that by giving these partial instructions prior to opening statements, the trial court improperly highlighted certain issues to the jury that were crucial for the State to prove.

¶ 97 Generally, a reviewing court will review jury instructions only for an abuse of discretion. *People v. Mohr*, 228 Ill. 2d 53, 66 (2008). Although there must be some evidence in the record to justify giving a particular instruction, the decision whether or not to give it is within the sound discretion of the trial court. *Id.* at 65. The trial court has the discretion to decide whether the evidence in the record raises a particular issue and whether an instruction on that issue should be given. *Id*. A reviewing court ordinarily will not reverse a trial court for giving faulty instructions unless they clearly misled the jury and resulted in prejudice to the appellant. *Schultz v. Northeast Illinois Regional Commuter R.R. Corp.*, 201 Ill. 2d 260, 274 (2002).

¶ 98 Here, prior to opening statements, the trial court judge gave an instruction on the law of accountability as well as the presumption of innocence. Illinois Supreme Court Rule 451(e) (eff. July 1, 2006) allows a judge to instruct the jury after the jury is selected and before opening statements on the issue of substantive law applicable to the case. Ill. S. Ct. R. 451(e) (eff. July 1, 2006) ("After the jury is selected and before opening statements, the court may orally instruct the jury as follows: (i) On cautionary or preliminary matters, including, but not limited to, the burden of proof, the believability of witnesses, and the receipt of evidence for a limited purpose. (ii) On the issue of substantive law applicable to the case, including, but not limited to, the elements of the offense."). Here, given that there is no dispute that the theory of accountability was at play in this case, and given that the trial court judge instructed the jurors on the presumption of innocence at the same time he instructed them on the law of accountability, we

find defendant's argument that the jury may have unduly focused on the accountability instruction to be without merit. As such, the trial court did not err when it instructed the jury on the presumption of innocence and the law of accountability prior to opening statements.

¶ 99 Defendant also argues that the trial court erred when it held simultaneous trials over defense counsel's objection, thereby prejudicing defendant's case. Specifically, defendant argues that the jury was not properly instructed on the use of two juries, that defendant's jury heard a wealth of unnecessary and irrelevant testimony, and defendant's jury was exposed to the issue of his codefendant's involvement in gangs when defendant had won his motion *in limine* to preclude gang-related evidence.

¶ 100 As a general rule, "[a]n accused does not have a right to be tried separately from his companions when charged with offenses arising out of a common occurrence." *People v. Ruiz*, 94 Ill. 2d 245, 257 (1982). In the interests of fairness, however, should it appear that an offender will be prejudiced by a joinder of defendants for trial, "the court may order separate trials, grant a severance of defendants, or provide any other relief as justice may require." *People v. Gholston*, 124 Ill. App. 3d 873, 887-88 (1984). Whether separate trials should be granted is, therefore, a matter addressed to the sound discretion of the trial court; such a decision will not be reversed absent an abuse of that discretion. *Id.*; *People v. Lee*, 87 Ill. 2d 182, 186 (1981).

¶ 101 The two-jury procedure is acceptable in Illinois " 'where a defendant is given every opportunity to present a complete defense before one jury, cannot point to any event which confused the jury or affected its ability to render a decision fairly, and the record shows that the trial judge adequately prepared the jurors for the procedure.' " *People v. Prince*, 362 Ill. App. 3d 762, 773 (2005) (citing *Gholston*, 124 Ill. App. 3d at 888). The reviewing court will not

speculate as to the impropriety of the procedure but, rather, must be shown that prejudice resulted from the dual jury trial. *Id.*; *People v. Brown*, 253 Ill. App. 3d 165, 178-79 (1993).

¶ 102 Here, the record shows that the trial court judge did instruct the jury on the use of two juries in the matter stating:

> "As you have already learned, there are over four people charged in this occurrence, and you're going to be participating in what we refer to as a double jury, so we will have two defendants on trial independently and separately, but simultaneously. Most of the evidence pertains to both defendants, so that's why very often you will have two juries in the courtroom at the same time. The jury for Mr. Williams was selected yesterday, and they are returning tomorrow morning. We had jury selection and opening statements on his case yesterday, and we will have jury selection and opening statements on Mr. Clay's case. Then we will begin with the evidence in this case."

As such, the jury was aware that multiple defendants had been charged in the crime, but there would only be juries present for two defendants. The jury was also aware that they were responsible for deciding defendant's case, and that the other jury was responsible for deciding Mr. Williams' case. Further, defendant has failed to show how any irrelevant evidence prejudiced his case. Although he mentions that gang affiliation came up during questioning on Mr. Williams' case, the questions asked were whether the witness knew that David Cook or David Clay was a member of the Ebony Vice Lord gang. Objections to those questions were sustained and no answers were given. Thus, not only were the questions not asked with respect

to defendant or the codefendant, Mr. Williams, but no answers were given to either question. Therefore, given that the trial court judge instructed defendant's jury on the use a double jury and defendant has not shown how his case was prejudiced by the use of a double jury, we do not find that the trial court abused its discretion when it allowed simultaneous but separate trials. See *Gholston*, 124 Ill. App. 3d at 887-88.

