

No. 95-1378

IN THE
ILLINOIS APPELLATE COURT
FIRST DISTRICT, FIRST DIVISION

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

BARNEY LONZO

Defendant-Appellant.

Appeal from the Circuit Court of Cook County,
No. 92 CR 23762 —Joan Corboy, *Judge.*

**BRIEF AND APPENDIX
OF DEFENDANT-APPELLANT**

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ORAL ARGUMENT REQUESTED

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BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

I. INTRODUCTION

Defendant was found guilty of unlawful use of a weapon by a felon, contrary to 720 ILCS 5/24-1.1. The question raised on the pleadings is whether the defendant could be prosecuted for both the actual possession of a handgun and the constructive possession of a shotgun in a single count information charging the possession of a firearm "on or about his person."

II. STATEMENT OF JURISDICTION

This is a direct criminal appeal, in accordance with Supreme Court Rule 603.

III. STATEMENT OF FACTS

A. Nature of the Proceedings Below

On October 3, 1992, the defendant Barney Lonzo was charged in two complaints with unlawful use of a weapon by a felon: the first charge accused the defendant of having knowingly possessed a shotgun (C7); the second charge accused the defendant of having knowingly possessed a handgun. (C8.)

Following a preliminary hearing, defendant was charged in a one count information with the knowing possession "on or about his person" of a firearm and ammunition. (C15, Appendix 10.)

Before trial, defendant moved to quash his arrest (C60) and to suppress physical evidence seized from his dwelling. (C118.) The trial judge denied the motion to suppress and the motion to quash arrest before trial (R. 350-51, R.461-62), and again after trial, when the issue was raised in defendant's written

motion for a new-trial. (C119.)

Immediately before trial, defendant moved in limine to preclude any reference "to the shotgun that was seized from 4849 West Crystal by officers Graf and Hawkins." (C86.) The trial judge originally granted this motion, but reconsidered her ruling after the prosecution filed a notice of appeal. (Supp.Record 36.) Thereafter, defendant filed his second motion in limine, arguing that he could not be prosecuted for possession of both the shotgun and the handgun in the single count information. (C88-90.) The trial judge denied the motion and the case proceeded to trial. (R. 475.)

The jury returned a general verdict of guilty of unlawful possession of a firearm by a felon. (C108.) Following denial of defendant's written motion for a new trial (C119), the trial judge sentenced defendant to five years imprisonment. (C147.) Notice of appeal (C148) was timely filed.

B. Statement of Facts

The statement of facts is organized as follows:

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C. Officers' Testimony

1. Officer Mark Hawkins

Mark Hawkins has been a Chicago police officer for 15 years. (R. 570.) On October 3, 1992, he was working as a tactical officer with his partner Bernard Graf (R. 572) as Beat 2563C in an unmarked car in the 25th District. (R. 2-3, 570.)

At about 2:00 p.m. (R. 574), the officers responded to a call of a "man with a gun" (R. 6-7) at a convenience store at 1203 North Laramie. (R. 6-7, 574.) It took the officers two to three minutes to get to the scene after the radio call. (R. 604.)

a. Responding to the Radio Call

On arrival at 1203 North Laramie, Graf remained in the car (R. 16) while Hawkins got out of the car and spoke with a clerk named Omar (R. 576.) According to Hawkins, Omar told him that "[t]he man has a gun, he's in the alley." (R. 576, 611.) Hawkins testified that (R. 16):

[Omar] came out of the store into the parking lot, and he pointed towards an individual who was running eastbound in the north alley of Laramie. That would be the alley between Division and Crystal. He pointed to this individual and stated that he had just threatened him with a handgun.

Hawkins testified that he then ran through the parking lot (R. 576) towards the alley (R. 15), accompanied by Omar. (R. 16.) Hawkins testified that Omar there pointed out a man, whom Hawkins could see was carrying a gun in his right hand. (R. 8, 17.) Hawkins made an in-court identification of defendant as the man he had seen at the scene. (R. 10, R. 578.)

According to Hawkins, he saw the defendant trying to get into small red car that was facing eastbound in the alley. (R. 577.) Hawkins testified that the defendant was unable to open the car door. (R. 8.) Hawkins stated that he ran towards the defendant, but that, while on foot (R. 68), he was cutoff by another car. (R. 8.) According to Hawkins, the driver of this car "just hit their brakes and ducked down because of the situation." (R. 579.) Hawkins testified that he then saw the defendant run northbound onto Crystal. (R. 19.) Hawkins testified as follows about why he did not run after the defendant (R. 367-68):

Prosecutor: Could you explain that to us what you mean and why you couldn't run after the man with the gun?

Hawkins: I ran to the back of the lot. That's as far as I was able to run. As I stated, I had my gun out, partner began to pull the car quickly. Person pulled around me, looked like they were trying to get out of their way and cut us both off.

Q: Now, that is why you couldn't follow the man [638] with the gun?

A: Right. The car stopped directly in front of me.

b. Finding the Red Car

According to Hawkins, after losing sight of defendant, he got back into the police car and with Graf began to search for the red car. (R. 22, R.68).

Hawkins listened to a recording of police communications transmissions and identified his voice saying "I suppose that this guy from 1203 Laramie was last seen walking eastbound on Crystal from Laramie." (R. 633-34.)

Hawkins did not put on the radio that he had seen a man with a gun (R. 608) or that the man had run northbound towards Crystal. (R. 609.) Hawkins identified his voice on the tape stating "supposed to be a car, maybe picked him up in the alley between Division and Crystal." (R. 635.)

Shortly after leaving the scene at 1203 Laramie, Hawkins advised the dispatcher about a partial license plate number. (R.22)

According to Hawkins, the officers observed the red car as it was driving on Crystal. (R. 22. 582.) Hawkins testified that the officers "got behind the car, called in the license plate to see where it was registered to, and the car pulled over by itself," (R. 582), about half a block from the alley where Hawkins and Graf had caught sight of it. (R. 614.)

Hawkins stated that the car pulled over and he spoke with the driver of the car, whose name he learned was Michael Hodges. (R. 9.) According to Hawkins, Hodges named "Barney" as the man who had the gun, and pointed out defendant's house, which was several doors down. (R. 10.)

c. The Arrest

After the conversation with Hodges, Hawkins and Graf walked to the defendant's house and, while standing on the sidewalk in front of the house, (R. 26), saw defendant come through the back gate, (R. 25), "running into the backyard," (R. 10-11), and entering the the dwelling. (R. 11.)

Hawkins testified that he heard Graf say that he saw a gun in defendant's hand. (R. 11.)

Hawkins testified that he then knocked on the front door. (R. 11.) The defendant answered the door. (R. 12.) Hawkins described his conversation with defendant as follows (R. 588-89):

Prosecutor: Do you recall what you said to him and he said to you?

Hawkins: As he opened the door, we told him — we identified ourselves as police officers. Stated there had been a confrontation at 1203 Laramie. And at that point, one of the clerks in the store stated Mr. Lonzo was the person who had the gun.

Q: Did you — do you know which clerk that was?

Hawkins: I believe it was Omar, but there were a couple of people on the scene at that point.

The officers took defendant out of his home (R. 29) and placed him under arrest. (R. 12.) The officers searched the defendant but did not find a handgun. (R. 12.)

d. Entry into the Home

According to Hawkins, as the officers placed defendant under arrest, a woman who had identified herself as the defendant's wife (R. 588) "became highly emotional." (R. 31.) Hawkins testified that "Mrs. Lonzo was very upset. She was yelling and emotionally distraught . . . she left the doorway area and turned her back on us and walked towards the back of the house," (R. 12), towards the bedroom. (R. 589.)

Hawkins and Graf followed the woman into the house; Hawkins offered the following explanation for entering the home (R. 12-13):

Prosecutor: And was it your belief at this time, officer that perhaps she could be retrieving that weapon?
Hawkins: I knew there was a weapon in the house, and she was [12] walking back towards me having retrieved the weapon. We hadn't retrieved the weapon from the auto, and we hadn't retrieved it from Mr. Lonzo and he was seen in the backyard with the gun.

