2016 IL App (1st) 141908-U

SIXTH DIVISION
October 28, 2016

No. 1-14-1908

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ALVIN GRAY, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Cook County. No. 2012 CR 13810 Honorable William Timothy O'Brien, Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

¶ 1 ***Held:*** We affirm defendant's conviction and sentence for burglary over his numerous contentions of error.

¶ 2 After a jury trial, defendant Alvin Gray was convicted of burglary and sentenced to 15 years' imprisonment. On appeal, he argues that: (1) the circuit court erred by denying his motion to suppress a witness's identification of him; (2) the State failed to prove him guilty beyond a reasonable doubt; (3) the State engaged in prosecutorial misconduct during closing arguments; and (4) his 15-year sentence was an abuse of discretion. We affirm.

¶ 3 BACKGROUND

¶ 4 Defendant was charged by information with one count of burglary. 720 ILCS 5/19-1(a) (West 2012). The State alleged that defendant broke into a parked car on Geneva Terrace in Chicago's Lincoln Park neighborhood in the early morning hours of July 15, 2012.

¶ 5 Prior to trial, defendant filed a motion to quash arrest and suppress evidence claiming that he was arrested in violation of his rights under the fourth amendment. As relief, defendant requested that the court suppress identification testimony that was procured as a result of his allegedly unlawful arrest.

¶ 6 The court held a hearing on the motion on May 28, 2013. Chicago police officer Jankowski testified that on July 15, 2012, at approximately 1:30 a.m**,** he and his partner, Officer Bronkema, were patrolling around Webster Avenue and Lincoln Avenue. They received a dispatch call reporting an automobile burglary in progress in the 2300 block of North Geneva Terrace. The dispatch indicated that the suspect was a black male wearing a black, backwards baseball hat, shorts, and a blue shirt, and that he was heading south. In response, Officers Jankowski and Bronkema drove to the 2200 block of Geneva Terrace. According to Officer Jankowski, there were not a lot of people on the street at the time. He acknowledged, however, that Geneva Terrace was "poorly lit" with "[l]ots of shadows" because the street lights were positioned above the tree line.

¶ 7 When the officers arrived, they observed a man walking south on Geneva Terrace who, except for the additional fact that he was carrying a backpack, matched the dispatcher's description of the suspect. At that point, Officer Jankowski shined a spotlight on defendant and defendant stopped walking. The officers then exited their car, ordered defendant to place his hands on the car, and patted him down. They then placed defendant in handcuffs, put him in the

backseat of their car, and drove to 2348 North Geneva Terrace. There, the officers presented defendant to Robert Skelton, the man who called 9-1-1 to report the burglary, for a show-up identification. Skelton identified defendant as the person he saw burglarizing the parked car.

¶ 8 At the conclusion of the hearing, the circuit court denied defendant's motion. The court specifically found that the officers' act of shining the spotlight on defendant was "not unconstitutional. It just makes sense. It's dark, so that [*sic*] had to illuminate the area." The court further found that "[t]he officers did have sufficient information to detain [defendant] for this identification procedure. He matched the description of a crime that took place moments before and a block away from where the officers observed [him]."

¶ 9 At trial, Skelton testified that around 1:20 a.m. on July 15, 2012, he was working on his computer in a lit office on the second floor of his home at 2347 North Geneva Terrace. Around that time, Skelton heard a car alarm sounding, so he looked out his window and onto Geneva Terrace. He saw a man rummaging through the passenger side of a car "[p]retty quickly, like someone was in a bit of a hurry trying to go through a car." Skelton stated that he "could see directly into the car from [his] window as [the man] was going through the car." The car's inside light was on, its alarm was sounding, and its headlights were blinking. According to Skelton, the man "continued to go through the car as the car was blaring."

