2018 IL App (2d) 150248-U
No. 2-15-0248
Order filed August 9, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Lake County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 10-CF-3625
	)	
JAMELL D. SMITH,	)	Honorable
	)	James K. Booras,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE HUDSON delivered the judgment of the court.
Justices Schostok and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: Where murder defendant's trial attorney had previously represented the intended victim of the murder, a *per se* conflict of interest existed; the trial court's bases for disregarding the polices' denial of minor defendant's mother's requests to speak with defendant during his interrogation were legally incorrect; the fact that minor defendant did not expressly waive his *Miranda* rights did not preclude a finding that he did so implicitly; sentencing issue was moot in light of intervening supreme court precedent; and remaining issues were either factual in nature and were best left for trial court to address in proper context on remand or were not likely to recur on retrial.

¶ 2 I. INTRODUCTION

¶ 3 Defendant, Jamell Smith, who was a juvenile at the time of the offense and at the time of his interrogation, was convicted of murder on an accountability theory following a jury trial in

the circuit court of Lake County. He now appeals, raising numerous points of error. First, he contends that a statement he made to police should have been suppressed for several reasons: that he never understood or waived his *Miranda* rights; that he never signed a waiver-of-rights form or verbally stated he was waiving those rights; that unrebutted expert testimony indicated that he lacked the mental capacity to understand those rights; that he was denied access to his mother, who was present at the police station during the interrogation; that a police officer, purportedly acting as the "juvenile officer," elicited an incriminating statement from him; and that the police "broke him down emotionally" before he made his statement. Second, he asserts that his lawyer labored under a *per se* conflict of interest in that he previously represented one of the alleged victims, which was called to the attention of the trial court, and that the trial court failed to take appropriate steps to address the conflict. Third, he argues that trial counsel was ineffective for failing to request an accomplice-witness instruction (the State agrees that such an instruction would have been appropriate, but contends any error was harmless). Fourth, he contends that the State artificially bolstered its case by insinuating facts not in evidence during cross-examination (and later failing to perfect impeachment) and also by mischaracterizing the testimony of a police officer during closing argument (again, the State agrees, but asserts that both errors were harmless). Defendant also raises an issue concerning sentencing; however, he acknowledges that this argument is no longer viable given intervening precedent from the supreme court. For the reasons that follow, we reverse and remand.

¶ 4 II. BACKGROUND

¶ 5 Defendant was charged by indictment with four counts of first degree murder (720 ILCS 5/9-1(a) (West 2010)) in the shooting death of Amy Williams. This offense occurred on August 23, 2010. Defendant was acquitted of the count that alleged he personally discharged the firearm

that caused Williams' death; however, he was convicted on an accountability theory. A motion for a new trial was denied on March 2, 2015, and defendant was sentenced to 40 years' imprisonment.

¶ 6 We will begin with a brief synopsis of the events to facilitate an understanding of the issues that follow. During the evening of August 23, 2010, Williams was fatally shot while she stood on the balcony of an apartment. Vernon Wright lived in the apartment above where Williams was shot. He was also on his balcony. Wright lived with Curtis Hood.

¶ 7 Earlier on the day of the shooting, Lieutenant Oliver of the Waukegan police department responded to a stabbing. Lance Nazario was the victim. Oliver recalled that defendant was present. Defendant appeared "animated." Hood was later arrested in connection with the stabbing. Hood lived with Wright on the second floor of the apartment where the shooting took place. Luis Nazario, who was involved in the shooting, is Lance Nazario's brother. The stabbing is alleged to be the motivation for the shooting.

¶ 8 On the evening of August 23, 2010, Stephen Moore brought defendant to Pierre Dorn's basement. Others were present that defendant did not know. Dorn gave defendant a black shirt and black shoes to put on. Defendant asked what was going on, and Dorn told him not to ask any questions. Dorn then brought out two guns. He gave one to Moore. They left Dorn's house, moving by backstreets. At one point, they encountered a person on a bicycle and asked him to check if there were any police in the area. The person rode forward, came back, and reported that there were not. The group then proceeded to the back of the apartment complex where the shooting occurred.

¶ 9 They could see people on the balconies of the apartments, including Wright (the intended victim) and Williams (the victim). Moore gave defendant a gun and told him to shoot. A person

named Luis put a gun to defendant's back and told defendant to "do it." Defendant pulled the trigger, but nothing happened. Someone told him to pull the top of the gun back, which defendant did (cocking the pistol). Defendant closed his eyes and fired three times. They all then ran back to Dorn's basement.

¶ 10 The shots were fired from an unlighted area of a garage in the back of the apartment complex. The police recovered a number of shell casings and one unfired bullet from that area. Three fired bullets were also recovered. A bullet found near the victim did not ballistically match the other two bullets that were recovered.

¶ 11 Additional facts, as they pertain to the issues raised by the parties, will be discussed as they are relevant.

¶ 12 III. ANALYSIS

¶ 13 We will divide the following discussion into three main sections. First, we will consider defendant's argument regarding his trial attorney's conflict of interest. Second, we will address defendant's contentions regarding the statement he made while in police custody. Third, we will comment on some additional alleged trial errors. Additionally, defendant raises one point regarding sentencing that, as he acknowledges, is no longer viable in light of intervening supreme court precedent. See *People v. Hunter*, 2017 IL 121306.

¶ 14 A. Conflict of Interest

¶ 15 A criminal defendant has a sixth amendment right to conflict-free representation. *People v. Morales*, 209 Ill. 2d 340, 345 (2005). Defendant advances two subarguments as to why he did not receive such representation. First, he contends that his trial attorney's previous representation (in another case) of the intended victim (and a potential witness) in this case constituted a *per se* conflict of interest. Second, defendant argues that the trial court took

insufficient steps to address and remedy the potential conflict. We find the first contention dispositive.