Hawkins described the woman as "just saying he hadn't done anything, and you can't take him out of this house and, you know, she was very loud, very emotional." (R. 13.)

e. The Search and Seizure of the Firearms

Once inside the house, Hawkins and Graf walked past the woman (R. 32) into the bedroom, where they recovered a handgun on the dresser. (R. 13.) Hawkins identified this handgun as the weapon he had observed in the defendant's hand in the alley. (R. 592.) A further search uncovered a shotgun in an open closet. (R. 13, 592.) Hawkins denied that the officers had looked through "drawers or anything." (R. 14.) Hawkins stated that as the officers were seizing the weapons, Mrs. Lonzo "was screaming about her money on the dresser." (R. 34.) Hawkins stated that "we counted [it] out and handed it to

her." (R. 34.)

f. Post-Arrest Conversation at 1203 North Laramie

After seizing the two firearms, Hawkins and Graf returned to the store at 1203 North Laramie; Hawkins testified that while at the store, he showed the handgun to a clerk named Ribí (R. 688) who identified the gun as the firearm he had seen in the store. (R. 594, R. 688)

g. Signing the Complaint

Under questioning by the prosecution on re-direct examination, Hawkins stated that when he returned to the store at 1203 North Laramie, Ribí identified the handgun (R. 638), and signed a complaint accusing defendant of aggravated assault. (R. 639.) This line of questioning continued as follows (R. 639):

Prosecutor: And did Ribí sign that complaint and take an oath that the information contained in that complaint was true?

Hawkins: Yes.

Prosecutor: You never signed the complaint, correct?

Hawkins: Right.

On re-cross examination, Hawkins reaffirmed that Ribí had signed and sworn to the complaints, (R. 646), but, when confronted with the criminal complaints (R. 650), admitted that he had signed the complaint for Mr. Allouri with "Mr. Allouri's permission." (R. 651.) According to Hawkins, Allouri told him that defendant had pointed a gun at him and requested Hawkins to sign the complaint. (R. 652.) Hawkins agreed that he had a "good, firm, clear, solid recollection that Ribí Allouri told [him] that Barney Lonzo pointed a gun at him." (R. 656.)

h. Alleged Inculpatory Oral Statement

At the police station, Hawkins spoke with the defendant, who (according to Hawkins), stated "he had been threatened in the store during an argument, and the only time he produced a gun is when he felt threatened. He said that the handgun and the shotgun are both given to him by his grandfather from Mississippi, and he was keeping them at his house at this time." (R. 601.) Hawkins also testified that defendant stated that he resided at 4849 West Crystal. (R. 602.) According to Hawkins, defendant refused to give a written statement. (R. 627.)

2. Officer Bernard Graf

On October 3, 1993, Bernard Graf was working with his partner Mark Hawkins when they responded to a call at 1203 North Laramie. (R. 143.) Hawkins had the radio that day. (R. 163.)

Graf testified that Hawkins spoke with Omar at 1203 North Laramie. (R. 176.) Graf stated that the two men started speaking by the store and "Omar took [Hawkins] over [177] to the alley and pointed down the alley." Graf described it as "a hurried conversation with Omar, and Mark running over to the alley and then I followed with the car." (R. 177.) Graf described the attempt to follow a red car (R. 177), and stated that after getting back into the car, Hawkins told him that he had seen a male trying to get into red car, and that the man had a gun. (R. 181.)

Graf listened to a tape of communication messages and identified Hawkins' voice stating "2563 Charlie, three of the numbers in the license plate are one, eight, and four." (R. 160.) Graf also identified Hawkins' voice on the tape, stating "run a registration, run a plate for me, registration Edward, Frank, Paul one, eight, four." (R. 161.)

Graf testified that after losing sight of the red car, the officers proceeded eastbound in the north alley of Division. (R. 180.) Graf stated that the officers turned north at the west alley of Cicero and Division, then pulled onto Crystal where they observed the small car, with Mr. Hodges getting out. (R. 180.) Graf stated that the officers then arrested Hodges. (R. 180.)

According to Graf, Hodges pointed out the defendant's house. (R. 166.) Graf stated that as he walked to defendant's house, he saw the defendant about 65-70 feet away (R. 170), "coming through the back gate and running into the back of the house." (R. 167) Graf stated that he looked through the open gate and "saw Barney Lonzo running northbound in the gangway of that house with a gun in his right hand." (R. 169.) Graf also stated that he did not see the defendant come into the yard (R. 169) and that he does not know how the defendant got into his yard. (R. 169.)

Graf testified that when he saw the defendant, he called for Hawkins and told him that "the subject just ran into the back of the house." (R. 171.) Hawkins then knocked on the front door; the defendant came to the door and stepped out, (R. 172), where he was arrested, handcuffed and taken away. (R. 173.)

According to Graf, "Mrs. Lonzo started yelling and screaming at us that we couldn't take her husband." (R. 173.) Graf testified that the woman was standing at the door inside of the house and was screaming in a very loud voice. (R. 174.) Graf stated that the woman never came out of the house. (R. 173.)

After the defendant was taken from the scene, "Mrs. Lonzo turned and was still yelling at us and started to walk back into the house." (R. 174.) The officers then went into the house and found weapons. (R. 175.)

3. Officer Michael Conley

Michael Conley is a Chicago police officer. On October 3, 1993, Conley was working car number 4641 (R. 183) with his partner James Rowan. (R. 184.)

Conley and Rowan responded to a call at 1203 North Laramie, (R. 184), but before arriving at the scene they "heard another car or a person with a radio saying that they were over on Crystal." (R. 184.) Conley and Rowan then "took a witness from the scene, a man that I know [185] as Omar, I don't know his last name, and we drove him over to the scene." (R. 185.)

On arrival on Crystal, Conley saw Officers Graf and Hawkins at the top of the stairs on a porch. (R. 195.) They were knocking on a door and talking with someone through the door. (R. 195.) Rowan heard someone yell "Watch the front" and he went to the front of the house. Shortly thereafter, detective McDonald emerged from within the dwelling with the defendant. (R. 186.) Conley and Rowan then transported the defendant to the 25th district. (R. 187.)

Conley heard "a female voice yelling" at the scene. (R. 198.) Conley was unable to see who was yelling or make out what she was saying. (R. 198.)

4. Officer James Rowan

James Rowan is a Chicago police officer and was Michael Conley's partner on October 3, 1992. (R. 191.)

The two officers arrived at 4849 West Crystal in a marked police car with a civilian witness, Omar, in the car. (R. 192.) At the scene, one of the officers asked Rowan and Conley to watch the front of the building. (R. 192.) Rowan does not recall anyone yelling or screaming. (R. 193.)

5. Officer Thomas Lynch

Thomas Lynch was working beat 2573B on October 3, 1992 with his partner Officer Gianopolus (R. 194-95) when the officers responded to a call of a man with a gun at Joe's Liquors on Division and Laramie. (R. 195.)

As Lynch and Gianopolus were heading for the scene, they heard a radio call from "I believe Officer Hawkins and his partner ask[ing] for an assistance in the 4900 block of Crystal." (R. 195.) Lynch and his partner were behind 4949 Crystal when the defendant was arrested. (R. 198.) They did not see anyone. (R. 198.)

Lynch described the scene behind the house: there is an alley behind the house and a fence that encircles the home. (R. 196.) There is a gate on the fence, made out of wood, a solid wood fence and gate. (R. 197.) According to Lynch, the back gate was open and he looked through it, and saw Officer Hawkins at the sidewalk in the front of the building, "pointing to the house to let me know that this was the house." (R. 197.) Lynch and Gianopolus then entered the yard and kept it under observation. (R. 197.) They did not see any dogs in the yard, but heard barking coming from inside the house. (R. 197.)

6. Officer Roy Boland

Roy Boland is a Chicago police officer. (R. 289.) He had been on the job for a few months in October of 1992, and on October 3, 1992 was working with his partner Officer Martin Tameron. (R. 290.)

Boland and Tameron were assigned to beat 2521. (R. 290.) Boland listened to the entire communication tape and agreed that his beat had been assigned to the man with a gun at 1203 Laramie. (R. 297.) Although Boland stated that he lacked personal recollection of the incident (R. 298), he agreed

that the communications tape shows that he responded to the scene, and that "19 Boy" was the signal that he radioed in after responding to the scene at 1203 North Laramie. (R. 297, R. 816.)

7. Officer Charles Morris

On October 3, 1992, Morris had been a Chicago police officer for four years (R. 300) and was working that day as a field training officer (R. 303), assigned to beat 2512 with officer Dennis Brown. (R. 301.)

On October 3, 1992, Morris and Brown were assigned as the backup unit (R. 717) to a call about a man with a gun at 1203 North Laramie. (R. 301, 710.)

As Morris and Brown arrived at 1203 North Laramie, they passed another police vehicle leaving the scene. (R. 302.) The officers did not get out of their car at 1203 North Laramie because "[w]e heard the transmission 19 Paul was given and didn't pursue it." (R. 302.) Morris then informed the dispatcher that "there was no offender on the scene at that time." (R. 712.)

