

No. 1-11-3089

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	the Circuit Court
Plaintiff-Appellee,)	of Cook County
)	
v.)	No. 10 CR 12106
)	
MICHAEL BROWN,)	Honorable
)	Maura Slattery Boyle,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Quinn and Justice Pierce concurred in the judgment.

ORDER

Held: We hold defendant has not satisfied his burden of proving his two allegations of ineffective assistance of counsel. We also hold that the circuit court did not abuse its discretion when it denied defendant's request to instruct the jury with IPI Criminal 4th No. 3.11, or when it found defendant fit to stand trial. Finally, we refuse to review defendant's contention on its merits regarding Illinois Supreme Court Rule 431(b) because the evidence in this case was not closely balanced, and therefore, defendant did not satisfy the first prong of the plain error doctrine.

¶ 1 A jury convicted defendant, Michael Brown, of possession of a controlled substance with intent to deliver. He was sentenced to ten years in prison. Defendant raises five issues before this court: (1) whether his trial counsel was ineffective for failing to submit the proper argument concerning the legality of the search of his person at the time of his arrest; (2) whether his trial counsel was ineffective for failing to introduce three allegedly inconsistent statements of a witness for impeachment purposes; (3) whether he was denied a fair trial where the circuit court refused to give a cautionary jury instruction, Illinois Pattern Jury Instructions, Criminal No. 3.11 (4th ed. 2000)(hereinafter IPI Criminal 4th No. 3.11), addressing prior inconsistent statements; (4) whether the circuit court erred in finding him fit to stand trial; and (5) whether this court should review, under the plain error doctrine, his allegation that the circuit court violated Illinois Supreme Court Rule 431(b). Ill. S. Ct. R. 431(b) (eff. May 1, 2007).

¶ 2 In this case, we hold defendant has not satisfied his burden of proving either of his two allegations of ineffective assistance of counsel. We also hold that the circuit court did not abuse its discretion when it denied defendant's request to instruct the jury with IPI Criminal 4th No. 3.11, or when it found defendant fit to stand trial. Finally, we refuse to review defendant's contention on its merits regarding Illinois Supreme Court Rule 431(b) (Ill. S. Ct. R. 431(b) (eff. May 1, 2007)) because the evidence in this case was not closely balanced, and therefore, defendant did not satisfy the first prong of the plain error doctrine.

¶ 3 JURISDICTION

¶ 4 The circuit court sentenced defendant on September 22, 2011, and he timely filed his notice of appeal on September 27, 2011. Accordingly, this court has jurisdiction pursuant to

article VI, section 6, of the Illinois Constitution and Illinois Supreme Court Rules 603 and 606, governing appeals from a final judgment of conviction in a criminal case entered below. Ill. Const. 1970, art. VI, §6; Ill. S. Ct. R. 603 (eff. Oct. 1, 2010); R. 606 (eff. Mar. 20, 2009).

¶ 5

BACKGROUND

¶ 6 Defendant was charged with one count of possession of a controlled substance with intent to deliver. Prior to trial, defendant filed a motion to quash his arrest and to suppress evidence arguing that the search of his person that led to his arrest had been conducted without a warrant, exigent circumstances, consent, or probable cause. Specifically, defendant alleged that "[a]t the time of the arrest, the officers had neither a warrant nor probable cause to believe that [he] committed an offense." Furthermore, defendant asserted that his conduct prior to his arrest "would not reasonably be interpreted by the arresting officers as constituting probable cause that he had committed or was about to commit a crime." He asked that the court "conduct a hearing to determine whether there was probable cause for arrest."

¶ 7 Officer Joseph Ceglarek testified on behalf of defendant at the January 7, 2011, hearing on defendant's motion to suppress. On June 11, 2010, Officer Ceglarek was a surveillance officer with the Chicago police department assigned to the area of 755 North Laverne in Chicago, Illinois. Officers Velez and Jones were also in the area. Officer Ceglarek first saw defendant "standing on the sidewalk roughly around 755 North Laverne." He described the area as "next to a fence, to a building leading to Chicago Avenue to the north. There is not really much there; a sidewalk." Officer Ceglarek was dressed in plain clothes with only his "star" visible, and was on foot approximately 50 feet away from defendant in an alley. When asked what drew his attention

to defendant, Officer Ceglarek testified that the "area is a known area for narcotic sales." Officer Ceglarek testified that he "observed [defendant] yelling blows, blows, which is a street term for heroin." He stated that "[a] few" people, less than five, were standing around defendant at that time. Officer Ceglarek testified that he heard defendant say, "blows, blows" two times. The following exchange occurred between defense counsel and Officer Ceglarek:

"Q. After you heard him say blows, blows two times, what did you see or hear next?

A. I observed an unknown male black approach him. They engaged in a brief conversation. The unknown male black tendered United States currency. [Defendant] then reached into his hair, grabbed an unknown item and tendered that item to the unknown male black."

Officer Ceglarek could not recall anything about the other person other than the person being African-American. Officer Ceglarek described how he then "broke surveillance," in the following exchange with defense counsel:

"Q. After you observed this what happened? What did you do?

A. Believing that to be a narcotics transaction I broke surveillance, started walking towards Mr. Brown. When I was roughly about 20 feet away I announced my office as [a] Chicago police officer; the unknown male fled on foot.

Q. Which direction did he flee?

A. North. He made good his escape. While I was also walking I observed [defendant] take the unknown amount of [money] that he had, tender that to another unknown male black, which he made his escape as well."

Defendant, however, did not attempt to flee.

¶ 8 When asked what he did when he "got to" defendant, Officer Ceglarek testified that "[f]irst thing I did, I detained [defendant] for questioning. I radioed my partners to come in and assist me." Although Officer Ceglarek was present, Officer Jones conducted the search of defendant. Officer Ceglarek testified that Officer Jones recovered four small bags "containing tinfoil packets, suspect heroin" from defendant's hair. The officers did not recover any currency.

¶ 9 On cross-examination, Officer Ceglarek testified that nothing obstructed his view when he was conducting surveillance, and that the bags recovered from defendant's hair tested positive for heroin. He clarified that he did see money exchange hands, that defendant accepted the money, and that defendant handed the money to an unknown person who fled. He identified defendant as the person whom he observed engage in a "hand-to-hand transaction." Officer Ceglarek also testified regarding his experience and credentials, stating he had four years of experience and that he was familiar with the way narcotics transactions occur on Chicago streets.

¶ 10 On redirect examination, the following exchange occurred between defense counsel and Officer Ceglarek:

" Q. Officer, when you approached [defendant] did you see

anything in his hair, sticking out of his hair?

A. When I was approaching from 20 feet I couldn't, but when I was next to him I could see small items protruding from his hair.

Q. No further questions."

¶ 11 The circuit court recited Officer Ceglarek's testimony on the record and then denied defendant's motion to suppress, finding that "[t]here was probable cause to arrest" defendant.

¶ 12 On February 8, 2011, the circuit court ordered a psychiatric evaluation of defendant. At the hearing on that day, defendant indicated to the court that he did not think he was being adequately represented. On February 18, 2011, Sharon L. Coleman, a licensed clinical psychologist, submitted a letter to the circuit court stating that, in her professional opinion, defendant was fit to stand trial. Coleman opined that defendant understood the nature and purpose of the proceedings against him and would be able to assist his counsel in his defense. On February 28, 2011, psychiatrist Peter Lourgos submitted a letter to the circuit court stating it was his opinion that defendant was fit to stand trial. He opined that defendant "is cognizant of the charge, understands the nature and purpose of the legal proceedings, and shows the ability to cooperate with counsel in his defense. He is not exhibiting active signs or symptoms of a mental disorder."