¶ 16 Prior to trial, four attorneys represented defendant. At trial, defendant was represented by Ian Kasper. Kasper had previously represented Wright on a weapons charge. Wright was the person that was alleged to be the intended victim in this case. He also was present at the altercation that allegedly motivated the shooting. Kasper represented Wright through the entire weapons case. Kasper informed the trial court of the conflict, explaining that Wright was an "important witness" and that Kasper believed he would have a conflict if he had to interview, examine, or cross-examine Wright. The trial court granted Kasper's motion to withdraw. However, on the motion of the attorney appointed to replace Kasper, Alex Rafferty, the trial court reinstated Kasper. Kasper was not present at the hearing in which he was reinstated. Kasper moved the court to reconsider. Following an off-the-record hearing regarding administrative matters as they pertained to court-appointed attorneys and outside the presence of defendant, the trial court continued Kasper's appointment.

¶ 17 We first consider defendant's contention that Kasper labored under a *per se* conflict of interest. Whether a *per se* conflict of interest exists is a question of law, subject to *de novo* review. *People v. Fields*, 2012 IL 112438, ¶ 19. Therefore, we owe no deference to the trial court's decision on this issue and may freely substitute our own judgment for that of the trial court. *People v. Davis*, 403 Ill. App. 3d 461, 464 (2010).

¶ 18 Our supreme court has identified three situations in which a *per se* conflict of interest exists: "(1) when defense counsel has a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution [citations]; (2) when defense counsel contemporaneously represents a prosecution witness; and (3) when defense counsel was a former

prosecutor who had been personally involved in the prosecution of the defendant. [citations]" *People v. Hernandez*, 231 Ill. 2d 134, 143-44 (2008). Where a *per se* conflict exists, there is no need for a defendant to show that the conflict affected counsel's performance. *People v. Spreitzer*, 123 Ill. 2d 1, 15 (1988). Unless waived by a defendant, a *per se* conflict is grounds for automatic reversal. *Morales*, 209 Ill. 2d at 345. When a *per se* conflict is involved, it is immaterial whether the trial court was advised of the conflict. See *Hernandez*, 231 Ill. 2d at 152 ("Bringing the situation to the trial court's attention would have provided the court with an opportunity to explain the circumstances and ramifications to defendant. Defendant could have made an informed decision about the situation and the conflict could have been waived had defendant so desired. Defendant was not afforded this opportunity in the case at bar because the attorneys never advised defendant or the trial court of the facts."). Defendant contends that Kasper's representation of Wright implicates the first criterion because Wright was the intended victim of the crime; the State, treating Wright as a mere witness, analyzes the issue as though the second criterion applies.

¶ 19 Before proceeding further, we must address two preliminary issues. First, as defendant concedes, he did not include this issue in a posttrial motion. As this is a constitutional issue that was actually presented to the trial court, though not in the posttrial motion, defendant contends that it is not subject to forfeiture. See *People v. Cregan*, 2014 IL 113600, ¶ 6 ("[T]hree types of claims are not subject to forfeiture for failing to file a posttrial motion: (1) constitutional issues that were properly raised at trial and may be raised later in a postconviction petition; (2) challenges to the sufficiency of the evidence; and (3) plain errors."). We agree with defendant, and we further agree that review would be appropriate under the third prong as well (assuming error exists, which we discuss below). See *People v. Massa*, 271 Ill. App. 3d 75, 84 (1995).

¶ 20 Second, we note that the State does not address—in any substantial manner—defendant's argument that Kasper's representation of Wright—*as the intended victim of the crime*—constitutes a *per se* conflict of interest.[1] The State confines its analysis to Wright as a *potential witness*. The State's failure to address this argument presents certain problems. In *First Capitol Mortgage Corp. v. Talandis*, 63 Ill. 2d 128, 133 (1976), the supreme court described how a reviewing court should proceed when an appellee fails to file a responsive brief:

> "We do not feel that a court of review should be compelled to serve as an advocate for the appellee or that it should be required to search the record for the purpose of sustaining the judgment of the trial court. It may, however, if justice requires, do so. Also, it seems that if the record is simple and the claimed errors are such that the court can easily decide them without the aid of an appellee's brief, the court of review should decide the merits of the appeal. In other cases if the appellant's brief demonstrates *prima facie* reversible error and the contentions of the brief find support in the record the judgment of the trial court may be reversed."

Talandis, of course, dealt with the failure to file a brief; here, we are confronted with a party's failure to address a key argument. In *Plooy v. Paryani*, 275 Ill. App. 3d 1074, 1088 (1995), the court explained, "When an appellee does not address arguments in [its] brief, [its] position should be equivalent to that as if [it] had not filed a brief at all." Under such circumstances, the principles of *Talandis* apply. See *People v. Bailey*, 375 Ill. App. 3d 1055, 1068-69 (2009). As

[1]The State acknowledges defendant is arguing that Kasper's prior representation of Wright should be analyzed based on Wright's status as the intended victim. The State simply states that this argument "is contradicted by case law," and, with no further explanation, goes on to consider Wright's status as a potential witness. This is not an argument in any real sense.

this court has previously observed, "We would normally treat the State's silence as acquiescence to defendant's argument." *Id*. Hence, we will apply the principles set forth in *Talandis* to this portion of the conflict-of-interest issue.

