

Nos. 88-1699, 88-1700

IN THE
ILLINOIS APPELLATE COURT
FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

FAUSTO VILLAREAL AND JESUS CONTRA

Defendants-Appellants.

Appeal from the Circuit Court of Cook County,
No. 86 CR 13533 — **Robert J. Collins**, Judge.

JOINT BRIEF AND APPENDIX OF DEFENDANTS-APPELLANTS

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I. INTRODUCTION

The defendants Fausto Villareal and Jesus Contra were charged in a single count indictment (R. 834, App. 1) with the offense of aggravated battery (aggravated because it was against police officer Pacheco). The jury, which deliberated for three days, found each defendant guilty. (R. 991-92.) Each defendant was sentenced to 30 months probation, the reporting requirements of which have been stayed pending appeal. (R. 1178-79, App. 2-3.) No issue is raised regarding the sufficiency of the indictment.

II. JURISDICTION

The jurisdiction of this Court is invoked under Supreme Court Rule 602.

III. STATEMENT OF FACTS

On September 26, 1986, two plain clothes police officers entered the second floor apartment of Mercedes Villareal at 1733 North Menard, Chicago. One officer, Israel Pacheco, was wearing a blue Chicago Bears "T-shirt," blue jeans and white gym shoes. (R. 106, R.164.) The other officer, Joseph O'Connor, was wearing a green short sleeved shirt, blue jeans, and tennis shoes. (R. 257, R. 282-283.)

In the dining room of the small apartment, the two plain clothes officers shot and killed appellants' brother, Jose Villareal. The two plain clothes officers, who fired a total of 12 shots at Jose, testified that they had shot at Jose because he had a gun. A gun with a full clip was recovered from the dining room; a gunshot residue test showed that Jose had not fired any weapon. (R. 341-42.)

The aggravated battery charges in this case involve events that occurred while the two plain clothes officers were shooting at Jose. The indictment (R. 834) charged that defendants "intentionally without legal justification caused bodily harm to Israel Pacheco knowing him to be a peace officer, to wit: a police office (sic) of the City of Chicago, engaged in the execution of his official duties, to wit: investigating the commission of an offense, beat and kicked him about the face, head and body with their hands and feet." The prosecution's evidence was that defendants beat and struck Pacheco while Pacheco and O'Connor were shooting at Jose. (R. 131.)

A. The Birthday Party

On September 26, 1986 the Villareal family gathered in the second floor apartment at 1733 North Menard to celebrate the twenty-first birthday of Mercedes Villareal. (R. 511.) Among those who came to the party were the deceased, Jose Villareal, his brothers, including the appellants Fausto Villareal and Jesus Contra, and other family members, including Jose's wife Quintina and their twelve year old daughter Imelda.

Mercedes (who is not a defendant in this case) celebrated his birthday by going out of the apartment and firing a handgun in the air. (R. 121.) Vanessa Orr, who lived in the adjoining house at 1735 North Menard, telephoned the police to complain about Mercedes. (R. 50-51.) Plain clothes police officers Israel Pacheco and Joseph O'Connor were the first officers to arrive in response to Orr's call. (R. 116.)

While speaking with Ms. Orr, Pacheco and O'Connor observed Mercedes fire a handgun in the air from the front of 1733 North Menard. (R. 116.) The officers followed Mercedes into 1733 North Menard and up the stairs, where they apprehended Mercedes and another male (who is also not a defendant in this case) on the landing outside the door to the first floor apartment. (R. 123.) Although Mercedes Villareal and the other person were apprehended outside the apartment, Pacheco pushed his way into the apartment. (R. 126 (Pacheco); R. 306 (O'Connor).)

According to Pacheco, Jose Villareal had come to the door of the apartment "pushing his way through [a bunch of females]." (R. 26.) Pacheco testified that he saw Jose "put his hand into his coat pocket." (R. 126.) Pacheco then pushed Jose back into the apartment (R. 126) and pinned him

against the door of the closet. (R. 127.) According to Pacheco, Jose pushed away and went into the adjoining dining room. (R. 127.) Pacheco testified that he was "pushed" into the dining room (R. 128) where he saw Jose holding a woman as shield and pointing a gun at Pacheco. (R. 131.) According to Pacheco, he then drew his gun (R. 131) and yelled: "Police, don't do it, police, drop it, get them up, get them up, get your hands up in the air." (R. 131.)

The lady in the tan dress pulled away and, according to Pacheco, when he saw Jose's trigger finger jerk he fired at Jose. (R. 131.) Pacheco testified that he fired a second time when he saw Jose's finger jerk again. (Id.) Pacheco testified that after he had fired twice at Jose, and while he fired two more times at Jose (R. 131), he was the victim of a battery from "someone on my back [and] someone kicking me." (Id.) All of the injuries that Pacheco received occurred after he had fired at Jose. (R. 225.)

Officer O'Connor, who had drawn his gun as he pursued Mercedes up the stairs (R. 309), testified that he kicked open the door to the dining room after hearing Pacheco's first two shots. (R. 272.) As O'Connor entered the dining room, he saw Pacheco "wrestling" with the defendants: "one was around the back of him with an arm around his neck and the other one was fighting him from the front." (R. 368.)

O'Connor fired at Jose and kept firing until Jose dropped. (R. 274.) According to O'Connor, the defendants were then on top of Pacheco, trying to pull his gun away. (R. 274)

B. Misfiring Revolver Testimony

Pacheco testified that after shooting his third and fourth shots at Jose, "somebody pulled my neck back and someone grabbed the gun from my hand." (R. 131.) According to Pacheco, Fausto Villareal gained control of Pacheco's .357 revolver, turned it on Pacheco, and pulled the trigger. (R. 132.) Pacheco claimed that because he had his hand on the revolving cylinder, and grabbed onto the cylinder, the revolver misfired when the hammer came down. (R. 132)

Appellant Villareal admitted that he grabbed the barrel of Pacheco's weapon to prevent further shooting of his brother but denied that he had put his finger on Pacheco's gun or pulled the trigger. (R. 600).

