2022 IL App (4th) 190705-U

NOS. 4-19-0705, 4-21-0103 cons.

FILED
February 1, 2022
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Woodford County
DAVID D. BOYD,	)	Nos. 18CF81
Defendant-Appellant.	)	18TR996
	)	
	)	Honorable
	)	Michael L. Stroh,
	)	Judge Presiding.

PRESIDING JUSTICE KNECHT delivered the judgment of the court.
Justices Cavanagh and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed in part and reversed in part, concluding (1) the State failed to prove defendant guilty of driving with a suspended license beyond a reasonable doubt, (2) the trial court's denial of defendant's motion to suppress evidence was proper, and (3) the trial court's Rule 431(b) admonishments did not constitute a clear error requiring reversal.

¶ 2 In these consolidated cases, defendant, David D. Boyd, appeals from his convictions for possession of a stolen motor vehicle (625 ILCS 5/4-103(a)(1) (West 2018)), a Class 2 felony (Woodford County case No. 18-CF-81), and driving while his license was revoked (*id.* § 6-303(a)), a Class A misdemeanor (Woodford County case No. 18-TR-996). Defendant argues (1) the State failed to prove him guilty of driving while his license was revoked beyond a reasonable doubt, (2) the trial court erred when it denied his motion to

suppress evidence obtained from the stop leading to his arrest, and (3) the trial court failed to comply with Illinois Supreme Court Rule 431(b) (eff. July 1, 2012). The State concedes it failed to prove defendant guilty of driving while his license was revoked and that his conviction in case No. 18-TR-996 should be reversed. The State asserts this court should otherwise affirm the trial court's judgment, arguing the court properly denied defendant's motion to suppress and substantially complied with Rule 431(b). We reverse defendant's conviction for driving while his license was revoked and otherwise affirm the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 In May 2018, the State charged defendant by information with (1) possession of a stolen motor vehicle, a Class 2 felony (625 ILCS 5/4-103(a)(1) (West 2018)), in that he knowingly and without authority possessed a vehicle belonging to Emma J. Jackson, a 2002 Kia Optima, while knowing it to have been stolen and (2) driving while his license was revoked, a Class A misdemeanor (*id.* § 6-303(a)), in that he drove a motor vehicle in Woodford County, Illinois, at a time when his driving privilege was revoked. In July 2018, the information with respect to the charge for possession of a stolen motor vehicle was superseded by indictment.

¶ 5 A. Motion to Suppress Evidence

¶ 6 In July 2018, defendant filed a motion to suppress evidence. In his motion, defendant argued at the time he was initially stopped and questioned regarding his possession of the allegedly stolen vehicle, officers did not have reasonable suspicion to stop defendant or probable cause to arrest him, and therefore his constitutional right to be free of unreasonable searches and seizures was violated. U.S. Const., amend. IV; Ill. Const. 1970, art. 1, § 6. Defendant argued any evidence gathered subsequent to his arrest should therefore be suppressed.

¶ 7 In August 2018, the trial court held a hearing on defendant's motion to suppress, wherein the following evidence was presented.

¶ 8 1. *Defendant*

¶ 9 Defendant testified as follows. On May 24, 2018, defendant was walking down a public street in Metamora, Illinois, around 2 p.m. A police officer pulled into a public parking lot, where he exited his police vehicle and approached defendant. The officer asked defendant for identification, which he provided, and about where he was going. A short time later, a second officer arrived, who also asked him questions. After the officers appeared to be finished asking him questions, defendant asked if he could leave, and the officers responded, " '[N]ot yet.' " The officers informed defendant they were in contact with another officer regarding a car that had been stolen nearby and asked whether defendant had stolen it. Defendant denied stealing a car. The officers asked if defendant would be willing to be transported to another location "to go and be identified," to which defendant responded he would not. Defendant again asked if he could leave, and again officers told him, " '[N]ot yet.' "

¶ 10 Following a back-and-forth via radio between the officers at defendant's location and the other officer inquiring about the stolen car, defendant was ordered to turn around, face the police vehicle, and place his hands behind his back. The officers placed defendant in handcuffs and removed all of the items from defendant's pockets before putting him into the first officer's vehicle. Defendant testified he spoke with the officers for approximately 10 to 15 minutes before being handcuffed.