¶ 21 The dispositive question is whether Wright should be treated as the victim of the crime or as a witness. If Wright were merely a witness, Kasper's representation of him would not create a *per se* conflict of interest. Only contemporaneous representation of a State's witness rises to the level of a *per se* conflict. *Hernandez*, 231 Ill. 2d at 143. However, as a victim, Kasper's earlier relationship with Wright would engender a *per se* conflict. Our supreme court has explained:

> "Moreover, we have construed broadly the *per se* conflict rule when counsel represents both the victim of defendant's offense and the defendant himself. In general, we have not required representation of the victim to be 'contemporaneous' or 'active.' Ordinarily, conflict arises from counsel's 'association,' 'relationship,' 'commitment,' 'professional connection,' or 'some tie' with the victim, a party, or the prosecution, which is either 'prior or current' or 'previous or current.' [Citations.] We decline to impose an 'active' requirement upon this category of *per se* conflicts, as the State urges. We have clearly stated in the past that a prior relationship falls within this category. As such, no active representation is necessary and, thus, we need not inquire into the specific facts of the nature and extent of the representation to determine whether the *per se* rule applies. *Hernandez*, 231 Ill. 2d at

Clearly, if Wright was the victim of the offense with which defendant was charged, Kasper's earlier representation of him created a *per se* conflict of interest.

¶ 22 As noted, the State does not respond to defendant's argument that Kasper's representation of Wright created a *per se* conflict as Wright was a victim of the instant offense

(save in the most cursory of fashions). Moreover, this issue does not appear to us to be sufficiently simple that we could decide it without the aid of briefing by the State and without crossing into the role of advocate for the State. See *Talandis*, 63 Ill. 2d at 133. Thus, as explained above, we will apply the *prima facie* error standard here. *Id.* If defendant establishes a *prima facie* case that Kasper's prior representation of Wright created a *per se* conflict, we will reverse.

¶ 23 Of course, as it turned out, though Wright was the intended victim of the shooting, the actual victim was Amy Williams. In the first count of the indictment, it is alleged that defendant acted "with intent to kill or do great bodily harm to Vernon Wright." Moreover, trial testimony indicates that defendant and the group he was with targeted Wright in retaliation for the stabbing of Lance Nazario that had occurred earlier on the day of the shooting. Thus, it is clear that Wright was the *intended* victim.

¶ 24 In *Hernandez*, 231 Ill. 2d 134, the defendant was convicted of solicitation to commit murder for hire. Hence, the victim of that crime was not actually harmed. Nevertheless, the *Hernandez* court held that the defendant's attorney's representation of the victim gave rise to a *per se* conflict. *Id.* at 152. In this case, as in *Hernandez* with respect to the victim there, it is enough that defendant was acting with intent to harm Wright. *Hernandez* supports the application of the *per se* conflict rule here.

¶ 25 Furthermore, we observe that, though the trial court need not have been apprised of the conflict (*Hernandez*, 231 Ill. 2d at 152), the trial court in this case had before it all of the information necessary to ascertain that a *per se* conflict existed. In a pretrial hearing on March 13, 2012, Kasper informed the trial court that he had previously represented Wright. The

indictment clearly lists Wright as the intended victim of defendant's acts. Thus, the trial court knew—or should have known—that a *per se* conflict existed.

¶ 26 Accordingly, in light of Kasper's representation of Wright, the allegation in the indictment that defendant intended to kill or harm Wright, and *Hernandez*, we hold that defendant has established a *prima facie* case of error. Accordingly, we reverse defendant's conviction and remand this case for a new trial.

¶ 27 B. Defendant's Statement

¶ 28 Defendant filed a motion to suppress his statement to the police. It alleged that he did not validly waive his *Miranda* rights and that his ensuing statement was not voluntary because, *inter alia*: defendant was a minor with limited cognitive ability who the police led to believe would be released, defendant never expressly waived his *Miranda* rights in writing or otherwise, the police denied him access to his mother, and they provided him with an inadequate juvenile officer. A hearing was held on the motion on March 3, 2014, where the following evidence was presented.

¶ 29 The State first called Detective Andy Ulloa, of the Waukegan police department. Ulloa testified that he became involved in this case "toward the end of the investigation." He interviewed Luis Nazario at the police station. Luis provided information pertaining to the Williams case. Ulloa was then assigned to assist in locating defendant. Defendant had been implicated in the homicide by Luis. Stephan Moore was also implicated. Ulloa, along with Lieutenant Oliver and Detective White, went to "pick up" defendant. As they approached the residence where defendant lived, they observed him leaving in an automobile. The officers were wearing civilian clothes and drove an unmarked vehicle. They followed the automobile defendant was riding in and requested a marked police car to assist them. Officer Biegay arrived in a marked car and effectuated a traffic stop. Ulloa made contact with defendant and requested

he come to the police station because Ulloa wanted to speak with him. Defendant agreed, stating he already knew what it was about. Ulloa testified that he never told defendant that defendant was required to get out of the vehicle he was riding in or come to the police station. Ulloa then escorted defendant to the unmarked police car, and they proceeded to the police station. Prior to placing defendant in the police car, Ulloa conducted a pat-down search. Defendant was not handcuffed. Ulloa sat next to defendant in the back seat. Defendant stared out the window during the trip, and it sounded like he was singing.

¶ 30 They arrived at the Waukegan police station at approximately 6 p.m. Ulloa guided defendant to the juvenile detective bureau. Ulloa testified that he told another officer to prepare an interview area with a video and audio recording device. Defendant was not handcuffed or restricted while he waited for the interrogation. At no time were weapons drawn on him. Ulloa spoke with Detective Schletz "and advised him that he would serve as [defendant's] juvenile advocate." Ulloa secured his weapon prior to the interrogation. He wore plain clothes, with his badge on his hip. Defendant was 16 years old at the time. Schletz is a certified juvenile officer, as is Ulloa. However, Ulloa explained, he could not act as the juvenile officer as he "was going to be doing the interview." He "could not do both roles."

