CRIMINAL MOTION TO SUPPRESS FELONY MURDER
1st Dist. **People v. Williams** No. 1-97-4559, 1-98-1767, 1-98-1768, and 1-98-2420 (Consolidated) (June 30, 2000) 1st div. (GALLAGHER) (FROSSARD, special concurrence) Affirmed in part, reversed in part.

In this multiple defendant case for felony murder, the court erred when it denied motion to suppress confessions of defendants who were illegally arrested. The police lacked probable cause, and there were no exigent circumstances. In order to attenuate the illegal arrest, by intervening confession of codefendant, the police would have been required to tell the defendant the details of the confession. Confession of juvenile defendant, who was detained without probable cause was attenuated by presence of his mother, who was given several minutes to speak with defendant in private and who was present at interrogation.

Arrest of last defendant was proper because police entered home with probable cause and exigent circumstance existed. In addition, it was proper for the trial court to allow prosecutor to dismiss counts of complaint charging intentional murder and proceed on remaining felony murder charge. By doing that, prosecutor avoided instruction on manslaughter and evidence did not warrant second degree murder instruction.

2000 Ill. App. LEXIS 558

June 30, 2000, Decided

NOTICE: [*1] THIS DECISION IS NOT FINAL UNTIL EXPIRATION OF THE 21 DAY PETITION FOR REHEARING PERIOD. UNPUBLISHED IN PART PURSUANT TO SUPREME COURT RULE 23.

PRIOR HISTORY: Appeal from the Circuit Court of Cook County. Honorable Thomas A. Hett and Honorable Bertina E. Lampkin, Judges Presiding.

DISPOSITION: Affirmed in part, reversed in part and remanded, and vacated in part.

JUDGES: JUSTICE GALLAGHER delivered the opinion of the court. RAKOWSKI, J., concurs. O'MARA FROSSARD, P.J., specially concurs.

OPINIONBY: GALLAGHER

OPINION: JUSTICE GALLAGHER delivered the opinion of the court:
Jonathan Beard, Nazareth Beard, Lewis Taylor and Rasheed Williams were charged with first degree murder and home invasion involving Sammie Britton (decedent) arising from an incident on December 27, 1994. The court granted defendants' motions to sever their trials and Jonathan, Nazareth and Taylor were tried simultaneously by three separate juries. Williams was tried in a separate proceeding. Nazareth and Jonathan Beard filed motions to quash their arrests which were granted. They also filed motions to suppress their statements as fruit of their illegal arrests which were subsequently denied. The court determined that their incriminating statements [*2] were attenuated by events following their illegal arrests. Nazareth and Jonathan Beard were convicted of first degree murder and home invasion after a jury trial and were both sentenced to terms of imprisonment of 28 and 12 years, respectively, to run concurrently.
Taylor also brought a motion to quash his arrest which was denied. The court determined that the officers had probable cause to arrest him and exigent circumstances to enter his home and arrest him without a warrant. His motion to suppress his statement was also denied since the court determined his statement was

voluntary. Taylor was convicted of home invasion and felony murder based on home invasion, and he was sentenced to 12 and 20 years, respectively, to run concurrently.

Williams also brought a pretrial motion to quash his arrest based on a lack of probable cause at the time the arrest was effectuated. His arrest was subsequently quashed. His motion to suppress his statement made while in custody was denied. The court determined that Williams' statement was attenuated from his illegal arrest. Williams was convicted of home invasion and first degree murder and was sentenced to 40 years imprisonment.

Jonathan, Nazareth, [*3] Taylor and Williams now bring this appeal. We affirm in part, reverse in part, and vacate in part. Due, however, to the page limitations imposed on our published opinions by Supreme Court Rule 23 (166 Ill. 2d R. 23) the only portion of our analysis that will be published relates to Taylor's argument that the trial court improperly refused instructions and verdict forms on involuntary manslaughter and second degree murder after the prosecution improperly nol-prossed the two counts of murder other than felony murder.

[The following material is nonpublishable under Supreme Court Rule 23]

Jonathan, Nazareth and Williams were arrested and charged with first degree murder and home invasion on January 16, 1995. Taylor was arrested and charged in the early morning hours of January 17, 1995. The multiple count indictment charged that on December 27, 1994, the defendants entered decedent's apartment at 13096 S. Drexel Avenue without authority and while inside the apartment, battered decedent. Decedent subsequently died as a result of his injuries. Meko McBounds was also charged with the death of the decedent and home invasion, but is not a party to the instant appeal. Quanario Renee [*4] was also implicated in the home invasion and first degree murder but was not before the court because he was a juvenile and transfer had been denied.

Motions to Quash Arrests

Defendants filed motions to quash their arrests. At the hearing on the motions, the following evidence was adduced. Decedent was attacked on December 27, 1994 and subsequently died of complications from his injuries on January 12, 1995. On January 14, 1995, Detectives Andrew Abbott and Bruce Campbell were assigned to investigate decedent's death. They spoke to the medical examiner's office and to decedent's mother. On January 15, 1995, they went to decedent's apartment and called the crime lab to take pictures. They checked a police department "victim file" and learned decedent was the victim of criminal trespass to property on December 17, 1994. They also spoke to CHA police and decedent's neighbors. They learned that Quanario Renee was involved in the beating death of decedent, and that Rasheed Williams had some knowledge concerning the incident. Detective Abbott and Campbell handed the case over to fellow detectives, James Boylan and Michael McDermott.

Detective Boylan of the Chicago Police Department [*5] testified that on January 16, 1995, he went to Rasheed Williams' house at 13026 South Drexel with Detectives McDermott and Higgins. Williams was 15 years old at the time. Upon arrival, the detectives told Williams and his mother they believed Williams had information regarding decedent's death. Williams told the detectives he had been expecting them and then left the house with them. On the way to the squad car, he told the detectives that the boys they were looking for lived down the street and that their names were Quanario Renee, Nazareth Beard, Jonathan Beard, and Meko McBounds. When asked how he knew this information, Williams stated that both he and Jonathan were present at the decedent's house during the incident, but were not actually involved in the beating. The detectives put Williams in the squad car and drove to the Beards' house after calling for additional officers. Without a warrant, the detectives entered the Beard home and placed Nazareth, Jonathan, McBounds and Renee under arrest. The boys said they knew what the arrest was about and had been expecting the police. The detectives transported them to Area 2 headquarters.

Detectives interrogated each of the suspects beginning with Renee. Through this exercise, they learned that a sixth suspect, Lewis Taylor, was also involved in the decedent's death. The parties stipulated the police arrested Taylor without a warrant at 12:15 a.m. on January 17, 1995. Taylor stated that shortly after midnight on January 17, 1995, he was at his grandmother's house at 800 E. 131st Street. He was 19 years old and a senior in high school. Two officers opened his door and told him to get dressed and come downstairs. They said they wanted to talk to him about an ongoing investigation. He was arrested, handcuffed and taken to the station.

The trial court found that Williams' initial statement to the detectives on his front lawn failed to give them probable cause to arrest Nazareth, and that a warrant was required to arrest Nazareth in his home under *Payton v. New York,* 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). Because detectives failed to obtain a warrant to enter the Beard home, and they did not have exigent circumstances,
the court granted the motion to quash Nazareth's arrest.

The trial court determined that Williams' initial statement failed to give detectives probable cause to arrest [*7] Jonathan because Williams stated only that Jonathan was present at the scene of the crime, but that he did not participate in the incident. The court also determined that there were no exigent circumstances and granted the motion to quash Jonathan's arrest.
Taylor's motion to quash his arrest was denied. The court ruled there was more than sufficient probable cause and there were exigent circumstances to arrest Taylor since he allegedly used a weapon, the victim subsequently died, and the arrests of the other defendants occurred within a short period of time in the same neighborhood.

The trial court determined there was no probable cause to arrest Williams and quashed his arrest.

Attenuation Hearing

Next, all four defendants brought motions to suppress their statements claiming their statements were the fruit of their illegal arrests. An attenuation hearing was conducted on March 29, 1996, and June 20, 1997. Detective James Boylan testified that he and Detective Michael McDermott were involved in the investigation of a beating that turned into a homicide. The beating occurred at 13096 S. Drexel on December 27, 1994, and decedent expired on January 12, 1995. Boylan said the [*8] officers learned that Quanario Renee was involved and that Rasheed Williams had some knowledge of the incident.

Detective Boylan testified that he and his partner, Detective McDermott, proceeded to Williams' house located at 13026 South Drexel about 8 p.m. They were admitted by Williams' mother, Diane Williams. The officers informed her of the nature of their visit, and when defendant joined their conversation, he told the officers that he was expecting them. As Williams and the officers walked to the squad car, Williams stated that the boys they were looking for were right down the street and their names were Quanario Renee, Nazareth Beard, Jonathan Beard and Meko McBounds. The officers asked Williams how he knew these boys were involved in the beating. Williams responded that he was at the scene but did not participate. He then directed the officers to 13088 South Drexel, the home of Jonathan and Nazareth Beard. The five boys were transported to Area 2 headquarters on January 16, 1995, at about 8:30 p.m. They were placed in separate rooms, and questioned by teams of detectives.

Boylan testified that he and McDermott spoke to Quanario Renee first at around 9:00 p.m. in the presence [*9] of a youth officer. They read Renee his *Miranda* rights. Renee made an oral statement implicating himself and the other suspects. He told the officers that he and the four other defendants had planned to beat up the decedent

because decedent had signed a complaint against Renee regarding a criminal trespass incident in mid-December, 1994. Also, decedent had allegedly touched Williams on the buttocks. The five boys devised a plan to forcibly enter decedent's house and "twist his cap." Each group member was assigned a role and Renee and Williams were to do most of the beating. Further, Renee disclosed that a sixth boy named Darnell was not involved in the plan but entered the apartment with them. Darnell was also known as Lewis Taylor.

Detective Boylan testified that he and McDermott talked to Jonathan next at approximately 9:30 p.m. The detectives read Jonathan his constitutional rights, and Jonathan indicated that he understood and would give a statement. Jonathan then told the detectives that about a week before Christmas 1994, Renee asked decedent if he could use his apartment for ten dollars. Decedent agreed and gave Renee the key. Renee then made duplicate keys for his friends. [*10] On December 17, 1994, decedent went home and found a large group of teenagers in his home. Decedent went to the CHA police at about 8:50 p.m. shaken and scared. Decedent told the officers that some teenagers were in his home and would not let him back in. As an officer went to investigate, he saw some male teenagers exit decedent's home and run away. The officer was able to apprehend and arrest Quanario Renee. Decedent later signed a complaint against Renee for criminal trespass to property.

Jonathan and his friends were angry at decedent for calling the police. They went to decedent's home a couple of days before Christmas to confront him, but he was not present. They entered the home and waited for him to return. When he did, Jonathan confronted him about calling the police and then punched him in the nose. The others began punching decedent as well and then left the apartment.
Jonathan then told the detectives that he and his friends were "hanging out" in the neighborhood on December 27, 1995, when decedent walked by the group of boys and either bumped into or grabbed Williams. When Williams told his friends that decedent had touched his buttocks, Jonathan, Nazareth, Williams, [*11] Renee and McBounds decided to "twist Sammie's cap" which meant they decided to beat him up. Jonathan stated that he was going to knock on the decedent's door because the decedent knew him and would let him in. He also stated that the person closest to the fuse box was supposed to turn off the lights so that decedent could not see. McBounds was supposed to act as a look-out.
At decedent's apartment, Jonathan knocked on the door. Once decedent opened the door, all the boys rushed in the apartment. As the lights went off, Jonathan saw Renee and Williams punching decedent. Jonathan saw Taylor hit decedent in the head with a metal BB gun and knock him into the TV. Once decedent was on the ground, Jonathan stated that he and his friends kicked him for about five minutes until McBounds yelled "Five-Oh." The group ran away because they thought the police were coming. Subsequently, Jonathan signed a written statement.

After speaking to Jonathan, Detectives Boylan and McDermott talked with Nazareth. Detective Boylan read Nazareth his constitutional rights and Nazareth indicated that he understood. Nazareth's statement was essentially the same as his brother's. In addition, detectives stated [*12] Nazareth told them that his nicknames were "Nazzie" and "Cain." He signed the written statement when he was finished.

Detectives Baker and Higgins decided to interview McBounds and Williams after their mothers arrived at the police station since they were both juveniles. They interviewed McBounds at 10:30 and Williams at about 10:45 p.m. McBounds said he and the four other boys went to decedent's house and "jumped on him" because he had allegedly grabbed Williams and had made some comments. McBounds also said that in the middle of the beating, decedent tried to leave his house, but ran into Taylor who was at the front door. Taylor pushed him into the television set and it went off.

When Diane Williams arrived at the station, she was given an opportunity to speak to Williams alone. Detective Higgins and Baker entered the room between 10:30 and 11 p.m. and advised Williams and his mother of the nature of their investigation. They also advised Williams of his *Miranda* rights and of the fact that he could be tried as an adult. Williams stated that he understood these admonitions, and neither he nor his mother raised questions on these matters or indicated a desire to speak to an attorney. [*13] Thereafter, Williams gave a similar account of events and signed a written statement.

[The preceding material is nonpublishable under Supreme Court Rule 23]

Attenuation Hearing

Detective McDermott of the Chicago Police Department testified Taylor was brought to Area 2 after midnight on January 17, 1995. Taylor had recently turned 19. McDermott and his partner, Detective Boylan talked with Taylor for 15 to 20 minutes between 12:30 and 1 a.m. McDermott testified the detectives read Taylor his *Miranda* rights and did not make any threats or promises.

An assistant State's Attorney took Taylor's statement at about 10:15 am. on January 17, 1995. In his statement, Taylor said he was "hanging around" with Meko McBounds, Nazareth, Jonathan, Quanario Renee and Rasheed Williams on December 27, 1994, but later broke off from the group and went to talk to a girl who lived next door to decedent. He heard shuffling noises coming from decedent's apartment and when he went next door, he saw Williams and Jonathan punching decedent. He stated that decedent broke away and tried to run, but bumped into him at the door and grabbed his coat. Taylor stated he became angry and pushed decedent [*14] into the television. He stated that he hit decedent with a BB gun he had brought with him. When decedent fell, Taylor and the others surrounded him and kicked him repeatedly.

