FOURTH DIVISION
December 15, 2016

No. 1-15-1133

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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. 10 CR 16748
	)	
JONATHAN ROBINSON,	)	Honorable
	)	Rosemary Higgins,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Ellis and Justice Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for first degree murder is affirmed; the trial court properly denied defendant's motion to quash arrest and suppress evidence where defendant's investigatory detention and subsequent arrest were lawful; defendant was not prejudiced by an incorrect jury instruction on the affirmative defense of withdrawal where the evidence does not support the defense; because defendant's statement to police was not induced by promises of leniency trial counsel was not ineffective in not moving to suppress it; and the State properly characterized defendant's statement admitting to all of the elements of the offense as a confession.

¶ 2 The State charged defendant, Jonathan Robinson, with multiple offenses arising from a home invasion and robbery during which his co-defendant (in a separate but simultaneous trial),

Leroy Owens, shot and killed one of the victims of the home invasion. Defendant made statements to police describing his role in the home invasion. Defendant filed a motion prior to trial to quash his arrest and suppress statements which was denied. At trial, defendant's attorney argued the affirmative defense of withdrawal from the crime. The jury found defendant guilty and the circuit court of Cook County convicted defendant of two counts of first degree murder and two counts of felony murder based on home invasion. The court merged three counts into one count for first degree murder and sentenced defendant to 40 years' imprisonment. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 The Robbery

¶ 5 The robbery and murder occurred in the early morning hours of August 20, 2010 near 108th and Sangamon Streets in Chicago at the residence of Anthony Anglin. Anthony Anglin was killed during the robbery. Defendant and Owens were tried simultaneously to separate juries.

¶ 6 Chantal Kimbrough lived next to the Anglin residence. She testified at defendant's trial that on the evening of August 19, 2010, at approximately 9:30 p.m., she was walking home when she encountered two African-American men on the street. She described one as wearing all black and the other as wearing a black shirt and light-colored jeans. Kimbrough and the two men engaged in a brief conversation after which she continued to her home. When Kimbrough got to her porch, she turned and looked at both men. Later that night Kimbrough heard noises outside her home coming from the direction of the Anglin residence. Kimbrough looked out her upstairs bedroom window. She heard a sound she believed to be a gunshot. Within minutes she saw the same African-American male she had seen earlier wearing all-black clothing run north across her lawn holding his hands down to the right side of his body. Later she saw Langford Anglin,

Anthony Anglin's son, standing in the street. On August 31, 2010, Kimbrough viewed a photo array. At trial Kimbrough identified the photographic exhibits (People's Exhibit 15-A and 15-B) depicting the two men she encountered on the street on the night of the offense. People's Exhibit 15-B depicted the man Kimbrough later saw running across her lawn with his hands down. (The parties did not clarify the name of the person depicted in People's Exhibit 15-B.)

¶ 7 Casheona King also testified at defendant's trial. King and Langford arrived at the Anglin residence at approximately 11:00 p.m. on the night of August 19, 2010. Langford had driven his mother's car to the home and parked it in the driveway. King and Langford watched movies in Langford's upstairs bedroom. King testified that after 1:00 a.m. Langford looked out the window and noticed the trunk of his mother's car was open, so he went to close it. As King waited upstairs a man wearing a mask that covered his face from the eyes down entered the bedroom and pointed a gun at her. King knelt on the floor facing a wall while the man rummaged through the bedroom. She heard a sound like the man tripped and she turned. King saw the man looking directly at her and that his mask had fallen to his chin. King later identified that man as Owens. Owens told King he had to kill her. King testified Owens then yelled downstairs "We have to pop her." King heard a male voice she knew did not belong to Langford yell back "Man get what we came for. We ain't on that." King heard noises downstairs and Owens ran out of the bedroom. She heard a gunshot and a door slam. King hid in the closet for a few minutes then went downstairs. Once downstairs King saw Langford's father lying on the living room floor. She ran outside to look for help, and then Langford arrived. Later, police took King to a show-up. King saw two black males in handcuffs in front of a vehicle. She identified one of them, Owens, as the man who pointed the gun at her and she identified a mask recovered from Owens at the time of his arrest as the mask the man in the bedroom wore. On cross-examination, King testified she did not see defendant in the home that night. She also

agreed that she had previously told a detective that when Owens said he was going to kill her, the voice from downstairs said "She had nothing to do with it."

¶ 8 Langford Anglin testified he and King were at his home on the evening of August 19, 2010. When they finished watching one movie and had started another, he noticed the trunk of his mother's car was open. When he got downstairs he looked out a kitchen window and saw a man he later testified was defendant jump down from the window. Langford walked outside and then he heard a voice say "Don't move we going to bust you." Langford saw two men approaching him. One man held a gun outstretched toward Langford. Langford ran and later called police from his cell phone. When he returned to the home Langford learned his father had been shot. On August 20, 2010, he viewed a line up and identified Owens as the man who held a gun toward him. Langford admitted he had drugs and a large amount of cash in his bedroom. He was told he would not be prosecuted for a drug offense.

¶ 9 Jamal Wright lived in the area of the Anglin residence. He testified defendant arrived at his home on August 19, 2010 around 7:00 p.m. in a black Grand Prix. Jamal testified that after 20 to 30 minutes, defendant left Jamal's home to pick up Owens. Defendant and Owens returned 15 to 20 minutes later in the same black Grand Prix. Jamal testified that later in the evening Owens spoke to Jamal about "hitting a lick on Lang." Jamal testified he understood Owens to mean robbing Langford. Jamal told Owens that was not his "MO." Later, defendant told Jamal he was thinking about "hitting a lick with Owens." Jamal testified he understood defendant to mean robbing Langford. Defendant and Owens left Jamal's residence at approximately midnight in the same Grand Prix and returned 15 to 20 minutes later. Jamal testified defendant and Owens left again between 1:00 and 2:00 a.m. Defendant returned first sometime later. Jamal testified defendant looked "shook up" and vomited. Owens returned approximately 5 minutes after

defendant, at around 2:00 a.m. Jamal testified Owens looked nervous and was sweating. Owens asked Jamal to ask his brother, Javan, to drive Owens home.

¶ 10 Javan Wright testified that at approximately 2:00 a.m. on August 20, 2010, his brother woke him and asked him to drive defendant and Owens home. Javan testified that he, defendant, and Owens all got into his car which had malfunctioning headlights. Owens sat in the front passenger's seat and defendant sat in the back on the passenger's side. Javan testified police stopped the car near 109th and Halstead Streets. Javan testified he saw Owens remove money from his pants pockets and stuff it into the glove box. On cross-examination Javan testified that only one headlight on his car was not working and that he did not see defendant in possession of any money, a mask, or a gun.

¶ 11 The Traffic Stop

¶ 12 The trial court held a hearing on defendant's pretrial motion to quash arrest and suppress evidence during which the State elicited testimony about the stop of the vehicle containing Javan, defendant, and Owens. The second officer who stopped the vehicle testified at defendant's trial. Officer Monica Richardson testified during the hearing on defendant's motion that at approximately 1:30 a.m. on August 20, 2010, she was on patrol with her partner Officer Lori Davis when she received a dispatch that someone reported a burglary involving two African-American males wearing masks and armed with a handgun. Officer Richardson was told the burglary occurred near 108th and Sangamon but the caller was at 109th and Peoria. While en route to 109th and Peoria, Officer Richardson saw a vehicle traveling away from the area with its headlights off. Officer Richardson testified that when she first saw the vehicle she saw only two African-American male occupants, and they were preoccupied with the dashboard. Officer Richardson flashed her own headlights at the vehicle but it did not turn on its headlights. That is when she turned around to stop the car.