¶ 31 Ulloa testified that the interview began about 6:53 p.m. Ulloa and Schletz escorted defendant to the interrogation room. The recording equipment was working at the time defendant entered the room. The video recording shows Ulloa giving defendant his juvenile *Miranda* warnings. Juvenile warnings contain two additional notifications pertaining to defendant having an opportunity to notify his parents and that the matter could be transferred to adult court. Ulloa examined the form he read to defendant and stated that he (Ulloa) filled out the top portion of it. Further, Ulloa placed his own initials next to each warning. Ulloa also

signed the bottom of the form after he read it to defendant. Ulloa testified that defendant then agreed to speak with them and that this is shown on the video tape. Defendant did not sign this form. Ulloa testified that they did not need to get his signature. The recording was then admitted into evidence.

¶ 32 Ulloa testified that towards the end of the interrogation, at about 7:49 p.m., he showed defendant a photographic lineup. Defendant identified Stephan Moore. He identified another individual as "Pierre" in a second such lineup. In a third lineup, he identified an individual as "Taco's brother." The individual was actually Luis Nazario. Defendant could not identify anyone in a fourth lineup.

¶ 33 On cross-examination, Ulloa acknowledged that he knew defendant to be a high school student in October 2010. He had no reason to believe defendant could not read or write English. At the time Ulloa went to pick up defendant, he had information that defendant had shot and killed a woman. Nevertheless, Ulloa stated that he did not handcuff defendant. Prior to the interview of defendant, Schletz had already interrogated Stephan Moore and possibly Pierre Dorn. As the juvenile officer in defendant's interview, it was Schletz's job to look out for defendant's rights. He was supposed to advocate for defendant. In that regard, Schletz explained his role to defendant, asked him if he needed anything, and told defendant he could ask him any questions. Schletz told defendant to let him know if he didn't understand something. Schletz and defendant were alone for a time in the interrogation room.

¶ 34 When defendant stated he did not understand a right, Schletz merely repeated it verbatim. Ulloa never asked defendant if he wished to remain silent, only if he understood that he could. After defendant responded, Ulloa initialed the waiver of rights form. Ulloa never handed the form to defendant or gave him an opportunity to read it or initial it himself. Ulloa repeated this

process with the remaining rights on the form. He never asked defendant if he wanted an attorney or if he wanted his mother present. Ulloa never told defendant that his mother was present at the police station asking to speak with him, as Ulloa was not aware that she was there. He denied that he later learned from Lieutenant Oliver that she was at the station at 7 p.m. However, when shown a copy of Lieutenant Oliver's report, he agreed that it indicated that defendant's mother was present at that time.

¶ 35 Ulloa agreed that he never read the portion of the *Miranda* form that stated that it was a "Waiver of Rights" or that the rights had been explained to defendant and defendant understood them. He also never gave defendant an opportunity to read those portions of the form. Further, he did not read to defendant the part of the form stating that all his questions regarding his rights had been answered. Ulloa testified that he did place the form on the table in front of defendant, though not necessarily facing him. Ulloa later clarified, "[I]t wasn't in front of him" (he later agreed that the video showed that the form was in front of defendant for only three to four seconds). Ulloa never asked defendant if he was willing to answer questions. He did not read the portion of the form to defendant that stated, "I do not want a lawyer at this time?" Ulloa never asked defendant if he wanted a lawyer, and defendant never asked for one. He further did not read defendant the part of the form stating that defendant understood what he was doing and that no coercion had been used against defendant. He never asked defendant to sign the form, and the section where defendant would sign it is blank.

¶ 36 Ulloa testified that Schletz, acting as the juvenile officer, corrected Ulloa when he used an incorrect lineup form. Schletz left the room to get a pen and to get defendant tissues. He also got defendant a drink and a Big Mac. Schletz told defendant to speak up at one point and asked defendant to clarify an answer at another.

¶ 37 Ulloa knew that defendant was in high school, but he did not know which school defendant attended. He also did not know what sorts of classes defendant was taking. At the start of the video recording, defendant states that he thought that they had been pulled over because the driver of the car in which he was riding was swerving. Ulloa agreed that it therefore appeared that defendant did not know the actual reason he had been brought to the police station. To Ulloa's knowledge, defendant had never had an opportunity to read a *Miranda* form prior to the interrogation.

¶ 38 On redirect-examination, Ulloa testified that defendant never asked to read the *Miranda* form. Ulloa never kept defendant from reading the form. Ulloa interpreted defendant's saying "uh-huh" as an indication that he wished to proceed with speaking to him after Ulloa stated, "Jamell, I'm going to talk with this case about you [*sic*]" ("[*sic*]" in original transcription). Further, defendant did not ask to see his mother until the end of the interrogation. The interrogation occurred seven days before defendants seventeenth birthday.

¶ 39 On recross-examination, Ulloa stated he could read the waiver of rights form in a few seconds, but then added that he was not sure if it could be done in less than five seconds. Ulloa stated the only important part of the *Miranda* waiver form is the rights themselves. After Ulloa's testimony concluded, the State rested.

¶ 40 The defense then called defendant's mother, Shavana Valencia Smith-Durham. She testified that she ultimately saw defendant at the Waukegan police station on October 21, 2010 between approximately 7 and 8 p.m. Prior to this time, she received a telephone call at work from a friend of defendant informing her that defendant had been taken to the police station. She left work and went directly to the police station. When she arrived at the police station, she spoke with a police officer at the front desk. A detective came out from the back of the station to

speak with Smith-Durham. She asked the detective what her son was doing at the station—identifying defendant by name. He stated that defendant was "just there looking over photos and going through computer pictures because he was familiar with different people by nicknames as well as real names." He further said that defendant was not under arrest and that Smith-Durham should return in 20 to 30 minutes, as defendant would be ready to go home. Smith-Durham told him that she wanted to see her son. They did not allow her to talk with defendant.