Morris explained that the "19 Paul means there was no incident or no one could be find." (R. 302.) (Morris also explained that "19 Paul" is the same as "19 Boy." R. 302.)

Morris listened to the communication tape and identified the voice of his partner, Officer Brown, asking the dispatcher for the description of the man at 1203 North Laramie. (R. 304-05.)

About fifteen minutes after his first visit to 1203 North Laramie, Morris returned there to speak with a "young gentleman." (R. 713.) After this conversation, Morris stated on the police radio that the "kid didn't see anything." (R.

715.)

8. Officer Tameron Martin

Tameron Martin has been a police officer for 23 years. (R. 307.) Martin was unable to identify any voice on the tape (R. 308) and stated that he did not have any independent recollection of the incident. (R. 308.)

D. Civilian Complainant and Eyewitness

1. Ribí Allouri

Ribi Allouri, or Joe (R. 556), operates the store at 1203 West Laramie. (R. 556.) On October 3, 1992, he was at work in his store with Omar Fattah (R. 556), Ribi's brother Derstarwis (R. 557), and a Jordanian national named Hane. (R. 557.)

At about 1:30 p.m. (R. 560) on October 3, 1992, the defendant entered Ribi's store "to sell some stuff." (R. 558.) (Ribi had seen the defendant on one prior occasion, when defendant had fixed his door after the Bulls won the NBA championship. R. 559.) Ribi testified that he did not know what the defendant was trying to sell (R. 558) and that he told the defendant to leave. (R. 558.) After an argument, the defendant said "Okay, I will be back" and left. (R. 559.) Ribi did not see the defendant again after this interchange. (R. 559.)

Allouri's testimony about what happened next is set out below (R. 560-61):

Q: Do you know if he came back to your store that day?
Allouri: Really, I go inside, that's it. After when I go, I come from inside. I see Omar, the guy he came with, call the police for 911 for him. That's it, because he said he's coming back.

Q: About how much later did you learn that he came back to your store?

A: About maybe fifteen minutes, twenty minutes.

Q: Where were you when he came back?

A: I was inside. At the time, I was praying.

Q: So when he returned to the store, you were in back praying, is that correct?

A: Yes. After I finish, I say Omar, when I go from inside, I say, okay, I call the police 911, Hane said this guy come in with a gun. That's it. Okay, [R.561] when the the police come, tell him the story.

On cross-examination, Allouri stated that he did not talk to the police on October 2nd. (R. 562.) Allouri reiterated that he only saw the defendant "that one time when you told them you don't want to buy things," and that he never saw the defendant with a gun at any time. (R. 563.)

2. Omar Abdel Fattah

Omar Abdel Fattah is 38 years of age and works at Joe's Food and and Liquor at 1203 North Laramie. (R. 564.) On October 2, 1993, Fattah saw the defendant enter the store and heard Joey tell defendant that "I don't buy no hot [566] stuff." (R. 565-66.) Fattah heard the defendant respond "I don't have no hot stuff. I want to sell you this thing." (R. 566) The two men then spoke loudly and the defendant left. (R. 566.)

About fifteen minutes later, Omar telephoned 911 and informed the police that there was a big man with a gun in the store. (Tr. 566.) Omar made the telephone call because he had been told in Arabic (R. 568) by one of the store's employees, Hana, that "He have a gun." (R. 566.)

The man to whom Hana had referred left the store after Omar made the call. (R. 567.) After that man left, Omar "asked where the man left, where he

went, [and was told that h]e went to the alley." (R. 567.)

When the police arrived, Omar walked to the police car (R. 568) and "point[ed] them to the direction of the alley, and they went over there." (R. 567.) Omar did not point out the man to the police (R. 569) because the man was not at the scene when the police arrived. (R. 569.) Omar then returned to the store. (R. 567.) About fifteen minutes later, other police came, and took Omar to a house on Crystal near Cicero, "and point me to which guy was in the store, and I point to this gentleman," (R. 567), whom Omar identified as the defendant. (R. 568.)

E. Defense Occurrence Witnesses

1. Jackie Moss

Jackie Moss is 45 years of age, lives across the street from defendant, and is a job developer for the West Side Holistic Family Service. (R. 38.) Moss identified defendant's Exhibit 1 as a photograph of the home where defendant lives. (R. 39.) Moss stated the the wood gate to the right of the house is always closed during the day. (R. 40.) Moss identified defendant's exhibits 2 and 3 as other pictures of the front of defendant's house that depict a six foot high continuous fence. (R. 41.)

Moss stated that it is impossible to see to the back of defendant's yard while standing in front of defendant's house when the gate is closed. (R. 42.) Moss also stated that one reason why the gate was always kept closed was because of the dogs that defendant kept in his yard. (R. 42.)

2. Michael Hodges

Michael Hodges is 31 years of age, married, the father of three children, and lives at 4843 West Crystal. (R. 78-79.) Hodges has been employed at

Wallace Computer Service for ten years. (R. 79.)

On October 3, 1992, Hodges and the defendant Barney Lonzo went to "Joey's place," at Division and Laramie (R. 84), where Hodges was seeking to sell register tapes. (R. 82.)

Hodges and Lonzo entered the store at about noon. (R. 113.) In addition to Hodges and Lonzo, present were three store employees, who were Arabic. (R. 113.) Lonzo and one of the employees had a short conversation (R. 113) and then Lonzo and Hodges left to go across the street to buy some uncooked chicken (R. 114) and two pops. After placing the food into the trunk of Hodges' car, the two men returned to "Joey's," where Lonzo and a salesclerk got into an argument. (R. 85, R. 117.) The salesclerk threatened to call the police. (R. 86.) Hodges calmed Lonzo down, left the store, and waited for Lonzo in the parking lot. (R. 118.) Lonzo was upset when he joined Hodges in the parking lot (R. 120) about a minute later. (R. 118.) The two men talked for several minutes and Lonzo said he would walk home. (R. 87, 120.) Hodges got into his car and drove to his house. (R. 120.) There were no police cars (marked or unmarked) present when Hodges left the scene. (R. 121.)

Hodges stopped at his garage, in the back of his house on Crystal, and put his pop in the garage. (R. 122.) He then drove his car to the front of his house and parked. (R. 123.) Hodges there met Mike, another neighbor, and talked him for several minutes, until he saw Lonzo walking on Crystal. (R. 124.) Hodges talked to Lonzo for a few minutes and then Lonzo went into his house. (R. 125.) Hodges told Mike that he had to give Lonzo the chicken (R. 125), retrieved the chicken from his car and took it to Lonzo's house. (R. 126.) Hodges gave the chicken to Lonzo and then went back to sit on his porch. (R.

126.)

While sitting on his porch, Hodges saw a police car pull up in the alley off Cicero. (R. 90, 126.) The police car remained in the alley for several minutes (R. 128) and then drove to Hodges' house. (R. 90-91.) With the officers was one of the persons from the store, but not the person with whom Lonzo had argued. (R. 129.) The officers came to Hodges on his porch, told him that he had been identified as one of the men who had attempted to rob the Arab grocery, and arrested him. (R. 91, 130.)

Hodges told the officers that there had been an argument at the store, but no robbery attempt, (R. 91), and then directed the officers to defendant's home. (R. 92.)

Hodges and the officers walked to defendant's home. (R. 93.) There, one of the officers banged on the window while the other officer pulled at the closed gate. (R. 93.) The gate never opened. (R. 93, 105, 133.) After a short time, Lonzo came to the front door; when he stepped out, the police arrested him. (R. 93.)

After Lonzo was arrested, Hodges saw Pat (R. 138), the woman who lives with Lonzo, at the door. (R. 136.) She was speaking in a "regular" tone (R. 141), trying to find out what was going on. (R. 136.) Hodges saw the officers walk right by Pat when they went into Lonzo's home. (R. 137.) Pat never turned her back on the officers. (R. 142.)

3. Theodore Simmons

Theodore Simmons is a 35 year old minister and a part-time photographer who, in October of 1993, lived at 4853 West Crystal (next door to defendant)

with his wife and three children. (R. 211.) Simmons identified defendant's Exhibit 10 as a picture of the defendant's back gate. (R. 215.) Simmons has always seen that gate closed. (R. 215.) ("It was always closed with the dog in there barking." R. 216.)

Simmons was at home when defendant was arrested. (R. 212.) He was called to the window by his children (R. 212), after defendant had been taken away. (R. 221-22.) The first thing that Simmons saw was defendant's wife in the doorway and the police outside, talking to her. (R. 213, 223.) The officer was "a big White man with a gun on his side." (R. 224.)