Pacheco told before the jury that when he got his weapon back two days after the shooting, "I noticed between the two cylinders — between the two shells, there is a mark. The mark was made from the hammer, itself, as it struck the metal, and I was holding it." (R. 159)

Over defense objection that the mark could have been made at any time and that this evidence had not been disclosed in discovery (R. 161-62), the gun was admitted as State Exhibit 13. (R. 157) Pacheco circled the mark on the cylinder with blue grease pencil and "walk[ed] slowly in front of the Jury and indicat[ed] the area" that he had circled. (R. 160.)

Pacheco admitted that there was no reference to the misfiring hammer incident in any of his reports about the shooting. (R. 211, 214.) He testified that he had revealed the misfiring revolver incident to investigators when he was questioned about the shooting at a police department investigation. (R. 213-14.) He also claimed he informed an assistant states attorney about the misfiring revolver incident. (R. 214)

Julien Gallet, the Deputy Chief of Detectives (R. 492), testified as a defense witness and denied that Pacheco, when questioned after the incident, had said anything about how his gun had been turned on him and clicked and misfired. (R. 502.)

C. The Defense Case

Jose's widow Quintina Villareal testified she was dancing in the dining room (R. 512) when a man wearing a "T" shirt and jeans came into the dining room. (R. 513.) She did not know that the man was a police officer. (R. 516.) Also in the room at that time were Fausto Villareal, his wife, Jesus Contra, and Quintina's sister, Josephina Garcia, Quintina's daughter, Imelda. (R. 512.) Imelda was seated next to Quintina's son. (R. 512.)

The man, who told her husband to put his hands up. (R. 513.) The man had a gun in his right hand, pointed at her husband. (R. 514.) Jose asked the man "who are you?" (R. 514.) The man spoke an obscenity and told Jose to shut up. (R. 154.) Jose told the man back the same thing that he had said to him and the man shot Jose. (R. 515.) After the man killed her husband, Quintina scratched the man's left eye. (R. 517.) Later, Quintina learned that the man was a police officer.

Imelda Villareal, Jose's 12 year old daughter, testified that a man had entered the dining room, displaying his weapon and went up to her father and "called him a swear." (R. 554.) Her father had responded with the same swear and the man then shot her father twice. (R. 554.) Imelda ran to a bedroom, where she heard another eight shots. (R. 564.) Imelda did not know at the time of the shooting that the man (Pacheco) was a police officer. (R. 559.)

Imelda had removed her shoes during the party and was playing in the dining room. She was taken to the police station without shoes, and while there, police officers told her that her father "was doing fine at the hospital." (R. 559)

Appellant Fausto Villareal is 30 years of age and has worked for 8 years as a "set up" man for a machining company. (R. 565.) Fausto is the father of a 9 year old boy and a 3 year old girl. (R. 566. On the day of the incident, Fausto lived downstairs from Mercedes, under the apartment where the shooting took place. (R. 566).

Fausto testified that during the party, he went to the bathroom. (R. 591.) As he came out of the bathroom, he heard someone kick the front door. (R. 568.) A man, whom Fausto later learned was Pacheco, came in to the dining room, holding a gun (R. 568), placed it on chest and said "Put your hands up, otherwise I will shoot you." (R. 569.) After Fausto, who did not know that the man was a police officer, had put his hands up, the man told Jose to put his hands up. (R. 570). Jose asked "Who are you?" The man said "shut up" and cursed Jose; Jose answered the curse and the man fired two shots at Jose, hitting him in the stomach. (R. 570.)

Fausto then yelled at the man who had shot at Jose and the man shot at Fausto. (R. 571.) The bullet that missed Fausto is shown in a photograph at the dining room, Contra No. 10, R. 572.

D. Jury Instructions

Appellants objected to the giving of an accountability instruction (R. 914) and to an instruction about a peace officer's right to use force. (R. 924)

Appellants each tendered an instruction on self defense, but the instruction was only given for defendant Fausto Villareal. (R. 921, 922.) Appellants also tendered instructions on the defense of necessity (R. 965) and on use of force to defend dwelling. (R. 963.) The trial judge refused to give these instructions.

E. Jury Deliberations

The jury required three days of deliberations to reach the guilty verdicts. On the first day of deliberations, the jury requested Pacheco's firearm. (R. 742.) Over defense objection that the jury should not be permitted to conduct experiments (R. 743-44), the weapon was sent to the jury.

In the evening of its first day of deliberations, the jury sent out a note (R. 984 stating "We are hung. What do we do?" (R. 747.) The jury was instructed to continue to deliberate. (R. 748.) At 7:50 p.m., the jury again requested a copy of the transcript (R. 749); in a written response (agreed to by all parties), the jury was told that "[t]he transcript of the trial is not available, at this time. You have heard the evidence. Continue your deliberations." (R. 752)

At 8:00 p.m. on the first day of deliberations, the defense moved for a mistrial. (R. 757-58.) This motion was denied and the jury was sequestered overnight. (R. 759.)

On its second day of deliberations, the jury again asked to review the trial transcript.¹ (Supplemental Record 6.) The trial judge advised the jury that the

1. Volume I of the record on appeal contains at R.760-70 a transcript erroneously identified as the proceedings of March 17, 1988, the second day of jury deliberations. This transcript is actually of the proceedings had on March 18, 1988, as appears at R.771-81. The proceedings of March 17, 1988 are contained in a supplemental record.

transcript was not available and that it would have to rely on its "collective memories as to what the evidence was." (Supplemental Record 8.)

While the jury was at lunch on its second day of deliberations, the trial judge announced his intention to give the jury a *Prim* charge. Over defense objections and request for a mistrial (Supplemental Record 9, 10), the *Prim* instruction was given at 1:30 p.m. (Supplemental Record 12.)