¶ 13 Officer Richardson testified that when their police vehicle was behind the vehicle they were stopping she observed a third occupant in the back seat. She testified she observed hand movements by the front passenger and saw the backseat passenger looking back and forth between the police and the front passenger. When Officer Richardson approached the vehicle she observed that the backseat passenger, who she later identified as defendant, was not wearing a shirt and was sweaty. Officer Richardson described defendant as fidgety. She identified Owens as the front seat passenger. Officer Richardson observed large sums of money in the console, on the floor in the front, and coming out of the glove box, which Owens was trying to hold shut with his knee. Officer Richardson asked defendant why he was sweating and he said he had just gotten off work. She testified he later said they had all been playing basketball, but no one could say where they had been playing. She then asked Owens whose money was in the front seat. Officer Richardson testified that Owens stated the money was his and that he was on his way to buy a car. At that point the officers ordered the occupants out of the vehicle.

¶ 14 Officer Richardson testified that as Owens exited the vehicle the glove compartment opened and money spilled out. The officers received another dispatch informing them someone was shot at the scene of the burglary. When Owens was out of the vehicle Officer Richardson observed a black mask in his rear pocket. She performed a pat down of Owens and felt a hard object in his pocket. Officer Richardson testified she believed the object to be a weapon but when she removed the object it was money secured by a black rubber band. The officers handcuffed Javan, defendant, and Owens. (At defendant's trial, Officer Davis testified they handcuffed the men to avoid a flight risk and for officer safety.) Approximately one half-hour later, police brought King to the scene for a show-up. When King arrived, Javan and Owens were standing outside the police vehicle and defendant was sitting in the back seat of the police vehicle. (At defendant's trial, Officer Davis testified this was because there were only two

officers and three suspects.) King identified Owens as the man who had been standing in the room pointing a gun at her. On cross-examination Officer Richardson testified the robbery dispatch did not provide a height and weight for the suspects or a vehicle description. She did not see defendant with any money and did not see defendant try to hide anything in the front seat. Officer Richardson patted down defendant and did not find a weapon, a mask, or cash. King did not identify defendant. Officer Richardson's arrest report stated the mask was in Owens' left pants pocket and did not state any money was found other than the money recovered from Owens' pants. The arrest report also did not state that defendant changed his story about why he was sweating. After King's identification all three men were taken to the police station.

¶ 15 At trial, Detective Herhold testified that he went to the Anglin home and saw blood on the floor with money scattered around. The money was held together by black rubber bands. The upstairs bedroom was disheveled and looked ransacked. Detective Herhold saw drugs and money secured by rubber bands in the bedroom. He learned that a black Grand Prix was discovered approximately 1½ blocks from the Anglin home. Detective Herhold testified there was a direct route from the Grand Prix to the Anglin home. He and another detective spoke to defendant shortly before 4:00 p.m. on August 21, 2010.

¶ 16 The Statement

¶ 17 The State played a recording of defendant's interview with detectives. Defendant received *Miranda* warnings prior to the interview. During the interview defendant stated that on August 19 he was using his girlfriend's car. When he got off of work he picked up Owens. Owens was carrying a bag that defendant saw contained a gun. Defendant stated in the interview that Owens had been calling him and telling him that he (Owens) wanted to rob someone who was selling drugs. Defendant stated he initially said no, but agreed to participate after he had been drinking. Defendant stated that when he and Owens went to the Anglin residence they

were going to rob the drug dealer. Owens asked defendant to drive by the house. Defendant parked the Grand Prix and walked back to the Wright residence with Owens. Defendant stated they parked the car "In case I guess to try and get away." Later, defendant and Owens left the Wright residence and went to the Anglin residence. They waited outside for 5 to 10 minutes. Defendant stated that Owens told him the car Langford drove was in the driveway so he knew someone was home. Defendant gave Owens a boost to look in a window. Defendant stated that Langford came out of the house and went toward the car. Owens produced a gun, pointed it at Langford, and ordered Langford into the house.

¶ 18 Defendant stated that when Langford ran, Owens told defendant to catch him. Defendant stated that Owens was "crazy" so defendant chased Langford but could not catch him. Defendant returned to the house and entered though an open door. He stated Owens had already gone in. Defendant heard Owens upstairs yelling. Defendant stated he went part way up the stairs and saw Owens with his arm outstretched pointing the gun downwards and telling someone to roll over. Owens was wearing a black ski mask but defendant did not have a mask. He pulled his shirt over his face. Defendant stated that he kept repeating "I'm finna go; I'm finna go." Defendant then ran back to the Wright residence because, he stated, he saw Owens with the gun and did not want anything to do with what was going on. He did not hear any shooting. Defendant stated that when he got back to the Wright residence he vomited in the backyard. Defendant then saw Owens walking out of the side door of the Wright house. Defendant stated that Owens told him that someone hit him (Owens) or struggled with him at the Anglin residence. Defendant and Owens then got into Javan Wright's car and left. Defendant sat in the back and Owens sat in the front passenger's seat. When police stopped them defendant saw Owens stuff a mask in the glove compartment and saw that Owens had a large amount of cash.

Defendant stated he did not know Owens had the cash until defendant saw Owens trying to stuff the cash into the glove compartment as the police were stopping them.

¶ 19 At trial, the parties stipulated that Owens matched the major DNA profile found on the mask recovered from Owens and defendant was excluded as a contributor to the major DNA profile found on the mask. The parties also stipulated that defendant and Owens tested negative for gunshot residue (GSR).

¶ 20 During closing argument the prosecutor repeatedly referred to defendant's statement to detectives as a confession. The trial court overruled defense counsel's objections to that characterization. During deliberations the jury sent out a note asking what is the difference between a statement and a confession. The court responded by telling the jury it had the law and the evidence and asked it to continue to deliberate. The jury sent a second note asking if it could convict defendant of home invasion and not murder. The court asked the jury to re-read the instructions and to continue to deliberate. The jury found defendant guilty of first degree murder.

¶ 21 Defendant filed a posttrial motion for a new trial alleging, in part, trial counsel was ineffective in failing to file a motion to suppress statements. The trial court appointed a new attorney to represent defendant on the posttrial motion. During a *Krankel* hearing defendant's trial counsel stated he chose not to file a motion to suppress defendant's statement to police because he believed it would be futile. The court determined defendant's trial counsel's performance was not deficient and denied defendant's motion for a new trial. The court sentenced defendant to 40 years' imprisonment.

¶ 22 This appeal followed.

¶ 23 ANALYSIS

¶ 24 Defendant raises four primary arguments on appeal: (1) the trial court should have granted his motion to quash arrest and suppress evidence; (2) he received ineffective assistance of counsel when trial counsel offered, and the court gave, an incorrect jury instruction on the law applicable to the affirmative defense of withdrawal; (3) he received ineffective assistance of counsel when defendant's trial counsel did not file a pretrial motion to suppress defendant's statement to police; and (4) defendant was denied a fair trial when the trial court permitted the State to repeatedly refer to defendant's statement as a confession.

