2018 IL App (5th) 150069-U

NO. 5-15-0069

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Madison County.
	)	
v.	)	No. 12-CF-2358
	)	
SHAWNTEZ ZANDERS,	)	Honorable
	)	Kyle Napp,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE OVERSTREET delivered the judgment of the court.
Justices Goldenhersh and Moore concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant's residential burglary conviction is affirmed where the circuit court did not err in denying his motion to suppress evidence and the court's failure to strictly comply with Supreme Court Rule 431(b) did not constitute plain error.

¶ 2 After a jury trial in the circuit court of Madison County, the defendant, Shawntez Zanders, was found guilty of residential burglary (720 ILCS 5/19-3(a) (West 2012)). On appeal from his conviction, the defendant argues that he should be granted a new trial because the circuit court erred in denying his motion to suppress evidence and failed to properly question the jury venire pursuant to Illinois Supreme Court Rule 431(b) (eff. July 1, 2012). For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 On November 16, 2012, at approximately 11:20 a.m., Tamera Jones was walking to her mother's house at 902 East 6th Street in Alton to grab an early lunch. Tamera's mother was away at work at the time, and no one was supposed to be there. Notably, about an hour earlier, the Alton Police Department had received a report of "two black males" looking into the home's front windows.

¶ 5 As Tamera neared the house, she saw the defendant outside with her mother's 55-inch television in his hands. The defendant was "walking at a fast pace" toward the back of the house and was wearing blue jeans, a white T-shirt, and white gloves. When Tamera asked the defendant what he was doing, he dropped the television, ran to a dark-colored two-door Saturn that was parked in a nearby alley, and drove away. Tamera then ran to her grandmother's house at 910 East 6th Street, called 9-1-1, and reported what she had seen. Tamera described the defendant as "a black male wearing a white T-shirt and white gloves," and she described his car as a purple two-door.

¶ 6 Tamera subsequently returned to her mother's residence and waited outside for the police. While waiting outside, Tamera thought that she saw someone inside her mother's kitchen, but she "was too scared to actually go in there and see."

¶ 7 Several Alton Police Department patrol officers immediately responded to the dispatch of the reported burglary and began looking for the suspect vehicle in the area around East 6th Street. The responding officers included Brian Brenner and Patrick Bennett, both of whom testified at the defendant's trial.

¶ 8 Approximately two to three minutes after receiving the report of the burglary, Officer Bennett observed a Saturn matching the description of the suspect vehicle traveling northbound on Silver Street. When Bennett observed the Saturn, he was at the intersection of Pearl Street and Silver Street, which is a two- to three-minute drive from the 900 block of East 6th Street and approximately five blocks away. When Bennett turned south onto Silver and approached the oncoming car, the defendant pulled over "quickly" and parked along the street. When Bennett pulled in front of the car, the defendant opened the driver's door "in a hurried manner" and started to exit the vehicle. Believing that the defendant was the suspect that Tamera had described and that he was about to flee, Bennett exited his squad car, drew his service weapon, and ordered the defendant to remain inside the Saturn. Bennett later explained that, based on his prior experience, when "a car pulls over and somebody gets out quickly, they usually run."

¶ 9 Approximately 30 to 60 seconds later, backup units arrived, and the defendant was ordered out of his car and handcuffed. Tamera was subsequently transported to Silver Street for a showup, and she immediately identified the defendant as the man she had seen walking away with her mother's television.

¶ 10 In addition to the television, which was severely damaged when the defendant dropped it, two videogame systems, a laptop computer, and three rings had been taken from inside the home at 902 East 6th. The videogame systems, laptop, and rings were never recovered. At the defendant's trial, Tamera's mother testified that the home had been ransacked and that she had not given the defendant permission to enter it.

¶ 11 When Officer Brenner inventoried the defendant's vehicle following the defendant's arrest, a pair of white plastic gloves was found on the front driver's side floorboard. The rear seats of the car had also been folded down.