¶ 11 The first officer then drove defendant about 10 minutes away to a home on a "country road." Defendant was not familiar with Metamora and testified he informed officers he would not voluntarily go to that location. Upon arrival, defendant heard an additional officer,

who was already at the location, say, " '[Y]eah, that's the guy. Just put him in my car.' " Defendant was then transferred into the vehicle of the additional officer. Defendant then observed two men drive up from behind the home in either "a two-seater driving lawn mower" or a "golf cart." The officer then opened the door to the vehicle so defendant, who was still in handcuffs, was visible. The two men stopped to speak with each other and looked toward defendant. One of the men "nodded" to the officer who was on the scene when defendant arrived, after which the men proceeded back behind the home.

¶ 12 On cross-examination, defendant testified at the time of his arrest, he lived in Chatham, Illinois. Defendant admitted he was wearing blue jeans and a red, long-sleeved shirt, and had long hair and a beard when he was arrested. Defendant agreed when he arrived at the home with the officers, his hair looked the same and he was wearing the same clothing as when the officers initially approached him.

¶ 13 2. *Michael Ealey*

¶ 14 Deputy Michael Ealey testified he worked for the sheriff's department in Woodford County. On the afternoon of May 24, 2018, Deputy Ealey received a call regarding a suspicious car outside of Metamora at 1356 Douglas Road. When he arrived, Officer Peter Merkle from the Metamora Police Department was there. Deputy Ealey observed the suspicious car in question, which was a Kia Optima. The car had been reported as stolen earlier that morning.

¶ 15 The two men who had called the vehicle in, Ralph Norton and William Christ, approached Deputy Ealey and Officer Merkle and told the officers they observed a man pull up in the Kia, exit it, and "walk around the vehicle like there was something wrong with it." They noticed the Kia appeared to be "smoking." They further described the man as white, tall, and

thin, with long hair and a long-sleeved maroon shirt. Officer Merkle informed Deputy Ealey he saw a man matching that description earlier in Metamora near a McDonald's. After Officer Merkle provided the description to the rest of the police department, Chief Michael Todd of the Metamora police department also observed a man matching that description near the McDonald's. Officer Merkle then departed to assist Chief Todd in making contact with the potential suspect while Deputy Ealey stayed at the Douglas Road house.

¶ 16 When Officer Merkle returned, he had a passenger with him, whom Deputy Ealey identified as defendant. Deputy Ealey observed defendant was wearing a maroon long-sleeved shirt and had long hair and a beard. Based on the description, Deputy Ealey believed defendant was the suspect they were looking for. Deputy Ealey then transferred defendant from Officer Merkle's vehicle to his own, at which point Norton and Christ informed him that defendant was the man they previously observed exit the Kia. Norton and Christ also informed Deputy Ealey when they initially saw the Kia, it was being driven on their street very slowly and there was "a line of cars behind it," which they found suspicious. After the Kia was parked in front of the home, they saw the man who exited was wearing long sleeves, which they also found "odd" because it was a hot day; the temperature was over 90 degrees Fahrenheit.

¶ 17 On cross-examination, Deputy Ealey admitted he did not ask Norton and Christ how far away they were when they saw defendant. Deputy Ealey also agreed he did not separate Norton or Christ before having them make the identification. There was no reason defendant was not taken to the jail and put through a "regular lineup procedure."

¶ 18 3. *Officer Merkle*

¶ 19 Officer Peter Merkle testified he worked for the Metamora Police Department as a patrol officer. On May 24, 2018, he responded to a call at 1356 Douglas Road regarding "a

suspicious male in a vehicle." Upon arrival, Officer Merkle observed the Kia and ran its license plates, which "came back as a stolen vehicle out of Peoria." He then received a description of a white male suspect that included "a long-sleeve red shirt, blue jeans and a hat, long hair." Prior to receiving that description and on his way to the Douglas Road house, Officer Merkle had driven past a man matching that description near the McDonald's on Route 116. Officer Merkle then contacted his chief via radio and asked him to stop the man he had seen near the McDonald's "for questioning." Once Deputy Ealey arrived at the house, Officer Merkle left to assist Chief Todd with questioning the man walking near the McDonald's. Officer Merkle recalled the Douglas Road house was only about one quarter of a mile away from the McDonald's, and it took him less than two minutes to drive there.