After noting that defendants lacked standing to object to any conduct regarding Renee, the trial court held that Renee's statement implicating the other five boys gave the detectives probable cause to detain and question each of the other defendants. Therefore, the trial court ruled that the State had met its burden and could introduce the statements of Nazareth and Jonathan at trial because their illegal arrests were attenuated by intervening events. Taylor's motion to suppress his statement was also denied. The trial court held that the police had probable cause for his arrest from statements given by the other defendants, who all stated Taylor participated in the beating of decedent. The court stated in its written order, "the only credible evidence I heard says that this 19 year old adult knowingly and intelligently waived his rights after having been given full *Miranda* warnings. There is no credible evidence to suggest that the statement was the product of any threat, any promise, or any untoward action [*15] by authorities."

The court also ruled that Williams' confession was admissible because the taint of the initial illegal arrest had been dissipated. In reaching that decision, the court found that the police had probable cause to arrest defendant before he gave his statement and cited as intervening circumstances the arrival of his mother at the station and the advisement of the voluntary statements of Williams' codefendants.

After Judge Hett heard the pretrial motions, the matter was thereafter transferred to Judge Lampkin who presided simultaneously over three juries in the severed case involving Jonathan, Nazareth and Taylor. Judge Hett continued to preside over Williams' trial.

The Trial

The following evidence was adduced at trial. Eddie Jean Bryant, the decedent's sister, testified that her brother was 51 and in good health. On the day of the assault, decedent was living in an apartment at 13096 S. Drexel in the Altgeld Gardens neighborhood in Chicago. She said he had lived in Altgeld Gardens all his life. Bryant

testified that her brother was hospitalized from December 27, 1994, to January 12, 1995, when he passed away due to complications from pneumonia. She stated that, [*16] following her brother's death, she went to his apartment and found that all the decedent's chairs had been slashed.
Chicago Housing Authority (CHA) police officer Stanley Grice testified that on December 17, 1994, decedent came into the Altgeld Gardens police station and reported that some teenagers had taken over his apartment and were denying him access. Grice investigated and saw teenagers running out of the apartment. He managed to arrest Quanario Renee as he left the apartment. Decedent signed a complaint against Renee for criminal trespass to property.

James Fitzgibbon, a fire department paramedic, testified that he responded to a call on December 27, 1994, from the CHA field house at 901 E. 131st Street at 10:20 p.m. Fitzgibbon testified that he found decedent complaining of shortness of breath and sore ribs. Decedent said he had been beaten by several boys. Fitzgibbon took decedent to Roseland Hospital, arriving at 10:40 p.m.
Dr. J. Lawrence Cogan, a forensic pathologist of the medical examiner's office, testified that on December 27, 1994, decedent was admitted to the hospital complaining of sore left ribs and difficulty breathing. An X ray showed he had four fractured [*17] or broken ribs. He was further diagnosed with a collapsed left lung. Decedent's body temperature rose from 96.1 to 99.9 degrees from the time he was admitted to the hospital until he was sent to the ward. The amount of oxygen present in his blood was low. On December 29, 1994, a tube was inserted to reinflate the collapsed left lung. This process takes a few days during which the right lung does most of the work of aerating or oxygenating the blood.
Decedent later developed pneumonia in his right lung. On December 31, 1994, he appeared disoriented and restless and was treated with Haldol and restrained. On January 2, 1995, he experienced a blood pressure spike. On January 3, 1995, there was a significant shift in his white blood cell count. Later, tests showed his kidneys were beginning to shut down. On January 5, the chest tube was removed because the pneumothorax had cleared up. On January 6, 1995, decedent was dehydrated, and on January 9, 1995, he was transferred to intensive care. On January 10, he was resuscitated from cardiac arrest. He was on a mechanical ventilator when he died on January 12, 1995.

Dr. Cogan testified that on January 14, 1995, he reviewed medical records [*18] and police reports and completed an autopsy on decedent. The medical history indicated that decedent suffered from hypertension, asthma, chronic lung disease (emphysema), and chronic alcohol abuse. In September of 1994, decedent was hospitalized for a "spontaneous pneumothorax" or collapsed left lung for which he was treated and released. He was taking medication for a seizure disorder and hypertension at the time of his death. Dr. Cogan testified that decedent looked much older than his 51 years.

Dr. Cogan's autopsy revealed that decedent weighed 125 pounds and was 5 feet 11 1/2 inches tall at the time of his death. Examination of the body revealed four healing rib fractures and discoloration on the outside of the rib cage that was consistent with decedent having been beaten or kicked. Examination of the cardiovascular system revealed severe narrowing and calcification of the arteries. Examination of decedent's skull revealed no head trauma. The decedent's lungs were a little heavy and firm, consistent with pneumonia. Dr. Cogan found that while the assault was not the immediate cause of death, "it set in [motion] a sequence of events which eventually led" to decedent's death. [*19]
Detective Andrew Abbott of the Chicago Police Department testified that on the morning of January 14, 1995, he and his partner, Detective Bruce Campbell, were assigned to investigate the death of decedent. On January 15, 1995, after learning that decedent had died in the hospital, they proceeded to decedent's apartment. Police obtained a key to the apartment from decedent's mother. Detective Abbott testified:

"[furniture] was tossed around and out of order. We found numerous gang slogans written all across the interior walls of that apartment, across the appliances, across the interior doors, and on the front exterior [door] of the apartment."

Detective Abbott contacted the mobile crime lab and requested assistance to process the scene.

Carl Brasic, a forensic investigator with the police crime lab, testified that he received his assignment on January 15, 1995. In processing the scene, Brasic and his partner examined the decedent's apartment and took numerous photographs. During his testimony, Brasic described the graffiti he photographed in decedent's apartment that had been inscribed on walls, doors, appliances, windows, and mirrors. He testified he saw graffiti [*20] and the nicknames "Cain," "Stacy," and "O'Dog" scrawled on a water pipe, the kitchen freezer, the bathroom mirror and the bedroom door. The State then introduced photographs of the decedent's apartment which included the nicknames and some gang graffiti. Brasic revealed that no identifiable fingerprints were found at the scene, nor were there any bloodstains. On cross-examination, Brasic opined that the apartment did not appear to have been ransacked. He saw a small television on top of a large television in the living room and neither was damaged.
Following the jury trials, Jonathan, Nazareth and Williams were convicted of first degree murder and home invasion. Taylor was convicted of felony murder based upon home invasion as well as home invasion.

[The following material is nonpublishable under Supreme Court Rule 23]

Nazareth's Appeal

On appeal, Nazareth argues that the trial court erred in finding that his confession was attenuated from his illegal arrest and in refusing to suppress his confession. A trial court's ruling on a motion to suppress evidence will not be overturned unless it is manifestly erroneous. *People v. Winters,* 97 Ill. 2d 151, 158, 454 N.E.2d 299, 303, 73 Ill. Dec. 439 (1983). [*21] Moreover, where the evidence is merely contradictory, we will not substitute our assessment of credibility of the witnesses for that of the trial judge. *People v. Wise,* 128 Ill. App. 3d 330, 333-34, 470 N.E.2d 1155, 1157, 83 Ill. Dec. 735 (1984).

Because no exigent circumstances existed, a warrant was required to arrest Nazareth in his home under *Payton v. New York,* 445 U.S. 573, 63 L. Ed. 2d 639, 100 S. Ct. 1371 (1980). *Payton* held that the Fourth Amendment, made applicable to the states by the Fourteenth Amendment, prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest. *Payton,* 445 U.S. 573, 63 L. Ed. 2d 639, 100 S. Ct. 1371. Because the detectives did not obtain a warrant and there were no exigent circumstances, the trial court properly granted the motion to quash Nazareth's illegal arrest.

Moreover, the trial court also determined that detectives lacked probable cause to arrest Nazareth. n1 The fact that Nazareth's arrest was made without probable cause does not mean that Nazareth's statement made while in custody is *per se* excludable. See [*22] *People v. Lekas,* 155 Ill. App. 3d 391, 411, 508 N.E.2d 221, 235, 108 Ill. Dec. 60 (1987); See *People v. Avery,* 180 Ill. App. 3d 146, 154, 534 N.E.2d 1296, 1301, 128 Ill. Dec. 691 (1989)("The determination that an illegal arrest has occurred is not dispositive of the issue of admissibility of a subsequent confession"). Therefore, we must determine whether the causal connection between Nazareth's arrest and his inculpatory statement was sufficiently attenuated to purge any taint of illegality. The relevant inquiry is whether the confession was obtained by the exploitation of the

illegality of his arrest. *Brown v. Illinois,* 422 U.S. 590, 603-04, 45 L. Ed. 2d 416, 427, 95 S. Ct. 2254, 2261-62 (1975). The evidence need not be suppressed if it was obtained by means sufficiently distinguishable to be purged of the primary taint. *Wong Sun v. United States,* 371 U.S. 471, 487-89, 9 L. Ed. 2d 441, 83 S. Ct. 407, 417-18 (1963).

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n1 Both parties seem to be confused as to whether the trial court found probable cause to arrest Nazareth. Specifically, the State contends police had probable cause to arrest Nazareth based upon Williams' statement that Nazareth was involved in the incident. However, after a lengthy and detailed search of the record, we have concluded the trial court found no probable cause for his arrest. The trial court specifically stated:

"[The police] violated [defendants'] rights because the police made an assumption that I didn't agree with [-] that there was probable cause based upon Mr. Williams statement."
* * *

"[The police] don't have to buy Williams' statement one hundred percent, and they can make some inference of it. But I ruled that what they had at the time was nothing more than suspicion. A lot of it. I think they had a lot of suspicion, but I don't believe that they had that magic amount of above suspicion to give them probable cause."

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The factors to be considered in determining whether a later statement was sufficiently attenuated from the illegal arrest include: (1) the presence of *Miranda* warnings; (2) the passage of time between the arrest and confession; (3) the presence of intervening circumstances; and (4) the purpose and flagrancy of police misconduct. *Brown,* 422 U.S. 590, 603-04, 45 L. Ed. 2d 416, 427, 95 S. Ct. 2254, 2261-62 (1975). The third and fourth attenuation factors--the flagrancy of the police misconduct and the presence or absence of intervening circumstances--have emerged as the most relevant in assessing the admissibility of a statement obtained subsequent to an illegal arrest. *People v. Jennings,* 296 Ill. App. 3d 761, 766, 695 N.E.2d 1303, 1306, 231 Ill. Dec. 184 (1998); see *People v. Beamon,* 255 Ill. App. 3d 63, 68, 627 N.E.2d 316, 319, 194 Ill. Dec. 200 (1993) ("we read *[People v. White,* 117 Ill. 2d 194, 512 N.E.2d 677, 111 Ill. Dec. 288 (1987)] to mean that the most important factor of the four factors enunciated in *Brown* is the presence or absence of intervening circumstances between the time of the illegal arrest [*24] and the confession"). The State bears the burden of demonstrating sufficient attenuation. *People v. Foskey,* 136 Ill. 2d 66, 86, 554 N.E.2d 192, 202, 143 Ill. Dec. 257 (1990). The State has not met this burden in this case.
In this case, Nazareth was given *Miranda* warnings on at least three separate occasions. The giving of the *Miranda* warnings alone will not guarantee the admissibility of statements made while in custody. *Brown,* 422 U.S. 590, 45 L. Ed. 2d 416, 95 S. Ct. 2254; *Lekas,* 155 Ill. App. 3d at 412, 508 N.E.2d at 236. Second, approximately an hour and a half had passed between Nazareth's arrest and his first interview. The mere passage of time, however, is not sufficient to purge the taint of an illegal arrest. *People v. Austin,* 293 Ill. App. 3d 784, 788, 688 N.E.2d 740, 743, 228 Ill. Dec. 42 (1997).

Third, we must consider the purposefulness and flagrancy of the official misconduct. An arrest has a quality of purposefulness where it is an expedition for evidence admittedly undertaken in the hope that something might turn up. *Brown,* 422 U.S. at 604, 45 L. Ed. 2d at 427, 95 S. Ct. at 2262; [*25] see *Dunaway v. New York,* 442 U.S. 200 at 218, 60 L. Ed. 2d 824 at 839, 99 S. Ct. 2248 at 2259-60. The purpose of suppressing evidence obtained as a result of police conduct which is purposeful and

flagrant is to prevent similar conduct on the part of the police in the future, and to deny, them any benefit from such conduct. *Avery,* 180 Ill. App. 3d at 156, 534 N.E.2d at 1302.
The arrest of defendants at the Beard home was not an "arrest sweep" conducted by the police in the hope that something might turn up. See *People v. Pierson,* 166 Ill. App. 3d 558, 564, 519 N.E.2d 1185, 1190, 117 Ill. Dec. 18 (1988) (not an "arrest sweep" because "officers had an anonymous tip that three named individuals had knowledge of the shooting"). In this case, the officers had received information from a police "victim report" concerning an incident on December 17, 1994, where decedent charged all five boys with criminal trespassing. The police caught and arrested Renee. After receiving further information from the CHA police, relatives and neighbors, police determined that Williams had some knowledge concerning the incident and Renee was involved in it. Subsequently, the police [*26] picked up Williams. Williams told the officers that Renee and three other boys were involved in the beating and they were located at the Beard house.