¶ 12 In January 2013, the defendant filed a motion to suppress evidence, arguing that he had been arrested without probable cause. At the hearing on the motion, Bennett described the events that led to the defendant's arrest and testified that the defendant's car had been "the only vehicle in the area" that he had seen matching the description of the suspect vehicle. Bennett further testified that when he pulled in front of the defendant's car, he could see that the defendant was "[a] black male wearing a white T-shirt." Bennett explained that he had treated the encounter as a "felony stop" because the reported crime was a felony and because he believed that the defendant and the car had been involved in the crime. Acknowledging that he had received no specific information suggesting that the defendant had been armed, Bennett further explained that the primary reason he had drawn his service weapon was to prevent the defendant from fleeing the scene. Acknowledging that Tamera had described the suspect vehicle as a purple two-door, Bennett testified that the car was actually black. He added, however, that he "could see why somebody might have thought it was purple." He further testified that he thought that it was purple when he was travelling towards it. We note that at the defendant's trial, a photograph of the car was admitted into evidence as People's Exhibit #6 and that the photo depicts a dark-colored Saturn two-door coupe with Illinois license plates.

¶ 13 In May 2013, the circuit court entered an order denying the defendant's motion to suppress. The court determined that given the nature and timing of the information that

Bennett had received from the dispatcher, he had acted with both reasonable suspicion and probable cause under the circumstances.

¶ 14 At the defendant's trial, Tamera positively identified the defendant as the man she had seen at her mother's house and People's Exhibit #6 as a photograph of his car. Tamera testified that the car was "dark purple." Tamera indicated that prior to the showup, she had not seen the defendant's face, but she "saw what he was wearing and the car he was in."

¶ 15 The defendant presented no evidence in his defense, but defense counsel thoroughly cross-examined the State's witnesses. When cross-examining Officer Brenner, counsel had him acknowledge that at some point after the defendant had been arrested, he had learned that the defendant had been dating someone who might have lived on Silver Street.

¶ 16 In its closing argument to the jury, the State maintained that much to the defendant's surprise, Tamera had caught him in the act of burglarizing her mother's home. The State also noted that it was not required to prove the identity of the defendant's apparent accomplice.

¶ 17 In response, defense counsel argued that the police had failed to conduct an adequate investigation, noting, among other things, that there was no DNA evidence connecting the defendant to the crime. Counsel also attacked Tamera's credibility, emphasizing that she had described the suspect vehicle as purple rather than black and had admittedly not seen the suspect's face. Counsel argued that the gloves found in the

defendant's car proved nothing and that the defendant had parked along Silver Street to visit someone he had been dating.

¶ 18 In October 2014, the circuit court entered judgment on the jury's verdict and set the cause for sentencing. In January 2015, the court sentenced the defendant to a 10-year term of imprisonment. The court noted that the defendant had committed the present offense while he was on parole for a previous residential burglary conviction and that, in light of his prior criminal history, the offense was a Class X felony. See 730 ILCS 5/5-5-3.2(a)(12), 5-4.5-95(b) (West 2012). In February 2015, the defendant filed a timely notice of appeal.

¶ 19 DISCUSSION

¶ 20 Motion to Suppress

¶ 21 The defendant's first argument on appeal is that the trial court erred in denying his motion to suppress evidence. The defendant suggests that Bennett did not have probable cause to arrest him until Tamera identified him at the showup and that Bennett's conduct before that time exceeded the bounds of a permissible *Terry* stop (see *Terry v. Ohio*, 392 U.S. 1 (1968)). We disagree.

¶ 22 A "seizure" occurs when an individual's freedom of movement is restrained "by means of physical force or a show of authority." *United States v. Mendenhall*, 446 U.S. 544, 553 (1980). "The fourth amendment to the United States Constitution and article I, section 6, of the Illinois Constitution, provide protection against unreasonable searches and seizures." *People v. Johnson*, 387 Ill. App. 3d 780, 788 (2009). To that end, any evidence derived from an arrest made without a warrant or probable cause must generally

be suppressed. See *People v. Rainey*, 302 Ill. App. 3d 1011, 1013 (1999); *People v. Skinner*, 220 Ill. App. 3d 479, 487 (1991).

