2014 IL App (3d) 120483-U

Order filed January 23, 2014

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 21st Judicial Circuit, Kankakee County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-12-0483
v.	)	Circuit No. 11-CF-114
	)	
EDRICK D. WILLIAMS,	)	
	)	Honorable
Defendant-Appellant.	)	Clark Erickson,
	)	Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Justice Carter concurred in the judgment.
Presiding Justice Lytton, dissenting.

ORDER

¶ 1 *Held*: A *Terry* frisk is valid where the officer conducting the frisk can point to specific, articulable facts which, when taken together with natural inferences, would cause a reasonably prudent person to believe that his safety or that of others was in danger. A person commits the offense of attempt when, with intent to commit a specific offense, he or she does any act that constitutes a substantial step toward the commission of that offense

¶ 2 Defendant, Edrick D. Williams, appeals from his conviction of attempt armed robbery (720 ILCS 5/8-4(a) (West 2010)), alleging the State failed to prove him guilty beyond a reasonable doubt. He also appeals the circuit court's denial of his motion to suppress. Upon review, we affirm the court's judgment with regard to the motion to suppress, but reverse defendant's conviction for attempt.

¶ 3 FACTS

¶ 4 On March 25, 2011, defendant was charged by indictment with one count of attempt armed robbery (720 ILCS 5/8-4(a) (West 2010)).[1] Defendant filed a motion to suppress evidence and statements. The following evidence was adduced at the hearing on defendant's motion.

¶ 5 Officer Samuel Miller testified that he was working off-duty as a security guard at a credit union on Friday, February 25, 2011, when two individuals from a nearby funeral home approached him. The individuals informed Miller that they saw two suspicious males wearing hoodies, and sitting on a stoop of an apartment building to the south of the credit union. Miller did not remember if the individuals said the men were black. Miller passed the information about "suspicious subjects" to the Kankakee police department.

¶ 6 On cross-examination, Miller testified that there were probably three banks or credit unions in the immediate area that had recently been robbed. On redirect, Miller stated that bank

[1] Defendant was also charged and convicted of one count of unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2010)). Defendant does not appeal his unlawful possession conviction. He only requests that we remand the matter for resentencing on his unlawful possession conviction if here on appeal we ultimately affirm the denial of the motion to suppress and reverse his attempt conviction.

robberies occur sporadically in the area, but he did not receive any specific warning regarding a bank robbery on the day of the incident.

¶ 7 Officer Wayne Trudeau testified he went to the funeral home to speak with the individuals who approached Miller. The individuals told Trudeau that they had observed two suspicious black males walking up and down the street, and in between apartment buildings, while wearing gray hoodies and dark clothes. Trudeau proceeded to the apartment buildings.

¶ 8 It was around 12:30 p.m. when Trudeau approached defendant and a companion on the rear stoop of an apartment building, which was about 100 feet from the closest bank. As he approached defendant, Trudeau had heightened suspicions due to recent bank robberies, however, there was no suggestion that defendant had committed any crime or that defendant had been seen approaching a bank. Defendant did not attempt to flee, cover his face, or make any furtive movements when Trudeau approached. Trudeau added that neither defendant nor his companion seemed to be fighting, casing the apartment building, or committing any crime whatsoever.

¶ 9 Upon approaching, Trudeau explained to defendant that he had received a call regarding suspicious black males dressed as they were in the area where numerous bank robberies had taken place. Defendant answered all of Trudeau's questions. Defendant told Trudeau that he did not live at the apartments and was not visiting anyone at the apartments. Defendant was honest about not having any identification on him at the time and told Trudeau his true name and correct home address. Defendant's companion initially lied about his name.

¶ 10 About five minutes had passed when Officer Rod Wagner arrived on the scene. This gave Trudeau time to run a name check on defendant and discover that he was a 35-year-old registered sex offender and his companion was 16 years old. Trudeau testified that he did not

know what restrictions defendant had as far as being around minors but felt it was common knowledge that sex offenders need to stay away from certain places like schools and day-care facilities. Defendant told Wagner that he and his companion had come "from the high school." Defendant told Trudeau that he and his companion were waiting for someone to pick them up at the apartment; however, defendant did not know the name of the individual picking them up. Trudeau thought the age discrepancy and defendant's sex offender status created a problem. Thus, Trudeau asked defendant's companion if he would consent to a pat-down. The companion consented. During the pat-down, Trudeau pulled a pillow case out of the companion's jacket pockets.