¶ 41 Smith-Durham initially arrived at the police station at about 6 p.m. She left and returned about 30 minutes after she finished speaking with the detective. She again spoke with the same detective and again asked to see defendant. The detective stated that defendant was not done looking at photographs. Smith-Durham insisted on seeing her son, and the detective "kept reassuring [her] that everything was fine." He said defendant would be ready to go home in about 30 minutes. He also told Smith-Durham that she could not see defendant at that time. This occurred before 7 p.m. on October 21, 2010. Her second visit to the police station lasted about 15 minutes, and she then left to see her husband.

¶ 42 Smith-Durham later returned to the police station a third time. It was sometime after 7 p.m. The detective again came out to speak with her, this time accompanied by another officer. She was finally allowed to see defendant. She stated she wanted to take him home, but an officer said she would not be allowed to do so as defendant had confessed to a murder.

¶ 43 At the time of this interrogation, defendant was 16 years old. He left Waukegan High School and attended the Jen School in the eleventh grade for both academic and behavioral reasons. Defendant could read, Smith-Durham testified, but his "reading level wasn't good at all." He could read and write "with help." In fourth or fifth grade, an individualized education plan (IEP) was developed for defendant. Defendant was placed in a special education program

in the fourth grade for reading, writing, and math. He remained in special education programs until his arrest.

¶ 44 On cross-examination, Smith-Durham explained that during her first visit to the police department, she spoke to the detective in a hallway. After leaving the first time, she went home. Smith-Durham returned to the police station after a brief stop at her house to check on another child. She was accompanied by several family members, including her mother. Only Smith-Durham spoke with the detective. Between her second and third trips to the police station, she went to a local hospital to speak with her husband, who was a patient. On her third visit to the police station, the detective with whom she had previously spoken took her to speak with two other detectives. One of them told her that defendant had confessed to a murder. She was then allowed to see defendant at about 8 p.m. A police officer remained in the room with Smith-Durham and defendant. Defendant was wearing his school uniform. She observed no marks on defendant. After 5 to 10 minutes, one of the detectives "came and got [her] when they were ready for [her] to leave."

¶ 45 On redirect-examination, Smith-Durham stated that she was not positive what defendant was wearing when she spoke to him after the interrogation. Her visit with defendant concluded because one of the detectives told her to leave. She asked for more time with her son, but a detective told her that "really he didn't have to let me go back to talk to him the first time."

¶ 46 Defendant then called Dr. Karen Chantry. Chantry testified that she is in private practice, doing "psychological evaluations for the criminal court." She had been in private practice for three years. Prior to that, she worked for Lake County court services as a psychologist. At the time of the hearing on defendant's motion to suppress his statement, she had performed about 100 evaluations, split approximately evenly between being for the State and the defense.

Chantry testified that she previously opined as to whether a defendant was competent to waive *Miranda* rights. She uses a psychological instrument developed by Dr. Thomas Griso. She had used the instrument 12 times, and on all but 2 occasions, it indicated that the defendant she was evaluating was competent to waive *Miranda*. On those two occasions, her testimony was permitted in Lake County felony trials. The GRISO instrument has been accepted in the courts of several states. She received formal training in using the instrument, for which she was subsequently certified. The trial court recognized Chantry as an expert in psychology.

¶ 47 Chantry met with defendant on two occasions in the Lake County jail for a total of six hours. She performed a clinical interview, which included health, substance-abuse, and psychological history. She gave defendant an I.Q. test, the GRISO test and the WAIS3 test (Wechsler Adult Intelligence Scale). She reviewed police reports and defendant's IEP. She observed the recording of the interrogation in which defendant confessed. She also reviewed an achievement test that had been given to defendant about a month before the interrogation. He scored "well below average on verbal comprehension" and below average in other areas. He did better on math. Her testing was consistent with this evaluation.

¶ 48 On the WAIS3, defendant scored in the low-average range. Verbal comprehension was "very low," at the "bottom end of low average." His score was in the twelfth percentile (meaning 88% of people score higher than defendant). Defendant scored average on a memory component, but below average on five other subtests. Chantry opined that defendant's test results were valid, as they were consistent with earlier achievement testing.

¶ 49 On the GRISO instrument, defendant responded "be quiet" when asked what the right to remain silent was. Chantry said this entitled him to "partial credit" and that he could not elaborate further. Chantry acknowledged that she evaluated defendant when he was 20 years

old, and the interrogation occurred when he was 16. Considering his age and I.Q., defendant still scored below the mean.

¶ 50 The GRISO instrument does not specifically address the additional warnings defendant was given as a juvenile. Chantry asked him about these separately. One concerns the transfer of a juvenile case to adult court. When she asked defendant about it, he stated that he did not understand because "it is not something that happened to me." Defendant told Chantry that the juvenile officer was sort of like a lawyer for him. Defendant reported to Chantry that he had been knocked unconscious several times. She stated that she would want verification, but that she "might give it some credence."

¶ 51 Chantry opined that defendant did not understand the *Miranda* warnings "very well." She added, "he understands to some degree, but not entirely." She further opined that at the time of the interview, he "really did not understand." She noted that defendant gave up on asking questions after the police officers merely repeated the warnings when defendant asked for clarification. Moreover, at the time of the interrogation, defendant did not understand what it meant to waive his rights. Also, given that defendant never signed a waiver or verbally expressed a desire to waive his rights, Chantry opined that he did not, in fact, waive them. She also opined that defendant's statement was not voluntary.

