

No. 1-07-3493

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

---

IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

---

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
	)	Cook County.
v.	)	
	)	05 CR 18295
JOHN BROWN,	)	
	)	The Honorable
Defendant-Appellant.	)	Diane Cannon,
	)	Judge Presiding.

---

JUSTICE PUCINSKI delivered the judgment of the court.  
Presiding Justice Gallagher and Justice Lavin concurred in the judgment.

ORDER

HELD: In this appeal from a conviction for first degree murder: 1. The trial court did not err in denying defendant's pretrial motion to quash arrest and suppress evidence where the initial encounter between defendant and police was an investigatory stop pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968), where the police observed defendant running two blocks away from the scene of the shooting, in a direction away from the shooting, defendant suspiciously slowed down upon observing the officers' squad car, and there were no other pedestrians in the area, and probable cause to arrest developed after a sergeant identified defendant as matching a description of the offender, and where the evidence recovered was in open view. The recovery of a ski mask and cellular telephone did not implicate a search and seizure under the fourth amendment, as they were in a public place in plain view. 2. Also, defendant forfeited review of his claim that the

trial court did not comply with Supreme Court Rule 431(b), and did not establish plain error because although the court violated Rule 431(b) the violation was not an error so serious that it affected the fairness of trial and the evidence was not closely balanced. 3. Lastly, defendant was entitled to additional presentence credit for time served, excluding the date of sentencing.

Following a jury trial, defendant, John Brown, was convicted of first degree murder and sentenced to 50 years in prison. In this appeal, defendant asserts the trial court committed reversible error in the following: (1) denying his motion to quash arrest and suppress evidence; (2) failing to question the venire in accordance with Supreme Court Rule 431(b) (Ill. S. Ct. Rule 431(b) (eff. May 1, 2007)); and (3) not giving proper credit for time served for presentence custody.

We determine that: (1) the trial court properly denied the motion to quash arrest and suppress evidence where the initial encounter between defendant and police was an investigatory stop under *Terry v. Ohio*, 392 U.S. 1 (1968), and probable cause to arrest developed after identification of defendant as matching a description of the offender, and where the evidence recovered was in open view; (2) defendant forfeited his argument that the court erred in failing to comply with Supreme Court Rule 431(b) because he failed to show plain error; and (3) defendant is entitled to credit for presentence time served from the date of his arrest, except the date of his sentencing. Therefore, we affirm defendant's conviction and sentence, but order that the mittimus be corrected to reflect 1,381 days served by defendant prior to sentencing.

#### BACKGROUND

Defendant, John Brown, was convicted of the first degree murder of Fred Hamilton after a jury trial and was sentenced to 50 years' imprisonment. Before trial, defendant filed a motion to quash arrest and suppress evidence.

Motion to Quash Arrest and Suppress Evidence

The following testimony was adduced at the hearing on defendant's motion to quash arrest and suppress evidence: Chicago police officers Joyce McGee and Robert Walker testified that on February 3, 2004, they were in their squad car traveling eastbound on 79<sup>th</sup> Street when they heard a radio call that a person had been shot in the area of 79<sup>th</sup> Street and Prairie Avenue. They responded to the call and drove northbound on King Drive toward the area. A few minutes later, Officers McGhee and Walker approached the intersection of 79<sup>th</sup> and King Drive, which was two blocks from the crime scene, and noticed two individuals climbing a fence into a McDonald's parking lot and running away from the direction of where the shooting occurred. Officer McGhee testified she thought this was suspicious, because they were coming from the location of the call of a person shot. There was no vehicular traffic heading southbound. One of the men, later identified as Alfred Marley, wore a puffy blue leather jacket, while the other man, later identified as defendant, wore a black leather jacket. Officer McGhee saw defendant talking on a cellular telephone while running. As Marley and defendant ran from the parking lot, they looked and saw the squad car, stopped, and then slowed their pace to a jog, going eastbound across King Drive, which Officer McGhee also found strange.

The officers pulled into the entrance of the T-alley on the east side of King Drive between 79<sup>th</sup> and 80<sup>th</sup> Streets to stop Marley and defendant and conduct a field interview. As the officers exited their squad car, Officer McGhee said, "Police, stop." The officers were in uniform. Marley stopped near the driver's side of the squad car. Defendant, however, glanced at Officer McGhee over his shoulder and continued going eastbound through the T-alley while talking on

1-07-3493

his telephone. The officers did not have their weapons drawn at this point. Officer McGhee began jogging after defendant. Officer Walker said, "Chicago police, come here." Defendant began running. Officer Walker immediately ran after defendant as Officer McGhee returned to the squad car, reported a radio call and drove into the alley to assist Walker. Officer Walker lost sight of defendant for a few seconds but then found him hiding in the alley, crouched behind a car. It was impossible to run further because the end of the alley was a dead-end blocked by concrete apartment buildings. Officer Walker then drew his weapon and ordered defendant to lay down on the ground. Defendant complied and lay down on the ground. Officer Walker told defendant not to move. Officer McGhee then came and placed handcuffs on defendant behind his back. Officer McGhee felt around the back part of defendant's pants to see if he had anything in his waistband but found no weapons, and then got defendant to his feet. On the ground, to the left of defendant, there was a black hat and a cellular telephone. Officer McGhee did not seize these items.

At that time, other units had responded to the scene. Sergeant William Peak testified that he identified defendant and informed Officer McGhee that defendant matched either the clothing or physical description he had heard from other officers of the reported offender, except for the fact that the offender was reported as wearing a ski mask. At the time of the identification, defendant was still standing in the alley, handcuffed. After identification by Sergeant Peak, defendant was then put in another officer's squad car to be transported to the police station. Officer Walker then recovered the black ski mask and cellular telephone, which were found on the ground inches away from where defendant was.

Defendant argued that the officers arrested him with no probable cause to believe he was involved in a crime. Defendant also argued that the black knit ski mask and cellular telephone were illegally seized without probable cause. The court denied the motion, finding that the totality of circumstances established reasonable suspicion to stop defendant, which included defendant jumping a fence and running, unprovoked, from the officers within three blocks of the shooting and finding the seized items beside defendant's hiding place in the alley.

#### Trial

The following testimony was adduced at trial:<sup>1</sup> Charmain Ankum testified that on February 3, 2004, at around 6:30 or 7 p.m., Fred Hamilton arrived at the Jack and Jill Daycare Center where she worked to pick her up. The two left the center and walked up the block to Hamilton's Jeep, which was parked on the 7900 block of South Prairie Avenue. Hamilton prepared to start the vehicle, and as Ankum walked around to the other side, she noticed what looked like an antenna sticking out of the front passenger side tire, which was flat. They walked back to the daycare center and Ankum called for assistance to tow the Jeep or fix the flat tire. When the tow truck arrived, Ankum and Hamilton walked back to the vehicle, along with Brian Miller, who also worked at the daycare center. The tow truck driver, Ernest Sanders, said the vehicle looked drivable, but Hamilton disagreed and wanted it towed. Ankum noticed a dark brown van circling the block and asked Hamilton if he had noticed it. Hamilton looked down the street and told Ankum and Miller to walk away, run, because something did not look right.

---

<sup>1</sup> Only evidence that was adduced in defendant's trial is recited herein. Testimony that was adduced only in co-defendant Edward Leak's case is excluded.

1-07-3493

Just then, a masked man came out from the gangway on the East side of Prairie Street and bumped Ankum on his way to Hamilton, pulling out a gun. He was wearing mustard-colored pants, a black jacket, and gloves. He fired the gun at Hamilton three or four times. Ankum thought the shooter's gun must have jammed, because he then knelt down next to Hamilton. Hamilton was attempting to roll under the car he was next to. Hamilton told the shooter, "no \*\*\* don't shoot me, don't do this. You don't have to do this. Just go back and tell him I'm sorry." But the man shot Hamilton again. Ankum turned and ran East to the end of Prairie Street at the intersection of Prairie and 80<sup>th</sup> Street, and then ran toward King Drive. As she ran, she called the police. Ankum heard more shots after she began running.