¶ 11 The discovery of the pillow case in conjunction with the recent bank robberies in the area and defendant not living or knowing anyone at the apartments heightened Trudeau's suspicions. Trudeau asked defendant if he would consent to a pat-down, but he refused. Trudeau then handcuffed defendant for safety reasons. Specifically, Trudeau explained that there were banks nearby, a pillow case and two people whom he believed did not belong where they were as they did not live at the apartments and did not know anybody there. Trudeau concluded "a further search of these individuals was warranted for our safety." Trudeau secured defendant with handcuffs and Wagner conducted a *Terry* frisk of defendant. Trudeau acknowledged, however, that defendant had not done anything threatening, did not use any heated language or resist. Instead, Trudeau's interaction with defendant had been "pretty cordial."

¶ 12 The defense rested. The State then moved for a directed finding, which the circuit court denied. The State called Officer Rod Wagner as its sole witness.

¶ 13 Wagner testified that he arrived at the apartments to back up Trudeau. Defendant told Wagner that his leg was hurt and that he was resting at the apartments because he was unable to

walk any further. Wagner learned defendant was a sex offender and previous parolee, and that the companion was younger and not in school on a school day. Defendant refused to give consent to search his person. Trudeau then handcuffed defendant. Wagner initially testified that he was not sure why they wanted to search defendant, but figured that Trudeau must have found something on the companion. After handcuffing defendant, Wagner conducted a *Terry* frisk of defendant and felt a hard, heavy object that turned out to be a .22 caliber semiautomatic handgun. The other items found on defendant during the search were a clear plastic baggy with less than 2.5 grams of suspected cannabis, a pillow case, and a Halloween mask.

¶ 14 Upon hearing argument, the court denied defendant's motion to suppress. Defendant subsequently waived his right to a jury trial. The witnesses at the bench trial consisted of Herb Hunn (funeral home), Officers Miller, Trudeau, Wagner and Steven Hunter (interrogator). Officers Miller, Trudeau and Wagner's testimony was essentially the same as what was heard during the motion to suppress hearing.

¶ 15 Herb Hunn testified that he was the manager of a funeral home in Kankakee. Hunn noticed two black men walking together down the street. One of the men was looking straight ahead while the other man was looking up, down and around. The men were walking south when they suddenly stopped, turned around and went behind some apartments. Hunn left work briefly and observed the men sitting on some stoops behind the apartments. Hunn approached Miller at the credit union and expressed his concerns regarding the men. Hunn specified the men were wearing very dark clothing, one of them was wearing a hoodie, and a bank was about three-quarters of a block from where the men were sitting on the stoops. Hunn never observed any of the men in possession of a weapon.

¶ 16 Officer Steven Hunter testified that he was an interrogator with the Kankakee Police Department and had conducted an interrogation of defendant the day of the incident. Hunter testified that defendant agreed to speak with him after being read his *Miranda* rights. The court then played a video of the interrogation.

¶ 17 During the video interrogation, defendant stated his companion was "just a friend," but denied knowing the name or identity of his companion. Defendant admitted he had intended to commit a burglary in order to help fund his drug habit, however, he never intended to rob a bank or a person. Defendant explained that he did not intend to rob a bank because bank robbery constituted a federal offense for which he would face "30 some years, 85 percent." Defendant stated that he had a gun because he had had a lot of enemies as a result of previous burglaries he committed. Defendant also stated he had a mask because he was looking for a car to burglarize. When Hunter challenged defendant by stating an individual does not wear a mask to burglarize a car, defendant indicated he was planning to burglarize a car or a house.

¶ 18 On cross-examination, and after the video had been played in open court, Hunter testified that during the interrogation he was trying to get defendant to admit that he had intended to commit a robbery on the day of the incident. However, defendant insisted throughout the entire interrogation that he never had any intent to commit robbery.

¶ 19 The State rested after presenting the foregoing evidence. Defendant moved for a directed verdict, which was denied. Defendant rested without presenting any evidence.

¶ 20 Upon conclusion of the parties' arguments, the circuit court found defendant was proven guilty beyond a reasonable doubt as to attempt armed robbery. The court noted that defendant was arrested on a porch of an apartment building, which was on the same block as a bank. The court stated it could infer defendant had the intent to commit a crime because defendant admitted

he intended to commit a crime. The court noted there were various businesses nearby and defendant was found with a pillow case, gloves, a "rather ghoulish mask" and a handgun. The court found the mask had been placed in defendant's hood so that it could be "rather rapidly placed over his face." The court noted that a pillow case and a mask were also found on defendant's companion. Thus, the court held it could be inferred the two were "up to no good" and "had a criminal purpose." Moreover, the court stressed there was direct evidence of a criminal purpose based on defendant's admission that the two were looking to commit a burglary of a car or burglarize a home.