¶ 103 IV. Excessive Sentence

¶ 104 Last, defendant argues that his 50-year sentence for first-degree murder was excessive where the evidence at trial showed that he was not the shooter, where there was no evidence that defendant helped in planning to harm anyone and where it was disproportionate to the sentences received by his codefendants. We disagree.

¶ 105 Although the legislature has prescribed the permissible ranges of sentences, great discretion still resides in the trial judge in each case to fashion an appropriate sentence within the statutory limits. *People v. Wilson*, 143 Ill. 2d 236, 250 (1991); *People v. James*, 118 Ill. 2d 214, 228 (1987). The trial court must base its sentencing determination on the particular circumstances of each case, considering such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. *People v. Streit*, 142 Ill. 2d 13, 19 (1991); *People v. Perruquet*, 68 Ill. 2d 149, 154 (1977). A reviewing court gives great deference to the trial court's judgment regarding sentencing because the trial judge, having observed the defendant and the proceedings, has a far better opportunity to consider these factors than the reviewing court, which must rely on the "cold" record. *Streit*, 142 Ill. 2d at 18-19.

¶ 106 In considering the propriety of a sentence, the reviewing court must proceed with great caution and must not substitute its judgment for that of the trial court merely because it would have weighed the factors differently. *People v. Fern*, 189 Ill. 2d 48, 54 (1999). A sentence

within statutory limits will not be deemed excessive unless it is greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense. *Id*.; *People v. Cabrera,* 116 Ill. 2d 474, 493-94 (1987). While we have the power to reduce an excessive sentence, the trial court's sentencing decision will not be disturbed absent an abuse of discretion. *People v. Green*, 177 Ill. App. 3d 365, 371 (1988).

¶ 107 Here, defendant was found guilty of first-degree murder, which has a sentencing range of not less than 20 years and not more than 60 years. 730 ILCS 5/5-4.5-24 (West 1998). Because he received a sentence of 50 years, which falls within the statutory range, there is a presumption that the sentence is proper. *People v. Gutierrez,* 402 Ill. App. 3d 866, 900 (2010) (when a sentence falls within the statutory guidelines, it is presumed to be proper and will not be disturbed absent an affirmative showing that the sentence is at variance with the purpose and spirit of the law or is manifestly disproportionate to the nature of the offense.). Further, contrary to many of the assertions made by defendant, the record contained evidence that prior to the robbery, both defendant and Tony Williams armed themselves with guns, that defendant agreed to act as a look out during the robbery, and that defendant agreed to back up Tony Williams "in case anything went wrong." Further, the trial court judge noted that during the robbery, defendant "placed himself in close proximity to the entrance of the currency exchange" and was "willing and able by his being armed and being located at a location to do whatever needed to be done to effectuate the plan that had been set forth." As such, we find that the trial court did not abuse its discretion when it sentenced defendant to 50-years' imprisonment for his first-degree murder conviction.

¶ 108 While defendant also argues that his sentence was excessive in light of the sentences imposed upon his codefendants—Roosevelt Clay, who acted as the getaway driver, received 30-

years' imprisonment for his first-degree murder conviction and Tony Williams, who was the shooter, received 50-years for his first-degree murder conviction—we do not find defendant's arguments to be persuasive. While defendants similarly situated should not receive grossly disparate sentences, equal sentences are not required for all participants in the same crime. *People v. Spriggle*, 358 Ill. App. 3d 447, 455 (2005); *People v. Godinez*, 91 Ill. 2d 47, 55 (1982). A difference may be justified by the relative character and history of the codefendants, the degree of culpability, rehabilitative potential, or a more serious criminal record. *Spriggle*, 358 Ill. App. 3d at 455. It is not the disparity that controls, but the reason for the disparity. *People v. Coustin*, 174 Ill. App. 3d 824, 827 (1988). Here, the trial court judge observed the character of defendant and further heard evidence that defendant knew Tony Williams was armed with a gun at the time of the robbery and that defendant himself was also armed with a gun during the robbery, "just in case." Based on such evidence, we cannot find that the trial court abused its discretion when it sentenced defendant to 50-years' imprisonment, which was within the statutory limits and 10 years below the maximum possible sentence, on a conviction of first-degree murder. *Green*, 177 Ill. App. 3d at 371 (trial court's sentencing decision will not be disturbed absent an abuse of discretion.).

¶ 109 Conclusion

¶ 110 For all the reasons above, we affirm defendant's convictions and sentence.

¶ 111 Affirmed.