Miller fled with Ankum. As they ran, Miller noticed an individual who looked like the shooter running through the alleys parallel to them. The individual was wearing a black leather coat, black "hoodie," beige-brown pants, a mask, and black baseball gloves with a little bit of white color at the straps. Miller saw this man at the end of an alley behind the McDonald's at 79<sup>th</sup> and King Drive standing with another man. Ankum hailed a cab and she and Miller returned to the scene of the shooting, where the police had already arrived.

James Davis was watching television at his parents' home on the second floor at 7947 S. Prairie Avenue when he heard gunshots around 8:20 or 8:25 p.m. Davis looked out the living room window and saw Hamilton lying on his stomach and pleading for a man not to shoot him, but the man fired twice. Davis observed the shooter was wearing a dark jacket and hood and could not see his face. He saw the shooter cut through the alley into the yard of another building, heading in the direction of King Drive. Davis called the police and went outside to check on

1-07-3493

Hamilton. Hamilton died at the scene.

The officers testified consistently with their testimony at the hearing on defendant's motion to quash arrest and suppress evidence regarding their encounter and chase of defendant leading to his apprehension in the alley. At the police station, the police seized and inventoried defendant's hooded sweatshirt, gloves, and jacket for forensic testing. The police brought Charmain Ankum and Brian Miller to the police station. Ankum identified the ski mask and gloves as those worn by the shooter, and Miller identified the black leather jacket, black hooded sweatshirt, and black gloves as those worn by the shooter.

The police searched the crime scene, and a forensic investigator discovered two live .40-caliber bullets, one fired .45-caliber cartridge casing, three spent .38-.357 caliber bullets, and a metal fragment from a fired bullet. The police found a .40-caliber Taurus revolver in a yard across from the alley where defendant attempted to hide. The next morning, the police found two more fired .40-caliber cartridge casings at the scene of the shooting.

The police investigation revealed that Hamilton was a partner at E & A Leak Monuments, and a dispatcher for Leak & Sons. Hamilton's business partner was Edward Leak. Leak was also a Chicago police officer. Leak had obtained a \$500,000 insurance policy on Hamilton's life, naming Leak as the beneficiary in the event of Hamilton's death. During the summer of 2003, funds were discovered missing from Leak & Sons. Hamilton had access to some business checks, and there were some excess checks that were cashed. It was assumed that Hamilton had cashed them. Hamilton was called in to the funeral home to be questioned about the funds, but the day the investigation started he walked out from the job and did not come back to work.

1-07-3493

Leak continued paying the policy premiums through the date of Hamilton's death.

A detective interviewed Corey Ankum, Charmain Ankum's brother, who previously worked at the Leak & Sons funeral home. Ankum stated he spoke with Leak at a party sometime between late 2003 and early 2004. Leak said he was looking for Hamilton and said "I'm going to kill Fred."

Ned Hamilton, Hamilton's twin brother, testified that in the Fall of 2003, Leak came to the restaurant where Ned worked, asking if he had seen his brother. Ned responded he did not know where his brother was. Leak stated, "Tell your brother than I'm lookin' for him. Tell your brother that I'm lookin' for him. I know a lot of people out there and we gonna get him." Leak came almost weekly looking for Hamilton, with a gun in his waistband, and said that he was going to "get" Hamilton.

From the cellular telephone recovered from the alley, the police obtained defendant's cellular telephone records, which indicated defendant made 117 calls to Leak in the weeks leading up to February 3, 2004. About an hour and a half before the murder of Hamilton, defendant and Leak called each other several times.

Defendant was indicted and charged with six counts of first-degree murder, one count of unlawful use of a weapon, one count of aggravated unlawful use of a weapon, and two counts of unlawful use of a weapon by a felon. Marley and Leak were also charged with Hamilton's murder. Defendant and Edward Leak were tried simultaneously, but before separate juries. Marley pled guilty in exchange for a recommendation of a 27-year sentence. Marley testified that in January 2004, defendant asked him to help shoot someone in exchange for \$1,500. Marley

1-07-3493

agreed and that same month they tried shooting Hamilton, but the gun jammed when Marley attempted to fire. On the night of February 3, 2004, defendant picked up Marley and they located Hamilton's Jeep and used a sharp metal object to poke a hole in one of the tires. Marley was wearing a dark blue coat with a hood on and blue khakis, and defendant was wearing a blue or black coat and a black ski mask.

Defendant and Marley then split up and waited for Hamilton to appear. Defendant got into a maroon car on the corner right off of 79<sup>th</sup> and Indiana, and Marley got into a van with an individual named Randy across the street from the daycare center on 79<sup>th</sup> Street, with a view of the back of the daycare center. Defendant then called Randy, stating, "come on now" because Hamilton was just leaving the daycare center. Marley went across the street behind the daycare center and walked down the alley going back towards Prairie. Before he arrived on the scene, Marley heard several gunshots. When Marley got to Hamilton, he was lying in the street dead already and he saw defendant in a gangway. Marley then shot Hamilton one to three times and met up with defendant. Marley and defendant proceeded to the McDonald's where they were supposed to be picked up by Leak. They jumped the fence into the parking lot of the McDonald's. When they saw that Leak had not shown up, defendant and Marley left the parking lot and headed towards an alley across the street. At that point, they noticed a squad car, which pulled right in front of them. The officers exited the squad car and ordered them to stop. Marley was able to walk away while the officers pursued defendant. Marley left the scene and disposed of his gun.

Hamilton had suffered 10 gunshot wounds. The medical examiner removed four bullets

1-07-3493

from Hamilton's body. Three of those bullets had been fired from the Taurus revolver. The fourth bullet had been fired from a second firearm that had fired three .38-.357 caliber bullets that were recovered from the scene of the shooting.

Gunshot primer residue was found on defendant's black leather jacket and gloves, indicating they were in the vicinity of a discharged firearm. The ski mask and gloves were submitted for DNA analysis at the Illinois State Police crime lab. Based on DNA comparison of the sample from the ski mask to a sample of defendant's DNA, 99.961% of the African American population was excluded, but defendant could not be excluded. Based on DNA comparison of the sample from the gloves to a sample of defendant's DNA, 99.981% of the African American population was excluded, but defendant could not be excluded.

Defendant presented the testimony of Detective Regina Hightower, who testified that she was assigned to investigate the homicide of Hamilton and went to the scene of the shooting. Crime scene tape was protecting the area and the area was photographed. Detective Hightower's general progress report indicated that the scene where the gun was recovered was videotaped. The formal report also indicated that scene was videotaped. However, there was no videotape; the scene where the gun was recovered was merely photographed. The scene where Hamilton was shot and killed on Prairie was videotaped.

The State argued that defendant was one of the shooters and also procured Marley for the shooting, while the defense argued that Marley was the only shooter. The jury convicted defendant of first-degree murder, but could not unanimously find that during commission of the offense defendant personally discharged a firearm and therefore acquitted him of the three

1-07-3493

weapons charges.

Defendant filed a motion for a new trial, arguing, among other things, that the court erred in denying his pretrial motion to quash arrest and suppress evidence. However, defendant did not make any argument as to Supreme Court Rule 431(b) admonishments. Defendant also did not make any objections based on Supreme Court Rule 431(b) at trial. The court denied the motion.

On November 15, 2007, the court sentenced defendant to 50 years. Defendant's motion to reconsider his sentence was denied. Defendant was arrested on February 3, 2004, and remained in continuous custody until sentencing on November 15, 2007. Upon sentencing, the mittimus reflected a credit of 1,377 days for time served.

#### ANALYSIS

Defendant argues that the trial court erred in the following: (1) denying his motion to quash arrest and suppress evidence; (2) failing to admonish and question the potential jurors in accordance with Supreme Court Rule 431(b); and (3) not giving proper credit for time served for presentence custody. We address each argument in turn.