¶ 10 Eventually, the man stood up and exited the car, at which point Skelton "looked at" the man and "viewed him as getting out of the car." According to Skelton, once he exited the car, the man began walking south on Geneva Terrace. During this time, Skelton "observed" the man, whom he described as a black male wearing shorts, a blue shirt, and a backwards black hat. Skelton called the police and told the dispatcher he saw a man stealing from a car whose alarm was triggered, and gave a description of the man. Skelton then opened his window and said

"[y]ou better start running because I talked to the police" to the man. In response, the man looked in Skelton's direction so that they were looking at each other "[f]ace to face." Skelton said he saw the man walking in an area illuminated by a streetlight.

¶ 11 A few minutes later, Skelton received a phone call from the police asking if he could identify the person he saw in the car. Skelton went to meet the police. The officers removed a man from the back of their car, shined a flashlight on him, and asked Skelton if that was the man Skelton saw rummaging through the car. When the man got out of the car, Skelton had "a full view of [the] individual from head to toe." Skelton identified the man as the burglar without hesitation.

¶ 12 On cross-examination, Skelton testified that the man "was across the street from my house" and was "easily recognized, what he was wearing and what he looked like." Skelton stated that he did not see the man carrying a backpack. In addition, he testified that in total, 20 minutes passed between the time when he witnessed the man rummaging through the car and when the show-up took place. Skelton testified that at the time, he had "no doubt" that the person he identified was the man he saw rummaging through the car.

¶ 13 Officer Bronkema testified that around 1:20 a.m. on July 15, 2012, he and his partner, Officer Jankowski, were patrolling the area. They responded to the dispatch, proceeding southeast on Lincoln Avenue and then north onto Geneva Terrace. Within two to three minutes, while the officers were on the 2200 block of North Geneva Terrace, Officer Bronkema saw a man with a backpack walking on the west side of the street. The officers pulled their car over to the west side of the street and shined a spotlight on the man, at which point they observed that he matched the description given by the dispatch. According to Officer Bronkema, there were no other people in the vicinity and no other cars on the road at the time.

¶ 14 At that point, the officers instructed the man to raise his hands and approach their car. Once the man came over, Officer Bronkema took his backpack and performed a protective search of the man. Officer Bronkema also called dispatch to confirm the suspect's description. Dispatch responded within 30 seconds and confirmed the description. The officers then placed the man in handcuffs and into the back seat of their car and drove to 2348 North Geneva Terrace. According to Officer Bronkema, approximately 10 minutes passed between the time when they received the dispatch and drove back to the crime scene. Back at the scene, Officer Bronkema located Skelton, who identified the man as the person he saw in the car. The officers then placed the man back in their police car.

¶ 15 Officer Bronkema then inspected the car in question. He observed that the glove compartment was open and there were "papers strewn everywhere." Officer Jankowski attempted to open the front and rear driver side doors, but they were locked. When he opened the unlocked passenger side door, the alarm sounded. Officer Bronkema entered the car and found a receipt for a City of Chicago vehicle sticker in the name of Daniel Webster. The receipt listed a nearby address. The officers drove to the address, located Webster, informed him that his car had been broken into, and asked him to meet them back at the crime scene. There, Webster confirmed that he owned the vehicle that had been burglarized.

¶ 16 On cross-examination, Officer Bronkema testified that Geneva Terrace was "poorly lit" because it was lined with trees below the streetlights, causing shadows to cast "in virtually every location." When pressed by defense counsel, Officer Bronkema stated that he was "sure" that no one else was on the street when he and Officer Jankowski first encountered defendant.

¶ 17 On redirect, Officer Bronkema testified that the specific area of Geneva Terrace where the crime took place was illuminated "much better" than other portions of Geneva Terrace

because it was near Fullerton, a major cross street.

¶ 18 Webster testified that the area where he parked his car was "well lit" by "streetlights and artificial lighting." When he went to his car at the request of the police, he noticed "stuff all over the place" and papers that had been in the glove compartment "strewn about." Nothing, however, was missing from the car. Webster explained that the passenger side lock of his car had been malfunctioning. Specifically, when using the "keyless entry," the driver's side doors and rear passenger side door locked, but not the front passenger side door, and the alarm would sound when the passenger side door was opened.