¶ 23 "[P]robable cause exists if the facts and surrounding circumstances are sufficient to justify a reasonable belief by the arresting officer that the defendant is or has been involved in a crime." *People v. Garvin*, 219 Ill. 2d 104, 115 (2006). Probable cause is a practical concept (*People v. Wright*, 111 Ill. 2d 128, 146 (1985)), and a determination of its existence must be based on "the facts known to the officer at the time of the arrest" (*People v. Grant*, 2013 IL 112734, ¶ 11). " 'In dealing with probable cause, *** we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' " *People v. Love*, 199 Ill. 2d 269, 279 (2002) (quoting *Brinegar v. United States*, 338 U.S. 160, 175 (1949)). "Indeed, probable cause does not even demand a showing that the belief that the suspect has committed a crime be more likely true than false." *People v. Wear*, 229 Ill. 2d 545, 564 (2008). Additionally, "[t]he difficulty of establishing probable cause is lessened when it is known that a crime has been committed." *People v. Hopkins*, 235 Ill. 2d 453, 476 (2009).

¶ 24 In the absence of probable cause to arrest, a police officer can still "stop and temporarily detain an individual for the purpose of a limited investigation if the officer is able to point to specific articulable facts which, taken together with reasonable inferences drawn from the officer's experience, reasonably would justify the investigatory intrusion." *People v. Frazier*, 248 Ill. App. 3d 6, 13 (1993) (citing *Terry*, 392 U.S. at 30). "The [f]ourth [a]mendment does not require a policeman who lacks the precise level of

information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape." *Adams v. Williams*, 407 U.S. 143, 145 (1972). To be a valid investigatory stop or "*Terry* stop," the officer must have a reasonable, articulable suspicion that the person temporarily detained has committed or is about to commit a crime. *People v. Richardson*, 376 Ill. App. 3d 612, 617 (2007).

¶ 25 "The difference between an arrest and a *Terry* stop is not the restraint on a person's movement but, rather, depends on the length of time the person is detained and the scope of the investigation that follows the initial encounter." *People v. Fields*, 2014 IL App (1st) 130209, ¶ 26. "Consequently, even though a defendant is actually not free to go during the investigatory stop, the stop is not an arrest." *Id.* Moreover, "[i]t would be anomalous to grant an officer authority to detain pursuant to an investigatory stop and yet deny him the use of force necessary to effectuate that detention." *People v. Roberts*, 96 Ill. App. 3d 930, 934 (1981). During a *Terry* stop, an officer may therefore detain a suspect with a drawn gun or handcuffs without converting the stop into a full arrest so long as doing so is reasonable under the circumstances. See *People v. Walters*, 256 Ill. App. 3d 231, 237 (1994); *People v. Martin*, 121 Ill. App. 3d 196, 206 (1984).

¶ 26 It is not unreasonable to assume that a burglary suspect might be armed, and police officers are not required to risk their lives "by assuming the contrary." *People v. McGowan*, 69 Ill. 2d 73, 79 (1977). It has also been "recognized that investigative detentions involving suspects in vehicles are especially fraught with danger to police officers." *Michigan v. Long*, 463 U.S. 1032, 1047 (1983).

¶ 27 When determining whether an officer acted with reasonable suspicion or probable cause, a court must consider the "totality of the circumstances." *People v. Jackson*, 348 Ill. App. 3d 719, 729 (2004). Additionally, "[e]ach case is governed by its own particular facts and circumstances." *People v. Scarpelli*, 82 Ill. App. 3d 689, 694 (1980). A court must also refrain from "second-guessing" a police officer's professional judgment, given that the police are often required to make "split-second decisions, without the benefit of immediate hindsight" in situations that are often uncertain, tense, and rapidly evolving. *People v. Lomax*, 2012 IL App (1st) 103016, ¶ 40.