¶ 13 Defense counsel, on April 13, 2011, indicated to the court that the sheriff's department was conducting additional psychiatric evaluations. Defendant indicated to the court his displeasure with his attorney. The following colloquy occurred between the court and defendant:

"THE COURT: *** What I'm also noticing is a big difference in his demeanor, and I don't mean it like you are very alert and very awake, but you seem to be delayed. Is he on medication?

Have you been taking medication?

DEFENDANT: No.

THE COURT: Prior to your incarceration, were you on medication?

DEFENDANT: No.

THE COURT: Something has happened because the way you are today is not how you were in March, and I don't think - - it's got to be with your motor - - the manner in which you're speaking, you seem really delayed.

DEFENDANT: That's the way I am.

THE COURT: I'm not saying I know you, but I've seen you since July, and this is a marked difference between how I [have] seen you on each court date and how you are today.

DEFENDANT: I want to go to trial. County don't got nothing to do with it. What they are supposed to got me for on or what they did, and what they told County, they ain't doing nothing."

The circuit court later stated the following to defendant:

"THE COURT: Well, I'm concerned about your mental state right now because I see a big difference between a month ago and today, and I don't know what's happened. I made that evaluation, and I don't have a report. So I'm going to require another evaluation.

DEFENDANT: I can go?

THE COURT: Today is the 13th. I'm going to see him back here on the 12th, May 12, 2011, BCX ordered."

In its order, the circuit court requested defendant be examined as to his fitness to stand trial and his fitness to stand trial with medication. On April 20, 2011, the circuit court entered another referral order to the Forensic Clinical Services, but asked that defendant be evaluated by someone other than Dr. Luorgos or Dr. Coleman.

¶ 14 On May 11, 2011, Dr. Roni L. Seltzberg, submitted a letter to the circuit court in which he opined that defendant was fit to stand trial. Dr. Seltzberg stated that defendant "was able to demonstrate his understanding of the nature of the charges against him, the purpose of the proceedings against him, and he is capable of assisting counsel in his defense if he so chooses." Dr. Seltzberg additionally stated that defendant was "not prescribed psychotropic medication nor is there an indication of a need for this type of intervention in order for [defendant] to maintain his fitness for trial." At a hearing on May 20, 2011, the circuit court stated the following on the record, "We have had an evaluation done. He was fit to stand trial."

¶ 15 During jury selection, the circuit court admonished the venire that they "must follow the law as I give it to you. You may not use your own ideas of what you think the laws should be." The circuit court then read the charges against defendant to the venire, and stated to the venire that they "must remember that an Information is not to be considered as any evidence against [defendant], nor does the law allow you to infer any presumption of guilt against [defendant] simply because he has been named in this information." The circuit court then gave the following admonishments to the venire:

"Under the law [defendant] is presumed to be innocent of the charge against him. This presumption remains with him throughout every stage of the trial and during your deliberations on the verdict and is not overcome unless from *** all the evidence you are convinced beyond a reasonable doubt that [defendant] is guilty.

The State has the burden of proving the guilt of [defendant] beyond a reasonable doubt and this burden remains on the State throughout the case.

[Defendant] is not required to prove his innocence, nor is he required to present any evidence on his behalf.

You are the judges of the facts in this case. That is you, and you, and only you, will determine which witnesses to believe, how much weight is to be given to their testimony. It is my job to

determine the law in the case and what evidence you may hear and consider. It will be your sworn duty to follow the law as I give it to you.

After you hear all the evidence, the arguments of the attorneys and my instructions on the law, you will retire to the jury room to determine your verdict. If you are convinced beyond a reasonable doubt from all the evidence in this case that [defendant] is guilty as charged in the *** information, it will be your duty to find him guilty.

Whatever verdict you reach, it will be your own, and you will not have to explain it or justify it to anyone at any time. It is essential that you not arrive at any decisions or conclusions of any kind until you have heard all the evidence, the arguments of the attorneys and the law that applies to this case and have begun your deliberations in the privacy of your jury room.

I ask that you not read or look at any magazines or anything in connection with this case or Google it or have any type of outside contact in regards to this case. The evidence that you will need to decide this case will be in one place and one place only, and that is in this courtroom and these four walls. You must rely on the evidence you see and hear in this courtroom and the

instructions of law that I give you.

I will say that many times before this trial has ended because that is the best way to insure a fair trial for both sides.

Ladies and gentleman, I'm going to ask generally of the whole venire, I have indicated just momentarily ago basic principles of American criminal jurisprudence in this country, is that a person is innocent until proven guilty. Is there anyone in this venire *** that cannot follow that principle of law? If so, please, raise your hands.

Let the time reflect that it is 12:46, and no one in the venire has raised their hand.

Ladies and gentleman, it is also a basic premise of American criminal law that an individual as charged is not required to testify, they do not have to prove anything, they do not have to produce any evidence. Is there anyone in the room that cannot follow that principle of law, that basic fundamental principle?

THE COURT: Your name, Ma'am.

THE VENIRE: La Donna Barber.

THE COURT: LaDonna Barber?

Ladies and gentlemen, it is also a fundamental principle in the United States Constitution and the Bill of Rights, the Fifth

Amendment, an individual need not testify. Again, it is not their burden. It is the burden of the State to prove this case beyond a reasonable doubt. Is there anyone in this jury box or out in the venire that cannot follow that principle of law?

Let the record reflect in regards to two of the questions, the *Zehr* questions, individuals have indicated and raised their hand, and I will discuss that at a later point.

Ladies and gentlemen, when you decide this case you must not allow sympathy or prejudice to influence your verdict. Our system of law is based on the principle that a jury will decide a case on the law and the evidence. That is the oath that you will take as jurors, and I know you will be able to faithfully adhere to that oath."

¶ 16 Trial

¶ 17 At trial, Officer Ceglarek again testified, but on the State's behalf. He testified that at approximately 10 p.m. on June 11, 2010, he was on duty as a surveillance officer. He was dressed in plain clothes, which he described as wearing "a vest with your star showing." As a surveillance officer, he usually observes areas known for narcotics or guns. He described the area of defendant's arrest as "well known for narcotics sales." Officer Ceglarek testified that although he was doing surveillance alone, he had enforcement officers on the team with him. Officers Jones, Ruiz, Fitzgerald, and Louis were the enforcement officers that day. He described

his assignment that day as "short-term." He testified he has never brought recording equipment, video or audio, with him on a short-term surveillance operation.

¶ 18 Officer Ceglarek testified regarding the area he was observing during his surveillance operation, stating "I was in an alley about 50 feet away from where I was doing my observations. I was ground level." He described the area as residential, and stated that although it was dark out, there "was good artificial streetlight." He was not using any binoculars or telescopic device that day and he was hiding behind a trash can. He stayed in that location "[a]bout 10 to 15 minutes." Shortly after 10 p.m., Officer Ceglarek "observed at the time unknown males on the right in front of 755 North Laverne." Defendant was amongst the approximately five males that Officer Ceglarek observed. Officer Ceglarek testified that he then observed defendant "yelling 'Blows. Blows,' " two times. The following exchange then occurred between the prosecutor and Officer Ceglarek:

"Q. Was he a part of the group at the time he was yelling 'blows, blows,' or did he separate himself at all from the group of approximately five?