¶ 20 When Officer Merkle met with Chief Todd, he began questioning the man Chief Todd had stopped, who he identified as defendant. Officer Merkle then transported defendant to the Douglas Road house, where he turned defendant over to Deputy Ealey. Officer Merkle did not speak with Norton or Christ.

¶ 21 Around the time he received the call, Officer Merkle saw approximately 10 or 15 people walking around outside in the area of town where he found defendant. He did not see any other people matching a description that included long hair, a beard, and wearing a long-sleeved red shirt.

¶ 22 On cross-examination, Officer Merkle agreed defendant asked to leave, and Officer Merkle told him "he was not free to leave *** because [they] were in the process of an investigation."

¶ 23 4. *Chief Todd*

¶ 24 Chief Michael Todd testified he was chief of police in Metamora on May 24, 2018. While on duty that day, he stopped an individual, who he identified as defendant, because he matched a suspect description provided to him by Officer Merkle regarding a stolen vehicle. Chief Todd stated the description was of a "[w]hite guy, long hair, long sleeves." On cross-examination, Chief Todd agreed at some point, defendant asked to leave, but he was not permitted to do so. The interaction lasted approximately 10 minutes. After Officer Merkle left with defendant, Chief Todd did not search for anyone else matching the description.

¶ 25 5. *Arguments and Denial of Motion to Suppress*

¶ 26 During argument, defense counsel argued (1) the officers lacked probable cause to arrest defendant and (2) the subsequent "show-up" identification of defendant was impermissibly suggestive in violation of defendant's constitutional right to due process. The State argued (1) there was both reasonable suspicion for the initial stop and probable cause for defendant's arrest and (2) the "show-up" identification was proper due to the exigent circumstances of defendant being "seen fleeing from the vehicle."

¶ 27 Following arguments, the trial court denied the motion to suppress. After summarizing the information known to the officers prior to defendant's arrest, the court stated as follows:

> "So looking at all of that the court finds, first of all, that the arrest or the detention of the defendant was not improper based upon what the officers knew during their investigation. Two, finding that the detention was not improper the court, applying those factors previously stated, finds that the identification of the defendant in this case was not unnecessarily suggestive or impermissibly suggestive so as to produce a very substantial likelihood of irreparable

misidentification. I don't believe there was any suggestivity (phonetic) at all in this identification. The person they brought back was a match to the identification that they gave to the officers and was very accurate."

¶ 28 B. Jury Trial

¶ 29 Defendant's case proceeded to a jury trial in March 2019.

¶ 30 1. *Voir Dire*

¶ 31 During *voir dire*, the court addressed the potential jurors as follows:

"Now, there's some propositions of law that I am required to make sure that you all understand before we can proceed. So I'm going to take a few moments to do that. In a criminal case a defendant is presumed to be innocent of the charge against him, and this presumption remains with him throughout every stage of the trial and during your deliberations on a verdict. It is not overcome unless from all of the evidence in the case you believe beyond a reasonable doubt that the defendant is guilty. The State in this case has the burden of proving the guilt of the defendant beyond a reasonable doubt, and this burden remains on the State throughout the case. The defendant is not required to prove his innocence.

Do each of you understand this proposition of law? If so, please nod in the affirmative. Front row? All acknowledge. Second row? All acknowledge they understand. Front row in the gallery? All acknowledge they understand. Middle row in the gallery? All acknowledge they understand. And back row? They all acknowledge they understand.

Is there any of you that disagree with this proposition of law? Front row? None disagree. Middle row? None disagree. Front row here? None disagree. Middle row? None disagree. And back row? None disagree.

Do each of you understand that the defendant is not obligated to present any evidence in his [defense]? Front row? Back row? Front row? Middle row? And back row? All understand. Do any of you disagree with that? Front row? Back row? Front row? Middle row? And back row? None disagree.

Finally, do each of you understand that the defendant is not required to testify [o]n his behalf, and if the defendant chooses not to testify you cannot hold that against him? Front row? Back row? Front row? Middle row? Back row? All understand.

Is there anyone that disagrees with that? Front row? Back row? Front row? Middle row?