¶ 19 During his closing argument, defendant emphasized that he was apprehended while carrying a backpack, but Skelton did not tell the dispatcher that the man he saw had a backpack:

> "[H]e has a big backpack on him as he's walking minding his own business. A big backpack, a big backpack that Mr. Skelton can't see. He can see the color, he can see everything else. He sees a black male in a car. He can't see his big backpack but he can tell you everything else. I don't think so. I think that's pretty obvious if somebody had a big backpack you would see him pick it up if it was on the ground, you would see something if it's large, if it's so perfectly clear to him that is what transpired."

¶ 20 During rebuttal, the prosecutor argued in response:

> "Do you think that somebody who is going to be rifling through the car is going to leave—it's a car—it's a street full of cars parked end to end, do you think he's going to put his stuff in whatever he recovers right next to where he is rifling through the car? He's no

> dummy. That would be even more evidence of guilt. He knows to put it two cars down, stuff it under a—stuff it under a bumper, go get it on the way out. He knows that. Of course he's not going to have the backpack with him while he's going through the car, and of course, Mr. Skelton isn't going to see that and he didn't."

¶ 21 The jury found defendant guilty. At sentencing, the state argued in aggravation that defendant had an extensive criminal history that began in the 1980's with minor convictions for retail theft and criminal trespass. As time went on, defendant's criminality became more severe. He was convicted of several offenses of increasing severity, including burglary and aggravated robbery. The prosecutor noted that defendant was eligible for sentencing as a class X offender and requested a prison sentence of "at least" 20 years.

¶ 22 In mitigation, defense counsel argued that the case against defendant was weak and that defendant was "quite possibly innocent." Defense counsel asserted that the jury made a mistake and asked the court not to "compound that mistake by setting Mr. Gray away for a long time." In allocution, defendant maintained that he was innocent.

¶ 23 The court explained that it had considered the statutory mitigating and aggravating factors and defendant's presentence investigation report. The court stated that defendant was eligible for class X sentencing and thus subject to a sentencing range of 6 to 30 years' imprisonment. Then, after reviewing defendant's extensive criminal history, the court stated:

> "You, sir, are a thief. You do not respect people who work. You do not obey the law or respect the law. You have shown since 1985 that you have no respect for the law. You have no respect for other people's property or their security. That's what you have

> demonstrated. You have also shown that you are virtually un-rehabilitatable, the number of times that you have been in and out of the penitentiary and you still have not learned your lesson."

¶ 24 The court sentenced defendant to 15 years' imprisonment. This appeal followed.

¶ 25 ANALYSIS

¶ 26 We first consider defendant's argument that the circuit court erred by denying his motion to suppress evidence and quash arrest because Officers Bronkema and Jankowski arrested him without probable cause. "When reviewing a trial court's ruling on a motion to suppress, we will accord great deference to the trial court's factual findings and will reverse those findings only if they are against the manifest weight of the evidence; but we will review *de novo* the court's ultimate decision to grant or deny the motion." *People v. Close*, 238 Ill. 2d 497, 504 (2010).

¶ 27 The Fourth Amendment of the U.S. Constitution provides in relevant part, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated***." U.S. Const., amend. IV. Our supreme court has explained that there are three categories of police-citizen encounters "that do not constitute an unreasonable seizure." *People v. Gherna*, 203 Ill. 2d 165, 176 (2003). The first category involves an arrest, which to be lawful must be supported by probable cause. *Id*. Probable cause "exists when the facts and circumstances known by the arresting officer are sufficient to warrant a reasonable person's belief that the arrested individual has committed an offense." *Id*.

¶ 28 The second category consists of investigative stops conducted pursuant to the principles of *Terry v. Ohio*, 392 U.S. 1 (1968). *Id*. Under *Terry*, a police officer "may, within the parameters of the fourth amendment, conduct a brief, investigatory stop of a citizen when the officer has a reasonable, articulable suspicion of criminal activity, and such suspicion amounts to

more than a mere 'hunch.' " *Id*. (quoting *Terry*, 392 U.S. at 27).