A. He separated himself from the group.

Q. And where did he separate, in which direction or describe in which direction - -

A. He went about four feet north of the group so I could see separation."

The prosecutor then asked Officer Ceglarek what action he took after observing defendant yell

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"blows, blows" two times. Officer Ceglarek testified that "knowing 'blows, blows' to be heroin," he "focused" his attention on defendant. He next observed an "unknown male black approach" defendant. Although he could not hear defendant and the unknown male, he observed them engage in "a brief conversation." Officer Ceglarek testified that he then saw defendant "accepting an unknown amount of [U.S. currency]. He then placed that money [in] his pocket. He then reached into his hair, retrieved an unknown item and tendered that item to the unknown male." Officer Ceglarek believed money was exchanged based on "shape, color, size." Defendant accepted the money with his right hand. The unknown individual was not a part of the earlier observed group of unknown males. Officer Ceglarek demonstrated how defendant retrieved an unknown item from his hair and placed that item into the unknown individual's hands. The unknown individual then walked northbound out of Officer Ceglarek's sight. Officer Ceglarek then "broke surveillance" and proceeded toward defendant because he thought that a narcotics transaction had occurred. He alerted, via radio, Officer Jones of the enforcement team, and described defendant to him. Officer Ceglarek testified that the following then occurred: "[a]s I proceeded, broke my surveillance, I observed [defendant] reach into his right pocket, hand over what I thought to be United States currency, that individual then proceeded to run eastbound down the alley out of my sight." When asked whether the individual who defendant gave the money to was walking or running, Officer Ceglarek testified the unknown male "was walking at a fast pace." Officer Ceglarek observed defendant hand the money to the unknown individual while he was approximately 20 feet away from defendant. Officer Ceglarek then announced "Chicago police." The enforcement officers arrived on the scene. The following exchange then

occurred between the prosecutor, defense counsel, and the court:

"MR. SAUCEDA [Assistant State's Attorney (ASA)]: Now, where did Officer Jones go? What did you see him do with respect to the defendant?

A. Once [defendant] was detained, I related to Officer Jones what I had s[een]. Officer Jones, along with myself, noticed small items protruding from his hair.

MS. McCARTHY [Assistant Public Defender (APD)]:
Objection to what Officer Jones noticed.

THE COURT: Sustained.

MR. SAUCEDA: What did you see?

A. I saw small Ziploc bags protruding from his hair. "

Four "baggies" containing heroin were recovered from defendant's hair. Officer Ceglarek testified that he had made "[p]robably close to a thousand" heroin related arrests in his career.

¶ 19 On cross-examination, Officer Ceglarek clarified that his fellow officers, the enforcement officers, were in the near vicinity and he was in radio contact with them the whole time. Officer Ceglarek testified that defendant was "near" a light pole. He could not describe what the other unidentified males standing by defendant were wearing or how tall they were. Nor could he recall how tall or what the person who approached defendant was wearing. He clarified that when he called Officer Jones, he only gave him a description of defendant. Officer Ceglarek testified that the person who he believed handed defendant money in the transaction was an

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African-American male of dark complexion. Even though it was dark outside, he agreed that he could still see a green item being handed to defendant. He could not recall the height, complexion, or hairstyle of the person who defendant handed the money to after the alleged transaction had occurred.

¶ 20 Defense counsel then introduced into evidence, after Officer Ceglarek testified that he believed that he prepared the case report on the arrest, the original case incident report on the case. Officer Ceglarek testified that he authored the report. When asked whether he wrote anything regarding defendant's separation from the original group of approximately five people, Officer Ceglarek testified that it was not in the report. Officer Ceglarek clarified that the enforcement officers also arrived on the scene just moments after he arrived on the scene. Defendant did not resist arrest. None of the officers attempted to go after any of the other unknown males in the area. When asked what he detained defendant for, Officer Ceglarek answered that defendant "yelled, 'blows, blows,' " which he characterized as "solicitation." He explained that when he "broke surveillance, I was approaching him for what I suspected to be a narcotics transaction and for solicitation." The following exchange then occurred:

"MS McCARTHY [APD]: So you were going to place him
under arrest?

A. That's correct.

Q. So when you say you detained him, you placed him
under arrest?

A. Yes.

Q. Officer, do you remember testifying in a motion to quash arrest and suppress evidence in this courtroom on January 7, 2011?

A. Yes

Q. Do you remember being asked these questions and giving these answers?

A. Yes

Q. Page 11, sorry.

Reading: 'Question, what did you do when you got to [defendant]? Answer, first thing I did I detained [defendant] for questioning. I radioed my partners to come in and assist me.'

MR. SAUCEDA [ASA]: Objection. Not impeaching. He said detain and arrest.

THE COURT: Sustained.

MS McCARTHY: Officer, your purpose in detaining him was to arrest, correct?

MR. SUACEDA: Objection, asked and answered.

THE COURT: Sustained.

MS. McCARTHY: Judge, I would argue that it is impeaching.

THE COURT: Sustained."

Defense counsel later asked Officer Ceglarek whether he remembered testifying during the motion to quash arrest and suppress evidence that, "[f]irst I detained [defendant] for

questioning. I radioed my partners to come in and assist me,' " to which Officer Ceglarek answered that he did remember it. Defense counsel then stated to Officer Ceglarek "[b]ut today you are testifying that you radioed your partners to assist you before you got to [defendant]," to which Officer Ceglarek responded that "[a]s I was approaching and near [defendant], I radioed my partners to assist me."

¶ 21 On re-direct examination, Officer Ceglarek clarified that the report he wrote was only a one paragraph summary of what happened. On the night in question, he was targeting drug sellers, not buyers. On re-cross-examination, Officer Ceglarek testified that a camera would have compromised his surveillance but he did not think that his badge would. Officer Ceglarek testified further that "[w]hile I was detaining [defendant], I radioed enforcement officers."

¶ 22 Officer Calvin Jones, the enforcement officer at the time of defendant's arrest, testified on behalf of the State. Officer Jones was in a car dressed in plain clothes when Officer Ceglarek contacted him by radio. Officer Jones testified that "[a]s I approached *** Officer Ceglarek was already on the scene and had detained" defendant. Officer Jones testified regarding his observations of defendant, stating:

"I observed a small plastic object on the left side of [defendant's] braided hair. At which time I went to reach for that item and [defendant] kind of moved over to the side. At which time he was placed in custody by Officer Ceglarek. I recovered from his hairline one Ziploc package with a yellow Batman logo on it containing a tinfoil packet containing white suspect heroin.

After that I continued to search the area of his hair and recovered three more similar packages at that time."

Officer Jones further described how he removed the packages from defendant's hair, stating:

"At the time I looked and saw his hair was braided, and there was at first something white, so it was sticking out of his left side of his head. So at that time I reached into his hair area. I pulled out the item, at which time you could see another clear plastic area. So I had to basically remove the braids from his hair and every time I removed a braid from his hair, I could see clearly more individual packets within his hair."

¶ 23 On cross-examination, Officer Jones testified that he himself never observed any suspected drug transaction. He also was never given a description of any alleged buyers to follow. He did observe a few other individuals in the area.

