2012 IL App (1st) 101829-U

SIXTH DIVISION
November 16, 2012

No. 1-10-1829

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CR 13962
	)	
DION CARMICHLE,	)	Honorable
	)	Lawrence P. Fox,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE GARCIA delivered the judgment of the court.
Presiding Justice R. Gordon and Justice Palmer concurred in the judgment.

O R D E R

¶ 1 *Held*: (1) Testimony by a police officer who twice viewed defendant before defendant was arrested was sufficient to establish defendant's identity beyond a reasonable doubt, and (2) the trial court's inquiry of the two *venire* panels was substantially within compliance of the mandate of Illinois Supreme Court Rule 431(b), and thus not error.

¶ 2 Following a jury trial, defendant Dion Carmichle was convicted of possession of a stolen motor vehicle and sentenced to 10 years in prison. On appeal, defendant challenges (1) the reliability of his identification by the sole witness who was a police officer and (2) the trial court's compliance with Supreme Court Rule 431(b)(eff. May 1, 2007). We affirm.

¶ 3 The *voir dire* process involved two panels of prospective jurors. The trial court addressed the first panel with the following:

> "Okay. As I previously stated, the defendant is presumed innocent of the charges throughout every stage in the trial. Does anyone have any problem with that concept? (no hands raised.)
>
> As I also previously stated, the state has the burden of proving the defendant guilty in this case beyond a reasonable doubt. Does anyone have a problem with that concept? (no hands raised.)
>
> The defendant does not have to testify or offer any evidence on his own behalf. If the defendant fails to testify or offer evidence on his own behalf, you must not hold that against him. Is there anyone who would hold the decision not to testify or offer evidence against the defendant regardless of what I've said to you? (no hands raised.)"

¶ 4 When the second panel had been seated in the jury box, the court addressed the prospective jurors in the following manner:

> "As previously stated, the defendant is presumed innocent of the charges throughout every stage of the trial. Does anyone have any problem with that concept?
>
> As I also previously stated, the state has the burden of proving the defendant guilty in this case beyond a reasonable doubt. Does anybody have any problem with that concept?
>
> The defendant does not have to testify or offer any

> evidence on his own behalf. If the defendant fails to testify or offer any evidence on his own behalf, you must not hold that against him. Is there anyone that would hold the decision not to testify or offer evidence against the defendant regardless of what I just said to you?"

The court concluded that "the record should indicate that nobody has raised his or her hand" in response to any of the preceding questions.

¶ 5 At trial, Brian Kelley testified that on July 9, 2009, he parked his tan and brown 1991 Chevy conversion van outside of his home in Evergreen Park, Illinois, in the area of 94th Street and Homan Avenue. On the morning of July 10, 2009, he could not locate the van, and contacted the police to report it stolen. On July 20, 2009, he was contacted by Chicago police, and, after arriving at a branch station, saw the van in the station's parking lot. The steering column had been stripped. Kelley testified that he did not recognize defendant in court and that he had not given defendant permission to borrow his van.

¶ 6 Officer Ryan Harty testified that while he and his partner were patrolling in Chicago around 2:10 a.m. on July 20, 2009, Harty observed a tan and brown van traveling on 79th Street. As the two vehicles passed each other, Harty noticed that the driver of the van was not wearing a seat belt; the officer then followed the van and pulled it over at 8130 South Bishop. As Harty walked up to the driver's side window, he observed a side profile of defendant's face, and a black "do rag" on his head. Harty was using his flashlight and the streetlights were lit above. As soon as Harty moved within two feet of the driver's window, the driver sped off. Returning to the police car, Harty discovered that the van had been reported stolen and chased the van until it stopped at the mouth of an alley between Bishop and Loomis at 82nd Street. At this point, Harty was about 10 feet from the van in the police car. From this

vantage point, he observed defendant exit from the van with a black and white article of clothing in his hand, turn and look towards Harty, and then run up the alley. Defendant was wearing all black with a white design on the back of his shirt. Nothing obstructed Harty's view, and streetlights lit the alley.

¶ 7 Harty chased defendant on foot through the alley, radioed for backup, and lost sight of defendant around 81st and Bishop. Four other officers arrived to assist in searching the backyards in the 8000 block of Bishop. About 15 minutes after the initial traffic stop and during the search, another officer notified Harty that someone was in a garage off the alley behind 8039 South Bishop. Harty observed defendant as he emerged from the garage. Harty had never seen defendant before the date in question. At the preliminary hearing, Harty stated that defendant was in a backyard when he was located, and did not mention the garage.