¶ 25 (1) Whether the trial court should have granted defendant's motion to quash arrest and suppress evidence.

¶ 26 Defendant argues police seized him without sufficient reasonable suspicion to justify a stop when they ordered him out of the car on August 20, 2010 and placed him in handcuffs for approximately 30 minutes before King identified Owens. Defendant also argues his detention in handcuffs in the back of a police car for 30 minutes while awaiting King went beyond an investigatory stop into an arrest, and that police did not have probable cause to arrest him. Thus, defendant argues, the trial court should have granted his motion to quash arrest and suppress evidence. The State responds the officers developed reasonable suspicion defendant was involved in the burglary to which they were responding during the course of the traffic stop and his detention was not an arrest. Regardless, the State argues, all of the facts known to the officers provided probable cause to arrest defendant prior to the show-up. For the following reasons we find (1) police had reasonable suspicion to conduct an investigatory stop of the occupants of Javan's vehicle after the traffic stop, and (2) police did not arrest defendant prior to the show-up identification by King.

¶ 27 A trial court's ruling on a motion to quash arrest and suppress evidence presents a mixed question of law and fact. *People v. Williams*, 2016 IL App (1st) 132615, ¶ 32. When this court

reviews the trial court's ruling we give great deference to the trial court's factual findings and will not disturb those findings unless they are against the manifest weight of the evidence. *Id.* "At a hearing on a motion to quash and suppress evidence, the trial court is responsible for determining the credibility of the witnesses, weighing the evidence, and drawing reasonable inferences therefrom." *Id.* However, the ultimate ruling on the motion raises a question of law we review *de novo*." *Id.*

¶ 28 The legality of an investigatory stop is judged under a different standard than an arrest. A police officer may conduct a brief investigatory stop if the officer has a reasonable, articulable suspicion that the person stopped is engaged in criminal activity. *Id.* ¶ 44. This suspicion need not rise to the level of probable cause, but must be more than "an inchoate and unparticularized suspicion or hunch. [Citations.]" (Internal quotation marks omitted.) *Id.*

> "The investigatory stop must be justified at its inception, and the officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the governmental intrusion upon the constitutionally protected interests of the private citizen. [Citations.] The officer's conduct is judged by an objective standard by considering whether the facts available to the officer at the moment of the seizure or the search warrant a man of reasonable caution in the belief that the action taken was appropriate. [Citations.]" (Internal quotation marks omitted.) *Id.* ¶ 45.

"The scope of the investigation must be reasonably related to the circumstances that justified the police interference and the investigation must last no longer than is necessary to effectuate the purpose of the stop. [Citation.]" (Internal quotation marks omitted.) *People v. Lawson*, 2015 IL App (1st) 120751, ¶ 32.

¶ 29 A warrantless arrest, contrarily, must be based on probable cause to be deemed lawful. *People v. House*, 2015 IL App (1st) 110580, ¶ 78. "Probable cause does not require proof beyond a reasonable doubt but does require more than mere suspicion. [Citation.] Probable cause exists if the totality of the circumstances known to the police at the time of a suspect's arrest is sufficient to warrant a reasonably prudent person to believe the suspect has committed a crime. [Citation.]" (Internal quotation marks omitted.) *Id.* "Our analysis of probable cause is based on common sense and concerns the probability of criminal activity rather than proof beyond a reasonable doubt. [Citation] The State need not show that it was more likely true than false that defendant was involved in criminal activity. [Citation.] The difficulty of establishing probable cause is reduced when the police know that a crime has been committed." *People v. Brown*, 2013 IL App (1st) 083158, ¶ 23. "Whether probable cause existed is not a legal or technical determination, but one of practicality and common sense which analyzes the totality of the circumstances at the time of arrest." *People v. McGee*, 2015 IL App (1st) 130367, ¶ 47.

¶ 30 A. The Initial Stop—Investigatory or Arrest

¶ 31 We must first determine whether defendant was the subject of an investigatory stop or whether defendant was under arrest prior to the show-up identification by King. Defendant argues that his detention prior to the show-up was actually an arrest, not an investigatory stop, because the officers' show of authority and his detention in handcuffs in the back of a police car for an extended period of time demonstrate that defendant was under arrest for purposes of the fourth amendment. The State responds there were legitimate reasons to handcuff defendant and place him in the back of the police car, and the length of the detention was no longer than was necessary to effectuate the purpose of the stop; therefore, handcuffing and placing defendant in the back of a police car for approximately 30 minutes did not turn an investigatory stop into an arrest.

¶ 32 There is no bright-line test for distinguishing between an investigatory stop and an arrest. *People v. Daniel*, 2013 IL App (1st) 111876, ¶ 38.

> "During the course of an investigatory stop, a person is no more free to leave than if he were placed under a full arrest. [Citations.] Allowing police officers to restrain individuals during an investigatory stop recognizes the paradox that would occur if the police had the authority to detain an individual pursuant to a stop but were denied the ability to enforce or effectuate the stop. [Citation.] Consequently, the status or nature of an investigatory stop is not affected by the drawing of a gun by a police officer [citation], by the use of handcuffs [citation], or by placing an individual in a squad car [citation]." *People v. Moore*, 378 Ill. App. 3d 41, 46-47 (2007).

"[A] detainee may be handcuffed during the duration of an investigatory *Terry* stop where necessary for officer or public safety." *People v. Simpson*, 2015 IL App (1st) 130303, ¶ 30. The placing of a suspect in a squad car can be a reasonable precaution for the officer's safety. See *People v. Walters*, 256 Ill. App. 3d 231, 238 (1994). Further, police may effectuate the stop with guns drawn if they reasonably suspect they may be dealing with a suspect who may be armed. *People v. Zielinski*, 91 Ill. App. 3d 519, 521 (1980).

¶ 33 We find that prior to the show-up identification of Owens by King, defendant was not under arrest but was subject to an investigatory detention authorized by *Terry*. See *Williams*, 2016 IL App (1st) 132615, ¶ 34. Defendant's arguments concerning being placed in handcuffs in the back of a police car are unavailing. The difference between an investigatory stop and an arrest does not necessarily lie in the initial restraint of movement. *Simpson*, 2015 IL App (1st) 130303, ¶ 30. "Regardless of the initial restraint of the person's movement, whether a stop becomes an arrest is determined by the length of time the person is detained and the scope of the

investigation that follows the initial stop." *People v. Ross*, 317 Ill. App. 3d 26, 32 (2000). See also *Simpson*, 2015 IL App (1st) 130303, ¶ 30. "If the officer's suspicions are not allayed within a reasonable time, the suspect must be allowed to leave or an arrest must be made." *Id.* (citing *Walters*, 256 Ill. App. 3d at 237). Further, the scope of the investigation in this case did not extend beyond that which is permitted under *Terry*. "The purpose of a *Terry* stop is to allow a police officer to investigate the circumstances that provoke suspicion and either confirm or dispel his suspicions." *People v. Ross*, 317 Ill. App. 3d 26, 31 (2000). "Police may detain a suspect long enough for an eyewitness to identify or clear him without turning an investigatory stop into an arrest." *People v. Brown*, 356 Ill. App. 3d 1088, 1090 (2005), *abrogated on other grounds, People v. Allen*, 222 Ill. 2d 340 (2006). "[A] lawful investigative stop pursuant to *Terry* could conceivably extend beyond 30 minutes and *** there is no fixed number of minutes beyond which such a stop automatically becomes an arrest." *People v. Calderon*, 336 Ill. App. 3d 182, 193 (2002).