¶ 28 There is no "bright-line test" for distinguishing a *Terry* stop from a formal arrest (*People v. Smith*, 2013 IL App (3d) 110477, ¶ 16), and a court need not determine the precise point at which a defendant was placed under arrest (*People v. Bujdud*, 177 Ill. App. 3d 396, 403 (1988)). Because the fourth amendment's "central requirement" is reasonableness, the ultimate inquiry is whether the police acted reasonably under the circumstances. *People v. Jones*, 215 Ill. 2d 261, 268 (2005).

¶ 29 "The defendant bears the burden of proof on a motion to suppress evidence." *People v. Cregan*, 2014 IL 113600, ¶ 23. When the underlying facts are undisputed, the circuit court's ruling on a motion to suppress is reviewed *de novo*. *People v. Topor*, 2017 IL App (2d) 160119, ¶ 14.

¶ 30 In the present case, the officers who responded to the dispatch of the burglary were acting on fresh information from an identified source who had generally described the defendant, the clothes he was wearing, and the car he was driving. Although general descriptions are insufficient to independently establish probable cause, such descriptions

may provide support for probable cause when combined with other relevant facts and circumstances known at the time of the arrest. *People v. Foster*, 309 Ill. App. 3d 1, 5 (1999); see also *Hopkins*, 235 Ill. 2d at 473-77. Here, it was relevant that two to three minutes after receiving the dispatch, Bennett observed the defendant's car at a location approximately two to three minutes away from the scene of the crime. See *People v. Rodriguez*, 387 Ill. App. 3d 812, 817-18, 829-30 (2008) (arresting officer had reasonable suspicion to stop the defendant's vehicle where it matched the description of the suspect vehicle and was observed approximately a mile from the crime scene approximately an hour after the crime). It was further relevant that the defendant's car was the only vehicle that Bennett had seen in the area that matched the description of the suspect vehicle. Most significant, perhaps, is that when Bennett began driving in the defendant's direction, the defendant pulled over and started to exit his car in a manner suggesting that he was about to flee. "Flight or the use of evasive maneuvers from the police, although not determinative by itself, is a consideration in determining the existence of probable cause and when coupled with reasonable suspicion to stop an individual can constitute probable cause." *People v. Belton*, 257 Ill. App. 3d 1, 6 (1993).

¶ 31 Given the totality of the circumstances, we conclude that when Bennett observed the defendant's car from the intersection of Silver and Pearl, Bennett acted with reasonable suspicion that ripened into probable cause when he saw that the defendant matched the suspect description and was about to flee. We note that in *People v. Lippert*, 89 Ill. 2d 171, 180-81 (1982), our supreme court found the existence of probable cause under analogous facts where there was no evidence of flight from the police. We further

conclude that even assuming Bennett lacked probable cause at the point he believed that the defendant was about to flee, the means used to briefly detain the defendant prior to the showup were reasonable under the circumstances and did not exceed the bounds of a proper *Terry* stop. See, *e.g.*, *People v. Starks*, 190 Ill. App. 3d 503, 509 (1989); *People v. Paskins*, 154 Ill. App. 3d 417, 421-22 (1987). Accordingly, we find that the trial court rightfully denied the defendant's motion to suppress evidence.

¶ 32 Rule 431(b)

¶ 33 The defendant's second argument on appeal is that he was denied the right to a fair trial by an impartial jury due to the circuit court's failure to strictly comply with Illinois Supreme Court Rule 431(b) (eff. July 1, 2012). The defendant acknowledges that by raising this claim for the first time on appeal, the issue is procedurally forfeited. See *People v. Naylor*, 229 Ill. 2d 584, 592 (2008). Maintaining that the evidence of his guilt was closely balanced and that the error threatened to tip the scales of justice against him, the defendant asks that we address the claim under the first prong of the plain-error doctrine.