¶ 21 The court referenced defendant's statement that he had a gun for protection and that he was not going to commit a bank robbery because it was a federal crime for which he "could do 30 years." The court stated: "[A] person with that kind of awareness of the possible risk or consequences of being caught committing a crime is not gonna commit a car burglary in the daylight. It's gonna be unlikely to commit a home burglary in the daylight." The court believed that if defendant were only going to commit a burglary there would be no need for a mask. Specifically, the court believed it was unlikely burglars would wear a mask and carry a pillow case and handgun. The court stated: "[I]t defies common sense to think that someone who is as experienced as [defendant] is going to gather together for himself and somebody else all of this gear that really the combination of which is uniquely suited for committing an armed robbery and then go out and break into a car in daylight. *** I think that he and M.J. (companion) were gonna rob somebody."

¶ 22 The court recognized that the questions he had to decide were whether defendant's conduct constituted a substantial step and was the State required to prove a specific intended victim. The court held defendant committed a substantial step because he gathered together with

another person; secured a pillow case for each, secured a mask for each; secured a gun; and went to a location that provided "plenty" of opportunity for committing an armed robbery. In coming to this conclusion, the court rejected defendant's explanation that he was resting and waiting for a ride. Specifically, the court found this explanation was "not believable."

¶ 23 As for a specific victim, the court found that the State did not need to establish a specific victim. The court referenced the IPI instruction which did not require for the offense of attempt that there be a specific victim. The court did ask why the State why it did not name a business, but held that the most likely victim was the nearby bank. The court also noted several other businesses in the area that defendant could have chosen to rob. Ultimately, the court found defendant was proven guilty beyond a reasonable doubt of attempt armed robbery.

¶ 24 ANALYSIS

¶ 25 The instant appeal presents us with two issues: (1) whether the circuit court erred in denying defendant's motion to suppress, and (2) whether a rational trier of fact could have found defendant guilty of armed robbery beyond a reasonable doubt. While we hold the motion to suppress was properly denied due to the officers having adequate grounds to conduct a *Terry* frisk, we find insufficient evidence in the record from which the trier of fact could find beyond a reasonable doubt that defendant had taken a substantial step toward the commission of armed robbery.

¶ 26 I. Motion to Suppress

¶ 27 In reviewing a circuit court's ruling on a motion to suppress, mixed questions of law and fact are presented. Factual findings made by the circuit court will be upheld on review unless such findings are against the manifest weight of the evidence. *People v. Crane*, 195 Ill. 2d 42,

51 (2001). We then review *de novo* whether suppression is warranted under those facts. *People v. Gonzalez*, 184 Ill. 2d 402, 412 (1998).

¶ 28 Defendant contends the *Terry* frisk was "unlawful" because the record is devoid of any "specific facts indicating that the officers feared for their safety or that he (defendant) was armed." Instead, defendant calls our attention to the facts that he truthfully and cordially answered all of the officers' questions, he did not run when approached by the officers and he was never seen committing any crime. Defendant also argues that his handcuffing transformed the *Terry* stop into an illegal arrest.

¶ 29 Both the fourth amendment and the Illinois Constitution of 1970 guarantee the right of individuals to be free from unreasonable searches and seizures. U.S. Const., amend. IV; Ill. Const. 1970, art. I § 6. The United State Supreme Court in *Terry v. Ohio*, 392 U.S. 1, 30 (1968), held that a brief investigatory stop, even in the absence of probable cause, is reasonable and lawful under the fourth amendment when a totality of the circumstances reasonably lead the officer to conclude that criminal activity may be afoot and the subject is armed and dangerous. See also *People v. Close*, 238 Ill. 2d 497, 505-06 (2010) (recognizing that Illinois courts follow Terry and adhere to its standards when reviewing the propriety of investigatory stops under the Illinois Constitution).

¶ 30 The *Terry* court held that when a police officer observes unusual conduct that reasonably leads him to conclude criminal activity may be afoot and the individual he is dealing with is armed and presently dangerous, the officer is permitted to stop the individual and make reasonable inquiries. *Terry*, 392 U.S. at 27. If, however, "nothing in the initial stages of the encounter serves to dispel [the officer's] reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search

of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him." *Terry*, 392 U.S. at 30-31. The court emphasized that "[t]he officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Terry*, 392 U.S. at 27.