¶ 24 Officer Jose Velez, the inventory officer, testified on behalf of the State as to the role he played in the chain of custody of the recovered narcotics. Hasnain Hamayat, a forensic scientist for the Illinois state police, testified as an expert in forensic science on behalf of the State. He testified that the recovered substance was heroin.

¶ 25 After the State rested, defendant motioned for a directed verdict, which the circuit court denied. During jury instructions, defendant presented IPI Criminal 4th No. 3.11 for presentation to the jury. The circuit court denied defendant's request, finding:

"Given the testimony and what the Court heard, the Court does not believe this is an appropriate instruction to be given. The Court does not

believe - - it wasn't, (a), by omission in regard to the summary; and two, the Court has heard - - the jury heard the testimony and the Court does not believe that this jury instruction needs or should be given."

After the jury was instructed and excused, defendant motioned for a mistrial based on the State's closing argument. The circuit court denied the motion.

¶ 26 The jury convicted defendant of possession of a controlled substance with intent to deliver. After trial, both defendant, *pro se*, and his counsel, filed motions for a new trial. In his *pro se* motion, defendant argued his counsel was ineffective. Trial counsel later amended its motion to add that the circuit court erred in denying defendant's motion for "IPI instruction 3.11." The circuit court denied both motions for a new trial and defendant subsequently appealed.

¶ 27 ANALYSIS

¶ 28 Pretrial Suppression Motion

¶ 29 Defendant first argues that his trial counsel was ineffective because counsel's pretrial suppression motion focused entirely on whether or not the police had a reasonable suspicion of criminal activity to justify temporarily detaining defendant for questioning. According to defendant, his counsel "evidently believed" that a proper stop pursuant to *Terry v. Ohio*, 392 U.S. 1, 21, 30 (1968), automatically justified a protective pat-down search for weapons. Defendant argues this was improper and that had his counsel argued that the protective pat-down search was unlawful, there is a reasonable probability that a motion to suppress based on this argument would have been successful and, therefore, a reasonable probability that the outcome of his trial would have been different.

¶ 30 In response, the State argues that defendant improperly characterizes both the facts and the circuit court's findings in this case. According to the State, a pat-down search was not performed, rather, defendant was searched incident to his arrest. The State asserts that because the circuit court found probable cause existed for defendant's arrest, a higher standard than the reasonable suspicion standard applicable to a *Terry* stop, the search after defendant's arrest was legal. Accordingly, the State maintains defendant received effective assistance of counsel because any challenge based on an allegedly illegal pat-down search would have been futile. Alternatively, the State argues that even if the circuit court had ruled that probable cause to arrest defendant did not exist, the narcotics seized were in plain view.

¶ 31 To prove he was denied the effective assistance of counsel, defendant "must show both that his counsel was deficient and that this deficiency prejudiced defendant." *People v. Givens*, 237 Ill. 2d 311, 330-331 (2010). "A defendant, to establish deficiency, must prove that counsel's performance, as judged by an objective standard of competence under prevailing professional norms, was so deficient that counsel was not functioning as the 'counsel' guaranteed by the sixth amendment." *People v. Bew*, 228 Ill. 2d 122, 127-28 (2008). If prejudice is not shown, however, a court can dispose of an ineffective assistance of counsel claim without first determining whether a counsel's performance was deficient. *Givens*, 237 Ill. 2d at 331. Defendant has the burden of proving that he did not receive the effective assistance of counsel. *People v. Rucker*, 346 Ill. App. 3d 873, 885 (2004).

¶ 32 To establish prejudice in the context of a claim that counsel was ineffective for failing to file a motion to suppress, "the defendant must demonstrate that the unargued suppression motion

is meritorious, and that a reasonable probability exists that the trial outcome would have been different had the evidence been suppressed." *People v. Henderson*, 2013 IL 114040, ¶ 15.

Generally, great deference is given to the decision of whether to file a motion to suppress because it is typically a matter of trial strategy. *Bew*, 228 Ill. 2d at 128. If the motion would have been futile, then the failure to file a motion to suppress does not establish incompetent representation. *Givens*, 237 Ill. 2d at 332.

¶ 33 Our supreme court has recognized that there are generally "three theoretical tiers of police-citizen encounters." *People v. McDonough*, 239 Ill. 2d 260, 268 (2010). The first tier, the arrest of a citizen, requires probable cause to support the arrest. *Id.* The second tier, the *Terry* stop, occurs when a police officer conducts a temporary investigative seizure based on the officer's "reasonable, articulable suspicion of criminal activity and such suspicion amounts to more than a mere 'hunch.'" *Id.* (quoting *Terry*, 392 U.S. at 27). The reasonable suspicion standard is less stringent than the standard required for an arrest, *i.e.* probable cause. *People v. Leggions*, 382 Ill. App. 3d 1129, 1132-33 (2008); *People v. Maxey*, 2011 IL App (1st) 100011, ¶46. The third tier, not at issue here, is when the encounter is consensual and does not involve coercion or detention. *McDonough*, 239 Ill. 2d at 268.

¶ 34 In this matter, we agree with the State that defendant improperly characterizes the facts and the findings of the circuit court. In his motion to suppress, defendant specifically asked the circuit court to "conduct a hearing to determine whether there was probable cause to arrest." After a hearing, the circuit court, in announcing its findings, recited Officer Ceglarek's testimony and stated on the record, "[t]here was probable cause to arrest." The reasonable suspicion

standard applicable to a *Terry* stop, however, is a less stringent standard than the probable cause standard applicable to an arrest. *Leggions*, 382 Ill. App. 3d at 1132-33; *Maxey*, 2011 IL App (1st) 100011, ¶46. Before this court, defendant takes the unique position that his trial counsel was ineffective for failing to raise a *Terry* pat-down search argument in the motion to suppress even though his counsel argued that there was no probable cause to arrest defendant in the motion. Subsequently, the circuit court found there was probable cause to arrest. It follows that since the circuit court found probable cause to arrest, a stricter standard than the reasonable suspicion standard applicable to a *Terry* pat-down search scenario, an analysis based on *Terry* is not applicable here. Therefore, we cannot say that a motion to suppress based on *Terry* would have had any reasonable probability of success based on the circuit court's finding that probable cause existed to arrest defendant.