¶ 8 Defendant was wearing a white and black hooded sweatshirt and had a black 'do rag' in his possession. No car keys were found on defendant. After inspecting the van, Harty noticed that the steering column had been peeled away, and no keys were in the ignition. Defendant told Harty that he lived about a half a block away from the site of the arrest.

¶ 9 Jessica McElroy, who is the mother of defendant's child, testified that on the evening in question, she met defendant near the corner of 79th Street and Laflin around 11:45 p.m. and stayed with him, "walking and talking" until approximately 12:45 a.m. McElroy then went home, and did not see defendant after that time.

¶ 10 Justin Canty testified that he lived at 8039 South Bishop on July 20, 2009. At 2:10 a.m. on that date, he was sitting on his friend's front porch at 8050 South Bishop with three other people when defendant "walked up" and then stayed on the porch for about 10 minutes. Canty also testified that he was not paying attention to the exact time when defendant arrived or left the porch. Canty did not see where defendant went. Next, around 2:30 a.m., Canty noticed

police cars arriving, walked back to his home and observed police officers coming out of his backyard with defendant, who was not breathing hard or panting.

¶ 11 The jury found defendant guilty of possession of a stolen motor vehicle. The court imposed a 10-year prison sentence based on defendant's criminal background.

¶ 12 On appeal, defendant first asserts that identification testimony from Officer Harty was not sufficient to prove beyond a reasonable doubt that he was in fact in possession of the van stolen from Brian Kelley. We disagree.

¶ 13 When a defendant challenges the sufficiency of the evidence at trial, the reviewing court must determine whether, in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Billups*, 384 Ill. App. 3d 844, 846 (2008). The reviewing court will not set aside a conviction unless the evidence is unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. *People v. Cox*, 195 Ill. 2d 378, 387 (2001).

¶ 14 A person commits the offense of possession of a stolen motor vehicle when he receives or possesses a vehicle, but was not entitled to possession of that vehicle. 625 ILCS 5/4-103(a)(1) (West 2008). The identification of defendant by a single witness is sufficient to sustain a conviction despite testimony to the contrary, provided the witness is credible and observed defendant under circumstances that would permit a positive identification to be made. *People v. Slayton*, 363 Ill. App. 3d 27, 31 (2006).

¶ 15 In assessing identification testimony, Illinois courts use the factors set forth by the Supreme Court in *Neil v. Biggers*, 409 U.S. 188 (1972); *People v. McTush*, 81 Ill. 2d 513, 521 (1980). Those factors include: the opportunity the witness had to view the criminal at the time of the crime; the witness' degree of attention; the accuracy of the witness' prior description of the criminal; how certain the witness was at the identification confrontation; how much time had

passed between the crime and the identification, and whether the witness knew the offender before the crime occurred. *Id*. Since reliability of the identification is the key inquiry, no one factor controls, and we must consider the totality of the circumstances. See *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977).

¶ 16 Applying the facts as adduced at trial to the *Biggers* factors, it was clear that Harty had an ample opportunity to view defendant at the time of the crime. Harty first observed defendant in the driver's seat of what would later be recognized as Brian Kelley's van when he saw defendant driving the van and not wearing his seatbelt. Harty next observed defendant when Harty stood approximately two feet away from the driver's side window during a traffic stop. He at that time observed a side profile of defendant, along with the fact that defendant was wearing a black "do-rag". Streetlights were lit above and Harty was using his flashlight. After chasing the van, Harty again observed defendant, this time seeing his face when defendant exited the van near the mouth of an alley and turned to look towards Harty before running away from the officers. Streetlights were lit above the alley, and Harty was approximately 10 feet from defendant. Though Harty temporarily lost sight of defendant during the chase, he observed defendant emerge from a garage behind 8039 South Bishop about a block from the abandoned van.

¶ 17 The length of time between the three sightings of defendant by Harty and defendant's arrest was not significant. The total elapsed time—from the first sighting on 79th Street to the arrest behind 8039 South Bishop—was about 15 minutes, and the first two viewings of defendant occurred within less than 10 minutes of each other.

¶ 18 It is true that Harty had never seen defendant before the crime occurred, which establishes that he did not know him before. However, Harty testified to details that made him certain that defendant was the same man who had been driving the van earlier. When defendant

had exited the van and ran up the alley, Harty observed that he was carrying a black and white article of clothing in his hand. At the time of his arrest, defendant was wearing a white and black hooded sweatshirt, and was in possession of a black do rag. Defendant had no car keys on him, and an immediate inspection of the van found that the steering column had been stripped, so that it would start without a key.