¶ 34 This is not a case where defendant was transported to a police station or held for an extended period of time while police continued to search for contraband. *Cf. Id.* Here, there is no evidence police continued to search Javan's car or question the suspects. Police held defendant until an eyewitness could be brought to the scene of the stop to investigate the circumstances that provoked the officers' suspicion the occupants of Javan's vehicle were involved in the reported robbery. The scope of the investigation was permissible under *Terry*. The duration of the investigation was also permissible. Defendant argues that, accepting the State's argument police had a reasonable suspicion to suspect the vehicle was involved in the crime due in part to their proximity to the crime scene, "there is no justification for a 30-minute delay [before] the show-up." This argument is not persuasive. Defendant has pointed to nothing to indicate that the 30-minute wait was any longer than was necessary to permit other officers to

bring King to the suspects to make an identification. Further, we do not find the time defendant had to wait for King was unreasonable. We hold defendant was not arrested prior to the identification of Owens as a participant in the burglary.

¶ 35 B. Justification for a *Terry* Stop

¶ 36 Turning to the question of whether the investigatory stop was lawful, defendant argues police lacked reasonable suspicion to detain him because (a) police were not told when the burglary occurred and thus had no reason to believe the offenders were still in the area; (b) police were not told a vehicle was used in the burglary, and the vehicle in which defendant was a passenger had three occupants whereas two people were involved in the burglary, thus police had no reason to suspect the occupants of Javan's vehicle were involved; (c) police were not told what was taken in the burglary, thus the money in the car gave police nothing more than a mere suspicion the money was proceeds from the burglary; and (d) defendant did not attempt to flee and police did not find a weapon, a mask, or currency on defendant's person or in the back seat, thus police had no reason to suspect defendant was involved in the burglary. Defendant also argues that "[b]ecause the investigatory detention started prior to the arresting officers' recovery of the mask [from Owens], the mask cannot serve as part of the basis for the reasonable suspicion supporting the detention."

¶ 37 The State responds police made several observations that led to a reasonable suspicion of criminal activity, which justified defendant's detention. Specifically, the State points to the fact that before the car was stopped, the car was driving from the area of the burglary, there were at least two African-American men in the car, defendant was looking back and forth between the police and the passenger as the car was being stopped, and Owens was shuffling his hands by the dashboard area. Then, after the car was stopped, police saw cash all over the console and falling out of the glove box, Owens was trying to hold the glove box closed with his knee, defendant

was sweating profusely and gave different answers as to why, and Owens claimed he was going to buy a car between 1:00 and 2:00 a.m. Finally, when the occupants did exit the vehicle, Owens had a mask in his pocket. The State argues the totality of the information known to the officers gave them sufficient reasonable suspicion to detain all of the vehicle's occupants.

¶ 38 We find that an investigative stop of the occupants of Javan's vehicle was justified under the circumstances. We find that the facts known to the officers at the time the occupants of the vehicle were ordered out of the car, "taken together with rational inferences from those facts," were such that would warrant a person of reasonable caution in the belief that the people in the car were involved in criminal activity and, specifically, the burglary. See *Williams*, 2016 IL App (1st) 132615, ¶ 45. When determining whether the officers' actions were appropriate, we consider the totality of the circumstances. *Id.* First, as to defendant's argument police did not know when the burglary occurred, it was reasonable for the officers to infer the burglary occurred in close proximity to the time it was reported to police, especially considering the crime was reported in the early morning hours. If a victim were going to delay in reporting a crime, it would be more reasonable to believe they would wait for daylight hours. Second, despite the fact police were not told specifically that a vehicle was involved, Javan's vehicle was traveling away from the area of what the officers could reasonably believe was a recent crime, and it was travelling without headlights. The vehicle also contained at least two people who fit the minimal description of the suspects in the burglary. The fact there were three occupants in the vehicle (a fact the officer did not know until the car was already being stopped), given the surrounding circumstances, does not mean police could not reasonably suspect that the men were the offenders. Further, not just the presence of the cash, but the way in which it appeared in the vehicle and Owens' explanation for it, again in light of the surrounding circumstances, were sufficient to give police a reasonable suspicion the occupants of the vehicle were involved in

criminal activity. The officers had seen Owens trying to hide the money and he continued to do so when they approached his car by trying to hold the glove box shut with his knee. The cash was being transported in a suspicious manner, having been stuffed into the console, on the floor, and falling out of the glove box. Moreover, Owens' explanation that he was going to buy a car at 1:00 a.m. was not credible. Finally, defendant's own suspicious behavior under the circumstances was sufficient to give police particularized suspicion he was involved in the criminal activity. "The concept that it is reasonable to infer that co-occupants of a vehicle are engaged in a common enterprise has been recognized by our appellate court." *People v. Ortiz*, 355 Ill. App. 3d 1056, 1069 (2005) (citing *People v. Allen*, 268 Ill. App. 3d 279, 284 (1994)). In this case, defendant was not just present in the vehicle, but he also associated himself with the other occupants of the vehicle when he told police they had all been playing basketball. The proximity of the vehicle to a recent crime scene, the cash, and Owens' conduct are facts that would lead a person of reasonable caution to believe criminal activity was afoot. Defendant's nervousness (profuse sweating) and evasiveness (shifting answers), as well as his presence in the vehicle (*id.*), were sufficient to give the officers particularized reasonable suspicion he was engaged in criminal activity.

¶ 39 C. Probable Cause for Arrest

¶ 40 Having determined police lawfully stopped and detained defendant, we turn next to defendant's argument he was arrested without probable cause even after King identified Owens. Defendant argues that although probable cause may have existed as to Owens, it was lacking as to him because his "mere propinquity to others independently suspected of criminal activity" does not, without more, give rise to probable cause to arrest him. Additionally, defendant argues, police only speculated he was involved in the crime because only two individuals were reported to be involved and "the second perpetrator was as or more likely to be Javan Wright."

Defendant argues police had no reliable information specific to him to give rise to probable cause for his arrest. The State responds defendant's arrest was legal because all of the facts known to the officers were sufficient to establish probable cause to arrest defendant. The State argues defendant's argument his proximity to Owens was not sufficient to establish probable cause fails because that is a single fact, but courts determine probable cause based on the totality of the circumstances. Nonetheless, the State agrees probable cause as to Owens did not itself provide probable cause to arrest defendant; but, the State argues, in addition to the facts known to police, it was reasonable to infer that defendant was engaged in a criminal enterprise with the other occupants of the car. In reply, defendant argues this rationale only applies when the vehicle itself was involved in the commission of an offense.