##### I. Motion to Quash Arrest and Suppress Evidence

Defendant asks us to reverse the trial court's ruling on his motion to quash arrest and suppress evidence, suppress the fruits of his illegal arrest, reverse his conviction, and remand for a new trial. The ruling of a trial court on a motion to suppress presents mixed questions of fact and of law. *People v. Mason*, 403 Ill. App. 3d 1048, 1052 (2010) (citing *People v. James*, 391 Ill. App. 3d 1045, 1050 (2009)). In reviewing a trial court's ruling on a motion to suppress evidence, we apply the two-part standard of review adopted by the Supreme Court in *Ornelas v.*

1-07-3493

*United States*, 517 U.S. 690, 699 (1996). *People v. Johnson*, 237 Ill. 2d 81, 88 (2010). “Under this standard, we give deference to the factual findings of the trial court, and we will reject those findings only if they are against the manifest weight of the evidence.” *Johnson*, 237 Ill. 2d at 88 (citing *People v. Cosby*, 231 Ill. 2d 262, 271 (2008), quoting *People v. Luedemann*, 222 Ill. 2d 530, 542-43 (2006)). “However, a reviewing court ‘ ‘ ‘remains free to undertake its own assessment of the facts in relation to the issues,’ ’ ’ and we review *de novo* the trial court’s ultimate legal ruling as to whether suppression is warranted.” *Johnson*, 237 Ill. 2d at 88 (quoting *Cosby*, 231 Ill. 2d at 271, quoting *Luedemann*, 222 Ill. 2d at 542-43).

#### *Terry Stop vs. Arrest*

Defendant first argues his arrest should have been quashed because the police did not have probable cause to arrest him. Defendant maintains that he was under arrest when the officer had his gun drawn and ordered him at gunpoint to lie on the ground and the other officer handcuffed him and searched him. The State argues that defendant was not immediately placed under arrest but, rather, was subjected to an investigatory stop pursuant to *Terry v. Ohio*, and the officers had reasonable suspicion to stop him because he was seen running from the direction of the murder and there were no other pedestrians in the area, and that defendant was placed under arrest only when the investigative stop was complete. Alternatively, defendant argues that even if the police initially conducted a *Terry* stop, handcuffing him transformed the stop into an arrest. The State also alternatively argues that even if defendant was under arrest when he was handcuffed, the police had probable cause to arrest him for the murder because he fled from police and because defendant matched a description of the offender and he and Marley were the

1-07-3493

only pedestrians in the area of the shooting. The State also maintains that the police had probable cause to arrest defendant for obstruction of a peace officer.

The Fourth Amendment to the United States Constitution guarantees the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. U.S. Const. amend. IV; Ill. Const. art. I, § 6 (1970). There are three tiers of lawful police-civilian encounters: (1) arrests supported by probable cause; (2) brief investigatory detentions, justified by a reasonable, articulable suspicion of criminal activity; and (3) consensual encounters involving no coercion or detentions that do not implicate Fourth Amendment interests. (Citation omitted.) *People v. Roa*, 398 Ill. App. 3d 158, 165 (2010).

The first tier involves an arrest of a citizen, which must be supported by probable cause. *People v. McDonough*, 239 Ill. 2d 260, 268 (2010) (citing *People v. Smith*, 214 Ill. 2d 338, 352 (2005)). Illinois applies a “limited lockstep” approach to the search and seizure clause of the fourth amendment, under which courts “will ‘look first to the federal constitution, and only if federal law provides no relief [will they] turn to the state constitution to determine whether a specific criterion – for example, unique state history or state experience – justifies departure from federal precedent.’ ” *People v. Caballes*, 221 Ill. 2d 282, 309 (2006) (quoting L. Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 *Hastings Const. L.Q.* 93, 104 (2000)). Section 107-2 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/100-1 *et seq.* (West 2004)) provides that a peace officer may arrest a person without a warrant when “[h]e has reasonable grounds to believe that the person is committing or has committed an offense.” 725 ILCS 5/107-2(1)(c) (West 2004). As used in the statute, “reasonable grounds” is

1-07-3493

considered to have the same substantive meaning as “probable cause.” *People v. Tisler*, 103 Ill. 2d 226, 236-37 (1984) (citing *People v. Wright*, 56 Ill. 2d 523, 528-29 (1974), quoting *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949)). To determine whether a warrantless arrest meets the reasonable-grounds/probable-cause requirement, the trial court must decide whether “a reasonable and prudent man, having the knowledge possessed by the officer at the time of the arrest, would believe the defendant committed the offense.” *People v. Wright*, 41 Ill. 2d 170, 174 (1968).

The second tier involves a temporary investigative seizure conducted pursuant to *Terry v. Ohio*. Under *Terry*, a police officer may conduct a brief, investigatory stop of a person where the officer reasonably believes that the person has committed, or is about to, commit a crime. *Terry*, 392 U.S. at 22. The officer’s suspicion must amount to more than an inarticulate hunch (*Terry*, 392 U.S. at 22), but need not rise to the level of suspicion required for probable cause (*United States v. Sokolow*, 490 U.S. 1, 7, (1989)). “[T]he police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Terry*, 392 U.S. at 21. This standard is impossible to define with precision. *Ornelas v. United States*, 517 U.S. 690, 695 (1996). “ ‘The Fourth Amendment requires “some minimal level of objective justification” for making the stop. [Citation.] That level of suspicion is considerably less than proof of wrongdoing by a preponderance of the evidence.’ ” *People v. Close*, 238 Ill. 2d 497, 511 (2010) (citing *Sokolow*, 490 U.S. at 7). We apply an objective standard, as stated in *Terry*: “it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the

1-07-3493

search ‘warrant a man of reasonable caution in the belief’ that the action taken was appropriate?”

*Terry*, 392 U.S. at 21-22; accord *Thomas*, 198 Ill. 2d at 109.

The same standard is applied in determining the propriety of investigatory stops under article I, section 6, of our state constitution (Ill. Const. 1970, art. I, § 6). *People v. Thomas*, 198 Ill. 2d 103, 109 (2001); see also *People v. Caballes*, 221 Ill. 2d 282, 313-14 (2006) (reaffirming court’s position that the search and seizure clause of our state constitution should be interpreted in limited lockstep with the search and seizure clause of the federal constitution). The standards of *Terry* have been codified in section 107-14 of the Code. *People v. Nelson*, 97 Ill. App. 3d 964, 968 (1981). Section 107-14 provides the following:

“A peace officer, after having identified himself as a peace officer, may stop any person in a public place for a reasonable period of time when the officer reasonably infers from the circumstances that the person is committing, is about to commit or has committed an offense \*\*\*. Such detention and temporary questioning will be conducted in the vicinity of where the person was stopped.” 725 ILCS 5/107-14 (West 2004).

An investigatory *Terry* stop, like an arrest, is considered a seizure for purposes of Fourth Amendment applicability. *People v. Roberts*, 96 Ill. App. 3d 930, 933 (1981) (citing *Terry*, 392 U.S. 1). It is similar to an arrest in that, during an investigatory stop, a person’s freedom of movement is necessarily restricted and he is no more free to leave than if he were placed under a full arrest. *People v. Hardy*, 142 Ill. App. 3d 108, 113-14 (1986). The difference between an investigatory stop and an arrest lies in the length of time the suspect is detained and the scope of the investigation which follows the initial stop. *People v. Starks*, 190 Ill. App. 3d 503, 509

1-07-3493

(1989), *appeal denied*, 129 Ill. 2d 571, *cert. denied*, 498 U.S. 827 (1990). A *Terry* stop must be limited in scope and duration because it is an investigative detention, which must be temporary and last no longer than necessary to effectuate the purpose of the stop. *Florida v. Royer*, 460 U.S. 491, 500 (1983). When an officer makes an arrest, he may take the arrestee into custody, conduct a full search of his person and the area within his immediate control, and transport him to the police station; but when he makes a stop, he may detain the person only for a reasonable period of time and may conduct a limited search for weapons if he reasonably suspects he is in danger. *Roberts*, 96 Ill. App. 3d at 934.