At 5:00 p.m. on the jury's second day of deliberation, when the jury had still not returned a verdict, both defendants moved for a mistrial. (Supplemental Record 18.) The prosecution asked that the jury be allowed to continue to deliberate (Supplemental Record 18), and the trial judge agreed, denied the motions for a mistrial (Supplemental Record 19) and ordered that the jury would be sequestered again if it was unable to reach a verdict. (Supplemental Record 21.)

The jury was sequestered for a second night and returned its guilty verdicts on the morning of its third day of deliberations. (R. 991, 992.)

F. Post Trial Motions

In their post-trial motions, defendants advised the court that they had learned after trial that the mark on the cylinder of Pacheco's weapon was made during manufacture of the firearm and could therefore not have been made during a struggle with defendants. (R. 1009-1012). Defendants argued that the scientific evidence (R. 1145-58, App. 10-23) showed that Pacheco had testified falsely and required a new trial. (R. 1011.) The prosecution did not dispute the scientific evidence but argued that Pacheco's credibility was a matter for the jury. (R. 795-96.)

After denying the post-trial motions, Judge Collins sentenced each defendant to 30 months probation and, on the filing of notices of appeal, stayed the

reporting requirements of the probation sentence pending appeal. Notices of appeal, as amended (R. 1181, 1186, App. 4-5) were timely filed.

IV. ARGUMENT

A. Reasonable Doubt

Defendants' convictions should be reversed outright for at least three reasons:

1. The "911" tape and the testimony of plain clothes police officers Israel Pacheco, Joseph O'Connor and uniformed officer Jack McNicholas, makes plain that defendants acted reasonably to protect their brother.
2. Stripped of Pacheco's false testimony — about shouting "Hands up" with his gun holstered, about wrestling with the defendants for his gun, and about how a dimple was made on his firearm during the incident — the evidence is insufficient to show that defendants intentionally committed a battery.
3. The evidence failed to establish the material allegation of the indictment that the defendants caused bodily harm to Pacheco while Pacheco was "*engaged in the execution of his official duties, to wit: investigating the commission of an offense.*"

1. Defendants Acted Reasonably to Protect their Brother

The jury's guilty verdicts (returned after three days of deliberation) rest on the testimony of plain clothes police officers Israel Pacheco, Joseph O'Connor and uniformed officer Jack McNicholas about an incident that happened in seconds: the alleged aggravated battery was committed in a 30 second period while Pacheco and O'Connor were inside the Villareal apartment, firing their weapons at defendants' brother, Jose Villareal.

As shown by the transcript of the "911" tape (People's Exhibit 12, App. 24-31), Pacheco and O'Connor were on their way to 1733 North Menard at 11:54:20 p.m. One minute and forty seconds later — at 11:56 p.m. exactly — the officers were on the street in front of 1735 North Menard when they saw Mercedes Villareal fire a gun in front of 1733 North Menard. (R. 170.)

Pacheco called in "Squad, it's bona fide." (R. 170.) The dispatcher gave priority to Pacheco, saying "You with the emergency go ahead." Pacheco's excited voice yelling "Get your hands up. Get them up." (R. 166) can be clearly heard on the tape (People's Exhibit 4):

Time Signal: 11:56 exactly

Pacheco: Squad, it's bona fide.

Dispatcher: Ten-four. Unit coming in. You with the emergency go ahead.

Time Signal: 11:56 and ten seconds

Pacheco: [inaudible] Police. Police. [loud sounds in background]

Dispatcher: Shit.

Pacheco: Squad, it's bona fide. The house next door is a whole party. Get your hands up. GET THEM UP! They just shot, [inaudible] shot, this house is full of people. Get in here quick, squad.

In the next fifty-five seconds, before Officer McNicholas called in a "10-1" ("officer needs assistance," R. 411), Pacheco and O'Connor chased Mercedes Villareal up the stairs into 1733 North Menard and apprehended him on the landing outside the first floor apartment where a family birthday party was underway. After the officers had apprehended Mercedes, Pacheco pushed his way inside the apartment door (R. 177), walked through a hallway and into the dining room, where he fired the first four of twelve shots that killed Jose Villareal, defendants' brother. (R. 131.)

McNicholas called in his call for assistance (the "10-1" call) after Pacheco had fired at Jose. (R. 411.) In the next thirty seconds, Pacheco fired twice more at Jose (R. 131) and O'Connor fired eight times. (R. 275.) McNicholas (beat 2521, R. 394) then called for an ambulance. It was during the thirty second period after McNicholas' "10-1" that the alleged aggravated battery occurred.

Pacheco, the alleged victim of the aggravated battery, admitted that he did not suffer any "bodily harm" until after he had fired at Jose (R. 225):

Defense Counsel:: Is is your testimony, Officer, that you cannot say at which point you received those injuries which are pictured in People's Exhibits 14 through 17?

Pacheco:: No, sir, no, sir. Those injuries I received when I was on the floor with two defendants on my back and one in front of me. That's when all the abrasions, scratches — that's when I received them.

Q:: Is that your testimony that that occurred after Jose Villareal had been shot by you?

Pacheco:: Yes.

Pacheco testified that after he had fired his third and fourth shots at Jose when "somebody pulled my neck back and someone grabbed the gun from my hand." (R. 131.)

Pacheco's testimony that defendants tried to stop him from shooting their brother was corroborated by O'Connor, who had come into the dining room after hearing Pacheco's first shots. (R. 272.) O'Connor testified that when he came into the room he saw defendant Contra punching Pacheco and defendant Fausto Villareal "with his arm around [Pacheco's] neck, punching him." (R. 272.) After he had fired eight times at Jose Villareal (R. 275), O'Connor saw the defendants on top of Pacheco and defendant Contra was trying to grab Pacheco's gun. (R. 274.)