¶ 41 We find that the totality of the circumstances known to the police at the time of defendant's arrest were sufficient to warrant a reasonably prudent person to believe defendant had committed a crime. See *House*, 2015 IL App (1st) 110580, ¶ 78. In addition to those facts known to police that gave rise to a reasonable suspicion to detain defendant, once the occupants were removed from the vehicle police discovered a mask in Owens' possession, and a mask had been used in the burglary. Then, after the show-up, police additionally knew that one of the occupants of the vehicle in which defendant was a passenger, with others who defendant associated himself with, was identified as the perpetrator of the offense. We reject defendant's argument this is not an appropriate factor to consider when determining whether police had probable cause to arrest defendant. We do not need to resolve the question raised by defendant's argument that the premise, "it is much more likely a car passenger is a companion to the driver, and perhaps involved in the driver's criminal behavior" (see *Allen*, 28 Ill. App. 3d at 284), only applies when "the at-issue vehicle was involved in the commission of an offense." Defendant was not merely present in the vehicle but associated himself with Owens when he told police

they had all been playing basketball. Owens was clearly a suspect in the burglary and police knew (at least) 2 offenders were involved. We recognize defendant's argument police did not know a car was used or even exactly when the burglary occurred and reject it as a basis for finding a lack of probable cause in this case. Defendant seeks certainty where it is not required. "All the police need is probable cause, which is well short of certainty. [Citation.]" (Internal quotation marks omitted.) *Ross v. Mauro Chevrolet*, 369 Ill. App. 3d 794, 800 (2006). See also *Zappa v. Gonzalez*, 819 F.3d 1002, 1005 (7th Cir. 2016) ("Probable cause does not require legal certainty, nor does it demand that all the facts in the officer's possession point in only one direction. [Citation.] As the Supreme Court put it long ago, '[probable] cause exists where the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.' (Internal quotation marks omitted.) [Citation.]"). Although police did not know with certainty when the burglary had occurred, they could reasonably infer it was recent; consequently, police could reasonably infer that someone who had recently committed a crime and still had its proceeds in his possession would not admit an innocent person who could subsequently provide evidence against him into the vehicle. See *Maryland v. Pringle*, 540 U.S. 366, 801 (2003). Under the facts of this case it is much more reasonable to assume that the car passenger is "engaged in a common enterprise *** [with] the same interest in concealing the fruits or the evidence of their wrongdoing." *Id.* Moreover, "[t]he difficulty of establishing probable cause is reduced when the police know that a crime has been committed." *Brown*, 2013 IL App (1st) 083158, ¶ 23.

¶ 42 We find the fact of Owens' identification coupled with other facts known to police were sufficient to warrant a reasonable person in the belief defendant was also involved in the crime. Specifically, the vehicle was traveling away from the area of the crime in the early morning

hours with its lights off. Defendant appeared and acted nervous upon the approach of the police officers, and he gave conflicting stories as to where he was coming from. Police could reasonably infer the cash in the vehicle was proceeds from the burglary, and defendant was looking back and forth between police and Owens as Owens was trying to hide the money. Police found a mask in the possession of one of the passengers, and a mask was used in the commission of the offense. Defendant was present in a vehicle with associates, one of whom had been identified as a suspect, with apparent proceeds of a burglary, leaving the area of the crime. Practicality and common sense given the totality of the circumstances at the time of arrest dictate finding probable cause to arrest defendant.

¶ 43 Having determined police had probable cause to arrest defendant, we have no need to address defendant's argument there were no intervening factors sufficient to purge the taint of the illegal arrest from defendant's statement. Defendant's statement was not the fruit of an illegal arrest; therefore, defendant's argument the trial court should have suppressed his statement as such must fail.

¶ 44 (2) Whether defendant received ineffective assistance of counsel based on defense counsel's tender of an erroneous instruction on the law applicable to withdrawal.

¶ 45 Next, defendant argues he received ineffective assistance of counsel where his trial attorney tendered, and the trial court gave to the jury, an erroneous instruction on the affirmative defense of withdrawal. The withdrawal defense is stated in section 5-2(c) of the Criminal Code, which states that a person is not legally accountable for the conduct of another if, "before the commission of the offense, he or she terminates his or her effort to promote or facilitate that commission and does one of the following: (i) wholly deprives his or her prior efforts of effectiveness in that commission, (ii) gives timely warning to the proper law enforcement authorities, *or* (iii) otherwise makes proper effort to prevent the commission of the offense."

(Emphasis added.) 720 ILCS 5/5-2(c) (West 2012). The Illinois Pattern Jury Instruction (IPI) on the defense of withdrawal reads as follows:

> "A person is not legally responsible for the conduct of another, if, before the commission of the offense charged, he terminates his effort to promote or facilitate the commission of the offense charged and [(wholly deprives his prior efforts of effectiveness in the commission of that offense) (gives timely warning to the proper law enforcement authorities) (makes proper effort to prevent the commission of that offense)]." Illinois Pattern Jury Instructions, Criminal No. 5.04 (4th ed. Supp. 2009).

¶ 46 In this case, defendant's trial attorney tendered, and the trial court gave, an instruction that stated the various ways one may effectively withdraw from the commission of an offense (the bracketed parentheticals in the pattern jury instruction) in the conjunctive rather than the disjunctive. In other words, the instruction given to the jury stated defendant had to wholly deprive his prior efforts of effectiveness, *and* give timely warning to police, *and* make an effort to prevent the commission of the offense to effectively withdraw, but under section 5-2(c) of the Criminal Code of 2012 (720 ILCS 5/5-2(c) (West 2012)), doing any one of those things (along with terminating his effort to promote or facilitate the commission of the offense) would have been sufficient to make him "not accountable" for Owens' conduct. To prove his claim of ineffective assistance based on this error, the "familiar two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984)" applies, and defendant must establish that his trial counsel's performance in this regard "was deficient and that the deficient performance prejudiced [him.]" *People v. Cherry*, 2016 IL 118728, ¶ 24. "More specifically, the defendant must demonstrate that counsel's performance was objectively unreasonable under prevailing professional norms

and that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' [Citation.]" *Id.*

¶ 47 The State concedes the instruction given to the jury was an incorrect statement of the law. The State further admits that defendant's trial counsel's strategy "was to use defendant's confession to pursue a withdraw defense." Trial counsel's act of submitting a jury instruction that misstated the law falls below an objective standard of reasonableness. "Where defense counsel argues a theory of the case, such as an affirmative defense, but then fails to ensure that the jury is properly instructed on that theory, that failure cannot be called trial strategy. [Citation.] The question is whether defendant suffered prejudice as a result. [Citation.]" *People v. Gonzalez*, 385 Ill. App. 3d 15, 21 (2008). See also *People v. Serrano*, 286 Ill. App. 3d 485, 492 (1997) ("Where defense counsel argues a theory of defense but then fails to offer an instruction on that theory of defense, the failure cannot be called trial strategy and is evidence of ineffective assistance of counsel."). The State argues defendant's claim fails because (1) he did not suffer any prejudice because the evidence did not support a withdrawal defense and (2) defendant's trial counsel subjected the State's case to meaningful adversarial testing and, therefore, he was not ineffective.