In *Avery,* this court determined that police conduct was flagrant when officers "repeatedly 'rounded up' teenagers in the area to attempt to gather any potentially relevant information." 180 Ill. App. 3d at 156, 534 N.E.2d at 1302; *See People v. Turner,* 259 Ill. App. 3d 979, 993, 631 N.E.2d 1236, 1245, 197 Ill. Dec. 777 ("deceit displayed by police to secure the illegal evidence from defendant's house in the middle of the night constitutes a certain degree of flagrancy"). In this case, however, while the police conduct was technically improper, the officers had some evidence suggesting a nexus between the decedent and the defendants. See *Austin,* 293 Ill. App. 3d at 788, 688 N.E.2d at 743. Therefore, the trial court properly determined that police misconduct was not flagrant, but merely "the product of a police mistake in the amount of proof that they thought they had."
Finally, we conclude there was no intervening event to purge the taint of Nazareth's illegal arrest. "An intervening [*27] circumstance is one that dissipates the taint of the unconstitutional police conduct by breaking the causal connection between the illegal conduct and the confession." *Turner,* 259 Ill. App. 3d at 993, 631 N.E.2d at 1245. An intervening event must have such an effect on the defendant so that his statement made after the event is an exercise of his free will, and not an exploitation of the initial illegality. *People v. White,* 117 Ill. 2d 194, 222, 512 N.E.2d 677, 687-88, 111 Ill. Dec. 288 (1987). As a general rule, the confrontation of a suspect with new information, untainted by the illegal arrest, has been identified as an intervening circumstance that may produce a voluntary desire to confess and thereby support admission of in-custody statements. *Lekas,* 155 Ill. App. 3d at 414, 508 N.E.2d at 237; *Jennings,* 296 Ill. App. 3d at 766, 695 N.E.2d at 1307.

The State argues that Renee's in-custody statement gave police after-acquired probable cause as to Nazareth, and thus, constituted an intervening circumstance. After-acquired probable cause has been held to be an intervening circumstance sufficient to break the connection [*28] between the taint of the illegal arrest and a defendant's statement. *Lekas,* 155 Ill. App. 3d at 414, 508 N.E.2d at 237. In *Pierson,* 166 Ill. App. 3d at 564, 519 N.E.2d at 1189-90, the court called the intervening acquisition of probable cause an "important factor" in the attenuation analysis. However, in *People v. Ornelas,* 295 Ill. App. 3d 1037, 1046, 693 N.E.2d 1247, 1253, 230 Ill. Dec. 496 (1998), this court determined that "it is clear that intervening probable cause will not attenuate an illegal arrest in every case." Instead, courts must conduct a case-by-case analysis pursuant to *Brown. Ornelas,* 295 Ill. App. 3d at 1046, 693 N.E.2d at 1253.
After-acquired probable cause will be an intervening circumstance attenuating the taint of an illegal arrest, only if the probable cause is obtained via *new* and *untainted* evidence. For example, in *Lekas,* 155 Ill. App. 3d 391, 508 N.E.2d 221, 108 Ill. Dec. 60, defendant was illegally arrested because officers had no probable cause and also violated *Payton.* Before defendant gave a statement, however, the police had gone to a motel where a desk clerk [*29] identified defendant and his two codefendants as

having recently been there. This evidence corroborated information given to police earlier by one of the other codefendants. Police then questioned defendant based on this new information and defendant confessed. The court found this new evidence attenuated the taint of defendant's illegal arrest.
In *People v. Gabbard*, 78 Ill. 2d 88, 398 N.E.2d 574, 34 Ill. Dec. 751 (1979), the defendant was illegally arrested on unrelated charges, and was eventually convicted of burglary and armed robbery based in part on statements he made while in police custody. Our supreme court held that the defendant's subsequent statements while in custody were not the product of his illegal arrest, stating:

"The evidence also shows that the defendant's statements were prompted by intervening events. Early in the interrogation, the defendant was shown the sketch which had been prepared prior to his arrest, and he acknowledged that it resembled him. Prior to the lineup he also impliedly admitted his involvement in the robbery by volunteering to cooperate in the prosecution if a favorable arrangement for serving his sentence should be [*30] reached. In addition, when the defendant, immediately preceding his inculpatory account of the robbery, was told that he had been identified by each of the viewers at the lineup, he responded to that information by stating that he was not surprised." *Gabbard*, 78 Ill. 2d at 99, 398 N.E.2d at 579.

However, *People v. Austin*, 293 Ill. App. 3d 784, 688 N.E.2d 740, 228 Ill. Dec. 42 (1997) is similar to the situation in the case at bar. In *Austin*, Simpson was found murdered. More than two months later, the burned-out remains of Simpson's missing car were found near the residence of defendant Walley. Police investigation of telephone records revealed numerous telephone calls between Walley and Simpson's step-son, Eric Watkins, another defendant. Four days after the discovery of Simpson's car, the police picked up Donnell Austin, Jamal Dorrough, Kevin Taylor, and Walley, as they left Walley's residence. All four men were taken to the police station where they were placed in separate interview rooms. Taylor was never charged while the other three defendants were arrested.
During a second interview by police, Taylor admitted knowledge of the homicide [*31] and implicated the three other men and Watkins. When confronted with the statements of Taylor, Dorrough proceeded to incriminate himself and identified Austin as the shooter. When Walley was confronted with the statements of Taylor and Dorrough, he confessed. When Austin was confronted with Taylor's, Dorrough's and Walley's statements, he eventually admitted that he was the shooter.

The trial court determined Austin's and Dorrough's arrests were illegal because police lacked probable cause. The court also determined that the statements of Taylor, Dorrough, and Walley implicating Austin in the murder provided a sufficient intervening event so as to attenuate Austin's illegal arrest from his statement.
After consideration of the first two *Brown* factors, *Miranda* warnings and time proximity, the *Austin* court found that the key issue in the case was determining what, if any, intervening events occurred between Austin's illegal arrest and his statement. The State maintained that an intervening circumstance had occurred when each defendant was confronted with his companion's statement. The court rejected this argument and held that incriminating statements from the other defendants, [*32] who were also victims of illegal arrests, could not serve as an intervening circumstance that would purge the taint of Austin's illegal arrest from his confession. The *Austin* court recognized the defendant's concern "that to allow the State to use illegally obtained evidence to purge the taint of an illegal arrest as done in this case would provide the prosecution with an incentive to conduct illegal arrests and then validly use the fruits of such improper arrests by merely deciding not to charge one individual in the group." *Austin*, 293 Ill. App. 3d at 791, 688 N.E.2d at 745.

Even if we determined that the intervening circumstances were untainted in this case, we must consider an important factor in the intervening event analysis -- that the new

and untainted evidence be *conveyed* to the defendant. See *People v. Wilson,* 260 Ill. App. 3d 364, 373, 632 N.E.2d 114, 120, 198 Ill. Dec. 55 (1994). The theory is that the defendant's statement will not be the fruit of an illegal arrest, but will be the fruit of being confronted with new, untainted evidence. The court in *Wilson,* 260 Ill. App. 3d at 373, 632 N.E.2d at 120, concluded [*33] that since nothing in the record indicated that defendant was aware of his codefendants' statements implicating him, the statements could not be viewed as intervening circumstances. The court stated:

"The State points out that [defendant's] codefendants implicated defendant in the armed robbery, but nothing in he record indicates that he was aware of their statements; thus, they cannot be viewed as intervening circumstances and no other such circumstances are evident from the record."

In *People v. White,* 117 Ill. 2d 194, 512 N.E.2d 677, 111 Ill. Dec. 288 (1987), the State argued that an intervening circumstance was the presence of a codefendant in an interrogation room next to the defendant. The court stated:

"While it is true that a defendant's confrontation with untainted evidence, which induces in the defendant a voluntary desire to confess, may be a legitimate intervening circumstance, [citations], [the codefendant's] presence was hardly 'evidence.' Absent any suggestion that the defendant believed or knew that [his codefendant] had implicated him in the crime, [his codefendant's] presence was inherently ambiguous. Indeed, there [*34] is no evidence that [codefendant] said or did anything which would impel the defendant to confess. Given the State's burden of proving attenuation, [defendant's codefendant] cannot, without more, constitute an intervening circumstance which will dissipate the taint of the defendant's lengthy and illegal detention." *White,* 117 Ill. 2d at 224-25, 512 N.E.2d at 689.

Similarly, in *People v. Wright,* 294 Ill. App. 3d 606, 613, 691 N.E.2d 94, 99, 229 Ill. Dec. 158 (1998), this court found attenuation and stated:

"As the day wore on, and before [defendant] made the sixth statement that supports the State's theory of the case, intervening events occurred that further dissipated any remaining taint: [Defendant] *was told* his brother had implicated him; [Defendant] *was shown* his brother's written statement; [Defendant] *was told* [a witness] did not support his alibi; * * *" (emphasis added).

Other circumstances where courts have found attenuation based upon intervening events include a defendant being confronted with legally seized evidence prior to confessing, and a defendant seeing his girlfriend at the police [*35] station and being told she was cooperating with the police prior to making a statement. *People v. Graham,* 214 Ill. App. 3d 798, 814, 573 N.E.2d 1346, 158 Ill. Dec. 161 (1991); *Foskey,* 136 Ill. 2d at 87-88, 554 N.E.2d at 203; see *People v. Tankson,* 92 Ill. App. 3d 328, 415 N.E.2d 1218, 47 Ill. Dec. 905 (1980) ("knowledge [by defendant] that the results of a police investigation contradicted the defendant's alibi account was held to be a significant intervening circumstance").

In this case, there is no evidence in the record that Nazareth was ever confronted with Renee's or Jonathan's statements implicating all six of the boys including Nazareth. Therefore, there was no intervening event and Nazareth's statement was not purged of the taint from his illegal arrest. Based on the analysis of *Austin* and *Wilson,* we conclude that the trial court erred in finding attenuation. See Austin, 293 Ill. App. 3d at 787-91, 688 N.E.2d at 742-45 (finding no attenuation when no intervening event was present, even though the other three *Brown* factors pointed toward attenuation); *Wilson,* 260 Ill. App. 3d at 373, 632 N.E.2d at 120. [*36] Therefore, Nazareth's confession should have been suppressed as a fruit of the illegal arrest.

Second, Nazareth contends he was deprived of his right to a fair trial where the prosecution introduced photographs depicting gang graffiti from decedent's apartment. However, Nazareth failed to object to the admission of the photographs at trial or in a post-trial motion. He concedes he has waived the issue under *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124, 1129, 119 Ill. Dec. 265 (1988). Nevertheless, he argues that we should address the matter either because the admission of the photographs was plain error, or because his counsel was ineffective for failing to object to their admission.

In a criminal case, the plain error doctrine allows a reviewing court to consider a trial error that was not properly preserved when: (1) the evidence is closely balanced; or (2) when the error is so fundamental and of such a magnitude that the defendant was denied his right to a fair trial. 134 Ill. 2d R. 615(a); *People v. Miller*, 173 Ill. 2d 167, 191-92, 670 N.E.2d 721, 733, 219 Ill. Dec. 43 (1996). The primary purpose of the plain error rule is to protect [*37] against the "possibility that an innocent person may have been convicted due to some error which is obvious from the record, but not properly preserved" for appellate review. *People v. Mullen*, 141 Ill. 2d 394, 402, 566 N.E.2d 222, 226, 152 Ill. Dec. 535 (1990).

In this case, Nazareth argues the error of allowing the photographs of gang graffiti was so fundamental that he was denied a fair trial. He contends the evidence was irrelevant and highly prejudicial. Although the error complained of was prejudicial to Nazareth, the error was not of such a character that the second prong of the plain error rule must be invoked to preserve the integrity and reputation of the judicial process. See *People v. Herrett*, 137 Ill. 2d 195, 215, 561 N.E.2d 1, 10, 148 Ill. Dec. 695 (1990). The second prong of the plain error doctrine will only be invoked in exceptional circumstances. *Herrett*, 137 Ill. 2d at 215, 561 N.E.2d at 10. The rule is invoked only when "the error is so fundamental to the integrity of the judicial process and so prejudicial to the defendant that the trial court could not cure the error by sustaining an objection or instructing the [*38] jury to disregard the error." *Herrett*, 137 Ill. 2d at 214-15, 561 N.E.2d at 10. That is not the case here.

Evidence is admissible if it is relevant to an issue in dispute and its probative value is not substantially outweighed by its prejudicial effect. *People v. Lewis*, 165 Ill. 2d 305, 329, 651 N.E.2d 72, 83, 209 Ill. Dec. 144 (1995). Relevant evidence is that which has any tendency to make the existence of any fact of consequence to the determination of the action more or less probable than it would be without the evidence. *People v. Peeples*, 155 Ill. 2d 422, 455-56, 616 N.E.2d 294, 309, 186 Ill. Dec. 341 (1993). In this case, the photographs were properly admitted because they helped to place Nazareth at the scene of the crime and establish his identity as one of the killers. Thus, the photographs were highly relevant.

Nazareth contends that there was no temporal nexus between the beating on December 27, 1994, and the defacement of property discovered on January 15, 1995. Nazareth posits that "a vacant apartment in a public housing building left alone for more than two weeks may attract any number of undesirables bent on destruction. [*39] " However, there is no evidence in the record of any other intrusion into decedent's home but for Nazareth and his friends. Officers Abbott and Brasic arrived to process the scene on January 15, 1995, and entered the apartment with a key given to them by decedent's mother. They found the apartment defaced. There was no testimony that the apartment door was unlocked or that the apartment had been broken into during decedent's absence.

Next, Nazareth contends that the photographs had no logical nexus to the case against Nazareth and therefore, were overly prejudicial. If photographs are relevant to prove any fact at issue, they are admissible and can be shown to the jury unless their nature is so prejudicial and so likely to inflame the jurors' passions that their probative value is outweighed. *People v. Terrell*, 185 Ill. 2d 467, 495, 708 N.E.2d 309, 323, 236 Ill. Dec. 723 (1998). Whether or not a jury is allowed to view photographs rests within the sound discretion of the trial court, and such decision will not be reversed unless it represents an abuse of discretion. *People v. Harris*, 182 Ill. 2d 114, 151, 695 N.E.2d 447, 465, 230 Ill. Dec. 957 (1998). [*40]

Nazareth pled not guilty to the beating death of decedent. Therefore, whether Nazareth was involved in the crime was a relevant issue at trial. Further, evidence of other crimes is admissible where relevant for any purpose other than to show the propensity to commit crime. *People v. Tomes,* 284 Ill. App. 3d 514, 523, 672 N.E.2d 289, 295, 219 Ill. Dec. 781 (1996)(Other crimes evidence may be relevant to prove identity). The walls of decedent's apartment were spray-painted with the name "Cain." Detectives testified that Nazareth told them one of his nicknames was "Cain." We conclude the spray-painted name in the photographs was connected to the beating of decedent, and the photographs were properly admitted to prove the fact that Nazareth was at the scene of the crime and participated in the beating of decedent.