¶ 35 We note that defendant did not properly challenge the circuit court's probable cause finding before this court. In his opening brief, defendant did not make any arguments regarding the circuit court's finding of probable cause to arrest. He did argue in his reply brief that Officer Ceglarek did not have probable cause to arrest, albeit still in the context of his ineffective assistance counsel argument even though trial counsel did challenge whether probable cause to arrest existed. Accordingly, defendant has waived review of this contention by failing to properly raise this issue before this court. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) (stating points not argued in appellant's brief "are waived and shall not be raised in the reply brief"); Ill. S. Ct. R. 612 (eff. Feb. 6, 2013) (stating Rule 341 applies to criminal appeals). Notwithstanding waiver, we do agree with the circuit court's probable cause finding. A warrantless arrest will

only be valid if probable cause existed at the time of the arrest. *People v. Grant*, 2013 IL 112734, ¶11. "Probable cause to arrest exists when the facts known to the officer at the time of the arrest are sufficient to lead a reasonably cautious person to believe that the arrestee has committed a crime." *Id.* Probable cause determinations depend on the totality of the circumstances and are governed by "commonsense considerations." *Id.* The probability of criminal activity, rather than proof beyond a reasonable doubt, is the proper calculation to consider when determining whether probable cause existed at the time of the arrest. *Id.* A police officer's knowledge and experience are relevant considerations in probable cause determinations. *Id.* "A search incident to a valid arrest is valid if made contemporaneously with the arrest." *Rucker*, 346 Ill. App. 3d at 886. A search is considered contemporaneous with an arrest even if conducted immediately prior to a valid arrest. *Id.* "Moreover, once an officer has probable cause to believe that items are contraband, the items are subject to seizure even in the absence of a warrant." *Id.*

¶ 36 In this case, we agree with the circuit court's finding that probable cause to arrest existed at the time of the arrest based on the totality of the circumstances. Officer Ceglarek heard defendant yell "blows, blows" two times, which he testified is a street term for heroin, in an area known for narcotic sales. He was approximately 50 feet away. He observed what he believed to be a narcotics transaction after seeing currency exchanged for an unknown item. He was familiar with how narcotics transactions occur in Chicago. Recently, in *People v. Grant*, 2013 IL 112734, our supreme court held that police had probable cause to arrest an offender where he was standing on a street corner yelling "dro, dro," a street term for cannabis. *Grant*, 2013 IL 112734,

¶ 22. Based on the totality of the circumstances, we agree with the circuit court's probable cause determination.

¶ 37 Overall, based on the circuit court's finding of probable cause to arrest, compared with defendant's argument before this court that an argument based on the less stringent reasonable suspicion standard would have been successful if filed, we cannot say that defendant can show that an argument based on an illegal *Terry* pat-down search had any probability of success. We hold that any such motion filed based on an illegal *Terry* pat-down search would have been futile. *Givens*, 237 Ill. 2d at 332. Therefore, defendant has not satisfied his burden of proving ineffective assistance of counsel. *Rucker*, 346 Ill. App. 3d at 885. Accordingly, we hold that trial counsel's failure to file a motion to suppress based on an alleged illegal *Terry* pat-down search does not constitute ineffective assistance of counsel in this case.

¶ 38 **Prior Inconsistent Statements**

¶ 39 Defendant next argues that his trial counsel was ineffective for failing to introduce allegedly prior inconsistent statements made by Officer Ceglarek in order to discredit his testimony.

¶ 40 Initially, we point out that in two instances defendant relies upon an arrest report to support his allegation that Officer Ceglarek offered inconsistent testimony. Defendant argues that this arrest report did not include any mention of the following as stated by Officer Ceglarek at trial: (1) that defendant separated himself from a group of people before yelling "blows, blows" two times; and (2) that Officer Ceglarek saw "Ziploc bags" in defendant's hair. This court has held, however, that "the testimony of a police officer cannot be impeached by the contents of

a police report which he neither prepared or signed." *People v. Currie*, 84 Ill. App. 3d 1056, 1060 (1980); *People v. Gomez*, 107 Ill. App. 3d 378, 382 (1982). Our review of the arrest report shows that Officer Ceglarek did not prepare the report in question. The document lists an "attesting officer," and at the bottom of the document it lists who "generated" it, neither of whom are Officer Ceglarek. Accordingly, the arrest report could not have been used by trial counsel to impeach Officer Ceglarek's testimony. Therefore, we hold that defendant's reliance on the arrest report in making his argument is improper and does not constitute the ineffective assistance of counsel.

¶ 41 Defendant does point to three instances, without relying on the above mentioned arrest report, where he alleges Officer Ceglarek's testimony at trial was inconsistent with his testimony at the pretrial suppression hearing. First, defendant alleges that Officer Ceglarek testified at trial that defendant separated himself from a group of people prior to yelling "blows, blows" two times at trial, but that he did not mention that defendant ever separated himself at the pretrial suppression hearing. Second, defendant contends Officer Ceglarek testified at trial that the alleged buyer walked out of sight before he broke surveillance, whereas at the suppression hearing he testified that the alleged buyer fled on foot after he broke surveillance. Third, defendant alleges that Officer Ceglarek testified at trial that he saw "Ziploc bags" in defendant's hair, whereas during the suppression hearing Officer Ceglarek testified that he saw "small items" in defendant's hair. Defendant contends that trial counsel's failure to impeach Officer Ceglarek with these discrepancies was not trial strategy, was prejudicial, and that there is a reasonable probability that his trial would have been different had the inconsistent testimony been

impeached. Defendant contends that the evidence was closely balanced as to whether he was the buyer or the seller of the narcotics.

¶ 42 In response, the State argues that trial counsel's decision not to further impeach Officer Ceglarek was a matter of trial strategy, which typically cannot support a claim of ineffective assistance of counsel. Furthermore, the State contends that the matters defendant contends are impeaching were not impeaching, or at best, were meaningless discrepancies, and were not prejudicial. Additionally, the State asserts that the uncontradicted testimony shows that defendant was clearly the seller, highlighted by the fact that defendant yelled "blows, blows" two times. Accordingly, the State maintains that evidence in this case was not closely balanced.

¶ 43 To prove that he was denied the effective assistance of his trial counsel, defendant must show that his counsel was deficient and that he was prejudiced by this deficiency. *Givens*, 237 Ill. 2d at 330-31. Typically, "the decision whether or not to cross-examine or impeach a witness is a matter of trial strategy which will not support a claim of ineffective assistance of counsel." *People v. Pecoraro*, 175 Ill. 2d 294, 326 (1997). "The manner in which to cross-examine a particular witness involves the exercise of professional judgment which is entitled to substantial deference from a reviewing court." *Id.* at 326-27. Accordingly, defendant must show that his counsel's decisions regarding cross-examination were objectively unreasonable. *Id.* at 327. Additionally, under the impeachment by omission rule, a witness's prior silence may be used to discredit that witness's testimony. *People v. Williams*, 329 Ill. App. 3d 846, 854 (2002). A defendant, however, only satisfies requirements of the rule if "(1) it is shown that the witness had an opportunity to make a statement, and (2) under the circumstances, a person normally would

have made the statement." *Id.*

¶ 44 In the first complained of instance of allegedly inconsistent testimony, *i.e.*, that Officer Ceglarek testified at trial that defendant "separated" himself from the group whereas at the suppression hearing he did not mention this fact, we hold that the alleged inconsistent testimony does not satisfy the impeachment by omission rule. At trial, while testifying for the State, the following testimony was elicited from Officer Ceglarek by the prosecutor on direct examination during the presentation of the State's case:

"Q. Was he a part of the group at the time he was yelling 'blows, blows,' or did he separate himself at all from the group of approximately five?

A. He separated himself from the group.

Q. And where did he separate, in which direction or describe in which direction - -

A. He went about four feet north of the group so I could see separation."

As the above colloquy shows, at trial, the prosecution elicited the testimony concerning separation from Officer Ceglarek during direct examination. At the suppression hearing, as defendant's witness, defense counsel never asked Officer Ceglarek about separation. Under the impeachment by omission rule, a defendant must show that "the witness had an opportunity to make a statement." *Williams*, 329 Ill. App. 3d at 854. In this case, defense counsel, in presenting the motion to suppress, never asked Officer Ceglarek about separation. At trial, the State directly

asked about separation. Accordingly, Officer Ceglarek never had the opportunity at the suppression hearing to speak about separation and this omission could not have been used by defendant's trial counsel to impeach Officer Ceglarek.