In analyzing the facts of this case, we determine that the initial stop of defendant was an investigatory *Terry* stop, and defendant was not arrested until after Sergeant Peak made the identification of defendant based on his match to the physical description of the offender, at which point defendant was arrested by being placed in a squad car and taken into custody. The facts indicate the officers had a reasonable suspicion sufficient to justify a *Terry* stop. Officers McGhee and Walker had reasonable suspicion to stop defendant and Marley because of their close proximity to a shooting that occurred minutes earlier and their suspicious behavior. They were observed running and jumping a fence into the McDonald's parking lot only two blocks away from the shooting, and when they observed the officers they suspiciously slowed down. Also, there were no other pedestrians in the area. Moreover, defendant and Marley were running in a direction away from the scene of the shooting. These facts provided the officers with sufficient reasonable suspicion that defendant and Marley may have just committed the shooting.

Defendant argues that flight alone does not establish probable cause, citing to, among

1-07-3493

other cases, *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000). However, the supreme court in *Wardlow* was not discussing probable cause, but, rather, reasonable suspicion for a *Terry* stop, which can be established by flight alone. In *Wardlow*, our supreme court held that “nervous, evasive behavior is a pertinent factor in determining reasonable suspicion” justifying a *Terry* stop. *Wardlow*, 528 U.S. at 124. As the supreme court recognized, “[h]eadlong flight – wherever it occurs – is the consummate act of evasion: it is not necessarily indicative of wrongdoing, but it is certainly suggestive of such.” *Wardlow*, 528 U.S. at 124. Defendant ignores this firmly established precedent that flight alone can indeed establish reasonable suspicion to justify a *Terry* stop, which is what happened in this case.

Defendant disputes other suspicious facts which gave rise to the officers’ reasonable suspicion to conduct a *Terry* stop, including the fact that he and Marley were the only individuals in the area. Although defendant argues that there was testimony that there was no other vehicular traffic in the area but was ambiguous about whether there were other pedestrians in the area of the shooting, our examination of the record reveals that the testimony at trial was clear that there were also no other pedestrians in the area. When reviewing a trial court’s determination on a motion to quash an arrest and suppress evidence, we are not limited to the evidence presented at the pretrial hearing and we may consider evidence adduced at trial. *People v. Rivas*, 302 Ill. App. 3d 421, 437 (1998) (citing *People v. Sims*, 167 Ill. 2d 483 (1995); *People v. Barlow*, 273 Ill. App. 3d 943 (1995)).

Defendant also argues he was two blocks east of the shooting, and the shooter could just as easily have traveled in any other direction, and he was running before the police attempted to

1-07-3493

stop him. However, “[p]olice officers are ‘ ‘not required to rule out all possibility of innocent behavior’ ” ’ before initiating a *Terry* stop.” *Close*, 238 Ill. 2d at 511-12 (quoting 4 W. LaFare, Search & Seizure § 9.5(b), at 481 (4th ed. 2004), quoting *United States v. Holland*, 510 F.2d 453, 455 (9th Cir. 1975)). An extremely close spatial and temporal proximity between the suspect and the crime will ordinarily provide the reasonable suspicion necessary to conduct a *Terry* stop. *People v. Hubbard*, 341 Ill. App. 3d 911, 918 (2003). Whether a *Terry* stop is supported by a reasonable suspicion depends on the facts known to the officer at the time of the stop. *Village of Lincolnshire v. Kelly*, 389 Ill. App. 3d 881, 884 (2009) (citing *People v. DiPace*, 354 Ill. App. 3d 104, 108 (2004)). For purposes of determining the existence of reasonable suspicion, “[t]he facts should not be viewed with analytical hindsight, but instead should be considered from the perspective of a reasonable officer at the time that the situation confronted him or her.” *Kelly*, 389 Ill. App. 3d at 887 (quoting *Thomas*, 198 Ill. 2d at 110). “While reasonable suspicion may develop from seemingly innocent, noncriminal conduct, the question for the court is the degree of suspicion that attaches to the circumstances surrounding a defendant’s actions.” *People v. Payne*, 393 Ill. App. 3d 175, 180 (2009) (citing *People v. Croft*, 346 Ill. App. 3d 669, 675 (2004)). “We consider commonsense judgments and inferences about human behavior when determining whether an officer’s suspicion was reasonable.” *Payne*, 393 Ill. App. 3d at 180 (citing *Croft*, 346 Ill. App. 3d at 675). Here, defendant’s suspicious actions in running in a direction away from the murder, merely two blocks from the scene of the murder, when no other pedestrians were in the area, and then slowing down upon noticing the squad car, justified the officers’ reasonable commonsense suspicion sufficient for a *Terry* stop.

Similar to the instant case, in *Hubbard*, cited by the State, the officer observed the defendant's car just two miles from a shooting that occurred ten minutes earlier, traveling away from the direction where the crime occurred, and it was the only car on the road in the area. *Hubbard*, 341 Ill. App. 3d at 919. Based on these facts, the court held it was reasonable for the officers to conduct a *Terry* stop and detain, in order to investigate, the only person they had seen coming from the direction of the scene of the crime. *Hubbard*, 341 Ill. App. 3d at 920. The *Hubbard* court emphasized that the very purpose of a *Terry* stop is to allow the officers involved to investigate their suspicions and "[t]he officers' suspicions need only rise to a level that further investigation is warranted." *Hubbard*, 341 Ill. App. 3d at 920. We find the facts of *Hubbard* on point and the reasoning of *Hubbard* persuasive.

Defendant takes issue with his handcuffing, arguing that this act, coupled with the fact that Officer Walker had his gun drawn, transformed the *Terry* stop into an arrest. However, "the status or nature of an investigative stop is not affected by either the drawing of a gun by the police officer [citation omitted], or by the use of handcuffs [citation omitted]," when a suspect is potentially armed and thus a threat to the officers. *People v. Ross*, 317 Ill. App. 3d 26, 32 (2000). Handcuffing is proper during an investigatory stop when it is necessary to effectuate the stop and to foster officer safety. *People v. Johnson*, No. 1-09-0518, 2010 WL 5487530, at \*4 (Ill. App. 1 Dist. Dec. 23, 2010). This court in *People v. Jordan*, 43 Ill. App. 3d 660 (1976), recognized that some indication of force or threatened force is a necessary element of an investigatory stop. *Jordan*, 43 Ill. App. 3d at 662 (citing *Terry*, 392 U.S. at 32); *Roberts*, 96 Ill. App. 3d at 934. "It would be anomalous to grant an officer authority to detain pursuant to an investigatory stop and

1-07-3493

yet deny him the use of force necessary to effectuate that detention.” *Roberts*, 96 Ill. App. 3d at 934.

Here, it was reasonable for Officer Walker to draw his gun because defendant failed to comply with the officers’ orders to stop and kept running, and a shooting had occurred just two blocks away and defendant could have been armed. Officer Walker drew his gun and Officer McGhee handcuffed defendant only after defendant refused to comply and halt for the investigatory stop and ran, attempting to flee.

Further justifying our conclusion that the initial portion of defendant’s encounter with the police was a *Terry* stop was the very brief amount of time he was detained before he was identified by Sergeant Peak and placed under arrest. Mere restraint of an individual does not turn an investigatory stop into an arrest; rather, it is the length of detention and the scope of investigation which distinguishes an arrest from a stop, not the initial restraint. *People v. Bujdud*, 177 Ill. App. 3d 396, 403 (1988). Here, the testimony indicated that almost immediately after defendant was handcuffed and patted down for weapons, Sergeant Peak was on the scene and identified him as matching a description of the offender. Thus, there was no extended detention that converted the *Terry* stop into an arrest.