Nazareth cites *People v. Mason* for his contention that erroneous admission of other offenses evidence carries a high risk of prejudice and generally calls for reversal. 219 Ill. App. 3d 76, 80, 578 N.E.2d 1351, 1354, 161 Ill. Dec. 705 (1991). In *Mason,* a witness violated an *in limine* order which prohibited any reference to misconduct [*41] by the defendant toward his two young sisters. The court found that the suggestion that defendant had perpetrated the same crimes allegedly committed against the victim against his six and seven year old stepsisters was highly prejudicial, and it was an error which required reversal.
Unlike the evidence in *Mason,* the photographs in this case were not introduced to show the defendant's propensity to commit crime. Instead, the photographs properly were admitted because they proved Nazareth's identity as one of the perpetrators. See *Tomes,* 284 Ill. App. 3d at 523, 672 N.E.2d at 295.
Instead, this case is similar to *People v. Garrison,* 146 Ill. App. 3d 592, 496 N.E.2d 535, 99 Ill. Dec. 842 (1986), where defendant contended that he was prejudiced by the testimony of witnesses that he had been armed with a .38 handgun at the time of the offense. The court held that evidence of other crimes alleged to have been committed by the defendant is not admissible to show the propensity to commit a crime in a criminal trial. See *People v. Marine,* 48 Ill. App. 3d 271, 277, 362 N.E.2d 454, 458, 6 Ill. Dec. 25 (1977). The court explained that this [*42] rule does not bar the admission of evidence of other crimes when it is relevant to establish "any material question such as motive, or if such evidence is intertwined with the offense charged; in short, if relevant to establish any material matter." See *Garrison,* 146 Ill. App. 3d at 593, 496 N.E.2d at 536 (1985). In *Garrison,* the evidence of defendant's possession of the handgun was intertwined with the offense and was relevant to defendant's motive in committing residential burglary. 146 Ill. App. 3d at 593, 496 N.E.2d at 536.

In this case, the evidence of the defaced apartment was intertwined with the beating that occurred there. Again, this evidence was relevant and probative because it placed Nazareth at the scene of the crime and established his identity as one of the killers.

Furthermore, Nazareth cites *People v. Mason,* 274 Ill. App. 3d 715, 653 N.E.2d 1371, 210 Ill. Dec. 909 (1995), for his argument that irrelevant gang evidence that permeates a trial results in reversible error. In *Mason,* the court found reversible error in the State's use of photographs of defendant which show him to be tattooed with gang symbols such [*43] as a pitchfork, a six-pointed star and the word "Midnight." The issue at trial was not whether the defendant was a member of the Gangster Disciples, since this was conceded by defense counsel during opening statement, but whether he was guilty of first degree murder of a fellow Gangster Disciple. While the State correctly argued that it had the right to put into evidence the fact that the defendant was a Gangster Disciple in order to demonstrate motive, too much emphasis was placed on this fact. For instance, the State discussed "gang life" including the structure of gangs, territories, leaders' names, rival gangs, gang symbols and signals, and more. The court stated "we are at a loss to understand how this evidence was probative of the issues properly before the jury. We find this evidence to have been irrelevant and prejudicial and conclude that it should have been excluded." *Mason,* 274 Ill. App. 3d at 722-23, 653 N.E.2d at 1376.

Although the graffiti in decedent's apartment had some gang-related content in addition to Nazareth's nickname, the State did not argue that Nazareth was a member of a gang, nor did it focus on, point out or explain the gang symbols. The [*44] depictions of "187" and "Bloods & Crips" and other gang references were not mentioned to the jury during the trial. The offered information was taken directly from the crime scene, and was not in-depth information on gang life as in *Mason supra*.

For instance, in this case, the prosecution questioned Brasic as follows:

"Q. Looking at People's No. 11, would you please explain to the Ladies and Gentlemen of the juries what is shown in that photograph?

A. This is another photograph of the door, the bedroom door showing the graffiti on that door.

Q. Do you see the word Cain on that door?

A. Yes, I do, on the upper left corner area."

This colloquy continued for each picture depicting the nickname "Cain." Further, the photographs were not referred to by the prosecution in closing arguments. See *People v. Smith*, 152 Ill. 2d 229, 264, 604 N.E.2d 858, 873, 178 Ill. Dec. 335 (1992).

Therefore, admitting the photographs of Nazareth's nickname, which were utilized to place him at the scene of the crime, was proper. It was more probative than prejudicial because the State maintained the focus on the nickname and not on the gang symbols. [*45]

Following his plain error argument, Nazareth argues that the issue of the admissibility of the photographs must be considered by this court because his counsel was clearly ineffective for his failure to object to the prejudicial evidence. *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984), held that an attorney will be found ineffective if: (1) his performance was deficient; and (2) if that deficient performance clearly changed the outcome of the case. However, we conclude that the counsel's performance was not deficient. The photographs were more probative than prejudicial and were properly admitted. The admission of the photographs to show the identity of one of the perpetrators was proper.

Jonathan's Appeal

On appeal, Jonathan argues that the trial court's attenuation ruling was erroneous because it mainly rested on the mistaken view that after-acquired probable cause always serves to attenuate a Fourth Amendment violation. Second, he argues that the after-acquired probable cause, which was based on Renee's statement, was tainted by illegality. Third, he argues that police misconduct in this case was flagrant because the arrests [*46] of the defendants were simply "an expedition for evidence." Fourth, Jonathan argues that the police misconduct in this case was flagrant because the police failed to adhere to the requirements in the Juvenile Court Act: (1) to attempt to notify his parent or legal guardian that he was in custody, and (2) to take him to a juvenile police officer. 720 ILCS 405/5-6 (West 1994).

The State contends that Jonathan's statement was properly admitted because his arrest was supported by "after-acquired" probable cause, an intervening event. Therefore, the State argues, Jonathan's statement was sufficiently attenuated from any illegality and the trial court's decision was proper. This court will not disturb a trial court's decision on a motion to suppress unless that decision is determined to be

clearly erroneous. *Foskey,* 136 Ill. 2d at 76, 554 N.E.2d at 197 (1990); *Austin,* 293 Ill. App. 3d at 787, 688 N.E.2d at 742. When neither the facts nor the credibility of witnesses is questioned, and the issue is a question of law, this court reviews *de novo. Foskey,* 136 Ill. 2d at 76, 554 N.E.2d at 197; *Austin,* 293 Ill. App. 3d at 787, 688 N.E.2d at 742. [*47]

The trial court determined that Jonathan was illegally arrested because police had no probable cause to arrest him. Therefore, Jonathan's subsequent statement was tainted by his illegal arrest. Nevertheless, a confession obtained after an illegal arrest may be admissible, if the court determines that it was obtained by means sufficiently distinguishable to be purged of the taint of the illegal arrest. *White,* 117 Ill. 2d at 222, 512 N.E.2d at 687-88. In determining whether the statement has been attenuated from the illegal arrest, the Court should consider several factors: (1) whether *Miranda* warnings were given; (2) the proximity in time between the arrest and the confession; (3) the presence of intervening circumstances; and (4) the purpose and flagrancy of the police misconduct. *Foskey,* 136 Ill. 2d at 85-86, 554 N.E.2d at 202, citing *Brown,* 422 U.S. at 603-04, 45 L. Ed. 2d at 426-28, 95 S. Ct. at 2261-62. The third and fourth factors are the most important in an attenuation analysis. See *Jennings,* 296 Ill. App. 3d at 765, 695 N.E.2d at 1306. The State bears the burden of demonstrating sufficient attenuation, [*48] and it has failed to meet this burden in this case. See *Foskey,* 136 Ill. 2d at 86, 554 N.E.2d at 202.

Jonathan's appeal focuses on the "intervening event" and "flagrancy of police" factors in the attenuation analysis under *Brown.* An intervening circumstance is one that dissipates the taint of unconstitutional police conduct by breaking the causal connection between illegal conduct and the confession. *Turner,* 259 Ill. App. 3d at 992, 631 N.E.2d at 1245. In this case, the trial court determined that while police did not have probable cause to arrest Jonathan, they obtained probable cause when they questioned Renee, a co-defendant, whose statement implicated Jonathan in the beating of decedent. The trial court held that this after-acquired probable cause constituted the intervening event in an attenuation analysis.

As in Nazareth's case, we need not determined whether Renee's statement providing after-acquired probable cause was tainted. Instead, we must determine whether the new evidence was conveyed to Jonathan. See *Wilson,* 260 Ill. App. 3d at 373, 632 N.E.2d at 120; *Wright,* 294 Ill. App. 3d at 613, 691 N.E.2d at 99; [*49] *White,* 117 Ill. 2d at 224-25, 512 N.E.2d at 689. As in Nazareth's case above, there is no evidence in the record that Jonathan was ever confronted by Renee's statement implicating all six of the boys including himself Therefore, there was no intervening event, and Jonathan's statement was not purged of the taint from his illegal arrest. We conclude that Jonathan's statement should have been suppressed as a fruit of his illegal arrest.

Taylor's Appeal

In his appeal, Taylor first argues that the prosecution did not prove beyond a reasonable doubt the essential element of decedent's cause of death. When presented with a challenge to the sufficiency of the evidence, it is not the function of this court to retry the defendant. *People v. Collins,* 106 Ill. 2d 237, 261, 478 N.E.2d 267, 277, 87 Ill. Dec. 910 (1985). Rather the relevant question is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis in original.) *Collins,* 106 Ill. 2d at 261, 478 N.E.2d at 277. Causation is a question [*50] of fact which should be left to the trier of fact and we will not disturb this verdict unless the evidence is "so unreasonable, improbable and unsatisfactory as to leave a reasonable doubt as to defendant's guilt." *People v. Brackett,* 117 Ill. 2d 170, 177, 510 N.E.2d 877, 881, 109 Ill. Dec. 809 (1987).

Taylor was charged and convicted of felony murder. The felony murder statute provides that "a person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death * * * he is attempting or committing a forcible felony other than second degree murder." 720 ILCS 5/9-1(a)(3) (West 1994). Illinois law follows the proximate cause theory of liability for felony murder. *People v. Dekens*, 182 Ill. 2d 247, 249, 695 N.E.2d 474, 475, 230 Ill. Dec. 984 (1998). Under that theory, liability attaches for any death proximately resulting from the unlawful activity. *Dekens*, 182 Ill. 2d at 249, 695 N.E.2d at 475.

A defendant's criminal acts are the proximate cause of a person's death if they contribute to that person's death, and the death is not caused by [*51] an intervening event unrelated to the defendant's acts. *People v. Lowery*, 178 Ill. 2d 462, 465, 687 N.E.2d 973, 975-76, 227 Ill. Dec. 491 (1997). The courts in Illinois have repeatedly held that an intervening cause relieves a defendant of criminal liability. *People v. Meyers*, 392 Ill. 355, 359, 64 N.E.2d 531, 533 (1946). The converse of this is also true. When criminal acts of a defendant have contributed to a person's death, the defendant may be found guilty of murder. *Brackett*, 117 Ill. 2d at 176, 510 N.E.2d at 880, citing *People v. Schreiber*, 104 Ill. App. 3d 618, 432 N.E.2d 1316, 60 Ill. Dec. 417 (1982). Thus, in Illinois, the defendant's acts do not have to be the sole and immediate cause of death for the court to find causation. *Brackett*, 117 Ill. 2d at 175, 510 N.E.2d at 880.

In this case, the trial court found that Taylor's acts were a contributing cause of decedent's death, and that Taylor, through his criminal acts, set in motion a chain of events which resulted in decedent's death. We are not prepared to say, after a careful review of the record in this case, that the medical evidence [*52] and opinions presented to the trier of fact were so unsupported that the trier of fact was left to form its decisions on causation based upon nothing more than speculation and inference. See *People v. Benson*, 19 Ill. 2d 50, 61, 166 N.E.2d 80, 86 (1960).
At trial, CHA police officers testified that when decedent arrived at the CHA police station on December 27, 1994, he told them he had been beaten up by several boys. He complained of pain in his ribs and chest and shortness of breath. X-rays taken at the hospital revealed several broken ribs. While in the hospital, decedent had emergency surgery for the collapse of his left lung. Dr. Cogan, the forensic pathologist who conducted the autopsy, testified that "these [broken] ribs can come through the lung, puncture the lung itself and then produce the pneumothorax or collapsed lung." While decedent's left lung was collapsed, his right lung was forced to oxygenate the blood by itself. This process put extraordinary stress on his right lung, which then developed pneumonia. The pneumonia interfered with decedent's respiration, which led to other complications and eventually caused his death. Dr. Cogan testified that the [*53] beating triggered the sequence of events which led to decedent's death. In this case, pneumonia was the immediate cause of death. However, the fact that the immediate cause of death was pneumonia does not preclude the beating from being the proximate cause. See *People v. Gulliford*, 86 Ill. App. 3d 237, 407 N.E.2d 1094, 41 Ill. Dec. 596 (1980); *People v. Love*, 71 Ill. 2d 74, 373 N.E.2d 1312, 15 Ill. Dec. 628 (1978) (immediate cause of death was pneumonia and post-operative complications, but proximate cause was beating by defendant eighteen days earlier); *People v. Baer*, 35 Ill. App. 3d 391, 342 N.E.2d 177 (1976) (acute secondary pneumonia resulted directly from paralysis induced by the blow to the head "was not a separate intervening act disconnected from the injury inflicted"); *People v. Reader*, 26 Ill. 2d 210, 186 N.E.2d 298 (1962).