¶ 31 With these principles in mind, we consider whether the trial court erred in denying defendant's motion to suppress. The parties agree that the officers' initial approach and their questioning of defendant were lawful. The sole question before us is whether *Terry* justifies the officers' subsequent decision, after questioning defendant and finding a pillow case on his companion, to handcuff and search defendant. We answer this question in the affirmative.

¶ 32 Here, defendant and his companion matched Herb Hunn's description of two "suspicious" individuals located in an area that recently has been subject to several bank robberies. When the officers approached, defendant was found sitting on the rear stoop of an apartment building, which was within 100 feet of a local bank. Defendant did not live in the apartment building, nor did he know anyone living there. Defendant did not have any identification in his possession. He stated he was waiting to get picked up, however, he did not know the name of the individual picking him up. Defendant was a registered sex offender and his companion was 16 years old. Defendant referred to his companion as his "little buddy" and stated to the officers that he and his companion "came from the high school." The officers found a pillow case on the companion.

¶ 33 Reviewing the actions of the officers under an objective standard, we believe that a reasonably cautious individual, when confronted with the above facts, could reasonably suspect defendant was involved in some sort of criminal activity, whether it is the involvement of a

registered sex offender with a 16 year old, or burglary of a car or apartment building, or robbery of the nearby bank. We emphasize that the validity of the *Terry* frisk was not dependent on the officers having witnessed the actual commission of one of these three crimes. Instead, each of these three reasonable suspicions implicates officer safety and thus justified the *Terry* frisk. Defendant's motion to dismiss was properly denied.

¶ 34 Contrary to defendant's suggestion, the fact that he was handcuffed did not transform the *Terry* stop into an illegal arrest. See *People v. Colyar*, 2013 IL 111835 ¶ 46. "Ultimately, the propriety of handcuffing during a *Terry* stop depends on the circumstances of each case." *Colyar*, 2013 IL 111835 ¶ 46. Here, we believe the handcuffing was reasonable and necessary because the officers could reasonably suspect that defendant was in possession of a gun or weapon. See *Colyar*, 2013 IL 111835 ¶ 46. We also note that the record is devoid of any evidence that the officers used excessive force or that defendant's brief detention while handcuffed and searched was overly intrusive or otherwise exceeded the scope of a limited search for weapons. See *Colyar*, 2013 IL 111835 ¶ 46. Finally, even if we were to accept defendant's argument that his handcuffing mutated the police encounter into an arrest, the above facts are sufficient to satisfy the more demanding probable cause standard. See *People v. Smith*, 214 Ill. 2d 338, 352 (2005) (a peace officer's arrest of a citizen must be supported by probable cause).

¶ 35 II. Reasonable Doubt

¶ 36 We review a challenge to the sufficiency of the evidence to determine 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " *People v. Collins*, 214 Ill. 2d 206, 217 (2005) quoting *People v. Cox*, 195 Ill. 2d 378, 387 (2001). Thus, it

is our duty in the instant case to carefully examine the evidence while giving due consideration to the fact that the trier of fact saw and heard the witnesses. *People v. Smith*, 185 Ill. 2d 532, 541 (1999). "If, however, after such consideration we are of the opinion that the evidence is insufficient to establish defendant's guilt beyond a reasonable doubt, we must reverse the conviction. *Smith*, 185 Ill. 2d at 541.

¶ 37 Defendant maintains that the State failed to establish his guilt beyond a reasonable doubt because there is no evidence that he "had taken a substantial step towards the commission of armed robbery." Defendant calls our attention to the fact that the State "never proved that he had even approached an identified target." In support, defendant cites the supreme court's decision in *People v. Smith*, 148 Ill. 2d 454 (1992). In response, the State cites the court's holding in *People v. Terrell*, 99 Ill. 2d 427 (1984). Before reviewing these two cases, however, we set out the applicable authority regarding the offenses of armed robbery and attempt.

¶ 38 "A person commits robbery when he or she knowingly takes property *** from the person or presence of another by the use of force or by threatening the imminent use of force." 720 ILCS 5/18-1 (West 2010). A person commits armed robbery when he commits robbery and "carries on or about his person or is otherwise armed with a firearm." 720 ILCS 5/18-2(2) (West 2010).