¶ 34 The plain-error doctrine allows a reviewing court to consider unpreserved claims of error when "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant" or "(2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). "In plain-error review, the burden of persuasion rests with the defendant," and

"[t]he first step of plain-error review is determining whether any error occurred." *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). If it is determined that an error occurred, we must then determine whether the error was "plain error." *People v. Jackson*, 2016 IL App (1st) 133741, ¶ 49.

¶ 35 Pursuant to Illinois Supreme Court Rule 431(b), during *voir dire*, the circuit court must:

> "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 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).

Rule 431(b) further states that "[t]he court's method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section." *Id.*

¶ 36 Rule 431(b) was adopted to memorialize our supreme court's holding in *People v. Zehr*, 103 Ill. 2d 472 (1984). *People v. Glasper*, 234 Ill. 2d 173, 187 (2009). Accordingly, the four principles set forth in Rule 431(b) are commonly referred to as the "*Zehr* principles." *People v. Rogers*, 408 Ill. App. 3d 873, 875 (2011). Rule 431(b) was adopted

to ensure that a defendant is tried by a fair and impartial jury. *People v. Sebby*, 2017 IL 119445, ¶ 67. Whether the circuit court complied with Rule 431(b) and "what consequences should flow from noncompliance" are questions reviewed *de novo*. *People v. Wilmington*, 2013 IL 112938, ¶ 26.

¶ 37 Here, at the commencement of the *voir dire*, the circuit court advised the entire pool of prospective jurors that there were "four basic tenets of law" that they needed to "understand" and "follow." The court then explained the four *Zehr* principles to the jurors, in groups, asking each group if anyone "disagree[d]" with them. The court further had each group indicate that they would "apply" the principles as instructed. The court thus arguably complied with Rule 431(b)'s requirement that the court inquire into the jurors' acceptance of the principles. See *Wilmington*, 2013 IL 112938, ¶ 32; *Jackson*, 2016 IL App (1st) 133741, ¶ 44. At no point, however, did the court ask the jurors whether they understood the principles, and our supreme court "has twice held that asking jurors if they disagreed with a principle is not the same thing as asking them whether they *understand* that principle." (Emphasis in original.) *Jackson*, 2016 IL App (1st) 133741, ¶ 45. We thus agree with the defendant's contention that the circuit court's failure to ask whether the jurors understood the four *Zehr* principles was "error in and of itself." *Wilmington*, 2013 IL 112938, ¶ 32; see also *People v. Belknap*, 2014 IL 117094, ¶ 46 (holding that the "failure to ask whether the jurors understood the principles constitutes error alone"). We do not, however, agree with the defendant's claim that the error necessitates a new trial.

¶ 38 Noncompliance with Rule 431(b)'s directives does not implicate a fundamental right or constitutional protection; it "only" involves a violation of a supreme court rule. *People v. Thompson*, 238 Ill. 2d 598, 609 (2010). "Although compliance with Rule 431(b) is important, violation of the rule does not necessarily render a trial fundamentally unfair or unreliable in determining guilt or innocence." *Id.* at 611. Moreover, in the absence of evidence that the error resulted in a biased jury, a Rule 431(b) violation is only cognizable under the first prong of the plain-error doctrine. *Sebby*, 2017 IL 119445, ¶ 52. As previously noted, under the first prong of the plain-error doctrine, a defendant must show that the evidence of his guilt is so closely balanced that the "error alone severely threatened to tip the scales of justice" against him. *Id.* ¶ 51.

¶ 39 Whether the evidence of a defendant's guilt is closely balanced is a separate question from whether the evidence is sufficient to convict. *Piatkowski*, 225 Ill. 2d at 566. When determining whether the evidence is closely balanced, a reviewing court "must undertake a commonsense analysis of all the evidence in context." *Belknap*, 2014 IL 117094, ¶ 50. The analysis must be a "qualitative, as opposed to a strictly quantitative," one and must take into account the totality of the circumstances. *Id.* ¶¶ 53, 62. The "inquiry involves an assessment of the evidence on the elements of the charged offense or offenses, along with any evidence regarding the witnesses' credibility." *Sebby*, 2017 IL 119445, ¶ 53.