Simmons saw the officer make "a gesture with his hand," (R. 227), to defendant's wife who was in her doorway. (R. 228.) Defendant's wife then came out of the house and the officer entered the house. (R. 213, 229.) Another officer came from the direction of the (closed) front gate (R. 229), and joined the woman "immediately after the other one went in the house." (R. 235.)

The officer and the woman went to the bottom of the steps and waited there until the first officer came out of the house. (R. 237.) When the first officer came out, he had a "rifle or shotgun." (R. 237) Simmons estimated that the incident extended over "maybe five minutes, ten minutes." (R. 238.)

4. Patricia Andrews

Patricia Andrews is 39 years of age and has worked at the post office for fifteen years. (R. 245.) Ms. Andrews has lived with defendant for the past eight years at 4849 West Crystal. (R. 240.)

On the day of the incident, Patricia was at home, sitting in the kitchen, reviewing her grocery list (R. 241) with defendant (R. 251) when Michael Hodges came to the door. (R. 241-42.) Hodges stayed in the house for about five minutes, talking with the defendant at the front door. (R. 253.) The defendant then returned to the kitchen. (R. 250.)

About five or ten minutes later (R. 256), a police officer came to the door. (R. 242.) The defendant went to the door (R. 242); as he opened the door, he stepped out onto the front porch where officers handcuffed him. (R. 243.) Patricia stayed inside and watched. (R. 243.)

After the defendant had been arrested, "another police officer came and ordered me out of the house." (R. 243.) Patricia did not say anything to the officers. (R. 259.) Patricia obeyed the order, and stayed on her front porch while several officers went inside. (R. 244, 261.)

After the officers had searched for about five minutes, Patricia heard one of the officers state that he had found a handgun. (R. 266.) Patricia testified that the gun had been in her drawer in her bedroom, a bedroom which she shared with the defendant. (R. 266.) After finding the gun, the officers continued to search and after a short interval, one of the officers "stepped out and he said I found that large sum of money" (about two thousand dollars). (R. 244, 267.) Thereafter, the officers also found a shotgun. (R. 286.) Eventually, the officers let Patricia to inside her house and returned her money. (R. 245.)

Patricia denied that she had run back into the house after defendant was arrested (R. 246) and asserted that the front gate is always locked and was closed that day. (R. 246.) Patricia also explained that the rear gate was also

locked and could not be opened from the alley on the date of the incident. (R. 247.) Patricia testified that her guard dog was in the yard when Barney was arrested; he was restrained in the yard by the locked gates. (R. 247.)

F. Audiotape Evidence

1. Sergeant David Kristovic

David Kristovic is a sergeant in the Chicago police department. (R. 723.) In 1993, he listened to the Chicago police communication tapes of October 3, 1993. (R. 729.) By looking at the tape machine, he was able to determine approximately what time particular calls were made on the tape. (R. 732.)

Kristovic testified that at about 1:54 p.m., the dispatcher broadcast the assignment of a man with a gun at 1203 North Laramie. (R. 732.) Kristovic made a real time copy of the reel-to-reel tape on a cassette (R. 733) and agreed that "if we start listening to the cassette tape at zero and we advance ten minutes into the cassette tape, we would hear exactly what was going on, on the reel to reel tape ten minutes after [he] started taping." (R. 733.)

2. Officer John Klich

John Klich has been a Chicago police officer for 13 years. (R. 675.) Part of his job is to listen to tapes of radio broadcasts (R. 677) and, on occasion, to make verbatim transcripts of those tapes. (R. 678.) Klich identified defense exhibit 11 (Appendix 12-22) as a duplicate original of the transcript he prepared after listening to a tape on August 3, 1993. (R. 680.) After the tape was played to the jury (R. 695), Klich agreed that his transcript is an accurate transcript of the tape. (R. 696.)

3. Joseph Deloughery

Joseph Deloughery was a Chicago police officer for 28 years (R. 361), and worked as a police officer, detective, sergeant, and lieutenant before retiring to become a private investigator. (R. 361-62, R. 739.) In the course of his work as a police officer, Deloughery became familiar with police radio communications. (R. 362.) While a police officer, Deloughery listened to hundred of tapes involving complaints against police officers (R. 425), as well as "a lot of

tapes on shooting incidents involving police officers." (R. 399.)

In preparation for his testimony, Deloughery listened to a tape (R. 365) and a compact disk (R. 366), each of which contained the identical recording of police communications between a dispatcher and field units. (R. 366, 740.)

There is nothing on the tape in which any officer reports that he is in pursuit of a man with a gun. (R. 740.) That an officer was in pursuit of a man with a gun is information that would have been put out over the radio. (R. 741.) Deloughery explained why an officer would put out that he (or she) was chasing a man with a gun (R. 741):

For the sake of other officers in the area, because there's a man with a gun, for citizens in the area and you want — if you are chasing somebody with a weapon, you want to keep a record, and the best record would be over the air on the tape in case you had to use [742] deadly force to sub — to arrest the man.

The communications tape starts with a call of a man with a gun at 1203 North Laramie, in the parking lot of a liquor store. (R. 404.) The job was assigned to car 2521. (R. 408.)

At three minutes and 31 seconds into the tape, there is a radio call "that supposedly this guy from 1203 North Laramie was last seen walking to Crystal from Laramie." (R. 416.) In Deloughery's opinion, this statement indicates that the officer was told this information. (R. 416.) This transmission was not proper police procedure if the officer had actually seen a man with a gun. (R. 753.) As Deloughery explained, "if [the officer] sees the offender and the offender is running, he would put that over the air, that he is chasing a suspect, [then he would] give a description." (R. 753.) The proper police procedure when a police officer has seen an offender is to put out a description of that

person on the radio. (R. 754.)

At 4 minutes and 36 seconds into the tape, car 2521 "said it was a 19 boy," (R. 408), which means "no offender at the scene." (R. 409.) Car 2563B came on the air in relation to the call about 8 minutes and ten seconds into the tape, (R. 412), with the statement that the offenders "went into a small car going eastbound through alley." (R. 412.) The dispatcher's response was "Now, it's a small red car going eastbound through the alley, small red car." (R. 413.) Immediately after that, car 2563C made a radio call, stating that "three of the numbers on the license plate are one, eight, four." (R. 413.)

After listening to an excerpt of the tape (R. 377) which contained the words "Now supposedly this guy from 1203 North Laramie was last seen walking to Crystal from Laramie" (R. 379), Deloughery offered the opinion that those words were not spoken by a police officer on the scene who had seen a man with a gun. (R. 379.) As Deloughery explained, "If [a police officer] pulls up on the scene and says he sees a man with a gun, he would put over the air that there is a man with a gun and give a description and give his direction of flight." (R. 380.)

In response to a question from the Court, Deloughery explained that the standard operating procedure when a police officer sees a person with a gun is "to get on the the air and let the other units responding know that there was a man with a gun." (R. 380.)

Deloughery listened to another excerpt of the tape which contained the words "What was the guy wearing?" and offered the opinion that those words would not have been spoken by a police officer who had seen an offender. (R.

381.) Deloughery explained that those words means that the officer "is asking for a description of the offender." (R. 381.)

Deloughery then listed to the excerpt of the tape containing the words "19 Boy for now" (R. 382) and explained that this "means that the car 2521 who was originally assigned to the job upon his arrival at the scene finds no offender at the scene. . . What he is saying is he is gone on his arrival." (R. 382.)

In Deloughery's opinion, the officers assigned to 2563C did not see a man with a gun when they arrived at the scene. (R. 386.) As Deloughery explained (R. 386-87):

If they had seen the man with the gun, they would follow — would have followed the procedures; they would have put it on the air that they were chasing a man with a gun, that they were in pursuit of a man with a gun. And they would have told the direction he was going, the description of him.

And other cars coming into the scene would have been aware there was a man with a gun. And they would have — they would have kept giving any changes in the — in the way the man was running and what directions he was going to. And they would have keep on monitoring that all the way [387] unless they lost him.

And if they had lost him, they should have said in what area they had lost him.

Deloughery expressed the opinion that, rather than chasing an offender, the officers "were driving the victim around in an attempt to locate and identify the offender." (R. 387.)

On cross-examination, Deloughery reaffirmed the importance of radio notification that officers are in pursuit of a man with a gun (R. 401-02):

To alert the other officers coming into the — into the scene that there is a man with a [402] gun to give a description of that man for those officers, for the officers coming into the scene to be

aware that there is a man in the area with a gun to alert citizens or people that were on the street in the area; and for the purpose of — if you are involved in a chase involving a man with a gun, whether it be on foot or in a car, that you make an — that you constantly give the location and — and the area the man is in and to — to progress it to the point to where if there is an incident they have to use excessive force that you have it documented, the steps you have taken on the air.