¶ 39 "A person commits the offense of attempt when, with intent to commit a specific offense, he or she does any act that constitutes a substantial step toward the commission of that offense." 720 ILCS 5/8-4 (West 2010). The general law regarding attempt was recently set out in *People v. Oduwole*, 2013 IL App (5th) 120039 ¶ 43-45.

> "The offense of attempt is generally recognized as an inchoate offense because it is preliminary to another and more

serious principal offense. [Citation.] It has been long recognized that troublesome questions arise in the area of inchoate offenses in regard to what intent is necessary and when preparation to commit an offense ceases and perpetration of the offense begins. [Citation.]

It is impossible to compile a definitive list of acts for each criminal offense which, if performed, would constitute a substantial step toward the commission of that offense. [Citation.] What constitutes a substantial step must be determined on a case-by-case basis by evaluating the unique facts and circumstances in each particular case. [Citations.] There must be an act or acts toward the commission of the principal offense, and the act or acts must not be too far removed in time and space from the conduct that constitutes the principal offense. [Citations.] A defendant does not have to complete the last proximate act to the actual commission of the principal offense, but mere preparation is not enough. [Citation.] The facts are to be placed on a 'continuum between preparation and perpetration. [Citation.] A substantial step occurs when the acts taken in furtherance of the offense place the defendant in a dangerous proximity to success. [Citation.]

Though the 'substantial step' issue must be determined based upon the facts and circumstances in each particular case, the Illinois Supreme Court has said that courts may be guided by prior

case law and by the Model Penal Code [Citations.] The Model Penal Code lists types of conduct that are to be considered sufficient as a matter of law to support an attempt conviction, as long as the conduct is strongly corroborative of the actor's criminal purpose. The types of conduct referenced in the Model Penal Code follow:

> '(a) lying in wait, searching for or following the contemplated victim of the crime;
>
> (b) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;
>
> (c) reconnoitering the place contemplated for the commission of the crime;
>
> (d) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed;
>
> (e) possession of materials to be employed in the commission of the crime, that are specially designed for such unlawful use or that can serve no lawful purpose of the actor under the circumstances;
>
> (f) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its

commission, if such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances;

(g) soliciting an innocent agent to engage in conduct constituting an element of the crime. [Citation.]' "

¶ 40 In *Terrell*, the defendant was indicted for the offenses of attempt armed robbery and unlawful use of a weapon. The record established that an anonymous telephone caller stated that two men, armed with guns, were hiding behind a local gas station. Two patrol cars responded to the call. Upon arriving, one of the officers saw the defendant crouched in the weeds 20 to 30 feet from the gas station. As the officer got out of his car, the defendant, who was carrying a gun, jumped up from the weeds, ran towards the fence, climbed to the other side, and then ran down another street. Some 12 to 15 minutes after the initial contact, the second officer discovered the defendant hiding in the weeds behind a second company which was located nearby. A black nylon stocking with a knot at the end of it was found in his pocket. A second individual who had also fled the scene upon the approach of the police was subsequently arrested about 180 feet from the scene of the original confrontation.

¶ 41 The defendant in *Terrell* raised arguments similar to those raised here in that the State failed to establish, beyond a reasonable doubt, the requisite intent to commit armed robbery and the completion of a substantial step towards the commission of armed robbery. In rejecting these arguments, the supreme court looked to the Model Penal Code factors. *Terrell*, 99 Ill. 2d at 435-36. The court noted that the defendant was in possession of the materials necessary to carry out the armed robbery. *Terrell*, 99 Ill. 2d at 432-33. Specifically, the defendant was in possession of

a stocking mask and a gun. *Terrell*, 99 Ill. 2d at 433. Both the anonymous caller and the officers witnessed defendant holding the gun, as opposed to simply having it on his person. *Terrell*, 99 Ill. 2d at 429-30. More importantly, however, the court cited that the defendant concealed himself in weeds and was lying in wait only 25 to 30 feet from the gas station, which was about to open for the day. *Terrell*, 99 Ill. 2d at 433. Thus, the trier of fact "could reasonably infer that the gas station was the object of [the] defendant's plan." *Terrell*, 99 Ill. 2d at 432. The court also found it significant that defendant immediately fled when approached by the officers. *Terrell*, 99 Ill. 2d at 433. Ultimately, the court found that "the evidence presented *** [was] sufficient to establish, beyond a reasonable doubt, [the] defendant's intent to commit armed robbery of an individual within the service station and that he took a substantial step toward the commission of the armed robbery." *Terrell*, 99 Ill. 2d at 436.