¶ 29 Applying these standards, we find that the police officers' conduct was constitutionally proper. At the outset of the encounter, defendant was subjected to a lawful *Terry* stop when the officers initially detained him on the street. "The validity of a *Terry* stop for investigative reasons turns on the totality of the circumstances known to a police officer at the time of the stop. *People v. Booker*, 2015 IL App (1st) 131872, ¶ 41. "To justify a brief investigatory stop of a person in a public place, a police officer must be able to articulate specific facts which, considered with rational inferences from those facts, would lead a reasonable person to believe the action taken was proper." *People v. Ross*, 317 Ill. App. 3d 26, 29 (2000); see 725 ILCS 5/107-14 (West 2012).

¶ 30 To determine whether a stop was reasonable under the circumstances, we examine "whether the police were aware of specific facts giving rise to reasonable suspicion and whether the police intrusion was reasonably related to the known facts." *Id*. On that point, this court has explained that "a general description of a suspect together with 'other specific circumstances that would lead a reasonably prudent person to believe the action taken was appropriate can constitute sufficient cause to stop or arrest.' " *Booker*, 2015 IL App (1st) 131872, ¶ 46 (quoting *Ross*, 317 Ill. App. 3d at 29-30).

¶ 31 In *Ross*, an elderly man called the police and stated that a black male wearing a blue shirt and pants entered his home and robbed him. *Ross*, 317 Ill. App. 3d at 28. Six minutes later, a police officer approached the defendant while he was walking less than a block from the man's home and ordered the defendant to stop. *Id*. The officer then placed the defendant in handcuffs and drove him to the man's house for a show-up identification. *Id*. The circuit court ruled that the police arrested the defendant at the time he was stopped. *Id*. At 29. This court disagreed and

instead ruled that the defendant was merely subjected to a lawful *Terry* stop. *Id*. at 30. We explained that the police had "at least the minimal articulable suspicion required to stop defendant" because he was located in the vicinity of the crime scene, he matched the description of the suspect, and "there were no other pedestrians in sight." *Id*.

¶ 32 Here, like in *Ross*, the police stopped defendant approximately two blocks from the crime scene two to three minutes after they received the dispatch. And, save for the backpack, defendant fit the description of the suspect that the officers received from the dispatcher. Moreover, the record shows that when the stop occurred, there were no other pedestrians in defendant's vicinity. Under these circumstances, the officers had sufficient reasonable suspicion to detain defendant. Accordingly, defendant's initial detention was lawful.

¶ 33 That, however, does not end our inquiry, because defendant contends that the officers arrested him without probable cause by telling him to put his hands on the police car, handcuffing him, and placing him in their police car, after the stop was initiated. We disagree. In *Ross*, the circuit court found that the defendant had been arrested when he was detained, placed in handcuffs, and driven a short distance for a show-up, because the defendant " 'was not free to go.' " This court rejected that ruling, stating, "[c]ontrary to this finding, the law provides that, during the course of a legitimate investigative stop, a person " 'is no more free to leave than if he were placed under a full arrest.' " *Ross*, 317 Ill. App. 3d at 32 (quoting *People v. Paskins*, 154 Ill. App. 3d 417, 422 (1987). Elaborating, we noted that "[t]he rationale for allowing such restraint during an investigatory stop recognizes the paradox that would occur if the police had the authority to detain a person pursuant to a stop yet were denied the use of force that might be necessary to effectuate the detention." *Id*. Thus, "the status or nature of an investigatory stop is not affected by either the drawing of a gun by the police officer [citation] or by the use of

handcuffs [citations] or by placing the person in a squad car [citation]." *Id*.

¶ 34 Applying these precedents, we find that the police did not arrest defendant when they detained him two to three minutes after receiving the dispatch, placed him in handcuffs, and transported him a short distance for the limited purpose of conducting a show-up identification. Accordingly, the circuit court did not err by denying his motion to quash arrest and suppress evidence.