* * *

Okay. I think we were on the last question. Do any of you disagree with this proposition of law? So I'm going to start again in the jury box and make sure I didn't miss anybody. Front row? Back row? Front row of the jury box—or of the gallery? Front—second row of the gallery. Last row of the gallery? None disagree with that proposition of law."

¶ 32 2. *Trial*

¶ 33 Emma Jackson testified on the morning of May 24, 2018, she discovered her Kia Optima, which needed repairs, was missing from her driveway in Peoria, Illinois. She had

inadvertently left the keys in the unlocked car. She did not know defendant and did not give him permission to take it. She reported the car stolen around 9 or 10 a.m.

¶ 34 Officer Merkle, Chief Todd, and Deputy Ealey testified in substantial conformity with their testimony at the hearing on defendant's motion to suppress. Officer Merkle added defendant, in addition to wearing a red or maroon long-sleeved shirt when they apprehended him, was also wearing a long-sleeved gray sweatshirt or jacket. Deputy Ealey further testified he did not think the keys to the Kia were ever recovered, and though fingerprints were taken from the car, no results were ever delivered. Detective Gibson of the Woodford County Sheriff's Office testified he was not able to locate any identifiable latent prints on the door handle, frame, window, gearshift, or steering wheel. The State showed each officer what had been previously marked as People's exhibit No. 1, a photograph taken of defendant following his arrest, and asked whether that photograph accurately depicted defendant's appearance that day. Each officer agreed it did and identified defendant.

¶ 35 William Christ testified on May 24, 2018, he was baling hay on his farm when he saw a black car coming up the road at around 10 or 15 miles per hour with a long line of cars behind it. The car had smoke coming out of the hood. Christ was at the end of his driveway on a John Deere "gator" utility vehicle when he observed the car drive past him and pull up in his yard. A few minutes later, Christ saw the driver exit the car. Christ described the individual as having long hair and facial hair. He wore jeans, a long-sleeved maroon sweatshirt, and a cap. Christ did not recall a gray sweatshirt but saw maroon sleeves. The State showed Christ People's exhibit No. 1 and asked whether that photograph accurately depicted the man he saw. Christ agreed it did and identified defendant. About 15 minutes after he initially observed defendant, Christ saw the car had moved about 200 feet further away. Christ saw the driver exit the car

again but did not see him after that and did not know where he went. Christ later contacted his wife to inform her about the abandoned car and asked her to call the police regarding the abandoned vehicle.

¶ 36 A county deputy arrived, and Christ gave him a description of the man he saw. A Metamora police officer later arrived with a suspect in the backseat, approximately 30 minutes after Christ last saw the Kia's driver. The officers asked Christ to stand off to the side, about 20 feet away, and identify whether the suspect was the person he saw earlier. Christ had "no doubt" it was the same person and informed the deputy.

¶ 37 Ralph Norton testified he was working with Christ on May 24, 2018, baling hay. Norton's testimony was consistent with Christ's, noting the man he saw exit the smoking black Kia "was dressed rather strange for that day." Norton explained it was very hot but the man was "dressed for wintertime" in a "dark maroon, very heavy long-sleeved sweatshirt," "long trousers," and "a cap of some sort." Norton also noted he had long brown hair and a beard. The State showed Norton People's exhibit No. 1 and asked whether that photograph accurately depicted the man he saw. Norton agreed it did and identified defendant.

¶ 38 At the conclusion of the State's evidence, the State moved to admit People's exhibit No. 2, which was described as "the abstract" and admitted and published without objection. The exhibit stated defendant's name and address at the top along with a series of letters and numbers. In the center was the official seal of the State of Illinois and a statement reading, "REVOCATION WAS IN EFFECT ON 05-25-2018 *END OF RECORD*."

¶ 39 The jury found defendant guilty of both possession of a stolen motor vehicle and driving while his license was revoked.

¶ 40 3. *Sentencing*

¶ 41 In May 2019, the case proceeded to a sentencing hearing. The trial court sentenced defendant to concurrent terms of 18 years in prison for possession of a stolen motor vehicle and 364 days in the county jail for driving while his license was revoked, with 369 days of credit for time served.