¶ 52 On cross-examination, Chantry explained that while the GRISO Instrument does not contain the juvenile warnings defendant received, it is used to evaluate juveniles. Defendant is "not what we used to call mentally retarded." Defendant does not have any impairments with "naming, immediate memory, ability or orientation." Chantry observed the recording of the interrogation and noted no police brutality or raised voices. She never heard defendant ask for a lawyer, and he did not ask to speak to his mother until after he made his statement. When

defendant began speaking during the interrogation, he immediately admitted to shooting the victim. Defendant was crying, and he said, "[Y]eah, I did it."

¶ 53 Chantry testified that defendant had previously been arrested for fighting. On those occasions, his mother was called and he had been allowed to go home. It was not clear whether he had been actually arrested. The State presented Chantry with some court documents it alleged were authored by defendant. Chantry stated that they sound "better than something even [she] would write."

¶ 54 On redirect-examination, Chantry stated she did not know who authored the documents in the court file that the State had shown her during cross-examination with one exception. There was one letter to the court that appeared to be in defendant's handwriting and contained misspelled words (she noted that "defendant" was not spelled correctly). Defendant told Chantry that before the interrogation started, he had told the police that he wanted his mother present.

¶ 55 The trial court denied defendant's motion to suppress. It stated that it considered Chantry's testimony; however, "in terms of weight, it does not live up to the obvious exhibition of the defendant's actions on the tape [*sic*] on the taped statement that he gave." It continued, "There was no evidence whatsoever of the defendant not understanding, not being able to communicate and not to verbalize." It is not necessary, according to the trial court, for the police to assess defendant's mental capacity. Moreover, the trial court added, substantial compliance with the language of the *Miranda* warnings is sufficient. The trial court then concluded that the police sufficiently advised defendant of those rights. Defendant "gave a verbal response or nodding [*sic*] and indicating [*sic*] that he understood those rights." The trial court placed primary importance on the videotape in coming to its conclusions.

¶ 56 The trial court then stated that it did not need a psychologist to explain that "defendant cannot mean yes when he said yes." It questioned whether defendant's low-average I.Q. meant he could not understand his rights. The trial court stated that Chantry did not know whether defendant was malingering, as she did not apply any malingering tests. The trial court also cited its observations of defendant in the courtroom and the "legal writing defendant had written." It therefore rejected Chantry's testimony.

¶ 57 The trial court went on to hold that, based on the videotape and by a preponderance of the evidence, defendant was given and did understand his rights. There was no evidence of coercion. By speaking with the police, "defendant gave an indication that he waived those rights." Defendant never manifested any reluctance to speak to the police and his will was not overcome. The trial court found that the juvenile officer helpfully explained a few things to defendant and never "interfered with the interrogation."

¶ 58 Regarding defendant's mother, the trial court found there was no indication as to when she arrived at the police station or where defendant was when she did. There was also no indication that the interrogating officer was aware of her presence. Moreover, defendant did not request her presence before he made his statement, though the trial court acknowledged defendant was a minor at the time. The trial court made no finding concerning defendant's mother's request to see him and did not consider the significance of this fact.

¶ 59 Generally, to be admissible, a *Miranda* waiver and a resulting confession must be voluntary. *People v. James*, 2017 IL App (1st) 143391, ¶ 129. The concept of "voluntariness" includes the issues of whether the waiver and confession were made knowingly and intelligently. *People v. Braggs*, 209 Ill. 2d 492, 505 (2003). The State bears the burden of proving a confession was voluntary by a preponderance of the evidence. *Id*. Further, "where the defendant

is a juvenile, the greatest care must be taken to assure that the statement was not coerced or suggested, and that the statement was not the result of ignorance of rights or of adolescent fantasy, fright, or despair." *People v. Richardson*, 234 Ill. 2d 233, 254 (2009). In assessing whether a confession was voluntary, a court must consider the totality of the circumstances. *In re G.O.*, 191 Ill. 2d 37, 54 (2000); *People v. Prude*, 66 Ill. 2d 470, 475 (1977) (quoting *People v. Johnson*, 44 Ill. 2d 463, 468 (1970)) (" 'The determination of the question whether or not a confession is voluntary depends not on any one factor, but upon the totality of all the relevant circumstances.' "). On review, we apply the manifest-weight standard to the trial court's factual and credibility findings. *People v. Slater*, 228 Ill. 2d 137, 149 (2008). Such findings will be disturbed only if an opposite conclusion is clearly evident. *People v. Bulman*, 212 Ill. App. 3d 795, 801 (1991). However, regarding the ultimate constitutional question of whether the confession was voluntary, we conduct *de novo* review. *People v. Kolakowski*, 319 Ill. App. 3d 200, 212 (2001).

¶ 60 Defendant raises a number of issues regarding his interrogation by the police. He initially contends that he did not validly waive his *Miranda* rights and that his ensuing confession was not voluntary. In support, defendant points to expert testimony indicating that he did not understand his rights or waive them. Moreover, he never expressly relinquished those rights, verbally or in writing. Additionally, the police never informed defendant that his mother was present at the police station or allowed her to talk to him prior to his confession, despite her requests to speak with him. Further, defendant contends that the officer purportedly acting as juvenile advocate actually elicited an incriminating statement from him. Finally, according to defendant, the police "broke him down emotionally" before he made his statement. We do find certain aspects of defendant's interrogation problematic and will address them serially. Though

we are reversing on the conflict-of-interest issue, to the extent that issues concerning the interrogation are likely to recur on retrial, we will comment on them here. *People v. Jones*, 105 Ill. 2d 342, 353 (1985).

¶ 61 1. Defendant's Mother's Presence

¶ 62 Regarding the interrogation, the first and perhaps most significant issue is the police's handling of defendant's mother's presence at the police station and her requests to see defendant, as well as the trial court's subsequent analysis of this issue. Defendant's mother testified that she was at the police station on the evening defendant was interrogated, arriving first at about 6 p.m., returning 30 minutes later, and returning for a final time sometime after 7 p.m. Her testimony is corroborated by a police report that states she was at the police station at 7 p.m. The trial court found this inconsequential, as defendant did not ask to see his mother and the interrogating officer was not aware of her presence.