¶ 42 In *Smith*, the defendant was indicted for the offenses of attempt armed robbery and unlawful use of a weapon by a felon.[2] The record established the defendant entered a taxi cab and requested that the cab driver take him to Waukegan, specifically to Genesee Street where the defendant said he was looking for a jewelry store. At one point, the cab driver spotted a jewelry store and pointed it out to the defendant, but the defendant told him that was "not the one." After noticing a police car, defendant instructed the driver to take him to the train station. Upon their arrival, defendant drew a gun and robbed the driver. The defendant drove off in the cab.

¶ 43 A short time later, police located the stolen cab about 1 1/2 miles from the train station. While surveying the area, the police saw the defendant walking. When the defendant saw the

[2] The defendant was also convicted of armed robbery and aggravated assault, however, he did not appeal these convictions, electing instead to appeal only his convictions for attempt armed robbery and unlawful use of a weapon by a felon.

police, he started running and dropped his gun, some money, and a blue pillowcase. Subsequently, the police found the defendant hidden in a nearby trailer. The defendant was arrested and admitted that he intended to rob an unidentified jewelry store on Genesee Street and to use the stolen cab as a getaway vehicle. The defendant stated that although he did not know the name of the jewelry store, he knew what the building looked like.

¶ 44 The arguments raised in *Smith* mirror those made in *Terrell* and here on appeal. The supreme court held that, although the defendant admitted that he intended to rob a jewelry store, possessed a weapon and a pillowcase, and had stolen a cab to serve as a getaway vehicle, the fact that he had not identified his target precluded a finding that the defendant had taken a substantial step. *Smith*, 148 Ill. 2d at 462-63. Specifically, the court stated:

> "In this case, as defendant notes, there is no evidence as to the location of the jewelry store, even though defendant did drive along the street where he expected to find it. Nor is there any evidence on how close defendant came to the jewelry store, or the name of the jewelry store. In essence, the State is charging defendant with attempted armed robbery of an unnamed, undetermined jewelry store. Although the police maintained that defendant had told them that he 'knew what the building looked like,' there is no evidence that defendant ever identified the building. Presumably he did not. Moreover, besides the 'Mexican' jewelry store previously mentioned, there is no evidence in the record of a jewelry store on Genesee Street. Thus,

we believe that it would be improper to conclude that defendant came 'within a dangerous proximity to success.' [Citations.]

The State maintains that the Model Penal Code factors quoted in *Terrell*, which may be considered to be a substantial step, demonstrate that defendant committed attempted armed robbery. We disagree. Initially, we note that these factors apply only if 'strongly corroborative of the actor's criminal purpose.' [Citation.] Such strong corroboration is absent in this case. First, although defendant was 'searching for' the jewelry store, 'the contemplated victim of the crime' was never identified. [Citation.] The appellate court stated 'defendant, as well as the State, was unable to give the name, address or description of the store that was 'the contemplated victim.' [Citation.] Consequently, this lack of information contradicts the existence of a specific 'contemplated victim' as required by the Model Penal Code. Second, it would be incorrect to hold that defendant was 'reconnoitering the place contemplated for the commission of the crime' [citation], given that the place contemplated for the commission of the crime, *i.e.*, the jewelry store, has yet to be identified, either by name, location, or physical description. We believe that 'reconnoitering' presumes that the place to be reconnoitered has already been located and identified.

Third, the materials found on defendant, the gun and

> pillowcase, are not 'materials *** which are *specifically designed*' for the unlawful purpose of robbing a jewelry store. (Emphasis in original.) [Citations.] Finally, since the jewelry store has yet to be named or located, defendant did not 'possess *** materials to be employed in the commission of the crime, *at or near the place contemplated for its commission.*' " (Emphasis in original.) [Citation.] *Smith*, 148 Ill. 2d at 462-64.

¶ 45 Although neither *Terrell* nor *Smith* is exactly on point with the facts of the present case, we find the instant case to be more analogous to the circumstances in *Smith*, as opposed to those in *Terrell*. For example, defendant was not concealing himself and lying in wait 20 to 30 yards from a specific target. Defendant also was not seen *holding* a firearm, nor was he seen approaching any bank or business. Instead, defendant was found on the rear stoop of an apartment building. Defendant did not flee when approached by the officers. By the officers' own admission, defendant cordially answered all of their questions. While defendant admitted that he intended to commit burglary, he consistently denied any intent to commit robbery.