We further find that, based on Sergeant Peak’s identification of defendant as the offender, the police had probable cause to arrest him at that time. Sergeant William Peak identified defendant and informed the officers that defendant matched either the clothing or physical description he had heard from other officers of the reported offender. Defendant was then put in another officer’s squad car to be transported to the police station.

Probable cause has been found in similar circumstances, where the defendant was observed heading away from the scene or was in close proximity to the area where the crime occurred and matched a general description. In *People v. Follins*, 196 Ill. App. 3d 680 (1990), this court found that probable cause existed where the arresting officer stopped defendant because he matched a radio broadcast of a general description (black male offender, 5 feet 9 inches tall, weighing 170 pounds, wearing a blue sweat suit). *Follins*, 196 Ill. App. 3d 680, 684. The defendant was stopped within minutes after a robbery only a few blocks from the scene of the crime as defendant was walking away from the scene. *Follins*, 196 Ill. App. 3d at 692. See also *People v. McGee*, 373 Ill. App. 3d 824, 831-32 (2007) (finding probable cause was established where defendant matched a general description as provided to the police officers by the victim and was the only person in the area that matched that description); *People v. Jones*, 374 Ill. App. 3d 566, 574 (2007) (holding police had probable cause to arrest the defendant where the murder and attempted murder had been committed about 15 minutes before and defendant was within three blocks of crime scene and fit general description of fleeing suspects); *People v. Hopkins*, 235 Ill. 2d 453, 477 (2009) (holding police officers had probable cause to arrest defendant, who was within one block of where the reported armed robbery occurred, and defendant fit the general description given by the victim and appeared to have been running through the snow as victim reported). Similarly here, defendant was initially stopped minutes after the shooting a few blocks from the scene, as he was running away from the scene, and was then identified by Sergeant Peak as matching a description of the offender. Once this identification was made, in addition to the surrounding circumstances, the officers had probable

1-07-3493

cause to arrest defendant.

Even if probable cause to arrest defendant for the shooting was not established based on all the circumstances, including the identification by the sergeant, the State correctly argues that the police had probable cause to arrest defendant for obstruction of a peace officer, citing *People v. Holdman*, 73 Ill. 2d 213 (1978), *cert. denied*, 440 U.S. 938 (1979). In *Holdman*, our supreme court held the defendants' arrests were proper based on their attempt to elude the police in violation of the statute prohibiting obstructing a police officer. *Holdman*, 73 Ill. 2d at 222. The statute provides:

“A person who knowingly resists or obstructs the performance by one known to the person to be a peace officer of any authorized act within his official capacity commits a Class A misdemeanor.” 720 ILCS 5/31-1(a) (West 2008).

The court in *Holdman* noted that the obstruction statute has been broadly defined to include any “‘physical act which imposes an obstacle which may impede, hinder, interrupt, prevent or delay the performance of the officer’s duties.’ ” *Holdman*, 73 Ill. 2d at 222 (citing *People v. Raby*, 40 Ill. 2d 392, 399 (1968), *cert. denied*, 393 U.S. 1083 (1969)) The court held that flight “is definitely a physical act within the purview of obstruction statute.” *Holdman*, 73 Ill. 2d at 222 (citing *People v. Carroll*, 133 Ill. App. 2d 78 (1971)). See also *Johnson*, No. 1-09-0518, 2010 WL 5487530, at \*9 (holding the defendant’s attempted flight was an offense for which an arrest for obstruction became appropriate, and that the use of handcuffs was a proper restraint pursuant to an arrest, even if it would have been unreasonable if gauged under the rules of appropriate restraints during a *Terry* stop). Based on clear precedent, we conclude that, even if the officers

1-07-3493

did not have reasonable suspicion for a *Terry* stop or probable cause to arrest defendant for the shooting, they had probable cause to arrest defendant for obstruction of their duties as police officers in investigating the shooting.

#### Seizure of Evidence

Lastly, defendant argues that the seizure of the cell phone, ski mask, and clothing should have been suppressed as the “fruit of the poisonous tree” (see *Wong Sun v. U.S.*, 371 U.S. 471, 487-88 (1963), based on an unlawful arrest. However, we have determined that the arrest was lawful. Thus, we first note that defendant’s clothing and gloves were properly seized and inventoried after his arrest while in custody at the police station to preserve evidence. Once an arrest is effectuated, police officers may conduct reasonable searches “incident” to the arrest while the defendant is in custody to protect themselves and to find and preserve evidence of the offense on the arrestee’s person. *Chimel v. California*, 395 U.S. 752, 763 (1969); *People v. Hayes*, 55 Ill. 2d 78, 81-82 (1973). In *United States v. Edwards*, 415 U.S. 800 (1974), the defendant’s clothes were seized 10 hours after his arrest, when it became clear to the police that the clothing was evidence of the crime charged. The court held that “the police were entitled to take, examine, and preserve [the clothing] for use as evidence, just as they are normally permitted to seize evidence of crime when it is lawfully encountered.” *Edwards*, 415 U.S. at 806.

Section 108-1 of the Code provides:

“When a lawful arrest is effected a peace officer may reasonably search the person arrested and the area within such person’s immediate presence for the purpose of:

(a) protecting the officer from attack; or

1-07-3493

(b) preventing the person from escaping; or

(c) discovering the fruits of the crime; or

(d) discovering any instruments, articles, or things which may have been used in the commission of, or which may constitute evidence of, an offense. 725 ILCS 5/108-1 (West 2004).

The clothing matched the description given of the offender, and analysis of DNA was performed, which could potentially include or exclude defendant as the offender. Thus, defendant's clothes and gloves were properly seized at the police station and inventoried as evidence.

Regarding the seizure of the ski mask and cellular telephone, defendant maintains the items were recovered during a search incident to arrest. However, the facts of this case show the seizure was not a classic search incident to arrest. At the hearing on defendant's motion to quash arrest and suppress evidence, Officer Walker testified as follows:

“Q: Officer, after arresting [defendant], did you seize anything from the area of the arrest?

A: Yes.

Q: What did you seize?

A: Immediately what was seized was a cell phone and a ski mask.

Q: Where were those items when you seized them?

A: On the ground where he was hiding behind the car.

1-07-3493

Officer Walker testified at trial as follows:<sup>2</sup>

“Q: When you say crouching in the dark, can you tell us, what did you do when you saw him hiding in the alley crouching in the dark?

A: When I saw him crouching in the dark, at that time, I pulled out my service weapon.

Q: When you pulled out your service weapon, what was the next thing that you did?

A: I ordered him to lay on the ground.

Q: As he laid on the ground, at some point, did you notice anything about him as he was laying on the ground?

A: As he was laying on the ground?

\* \* \*

Q: Did you notice any articles of – anything around him as he was laying on the ground?

A: Oh. As he was laying on the ground, yes. There was a black ski mask and a cell phone.”

At trial, Officer McGhee testified that she observed the ski mask and cellular telephone on the ground to the left of defendant when she handcuffed him but did not seize the items. Thus, there

---

<sup>2</sup> See *Rivas*, 302 Ill. App. 3d at 437 (when reviewing a trial court’s determination on a motion to quash an arrest and suppress evidence, we are not limited to the evidence presented at the pretrial hearing and we may consider evidence adduced at trial) (citing *Sims*, 167 Ill. 2d 483; *Barlow*, 273 Ill. App. 3d 943).

1-07-3493

was no search.

However, even assuming *arguendo* that there was a search incident to arrest, we find that such a search and seizure would have been proper. In *Chimel*, the Supreme Court held that a search incident to arrest is limited to “the arrestee’s person and the area ‘within his immediate control’ – construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.” *Chimel*, 395 U.S. at 763. The ski mask and cellular telephone were found “inches” away from where defendant was previously when he was handcuffed. Defendant himself argues the items were within his immediate control. Thus, any items of evidence revealed during a search incident to arrest of defendant and the area within his immediate control were properly seized. However, here the officers observed the ski mask and cellular telephone on the ground next to defendant in the alley, and did not discover these items by searching defendant’s person.