In Deloughery's opinion, there is nothing on the tape that shows that police officers were pursuing a person with a gun. (R. 403.)

Deloughery was asked about the situation where an officer has a choice between following a car or running after a man with a gun, and stated that the officer would "try to apprehend the man with the gun." (R. 744.)

Deloughery explained that apprehending the man with the gun was important "[b]ecause there is a strong probability of violence with a man with a gun." (R. 743.)

At trial, on cross-examination, over defense objection (R. 766), Deloughery was asked if he had ever signed a complaint for a victim. (R. 766.) Deloughery answered that he had signed complaints in murder cases (R. 765) and that he was aware of officers who had signed complaints on behalf of people who were not present at the police station in other cases. (R. 767.)

G. Ruling on the Motion to Suppress

In her initial ruling on the motion to suppress, the trial judge resolved all credibility disputes in favor of the police (R. 354) and upheld the home entry (R. 350-351):

* * * I do think that what Officer Hawkins was saying which he testified was, we were arresting somebody for using a gun. There was an hysterical woman on the porch outside the door. Actually,

she didn't come out on the porch. I saw him with a gun at the scene and I saw him with a gun in the yard. I heard the door slam and now it's moments later and he doesn't have a gun on him. I see her. She's hysterical screaming. She's causing a scene. She runs back and turns around, goes back in the house and I go in after her. I think that is very fair [351] to infer that his conduct, if you believe that's what happened, that that conduct was the type of conduct which is authorized by the exigent circumstances exception to the rule which ordinarily precludes a warrantless entry there to an individual's home giving the time frame that we are dealing with, and there's been some discussion about what it was. But at the outside, it's twenty-one minutes. Because that we figured out when we listened to the tape in its entirety that from the call to the last sign off from 2563 Charlie is twenty-one minutes. Given that time frame, if the officer is to be believed, I don't believe for one minute that that was unreasonable on his part to go into that house after what he described as a screaming hysterical woman protesting the arrest of her husband.

* * *

[R. 354]

So the issue is, all boils down to, as Mr. Flaxman put it, whether that fits into the exception against a warrantless entry to individuals' homes that allow for an entry because of exigent circumstances.

These circumstances I believe are that there was a call of a man with a gun that had been confirmed by a sighting by Officer Hawkins, been confirmed by a second sighting by Hawkins and been confirmed in part by Michael Hodges after he was taken into custody.

The identification was made at the front porch [355] by the civilian witness who was brought to the scene prior to the arrest of the defendant, and then the conduct of Pat Andrews on the — just inside the door.

I think it would have been irresponsible and terrible police work had that woman been allowed to go back there to the house where there was a great likelihood of a weapon and not been stopped. I could see the editorials now. If she had gone back to the house, gotten a gun and used it on someone herself, perhaps the police would have been correctly chastised for not doing something they should have done. It's the protection of themselves, prisoner and any civilians in the area.

Accordingly, the motion to suppress evidence based on an illegal search will be denied.

On July 21, 1994, defendant presented his "Motion to Quash Arrest and to Reconsider Ruling on Motion to Suppress." (R. C60.) The trial judge reopened proofs on the motion to suppress (R. 326) and heard from defendant's witness Joseph Deloughery. (R. 361-433.)

After hearing Deloughery's testimony, the trial judge was less accepting of the police testimony (R. 458):

And there is no question that Mr. Deloughery's testimony today corroborated the suggestion made throughout these proceedings that the tape would have sounded very different if things happened the way that Officers Graf and primarily Hawkins said they happened at the Laramie location.

* * *

[459] But there is no question that some significant impeachment has been established regarding those events.

The trial judge denied the motion to reconsider on two findings: First, that "the defendant had been identified [in front of his house] by a civilian witness as a person who 20 minutes earlier had a gun in his store." (R. 461.) Second, after the defendant had been arrested, the officers chased Patricia Andrews back into the house "fearing that she might be going for the gun given she was acting in an irrational manner." (R. 461-62.)

H. Trial Proceedings

1. Request to Reopen Motion to Suppress

Immediately before trial, defendant asked the trial judge to reopen the motion to suppress. (Supp.Rec. 8.) Defense counsel represented that he had just spoken with Mr. Ribl Allouri and that Mr. Allouri would testify that he was present at 4849 West Crostal when the defendant was arrested and that he

had never seen the defendant with a gun. (Supp. Rec. 9.) The trial judge denied this request.

2. Motion in Limine re Shotgun

Before trial, defendant presented a motion in limine concerning the shotgun seized from the closet. (C. 86.) The trial judge initially stated her intention to grant the motion in limine and exclude evidence about the shotgun. (Supp. Rec. 18.) The prosecution then announced its intention to appeal, asserting that the Court's ruling on the motion in limine had substantially impaired the States's ability to proceed. (Supp. Rec. 26.) After the state filed its notice of appeal, the trial judge indicated that she was inclined to change her ruling. (Supp. Rec. 28.) The prosecution expressed its intent to withdraw the notice of appeal and the trial judge then reconsidered and denied the motion in limine. (Supp. Rec. 37.)

Before the jury had been sworn, defendant presented a second motion in limine concerned with the shotgun. (C.88.) Defendant argued that evidence about the shotgun was extra-information evidence (R. 465-67), and contended that a two count information was required to prosecute him for actual possession of the handgun and constructive possession of the shotgun. The trial judge acknowledged that she was uncertain about the law (R. 467), but after hearing argument from counsel, held that the "state [could] proceed with both firearms and ask for convictions on both firearms." (R. 475.)

I. Trial Evidence

At trial, the prosecution presented the testimony of Ribí Allouri, Omar Abdel Fattah, and Mark Hawkins, and a stipulation that in 1975, the defendant had been found guilty of the felony offense of attempt murder. (R. 668.) Defendant presented testimony from David Kristovic, John Klich, Joseph

Deloughery, and Charles Morris.

IV. ARGUMENT

A. TWO SEPARATE COUNTS WERE REQUIRED BEFORE DEFENDANT COULD BE PROSECUTED FOR POSSESSION OF TWO WEAPONS, ONE ON A THEORY OF CONSTRUCTIVE POSSESSION, THE OTHER ON A THEORY OF ACTUAL POSSESSION

Over defense objection, defendant was prosecuted for two offenses in a single count indictment: The evidence and instructions authorized the jury to return a guilty verdict on two theories — first, if it found that defendant had knowingly possessed a handgun outside his house "on or about his person," as charged in the information. (C. 14, Appendix 8). The alternative theory was for the jury to find that defendant had constructively possessed the shotgun that was found in his house. (C. 104, Appendix 27.) The trial court erred in permitting the prosecution to request a conviction on two theories in the single count information.

Illinois law has long provided that separate counts are required for separate offenses. 725 ILCS 5/111-4(a) provides as follows:

Two or more offenses may be charged in the same indictment, information or complaint *in a separate count for each offense* if the offense charged, whether felonies or misdemeanors or both, are based on the same act or on 2 or more acts which are part of the same comprehensive transaction. (emphasis supplied)

The Committee Comments to the 1963 revision of the Criminal Code make plain that "the generally accepted practice and the safest course was to use separate counts for each offense." This "generally accepted" practice is reflected in numerous cases. For example, in *People v. McCrimmon* (1986), 150 Ill.App.3d 112, 501 N.E.2d 334. the defendant was charged in separate counts of actual possession of a revolver and constructive possession of a target pistol

that had been discovered in his bedroom. Other cases illustrating the principal that separate offenses are charged in separate counts include *People v. Hester* (1995), 271 Ill. App. 3d 954, 649 N.E.2d 1351 (8 counts for 8 guns); *People v. Davilla* (1993), 236 Ill. App. 3d 367, 603 N.E.2d 666 (9 counts for 9 guns); *People v. Jennings* (1990), 204 Ill. App. 3d 1075, 562 N.E.2d 1239 (4 counts, 4 guns); *People v. Bond* (1989), 178 Ill. App. 3d 959, 533 N.E.2d 1163 (2 counts for 2 guns); *People v. Dawson* (1991), 213 Ill. App. 3d 335, 572 N.E.2d 972 (2 counts unlawful use, 2 guns); *People v. McCrimmon* (1986), 150 Ill. App. 3d 112, 501 N.E.2d 334 (3 counts, 3 guns). See also *People v. Rushing* (1995), ___ Ill. App. 3d ___, 649 N.E.2d 609 (2 counts for 2 types of drug possessed); *People v. Sutton* (1994), 260 Ill. App. 3d 949, 631 N.E.2d 1326 (same); *People v. Scott* (1993), 256 Ill. App. 3d 844, 628 N.E.2d 456 (same); *People v. Green* (1993), 256 Ill. App. 3d 496, 628 N.E.2d 586 (same); *People v. Robinson* (1993), 252 Ill. App. 3d 1023, 624 N.E.2d 1318 (same); *People v. Turnage* (1993), 251 Ill. App. 3d 485, 622 N.E.2d 871 (same); *People v. Stone* (1993), 244 Ill. App. 3d 881, 614 N.E.2d 293 (same); *People v. Bookout* (1993), 241 Ill. App. 3d 72, 608 N.E.2d 598 (same); *People v. Love* (1991), 222 Ill. App. 3d 428, 584 N.E.2d 189 (same).