¶ 48 The latter argument is based on an apparent misapprehension of the law, as the failure to subject the prosecution's case to meaningful adversarial testing triggers an exception to the *Strickland* test which relieves the defendant of the burden of establishing prejudice. *Cherry*, 2016 IL 118728, ¶ 25. The United States Supreme Court recognized that "there are some circumstances so likely to prejudice the accused that such prejudice need not be shown but instead will be presumed." *Id.* (citing *Strickland*, 466 U.S. at 692). The Court identified three such circumstances, the second being a complete failure of meaningful adversarial testing. *Id.* (citing *U.S. v. Cronic*, 466 U.S. 648, 659-67 (1984)). Our supreme court has explained the

second *Cronic* exception to the *Strickland* test applies when "counsel's effectiveness has fallen to such a low level as to amount not merely to incompetence, but to no representation at all. [Citations.]" (Internal quotation marks omitted.) *Id.* ¶ 26 (citing *People v. Caballero*, 126 Ill. 2d 248, 267 (1989)). Additionally, the Seventh Circuit has explained the exception "only applies if counsel fails to contest any portion of the prosecution's case; if counsel mounts a partial defense, *Strickland* is the more appropriate test. [Citation.]" (Internal quotation marks and emphasis omitted.) *Id.* (citing *U.S. v. Holman*, 314 F.3d 837, 839 n. 1 (2002)). Defendant in this case does not seek to invoke the second *Cronic* exception to the *Strickland* test. The State cannot defeat defendant's claim of ineffective assistance merely by showing that the second *Cronic* exception does not apply. Simply because defendant's trial counsel subjected some portion of the prosecution's case to adversarial testing does not mean, necessarily, that defendant was not prejudiced by trial counsel's deficient performance. See *Cherry*, 2016 IL 118728, ¶ 29 (finding the defendant's claims were governed by *Strickland* rather than *Cronic* because, if the defendant's claims of counsel's deficient performance were proven true, such performance "hardly rises to the level of 'entirely fail[ing] to subject the prosecution's case to meaningful adversarial testing.' On the contrary, if established, such a failure would fall squarely in the category of poor representation, not 'no representation at all.' "). The State's argument defendant's trial counsel was not ineffective because "counsel subjected the People's case to a meaningful adversarial testing" is wholly misplaced.

¶ 49 The State argues defendant suffered no prejudice because the evidence at trial, including defendant's statement to police, establishes defendant did not sufficiently withdraw from the offense. The State asserts that "simply running away" after the crime is in motion and almost complete is not an affirmative act which would have wholly deprived Owens of the effectiveness of defendant's prior efforts, and defendant's assertion he left Owens with no means of escape is

"wholly insufficient to show that he [(defendant)] withdrew from the crime." The State also claims that argument is belied by the fact defendant did not take the getaway car he and Owens positioned near the crime scene. The State argues "the jury would have properly rejected the withdraw defense even if the instruction had been correct. Counsel, therefore, did not prejudice defendant."

¶ 50 We find the evidence at trial did not support a withdrawal defense. Therefore, defendant cannot establish a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Internal quotation marks and citation omitted.) *Cherry*, 2016 IL 118728, ¶ 24. "Because a defendant must satisfy both prongs of the *Strickland* test to prevail, the failure to establish either precludes a finding of ineffective assistance of counsel." *Id.* To invoke the withdrawal defense defendant must be able to point to "some *affirmative act* which would have deprived his prior efforts of their effectiveness." (Emphasis added.) *People v. Tiller*, 94 Ill. 2d 303, 315 (1982).

> "In order to effectively withdraw from a criminal enterprise, defendant cannot merely withdraw, but must communicate his intent to withdraw. [Citations.] According to section 5-2(c)(3) of the Code, defendant may communicate his withdrawal from a crime in three ways: (1) by wholly depriving the group of the effectiveness of his prior efforts in furtherance of the crime; (2) giving timely warning to the proper law enforcement authorities; *or* (3) otherwise making proper efforts to prevent the commission of the crime. [Citation.]" (Emphasis added.) *People v. Jones*, 376 Ill. App. 3d 372, 386 (2007).

In *Tiller*, the defendant and his accomplice entered a business for the purpose of committing a robbery. *Tiller*, 94 Ill. 2d at 310-11. The defendant was about to leave the business without taking a television he initially picked up when he saw a postal mail carrier approaching the shop.

Id. at 311. "Before leaving, [the] defendant twice told [his accomplice] not to hurt the 'mail lady.' " *Id.* The accomplice shot and killed the mail carrier after the defendant left the business. *Id.* at 313. The defendant argued the withdrawal defense applied because "he withdrew from the robbery when he left the cleaners due to his admonition to [the accomplice] regarding the [mail carrier.]" *Id.* at 314. Our supreme court held this argument "must fail." *Id.* at 315. The court held that the defendant's actions upon leaving the business "hardly vitiates his participation in the commission of the robbery, and certainly does not absolve him from liability for the murder." *Id.* The court held that "[c]onsidering his apparent knowledge of the fact that [the accomplice] might harm her, it is essential that the record show some affirmative act which would have deprived his prior efforts of their effectiveness." *Id.* In *Tiller*, the court found that the defendant "was aware of another crime that was going to occur due to the commencement of the robbery, but did nothing to prevent the crime." *Id.* Similarly, here, even if defendant did not act as Owens' getaway driver, this would do nothing to prevent the crime that defendant knew was going to occur due to the commencement of the robbery.

¶ 51 Two cases on which the *Tiller* court relied are also instructive. In *People v. Brown*, 26 Ill. 2d 308, 313 (1962), our supreme court held that the defendant's "attempt at withdrawal came too late." In that case, four men, including the defendant, went to an apartment where it appeared an illegal tavern was being operated to rob a group of people who were gambling in the apartment. *Id.* at 311. When the men entered the apartment one accomplice said there were too many people and the defendant said "Yes, forget it, let's go." Before the men could leave another accomplice pulled out a gun and shouted, whereupon the first accomplice (who said there were too many people) pulled out his gun and announced the robbery. *Id.* at 311-12. The defendant ran away, after which the victim was shot and killed during a struggle with the first accomplice. *Id.* at 312. The defendant was found guilty of the murder. *Id.* at 309. On appeal,

the defendant in *Brown* argued that he was not guilty of the murder because he withdrew from the criminal enterprise of his companions. *Id.* at 312. Our supreme court found that by the time the defendant attempted to withdraw, "the criminal enterprise which begot the murder had already commenced." *Id.* at 313. The defendant "by his presence, was efficiently encouraging and aiding the others." *Id.* It was of no consequence that the defendant had fled before the murder took place. *Id.* at 313-14. The defendant "knew his companions were armed and is deemed to have known they would use their weapons if resistance was met. Where conspirators contemplate that violence may be necessary to enable them to carry out their conspiracy or common purpose, all are liable for the acts done in furtherance of the common object, and where death results from the prosecution of the common object, all are equally guilty of murder, whether or not each is actually present." *Id.* at 314.

¶ 52 In *People v. Hubbard*, 55 Ill. 2d 142, 150 (1973), also cited in *Tiller*, our supreme court held that the defendant "did not wholly deprive his prior efforts of effectiveness" in the commission of a murder that occurred during a robbery where the defendant failed to recover a gun he provided to the shooter. In that case, the defendant showed a gun to a group of four other young men in an apartment in a housing project. *Id.* at 146. The five left the apartment and saw an insurance-premium collector descending a stairway. At this time, one of the other men had the gun. The men "fanned out" around the victim. *Id*. When they regrouped, one of the men was pointing the gun at the victim. An apparently fake struggle ensued over the gun, and the defendant and another man left the area. *Id.* at 147. The defendant heard a shot and returned to where they had seen the intended victim, who had been shot. *Id.* Our supreme court found that "there was sufficient evidence for the jury to find that [the defendant] was part of a conspiracy to commit robbery, and that he, in fact, did acts which were intended to aid, abet and accomplish

the robbery. It [could] also justifiably be inferred that [the defendant] approved of the use of the rifle as a means of frightening the victim." *Id.* at 148.