Analysis of the seizure of the ski mask and cellular telephone presents a question whether the fourth amendment is implicated at all because these items were recovered without a search and were merely observed laying on the ground next to defendant when he was apprehended in a public alley. Fourth amendment rights are personal and may not be asserted by one whose rights have not have been violated. *Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978). Courts sometimes refer to this concept as an issue of standing but, as the Court in *Rakas* explained, the issue “is more properly subsumed under substantive Fourth Amendment doctrine” and “the better analysis forth-rightly focuses on the extent of a particular defendant's rights under the Fourth Amendment.” *Rakas*, 439 U.S. at 139. Capacity to claim fourth amendment protection depends

1-07-3493

upon whether the aggrieved person has a legitimate expectation of privacy in the place invaded. *People v. Kidd*, 178 Ill. 2d 92, 135 (1997) (citing *Rakas*, 439 U.S. at 143; *People v. Bolden*, 152 Ill. App. 3d 631, 635 (1987)). As the Supreme Court explained in *Katz v. United States*, 389 U.S. 347, 351-52 (1967):

“[The] Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. See *Lewis v. United States*, 385 U.S. 206, 210; *United States v. Lee*, 274 U.S. 559, 563. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. See *Rios v. United States*, 364 U.S. 253; *Ex parte Jackson*, 96 U.S. 727, 733.” *Katz*, 389 U.S. at 351-52.

According to defendant, he had a legitimate expectation of privacy because the cellular telephone and ski mask were close to him, the items were within his control, he had the ability to exclude others from using his property, and he had a reasonable expectation of privacy in the items. However, the following factors should be examined to determine whether a defendant possesses a reasonable expectation of privacy: (1) ownership of the property searched; (2) whether the defendant was legitimately present in the area searched; (3) whether defendant has a possessory interest in the area or property seized; (4) prior use of the area searched or property seized; (5) the ability to control or exclude others from the use of the property; and (6) whether the defendant himself had a subjective expectation of privacy in the property. *People v. Pitman*, 211 Ill. 2d 502, 520-21 (2004) (citing *People v. Johnson*, 114 Ill. 2d 170, 191-92 (1986)).

“A ‘search,’ as contemplated by the fourth amendment to the United States Constitution,

1-07-3493

occurs when an expectation of privacy considered reasonable by society is infringed.” *People v. Radcliff*, 305 Ill. App. 3d 493, 501 (1999) (quoting *People v. Mannozi*, 260 Ill. App. 3d 199, 203 (1994)). “If, however, the inspection by the police does not intrude upon a legitimate expectation of privacy, there is no ‘search’ subject to the warrant clause of the fourth amendment.” *Radcliff*, 305 Ill. App. 3d at 501 (citing *Illinois v. Andreas*, 463 U.S. 765, 771 (1983)). Our supreme court has held that “a search implies prying into hidden places for that which is not open to view; and that a search implies an invasion and quest with some sort of force, either actual or constructive.” *People v. McCracken*, 30 Ill. 2d 425, 429 (1964) (citing *People v. Woods*, 26 Ill. 2d 557, 561 (1963)). Here, defendant was in a public alley and had no ability to control or exclude others. The ski mask and cellular telephone were laying on the ground, out in the open in the alley. It cannot be said that defendant had a legitimate expectation of privacy in the alley. Moreover, there was no search; the items were laying out in the open on the ground.

In this case, several distinct Fourth Amendment concepts which do not implicate a search are at issue: abandonment; the plain view doctrine; and the “open fields” doctrine. The State first argues that defendant relinquished any privacy interest in the ski mask and cellular telephone because he abandoned them when he dropped the items as he ran from the police and hid in the alley, citing *People v. Hoskins*, 101 Ill. 2d 209, 219-20 (1984), and *People v. Bridges*, 123 Ill. App. 2d 58, 67 (1970). Defendant claims the evidence showed that he did not abandon the items but, rather, merely “temporarily relinquished possession” of them by putting them on the ground. Neither party cites to the record for support for these factual assertions. “To demonstrate abandonment, the government must establish by a preponderance of the evidence that the

1-07-3493

defendant's voluntary words or conduct would lead a reasonable person in the searching officer's position to believe that the defendant relinquished his property interests in the item searched or seized. [Citations.]" *Pitman*, 211 Ill. 2d at 520 (quoting *United States v. Basinski*, 226 F.3d 829, 836-37 (7th Cir. 2000)).

Our review of the record reveals that there was no evidence at either the motion to suppress or at trial that defendant dropped the items either as he ran or while he was hiding in the alley. Although dropping the items could be inferred from the fact that the items were found next to where defendant was hiding, it could just as easily be inferred that the items fell out of defendant's pocket as defendant was crouching and hiding before Officer Walker observed them. Thus, abandonment is not a concept which lends itself applicable to the facts of this case.

The State alternatively argues that the ski mask and cellular telephone were "in open view in a public area." Here, the State may be confusing two distinct Fourth Amendment doctrines: the plain view doctrine and the "open fields" doctrine. Under the plain view doctrine, if an article is already in plain view, "neither its observation nor its seizure would involve any invasion of privacy." *Horton v. California*, 496 U.S. 128, 133-34 (1990) (citing *Arizona v. Hicks*, 480 U.S. 321, 325 (1987); *Illinois v. Andreas*, 463 U.S. 765, 771 (1983)). As originally formulated in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (plurality opinion), the plain view doctrine required that an officer come upon the evidence inadvertently. See *Coolidge*, 403 U.S. at 465-66. In *Horton*, however, the Court specifically eliminated the inadvertence requirement and noted three conditions that must be satisfied to justify a plain view seizure: (1) the police must show that they "did not violate the Fourth Amendment in arriving at the place

1-07-3493

from which the evidence could be plainly viewed”; (2) the searching officer must have a lawful right of access to the evidence itself; and (3) the incriminating character of the evidence seized must be immediately apparent. *Horton*, 496 U.S. at 136-37. In *Coolidge*, the Supreme Court gave an example for guidance: “An example of the applicability of the ‘plain view’ doctrine is the situation in which the police have a warrant to search a given area for specified objects, and in the course of the search come across some other article of incriminating character.” *Coolidge*, 403 U.S. at 465. See, e.g., *People v. Redman*, 386 Ill. App. 3d 409, 419 (2008) (holding officer legitimately on the property as part of an investigation or to arrest the occupants of the house did not commit a search or seizure in peering inside an open garbage can on the way to the back door of the house; as the contents were exposed to anyone passing by). Here, the place where the evidence was viewed was in an alley, a public space, and thus the facts here do not present the typical example of a “plain view” seizure.

The “open fields” doctrine involves searches or observations conducted outdoors on property that is not protected by the fourth amendment, and was recognized in *Hester v United States*, 265 US 57 (1924). In *Hester*, officers who were concealed 50 to 100 yards from a house observed what appeared to be an illegal liquor transaction between the defendant and another individual outside a house and chased the two men, who fled and dropped containers of whiskey which were found by the officers and subsequently admitted in evidence in a federal prosecution for concealing distilled spirits. In upholding the admission of the whiskey, the Supreme Court held that the protections accorded by the Fourth Amendment did not extend to the “open fields.” *Hester*, 265 US at 59. The Supreme Court reiterated in *Katz* that a private home is protected by

1-07-3493

the Fourth Amendment but an open field is not. *Katz*, 389 US at 352, fn. 8. The Fourth Amendment protects only reasonable expectations of privacy in the area immediately surrounding the home which was known at common law as the curtilage; an individual may not legitimately demand privacy for activities conducted in open fields. *Oliver v. United States*, 466 US 170, 180-81 (1984); *accord, Pitman*, 211 Ill. 2d at 515-16.