The trial judge initially agreed with defendant's reading of the information, concluding that because the information charged defendant with possession of a firearm "on or about his person," the prosecution could not also proceed on a constructive possession theory. (Supp. Rec. 18.) The court below reconsidered after the prosecution announced its intention to appeal and filed a notice of appeal. (Supp. Rec. 26-28, 37.) The trial judge was correct in her first ruling.

In *People v. Heard* (1970), 47 Ill.2d 501, 266 N.E.2d 340, the Court stated the general rule that "[w]hile a charge which follows the language of the statute defining the crime and uses the disjunctive 'or' will be sufficient under some circumstances, it will not be sufficient where the statute names disparate and alternative acts, any one of which will constitute the offense." 266 N.E.2d at 342. In *Heard*, the Court concluded that the use of a disjunctive is impermissible when it "causes uncertainty and conjecture as to which of the alternatives the accused is charged with committing." *Id.* The Court reaffirmed this principle in *People v. Eagle Books* (1992), 151 Ill.2d 235, 602 N.E.2d 698.

In this case, the information gave defendant specific notice that he was accused of violating the statute by possessing a firearm "on or about his person." (C. 14, Appendix 9.) Evidence about the shotgun — about which there has never been any contention that defendant possessed "on or about his person" — was extra-information evidence that was not relevant and was highly prejudicial.

To explain her decision to reconsider, the trial judge cited *People v. Rangel* (1987), 163 Ill.App.3d 730, 516 N.E.2d 936. *Rangel*, though, has nothing to do with charging two offenses in a single count information. On the contrary, *Rangel* stands for the proposition that possession of a firearm may be proved on a constructive possession theory, a hardly remarkable proposition that is not challenged in this case.

What is challenged in this case is charging the defendant in a single count information with possession of a firearm "on or about his person" and then, over repeated and specific defense objections, permitting the prosecution to secure a conviction on evidence that the defendant either possessed a handgun "on or about his person" or constructively possessed a shotgun in his house.

Defendant could not be properly prosecuted for two offenses in a single count information and it was prejudicial error to instruct the jury on constructive possession. Defendant's conviction must therefore be reversed; because, as we show below, there is not enough admissible evidence to establish defendant's guilt, the case should be reversed outright.

B. REVERSAL IS REQUIRED BECAUSE OF THE PROSECUTION'S KNOWING USE OF PERJURED POLICE TESTIMONY

The record in this case leaves no doubt that Police Officer Mark Hawkins testified falsely on at least three material issues. The record also shows that the prosecution elicited, sponsored, endorsed, and supported this testimony, which it knew was false. This basic denial of fundamental fairness requires that defendant's conviction be reversed.

First, Hawkins repeatedly swore that he had seen the defendant, holding a handgun, at 1203 North Laramie. The police communications tape (Plaintiff's Exhibit 11, Appendix 12-22), and the testimony of the civilian eyewitnesses, establish more than what the trial judge characterized as "significant impeachment" (R. 459) — the evidence in this record makes plain that Hawkins lied about having seen defendant at 1203 North Laramie. See below at 36-39.

Second, Hawkins claimed that Omar Fattah, an employee of the store at 1203 North Laramie, identified defendant in the parking lot at 1203 North Laramie (R. 16, R. 576.) Omar testified as a prosecution witness that he had not pointed out anyone to Hawkins because the man who had been in store was not at the scene when the police arrived. (R. 569.)

Third, Hawkins claimed that Ribbi Allouri, the owner of the store at 1203 North Laramie, identified the handgun that Hawkins had seized from defendant's

home as the weapon Allouri had seen in defendant's hand at the store. (R. 594, R. 639, R. 688.) Hawkins buttressed this claim by stating that Allouri had signed a criminal complaint formally accusing defendant of aggravated assault. (R. 639.) Under questioning by the prosecution, Hawkins stated that Allouri had signed the complaint after taking an oath to tell the truth. (R. 639.) Allouri's trial testimony shows that Hawkins fabricated this testimony: Allouri never saw defendant (or any other person) with a handgun; Allouri never told Hawkins that defendant (or any other person) had threatened him with a handgun; and Allouri never pointed out defendant (or any other person) to Hawkins.

Fourth, after Hawkins' lie about the signing of the complaint had been revealed to the jury, the prosecution was permitted to introduce evidence that signing complaints on behalf of crime victims was an accepted and ordinary practice in the Chicago police department. (R. 765-67.)

"It has long been recognized that the deprivation of an individual's liberty based upon false testimony is contrary to the basic principles in a civilized society." *People v. Laboy* 1992), 227 Ill.App.3d 654, 592 N.E.2d 179, 185; *People v. Cornille* (1983), 95 Ill.2d 497, 448 N.E.2d 857, 863.) In this case, Hawkins' false testimony — which was elicited and sponsored by the prosecution — requires that defendant's conviction be reversed outright.

1. Hawkins Did Not See the Defendant at 1203 North Laramie

At about 1:54 p.m., the police dispatcher announced "a man with a gun at 1203 North Laramie in a parking lot of a liquor store. We're talking about a fat male black with a black coat. That's all we have, Zone 12." (Defense Exhibit 11 at 1, Appendix 12.)

About three minutes later, Officer Hawkins made the following radio transmission (Defense Exhibit 11 at 2, Appendix 13):

I suppose that this guy from 1203 Laramie was last seen walking eastbound on Crystal from Laramie. Supposed to be a car maybe picked him up in the alley between Division and Crystal. Right over here, the fifty-one hundred block.

These are not the words that would be spoken by a police officer who had just seen a man with a gun in his hand trying to get into a small red car. As defendant's expert explained (R. 416), this is the language that would be used by a police officer who was relaying information he had received from a witness. A police officer who had personally observed a man with a gun would immediately put that information out over the radio (R. 741) — both to make a record that he was in pursuit of an armed suspect and to alert other police officers to a man with a gun. (R. 753-54.)

The radio traffic after Hawkins talked about the man who he "suppose[d] . . . was last seen walking eastbound on Crystal from Laramie" confirms that Hawkins did not see any man with a gun.

About a minute after Hawkins made his "suppose[d] . . . walking eastbound on Crystal" transmission, Officer Boland, in beat 2521, asked the dispatcher to "put us clear with a nineteen boy for now." (Defense Exhibit 11 at 3, Appendix 14; R. 297.) Boland made this request after responding to the call at 1203 North Laramie. (R. 297, 816.) "Nineteen boy" means "no offender at the scene." (R. 409.) Officer Morris, in beat 2512, heard this message as he was approaching 1203 North Laramie (R. 302), and did stop because there was no offender at the scene. (R. 712.)

About four minutes after Hawkins made his transmission about "suppose[d] ... was last seen walking eastbound," beat 2526 asked the dispatcher for a description of the offender. (Defense Exhibit 11 at 4, Appendix 15.) The dispatcher responded "[m]ale black, fat, running eastbound, uh, black coat." (Id.)

Shortly after beat 2526 asked for a description, beat 2563B provided further details about the incident, informing the dispatcher that "the guy got into a small red car, went eastbound in the alley over here." (Defense Exhibit 11 at 4, Appendix 15.) This report is directly contrary to Hawkins' story that long before this transmission, he observed the man with the gun try unsuccessfully to get into the small red car. (R. 577.)

Immediately after 2563B provided details about the small red car, Hawkins furnished the dispatcher with three of the numbers on the license plate of the small red car. (Defense Exhibit 11 at 4, Appendix 15.) As defendant's expert explained, if Hawkins had observed the small red car in the parking lot at 1203 North Laramie, he would have immediately provided this information to the dispatcher. (R. 385.)