McNicholas testified that when he came into the dining room after hearing Pacheco's shots, he saw the defendants wrestling with Pacheco (R. 368), who was pointing his gun at Jose. McNicholas then saw Pacheco fire two more shots. (R. 369.)

The "bodily harm" that Pacheco suffered during this 30 second period occurred after he had fired at least two shots at Jose, while O'Connor was emptying his automatic into Jose, and while Pacheco continued to fire at Jose.

(Pacheco's "bodily harm" did not require medical attention and consisted of black and blue marks that he observed on his body the next day. R. 134.)

The officers' testimony that the defendants used force on Pacheco during the thirty second period after the blue jean clad officer had forced his way into the apartment and while Pacheco and O'Connor were shooting at their brother establishes the legitimacy of defendants' use of force and requires that defendants' convictions be reversed outright.

Illinois has long recognized a person's right to use force to defend a family member. In *People v. Forte*, 269 Ill. 505 (1915), a brother "was called to rescue his sister Anna by the screaming of the little girl, Caroline, who shouted that Tony was killing Anna." *Id.* at 510. The brother killed Tony "in good faith under an honest and reasonable belief that it was necessary to prevent Morasco's apparent purpose." *Id.* Our Supreme Court held that when a brother believes that "his sister was in imminent danger of losing her life or suffering great bodily injury. . . [t]he right of self-defense extends to the killing, by a brother, of an assailant of his sister." *Id.* Similarly, in *People v. Scott*, 284 Ill.465 (1918), the Court stated as black-letter law the principle that a son has "the same right to defend his father as his father would have had to defend himself." *Id.* at 483.

Under Section 7-1 of Chapter 38, one person may lawfully use force to protect another even in situations where the persons being protected could not lawfully use force. For example, in *People v. Smith*, 19 Ill.App.3d 704, 312 N.E.2d 355 (1974), a citizen saw "two men struggling and he tried to get the attacker, who was the taller and heavier person, off of the smaller one." 312 N.E.2d at 357. Although the heavier person was a plain clothes police officer,

this Court reversed the finding of guilty, finding that the citizen's "belief that his actions was necessary to protect the smaller person from unlawful force was reasonable under the circumstances." *Id.* This holding is in accord with the long established rules that the principles for defense of another "are the same as those of self defense," *People v. Spangler*, 314 Ill. 602, 612 (1924) and that "[a]ctual danger is not necessary to justify self-defense, but the question is whether the facts as they appeared to the defendant at the time and under the conditions there present were such as to indicate to him, as a reasonable person, an intent [to harm another]." *People v. Duncan*, 315 Ill. 106, 111 (1924).

In this case, defendants' attempt to protect their brother — after Pacheco had fired two shots — was reasonable. As Mr. Justice Holmes observed in a similar context, "[d]etached reflection cannot be demanded in the presence of an uplifted knife." *Brown v. United States*, 256 U.S. 335, 343 (1921). Here, confronted with a man wearing a Chicago Bears "t-shirt" (R. 106), blue jeans (R. 164) and gym shoes (R. 106) who was shooting at their brother, it was perfectly natural for defendants to try to disarm the intruder. It has long been the law in Illinois that plain clothes officers who enter dwellings at night cannot rely on their office unless it can be shown that the defendants have "knowledge of [the officer's] official character and of his authority." *People v. Bissett*, 246 Ill. 516, 92 N.E. 949, 952; *People v. Lavac*, 357 Ill. 554, 192 N.E. 568 (1934).

It was the prosecution's burden to prove that defendants' acts in seeking to defend their brother were unreasonable. The prosecution failed to meet this burden and the guilty verdicts should be reversed outright. *People v. Oscar Williams*, 57 Ill.2d 239, 311 N.E.2d 681 (1974)

2. Pacheco's False Testimony

Pacheco's false testimony — about entering the apartment with his gun holstered, about wrestling with the defendants for his gun, and about how a dimple was made on his firearm during the incident — helped convince the jury to return its erroneous verdicts. Stripped of this false testimony, the evidence is insufficient to establish that defendants intentionally caused bodily harm to Pacheco.

Pacheco's claim that his gun was holstered when he pushed his way into the Villareal's apartment (R. 171.) is not believable: Pacheco had gone through the outer door of the two flat after he had seen Mercedes Villareal fire a handgun in the air. (R. 121.) Pacheco then ordered Mercedes to put his hands up (R. 153) and requested back up from the dispatcher. (Id.) The emotion in Pacheco's voice is apparent from the tape, People's Exhibit 4. Under these circumstances, before entering the building, any police officer would have drawn his weapon "for his own protection," as Officer McNicholas truthfully testified. (R. 400.) Pacheco's claim to the contrary is incredible.

Pacheco was also untruthful in his testimony about how he had saved his live by holding the cylinder of his firearm to cause the weapon to misfire. Pacheco testified that his weapon was wrestled away from him by one of the defendants (R. 132) and then described in graphic detail for the jury how he "saw the hammer go back and hit and strike the cylinder." (Id.) Pacheco told the jury that he had been "[a]ble to hold the cylinder the keep the hammer from striking the bullet so it discharges." (R. 132.) Pacheco claimed that if he had not held the hammer back, the gun "would have discharged." (R. 206.)

To corroborate this tale of superhuman strength, Pacheco showed the jury a mark on his cylinder that he claimed had been made during the struggle (R. 159-60):

Prosecutor: Officer Pacheco, when your service revolver was being taken from you and you said you had your hand over the cylinder and it clicked, do you know where the hammer struck?

Pacheco: Yes I do.

Q: Where did it strike? How do you know that?

A: Two days later, I got my gun back from the evidence technician. Automatically take our weapon and make sure they are firing properly and had the right ammunition. When I got it back, I noticed between the two cylinders — between the two shells, there is mark. *The mark was made from the hammer, itself, as it struck the metal, and I was holding it.* (emphasis supplied)

Q: That's the service revolver you have with you at this time?

A: Yes.