¶ 19 Therefore, viewing the evidence in the light most favorable to the prosecution, and in the totality of the factual circumstances under *Biggers*, we find sufficient evidence to support defendant's conviction.

¶ 20 Next, defendant contends the trial court did not comply with the requirement of Rule 431(b) to ask each potential juror whether he or she "understands and accepts" each of the four stated principles because the court asked them whether they "had any problem" with the principles. Defendant acknowledges that he did not properly preserve this issue for appeal but urges our review under the closely-balanced evidence prong of plain error. The plain error rule allows an unpreserved issue to be considered on appeal if the evidence is closely balanced. *People v. Herron*, 215 Ill. 2d 167, 177 (2005). The first step of the plain error analysis is whether an error was committed. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). We review *de novo* compliance with a supreme court rule. *Robidoux v. Oliphant*, 201 Ill. 2d 342, 332 (2002).

¶ 21 Rule 431(b) provides that,

> "[t]he court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any

> evidence on his or her own behalf; and (4) that the defendant's failure to testify cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's failure to testify when the defendant objects.
>
> The court's method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section." Ill. S. Ct. R. 431(b) (eff. May 1, 2007).

¶ 22 The failure of a trial court to address any of the four principles set forth in Rule 431(b) as derived from *People v. Zehr*, 103 Ill. 2d 472, 477 (1984) constitutes error. *People v. Thompson*, 238 Ill. 2d 598, 607 (2010). In the present case, defendant admits that the court informed the *venire* about each of the four principles: a defendant is presumed innocent, must be proven guilty beyond a reasonable doubt, is not required to offer any evidence, and need not testify.

¶ 23 Instead, defendant claims that the court did not properly ask the jurors whether they understood and accepted each principle as required in Rule 431(b). Although no specific method of inquiry is mandated, the court must provide each juror an opportunity to respond to the four principles. The failure of the court to present an opportunity for response to each prospective juror on their understanding and acceptance of the principles is error. See *People v. Johnson*, 2012 IL App (1st) 091730, ¶40-41 (trial court erred where it asked both *venire* panels only whether they accepted the fourth *Zehr* principle and entirely omitted admonishment on the third principle in one *venire*). Since *Thompson*, this court has found that "[it] is likely error *** not to ask prospective jurors to respond to separate questions whether he or she 'understands' and 'accepts' each of the four principles," and that "[m]odification to the language in Rule 431(b) is

discouraged." *People v. Fountain*, 2011 IL App (1st) 083459-B.

¶ 24 Trial courts, however, need not employ "special magic language" in questioning to determine whether a prospective juror understands and accepts the four *Zehr* principles. *People v. Ware*, 407 Ill.App.3d 315 (2011). We have found no error in a trial court's less formal interrogatories regarding the *Zehr* principles when they are "sufficient to ascertain the understanding and acceptance of the potential jurors." *People v. Vargas*, 409 Ill. App. 3d 790, 796 (2011). Specifically, we have found no error where a court asks prospective jurors if they "had any quarrel" with the principles. *People v. Martin*, 2012 IL App (1st) 093506, ¶78; *People v. Salcedo*, 2011 IL App (1st) 083148, ¶33. We have also found no error where the court asked prospective jurors if they "had a problem with" or "disagreed with" the principles. *People v. Digby*; 405 Ill. App. 3d 544, 548 (2010); *People v. Quinonez*, 2011 IL App (1st) 092333, ¶44.

¶ 25 Here, the court informed the prospective jurors that it would direct a series of questions to the *venire* and if anyone wanted to answer yes to a question, that the person should raise his or her hand. The court then indisputably set out each requisite principle separately and asked whether the *venire* "had any problems" with the concept. The record revealed that no one raised his or her hand. We find that the court's method of inquiry accorded with the holdings of *Ware*, *Vargas*, *Martin*, *Salcedo*, and *Quinonez*, and we find no error.

¶ 26 Defendant's reliance on *People v. Lampley*, 2011 IL App (1st) 090661-B, does not warrant a different result. In *Lampley*, the trial court collapsed three of the four principles into one statement and then asked if any of the potential jurors had "any problems with those concepts," and, if so, that they "please stand up." *Id*. ¶5 The *Lampley* court found this method did not follow the "straightforward questioning of the *Zehr* principles as outlined by Rule 431(b) and, as a result committed error" (*id*. at ¶35) but not reversible error (*id*. at ¶36). In contrast, in the present case, the court delivered all of the required admonishments and directly asked the

prospective jurors in a manner that would determine whether they understood and accepted each principle.

¶ 27 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 28 Affirmed.