¶ 45 Similarly, defendant's allegation that Officer Ceglarek inconsistently described the drugs found in defendant's hair as "small items" at the suppression hearing, but as "Ziploc bags" at trial also fails to satisfy the impeachment by omission rule. At the suppression hearing, the following testimony was elicited by defense counsel on redirect examination:

"Q. Officer, when you approached [defendant] did you see anything in his hair, sticking out of his hair?

A. When I was approaching him from 20 feet I couldn't, but when I was next to him I could see small items protruding from his hair.

Q. No further questions."

At trial, the prosecutor, on direct examination, elicited the following testimony from Officer Ceglarek:

"Q. Now, where did Officer Jones go? What did you see him do with respect to the defendant?

A. Once [defendant] was detained, I related to Officer Jones what I had saw. Officer Jones, along with myself, noticed small items protruding from his hair.

MS. McCARTHY [APD]: Objection to what Officer Jones noticed.

THE COURT: Sustained.

MR. SAUCEDA [ASA]: What did you see?

A. I saw small Ziploc bags protruding from his hair. "

A comparison of Officer Ceglarek's testimony at the suppression hearing and his testimony at trial shows that in both instances, he testified that he saw "small items protruding from his hair." It was only after an objection where part of his answer was struck and a further question was asked, did Officer Ceglarek provide the more detailed testimony that he saw "Ziploc bags." Under the impeachment by omission rule, it must be shown that the witness both had the opportunity to make the statement and a person would normally have made the statement under the circumstances. *Williams*, 329 Ill. App. 3d at 854. We cannot say that Officer Ceglarek either had the opportunity or that he would have given the more detailed description of the "small items" at the suppression hearing because defense counsel stopped questioning Officer Ceglarek. The prosecutor, at trial, did not stop questioning Officer Ceglarek and he provided a more detailed description, *i.e.*, "Ziploc bags," after Officer Ceglarek initially provided the less detailed description of "small items." As such, defense counsel would not have been able to use this alleged omission as impeachment evidence because it does not satisfy the impeachment by omission rule.

¶ 46 Defendant's final allegation of inconsistent testimony is that Officer Ceglarek testified at the suppression hearing that he broke surveillance, announced his office, and then the buyer fled;

whereas at trial Officer Ceglarek testified that the buyer walked out of his sight prior to his breaking of surveillance and proceeded towards defendant. We agree with defendant that Officer Ceglarek did testify as follows at the suppression hearing:

"Believing that to be a narcotics transaction I broke surveillance, started walking towards Mr. Brown. When I was roughly about 20 feet away I announced my office as [a] Chicago police officer; the unknown male fled on foot."

At trial however, Officer Ceglarek testified that the buyer "walked northbound out of" his sight prior to breaking his surveillance. We disagree with defendant, however, that this minor inconsistency in Officer Ceglarek's testimony prejudiced him. The timing of when Officer Ceglarek broke surveillance was not a critical fact and defendant cannot overcome the strong presumption that counsel's decision to not cross-examine Officer Ceglarek on this discrepancy was not trial strategy. *Pecoraro*, 175 Ill. 2d at 326-27.

¶ 47 Defendant's argument that his trial counsel was ineffective for failing to impeach Officer Ceglarek's testimony is based on two instances of omitted testimony and only one instance of inconsistent testimony. As stated above, the two instances of omitted testimony do not satisfy the rule regarding impeachment by omission. That leaves only one instance of inconsistent testimony, which concerns the timing of when Officer Ceglarek broke surveillance and when the buyer left the scene. We cannot say that based on this one instance of inconsistent testimony that defendant has overcome the strong deference given to the decision to cross-examine a witness or that defendant was prejudiced by this. Therefore, we cannot say that defendant has proven that

his trial counsel was ineffective.

¶ 48 Jury Instructions

¶ 49 Defendant next argues that the circuit court abused its discretion when it denied his request to have the jury instructed about prior inconsistent statements according to IPI Criminal 4th No. 3.11. Defendant points to three alleged inconsistent statements made by Officer Ceglarek that he claims justified the giving of the instruction. First, defendant argues that Officer Ceglarek testified at trial that defendant separated himself from a group. This fact, however, was missing from Officer Ceglarek's case incident report.¹ Second, defendant contends Officer Ceglarek testified at the suppression hearing that he radioed his partners after detaining defendant, but at trial testified that he radioed his partners prior to arriving at defendant's location. The final alleged inconsistent statement defendant points to is that Officer Ceglarek testified at the suppression hearing that he detained defendant for questioning, whereas at trial he testified that he approached defendant with the intent to place him under arrest.

¶ 50 In response, the State maintains that the circuit court did not err in refusing to instruct the jury with IPI Criminal 4th No. 3.11 because each of the alleged inconsistencies were minor and not material. Regarding Officer Ceglarek's case incident report, the State notes that the case incident report is not in the record. Alternatively, the State argues that even if the circuit court erred in not giving the cautionary instruction, any error was harmless.

¶ 51 Initially, we note that the parties disagree over what version of IPI Criminal 4th No. 3.11

¹We note that the case incident report is different than the police report defendant refers to in his argument regarding the effectiveness of his trial counsel.

was tendered to the court. Our review of the record shows the following was submitted by defendant:

"The believability of a witness may be challenged by evidence that on some former occasion he made a statement acted in a manner that was not consistent with his testimony in this case. Evidence of this kind ordinarily may be considered by you only for the limited purpose of deciding the weight to be given the testimony you heard from the witness in this courtroom. However, you may consider a witness's earlier inconsistent statement as evidence without this limitation when

[1] the statement was made under oath at a Trial

[or]

[2] the statement narrates, describes, or explains an event or condition the witness had personal knowledge of;

and

[a] the statement was written or signed by the witness.

[or]

[b] the witness acknowledged under oath that he made the statement.

[or]

[c] the statement was accurately recorded by a tape recorder, videotape, recording, or a similar electronic means of sound recording.

It is for you to determine whether the witness made the earlier statement, and, if so what weight should be given to that statement. In determining the weight to be given to an earlier statement, you should consider all of the circumstances under which it was made."

This court has held that IPI 3.11 is a cautionary instruction that encompasses both affirmative statements and omissions. *People v. Eggert*, 324 Ill. App. 3d 79, 81-82 (2001). It is given when two statements are inconsistent on a material matter. *Id.* at 82. Materiality of the alleged inconsistency is an issue for the circuit court to determine. This court has held "that an issue is material when the contradiction reasonably tends to discredit the testimony of the witness on such facts." *Id.* "There must be some evidence in the record to justify an instruction, and it is within the trial court's discretion to determine which issues are raised by the evidence and whether an instruction should be given." *People v. Mohr*, 228 Ill. 2d 53, 65 (2008). We review the circuit court's determination of the proper jury instructions for an abuse of discretion. *Id.* at 66; *People v. Miller*, 363 Ill. App. 3d 67, 76 (2005) ("the trial court's refusal to give a cautionary jury instruction is reviewed under the abuse of discretion standard.")