¶ 35 We next consider defendant's argument that the State failed to prove him guilty beyond a reasonable doubt because Skelton's on-site identification of defendant, and his testimony that was based on that identification, was not reliable. "When reviewing the sufficiency of the evidence to sustain a verdict on appeal, the relevant inquiry is 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " *People v. Pollock*, 202 Ill. 2d 189, 217 (quoting *Jackson v. Virginia,* 443 U.S. 307, 318–19 (1979)). "A positive identification by a single eyewitness who had ample opportunity to observe is sufficient to support a conviction." *People v. Piatkowski*, 225 Ill. 2d 551, 566 (2007). To determine whether a witness's identification testimony is reliable, Illinois courts apply the five-factor test set forth by the United States Supreme Court in *Neil v. Biggers*, 409 U.S. 188 (1972). *Id*. at 567. The *Biggers* factors are: "[(1)] the opportunity of the witness to view the criminal at the time of the crime, [(2)] the witness' degree of attention, [(3)] the accuracy of the witness' prior description of the criminal, [(4)] the level of certainty demonstrated by the witness at the confrontation, and [(5)] the length of time between the crime and the confrontation. *Biggers*, 409 U.S. at 199-200. Here, each of these factors favors the State.

¶ 36 First, the record shows that Skelton had ample time to view defendant when he was

burglarizing the car. Skelton testified that he: (1) "could see directly into the car from [his] window as [defendant] was going through the car"; (2) "looked at" and "viewed" defendant as defendant got out of the car; (3) "observed" defendant as he began walking south on Geneva Terrace and was able to describe defendant's race and clothing; and (4) looked at defendant "face to face" after Skelton opened his window and yelled that he had called the police. In addition, Skelton explained on cross-examination that defendant was "across the street from [Skelton's] house" and "easily recognized, what he was wearing and what he looked like." Moreover, Webster testified that the area of Geneva Terrace where his car was parked was "well lit" by "streetlights and artificial lighting."

¶ 37 The second *Biggers* factor requires us to consider Skelton's degree of attention to defendant. Defendant has waived consideration of this factor by failing to argue it in his appellate brief. Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016). Waiver aside, we have scoured the record and are unable to locate testimony suggesting that Skelton was not fully attentive during the time when he witnessed defendant in the car.

¶ 38 The third factor, directed towards the accuracy of Skelton's description of defendant, also resolves in the State's favor. Defendant argues that Skelton's description was not accurate because (1) it was too generalized and (2) Skelton did not state that defendant had a backpack. We disagree. The Illinois Supreme Court has explained that "[t]he presence of discrepancies or omissions in a witness' description of the accused do not in and of themselves generate a reasonable doubt as long as a positive identification has been made." *People v. Slim*, 127 Ill. 2d 302, 309 (1989). In this case, Skelton positively identified defendant without hesitation approximately 20 minutes after the crime took place. Based on our review of the record, we find under the circumstances of this case that Skelton's description was sufficiently accurate.

¶ 39 The fourth *Biggers* factor calls for consideration of Skelton's degree of certainty when he identified defendant. Defendant argues that this "specious factor should be accorded no weight" based on *People v. Allen*, 376 Ill. App. 3d 511 (2007). There, in the course of discussing an expert report prepared in that case, the court stated, "studies show jurors tend to rely on a witness's confidence in her identification as a guide to accuracy, but that there are low correlations between the witness's confidence and the accuracy of her identification." *Id*. at 524. *Allen* is inapposite. The issue in that case was whether the circuit court erred by refusing to admit expert testimony concerning the reliability of eyewitness identifications. *Id*. at 513. Even if *Allen* were on point, the fact remains that the Illinois Supreme Court has held that the reliability of eyewitness identifications is determined by applying the *Biggers* factors, including the fourth factor. *Piatkowski*, 225 Ill. 2d at 567. As an intermediate court of review, this court is bound to faithfully follow and apply judicial precedents established by our supreme court. We therefore decline defendant's invitation to ignore the fourth *Biggers* factor.