¶ 53 In this case, defendant argues the State's theory was that defendant was to act as the getaway driver, and that he "wholly deprived his prior efforts of effectiveness, *i.e.*, by leaving Owens at the scene without a means to escape." We find the evidence does not support defendant's theory of the defense as a matter of law. Contrary to defendant's argument on appeal, there was evidence defendant knew Owens was armed. Defendant told police he saw a gun in a white bag in the basement of the Wright home before defendant and Owens drove past the Anglin residence. Defendant also stated that Owens had been talking to defendant about the robbery "all day." Thus, a reasonable trier of fact could find that defendant and Owens contemplated that violence may be necessary to enable them to carry out their common purpose. See *Brown*, 26 Ill. 2d at 314. Here, as in *Brown*, it is of no consequence that defendant left the Anglin residence before the murder since the robbery[1] had already commenced. See *id.* at 313. Nor was defendant's withdrawal effective. The defendant in *Tiller* was accountable for his accomplice's act of killing the mail carrier because the murder was in furtherance of the robbery, and the defendant failed to show an affirmative act which deprived his prior efforts in support of the robbery of their effectiveness. *Tiller*, 94 Ill. 2d at 314-15. In *Hubbard*, the "affirmative act" would have been recovering the gun the defendant provided to the shooter. See *Hubbard*, 55 Ill. 2d at 150. In this case, defendant has shown no affirmative act to deprive his prior efforts to promote or facilitate the robbery of their effectiveness. Defendant's argument on appeal that when he fled, he told Owens he was going to call police, is based on words defendant stated in

[1]For reasons that will be explained below, the home invasion, which formed the basis of defendant's felony murder conviction, was part of the common criminal design to rob Langford Anglin. See *infra* ¶ 60.

the police interview which hardly support that conclusion. (Defendant told police that he told Owens: "man I'm finna [*sic*] go. I'm finna [*sic*] go the police ***." Later, when defendant repeated to police what he said to Owens before fleeing the scene, defendant did not include any words about the police.) Regardless, defendant did not call police after leaving the residence. Even if defendant did not carry out his role in assisting in the escape from the crime, that did not deprive his prior efforts in promoting and facilitating the robbery of their effectiveness in the execution of the robbery itself, or of their effectiveness in facilitating Owens' acts in furtherance of the robbery. See *infra* ¶ 60.

¶ 54 The evidence did not support a finding pursuant to section 5-2(c) of the Criminal Code that defendant withdrew from the offense. Thus, we cannot say a reasonable probability exists that the outcome of the trial would have been different but for defendant's trial counsel tendering an incorrect statement of the law of withdrawal. Additionally, even if defendant were not accountable for first degree murder because he withdrew from the criminal enterprise before Owens shot Anthony Anglin, defendant was also convicted of felony murder based on home invasion. Defendant saw Owens pointing the gun at King, and this occurred after Owens had ransacked Langdon's room looking for money. "[T]his court held that *** section 5-2 of the Code means that where one aids another in the planning or commission of an offense, he is legally accountable for the conduct of the person he aids; and that the word 'conduct' encompasses any criminal act done in furtherance of the planned and intended act. [Citation.]" (Internal quotation marks omitted.) *People v. Fernandez*, 2014 IL 115527, ¶ 16 (citing *People v. Kessler*, 57 Ill. 2d 493 (1974)). Owens had knowingly entered the dwelling place of another and while armed with a firearm threatened the imminent use of force upon King (720 ILCS 5/19-6 (West 2012) (Home Invasion)), all before defendant allegedly "attempted" to withdraw. The predicate felony home invasion was complete and that felony resulted in the murder. See *People*

v. Davison, 236 Ill. 2d 232, 242-43 (2010) (concluding predicate felony of mob action properly formed the basis of the defendant's felony-murder conviction where the defendant completed the predicate felony "before the end of the aggression that eventually resulted in the victim's death"). Defendant would be subject to sentencing on that offense. See generally *People v. Aguilar*, 2013 IL 112116, ¶¶ 7, 30. We have no reason to believe defendant's sentence would be different. Defendant cannot prove his trial counsel's performance prejudiced him, and his claim of ineffective assistance of counsel must fail.

¶ 55 (3) Whether defendant received ineffective assistance of counsel based on defense counsel's failure to move to suppress defendant's statement as induced by false promises.

¶ 56 Next, defendant argues trial counsel was ineffective for failing to file a motion to suppress defendant's statement to police on the grounds the statement was not voluntary because it was the product of false promises of leniency. Specifically, defendant argues that detectives interviewing him implied that by telling them what he knew defendant would be absolved of responsibility for the murder. The State responds the decision not to file a motion to suppress defendant's statement was based on a reasonable strategy to use defendant's statement to support the defense of withdrawal and defendant was not prejudiced because his statement was voluntary.

> "It is a fundamental principle of criminal procedure that a confession must be voluntary; otherwise, it is inadmissible. [Citations.] The test of voluntariness is whether the statement was made freely, voluntarily and without compulsion or inducement of any sort, or whether the defendant's will was overcome at the time he confessed. [Citations.] A determination of voluntariness requires consideration of the totality of the circumstances. [Citations.] Factors to be considered in making the determination include the age, education and

> intelligence of the accused, the duration of the questioning, and whether he received his constitutional rights or was subjected to any physical punishment. [Citations.] No single fact is dispositive; the question must be answered on the facts of each case. [Citations.]" (Internal quotation marks omitted.) *People v. Johnson*, 285 Ill. App. 3d 802, 807 (1996).

¶ 57 Defendant does not argue that his age, education, or intelligence impacted the voluntariness of his statement to police. Defendant received *Miranda* warnings. He mentions that the questioning occurred after he had been in custody for almost 37 hours, and that he was inexperienced in the criminal justice system, but his only argument that the statement was involuntary is based on the detective's alleged promises of leniency. (Regardless, the length of his detention alone would not render his statement involuntary. See *People v. Lee*, 2012 IL App (1st) 101851, ¶ 37 ("While the defendant had been detained for about 46 hours at the time he began making incriminating statements to the police, we find that the time in custody alone did not render his statement involuntary.")). Defendant asserts he "clearly relied on these representations in choosing to speak with police." To constitute a promise of leniency, such a statement "must be coupled with a suggestion of a specific benefit which would follow if the defendant confessed." *People v. Eckles*, 128 Ill. App. 3d 276, 278 (1984).

¶ 58 The statements by the police on which defendant relies were not coupled with a suggestion of a specific benefit that would follow if defendant confessed. Defendant argues the detectives' "design was to lead [him] to believe that if he made admissions but disavowed participation in the shooting he would not be held culpable for the murder." The specific statements on which defendant bases that argument are: "you can either be an accessory, or you can have nothing to do with it and just tell me the truth;" "So you have the truth, in which you didn't do nothing, or you can give me some [expletive], and I know you got something to do

with it;" "I don't want you to get in so much trouble 'cause of what [Owens] did;" "you gonna have to separate yourself from [Owens.]" The statements suggesting defendant tell the truth, even coupled with the admonishment that the alternative would be worse for defendant, are not promises. Words such as "you would be better off" do not necessarily carry the implication the accused will be treated better if he makes a statement. *Eckles*, 128 Ill. App. 3d at 278. Suggestions on the advisability of making a statement and conveying to the defendant that he should tell the truth will not render a statement involuntary. See *Johnson*, 285 Ill. App. 3d at 808 (citing *People v. Hartgraves*, 31 Ill. 2d 375, 381 (1964)).