¶ 42 Defendant filed a motion to reconsider his sentence in the possession case (No. 18-CF-81), which the trial court denied. Defendant filed a notice of appeal, which was later amended and docketed as No. 4-19-0705. Defendant filed neither a motion to reconsider nor a notice of appeal in the traffic case (No. 18-TR-996). However, the Illinois Supreme Court later allowed defendant's motion requesting a supervisory order directing this court to allow him to file a late notice of appeal in case No. 18-TR-996. *People v. Boyd*, No. 126942 (Ill. Feb. 18, 2021) (supervisory order). Defendant filed a late notice of appeal, which was docketed as No. 4-21-0103. This court later allowed defendant's motion to consolidate the two appeals.

¶ 43 II. ANALYSIS

¶ 44 On appeal, defendant argues (1) the State failed to prove him guilty of driving while his license was revoked beyond a reasonable doubt, (2) the court erroneously denied his motion to suppress evidence, and (3) the court failed to comply with Illinois Supreme Court Rule 431(b) (eff. July 1, 2012). We address each argument in turn.

¶ 45 A. Driving While Defendant's License Was Revoked

¶ 46 Defendant argues the State failed to prove him guilty of driving while his license was revoked (case No. 18-TR-996) beyond a reasonable doubt because the State presented no evidence his license was revoked on May 24, 2018. The State concedes it failed to prove defendant guilty beyond a reasonable doubt and his conviction for that charge should be reversed. We agree with the parties.

¶ 47 Here, defendant was charged by indictment with driving while his license was revoked in that "*on May 24, 2018,* *** defendant drove a motor vehicle in Woodford County, Illinois, at a time when [his] driving privilege was revoked." (Emphasis added.) The record shows despite no testimony from the State's witnesses defendant's driving privileges were revoked on May 24, 2018, the assistant state's attorney argued in closing, "Testimony of the officers at the scene that ran his driver's license, it was revoked." As defendant correctly notes, closing arguments are not evidence, and any argument not based in evidence should be disregarded. *People v. Sanders*, 2020 IL App (3d) 180215, ¶ 13. The jury therefore should not have considered the State's argument as evidence defendant's driving privileges were revoked on the date at issue. Moreover, the driving "abstract" admitted as People's exhibit No. 2 indicated "REVOCATION WAS IN EFFECT ON *05-25-2018*." (Emphasis added.) May 25th, 2018, was one day *after* the date the State alleged defendant committed the offense. Because the State did not present any evidence defendant's driving privileges were revoked on May 24, 2018, as alleged in the indictment, no reasonable juror could have found defendant guilty of driving while his license was revoked beyond a reasonable doubt. We therefore reverse defendant's conviction for driving while his license was revoked in Woodford County case No. 18-TR-996.

¶ 48 B. Denial of Motion to Suppress Evidence

¶ 49 Defendant next argues the trial court erred when it denied defendant's motion to suppress evidence because "there was no reasonable and articulable suspicion to justify the stop, and defense counsel should have renewed the motion to suppress when evidence was presented at trial indicating that [defendant] did not match the description of the driver." We disagree.

¶ 50 1. *Applicable Law*

¶ 51 At a hearing on a motion to suppress evidence, the defendant bears the burden of persuasion. *People v. Roberson*, 367 Ill. App. 3d 193, 195-96, 854 N.E.2d 317, 320 (2006). The burden of producing evidence, *i.e.*, the burden of production, also rests with the defendant. *Id.* at 196. If the defendant states a *prima facie* case of an unlawful search or seizure, the burden then shifts to the State to introduce evidence justifying the search or seizure. *Id.* When reviewing a ruling on a motion to suppress, this court is presented with mixed questions of fact and law. *People v. Manzo*, 2018 IL 122761, ¶ 25, 129 N.E.3d 1141. This court will defer to a trial court's findings of fact and reverse those findings only if they are against the manifest weight of the evidence. *Id.* "A finding is against the manifest weight of the evidence only if the opposite conclusion is clearly evident or if the finding itself is unreasonable, arbitrary, or not based on the evidence presented." *People v. Deleon*, 227 Ill. 2d 322, 332, 882 N.E.2d 999, 1005 (2008). Where the factual findings are accepted, this court reviews *de novo* whether suppression is warranted under those facts. *Manzo*, 2018 IL 122761, ¶ 25.