About two minutes after providing information about the partial plate — and about seven minutes after his first transmission — Hawkins provided the dispatcher with a complete license plate for Michael Hodges' vehicle. About three minutes later — after receiving Michael Hodges' name and address — Hawkins asked for assistance to cover the back of Hodges' home. (Defense Exhibit 11 at 5.)

The communications tape shows that Hawkins' testimony about seeing defendant with a gun in the parking lot at 1203 North Laramie is a fairy tale fashioned by Hawkins to justify the arrest.

2. Hawkins Lied about the Civilian Eyewitnesses

Officer Hawkins repeatedly and emphatically swore that Omar Fattah pointed out the defendant at 1203 North Laramie. (R. 576, 611.) This was a lie: Fattah did not point anyone out to the police because the offender was not at the scene when the police arrived. (R. 569.) Fattah's testimony in this regard is corroborated by the police communications tape.

Hawkins testified falsely when he stated that defendant was arrested because "the victim from the grocery store was on the scene and stated that Lonzo was the person who had threatened him with a handgun." (R. 12, 588.) Testimony at trial made plain that no one told Hawkins or any other police officer that defendant had threatened anyone with a handgun: The only store employee who saw a gun spoke only Arabic (R. 568); while there was testimony at trial that this employee had stated "[h]e have a gun," (R. 566), there was no testimony that the employee made this statement when defendant was in the store. (R. 567.) Ribi Allouri, whose name Hawkins used when he signed the aggravated assault complaint (R. 651), stated that he did not see defendant with a handgun. (R. 563.) Omar Abdel Fattah, the store employee who was at the scene of the arrest, identified defendant as a man who had been in the store earlier that day, but Fattah did not see defendant — or any other person — with a gun. (R. 566-68.)

Hawkins also lied when he told the jury that after arresting defendant, he returned to the store at 1203 North Laramie, where he showed the handgun that

he had seized from defendant's home to Ribi Allouri, who, Hawkins claimed, identified the weapon as the handgun that defendant had pointed at him earlier that day. (R. 52, 688.) No one had pointed a handgun at Ribi; Ribi did not talk with the police on the day of the incident and did not see the defendant with a gun at any time. (R. 563.)

Hawkins most blatant lie was that Ribi Allouri had signed and sworn to the misdemeanor complaint charging defendant with aggravated assault. (R. 646.) When confronted with the complaint, which shows that Allouri did sign the complaint, Hawkins claimed that he had signed the complaint for Mr. Allouri with "Mr. Allouri's permission," (R. 651), after "Allouri told [him] that Barney Lonzo pointed a gun at him." (R. 656.) Hawkins lied about who signed the complaint and lied about what Allouri told him: Allouri did not see the defendant with a gun at any time. (R. 563.)

3. Reversal Is Required Because the Police Perjury Was Sponsored by the Prosecution

The prosecution had a duty to correct Hawkins' false testimony. *Napue v. Illinois* (1959), 360 U.S. 264; *People v. McKinney* (1964), 31 Ill.2d 246, 201 N.E.2d 431; *People v. Cornille* (1983), 95 Ill.2d 497, 448 N.E.2d 857. This rule applies even when the jury has before it evidence that the state's witness has testified falsely. *People v. Higgs* (1973), 11 Ill.App.3d 1032, 298 N.E.2d 283; *People v. Faulkner* (1972), 7 Ill.App.3d 221, 287 N.E.2d 243..

Instead of correcting Hawkins' false testimony, the prosecution used it to buttress its case. After Hawkins sought to escape his lie that Allouri had signed the complaint by stating that he had signed (and sworn to) the complaint with Allouri's "permission," (R. 651), the prosecution asked defendant's expert, a retired police lieutenant, whether he had ever signed complaints for crime

victims. (R. 766.) Over defendant's objection, (R. 766), the trial judge permitted this inquiry.

Once the defendant establishes the condemned use of false testimony, he is entitled to relief unless the State can establish beyond a reasonable doubt that the false testimony was immaterial in that it did not contribute to the conviction. *People v. Cornille* (1983), 95 Ill.2d 497 448 N.E.2d 857, 866. The judgment below should be reversed; because, as we show below, there is not enough admissible evidence to establish defendant's guilt, the case should be reversed outright.

C. THE MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED

After arresting defendant as he came out of his home, officers Hawkins and Graf entered defendant's house and found a handgun and a shotgun in a bedroom. The trial court erred in denying defendant's motion to suppress these items.

The warrantless entry into defendant's dwelling implicates the core values protected by the Fourth Amendment: "the warrantless entry of a person's home is 'the chief evil against which the wording of the Fourth Amendment is directed.'" *People v. Hassan* (1993), 253 Ill.App.3d 558, 624 N.E.2d 1330, 1336-37, quoting *Payton v. New York* (1980), 445 U.S. 573, 586.

A warrantless search or seizure carried out in a private residence is presumptively unreasonable. *Welsh v. Wisconsin* (1984), 466 U.S. 740, 748-49; *Coolidge v. New Hampshire* (1971), 403 U.S. 443, 474-75. When, as here, a defendant challenges a warrantless search, it is the State's burden to justify the search under an exception to the warrant clause. *People v. Foskey* (1990), 136 Ill.2d 66, 554 N.E.2d 192, 196.

The trial court concluded that the State had met its burden by showing that there had been probable cause to arrest defendant (R. 461), that the entry into defendant's home was lawful, (R. 461-62), and that it was reasonable under the Fourth Amendment to seize both the handgun and the shotgun. Defendant challenged each of these rulings in the trial court and renews these arguments on appeal.

The Fourth Amendment's issues must be reviewed in light of all of the testimony — both at the pre-trial motions and the testimony at trial. *People v. Stewart*, (1984) 104 Ill.2d 463, 473 N.E.2d 1227; *People v. Turner*, (1994) 259 Ill.App.3d 979, 631 N.E.2d 1242, 1243; *People v. Rushing*, (1995) 272 Ill.App.3d 387, 649 N.E.2d 609, 610. While the trial court's factual determinations are reviewed under the "manifestly erroneous" standard, "[t]he question of whether exigent circumstances exist is a question of law, subject to de novo review by this Court." *People v. Klimek*, (1981) 101 Ill.App.3d 1, 427 N.E.2d 598, 601, citing *People v. Abney*, (1980) 81 Ill.2d 159, 407 N.E.2d 543.

1. Evidence at Trial Established that the Officers Did Not Have Probable Cause to Arrest

The trial judge concluded that the officers had probable cause to arrest the defendant because a civilian eyewitness had identified defendant as the man who had threatened him with a gun twenty minutes before. (R. 461.) Testimony at trial established that this finding is manifestly erroneous.

There were six persons present during the incident in the store at 1203 North Laramie: in addition to the defendant and his neighbor Michael Hodges, present were Omar Fattah, Ribi Allouri, Ribi's brother Derstarwis and a Jordanian national named Hane. (R. 556-577.)

Neither Hane nor Derstarwis testified. Ribi Allouri testified at trial that he never saw the defendant with a gun at any time. (R. 563.) Omar Fattah also testified that he did not see a gun in the store; Fattah testified that he had called the police about a man with a gun because Hana told him that "He have a gun." (R. 568.) The prosecution chose not to ask Fattah if defendant had been in he store when Hana stated "He have gun." (R. 566-68.)

Fattah was in front of defendant's home when defendant was arrested and pointed out defendant as a man who had been in the store earlier that day. (R. 567.) Conspicuously absent from Fattah's testimony is any suggestion that he ever told the police he had seen the defendant with a gun.

The trial judge correctly refused to credit the testimony of Officers Hawkins and Graf that they had seen the defendant with a handgun but, in making a finding that defendant had been arrested on probable cause, relied solely on the finding that "the defendant had been identified [in front of his house] by a civilian witness as a person who 20 minutes earlier had a gun in his store." (R. 461.) When the existence of probable cause is viewed in light of all the evidence of record, it is plain that the trial court's finding of probable cause is manifestly erroneous: no one identified the defendant as a person who had a gun at 1203 North Laramie. The motion to suppress should have been granted.

2. The Warrantless Entry into the Home Was Unreasonable under the Fourth Amendment

The evidence of record shows that the police acted unreasonably in entering defendant's home without a warrant. Defendant was arrested on his front porch, as he came out of his house. The evidence was in conflict about circumstances surrounding the subsequent entry into home.

Theodore Simmons, a neighbor, testified that after defendant had been removed from his front porch (R. 221-22), one of the officers instructed defendant's wife to step out of the house onto the front porch. (R. 228-29.) Patricia Andrews, defendant's wife, corroborated this testimony, stating that after defendant had been taken from the porch, "another police officer came and ordered me out of the house." (R. 243.) Ms. Andrews obeyed the order, and stayed on her front porch while the officers went inside the house. (R. 244.)