¶ 63 Generally, "[t]he presence or absence of the parent is a factor in evaluating the voluntariness of a statement or confession under the totality of the circumstances test." *People v. Brown*, 182 Ill. App. 3d 1046, 1053 (1989). Furthermore, "where they indicate an interest by their presence, parents should be allowed to confer with their child before, and to be present during, any questioning." *Id*. Here, it is undisputed (in fact, confirmed by police records) that defendant's mother came to the police station and she expressed a desire, not only by her presence but by actually requesting, to speak with her son. Under such circumstances, a presumption arises that the minor's will was overborne. *In re J.J.C.*, 294 Ill. App. 3d 227, 237 (1988); see also *People v. Robinson*, 301 Ill. App. 3d 634, 642 (1998).

¶ 64 One of the reasons the trial court articulated for not applying this presumption is that defendant did not request to speak with his mother. This is simply not the law. In *J.J.C.*, 294 Ill.

App. 3d at 237, this court rejected the State's argument that the fact that a minor stated he did not want his parents present vitiated the fact that "the police *** clearly frustrated respondent's parents' attempts to confer with their child." The *J.J.C.* court noted that the parents also had an interest "to confer with their child before questioning" independent of what the minor wanted. *Id*; see also *People v. Griffin*, 327 Ill. App. 3d 538, 546 (2002). In this case, that defendant did not state that he wanted to speak with this mother does not diminish the fact that she manifested a desire to speak with him. Thus, even if defendant did not ask to speak with his mother, this was not a proper basis to disregard his mother's presence at the police station during the interrogation or her attempts to see him.

¶ 65 The trial court also based its ruling on the fact that the interrogating officer (Ulloa) did not know of defendant's mother's presence, as no other officer communicated this fact to him. However, it is clear that Lieutenant Oliver was aware of her presence, as that fact appears in a report he authored. Thus, the question becomes whether Oliver's failure to communicate this information to Ulloa somehow excuses the police conduct at issue here.

¶ 66 We conclude that it does not. First, Oliver, being aware of defendant's mother's presence and the fact that he knew the interrogation was being conducted, had a duty to facilitate defendant's mother's request. In *Griffin*, 327 Ill. App. 3d at 546, the court analyzed the role of the police chief in thwarting the parents' requests to see their son, who was being interrogated. There is no indication that the chief played any role in the interrogation itself. Thus, what was important was the chief's interference with the parents' attempts to confer with their son. The chief's actions in *Griffin* are similar to Oliver's actions here. Neither the trial court nor the State identify any sort of good-faith exception that would apply to Ulloa's conduct. Indeed, we are

aware of no principle of law that would allow the police to escape their obligations to juvenile detainees through such an artifice.

¶ 67 In short, the trial court erred in disregarding defendant's mother's actions based on defendant's refusal to request her presence. Moreover, the interrogating officer's alleged ignorance of her presence was not a valid basis to ignore her presence. As explained above, this is not a reason in itself to suppress defendant's statement; rather, it is one factor to consider in assessing the totality of the circumstances. *Brown*, 182 Ill. App. 3d at 1053. On remand, the trial court should give these facts their proper due in assessing the totality of the circumstances.

¶ 68 2. Implied Waiver

¶ 69 Defendant next argues that he never validly waived his *Miranda* rights. Nowhere in the video recording of the confession does defendant waive those rights. Further, he never signed the waiver form. On the other hand, those rights were read to him. As we are remanding on other grounds, we express no opinion on factual issues surrounding defendant's purported waiver; we limit our consideration to the question of whether a juvenile can make an implied waiver of his *Miranda* rights. Undoubtedly, that the police did not expressly seek a formal waiver from defendant is problematic and weighs in defendant's favor. See *Brown*, 182 Ill. App. 3d at 1052 ("In reaching our conclusion, we also rely on the undisputed fact that neither the police officers nor assistant State's Attorney who interrogated Brown obtained his signature on a rights waiver form. Surely, it must be apparent to law enforcement officers that a defendant's signature on such a form would be of great value in refuting a later claim that he had not knowingly and intelligently waived his *Miranda* rights before making an inculpatory statement.").

¶ 70 However, we decline to hold that the mere fact that a defendant did not expressly waive his *Miranda* rights is dispositive.[2] The failure to request or obtain an express waiver allows, but does not compel, an inference that a defendant did not validly waive his *Miranda* rights. *Id*. at 1053. In *North Carolina v. Butler*, 441 U.S. 369, 376, the Supreme Court held that it was not necessary for a criminal defendant to expressly waive *Miranda* rights for the waiver to be valid, It explained, "Even when a right so fundamental as that to counsel at trial is involved, the question of waiver must be determined on 'the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.' " *Id*. at 463 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). Defendant points out that the implied-waiver principle has never been expressly extended to minor defendants. We note that it has also not been limited from such application.

¶ 71 Defendant contends that allowing implied waivers of *Miranda* rights from juveniles would be in tension with the principle that "greatest care" must be taken to assure that the confession was not coerced or suggested and that " 'it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.' " *People v. Simmons*, 60 Ill. 2d 173, 180 (1975). However, our supreme court has held that juvenile confessions are assessed, like adult statements, using the totality-of-the-circumstances criterion. *E.g.*, *In re G.O.*, 191 Ill. 2d 37, 55 (2000). We see no basis in supreme court precedent to impose a prophylactic requirement such as a *per se* rule suppressing all statements made without an express waiver. We trust that the

[2]The current version of section 103-2.1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/103-2.1 (West 2018)), which defines certain rights of juveniles subject to interrogation, was not in effect at the time of defendant's statement.

trial courts of this State can and will take the "greatest care" in evaluating statements made by minors in police custody.