¶ 52 In this case, we hold the circuit court did not abuse its discretion when it denied defendant's request to instruct the jury according to IPI Criminal 4th No. 3.11. In the first complained of instance, we cannot make a proper determination concerning whether Officer

Ceglarek's testimony at trial was inconsistent with the case incident report that he authored because the case incident report is not part of the record. Defendant, as the appellant in this case, "has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with the law and had a sufficient factual basis. Any doubts that may arise from the incompleteness of the record will be resolved against the appellant." *People v. Steward*, 406 Ill. App. 3d 82, 87 (2010). The impeachment by omission rule is relevant here because defendant argues that Officer Ceglarek omitted a fact from his case incident report. As discussed *supra*, the impeachment by omission rule is satisfied if "(1) it is shown that the witness had an opportunity to make a statement, and (2) under the circumstances, a person normally would have made the statement." *Williams*, 329 Ill. App. 3d at 854. Without the opportunity to review the case incident report, we are unable to compare it with Officer Ceglarek's testimony to analyze the alleged inconsistencies within the frame work of the impeachment by omission rule. Therefore, because the case incident report is not in the record, we must assume that the circuit court properly dismissed defendant's argument concerning any inconsistency based on the report. *Steward*, 406 Ill. App. 3d at 87. Accordingly, defendant's argument that Officer Ceglarek testified inconsistently regarding defendant's separation from a group of people at the time of the incident is without merit.

¶ 53 Notwithstanding our presumption that the circuit court properly discounted this argument, we note that Officer Ceglarek did testify that he authored the missing case incident report and admitted that there was no mention in the report of defendant's separation from the group. He

also testified, however, that the case incident report was only a one paragraph summary of what happened. Officer Ceglarek's testimony that it was just a one paragraph summary would not satisfy the impeachment by omission rule. *See Williams*, 329 Ill. App. 3d at 854 (stating that the second element of the impeachment by omission rule is if "under the circumstances, a person normally would have made the statement.") Based on Officer Ceglarek's testimony that the omission occurred in a one paragraph summary, we cannot say that a person would normally have included the omitted fact in the case incident report. Therefore, we doubt that the alleged omission would have been considered inconsistent even if we did have the case incident report to review.

¶ 54 Regarding defendant's other two allegations of inconsistent testimony to justify giving IPI Criminal 4th No. 3.11; we hold that the two instances of allegedly inconsistent testimony defendant relies upon concern matters that are not material. Therefore, they do not justify the giving of IPI Criminal 4th No. 3.11 as a cautionary instruction to the jury. *Eggert*, 324 Ill. App. 3d at 82 ("The pattern jury instruction regarding inconsistent statements is appropriately given when two statements are inconsistent on a material matter."). Neither the actual timing of when Officer Ceglarek radioed his fellow officers or whether Officer Ceglarek approached defendant to detain or arrest him were material issues in determining whether he was guilty of the crime of possession of a controlled substance with the intent to deliver. Rather, what was important is that Officer Ceglarek testified consistently that he observed defendant yell "blows, blows," two times and then engage in a hand-to-hand narcotics transaction. Narcotics were then found stored in defendant's hair. Accordingly, we hold that the circuit court did not abuse its discretion when it

refused to instruct the jury, over defendant's objection, with IPI Criminal 4th No. 3.11.

¶ 55 Fitness to Stand Trial

¶ 56 Defendant next argues that this court should reverse his conviction and remand the matter for a new trial because the circuit court, on two occasions, *sua sponte* ordered defendant to undergo psychiatric evaluations.² According to defendant, the circuit court acknowledged the report for each evaluation, but never held a fitness hearing or made an independent judicial determination on the record of defendant's fitness prior to letting him stand trial. Specifically, defendant contends that the circuit court did not evaluate, analyze, or weigh the evaluations conducted on defendant.

¶ 57 In response, the State argues that the fact that an examination was ordered does not mean that the circuit court had a *bona fide* doubt as to defendant's fitness. The State maintains that the findings of the evaluations and defendant's behavior show defendant was fit for trial.³

¶ 58 A defendant's fitness to plead, stand trial, or be sentenced is presumed and a defendant will only be deemed unfit if, "because of his mental or physical condition, he is unable to understand the nature and purpose of the proceedings against him or to assist in his defense."

² In his brief, defendant contends that the circuit court ordered psychiatric evaluations on February 4, 2011 and April 4, 2011. Our review of the record, however, shows that the circuit court ordered the evaluations on February 8, 2011 and April 13, 2011.

³We note that defendant admits that he did not properly preserve this issue for appeal, but urges us to review it under the plain error doctrine. The State concedes that we may review the issue as it affects a fundamental right. We agree with the parties and, thus, will review this issue on its merits under the plain error doctrine. *See People v. Sandham*, 174 Ill. 2d 379, 382 (1996); *People v. Moore*, 408 Ill. App. 3d 706, 710 (2010).

725 ILCS 5/104-10 (West 2010). Section 104-11 of the Code of Criminal Procedure of 1963 (Code) addresses fitness for trial. It provides, in relevant part:

"Raising Issue; Burden; Fitness Motions. (a) The issue of the defendant's fitness for trial, to plead, or to be sentenced may be raised by the defense, the State or the Court at any appropriate time before a plea is entered or before, during, or after trial. When a bonafide doubt of the defendant's fitness is raised, the court shall order a determination of the issue before proceeding further.

(b) Upon request of the defendant that a qualified expert be appointed to examine him or her to determine prior to trial if a bonafide doubt as to his or her fitness to stand trial may be raised, the court, in its discretion, may order an appropriate examination. However, no order entered pursuant to this subsection shall prevent further proceedings in the case. An expert so appointed shall examine the defendant and make a report as provided in Section 104-15." 725 ILCS 5/104-11(a), (b) (West 2010).

¶ 59 Our supreme court, in *People v. Hanson*, 212 Ill. 2d 212 (2004), explained the application of subsections (a) and (b) of section 104-11 of the Code. Our supreme court stated:

"Sections 104-11(a) and (b) may be applied in tandem or separately, depending on if and when the trial court determines a *bona fide* doubt of fitness is raised. If the trial court is not

convinced *bona fide* doubt is raised, it has the discretion under section 104-11(b) to grant the defendant's request for appointment of an expert to aid in that determination. [Citation.] Even for a motion filed under section 104-11(a), the trial court could specify its need for a fitness examination by an expert to aid in its determination of whether a *bona fide* doubt is raised without a fitness hearing becoming mandatory. In either instance, after completion of the fitness examination, if the trial court determines that there is *bona fide* doubt, then a fitness hearing would be mandatory under section 104-11(a). [Citations.] *Conversely, if after the examination the trial court finds no bona fide doubt, no further hearings on the issue of fitness would be necessary.*

Alternatively, section 104-11(b) may be bypassed entirely if the trial court has already determined without the aid of a section 104-11(b) examination that there is a *bona fide* doubt of the defendant's fitness. In that instance, the trial court would be obliged under section 104-11(a) to hold a fitness hearing before proceeding further. [Citation.] In sum, the primary distinction between sections 104-11(a) and 104-11(b) is that section 104-11(b) aids the trial court in deciding whether there is a *bona fide* doubt of fitness." (Emphasis added). *Id.* at 217-18.

The *Hanson* court further held that "[t]he mere act of granting defendant's motion for a fitness examination cannot, by itself, be construed as a definitive showing that the trial court found a *bona fide* doubt of defendant's fitness." *Id.* at 222; see also *People v. Gentry*, 351 Ill. App. 3d 872, 877 (2004) ("Because a court can order an examination for the very purpose of determining whether 'a *bona fide* doubt as to *** fitness *** may be raised' (725 ILCS 5/104-11(b) (West 2002)), it must follow that merely ordering such an examination does not necessarily imply a finding of *bona fide* doubt.").