Taylor argues that a "contributing factor is not a direct or proximate cause." However, that is not the law in Illinois. Our supreme court has held that a defendant's acts are a contributing cause of a person's death when "the defendant, through his criminal acts, set in motion a chain [*54] of events which culminated in [that person's] death." *Brackett*, 117 Ill. 2d at 176, 510 N.E.2d at 880. Further, when the criminal acts of

defendant have contributed to a victim's death, the defendant may be found guilty of murder. *Brackett,* 117 Ill. 2d at 176, 510 N.E.2d at 880.

Next, Taylor argues that decedent's death was not a "foreseeable consequence" of the beating. He claims the assault was "so limited that aside from four broken ribs on his left side there was no injury to [decedent] or his apartment." However, it is not necessary that defendant foresee the precise manner of death. See *Brackett,* 117 Ill. 2d at 180, 510 N.E.2d at 880 (even if the precise manner of death was not foreseeable to the defendant while he was committing a felony, he is not relieved of responsibility).

In *Brackett,* defendant raped and beat an 85 year-old widow who subsequently died of asphyxiation when food was aspirated into her trachea while being fed by nursing home staff. The court found that defendant was responsible for her death. The victim's doctor testified that to clear the trachea when food enters, it requires a sufficient volume [*55] of air to be present in the lungs, which, when expelled, pushes the food out of the trachea and back into the mouth. The doctor also testified that the pain associated with a broken rib, such as the one suffered by the widow, generally inhibits deep breathing, which limits the amount of air available to the lungs. Defendant's actions caused the broken rib which caused insufficient breathing which caused food to become lodged in the widow's trachea, asphyxiating her. The court found that defendant's acts were a contributing cause of the widow's death, in that the defendant, through his criminal acts, set in motion a chain of events which culminated in her death.

We hold that Taylor did not have to foresee that decedent would die from pneumonia precipitated by the beating in order to be guilty of felony murder. Given the fact that Taylor and five of his teenage friends beat up a frail 51 year-old man, we find it difficult to give credibility to defendant's argument that decedent's death was not a foreseeable consequence of his acts. It is conceivable that death may result in such a situation.

Next, Taylor contends that "the more reasonable inference" is that some preexisting condition [*56] caused decedent's death. There was evidence at trial that decedent had preexisting health conditions and was recently hospitalized. Decedent was 51 years-old, but looked much older. He was frail-standing almost 6 feet tall and weighing only 125 pounds. Dr. Cogan examined decedent's medical records and learned that decedent suffered from chronic alcohol abuse, asthma, hypertension, and chronic lung disease or emphysema.

Specifically, Taylor focused on the decedent's history of emphysema which he argues could itself have caused the pneumonia or collapsed lung. After conducting the autopsy, Dr. Cogan concluded that none of decedent's previous or preexisting conditions caused his death. He testified that emphysema makes the lungs lighter and Sammie's lungs were unusually heavy, a sign of pneumonia.
Taylor also asserts that decedent had a collapsed lung in December 1994, which was due to pneumonia that preexisted the beating on December 27, 1994. However, the record shows that decedent's lung collapsed in September 1994, and that decedent was treated and discharged after his lung re-expanded. Further, allegations of drug abuse by Taylor were unsubstantiated.

Taylor cites *Benson,* 19 Ill. 2d at 61, 166 N.E.2d at 86 (1960), [*57] and *People v. Humble,* 18 Ill. App. 3d 446, 310 N.E.2d 51 (1974), for the contention that it was possible that decedent would have died whether he was attacked or not. However defendant must take his victim as he finds him. *Brackett,* 117 Ill. 2d at 178, 510 N.E.2d at 881. So long as defendant's acts contributed to the decedent's death, there is sufficient proof of causation, even if preexisting health conditions also contributed to the decedent's death. *Brackett,* 117 Ill. 2d at 178, 510 N.E.2d at 881. A reasonable

doubt does not exist because other factors may have contributed to [a] decedent's death or because an individual without [the] decedent's medical history might not have died from the trauma." *People v. Fuller,* 141 Ill. App. 3d 737, 748, 490 N.E.2d 977, 986, 95 Ill. Dec. 885 (1986).

Next, Taylor attacks Dr. Cogan's conclusions as being "mere speculation" without "supporting facts." However, Dr. Cogan based his findings on a review of decedent's medical records and an autopsy. He specifically determined that none of decedent's previous or preexisting conditions caused his death. Taylor presented no expert [*58] testimony at trial to rebut Dr. Cogan's findings.

Therefore, this argument is without merit.

Next, Taylor argues that even if proximate cause was established as to the other defendants, the State failed to establish that the conduct he took part in caused decedent's death. He states that his participation in the beating was "provoked or justified" and "independent" of the conduct of the other defendants.

Taylor's contention that his conduct was provoked or justified is not supported by the evidence. According to Taylor's statement to police, decedent broke away from the other defendants who were beating him and ran into Taylor at the door. Taylor claims that he was provoked when decedent grabbed Taylor's coat. In response, Taylor became angry and pushed decedent who fell into the television and hit his head. However, when Taylor pulled out a BB gun and hit decedent on the head with it and then circled decedent with the other defendants kicking him, Taylor's argument fails. The type and amount of force used by Taylor was not necessary. Taylor was only allowed to use force necessary to defend himself and he clearly overstepped that line. See *People v. Lewis,* 198 Ill. App. 3d 976, 983, 556 N.E.2d 697, 701, 145 Ill. Dec. 79 (1990). [*59]

Further, after reviewing the record, we conclude that Taylor did not act independently of the others. Taylor participated in the home invasion and is legally responsible for the conduct of his codefendants during the commission of the home invasion. Furthermore, the evidence shows that Taylor entered the fray when he pushed decedent, hit him on the head with his BB gun, and kicked him repeatedly with the other defendants. From this evidence, we find that Taylor obviously acted in concert with the other defendants..

Moreover, under the felony murder rule, a defendant is liable for the acts of another if those acts proximately caused a death during the commission of a felony to which defendant is a party, even if the defendant joins in the criminal activity after the "death blow" has been struck. *People v. Fuller,* 91 Ill. App. 3d 922, 929-30, 415 N.E.2d 502, 507-08, 47 Ill. Dec. 497 (1980). Therefore, it is irrelevant whether Taylor's kicks or punches broke decedent's ribs. What is important, however, is that Taylor is liable for the acts of his friends if their acts proximately cause a death during the commission of a felony to which Taylor was a party. See *Fuller,* 91 Ill. App. 3d at 929, 415 N.E.2d at 507. [*60] That is the case here.

We conclude the trier of fact was entitled to find that Taylor, who fully participated in the beating of decedent, set in motion a chain of events which contributed to decedent's death. Therefore, there is no reversible error on the issue of causation.

Taylor's second argument is that the jury was not properly instructed on the standard for causation. He argues the instructions incorrectly indicated that *any* connection between his actions and decedent's death was sufficient to find him guilty of first degree murder.

Under Supreme Court Rule 451(a)(134 Ill. 2d R. 451(a)), when an Illinois Pattern Instruction does not accurately state the law with respect to a particular subject, the trial court may, in its discretion, give a non-IPI instruction on the subject. *People v. Blackwell,* 76 Ill. App. 3d 371, 379, 394 N.E.2d 1329, 1336, 31 Ill. Dec. 952 (1979). A trial court has discretion to submit an instruction to the jury that is non-IPI if the instruction covers a subject that the jury should be instructed upon, and it is an accurate, simple, brief, impartial, and non-argumentative statement of the law. *People*

v. Ramey, 151 Ill. 2d 498, 536, 603 N.E.2d 519, 534, 177 Ill. Dec. 449 (1992).
[*61] The State's Instruction 17, a non-pattern instruction read:

"In order for you to find the acts of the defendant or one for whose conduct he is legally responsible caused the death of Sammie Britton, it is not necessary that you find the acts were the sole and immediate cause of death, but you must find beyond a reasonable doubt that they were a contributing factor such that the death did not result from a source unconnected with said acts."

There is no substantial defect in the instruction given. We find this instruction accurately stated the law of causation, effectively states the State's burden of proof, and properly touched on the defense of an intervening act. The instruction was designed to inform the jury that they were required to consider and determine whether the death of decedent occurred because of the acts of the defendant, and that it was not necessary that his acts were the sole and immediate cause thereof See *People v. Fuller,* 141 Ill. App. 3d 737, 749, 490 N.E.2d 977, 987, 95 Ill. Dec. 885 (1986) (identical instruction was proper). No error occurred in instructing the jury on causation. See *Love,* 71 Ill. 2d 74, 373 N.E.2d 1312, 15 Ill. Dec. 628 (1978); [*62] *Gulliford,* 86 Ill. App. 3d 237, 407 N.E.2d 1094, 41 Ill. Dec. 596 (1980).

Third, Taylor argues the prosecution did not prove home invasion beyond a reasonable doubt. Specifically, he argues that the State failed to show "an entry without authority" and "with intent to commit a criminal act." On appeal, a reviewing court, considering all of the evidence in the light most favorable to the prosecution, must determine whether any rational fact finder could have found beyond a reasonable doubt the essential elements of the crime. *Peeples,* 155 Ill. 2d at 487, 616 N.E.2d at 324. A criminal conviction will not be set aside unless the evidence is so improbable or unsatisfactory as to create a reasonable doubt of the defendant's guilt. *Peeples,* 155 Ill. 2d at 487, 616 N.E.2d at 324.
A defendant commits home invasion when he: (1) knowingly enters the dwelling place of another, without authority and with knowledge that the dwelling is occupied, and (2) intentionally causes injury to an occupant of the dwelling or, while armed with a dangerous weapon, uses or threatens force upon any occupants of the dwelling. 720 ILCS § 5/12-11(a) (West 1993); [*63] *People v. Hicks,* 181 Ill. 2d 541, 545, 693 N.E.2d 373, 375, 230 Ill. Dec. 244 (1998). The gravamen of the offense of home invasion is unauthorized entry. *Peeples,* 155 Ill. 2d at 487, 616 N.E.2d at 325.

On the night of the alleged offense, Taylor claimed he was talking to a girl who lived next door to decedent when he heard a struggle in decedent's apartment. He claims that after he heard noises in decedent's apartment he only went to see what was happening. Thus, Taylor argues that he had authority to enter decedent's apartment. However, decedent was in no condition at the time to grant Taylor authority to come in as he was being beaten by five of Taylor's friends.
Taylor also argues that he had known decedent all his life. This fact was of no consequence. The mere fact that Taylor knew decedent did not give him authority to enter decedent's house on the evening of December 27, 1994. *People v. Sanders,* 212 Ill. App. 3d 773, 778, 571 N.E.2d 836, 839, 156 Ill. Dec. 856 (1991) (individual who has a personal relationship with occupant and had authority to enter in the past will not be presumed to have present authority to enter absent [*64] evidence of consent).

Taylor argues that he had an innocent intent upon entering decedent's apartment so he cannot be convicted of home invasion. Specifically, he states:

"No individual who is granted access to a dwelling can be said to be an authorized entrant if he intends to commit criminal acts therein * * *. Conversely, where the

defendant enters with an innocent intent, his entry is authorized, and criminal actions thereafter engaged in by the defendant do not change the status of the entry." *People v. Bush*, 157 Ill. 2d 248, 623 N.E.2d 1361, 191 Ill. Dec. 475 (1993).

The evidence indicates Taylor's intent in entering the apartment was not innocent, and therefore, *Bush* is inapposite. The record reflects that this group of boys had previously harassed and beaten decedent. Further, Taylor spent time with the other defendants earlier on December 27, 1994, the same day they decided to beat up the decedent. While he may have arrived later to decedent's apartment than the other defendants, he arrived with a BB gun and quickly entered the fray We conclude that Taylor's intent was not innocent and his entry was not authorized.

[The preceding [*65] **material is nonpublishable under Supreme Court Rule 23]**

Taylor contends the trial court improperly refused instructions and verdict forms on involuntary manslaughter and second degree murder after the prosecution improperly nol-prossed the two counts of murder other than felony murder. Taylor argues that he was substantially prejudiced because the trial court left only felony murder, and the jury was precluded from finding him guilty of a lesser-included offense of felony murder. We disagree.

First, we conclude the trial court properly allowed the State to nol-pros the charges of intentional and knowing murder. The State has nearly unfettered discretion in determining whether to nol-pros a charge. *People v. Olson*, 128 Ill. App. 3d 560, 562, 470 N.E.2d 1176, 1178, 83 Ill. Dec. 756 (1984); *People v. Rixie*, 190 Ill. App. 3d 818, 831, 546 N.E.2d 52, 60, 137 Ill. Dec. 428 (1989). Consent and approval of the court are necessary before the State may enter a nolle prosequi, but the standard of the discretion vested in the court to review the State's request is governed by a determination of whether the State's action is "capriciously or vexatiously [*66] repetitious," or whether it will cause substantial prejudice to the defendant. *Olson*, 128 Ill. App. 3d at 562, 470 N.E.2d at 1178. The State's power to nol- pros a charge extends to all stages of the trial proceedings up until the time that sentence is imposed. *People v. Baes*, 94 Ill. App. 3d 741, 746, 419 N.E.2d 47, 51, 50 Ill. Dec. 180 (1981); *Olson*, 128 Ill. App. 3d at 562, 470 N.E.2d at 1178.
Initially, Taylor was charged with intentional murder, knowing murder, and felony murder, in violation of 9-1(a)(1), (a)(2), and (a)(3) of the Criminal Code of 1961 (720 ILCS 5/9-1(a)(1), (a)(2), and (a)(3) (West 1994)). After jury selection, the State nol-prossed the first count of murder brought under section 9-1(a)(1). During the instruction conference, the trial court indicated it would give instructions and verdict forms on involuntary manslaughter. Thereafter, the State nol-prossed the second murder count brought under section 9-1(a)(2), and left only felony murder. The court then refused to give the jury instructions and verdict forms on involuntary manslaughter or on second degree murder. The court also [*67] denied a motion for a mistrial.