Q: Would you take that service revolver and empty it please. For the record, I will put an evidence sticker on this, People's Exhibit No. 13, and mark it for identification. I am going to ask that you, first of all, step in front of the Jury. May the officer step in front of the Jury and demonstrate — point to the mark, where it is?

Over defense objections (R. 160-62), the trial judge received the firearm into evidence and permitted it to be published to the jury. (R. 162.) Pacheco's firearm was not among the exhibits sent to the jury when it began its deliberations. But after about two hours of deliberations, the jury specifically requested the firearm. (R. 742.)

Pacheco's testimony about the mark on his cylinder was false: the mark on the cylinder of Pacheco's weapon was made during the manufacture of the firearm. (R. 1147-48.) Moreover, it was physically impossible for the firing pin to make contact with the cylinder because of a component known as a "transfer bar." (R. 1148.)

After defendants' trial (at which they had learned for the first time about Pacheco's claim about the mark on the cylinder, see argument B below), a defense expert examined Pacheco's weapon. The expert, the former assistant chief firearms examiner of the Chicago police crime lab (R. 1145, |3, App. 10), looked at the dimple on Pacheco's firearm and immediately knew that the mark was part of the manufacturing process (R. 1147-48, App. 12-13):

10. I inspected the rear face of the cylinder and found a factory applied dimple on the opposite edge of the rim from the "S" mark. The "S" mark between the chambers on the rim of the cylinder is a factory proof mark, showing that the cylinder has been tested with hot loads. *The dimple indicates that the cylinder had been magnafluxed (subjected to magnetic particle inspection) at the factory.* I observed another magnaflux dimple approximately one-quarter of an inch forward of the frame on the left side of the barrel in the ejector rod shroud. (emphasis supplied)

The defense expert also knew that the dimple could not have been made by the hammer of Pacheco's firearm:

12. The construction of the .357 Ruger double action revolver makes it impossible for the firing pin to strike the cylinder other than the primer of a center fired cartridge. This is because of a part of the firearm known as the "transfer bar" which transfers energy from the hammer to the firing pin. Because of the way in which the firearm is constructed, the transfer bar will not be in position between the hammer and the firing pin unless the cylinder had been rotated and locked into position, with a cartridge directly under the firing pin. Attached to this affidavit are several illustrations of the transfer bar safety mechanism.

Because Pacheco's false testimony makes the state's case so improbable and unsatisfactory that it creates a reasonable doubt of a defendant's guilt, the conviction of each defendant must be reversed.

3. Execution of Official Duties

The evidence failed to establish the material allegation of the indictment that the defendants caused bodily harm to Pacheco knowing that Pacheco was "*engaged in the execution of his official duties, to wit: investigating the commission of an offense.*" (R. 834, App. 1.) This allegation is an essential element of an aggravated battery charge under Ill.Rev.Stat. ch. 38, section 12-4-b(6), *People v. Bailey*, 10 Ill.App.3d 191, 293 N.E.2d 186, 187 (1973); *People Weaver*, 100 Ill.App.3d 512, 426 N.E.2d 1227, 1228 (1981), and each element of an offense must, of course, be proved beyond a reasonable doubt, *Jackson v. Virginia*, 443 U.S. 3097 (1979). The prosecution's inability to prove that defendants knew that Pacheco was "investigating the commission of an offense" means that defendants' convictions must be reversed outright.

The offense that Pacheco was investigating had been committed by Mercedes Villareal on the street, in front of 1733 North Menard. Pacheco and O'Connor had arrested Mercedes outside the closed door of the front floor apartment at 1733 North Menard. (R. 123.) Pacheco had not been invited into the apartment (R. 220) and he did not have probable cause to believe that any offense was being committed inside the apartment. Moreover, he did not have a warrant and there was no emergency excusing a warrant.

At trial, Pacheco admitted that he had not entered the apartment to investigate an offense (R. 247):

Defense Counsel:: When you related the story after the incident did you say you had entered the apartment for further investigation?

Pacheco:: I did not relate that yesterday, I did not relate it that night, I don't think so.

Pacheco testified that he had pushed his way into the apartment when he saw Jose Villareal come to the front door and "put his hand into his coat pocket." (R. 126.) As Pacheco explained on cross-examination (R. 220):

Pacheco:: Mr. Jose Villareal came towards me. I pushed him back. He came towards me again. And I pushed him and followed through and pushed him against the hallway.

This testimony, and Pacheco's admission (R. 247) that he had not entered the apartment for "further investigation," makes plain that the prosecution failed to prove the material allegation of the indictment that Pacheco had entered the apartment to "investigat[e] an offense." (R. 874, App. 1.)

Similarly, the prosecution's evidence fails to prove that the defendants knew that Pacheco was a police officer *engaged in the execution of his official duties*. Although Pacheco claimed that he repeatedly announced that, notwithstanding his casual attire, he was a police officer, Pacheco was unable to say that either of the defendants had been within earshot.

Viewed in the light most favorable to the prosecution, the evidence showed that defendants saw a man wearing a blue Chicago Bears "T-Shirt," blue jeans and white gym shoes (R. 106, R. 164) shooting at their brother. There is a complete failure of proof of the material allegations of the indictment that the defendants knew that Pacheco was a peace officer "*engaged in the execution of his official duties, to wit: investigating the commission of an offense.*" (R. 834.) Defendants' convictions must

therefore be reversed outright.

B. A New Trial Is Required Because of the False Evidence About Pacheco's Gun

Pacheco's false testimony that he saw the hammer of his revolver "go back and hit and strike the cylinder" (R. 211) and the bogus physical evidence (Pacheco's firearm, People's Exhibit 13) ostensibly corroborating this testimony infected the jury's verdicts and demands that defendants receive a new trial, free of false testimony and free of bogus physical evidence.