¶ 52 The right to be free from unreasonable searches and seizures is guaranteed under both the United States and Illinois Constitutions. U.S. Const., amend. IV; Ill. Const. 1970, art. 1, § 6. "The essential purpose of the fourth amendment is to impose a standard of reasonableness upon the exercise of discretion by law enforcement officers to safeguard the privacy and security of individuals against arbitrary invasions." (Internal quotation marks omitted.) *People v. Turman*, 2019 IL App (4th) 170815, ¶ 31, 145 N.E.3d 473 (quoting *People v. McDonough*, 239 Ill. 2d 260, 266, 940 N.E.2d 1100, 1106 (2010)). Encounters between citizen and the police are generally divided into three types:

> "(1) arrests, which must be supported by probable cause; (2) brief investigative detentions, or '*Terry* stops[ ]' [(*Terry v. Ohio*, 392 U.S. 1 (1968)),] which must be

supported by a reasonable, articulable suspicion of criminal activity; and (3) encounters that involve no coercion or detention and thus do not implicate fourth amendment interests." *People v. Luedemann*, 222 Ill. 2d 530, 544, 857 N.E.2d 187, 196 (2006).

¶ 53 The determination of whether an investigatory stop was supported by the requisite reasonable suspicion requires a consideration of "the totality of the circumstances—the whole picture." (Internal quotation marks omitted.) *People v. Timmsen*, 2016 IL 118181, ¶ 9, 50 N.E.3d 1092. "Although reasonable, articulable suspicion is a less demanding standard than probable cause, an officer's suspicion must amount to more than an 'inchoate and unparticularized suspicion or hunch of criminal activity.' " *Id.* (quoting *Terry*, 392 U.S. at 27). "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." *Id.*

¶ 54 "An officer may initiate a *Terry* stop based on information provided by a third party if the information is reliable and 'allows an officer to reasonably infer that a person was involved in criminal activity.' " *People v. Shafer*, 372 Ill. App. 3d 1044, 1049, 868 N.E.2d 359, 362-63 (2007) (quoting *People v. Jackson*, 348 Ill. App. 3d 719, 729, 810 N.E.2d 542, 553 (2004)). Generally, "a description from an eyewitness is given particularly great weight in determining whether an officer has a reasonable suspicion to justify a stop." *People v. Brown*, 356 Ill. App. 3d 1088, 1090, 828 N.E.2d 351, 354 (2005).

¶ 55 2. *This Case*

¶ 56 Defendant argues the trial court erroneously denied his motion to suppress evidence because Chief Todd lacked reasonable, articulable suspicion to stop and detain defendant because defendant's appearance at the time he was stopped did not match the description Christ and Norton provided to Deputy Ealey, and "there was nothing about [defendant's] conduct that would provide reasonable articulable suspicion of criminal activity that otherwise supports the stop." Defendant further argues his trial counsel was ineffective for failing to renew the motion to suppress following the State's evidence. We disagree with both arguments.

¶ 57 a. Motion to Suppress

¶ 58 Here, we conclude the trial court's finding defendant matched the description of a suspect driving a stolen vehicle provided by eyewitnesses was not against the manifest weight of the evidence and Chief Todd therefore had reasonable, articulable suspicion to support stopping defendant. First, defendant himself testified when he was stopped by Chief Todd, he was wearing blue jeans and a red, long-sleeved shirt, and had long hair and a beard. In turn, Deputy Ealey testified, "[Norton and Christ] said [the suspect] had—the gentleman had long hair, said he was wearing a long-sleeved maroon shirt, taller and skinnier." Officer Merkle also testified he was provided a description of a white male suspect with "a long-sleeve red shirt, blue jeans and a hat, long hair," and recalled seeing someone matching that description on his way to the scene. Chief Todd testified he was provided a description of a suspect who had allegedly driven a vehicle reported as stolen, which was a "[w]hite guy, long hair, long sleeves." Although defendant correctly notes Chief Todd's testimony regarding the description he was provided did not include details such as defendant's height, build, or facial hair, the other officers' testimony regarding the information provided via dispatch did contain these additional details. Chief Todd

knew (1) a car had been reported stolen, (2) a suspect was seen driving the car, and (3) defendant's appearance was consistent with the suspect description provided by eyewitnesses. It was therefore not improper for the trial court to deny the motion to suppress based on its conclusion Chief Todd had reasonable, articulable suspicion defendant was involved in criminal activity.