¶ 40 On the merits, the fourth factor clearly favors the State. Skelton testified that he had a "full view" of defendant during the show-up, and he stated that he identified defendant without hesitation. Likewise, Officer Bronkema testified that Skelton identified defendant within 5 to 10 seconds. And, as we have noted, Skelton testified that defendant was "easily recognized." Moreover, Skelton stated that at the time of the identification, he had "no doubt" that defendant was the person he saw in the car.

¶ 41 Finally, the fifth *Biggers* factor calls on us to consider how much time elapsed between the crime and the identification. The record shows that 20 minutes passed between the crime and identification. Defendant does not argue that time interval was excessive, and has thus waived consideration of this factor. Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016).

¶ 42 Based on the foregoing, we find that Skelton's identification of defendant was reliable. Accordingly, defendant's challenge to the sufficiency of the evidence fails. See *Piatkowski*, 225 Ill. 2d at 566 ("A positive identification by a single eyewitness who had ample opportunity to observe is sufficient to support a conviction.").

¶ 43 Next, we consider defendant's claim that the State denied him his right to a fair trial by referring in rebuttal closing argument to facts that were not in evidence. Specifically, defendant argues that the prosecutor, in the course of addressing Skelton's failure to state that defendant had a backpack, argued that defendant had hidden the backpack from sight during the time when Skelton observed defendant. We review this issue for plain error because defendant did not object at trial. *People v. Nieves*, 193 Ill. 2d 513, 524 (2000).

¶ 44 The first step in any plain-error analysis is to determine whether an error occurred. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). "A prosecutor has wide latitude in making a closing argument." *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). And, although a prosecutor may not "argue assumptions or facts not contained in the record," it is well established that the prosecutor may "comment on the evidence and any fair, reasonable inferences it yields." *Id*.

¶ 45 Although there was no testimony that defendant hid or otherwise concealed his backpack from view while he was inside the car, based on the fact that defendant was detained minutes after Skelton called the police in an area where there were no other pedestrians, the prosecutor was entitled to draw the legitimate inference that defendant was not wearing the backpack—and thus had to have placed it someplace else—during the time when Skelton was observing defendant. See *People v. Shum*, 117 Ill. 2d 317, 347-48 (1987) ("While there was no eyewitness testimony that this defendant concealed the gun in question, it is a legitimate inference based upon that fact that a gun was used in the assault and was not recovered."). As such, the

prosecutor's statement was not error. Defendant's plain error argument fails.

¶ 46 Defendant suggests that he was denied the effective assistance of counsel due to his trial lawyer's failure to object to the prosecutor's comment. Because the prosecutor's statement was not improper, however, an objection would have been futile. Defendant's ineffective assistance of counsel claim is meritless. *People v. Givens*, 237 Ill. 2d 311, 331 (2010).

¶ 47 Last, we consider defendant's claim that his 15-year sentence is excessive. Specifically, defendant argues that the circuit court abused its discretion by failing to consider defendant's history of mental illness, family ties, and "the minimal harm caused by the circumstances of the offense." Defendant failed to argue any of those points during the sentencing hearing or in his motion to reconsider sentence. We reject defendant's claim that the circuit court abused its discretion by failing to consider arguments that defendant did not make. This argument is forfeited. *People v. Baez*, 241 Ill. 2d 44, 129-30 (2011) (to preserve claim of error at sentencing, a defendant must raise the claim during the sentencing hearing and in postsentencing motion). Forfeiture aside, the record shows that the trial court considered defendant's presentence investigation report, which contained the information about defendant's family, mental illness, and the circumstances of the offense which defendant now claims the court failed to take into account. Defendant's claim is therefore directly contradicted by the record. Further, defendant had a lengthy criminal history which the court explicitly considered during the sentencing hearing. We thus reject his claim of error.

¶ 48 CONCLUSION

¶ 49 We affirm defendant's conviction and sentence.

¶ 50 Affirmed.