As defendants established in their post-trial motion, Pacheco's testimony about the hammer striking the cylinder and making a mark on the cylinder of his revolver is false: the mark on the cylinder of Pacheco's weapon was made during the manufacture of the firearm and it is physically impossible for the firing pin to make contact with the cylinder because of a component known as a "transfer bar." See above at 15.

Defendants did not know before trial that Pacheco would testify that he saw the hammer of his revolver "go back and hit and strike the cylinder." (R. 211.) This story, which would have resulted in attempt murder charges, does not appear in any of the statements that Pacheco made after the incident. (R. 1019-1020, R. 1025-26, R. 1035, R. 1036, R. 1043-44, R. 1059, R. 1067-68.)

Similarly, defendants did not know before trial that Pacheco would offer the expert opinion that a mark on the cylinder of the revolver "was made from the hammer, itself, as it struck the metal, and I was holding it." (R. 159.) The revolver had not been stored for use as a trial exhibit (R. 161-62) and nothing in the state's answer to discovery (R. 867-72) suggested that the prosecution would offer expert firearm testimony.

Defendants were able to show that Pacheco had not told the "hammer-striking-cylinder story" when he was initially interviewed about the incident. (R. 503-04, Gallet Testimony.) The prosecution was able to minimize this impeachment, by arguing that when interviewed after the incident Pacheco was "scared, he was frightened, he was nervous." (R. 696.)

The prosecution would not, however, have been able to answer scientific evidence about the falsity of Pacheco's "hammer-striking-cylinder" story. The prosecution could not have responded to the fact that the mark pointed out by Pacheco was part of the manufacturing process of his revolver. Nor could the prosecution have responded to the scientific fact that "[t]he construction of the .357 Ruger double action revolver makes it impossible for the firing pin to strike the cylinder other than the primer of a center fired cartridge." (Neilson Affidavit, 12, R. 1148, App. 13.) If defendants had been able to present this evidence at trial, Pacheco's credibility would have been seriously impaired.

The jury was very interested in Pacheco's weapon: After several hours of deliberations, it made a specific request for the firearm. (R. 982.) Defendants objected to providing the jury with this exhibit (R. 743-44), but the objection was denied and the weapon was sent back to the jury. (R. 744.) Given the duration of jury deliberations (three days), and the jury's specific request for the firearm, the evidence that Pacheco testified falsely about the "hammer-striking-cylinder" story would likely have produced a different result.

The failure of the prosecution to disclose the "hammer-striking-cylinder" story before trial deprived defendants of a fair trial: without notice of this testimony, defendants had no reason to retain an expert to examine Pacheco's weapon (especially when the weapon was not inventoried but had been used by

Pacheco in the time between the incident and trial).

This case meets each of the requirements of *People v. Baker*, 16 Ill.2d 364, 158 N.E.2d 1 (1959) and *People v. Molstad*, 101 Ill.2d 128, 461 N.E.2d 398 (1984) for the granting of a new trial:

To warrant a new trial, the new evidence must be of such conclusive character that it will probably change the result on retrial, that it must be material to the issue but not merely cumulative, and that it must have been discovered since the trial and of such character that it could not have been discovered prior to trial by the exercise of due diligence.

As set out above, each part of this test is satisfied in this case and a new trial is required.

C. Jury Instructions

Incomplete and confusing jury instructions were a factor in the jury's erroneous verdicts:

1. The trial court erred in refusing to instruct the jury on the necessity defense of Ill.Rev.Stat. ch. 38, par. 7-13 (R. 965).
2. The trial court erred in refusing to instruct the jury on the law of defense of dwelling. (R. 963.)
3. The trial court erred in refusing to give a justifiable use of force instruction for defendant Contra. (R. 922.)
4. The trial judge improperly lessened the state's burden of proof by giving an accountability instruction (R. 917) and an instruction defining a police officer's right to use deadly force (R. 924)

1. Defendants Were Entitled to an Instruction on the Defense of Necessity

One of defendants' theories is that they reasonably believed that their conduct was necessary to prevent injury to their brother, Jose Villareal. As counsel for defendant Fausto Villareal argued in his opening statement (Tr. 43-44):

If you can put yourself in the position of seeing your brother shot down by the police, having 12 bullets pumped into him in the presence of his wife and child — ladies and gentlemen, if you can thereafter still say that you would not have touched that police officer who you had seen doing this, well, then, I suppose you can find Fausto Villareal guilty. But I will ask you, each and every one of you, to put [44] yourself in the position of seeing a close relative of yours shot down by police at the time by persons running into a house late at night with guns in plain clothes, apparently robbers. I don't know. Watch your brother shot down? And then how would you react? I would ask you to keep that in mind throughout the trial.

There are two elements to the affirmative defense of necessity: "(1) that the person claiming the defense was without blame in occasioning or developing the situation, and (2) that this person reasonably believed that his conduct was *necessary* to avoid a greater public or private injury than that which might

reasonably have resulted from his conduct." (emphasis in original) *People v. Perez*, 97 Ill.App.3d 278, 422 N.E.2d 945, 947 (1981); *People v. Blake*, 168 Ill.App.3d 581, 522 N.E.2d 822 (1988). The record provides "some evidence" of each element.

Defendants were without blame in Pacheco's entrance into the apartment: there was no testimony that either defendant Fausto Villareal or defendant Jesus Contra had anything to do with Pacheco until after Pacheco had fired twice at their brother, Jose Villareal. Unlike *People v. Perez, supra*, where the defendant had carried a loaded revolver into the City of Chicago, 422 N.E.2d 948, the defendants in this case were unarmed, had gathered for a family birthday party, and were not in any way involved with Pacheco's use of force against their brother. As in *People v. Blake, supra*, the evidence showed that the defendants were "without blame in occasioning the situation." 522 N.E.2d at 826. Moreover, the prosecution's witnesses testified that defendants used force on Pacheco during a thirty second period *after* Pacheco had fired two shots at defendants' brother Jose Villareal and while Pacheco continued to fire at Jose. (R. 225.)