¶ 59 The statement "I don't want you to get in so much trouble ***" is not a promise by police they would do anything on defendant's behalf and it is not a promise defendant would receive less time. Regardless, even if we were to construe this statement as a promise of leniency, our review of the transcript of defendant's statement reveals "that promise did not have an influence on defendant's decision" to make a statement. See *People v. Shaw*, 180 Ill. App. 3d 1091, 1096 (1989) (distinguishing cases in which "the promise did not influence the defendant's decision to confess" (and cases cited therein)). After making this statement, police continued to question defendant at different times and confronted him with information they learned during the course of their investigation, including, significantly, King's statements about another person in the Anglin residence and the discovery of the black car defendant drove. Based on our review, defendant made statements to police because he was confronted with information revealed in the investigation and not based on any alleged promises by police.[2] Based on the totality of the circumstances, we do not find that any of the statements defendant claims constituted a promise

[2]We express no opinion on whether confronting defendant with this information would be sufficient to attenuate the taint of an illegal arrest. We have found that police had probable cause to arrest defendant; and, therefore, defendant's statements were not the product of an illegal arrest.

of leniency contained a suggestion of a specific benefit which would follow if the defendant confessed (*Eckles*, 128 Ill. App. 3d at 278) or can be said to have overborne defendant's will, rendering his confession involuntary (see *Shaw*, 180 Ill. App. 3d at 1101). Therefore, defendant cannot establish prejudice from trial counsel's failure to move to suppress the statement on this basis. Accordingly, defendant's claim of ineffective assistance of counsel fails.

¶ 60 (4) Whether defendant was denied a fair trial because the prosecution referred to his custodial statement as a "confession."

¶ 61 Finally, defendant argues he was denied a fair trial because the prosecutor misstated the evidence during closing argument by repeatedly referring to his statement to police as a confession. Defendant asserts this is a misstatement of the evidence because he "did not admit direct culpability in the offense." The State responds no error occurred because the prosecutor properly referred to defendant's statement as a confession to the offense of home invasion, and, "in the entire context of the challenged argument, the prosecutor used the word 'confession' to refer to defendant's admission to his involvement in the crime of home invasion." The State also argues defendant did not suffer substantial prejudice from the prosecutor's remarks.

¶ 62 A confession is a voluntary acknowledgment of guilt, and is distinguishable from an admission, which is any statement or conduct from which guilt may be inferred, but from which guilt does not necessarily follow. *People v. Bunning*, 298 Ill. App. 3d 725, 729-30 (1998) (citing *People v. Stanton*, 16 Ill. 2d 459, 466 (1959)). In *People v. Jackson*, 22 Ill. App. 3d 170, 172 (1974), the court considered a statement a confession "since it contained the material facts which constituted the necessary elements of the crime." The State notes the conflict created by our supreme court as to the appropriate standard of review for issues regarding the prosecutor's comments. See *People v. McGee*, 2015 IL App (1st) 130367, ¶ 55. We will not resolve this issue because whether we review this claim *de novo* (*People v. Wheeler*, 226 Ill. 2d 92, 121

(2007)) or for an abuse of discretion (see *People v. Hudson*, 157 Ill. 2d 401, 441 (1993)), our decision in this case would be the same. *McGee*, 2015 IL App (1st) 130367, ¶ 55. The State did not misstate the evidence when it referred to defendant's statement to police as a confession.

¶ 63 In *People v. Smith*, 53 Ill. App. 3d 395, 405-06 (1977), the defendant argued the trial court committed reversible error by instructing the jury the defendant had made a confession. The defendant argued his statement was not a confession. *Id.* at 406. The court defined a confession as "as a comprehensive admission of guilt or of facts which necessarily and directly imply guilt. [Citations.]" (Internal quotation marks omitted.) *Id.* In the defendant's second written statement, he relayed certain facts pertaining to the offense, a robbery and murder, but denied that he had ever fired the gun he admitted he possessed during the incident. *Id.* at 400-01. In that case, the defendant was seen entering a building and discarding an object immediately prior to his arrest. *Id.* at 399. The object was a handgun, police recovered it, and ballistics testing proved it was the gun that fired the fatal bullet. *Id.* at 399-401. With regard to the defendant's written statement, the court found as follows:

> "The defendant's statement corroborates all of the remaining evidence of guilt with one exception. The forensic evidence is that the deceased was struck with the butt of the Browning gun found behind the residence on Leavitt Street while the ballistics evidence is that the fatal bullet was fired from the Star automatic found in the vacant lot on Seeley Avenue [(the gun the defendant discarded)]. In his statement defendant said that he did not abandon a gun; he did not strike the victim with either gun; he did not fire either gun and was not in the manager's office when Collins fired the fatal shot. The only logical solution to defendant's disclaimer of firing or abandoning a gun is that it is simply an attempt to place the blame for the actual shooting upon Collins.

> However, this attempt was ill-conceived. Since defendant concedes that he cooperated with Collins in the plans for the armed robbery and was an active participant therein, defendant would be criminally responsible for the murder on the theory of accountability even though he did not actually fire the fatal shot." *Id.* at 401-02.

In addressing the defendant's argument he did not confess, and thus the trial court's instruction to the jury was erroneous, the court held "it is apparent that the last written statement which defendant made to the assistant State's Attorney was a full and complete confession to murder on the theory of accountability. It follows that the assailed instruction was not erroneous." *Id.* at 406.

¶ 64 In this case, it is apparent defendant's statement is a full and complete confession to home invasion and "to murder on the theory of accountability." Defendant's statement "corroborates all of the *** evidence of guilt." See *id.* at 401. We find defendant's argument he did not confess to home invasion because "he thought Owens was going to rob Langford, and that there was not a plan," unpersuasive. Defendant's statement makes him accountable for Owens' conduct. 720 ILCS 5/5-2 (West 2012). Defendant stated he went to the Anglin home to rob Langdon, he and Owens drove by and confirmed Langdon was in the home, they looked inside the home when they arrived, and defendant expected to receive proceeds from the robbery. When Langdon exited the house and ran, Owens ordered defendant to chase him, but defendant could not catch Langdon. At this point, defendant and Owens had not obtained any proceeds of their criminal enterprise. The proceeds of robbing Langford Anglin were obtained from his bedroom inside the residence. Defendant returned to the Anglin residence and looked for Owens inside. Owens committed the acts constituting the home invasion in furtherance of his and defendant's common design to commit a robbery, therefore defendant would be accountable for

the home invasion, felony murder, and first degree murder. *Fernandez*, 2014 IL 115527, ¶ 19 ("there is no question that one can be held accountable for a crime other than the one that was planned or intended, provided it was committed in furtherance of the crime that was planned or intended"). Defendant's statement contained the material facts which constituted the necessary elements of the crimes charged and therefore was a confession. *Smith*, 53 Ill. App. 3d at 406; *Jackson*, 22 Ill. App. 3d at 172. The prosecutor did not misstate the evidence.

¶ 65 CONCLUSION

¶ 66 For the foregoing reasons, the circuit court of Cook County is affirmed.

¶ 67 Affirmed.