¶ 72 In sum, this is one factor for a court to consider in assessing the totality of the circumstances. Doing so is a proper task for the trial court on remand.

¶ 73 3. The Juvenile Officer

¶ 74 Defendant also complains of the actions of the juvenile officer required by section 5-405(2) of the Juvenile Court Act of 1987 (705 ILCS 405/5-405(2) (West 2010)). There is no requirement that a juvenile officer be present while a minor is interrogated; however, it is a "significant factor" to consider in the totality-of-the-circumstances analysis. *Kolakowski*, 319 Ill. App. 3d at 213. Here, the officer was present; however, defendant contends that the officer (Detective Schletz) departed from the role of juvenile officer by eliciting an incriminating statement from defendant.

¶ 75 In *People v. Murdock*, 2012 IL 11232, ¶ 49, our supreme court stated, "[The police officer] could not be the lead investigator interviewing defendant while at the same time being a juvenile officer." Similarly, in *People v. Griffin*, 327 Ill. App. 3d 548, the court observed:

> "[The police officer] did not remain a neutral observer but, rather, worked against defendant's interests. While an investigator's role is to interrogate witnesses and collect evidence, it is clear that the role of a youth officer is to act as a concerned adult interested in the juvenile's welfare. A youth officer cannot be adversarial or antagonistic toward the juvenile."

Defendant point out that Schletz encouraged defendant to "let it out" as defendant was crying in the interrogation room. Defendant responded by stating he did not mean to kill the decedent.

¶ 76 Despite defendant's attempts to portray Schletz's actions as an attempt to elicit an incriminating statement, Schletz's conduct is ambiguous. It is unclear whether Schletz was trying to get defendant to incriminate himself or simply telling defendant that it was okay to cry. These, of course, are questions of fact, and the trial court can address them on remand.

¶ 77 4. Other Considerations

¶ 78 Defendant makes a number of additional arguments concerning his statement. These arguments concern issues that inform the totality-of-the-circumstance analysis, but do not constitute errors of law *per se*. They include issues such as defendant's claim that the trial court rejected unrebutted expert testimony, that the police overbore his will, and that defendant never actually waived his *Miranda* rights. Such issues concern fact-oriented rather than legal determinations and are best left for the trial court to reconsider, placing them in the proper context by taking into account what is set forth herein.

¶ 79 For example, defendant takes issue with the trial court's rejection of unrebutted expert testimony concerning his ability to understand the *Miranda* warnings. Essentially, defendant is arguing that the trial court should have attributed greater weight to this testimony. His two arguments on this point are that the trial court erroneously believed defendant authored some *pro se* legal filings that showed his ability to comprehend legal issues and that it did not believe that the expert testimony offered by defendant was helpful in analyzing the recording of defendant's statement. Thus, the trial court's reasons for rejecting this testimony were not *legally* erroneous. Compare this to the issue discussed above concerning defendant's mother's attempts to speak with him, which the trial court discounted for the *legally* irrelevant reasons that defendant did not ask to speak to his mother and that the interrogating officer was unaware of her presence. In the latter case, a mistake of law was made, in the former, the alleged mistakes are factual in nature.

Such errors will be left for the trial court to reconsider, as we are remanding this cause regardless, due to defendant's attorney's *per se* conflict of interest.

¶ 80 On remand, then, the trial court should, if the issue arises again as is likely, reconsider the totality of the circumstances surrounding defendants purported waiver of his *Miranda* rights and the ensuing statement. In so doing, it should take proper account of defendant's mother's request to speak with her son as well as the other issues discussed above.

¶ 81 C. Other Trial Issues

¶ 82 Finally, defendant raises a number of issues about the conduct of the trial. First, he asserts that trial counsel was ineffective for failing to tender an accomplice-witness instruction where it was warranted by the evidence. See *People v. Caffey,* 205 Ill. 2d 52, 116 (2001). Second, defendant points out that the State attempted to impeach him with a statement he allegedly made to the police indicating that earlier on the day of the shooting, he and Lance Nazario went to fight some people where Lance ended up getting stabbed. Defendant denied making such statements, and the State did not perfect impeachment. See *People v. Evans*, 2016 IL App (3d) 140120, ¶ 33. Third, the State argued that Lieutenant Oliver testified that he heard defendant vow revenge for the stabbing of Lance Nazario when, in fact, Oliver gave no such testimony. *People v. Jeter*, 247 Ill. App. 3d 120, 128 (1993).

¶ 83 The State agrees with all three assertions; however, it contends that given the overwhelming nature of the evidence, these errors were all harmless. As we are reversing on other grounds, we need not consider whether these errors were sufficiently prejudicial to warrant reversal. Having identified them, we trust they will not be repeated on remand.

¶ 84 IV. CONCLUSION

¶ 85 In light of the foregoing, we reverse defendant's conviction and remand this cause for further proceedings consistent with the view expressed above. As the evidence presented is sufficient to sustain defendant's conviction, double jeopardy does not bar a retrial. *People v. Olivera*, 164 Ill. 2d 382, 393 (1995) ("Although the double jeopardy clause precludes the State from retrying a defendant after a reviewing court has determined that the evidence introduced at trial was legally insufficient to convict, the double jeopardy clause does not preclude retrial of a defendant whose conviction has been set aside because of an error in the proceedings leading to the conviction. [Citation.] Moreover, retrial is permitted even though evidence is insufficient to sustain a verdict once erroneously admitted evidence has been discounted, and for purposes of double jeopardy all evidence submitted at the original trial may be considered when determining the sufficiency of the evidence. [Citations.]").

¶ 86 Reversed and remanded with instructions.