In *People v. Rixie*, 190 Ill. App. 3d 818, 546 N.E.2d 52, 137 Ill. Dec. 428, a case substantially similar to the case at bar, the defendant was charged with one count of murder (see 720 ILCS 5/9-1(a)(1)(West 1994)) and one count of felony murder (see 720 ILCS 5/9-1(a)(3)(West 1994)). After the initial instruction conference, the court agreed to instruct the jury on the lesser-included offenses of murder. The State then nol-prossed the intentional murder count (see 720 ILCS 5/9-1(a)(1)(West 1994)), leaving only the felony murder count. Defendant's motion for a mistrial was denied. Despite the dismissal of the intentional murder charge, defendant proffered instructions on the lesser-included offenses. These instructions were refused and defendant was convicted of felony murder. The court determined:

"By allowing the State to nol-pros count I [murder] of the indictment, the jury was limited to finding guilty or not guilty of felony murder only. We do not see this as substantially prejudicing defendant. Defendant knew of the felony murder charge [*68] since the inception of the proceedings. He was given a full opportunity to prepare and present a defense to felony murder. The jury was presented with all the evidence in this matter along with counsel's arguments that Rixie was not involved in any plan or attempt to rob [the victim]. The jury could have concluded that Rixie may have been guilty of something, but not felony murder. This determination would have required the jury to find Rixie not guilty. * * * The court did not err in allowing the State to nol-pros the murder charge and to proceed on only the felony murder charge." *Rixie,* 190 Ill. App. 3d at 831, 546 N.E.2d at 61.

Like the defendant in *Rixie,* Taylor was charged with felony murder from the start. He was able to defend against that charge. The jury was properly instructed on the charge of felony murder. Thus, as in *Rixie,* Taylor was not prejudiced and the trial court properly granted the State's motion to nol-pros the murder counts.

Next, we review the trial court's refusal to issue tendered jury instructions under an abuse of discretion standard. *People v. Kidd,* 295 Ill. App. 3d 160, 167, 692 N.E.2d 455, 460, 229 Ill. Dec. 682 (1998). [*69] First, Taylor argues the trial court should have given an involuntary manslaughter instruction. Second, he argues the trial court erred in not giving a second degree murder instruction.

Generally, a defendant may not be convicted of an offense for which he has not been charged. *People v. Novak,* 163 Ill. 2d 93, 105, 643 N.E.2d 762, 769, 205 Ill. Dec. 471 (1994). However, in an appropriate case, a defendant is entitled to have the jury instructed on less serious offenses that are included in the charged offense. *People v. Hamilton,* 179 Ill. 2d 319, 323, 688 N.E.2d 1166, 1169, 228 Ill. Dec. 189 (1997); *People v. Landwer,* 166 Ill. 2d 475, 485-86, 655 N.E.2d 848, 854, 211 Ill. Dec. 465 (1995); see *Novak,* 163 Ill. 2d at 105, 643 N.E.2d at 769, citing *People v. Jones,* 149 Ill. 2d 288, 292, 595 N.E.2d 1071, 1073, 172 Ill. Dec. 401 (1992)("an accused may be convicted of an offense not expressly included in the charging instrument if that offense is a 'lesser included offense' of the offense expressly charged"). The purpose of an instruction on a lesser offense is to provide "'an important third option to a [*70] jury which, believing that the defendant is guilty of something but uncertain whether the charged offense has been proved, might otherwise convict rather than acquit the defendant of the greater offense.'" *Hamilton,* 179 Ill. 2d at 323-24, 688 N.E.2d at 1169, quoting *People v. Bryant,* 113 Ill. 2d 497, 502, 499 N.E.2d 413, 415, 101 Ill. Dec. 825 (1986).

An included offense is an offense that "is established by proof of the same or less than all of the facts or a less culpable mental state (or both), than that which is required to establish the commission of the offense charged." 720 ILCS 5/2-9(a) (West 1994). In applying this definition to determine whether a particular offense is included in a charged offense, the Illinois Supreme Court has held that the proper approach is to examine the charging instrument and the evidence presented at trial. *Hamilton,* 179 Ill. 2d at 324, 688 N.E.2d at 1169; *Landwer,* 166 Ill. 2d at 486, 655 N.E.2d at 854.

To determine whether an offense is identified as a lesser-included offense under the charging instrument approach, a court must look to see if the offense [*71] is described by the charging instrument. *Hamilton,* 179 Ill. 2d at 324, 688 N.E.2d at 1169; *People v. Jones,* 175 Ill. 2d 126, 135, 676 N.E.2d 646, 650, 221 Ill. Dec. 843 (1997). "Once a lesser included offense is identified, however, it does not automatically follow that the jury must be instructed on the lesser offense." *Hamilton,* 179 Ill. 2d at 324, 688 N.E.2d at 1169, citing *Novak,* 163 Ill. 2d at 108, 643 N.E.2d at 770. A defendant is only entitled to a lesser-included offense instruction if an examination of the evidence reveals that it would permit a jury to rationally find the defendant guilty of the lesser offense yet acquit the defendant of the greater offense.

Hamilton, 179 Ill. 2d at 324, 688 N.E.2d at 1169; *Landwer,* 166 Ill. 2d at 486, 655 N.E.2d at 854.

Applying these principles to the instant case, we must first determine whether involuntary manslaughter was described by the charging instrument in Taylor's case. The bill of indictment in this case alleged that Taylor, "without lawful justification while committing a forcible felony, to wit: home invasion, beat and killed [*72] Sammie Britton with hands, feet and a B.B. gun in violation of chapter 720, Act 5, section 9-1(a)(3) of the Illinois Complied Statutes 1992 as amended." In comparison, the offense of involuntary manslaughter is committed when a person "unintentionally kills an individual without lawful justification" and "if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly." 720 ILCS 5/9-3(a) (West 1996).

It is clear that the offense of involuntary manslaughter requires a mental state of recklessness whereas felony murder requires no mental state independent of the mental state of the predicate felony. See *People v. Sandy,* 188 Ill. App. 3d 833, 842-44, 544 N.E.2d 1248, 1254, 136 Ill. Dec. 473 (1989) (involuntary manslaughter is not a lesser-included offense of felony murder because it requires a reckless mental state and felony murder does not require any mental state independent of that required by the underlying felony); see *People v. McCarroll,* 168 Ill. App. 3d 1020, 1023, 523 N.E.2d 150, 152, 119 Ill. Dec. 682 (1988) [*73] ("if death resulted from recklessness or even accident during the commission of the underlying felony, the defendant would still be guilty of felony murder"). Essentially, involuntary manslaughter requires proof of a more culpable mental state than felony murder. Therefore, where the sole murder charge against a defendant is based on felony murder, no involuntary manslaughter instruction need be given. *McCarroll,* 168 Ill. App. 3d at 1023, 523 N.E.2d at 152. Since involuntary manslaughter is not a lesser-included offense of felony murder, we need not discuss the second prong of the inquiry--whether evidence exists to permit a jury to rationally find Taylor guilty of the lesser offense.

Next, Taylor argues that a second degree murder instruction should have been given. A person commits the offense of second degree murder when he commits the offense of first degree murder as defined in paragraphs (1) and (2) of subsection (a) of section 9-1, and a mitigating factor is present. 720 ILCS 5/9-1(a), 9-2(a)(West 1994). The mitigating factors include: (1) if at the time of the killing, defendant is acting under a sudden and intense passion resulting [*74] from serious provocation; and (2) at the time of the killing he believes the circumstances to be such that, if they existed, would justify or exonerate the killing, but his belief is unreasonable. 720 ILCS 5/9-2(a)(1), (a)(2) (West 1994).
As with involuntary manslaughter, the offense of second degree murder requires a mental state (intent to commit murder or knowing such acts create a strong probability of death) and felony murder requires no mental state. Furthermore, second degree murder requires proof of a mitigating defense. Since second degree murder requires proof of additional facts and a more culpable mental state than felony murder, it cannot be a lesser-included offense of felony murder. See 720 ILCS 5/2-9(a) (West 1994).

This finding is supported by the fact that one of the rationales behind the felony murder doctrine is that a person who intends to commit a forcible felony should not be excused from the unintended results of his actions that occur during the course of the original felony. *People v. Williams,* 164 Ill. App. 3d 99, 109, 517 N.E.2d 745, 751, 115 Ill. Dec. 334 (1987). Therefore, in most [*75] felony murder cases it should not be a defense that a defendant is provoked. See *Williams,* 164 Ill. App. 3d at 108, 517 N.E.2d at 751; *Kidd,* 295 Ill. App. 3d at 164-65, 692 N.E.2d at 458. "A person who intends to rob a shopkeeper or rape an individual is not allowed to claim that he was provoked by his victim or to raise any other affirmative defense if[,] in the course of

committing the original felony, the intended victim or any other person is killed." *Williams,* 164 Ill. App. 3d at 109, 517 N.E.2d at 751. The argument that a defendant was provoked to commit the robbery or rape in which the victim was killed similarly has no merit. *Kidd,* 295 Ill. App. 3d at 164, 692 N.E.2d at 458. Mental state is irrelevant in a felony murder analysis. *Kidd,* 295 Ill. App. 3d at 164, 692 N.E.2d at 458. Once a person intends to commit a forcible felony and takes a substantial step to carry out that intent, he is liable for all of the actual results of his actions, even if they are unintended. *Williams,* 164 Ill. App. 3d at 109, 517 N.E.2d at 751. A person cannot claim that he was provoked by a person [*76] against whom he has already committed or attempted to commit a forcible felony. *Williams,* 164 Ill. App. 3d at 109, 517 N.E.2d at 751.

Nevertheless, courts have carved out a narrow exception to this rule. Provocation and belief in the need for self-defense are partial defenses to a felony murder charge only where provocation or belief in the need for self-defense occurs before defendant forms felonious intent and before he commits the forcible felony. *Kidd,* 295 Ill. App. 3d at 165, 692 N.E.2d at 458. Therefore, if there is evidence that provocation or belief in the need for self-defense occurred prior to the emergence of defendant's felonious intent, defendant's request for a second degree murder instruction must be granted. *Kidd,* 295 Ill. App. 3d at 167, 692 N.E.2d at 460. However, the defendant first has the burden of proving that at least "some evidence" of serious provocation or need for self-defense exists, otherwise the trial court may deny giving the instruction. *Kidd,* 295 Ill. App. 3d at 167, 692 N.E.2d at 460; *People v. Austin,* 133 Ill. 2d 118, 125, 549 N.E.2d 331, 334, 139 Ill. Dec. 819 (1989). [*77]

We hold that the trial court did not abuse its discretion in refusing to give Taylor's second degree murder provocation instruction because Taylor did not present sufficient evidence to warrant giving that instruction. See *Kidd,* 295 Ill. App. 3d at 167, 692 N.E.2d at 460. Specifically, Taylor failed to produce evidence that he was acting under a sudden and intense passion resulting from serious provocation at the time he beat decedent.

The Criminal Code of 1961 defines "serious provocation" as "conduct sufficient to excite an intense passion in a reasonable person." 720 ILCS 5/9-2(b) (West 1994). The defendant must be acting under a sudden and intense passion spurred from serious provocation that the law recognizes as reasonable. *Kidd,* 295 Ill. App. 3d at 167, 692 N.E.2d at 460. Illinois courts have recognized four categories of provocation: (1) substantial physical injury or substantial physical assault; (2) mutual quarrel or combat; (3) illegal arrest; and (4) adultery with the offender's spouse. *Kidd,* 295 Ill. App. 3d at 167, 692 N.E.2d at 460.

The evidence shows that on December 27, 1995, the day [*78] of the incident, Taylor was "hanging around" with McBounds, Jonathan and Nazareth Beard, Rasheed Williams and Quanario Renee. He broke off from the group and went to talk to a girl who lived next door to the decedent. While next door, he heard a struggle going on inside decedent's apartment. He went inside decedent's apartment. He saw his friends punching and kicking the decedent. Decedent then broke away from the other attackers and tried to run toward the door. He ran into Taylor and grabbed his coat. Taylor then pushed decedent, hit him in the head with his BB gun and joined his friends in kicking him.

Taylor does not specify which of the four recognized categories of provocation he was acting under. It appears that the only possible category would be mutual quarrel or combat. However, mutual quarrel or combat is defined as a "fight or struggle which both parties enter willingly or where two persons, upon a sudden quarrel and in hot blood, mutually fight upon equal terms and where death results from the combat." *Austin,* 133 Ill. 2d at 125, 549 N.E.2d at 334.

We conclude this situation did not constitute mutual combat. Taylor presented no evidence that decedent [*79] voluntarily entered into the struggle or that the fight

was on equal terms. See *Kidd,* 295 Ill. App. 3d at 167, 692 N.E.2d at 460. This was not a one-on-one fight since decedent was already being beaten by Taylor's five teenage friends when Taylor entered the apartment. Decedent was 51 years old, frail and sick. Even if decedent grabbed Taylor's jacket, this was not serious provocation. He may have only been trying to escape the beating by running toward the door. Instead of an escape, however, he ran into Taylor. Therefore, the trial court did not abuse its discretion when Taylor was prevented from presenting to the jury the second degree murder instructions based on provocation. We need not determine *when* the provocation occurred, as we have determined that no evidence of serious provocation existed.

Next, we hold that the trial court did not abuse its discretion in refusing to give Taylor's second degree murder instruction based upon his unreasonable belief in the need for self-defense. Again, Taylor did not present sufficient evidence to warrant giving that instruction. The evidence of Taylor's unreasonable belief did not clearly outweigh the State's evidence [*80] indicating that no such mitigating factor existed at the time of the killing.