The evidence at trial was also sufficient to raise a question for the jury of whether defendants reasonably believed that their conduct was necessary to prevent their brother's death. In *City of Chicago v. Mayer*, 56 Ill.2d 366, 308 N.E.2d 601 (1974), a third year medical student had been convicted of disorderly conduct and interfering with a police officer. At issue on appeal was whether the medical student, who claimed that at the time of arrest he had been attempting to administer emergency medical care, had been entitled to a necessity defense. In answering this question in the affirmative, and reversing and remanding for a new trial, our Supreme Court held that the necessity defense of

Ill.Rev.Stat. ch. 38, section 7-13 "must be viewed in light of the factual situation of the particular case, which must include a defendant in a peculiar position to reasonably believe or anticipate an injury not apparent to someone who lacks similar knowledge, information, or training." 308 N.E.2d at 604. In *Mayer* the Court held that the necessity instruction should have been given because "[t]he jury could well conclude that a third-year medical student might have a reasonable belief under this factual background, whereas a person with no medical training would not." 308 N.E.2d at 604. Similarly, in this case, the jury could well have concluded that in the chaos that followed Pacheco's entrance into the apartment, defendants reasonably believed that their actions were necessary to protect their brother.

The Court reaffirmed the trial judge's obligation to give a necessity defense in *People v. Unger*, 66 Ill.2d 333, 362 N.E.2d 319 (1977). There, a prison escapee sought to defend his escape on the ground "that he left the honor farm to save his life." 362 N.E.2d at 320. The Court held that this testimony was "clearly sufficient to raise the affirmative defense of necessity," 362 N.E.2d at 322, and remanded for a new trial.

The sight of a man wearing a Chicago Bears "T-shirt" and jeans shooting at their brother and the choice that confronted defendants of standing idly by or trying to stop harm to their brother is far different than the "choice" in *People v. Wright*, 171 Ill.App.3d 573, 525 N.E.2d 1165 (1988). In *Wright*, the defendant claimed that he had shot at a police officer because he thought that the officer "was a drug dealer trying to kill him." 525 N.E.2d at 864. The police officer in *Wright*, however, was in uniform, was driving a marked squad car, and had not displayed his firearm "in a threatening manner." 525 N.E.2d at 525. On those

facts, the defendant was not entitled to an instruction on necessity. In this case, though, Pacheco was not in uniform, but was wearing a "t-shirt," jeans, and had fired at defendants' brother before any force was used against him.

As in *People v. Veatch*, 145 Ill.App.3d 23, 495 N.E.2d 674, 678 (1986), defendants were entitled to a necessity defense. The refusal of the trial judge to give this instructions requires that defendant receive a new trial.

2. Defendants Were Entitled to an Instruction on the Defense of Dwelling

The evidence at trial justified an instruction on defense of dwelling, i.e., that "[a] person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to prevent or terminate such other's unlawful entry into or attack upon a dwelling." Ill.Rev.Stat. ch. 38, section 7-2.

In *People v. Stombaugh*, 52 Ill.2d 130, 284 N.E.2d 640 (1972), afforded an expansive construction to section 7-2:

Section 7-2 provides that a person may use force against another to prevent an unlawful entry into his dwelling. This authorized use of force is somewhat earlier than in comparable situations. Thus, one may use force to *prevent* an entry into a dwelling, where force would not otherwise be condoned. But the benefit of the statute does not cease once the intruder has crossed the threshold into a person's dwelling. The right to use force under the circumstances specified is equally applicable after the unlawful entry has been accomplished. A person not in a public place, but in the privacy of his dwelling or that of another, has the right to use force to prevent or terminate an attempted or actual unlawful entry on the part of another. This right extends beyond the point of the threshold of the dwelling. The statute permits the use of force if the unlawful entry is "attempted" or "is made."

Thus, as construed in *Stombaugh*, section 7-2 continues the long standing rule that "a man's habitation is one place where he may not be disturbed without

proper invitation or warrant, and that he may use all of the force apparently necessary to repel any invasion of his home." 284 N.E.2d at 644, citing *People v. Eatman*, 405 Ill.491, 91 N.E.2d 387, 390 (1950). Defendants in this case were entitled to have the jury apprised of this defense.

3. Defendant Contra Was Entitled to a Self-Defense Instruction

The trial judge erred in refusing to give a self-defense instruction on behalf of defendant Contra.

It has long been the law in Illinois that "very slight evidence upon a given theory of a case will justify the giving of an instruction." *People v. Khamis*, 411 Ill. 46, 103 N.E.2d 133, 136 (1952). It has also long been the law that "[a] man, when threatened with danger, must determine from appearances and the actual state of things surrounding as to the necessity of resorting to self-defense." *People v. Scott*, 284 Ill. 465, 479-80 (1918). In this case, there was far more than "slight evidence" on which the jury could have found that defendant Contra acted reasonably to protect his brother. See above at 9-13. The trial court's refusal to give a self-defense instruction on behalf of defendant Contra was error requiring a new trial.

4. The Accountability Instruction Improperly Lessened the State's Burden of Proof

The accountability instruction (R. 917) made it possible for the jury to return guilty verdicts without finding that the state had proved each element of the offense beyond a reasonable doubt.

From the prosecution's evidence, the jury could have found that either defendant or the two acting together had caused bodily harm to Pacheco. If the

jury believed that Contra had caused the bodily harm, it could return a guilty verdict by finding that Contra knew that Pacheco was a peace officer engaged in the execution of his official duties. (R. 922.) Alternatively, the jury could return a guilty verdict against Contra by finding that he was "legally responsible" for Fausto's conduct, and that Fausto knew that Pacheco was a peace officer engaged in the execution of his official duties. (Id.) The jury should not have been able to find Contra guilty of aggravated battery without being satisfied beyond a reasonable doubt that Contra knew that Pacheco was a peace officer engaged in the execution of his official duties.