A different version was offered by the prosecution's witnesses. Officer Hawkins testified that after defendant had been removed from the front porch (R. 32), defendant's wife became "very upset. She was yelling and emotionally distraught . . . she left the doorway area and turned her back on us and walked towards the back of the house." (R. 12.)

Officer Hawkins stated that the woman did not threaten him, but loudly protested defendant's arrest (R. 31):

Q: When she became highly emotional, what did she do or say?
Hawkins: We didn't have a right to take him. He didn't do anything. He's been here all day. Then she was screaming even louder, swearing at us. At that point we didn't have a conversation with her. It seemed to be no point to have a conversation with someone in this state. She turned her back and started walking away from us.

Officer Hawkins could not agree with the prosecution's suggestion that "perhaps [the woman] could be retrieving that weapon" (R. 11-12):

Prosecutor: And was it your belief at this time, officer that perhaps she could be retrieving that weapon?

Hawkins: I knew there was a weapon in the house, and she was [12] walking back towards me having retrieved the weapon. We hadn't retrieved the weapon from the auto, and we hadn't retrieved it from Mr. Lonzo and he was seen in the backyard with the gun.

Officer Graf, who entered the dwelling with Hawkins, testified that the woman "turned and was still yelling at us and started to walk back into the house." (R. 174.)

The trial judge refused to credit any of the testimony from Simmons because he testified that he saw the officers walking out of the house with a rifle. (R. 460.) The trial also refused to accept any of the testimony from Ms. Andrews. (R. 460-61.) Instead, the court below made several unwarranted inferential leaps from the evidence to conclude that "the police chased [defendant's wife] fearing that she might be going for the gun given she was acting in an irrational manner." (R. 461-62.) This finding is against the manifest weight of the evidence.

First, the officers came out of defendant's home with a small handgun and a shotgun. (R. 592.) Simmons testified that he saw the officers come out of the house with a "rifle or shotgun." (R. 237.) This truthful and accurate testimony fails to provide any basis for rejecting Simmons' testimony.

Second, contrary to the trial judge's findings, neither of the officers who entered defendant's home testified that he had "chased" defendant's wife. Officer Hawkins stated that the woman "turned her back on us and walked towards the back of the house," (R. 12), and agreed with the prosecutor's characterization that the woman had "started walking back into the house." (R. 12.) Officer Graf likewise stated that the woman "turned and was still yelling at us

and started to walk back into the house." (R. 174.) There is absolutely no evidence in the record to support the trial judge's view that "Mrs. Lonzo ran back into the house, and they went after her for fear that she was going to get the gun." (R. 175.)

Third, the police communications tape (Defendant's Exhibit 11, Appendix 12-22), supports defendant's contention that Hawkins and Graf entered the dwelling to find the gun. At twenty minutes into the tape, Hawkins informed the dispatcher that "We've got the gun, we've got the guys, and everything's happy."

Fourth, Officer Hawkins' testimony is not entitled to any weight: as discussed above at 35-40, Hawkins testified untruthfully about several material issues and any credibility disputes should have been resolved against him. The evidence of record establishes that the officers entered defendant's home to search for a firearm.

Even if the officers "knew" that the firearm was in the house, the warrantless entry of the home was unreasonable under *Vale v. Louisiana* (1970), 399 U.S. 30. There, as in this case, the police arrested the defendant outside of his home and, as in this case, the officers entered the dwelling to search for evidence. The Supreme Court held that absent some "exceptional situation," the warrantless entry to search for evidence was unreasonable under the Fourth Amendment. 399 U.S. at 33-35. *Vale* dictates the result in this case: As a matter of law, a woman who is loudly protesting police action from inside of her home and who is not making any threats to the officers does not create an exigency authorizing the warrantless entry of her home.

This case is similar to *People v. Rushing* (1995), 272 Ill.App.3d 387, 649 N.E.2d 609. There, a citizen reported to the police that the defendant had threatened him with a gun. The police entered the defendant's dwelling, placed him under arrest, but did not find a gun. Thereafter, the citizen told the officers that the gun might be in a toolbox in which the defendant stored narcotics. The officers searched the toolbox and found narcotics, but no gun. In attempting to justify the search, the State argued on appeal that the search was justified because of the need to locate the firearm:

To have walked away from the situation and left the gun where it was secreted would have left the officers facing an unknown peril both with regard to those who remained in the apartment and during their departure from defendant's home. After all, defendant's family remained behind and were not likely pleased that one of their own was being taken away in police custody. The search in the toolbox was necessary to ensure that the gun was located before the officers left. The discovery of the drugs, in plain view at that point, could be seized despite the fact that their discovery was not inadvertent.

(649 N.E.2d at 611)

This argument, which was rejected by the Court in *Rushing*, is identical to the theory relied on by the trial judge in this case. In the view of the court below,

I think it would have been irresponsible and terrible police work had that woman been allowed to go back there to the house where there was a great likelihood of a weapon and not been stopped. I could see the editorials now. If she had gone back to the house, gotten a gun and used it on someone herself, perhaps the police would have been correctly chastised for not doing something they should have done. It's the protection of themselves, prisoner and any civilians in the area.

(R. 355.)

Notwithstanding the trial court's concern about editorial writers, there is no "hysterical woman" exception to the warrant clause of the Fourth Amendment. The "protective sweep" exception does not allow the police to enter a dwelling after the defendant has been removed from the scene on the pretext that the defendant's wife is upset about the arrest.

In *Maryland v. Buie* (1990), 494 U.S. 325, the Court held that the Fourth Amendment permitted a "protective sweep" when an officer reasonably believes that the area to be swept "harbor[s] an individual posing a danger to the officer or others." *Id.* at 327. The Court held that incident to an arrest inside a dwelling, officers "could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched." *Id.* at 334. Any additional search must be based on "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Id.* Nothing in *Maryland v. Buie* authorizes the entry into a dwelling to search for a weapon, after a suspect had been arrested on the front porch.

In *People v. Free* (1983), 94 Ill.2d 378 447 N.E.2d 218, the Illinois Supreme Court stated that after an arrest without entry "the police may have good reason to doubt whether they can withdraw from the area with their prisoner without being fired upon, in which case an entry and 'protective sweep' is justified." 447 N.E.2d at 227. In *Free*, however, the officers reasonably believed that there were other persons still inside the house. 447 N.E.2d at 227. A warrantless entry to make a protective sweep to search for firearms is unreasonable

when there is "absolutely no evidence that there was anyone present in the house to fire it." *People v. Hassan* (1993), 253 Ill.App.3d 558, 624 N.E.2d 1330, 1341.

In this case, the officers entered defendant's home to search for a firearm. They did not enter to conduct a "protective sweep," but to search for evidence. The officers testified that they rang the doorbell, defendant came to the door and crossed the threshold onto the front porch. Because the officers did not have a warrant, the items they seized inside the house should have been suppressed.

3. The Officers Did Not Have Probable Cause to Seize the Shotgun

After finding a handgun in defendant's home, officers Hawkins and Graf seized a shotgun that Graf found in the bedroom closet. Even assuming that the officers lawfully seized the handgun, their seizure of the shotgun was improper.

When they seized the shotgun, the officers could not reasonably have believed that the shotgun was evidence of a crime. No one claimed to have seen the shotgun outside of the house. There has never been any suggestion that the shotgun had been used to commit a crime. The firearm was not a sawed off shotgun and was not per se unlawful. As far as the officers knew, the firearm was being lawfully maintained in the closet of the bedroom.

It is of no aid to the prosecution that after seizing the shotgun from the closet in the bedroom, the officers learned that the defendant was a convicted felon who could not constructively possess a firearm. The existence of probable cause turns on the fact and circumstances known to the officers at the time of the seizure; a warrantless seizure cannot be legitimized by after acquired evidence.

To justify the warrantless seizure of the shotgun under the plain view doctrine, the prosecution was required to show that upon viewing the shotgun, the officers had probable cause to believe that it was subject to seizure. *People v. Mitchell* (1995), 165 Ill.2d 211, 650 N.E.2d 1014, 1024. The records is completely bereft of any such evidence and the prosecution should not have been permitted to use the shotgun at trial.

The shotgun was unlawfully seized from defendant's home; defendant's repeated objections to the introduction into evidence of the shotgun (R. 663-65) should have been granted and the shotgun suppressed.

V. CONCLUSION

For the reasons above stated, the judgment should be reversed and the case reversed outright. In the alternative, the case should be reversed and remanded for a new trial.

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