The only evidence Taylor provides regarding this defense is that, when he walked in decedent's door, decedent grabbed his jacket. On the other hand, the State established that, on the day of the beating, Taylor was with the McBounds, the Beard brothers, Williams and Renee. On that same day, the group decided to "twist Sammie's cap." While Taylor broke off from the group and his friends went to decedent's apartment, Taylor went to the apartment next door to decedent's. He had his BB gun with him at that time. When he heard the struggle, he walked into decedent's apartment and saw his five friends punching decedent. The jury could conclude that the defendant could not believe, even unreasonably, that he was in imminent danger of death or great bodily harm when he participated in the beating. See *People v. Thurman,* 223 Ill. App. 3d 196, 204, 584 N.E.2d 1069, 1075, 165 Ill. Dec. 635 (1991). Therefore, the trial court did not abuse its discretion when Taylor was prevented from presenting the second degree murder instructions based upon unreasonable belief in self-defense to the jury. To that [*81] end, we do not need to evaluate *when* the belief in the need for self-defense was formed.

Taylor cites *People v. Toney,* 309 Ill. App. 3d 28, 242 Ill. Dec. 859, 722 N.E.2d 643 (1999), and *People v. Luckett,* 309 Ill. App. 3d 14, 242 Ill. Dec. 850, 722 N.E.2d 634 (1999), for the contention that if the evidence warrants instructions on second degree murder, then those instructions should be given, regardless of the charges actually filed against Taylor. However, these cases do not conflict with our decision today.

In *Toney,* defendant was charged with intentional and knowing murder and aggravated discharge of a firearm. He was convicted of first degree murder, attempted first degree murder, and aggravated discharge of a firearm. Defendant argued on appeal that the court erred in failing to instruct the jury on the offense of second degree murder. He contended there was sufficient evidence to raise the issue of whether he had an unreasonable belief that self-defense was necessary. The appellate court concluded that the record demonstrated sufficient evidence to warrant an instruction on second degree murder due to the history of the rival gangs, [*82] the evidence of a confrontation just days before, and evidence of the fact that the victim and his friends had been the aggressors.

In *Luckett,* a related case, defendant was charged with intentional and knowing first degree murder and three counts of aggravated discharge of a firearm. He was found guilty of first degree murder, aggravated discharge of a firearm and attempted first degree murder. The jury was given a felony murder instruction based upon aggravated discharge of a firearm. The jury was not given an instruction for the charged offense of intentional and knowing murder or for the lesser mitigated offense of second degree murder. The State argued that there was no evidence to support an

instruction for second degree murder, but the appellate court again decided otherwise finding that the record demonstrated sufficient evidence to warrant an instruction on second degree murder.
Ordinarily, a defendant cannot be convicted of an uncharged offense unless it is a lesser-included offense of the crime charged. *Hamilton*, 179 Ill. 2d at 324, 688 N.E.2d at 1169; *People v. Schmidt*, 126 Ill. 2d 179, 183-84, 533 N.E.2d 898, 900, 127 Ill. Dec. 816 (1988). [*83] Second degree murder is not a lesser-included offense of first degree murder (intentional or knowing) but is more accurately described as a lesser *mitigated* offense. *People v. Jeffries*, 164 Ill. 2d 104, 122-23, 646 N.E.2d 587, 595, 207 Ill. Dec. 21 (1995). It is a lesser offense because its penalties upon conviction are lesser, and it is a mitigated offense because it is first degree murder plus defendant's proof by a preponderance of the evidence that a mitigating factor is present. *People v. Newbern*, 219 Ill. App. 3d 333, 356, 579 N.E.2d 583, 598, 161 Ill. Dec. 912 (1991); *Jeffries*, 164 Ill. 2d at 122, 646 N.E.2d at 595.

In *People v. Rogers*, 286 Ill. App. 3d 825, 677 N.E.2d 13, 222 Ill. Dec. 200 (1997), the court held that departure from the general rule -- that a defendant cannot be convicted of an uncharged offense unless it is a lesser included offense -- was authorized by section 9-2(c) of the Illinois Criminal Code. Section 9-2(c) states that "when a defendant is on trial for first degree murder * * * the defendant can be found guilty of second degree murder." 720 ILCS 5/9-2(c) [*84] (West 1998). Therefore, a defendant charged with intentional or knowing first degree murder may be convicted of second degree murder even though it was not charged and is not a lesser-included offense. *People v. Kauffman*, 308 Ill. App. 3d 1, 8, 719 N.E.2d 275, 280, 241 Ill. Dec. 414 (1999). Notably, the court must still consider whether "an examination of the evidence reveals that it would permit a jury to rationally find the defendant guilty of the lesser offense," in this case, second degree murder. See *Hamilton*, 179 Ill. 2d at 324, 688 N.E.2d at 1169.
Since the defendants in *Toney* and *Luckett* were both charged with first degree murder (intentional or knowing), and there was sufficient evidence in the record supporting an unreasonable belief in the need for self-defense, a second degree murder instruction was properly given. In this case, however, Taylor was charged with felony murder, not with first degree murder based upon sections 9-1(a)(1) and (a)(2). To the contrary, the exception outlined in *Rogers* involved intentional and knowing first degree murder and second degree murder, but did not include felony murder. Therefore, the second [*85] degree murder instruction was properly denied in this case.

Fifth, Taylor argues that the jury instructions did not accurately state the law of accountability in this case. However, Taylor failed to object to the State's instruction number 13 on accountability at trial or in Taylor's post-trial motion. Further, while he objected to the State's instruction number 14 on accountability at trial, he failed to object to the instruction in his post-trial motion. The failure to raise an issue in a written motion for a new trial results in a waiver of that issue on appeal. *Enoch*, 122 Ill. 2d at 186, 522 N.E.2d at 1129. Therefore, we will not consider this issue.

Sixth, Taylor contends he was arrested in violation of state law and the Fourth Amendment. Taylor argues that his arrest was unlawful because he was arrested in his home without a warrant, allegedly in violation of the Fourth Amendment as construed in *Payton*, 445 U.S. 573, 63 L. Ed. 2d 639, 100 S. Ct. 1371 (1980). Moreover, he contends that the incriminating statements he made following his arrest should have been suppressed because they were not sufficiently attenuated from the allegedly illegal [*86] arrest. The trial court held that the officers had exigent circumstances to arrest Taylor in his home and therefore, his arrest was legal. To that end, the trial court determined Taylor's statement was properly admitted.

The physical entry of the home is the chief evil against which the Fourth Amendment is directed. *Payton*, 445 U.S. at 585, 63 L. Ed. 2d at 650, 100 S. Ct. at 1379-80.

"Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Payton*, 445 U.S. at 590, 63 L. Ed. 2d at 653, 100 S. Ct. at 1382.

The State bears the burden of demonstrating exigent need for a warrantless search or arrest. *Foskey*, 136 Ill. 2d at 75, 554 N.E.2d at 197. Where the facts and the credibility of the witnesses are undisputed, the question of whether exigent circumstances are present is a question of law, subject to consideration by this court *de novo*. *People v. McNeal*, 175 Ill. 2d 335, 345, 677 N.E.2d 841, 846, 222 Ill. Dec. 307 (1997).

Although each case must be decided on its own facts, the Illinois Supreme Court has recognized the following factors as relevant to a determination of exigency [*87] in circumstances involving a warrantless entry into a private residence to effectuate an arrest: (1) whether the crime was committed recently; (2) whether there was any deliberate or unjustified delay by the police during which time a warrant could have been obtained; (3) whether the crime was grave or violent; (4) whether there was a reasonable belief that the suspect was armed; (5) whether the police were acting on a clear showing of probable cause; (6) whether there was a likelihood that the suspect would escape if he was not swiftly apprehended; (7) whether there was strong reason to believe that the suspect was in the premises; and (8) whether the police entry was made peaceably, albeit without consent. *McNeal*, 175 Ill. 2d at 345, 677 N.E.2d at 846. This list of factors is not exhaustive (*McNeal*, 175 Ill. 2d at 345, 677 N.E.2d at 847), and all factors may not be present in every case (*People v. Cobb*, 97 Ill. 2d 465, 484, 455 N.E.2d 31, 39, 74 Ill. Dec. 1 (1983)). A court must consider the totality of the circumstances confronting the police at the time they entered the house and determine whether they acted reasonably. *McNeal*, 175 Ill. 2d at 345-46, 677 N.E.2d at 847. [*88]

The balance of these factors clearly supports the police conduct here. First, we note that while the crime was not recently committed, the officers obtained probable cause to arrest Taylor only four hours prior to his arrest. The law is clear that "exigent circumstances may arise * * * not only immediately after the perpetration of the crime, but also when additional facts justify immediate action." *Cobb*, 97 Ill. 2d at 486, 455 N.E.2d at 40 (while the arrest of Cobb occurred three weeks after the crimes, it was within minutes of receipt by the police of new material information establishing probable cause to believe Cobb committed the offense). Police arrested Taylor within five days of decedent's death and more importantly, within four hours of learning of his involvement from the confessions of the other defendants. Second, there was no deliberate or unjustified delay by the officers during which time a warrant could have been obtained. To that end, the police left the station to arrest Taylor as soon as they secured probable cause through the confessions of the other defendants. "As the time between when the police formulate probable cause and when defendant is [*89] arrested grows longer, the exigency of the situation is certainly diminished." *People v. Smith*, 152 Ill. 2d 229, 249, 604 N.E.2d 858, 866, 178 Ill. Dec. 335 (1992).

Third, we note that the crime was both violent and grave as six teenagers beat a man in his home resulting in his death. Fourth, the officers learned from the other defendants that Taylor was armed during the beating. The other defendants each reported that Taylor had used a metal pellet gun to hit decedent on the head. Further, since all of the other defendants made statements to the effect that they had been expecting the police, the officers had reason to believe Taylor would also expect the police and have his weapon with him for protection. In any event, even if the officers did not have reason to believe Taylor was armed, they still had reason to believe that he was a violent individual. See *People v. Sakalas*, 85 Ill. App. 3d 59, 66, 405 N.E.2d 1121, 1127, 40 Ill. Dec. 29 (1980) (Exigent circumstances existed partly because the officers knew that defendant had used a pipe to violently beat the victim, even though they had no reason to believe that he was armed when arrested).

Fifth, [*90] the officers were acting on a clear showing of probable cause. Probable cause to arrest may be established by an accomplice where he makes a statement against his penal interest while in police custody if there is some indicia of reliability. *People v. Almendarez*, 266 Ill. App. 3d 639, 642, 639 N.E.2d 619, 622, 203 Ill. Dec. 299 (1994); *People v. James*, 118 Ill. 2d 214, 224-25, 514 N.E.2d 998, 1001-02, 113 Ill. Dec. 86 (1987). Here, Williams, whose statement was not suppressed, confessed to his own involvement in the incident. He also implicated Taylor in the beating. Further, Williams recounted the events that instigated the beating which were already known to the officers from speaking with the CHA police. Similarly, in *People v. Johnson*, the information from defendant bore indicia of reliability since he implicated himself in the offense and since it was corroborated by other information known to the officer at the time of his arrest. 121 Ill. App. 3d 358, 364, 459 N.E.2d 1000, 1005, 76 Ill. Dec. 865 (1984).

Sixth, while there was only a small likelihood that Taylor would escape if he was not quickly apprehended, the fact that other arrests were [*91] made across a "gangway" and occurred only a few hours earlier bolsters the case for finding exigent circumstances. See *Cobb*, 97 Ill. 2d at 486, 455 N.E.2d at 40 (the fact that an accomplice was arrested gave rise to the possibility that the defendant, who lived a few blocks from the police station, would be alerted to her interrogation, giving the defendant the incentive to either flee or prevent his peaceful arrest).

Seventh, there was strong reason to believe that the suspect was on the premises. The officers learned from Taylor's sister that he was at his grandmother's house that evening. Eighth, the police entry was made peaceably. When the officers arrived at Taylor's grandmother's house, they knocked on the door and told Taylor's grandmother that they wanted to question Taylor about a homicide. We conclude that the arrest of Taylor was "reasonable" due to the exigent circumstances that surrounded it, and therefore, it was not a violation of the Fourth Amendment.

Taylor argues that his possession of the BB gun did not constitute an exigent circumstance because it was unrelated to decedent's death. Taylor cites *People v. Riddle*, 258 Ill. App. 3d 253, 630 N.E.2d 141, 196 Ill. Dec. 444 (1994), [*92] to support this assertion. However, in *Riddle*, the court held that officers may be excused from the "knock and announce" requirement if exigent circumstances exist sufficient to justify the intrusion. The court held that the mere presence of guns, drugs and pit bulls in the apartment did not give rise to exigent circumstances to allow a "no-knock entry." We fail to see how this case aids Taylor's argument. Taylor used his weapon in the beating of decedent.

This court has held that exigent circumstances may exist if defendant is reasonably likely to be armed at the time of the arrest, which can be affected by whether defendant was armed during the criminal act. *People v. Chambers*, 200 Ill. App. 3d 538, 547, 558 N.E.2d 274, 281, 146 Ill. Dec. 311 (1990). Taylor carried a BB gun with him to decedent's apartment and then hit decedent on the head with the BB gun during the incident. According to *Chambers*, the officers could take this into account in determining whether Taylor would be armed when they attempted to arrest him. *Chambers*, 200 Ill. App. 3d at 547, 558 N.E.2d at 281. It is irrelevant that the gun may not have been the instrument that [*93] caused decedent's death. What is important is that Taylor was armed with a BB gun during the beating of decedent. Since we conclude Taylor's arrest was legal, we must also conclude that his statement was properly admitted since it was not the fruit of an illegal arrest.