Under either doctrine, there is no “search.” However, the key distinction is the location where the property is seized; the open fields doctrine implicates public areas. This was the case here, since the items were found in an alley. Thus, the open fields doctrine may more appropriately apply to this case, as there is no reasonable expectation of privacy in an alley. However, even if we were to solely rely on the doctrine of plain view, the items were properly recovered as the officers were legitimately in the alley and saw the items next to defendant in plain view. Either way, defendant had no reasonable expectation of privacy in the alley where the ski mask and cellular telephone were found by the officers.

We thus hold there was no unlawful search and seizure of the ski mask and cellular telephone, as they were found in a public place and were in plain view. We further hold the items could have been properly seized during a search incident to arrest. Defendant’s argument that these items were the fruit of the poisonous tree does not apply, as here there either was no search, or, if viewed as a search incident to arrest, the arrest was based upon probable cause. Therefore, under our *de novo* review we conclude the trial court did not err in denying the motion to quash arrest and suppress evidence.

## II. Failure to Question Jurors Regarding *Zehr* Principles

Defendant next asserts that the court erred in not questioning the venire regarding the principles articulated in *People v. Zehr*, 103 Ill. 2d 472, 469 N.E.2d 1064 (1984). In *Zehr*, our supreme court set forth the requirement that, when requested by the defendant, a trial court must question prospective jurors during *voir dire* regarding the State's burden of proof, the presumption of the defendant's innocence, the defendant's right not to testify on his own behalf, and that a defendant's failure to testify cannot be held against him. *Zehr*, 103 Ill. 2d at 477-478, 469 N.E.2d at 1064. Amended Supreme Court Rule 431(b) now makes *Zehr* mandatory and provides:

“(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. Rule 431(b) (eff. May 1, 2007).

The State argues that defendant forfeited this issue by failing to raise it either at trial or in a post-trial motion. Defendant maintains that despite trial counsel's failure to raise the issue, it is

1-07-3493

not forfeited because the amended version of Supreme Court Rule 431 eliminated the requirement for defense counsel to intervene and make a request and because a judge's conduct is at issue. Defendant alternatively maintains that the plain error doctrine applies.

Generally, a defendant must object to claimed errors at trial and raise them in his post-trial motion; otherwise, they are procedurally defaulted or forfeited. *People v. Naylor*, 229 Ill. 2d 584, 602 (2008). Despite defendant's insistence that preserving the error was unnecessary, a defendant's failure to object to the trial court's failure to comply with Rule 431(b) or include that issue in his posttrial motion results in forfeiture of appellate review of the claim. *People v. Thompson*, 238 Ill. 2d 598, 612 (2010). Thus, defendant has forfeited his *Zehr* claim by failing to contemporaneously object at trial and raise the issue in his post-trial motion. The issue is thus subject only to the plain-error exception, and not harmless-error review. The supreme court held in *Thompson* that when a defendant has forfeited review of an issue, we consider only plain error; harmless error applies when a defendant has preserved error. *Thompson*, 238 Ill. 2d at 611 (citing *People v. McLaurin*, 235 Ill. 2d 478, 495 (2009)).

The plain error doctrine permits courts to consider otherwise forfeited claims when: “(1) a clear or obvious error occurs and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurs and that error is so serious that it affected the fairness of 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).

Defendant argues that the failure to strictly comply with Rule 431(b) constitutes

1-07-3493

reversible plain error, without regard to the closeness of the evidence, and that structural error occurred in that he was denied a fair trial by an impartial jury, thus implicating the second prong of the plain-error exception.

Here, the trial court gave the first group of potential jurors the following admonishment:

“As I indicated earlier, *the defendant is presumed innocent* of the charges against him. *The State has the burden of proving his guilty beyond a reasonable doubt.*

Is there anybody who has any qualms or opposition to that principal [*sic*] of law?

No response.

*The defendant has a right to testify, he has a right not to testify.* Should he exercise his right not to testify, is there anybody seated in the jury box who would hold that against him? No response.

He is presumed innocent. If the State meet their burden of proof beyond a reasonable doubt, is there anybody seated in the jury box who could not or would not go back into the jury room with your fellow jurors and the law that governs this case as I give it to you, and sign a verdict form of guilty? Anybody who could not or would not do that for any reason? No response.

Should the State fail to meet their burden of proof beyond a reasonable doubt, is there anybody seated in the jury box who could not or would not go into the jury room with your fellow jurors and sign a verdict form of not guilty? No response.”

The trial court advised these jurors that (1) that the defendant is presumed innocent of the charge(s) against him or her; and (2) that before a defendant can be convicted the State must

1-07-3493

prove the defendant guilty beyond a reasonable doubt. Ill. S. Ct. R. 431(b)(1), (2) (eff. May 1, 2007). Although the court stated that defendant has the right not to testify, the court did not properly admonish the jury that the defendant is not required to offer any evidence on his or her own behalf and that the defendant's failure to testify cannot be held against him. Ill. S. Ct. R. 431(b)(3), (4) (eff. May 1, 2007).

Seven jurors were selected from the first group.

The trial court gave the following admonishment to the second group of prospective jurors:

*"The defendant is presumed innocent, and you are being called upon to deliberate and enter a verdict on Mr. Brown only. He is presumed innocent. He has the right to testify. He has a right not to testify.*

If he exercises his right not to testify, is there anybody who would hold that against him? No response.

Should the State meet their *burden of proof beyond a reasonable doubt*, is there anybody could not [sic] or would not go into the jury room with your fellow jurors and the law that governs this case as I give it to you, and sign a verdict form of guilty? Anybody who could not or would not do that for any reason? No response.

Should the State fail to meet their burden of proof beyond a reasonable doubt, is there anybody who could not or would not follow the law that governs this case and sign a verdict form of not guilty?

Is there anybody who has any qualms with the proposition of law that the

1-07-3493

defendant is presumed innocent and does not have to prove his innocence, *he doesn't have to call witnesses or testify on his own behalf*. The State has the burden of proofing [sic] him guilty. Is there anybody who does not agree with that law? No response.

Again, the trial court admonished the jury as to some, but not all, of the required Rule 431(b) *Zehr* principles. The court admonished that: (1) 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; and (3) that the defendant is not required to offer any evidence on his or her own behalf. Ill. S. Ct. R. 431(b)(1), (2), (3) (eff. May 1, 2007). However, the court failed to admonish the potential jurors that the defendant's failure to testify cannot be held against him. Ill. S. Ct. R. 431(b)(4) (eff. May 1, 2007).

Also, the trial court completely failed to conduct the required *voir dire* examination and ask each of the potential jurors whether he or she understands and accepts each of the Rule 431(b) principles. Here, the trial court merely questioned the potential jurors whether they were willing to follow the law. Rule 431(b) requires a specific question and response process where the trial court must ask each potential juror whether he or she understands and accepts each of the principles in the rule. *Thompson*, 238 Ill. 2d at 607. "The questioning may be performed either individually or in a group, but the rule requires an opportunity for a response from each prospective juror on their understanding and acceptance of those principles." *Thompson*, 238 Ill. 2d at 607. "[T]rial 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.'" *Thompson*, 238 Ill. 2d at 610 (quoting 177 Ill. 2d R. 431, Committee Comments). Thus, the court below violated

1-07-3493

Supreme Court Rule 431(b). See *Thompson*, 238 Ill. 2d at 607 (held the trial court violated Rule 431(b) for failing to question whether the potential jurors both understood and accepted each of the enumerated principles).

However, although the trial court violated Rule 431(b), a trial court's violation of amended Rule 431(b) does not rise to the level of plain error. As the supreme court explained in *Thompson*:

“Our amendment to Rule 431(b) does not indicate that compliance with the rule is now indispensable to a fair trial. As we have explained, the failure to conduct Rule 431(b) questioning does not necessarily result in a biased jury, regardless of whether that questioning is mandatory or permissive under our rule. Although the amendment to the rule serves to promote the selection of an impartial jury by making questioning mandatory, Rule 431(b) questioning is only one method of helping to ensure the selection of an impartial jury. See [*People v.*] *Glasper*, 234 Ill. 2d [173,] 195-96 [2009]. It is not the only means of achieving that objective. A violation of Rule 431(b) does not implicate a fundamental right or constitutional protection, but only involves a violation of this court's rules. *Glasper*, 234 Ill. 2d at 193. Despite our amendment to the rule, we cannot conclude that Rule 431(b) questioning is indispensable to the selection of an impartial jury.