¶ 46 The State did not argue that defendant had planned to rob any specific bank or business. Rather, the State merely asserted that there were several banks and businesses located in the general vicinity that defendant could rob. As in *Smith*, the State was in essence charging defendant with attempt armed robbery of an unnamed, undetermined entity (bank or business). See *Smith*, 148 Ill. 2d at 463. We find it significant that the *Smith* court, even in light of the defendant's admission that he intended to rob a jewelry store, held that the State's failure to establish which specific jewelry store the defendant intended to rob resulted in the inability to establish that defendant came "within a dangerous proximity to success." See *Smith*, 148 Ill. 2d

at 463, quoting *Terrell*, 99 Ill. 2d at 434. Here, we do not even have an allegation, let alone proof, of what defendant specifically intended to rob. Thus, we find the State failed to establish beyond a reasonable doubt that defendant's actions constitute a substantial step towards the commission of armed robbery.

¶ 47 We reject the State's reliance upon the facts that defendant was armed and carrying a pillow case and mask. The *Smith* court held that a gun and a pillowcase are not materials that are specifically designed for the unlawful purpose of robbery. *Smith*, 148 Ill. 2d at 464. We do not believe that the addition of a mask, absent any additional facts such as those in *Terrell* (laying in wait extremely close to a *specific* target, actually holding the gun, running from police), changes this conclusion. We also note that a mask can be used to conceal one's identity while conducting a burglary.

¶ 48 The trial court's conclusion that an individual with knowledge of federal sentencing ranges would not commit a burglary in daylight is speculative. Some burglaries are, in fact, committed in daylight where there is knowledge that the home is empty. Similarly, the assumption that burglars do not arm themselves with a weapon is unreasonable – burglaries do escalate to armed robberies when, for example, a burglar is surprised by the return of the car's occupants or the home's residents. Generalizations such as those made in the instant case are untenable. Absent specific articulable facts, arguments that burglars may be armed with weapons or they may not, or that burglaries occur in the daytime or at night are equally persuasive and equally inconclusive.

¶ 49 Accordingly, we reverse defendant's conviction for attempt armed robbery. In doing so, we vacate defendant's sentence for unlawful possession of a weapon by a felon and remand for resentencing. As the supreme court noted in *People v. Cardona*, 158 Ill. 2d 403, 414 (1994), the

trial court's considerations in imposing sentence on a single conviction rather than multiple convictions might now be different. We find reversal of defendant's conviction for attempt has changed the facts and circumstances of the instant case drastically. Per both parties agreement, we also vacate defendant's $200 DNA analysis fee.

¶ 50 Affirmed in part, reversed in part, vacated in part, remanded for resentencing.

¶ 51 JUSTICE LYTTON, dissenting.

¶ 52 I dissent from the majority's decision as to the motion to suppress and the finding of reasonable doubt. I disagree with the majority's conclusion that Officer Wagner conducted a valid *Terry* frisk of defendant; I would have reversed the trial court's denial of the motion to suppress and remanded for further proceedings. I also disagree with the majority's holding that a rational trier of fact could not have found defendant guilty of attempted armed robbery beyond a reasonable doubt.

¶ 53 I. Motion to Suppress

¶ 54 An officer may conduct a warrantless investigatory stop where the officer can point to specific, articulable facts that, when combined with rational inferences derived from those facts, create reasonable suspicion that the person seized has committed or is about to commit a crime. *Village of Mundelein v. Thompson*, 341 Ill. App. 3d 842, 848 (2003). Establishing whether an officer is justified in conducting a *Terry* stop is a fact driven process and must be approached on a case by case basis. *People v. Hubbard*, 341 Ill. App. 3d 911 (2003). A *Terry* stop detention cannot be justified on the basis of "unparticularized suspicion" or a "hunch." *People v. Gherna*, 203 Ill. 2d 165, 181 (2003) (citing *Terry v. Ohio*, 392 U.S. 1, 27 (1968)).

¶ 55 During a *Terry* stop, the right to frisk is not automatic. *People v. Galvin*, 127 Ill. 2d 153 (1989). To justify a *Terry* frisk, the question that must be answered is whether a reasonably

prudent person in the circumstances would be warranted in the belief that his safety or that of others was in danger. *People v. Ware,* 264 Ill. App. 3d 650 (1994). The officer must have reason to believe that the individual he is investigating is armed and presently dangerous. *People v. Flowers*, 179 Ill. 2d 257 (1997).