[The following material is nonpublishable under Supreme Court Rule 23]

Taylor's seventh argument is that his post-arrest statement was elicited in violation of state law and the Fifth Amendment. Specifically, he contends that the incriminating statement he made at the station should have been suppressed because it was involuntary. The standard of review for the trial court's finding that an incriminating statement was voluntary is whether the finding is contrary to the manifest weight of

evidence. *People v. Oaks,* 169 Ill. 2d 409, 447-48, 662 N.E.2d 1328, 1344, 215 Ill. Dec. 188 (1996).
Taylor's testimony in the pretrial hearing indicated that in the middle of the night, the police woke Taylor and took him in handcuffs to the police station for questioning. Taylor says he asked to speak to his grandmother but no arrangements were made even though his grandmother was at the police station. [*94] He claimed that a man wearing a suit told him that he could go home if he signed the statement. He claimed that the man told him that his "rappies" were sending him down to the penitentiary, and that he was going to ask the judge to give Taylor life in prison. Taylor remained in a room at the station all night long. He claimed in his pretrial hearing he had not been given anything to eat.
Officer O'Neill testified that he handcuffed Taylor to the wall when they arrived at the station, but took the handcuffs off a couple of minutes later when Detectives Boylan and McDermott came to interview Taylor. He also testified that Taylor was not handcuffed again in his presence. ASA Falagario testified that he informed Taylor of his *Miranda* rights and Taylor indicated that he understood and did not ask any questions. Prior to taking Taylor's statement, Falagario read the preprinted paragraph containing Taylor's rights out loud. Taylor again stated that he understood and signed beneath the paragraph. Falagario also had Taylor read the first handwritten paragraph out loud to ensure Taylor was literate and could read his handwriting. After completing the statement, Taylor's picture was taken, [*95] signed, and marked with the date and time. The detectives and ASA Falagario denied making any statements to Taylor about asking the judge for life in prison, or that he could go home if he signed the statement. Falagario testified that he was alone with Taylor on two occasions and asked him how he had been treated. Taylor had no complaints. In Taylor's handwritten confession, he stated that he was given two hamburgers and french fries. He also stated that he was allowed to use the bathroom as needed. The trial court denied Taylor's motion to suppress his statement finding that "this 19 year-old adult knowingly and intelligently waived his rights after having been given full *Miranda* warnings."

The test for voluntariness is whether the defendant made the statement freely, voluntarily, and without compulsion or inducement--whether the defendant's will was overcome when he confessed. *People v. Gilliam,* 172 Ill. 2d 484, 500, 670 N.E.2d 606, 613, 218 Ill. Dec. 884 (1996). The determination must be made after considering the totality of the circumstances. *Gilliam,* 172 Ill. 2d at 500, 670 N.E.2d at 614. It is not important whether a defendant wanted to [*96] confess or would have confessed in the absence of interrogation. *Gilliam,* 172 Ill. 2d at 500, 670 N.E.2d at 613. The credibility of the witnesses regarding the voluntariness of a statement is to be determined by the trial court. *Gilliam,* 172 Ill. 2d at 505, 670 N.E.2d at 615.

We could find no credible evidence in the record that Taylor was mistreated or coerced. The record in this case discloses that the trial judge applied the correct totality of circumstances test in ruling that defendant's statements were admissible. The evidence showed that defendant's confession was freely given, without threats, promises, inducements, or physical coercion. Defendant was given food and allowed to use the restroom. He was treated well by the police and had no complaints about his treatment. Detectives made sure he could read and understand his statement. Further, he made corrections and signed it. There was no corroborating evidence that he asked to speak to his grandmother. Therefore, we hold that the trial court's determination was not against the manifest weight of the evidence.

Taylor contends that "juvenile confessions are to be carefully reviewed to ensure [*97] that they are voluntary and not coerced, suggested, or the product of a juvenile's ignorance of rights, his adolescent fantasy, fright or despair." *People v. Montanez,* 273 Ill. App. 3d 844, 853, 652 N.E.2d 1271, 1277, 210 Ill. Dec. 295 (1995). However, Taylor was 19 years old at the time of the crime and his arrest. He is not considered a juvenile entitled to special consideration.

Eighth, Taylor argues the conviction and sentence for home invasion must be vacated as a lesser-included offense of felony murder. Taylor was convicted of home invasion and felony murder and was sentenced to 20 years for first-degree murder and 12 years for home invasion to run concurrently. Our supreme court has held that multiple convictions are improper if they are based on lesser included offenses. *People v. King*, 66 Ill. 2d 551, 363 N.E.2d 838, 6 Ill. Dec. 891 (1977); *People v. Rodriguez*, 169 Ill. 2d 183, 186, 661 N.E.2d 305, 306-07, 214 Ill. Dec. 451 (1996). For instance, in *People v. Johnson*, 154 Ill. 2d 356, 370-72, 609 N.E.2d 294, 301-02, 181 Ill. Dec. 926 (1993), the court determined that the predicate felony of home invasion [*98] was a lesser-included offense of felony murder requiring defendant's conviction and sentence for home invasion to be vacated.

Similarly, in this case, since home invasion is a lesser-included offense of felony murder, the included offense of home invasion will not support a separate conviction and sentence in this case. This is conceded by the State. Therefore, Taylor's lesser-included offense of home invasion must be vacated.

Williams' Appeal

In this appeal, Williams challenges the trial court's determination that his confession was sufficiently attenuated from his illegal arrest to allow it to be introduced at trial. He maintains that his age and the proximity of his admissions to the arrest undermined the voluntariness of the statements and that the court erred in refusing to suppress them.

The relevant inquiry as to the admissibility of a voluntary confession made after an illegal arrest is whether the confession was obtained by exploitation of the illegal arrest. *Foskey*, 136 Ill. 2d at 85, 554 N.E.2d at 202. To be admissible, a confession following an illegal arrest must be "'sufficiently an act of free will to purge the primary taint of the unlawful [*99] invasion.'" *People v. White*, 117 Ill. 2d 194, 222, 512 N.E.2d 677, 687-88, 111 Ill. Dec. 288 (1987), quoting *Wong Sun v. United States*, 371 U.S. 471, 486, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963). This determination depends on the facts of each case and consideration of the four factors set forth by the Supreme Court in *Brown v. Illinois*, 422 U.S. 590, 603-04, 45 L. Ed. 2d 416, 95 S. Ct. 2254 (1975): (1) whether *Miranda* warnings were given; (2) the temporal proximity between the arrest and the statement; (3) the presence of intervening circumstances; and (4) the purpose and flagrancy of the police misconduct. The burden of demonstrating attenuation is on the State (*Foskey*, 136 Ill. 2d at 86, 554 N.E.2d at 202)), and the trial court's finding in this matter will not be reversed unless it is manifestly erroneous. *Lekas*, 155 Ill. App. 3d at 410, 508 N.E.2d at 235.

The record clearly shows, and defendant does not dispute, that he was advised of his *Miranda* rights before he gave either his oral or written statement and that his mother was present on both occasions. Although the giving of *Miranda* [*100] warnings is alone insufficient to purge the taint of illegality (*Foskey*, 136 Ill. 2d at 86, 554 N.E.2d at 202), it is, nevertheless, one factor to be considered in the analysis. *Lekas*, 155 Ill. App. 3d at 415, 508 N.E.2d at 236.

The second factor, the temporal proximity of the arrest and the confession, is often ambiguous and its significance depends on the particular circumstances of each case. *White*, 117 Ill. 2d at 223-24, 512 N.E.2d at 688. In the context of a confession following an illegal arrest, the key in determining whether the taint of illegal police conduct has been purged by the passage of time is what, if any, intervening events occurred during that time and the nature of those events. *People v. Turner*, 259 Ill. App. 3d 979, 992, 631 N.E.2d 1236, 1245, 197 Ill. Dec. 777 (1994).

In this case approximately two- and one-half hours elapsed from defendant's arrest to the time he was first questioned, and more than seven hours transpired between his

arrest and the written statement. The initial delay was in deference to his status as a juvenile when the officers postponed interviews with him until his mother [*101] arrived at the station.

The trial court's finding that the presence of defendant's mother was an intervening circumstance was not against the manifest weight of the evidence. But see *People v. Vega*, 250 Ill. App. 3d 106, 620 N.E.2d 1189, 189 Ill. Dec. 872 (1993) (court found no intervening circumstance when telephone call with mother did not result in defendant taking a lie detector test). In this case, prior to being brought down to the station, Williams stated he was present during the beating but that he was not involved in the incident. When his mother arrived at the station, the officers allowed her to speak with Williams for ten minutes prior to questioning him. After speaking with his mother, and while in his mother's presence, Williams confessed to being directly involved in the beating of decedent. Therefore, Williams' statement was attenuated and was properly admitted.

The State also argues that Williams' statement was attenuated from his illegal arrest because the statements of four of his codefendants provided after-acquired probable cause. Notably, when the officers questioned Renee, Jonathan, Nazareth and Meko, the suspects all implicated Williams in [*102] the beating of decedent.
The acquisition of after-acquired probable cause to arrest is another intervening circumstance which militates in favor of attenuation. *Pierson*, 166 Ill. App. 3d at 564, 519 N.E.2d at 1189-90; see also *People v. Allen*, 249 Ill. App. 3d 1001, 1014-15, 620 N.E.2d 1105, 1115, 189 Ill. Dec. 788 (1993). Again, to effectively attenuate the statement from the illegal arrest, the intervening circumstance must not be tainted. *Austin*, 293 Ill. App. 3d at 788, 688 N.E.2d at 743. Even without addressing whether the codefendants' statements were tainted, however, we find no evidence in the record that Williams was ever confronted with the statements of his codefendants. n2 Therefore, the after-acquired probable cause did not constitute an intervening circumstance.

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n2 The trial court found that Williams was confronted with the statements of his codefendants, and therefore, that his statement was attenuated from his illegal arrest. However, after searching the record, we have found no evidence of such a confrontation.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - [*103]
Finally, the record discloses no flagrant misconduct by the police in effectuating the arrest or in the period of detention. The detectives had information that defendant might have knowledge of the beating death of Britton and went to his home for investigatory, not coercive, purposes. After speaking to his mother, defendant voluntarily went with the officers, told them where the offenders could be found, and in the process, inadvertently implicated himself in the incident. He was not handcuffed at the station or questioned until his mother arrived, and he acknowledged that he had not been mistreated by the police.
The record does not disclose purposeful or intentional police misconduct in the initial arrest, as set forth in *Brown (Foskey*, 136 Ill. 2d at 86-87, 554 N.E.2d at 202; see also *Ornelas*, 295 Ill. App. 3d at 1048, 693 N.E.2d at 1254-55; *cf., Jennings*, 296 Ill. App. 3d at 765-66, 695 N.E.2d at 1308 (1998)), or show that the subsequent treatment of Williams at the station met that criteria. To the contrary, the record shows caution concerning Williams' youth, deference to his mother, and no threats or coercion. Accordingly, [*104] we find no manifest error in the trial court's denial of Williams' motion to suppress statements based on its conclusion that the taint of the initial illegality was dissipated and that Williams' confession was therefore admissible as evidence.

[The preceding material is nonpublishable under Supreme Court Rule 23]

For the foregoing reasons discussed in the nonpublished material, we reverse and remand Nazareth's and Jonathan's convictions and sentences for first degree murder and home invasion. Taylor's conviction and sentence for felony murder are affirmed. Taylor's conviction and sentence for home invasion are vacated. Williams' conviction and sentence for first degree murder and home invasion are affirmed.
Affirmed in part, reversed in part and remanded, and vacated in part
RAKOWSKI, J., concurs.
O'MARA FROSSARD, P.J., specially concurs.

CONCURBY: O'MARA FROSSARD

CONCUR: PRESIDING JUSTICE O'MARA FROSSARD, specially concurring on Taylor's appeal: The defense argues that the jury should have received instructions on involuntary manslaughter and second degree murder. While I concur with the majority's resolution of the jury instruction issue, I believe the reliance by the majority [*105] on the analysis used in *People v. Rixie* was unnecessary. The issue in this case regarding jury instruction is resolved by reviewing the evidence. The majority undertakes such review and based on the record properly concludes the evidence did not warrant giving the jury these instructions. I agree with this conclusion and the analysis should end there.
I agree with the majority's holding that the trial court did not abuse its discretion in refusing to give Taylor's second degree murder provocation instruction because Taylor did not present sufficient evidence to warrant giving that instruction. Specifically, the record does not contain evidence that Taylor was acting under a sudden and intense passion resulting from a serious provocation at the time Taylor beat the victim. I also agree with the holding of the majority that the trial court did not abuse its discretion in refusing to give Taylor's second degree murder instruction based upon his unreasonable belief in the need for self-defense. The record did not reflect sufficient evidence to warrant giving the jury that instruction.
However, I disagree with the majority's reliance on the *Rixie* approach because such reliance [*106] tends to lend approval to the prosecution gamesmanship condoned by the court in *Rixie* where the prosecution was allowed to limit jury instruction to only the charge of felony murder by deciding to nolle-pros the charge of first degree murder after evidence had been heard by the jury on the charge of first degree murder and after the court agreed to instruct the jury on the lesser-included offenses of murder. *Rixie,* 190 Ill. App. 3d at 825 (1989).

In *Rixie*, the court as the result of evidence heard at trial, agreed to instruct the jury on the lesser included offenses of murder based on the first degree murder charge. Following the initial instruction conference upon learning of the court's intention to instruct on the lesser included offenses, the court allowed the State to dismiss the first degree murder charge. The court then refused to instruct on the lesser included offenses of murder, but instructed the jury on felony murder only. The jury was thereby limited to finding the defendant guilty or not guilty of felony murder. Once the charges are brought and evidence is presented and as a result of those charges and evidence the record reflects that instruction [*107] on a lesser included offense is warranted by the evidence I believe fundamental fairness requires that a prosecution motion to dismiss the charges which provide the basis for the lesser included offense instructions should be denied and instruction on the lesser included offense should be given. Where there is sufficient evidence to support an instruction to the jury on a lesser mitigated offense, yet the trial court denies the jury the opportunity to return a verdict of guilty on that mitigated offense such denial contributes to the likelihood of not only inaccurate, but substantially unfair jury verdicts.