¶ 40 In the present case, to prove the charged burglary, the State was required to prove that the defendant knowingly made an unauthorized entry into the residence at 902 East 6th Street with the intent to commit a theft therein. See 720 ILCS 5/19-3(a) (West 2012).

A conviction for burglary may be proved solely by circumstantial evidence. *People v. Smith*, 2014 IL App (1st) 123094, ¶ 13. "Circumstantial evidence is proof of facts or circumstances that give rise to reasonable inferences of other facts that tend to establish guilt or innocence of the defendant." *People v. Saxon*, 374 Ill. App. 3d 409, 417 (2007). The State is not required to prove "each link in the chain of circumstantial evidence" (*id.*), nor is it required to disprove every reasonable hypothesis of innocence (*People v. Pintos*, 133 Ill. 2d 286, 291 (1989)).

¶ 41 The defendant maintains that the evidence of his guilt is closely balanced. He argues, *inter alia*, that Tamera's identifications should be viewed with suspicion and that there was no evidence that he, as opposed to his apparent accomplice, actually entered the residence at 902 East 6th. We disagree.

¶ 42 Although Tamera indicated that she had not seen the defendant's face prior to the showup, she indicated that she had clearly seen the car he was driving and the clothes he was wearing. Further, although she described the defendant's car as purple or dark purple, while Bennett described it as black, Bennett testified that he "could see why somebody might have thought it was purple" and that he initially thought it was purple. In any event, Tamera and Bennett both identified People's Exhibit #6 as a picture of the defendant's dark-colored car, and we agree with the State's observation that common experience dictates that dark purple and black can sometimes be mistaken. Moreover, Bennett testified that the defendant's car had been the only vehicle in the area that had matched the description of the suspect vehicle. The defendant's argument also ignores that Tamera identified the suspect as wearing white gloves, and a pair of white gloves

was found on the front floorboard of the car. A commonsense analysis of the evidence in context thus leads to the inferences that the defendant was correctly identified and that he had worn the gloves found in his car to avoid leaving fingerprints while he was inside the residence. See *People v. Gutknecht*, 121 Ill. App. 3d 839, 846 (1984). It is further reasonable to infer that the back seats of the Saturn had been folded down so that its small trunk area could accommodate the large television that the defendant had been carrying. The defendant's argument also ignores that the evidence of his attempted flight from Bennett can be viewed as demonstrating a consciousness of guilt and can thus be considered evidence of guilt. See *People v. Jimerson*, 127 Ill. 2d 12, 45 (1989); *People v. James*, 2017 IL App (1st) 143036, ¶ 49; see also *E.L.W. v. State*, 736 P.2d 523, 524 (Okla. Crim. App. 1987) (finding that the arresting officer's testimony that the suspect "was moving very quickly as he tried to get out of the car" supported the officer's opinion that the suspect was attempting to exit and flee and thus provided additional circumstantial evidence of guilt).

¶ 43 Under the circumstances, we conclude that the State presented a strong circumstantial case. *Cf. People v. Natal*, 368 Ill. App. 3d 262, 271 (2006) (reversing the defendant's conviction for residential burglary where "[t]he only evidence the [trier of fact] could rationally consider in its decision-making process was the exclusive possession of items of minimal value that were taken in the burglary and were found in close proximity to the offense"). Accordingly, we reject the defendant's contention that the evidence of his guilt was so closely balanced that the circuit court's failure to ask the

jurors if they understood the *Zehr* principles severely threatened to tip the scales of justice against him.

¶ 44 CONCLUSION

¶ 45 For the foregoing reasons, the defendant's conviction is hereby affirmed.

¶ 46 Affirmed.