In this case, the prospective jurors received some, but not all, of the required Rule 431(b) questioning. The venire was also admonished and instructed on Rule 431(b) principles. Defendant has not established that the trial court's violation of Rule 431(b)

resulted in a biased jury. Defendant has, therefore, failed to meet his burden of showing the error affected the fairness of his trial and challenged the integrity of the judicial process. Accordingly, the second prong of plain-error review does not provide a basis for excusing defendant's procedural default." *Thompson*, 238 Ill. 2d at 614-15.

Defendant must establish that the trial court's violation of Rule 431(b) resulted in a biased jury, and has failed to do so here. Defendant merely claims that the violation of Rule 431, by itself, resulted in a biased jury. Under *Thompson*, a violation of Rule 431(b)'s requirements, by itself, is not an error so serious that it affects the fairness of trial and the selection of an impartial jury, and thus it does not rise to the level of plain error. Defendant has not pointed to anything in the record to show that the error in this case resulted in a biased jury. As the State points out, the jury in fact acquitted defendant of three charges. Therefore, defendant has failed to establish any error sufficient to invoke the second prong of the plain error exception.

Though defendant initially only argued the second prong of plain-error review, in reply he concedes his argument has been overruled by *Thompson*. Defendant now argues that the evidence was closely balanced, under the first prong of plain-error review. However, here defendant fails to point out how the evidence was closely balanced. Defendant notes that the testimony of his only witness, Detective Hightower, did not concern defendant's guilt, but merely whether the area where the gun was found was videotaped. Defendant nevertheless argues that, "[t]herefore, the trial court's failure to question the prospective jurors about Brown's right not to present evidence was not inconsequential." However, defendant's argument underscores the fact that the evidence was not closely balanced but, rather, that defendant did not present evidence of

his innocence. Defendant merely reverts to repeating his argument that the trial court's error in not admonishing the potential jurors regarding his right not to present evidence denied him a fair trial. Such argument, without showing that a biased jury resulted, is insufficient under *Thompson*. See *Thompson*, 238 Ill. 2d at 614. Defendant points to no evidence in the record establishing how the evidence in this case was closely balanced. On the contrary, we find the evidence of defendant's guilt was overwhelming. Thus, defendant has also failed to establish the first prong of plain-error exception to forfeiture. We find defendant forfeited the issue and we decline review of this issue.

### III. Credit For Time Served

Lastly, defendant maintains that he was entitled to credit for time served from the date of his arrest through the date of sentencing. A defendant is entitled to sentencing credit for "time spent in custody as a result of the offense for which the sentence was imposed." 730 ILCS 5/5-8-7(b) (West 2008). Defendant was arrested on February 3, 2004, and remained in continuous custody until sentencing on November 15, 2007, amounting to 1,382 days in custody. Upon sentencing, the mittimus reflected a credit of 1,377 days for time served.

Defendant seeks to count the date of sentencing as a day of presentence custody and asks us to take judicial notice of information on the Illinois Department of Corrections website that he was not received into the custody of the Illinois Department of Corrections until November 16, 2007. Defendant cites *People v. Peterson*, 372 Ill. App. 3d 1010, 1019, 868 N.E.2d 329, 336, 311 Ill. Dec. 329 (2007), for the proposition that we may take judicial notice of Department of Corrections records because they are public documents. Defendant's admission date to the

1-07-3493

Menard Correctional Center is reflected on the Illinois Department of Corrections website as November 16, 2007.

The State concedes that defendant is entitled to more days credit for presentence custody time served, and requests that we correct the mittimus. However, the State argues the day of sentencing should not be included as time served in presentence custody and maintains that defendant is entitled to only 1,381 days' credit for time served. The State cites to *People v. Williams*, 394 Ill. App.3d 480 (2009), for the proposition that the day of sentencing is not included because the issued mittimus is effective that same day. Defendant points out that *Williams* was on appeal during the briefing on appeal in the present case.

Since briefing in this case, the supreme court affirmed *Williams*. See *People v. Williams*, 239 Ill. 2d 503 (2011). The court addressed the question of whether the date of sentencing is properly classified as "time spent in custody as a result of the offense for which the sentence was imposed" under section 5-4.5-100. The court analyzed sections 5-4.5-100, 3-6-3, of the Unified Code of Corrections (Code) (730 ILCS 5/5-4.5-100, 3-6-3 (West 2008)) under which defendants are to receive one day of good conduct credit for each day spent in presentence custody, as well as credit for each day of their sentence under section 3-6-3 and, thus, defendants will ultimately receive the same credit whether the day of his sentencing is counted under section 3-6-3 or section 5-4.5-100. *Williams*, 239 Ill. 2d at 507. However, the court held, "because section 5-8-5 requires the court to commit the defendant to the Department at the time of the entry of judgment, section 5-4.5-100 means that the sentence commences upon the issuance of the mittimus," and therefore, "the date of issuance of the mittimus is a day of sentence, subject to

1-07-3493

counting under section 3-6-3.” *Williams*, 239 Ill. 2d at 509. The court held that “the date of the issuance [of the mittimus] should therefore not be counted as a day of presentence custody under section 5-4.5-100(b)” and that “the date a defendant is sentenced and committed to the Department is to be counted as a day of sentence and not as a day of presentence credit.” *Williams*, 239 Ill. 2d at 510.

We take judicial notice that the Illinois Department of Corrections website reflects that defendant was admitted on November 16, 2007, to the Menard Correctional Center in Menard, Illinois. See *People v. Steward*, \_\_\_ Ill. App. 3d \_\_\_, \_\_\_, 940 N.E.2d 140, 150 (2010), citing *Peterson*, 372 Ill. App. 3d at 1019 (we may take judicial notice of Department of Corrections records because they are public documents). However, this website information only reflects the date of defendant’s admission at the Menard Correctional Center, and not the date the mittimus was issued and he was ordered into the custody of the Illinois Department of Corrections. The fact remains that, under the holding of *Williams*, upon sentencing and the issuance of the mittimus, defendant was legally in the custody of the Illinois Department of Corrections. Thus, the date of his sentencing is not included in the time served for presentence custody. Here, defendant was sentenced and the mittimus was issued on November 15, 2007. Under the holding of *Williams*, this day is to be counted as a day of sentence and not as a day of presentence credit. Defendant is entitled to 1,381 days’ credit for time served. Therefore, we remand and order that the mittimus be corrected to reflect 1,381 days’ credit for time served.

#### CONCLUSION

\_\_\_\_\_ We conclude that: (1) the trial court properly denied the motion to quash arrest and

1-07-3493

suppress evidence where the initial encounter between defendant and police was an investigatory stop under *Terry v. Ohio*, 392 U.S. 1 (1968), and probable cause to arrest developed after identification of defendant as matching a description of the offender, and where the evidence recovered was in a public area and in plain view; (2) defendant forfeited his argument that the court erred in failing to comply with Supreme Court Rule 431(b) because he failed to show plain error where (a) a violation of Supreme Court Rule 431(b) is not an error so serious that it affects the fairness of trial and the selection of an impartial jury, and defendant did not show that it resulted in a biased jury and (b) the evidence was not closely balanced; and (3) defendant is entitled to credit for presentence time served from the date of his arrest, except the date of his sentencing.

\_\_\_\_\_Therefore, we affirm defendant's conviction and sentence, but order that the mittimus be corrected to reflect 1,381 days served by defendant prior to sentencing.

\_\_\_\_\_Affirmed as modified and remanded with directions.