Similarly, if the jury believed that Fausto had caused the bodily harm, it could have returned a guilty verdict by finding that Fausto was "legally responsible" for Contra, and that Contra knew that Pacheco was a peace officer engaged in the execution of his official duties. Alternatively, if the jury believed that both defendants had acted together to harm Pacheco, it could have found either defendant guilty because the other knew that Pacheco was a peace officer engaged in the execution of his official duties.

Finally, the jury could have found that Contra had caused the bodily harm, that Fausto as "legally responsible" for Contra's conduct, and that either defendant knew that Pacheco was a peace officer engaged in the execution of his official duties. If this was the basis for the jury's verdict, then it did not consider Fausto's claim of self-defense, which was limited to whether Fausto (not someone for whom he was "legally responsible") was justified in using force. (R. 921.)

There was no place for an accountability instruction in this case; the giving of that instruction (over defense objection) made it possible for the jury to

return guilty verdicts without finding that the state had proved each element of the offense beyond a reasonable doubt. Accordingly, a new trial is required. *People v. Banks*, 26 Ill.2d 259, 186 N.E.2d 338, 340 (1962).

5. The Jury Should Not Have Been Instructed on a Police Officer's Right to Use Deadly Force

Over defense objection, the jury was instructed (R. 924) about a peace officer's right to use deadly force. This error should not be permitted at a new trial: Neither party in a criminal case is entitled to "unlimited instructions, which are wholly unrelated to the case but are based upon the mereest factual reference or witness's comments." *People v. Bratcher*, 63 Ill.2d 534, 349 N.E.2d 31, 34 (1976).

D. A Mistrial Should Have Been Granted at the Close of the Jury's Second Day of Deliberations

The trial judge should have granted a mistrial when the jury was unable to reach a verdict after its second day of deliberations. Under the unique facts of this case, it was an abuse of discretion for the trial judge to sequester the jury for a second night.

The factual dispute at trial was simple and uncomplicated: the alleged aggravated battery had occurred in a thirty second period; there was no medical testimony; each side presented three eyewitnesses — O'Connor, Pacheco, and McNicholas testified for the prosecution, Quintina Villareal and her daughter Imelda and defendant Fausto Villareal testified for the defense. The other witnesses at trial where pre-occurrence witness (Vanessa Orr), witnesses to statements allegedly made after the occurrence (Valdez, Gallet) and two witnesses to provide foundation testimony for photographs and physical evidence (Tickner

and Ferrara).

The communications from the jury showed that its need for the trial transcript to resolve disputes about the evidence. On the evening of its first day of deliberations, the jury announced that it was hung; the trial judge instructed the jury that "you have heard all the evidence, you have heard the arguments of the lawyers, the Court has instructed on the law, and you are directed to continue your deliberations." (Tr. 748.) After being told to continue its deliberations, the jury requested the trial transcript. (R. 987.) The jury was informed that the transcript "is not available at this time," (Tr. 752) On its second day of deliberations, the jury again asked to review the trial transcript. (Supplemental Record 6.) The trial judge advised the jury that the transcript was not available and that it would have to rely on its "collective memories as to what the evidence was." (Supplemental Record 8.)

A *Prim* instruction was given in the early afternoon of the jury's second day of deliberations. (Supplemental Record 17.) Throughout its second day of deliberations, the jury did not give any indication that further deliberations were likely to result in a verdict.

Under these circumstances, it was an abuse of discretion for the trial judge to deny the defense motions for a mistrial on the evening of the jury's second day of deliberations. This case is far different from *People v. Daily*, 41 Ill.2d 116, 242 N.E.2d 170 (1968), where testimony had been presented from 31 witnesses and where the jury deliberations had not extended over two nights. This case is also different from *People v. Alexander*, 15 Ill.App.3d 607, 305 N.E.2d 61 (1973), where the jury had only been sequestered for one night. This case is also unlike *People v. Evans*, 78 Ill.App.3d 366, 399 N.E.2d 1333 (1980),

where the jury had "20 verdict forms, 10 for each defendant, and had to decide complex issues of felony murder and accountability" and "deliberated for about 12 hours before reaching a verdict." 399 N.E.2d at 1345. The facts in dispute in this case were uncomplicated; and the legal issues that were submitted to the jury were not complex. Under the unique circumstances of this case, it was an abuse of discretion to deny the defense motions for a mistrial after the jury's second day of deliberations.

E. Abuse of Subpoena

At trial, Vanessa Orr testified that she had been interviewed by the prosecution on the Thursday prior to trial when, in response to a subpoena, she had traveled on her lunch hour to the prosecution's office. Immediately before trial, when counsel for defendant Fausto Villareal sought to interview Orr, a female employee of the State's Attorney's office interceded and frustrated counsel's efforts.

The prosecution's use of a subpoena to interview a witness was an abuse of a trial subpoena. The case was not set for trial on the day that Ms. Orr was subpoenaed to appear at the prosecution's office and the Court erred in refusing to impose any sanction for this misuse of the subpoena power.

Defendant was prejudiced by the prosecutions' abuse of a trial subpoena: after her interview with the prosecution, Orr recalled facts that she had been unable to recall immediately after the incident when she made her initial statements to the police. Specifically, after being interviewed by the prosecution, Orr testified that she had seen the face of Jose Villareal looking through the window of the apartment at 1733 North Menard Avenue before officers Pacheco and O'Connor entered that apartment.

"The use of subpoenas to ensure the attendance of witnesses is an important part of our system of jurisprudence." *People v. Lego*, 116 Ill.2d 323, 507 N.E.2d 800, 804 (1987). In this case, the prosecution misused a subpoena to gain an advantage in discovery. A new trial, at which the prosecution is prohibited from eliciting any testimony from Orr that was developed as a result of its abuse of a subpoena, is required.

V. CONCLUSION

For the reasons above stated, defendants' convictions should be reversed outright. In the alternative, defendants' convictions should be reversed and remanded for a new trial.

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