¶ 60 Additionally, this court has held that "[s]ome doubt of a defendant's fitness is not enough" to constitute a *bona fide* doubt as to a defendant's fitness. (Emphasis in original.) *People v. Walker*, 262 Ill. App. 3d 796, 803 (1994). Furthermore, defendant bears the burden of proving that a *bona fide* doubt as to his fitness exists. *Hanson*, 212 Ill. 2d at 222. Absent an abuse of discretion, we will not reverse the circuit court's decision regarding whether a *bona fide* doubt as to a defendant's fitness arose. *People v. Hill*, 345 Ill. App. 3d 620, 625-26 (2003).

¶ 61 In this case, we hold that our review of the record shows that the circuit court never made any finding that there was a *bona fide* doubt as to defendant's fitness. The circuit court ordered a fitness examination, but it never made any determination that it had a *bona fide* doubt as to defendant's fitness. Our supreme court stated in *Hanson* concerning sections 104-11(a) and (b), "after the completion of the fitness examination, if the trial court determines that there is a *bona fide* doubt, then a fitness hearing would be mandatory under section 1-4-11(a). [Citations.] Conversely, if after the examination the trial court finds no *bona fide* doubt, no further hearings on the issue of fitness would be necessary." *Hanson*, 212 Ill. 2d at 217. Here, the circuit court

never stated that it had a *bona fide* doubt as to defendant's fitness. After the final fitness examination in the case at bar, the circuit court stated on the record that defendant was fit for trial and then it proceeded to trial. Although the circuit court did state on the record that defendant was found fit for trial, even without the circuit court's statement on the record, it still proceeded with trial implying that it had no doubts as to defendant's fitness. *See Hill*, 345 Ill. App. 3d at 626 ("Although the court did not expressly state that it found defendant fit, by proceeding with trial, the court implicitly found no *bona fide* doubt as to defendant's fitness.").

¶ 62 Accordingly, we disagree with defendant's assertion that the circuit court had *bona fide* doubts as to his fitness. Rather, it ordered an examination and then found defendant fit for trial. *See Gentry*, 351 Ill. App. 3d at 877 (merely ordering such an examination does not necessarily imply a finding of *bona fide* doubt.") We also note that defendant has made no arguments before this court that his behavior at trial showed that he was unfit, nor did he address any of the factors that courts look to in making fitness determinations. *See Hanson*, 212 Ill. 2d at 221-225 (listing factors as including "(1) the rationality of the defendant's behavior and demeanor at trial; (2) counsel's statements concerning defendant's competence; (3) and any prior medical opinions on the issue of defendant's fitness.") Therefore, we hold that the circuit court did not abuse its discretion when it found defendant fit for trial.

¶ 63 Supreme Court Rule 431(b)

¶ 64 Defendant's final argument is that the circuit court failed to comply with the admonishment requirements of Illinois Supreme Court Rule 431(b) when questioning potential jurors during *voir dire*. Ill. S. Ct. R. 431(b) (eff. May 1, 2007). Specifically, defendant contends

that the circuit court failed to admonish the prospective jurors that defendant's failure to testify cannot be held against him, or ascertain whether they understood and accepted this principle.

Defendant concedes that he did not properly preserve this issue for appeal, but urges this court to excuse his procedural default and review his claim on the merits under the first prong of the plain error doctrine because he alleges the evidence in this case is closely balanced.

¶ 65 In response, the State contends that the circuit court adequately addressed the principle that defendant's failure to testify cannot be held against him. Alternatively, the State maintains that the evidence of defendant's guilt was not closely balanced.

¶ 66 Rule 431(b) is a codification of our Supreme Court's holding in *People v. Zehr*, 103 Ill. 2d 472, 477 (1984). The *Zehr* principles make clear that "essential to the qualification of jurors in a criminal case is that they know that a defendant is presumed innocent, that he is not required to offer any evidence in his own behalf, that he must be proved guilty beyond a reasonable doubt, and that his failure to testify in his own behalf cannot be held against him." *Id.* Rule 431(b) states:

“(b) The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that the defendant's

failure to testify cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's failure to testify when the defendant objects.

The court's method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section." Ill. S. Ct. R. 431(b) (eff. May 1, 2007).⁴

Under Rule 431(b), the circuit court may question potential jurors individually or as a group. Ill. S. Ct. R. 431(b) (eff. May 1, 2007). The circuit court must allow each prospective juror the opportunity to respond when asked whether he or she understands and accepts the principles stated in Rule 431(b). *People v. Thompson*, 238 Ill. 2d 598, 607 (2010); see also *People v. Davis*, 405 Ill. App. 3d 585, 590 (2010) (“[a] trial court complies with Rule 431(b) when it admonishes the venire regarding the four *Zehr* principles and gives the venire an opportunity to disagree with them”). “Rule 431(b), therefore, mandates a specific question and response process.” *Thompson*, 238 Ill. 2d at 607. Further the committee comments to Rule 431(b) warn that “trial courts may not simply give ‘a broad statement of the applicable law followed by a general question concerning the juror’s willingness to follow the law.’ ” *Id.* (quoting Ill. S. Ct. R. 431(b), Committee Comments (eff. May 1, 2007)). Our review of a supreme court rule is *de*

⁴ Rule 431(b) has been amended since defendant's trial to state "that if a defendant does not testify it cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's decision not to testify when the defendant objects." Ill. S. Ct. R. 431(b) (eff. July 1, 2012).

novo. Thompson, 238 Ill. 2d at 606.

¶ 67 A review of the record in this case shows the trial court failed to comply with the requirements of Rule 431(b) because the prospective jurors were never properly admonished regarding the fourth principle under Rule 431(b), *i.e.* "that the defendant's failure to testify cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's failure to testify when the defendant objects." Ill. S. Ct. R. 431(b) (eff. May 1, 2007). The circuit court mentioned that defendant did not need to testify, but it never stated to the prospective jurors that his decision not to testify could not be held against him. It follows that because this fourth principle was never properly discussed, the court also never determined whether the prospective jurors understood and accepted this principle.

¶ 68 Defendant, however, did not preserve this issue for our review. On appeal, defendant does not argue that the second prong of the plain error doctrine applies because the jury was biased. *Thompson*, 238 Ill. 2d at 613-16. Therefore, we may only address the issue on its merits if defendant sustains his burden of persuasion under the first prong of the plain error doctrine. The first prong of the plain error doctrine allows this court to review a forfeited claim of error "where the evidence in a case is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence" *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005).

¶ 69 In this case, we hold that the evidence is not closely balanced. Officer Ceglarek observed defendant yell "blows, blows" two times. He then observed defendant accept currency from an unknown person, retrieve an item from his hair, and then give that item to the unknown person. Heroin was then recovered from defendant's hair. We cannot say that in this case "the evidence

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was so closely balanced that the error alone severely threatened to tip the scales of justice against him.” *Herron*, 215 Ill. 2d at 187. Accordingly, we will not review defendant's claim on its merits as defendant has not sustained his burden under the first prong of the plain error doctrine.

¶ 70

CONCLUSION

¶ 71 The judgment of the circuit court is affirmed.

¶ 72 Affirmed.