¶ 56 Here, defendant and his companion were cooperative during the entire incident. Officer Trudeau testified that defendant was "pretty cordial" and was not combative. He provided his name, date of birth, and current address. He told the officers that he did not live at the apartment building and that he was waiting for someone to pick him up. Although he could not recall the name of the person who was picking him up, he gave a detailed description of the vehicle. Officer Trudeau testified that prior to conducting the *Terry* frisk, he concluded that defendant looked "suspicious" because he was walking in the area where bank robberies had recently taken place. That fact, however, would not cause a reasonable person to fear for his safety or the safety of others. Even if the officer had a hunch defendant was attempting to commit a robbery, mere subjective feelings from the officers do not justify a frisk based on the circumstances. See *Galvin*, 127 Ill. 2d at 165-170 (subjective testimony of officer, standing alone, does not satisfy the safety requirement). Prior to the pat down search of defendant, no specific facts indicated that defendant was armed or was a threat to the officers' safety. At that point, the only evidence recovered in support of Trudeau's suspicion was a pillow case from the pocket of defendant's companion. A pillow case does not warrant an officer's belief that his safety or that of others is in danger. See *People v. Anderson*, 304 Ill. App. 3d 454, 463 (1999) (mere fact that the defendant put something in his jacket pocket would not cause a reasonable person to fear for his safety). Thus, the evidence presented at the suppression hearing did not demonstrate that

defendant was a threat to the safety of the officers prior to the *Terry* frisk, and the motion to suppress should have been granted.

¶ 57 II. Reasonable Doubt

¶ 58 Assuming, as the majority concludes, that the trial court properly denied the motion to suppress, I believe the evidence presented at trial supports the reasonable inference that defendant took a substantial step toward the commission of crime of armed robbery.

¶ 59 A person commits armed robbery where he or she takes property from the person or presence of another by the use of force or by the threat of the imminent use of force and carries on or about his person a dangerous weapon. 720 ILCS 5/18-2(a) (West 2010). Attempt armed robbery is committed when a person, while armed with a gun, has the specific intent for, and takes a substantial step toward, the commission of a robbery. 720 ILCS 5/8-4(a) (West 2010); *People v. Smith*, 148 Ill. 2d 454 (1992). A substantial step must put the accused in a "dangerous proximity to success." *People v. Morissette*, 225 Ill. App. 3d 1044, 1046 (1992). Whether a substantial step has been taken is to be determined by evaluating the facts and circumstances of each particular case. *People v. Jiles*, 364 Ill. App. 3d 320 (2006). Lying in wait, reconnoitering the place contemplated for the commission of the crime, possession of materials to be employed in the commission of the crime, and possession of material to be employed in the commission of the crime at or near the place are all types of conduct that support an attempt conviction. *People v. Oduwole*, 2013 IL App (5th) 120039, ¶ 45 (citing Model Penal Code § 5.01(2) (1985)).

¶ 60 In this case, defendant's conduct strongly corroborated his criminal intent to commit armed robbery. Defendant was questioned by Officer Trudeau on the stoop of an apartment building within 100 feet of a nearby bank in an area where several banks had been robbed in recent weeks. He had no purpose for his presence at the apartment building other than his

statement that his leg hurt and he was waiting for a ride. Defendant appeared to by lying in wait, reconnoitering the area. In addition, Trudeau searched defendant's companion and found a pillow case and a "Scream" mask. Officer Wagner searched defendant and found another pillow case, a mask and a handgun. Defendant and his companion were in possession of materials that would be used to commit an armed robbery. Moreover, the mask, pillow case and handgun served no lawful purpose under the circumstances. Thus, a trier of fact could reasonably infer that defendant had taken a substantial step toward committing armed robbery.

¶ 61 Nevertheless, the majority finds the evidence insufficient because the State failed to show that defendant planned to rob a *specific* bank, citing *Smith*. In *Smith*, the defendant took a train to Waukegan and hired a cab to drive him up and down the streets looking for a jewelry store. He eventually instructed the driver to take him back to the train station where he robbed the cab driver and stole the cab. In that case, there was no evidence as to the location of the jewelry store, how close defendant came to the jewelry store or the name of the jewelry store. *Smith*, 148 Ill. 2d at 462-63. Here, the evidence demonstrates that defendant was arrested while sitting on a stoop approximately 100 feet from First Trust Bank in an area that had recently experienced a rash of bank robberies, and he was in possession of materials used to commit such a robbery. In light of the evidence, I would affirm defendant's conviction.