¶ 59 b. Ineffective Assistance

¶ 60 Neither was trial counsel ineffective for failing to renew defendant's motion to suppress evidence following the evidence provided by the State at trial.

¶ 61 In *People v. Henderson*, 2013 IL 114040, ¶ 11, 989 N.E.2d 192, our supreme court stated as follows:

> "A claim of ineffective assistance of counsel is evaluated under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). [Citations.] Under this test, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness, and a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. [Citation.] A defendant's failure to establish either prong of the Strickland test precludes a finding of ineffective assistance of counsel. [Citation.]"

In the context of this case, "in order to establish prejudice under *Strickland*, the defendant must demonstrate that the unargued suppression motion is meritorious, and that a reasonable probability exists that the trial outcome would have been different had the evidence been suppressed." *Id.* ¶ 15. We review claims of ineffective assistance of counsel *de novo*.

¶ 62 Defendant contends at trial, Chief Todd "testified that he stopped someone wearing a heavy gray hooded sweatshirt or coat and a hat" and "this did not match the description provided by the witnesses to Deputy Ealey, Officer Merkle and Chief Todd." According to defendant, had defense counsel renewed his motion to suppress evidence following this trial testimony, the trial court would have determined the officers lacked reasonable suspicion to stop defendant and would have barred the introduction of evidence stemming from the stop.

¶ 63 At trial, Officer Ealey testified the suspect description included an individual wearing a maroon shirt with long hair. Officer Merkle similarly testified the description was "a white male, thin, long hair, beard, red shirt." Officer Merkle indicated that defendant also wore a gray "hoodie." Chief Todd testified the description was of a man with "long hair and a beard, and wearing a heavy coat." However, Chief Todd also indicated defendant wore a long-sleeved maroon shirt and agreed People's exhibit No. 1 accurately reflected the way defendant appeared when he saw him on May 24, 2018. The record shows in People's exhibit No. 1, defendant appears to be a white male wearing a long-sleeved maroon shirt with shoulder-length hair and a beard. Additionally, Chief Todd stated defendant stuck out like a "sore thumb" because it was unusual to wear such heavy clothing on such a hot day. Contrary to defendant's assertion, Chief Todd did not testify "the man [he] stopped was wearing a gray hooded sweatshirt." Rather, Chief Todd testified, "I just remember it was a heavy sweatshirt type jacket."

¶ 64 We agree with the State that although the trial testimony was not identical to the testimony presented at the motion to suppress hearing, it was not so deficient such that it rendered the trial court's prior finding defendant matched the suspect description as against the manifest weight of the evidence and the stop unreasonable under the fourth amendment. This

was not, as defendant contends, a circumstance where "[a]bsolutely no evidence was presented as to the perpetrator's approximate age, height, or weight, whether the perpetrator had a light or dark complexion, was clean-shaven or had facial hair, wore glasses, or had any other distinguishable characteristic." *People v. Washington*, 269 Ill. App. 3d 862, 868, 646 N.E.2d 1268, 1272-73 (1995). Between Officer Merkle, Deputy Ealey, and Chief Todd, the court heard, for the most part, substantially consistent testimony regarding the suspect's build, complexion, facial hair, and clothing—which, because of the weather, the witnesses found distinctive. Those descriptions were consistent with defendant's appearance on the date in question as depicted in People's exhibit No. 1.

¶ 65 We conclude defendant's argument his trial counsel was ineffective must fail because no reasonable probability exists the trial court would have granted a renewed motion to suppress had it been argued, and defendant therefore cannot establish he was prejudiced by trial counsel's failure to do so.

¶ 66 C. Rule 431(b) Compliance

¶ 67 Defendant argues this court should reverse defendant's conviction and remand for a new trial because the trial court failed to substantially comply with Illinois Supreme Court Rule 431(b) (eff. July 1, 2012). Defendant concedes he has forfeited this argument by failing to object at trial and raise the issue in a posttrial motion but asks that we review the issue for first-prong plain error because the evidence was closely balanced in this case. The State argues the trial court complied with Rule 431(b), or alternatively, no plain error occurred because the evidence was not closely balanced. We agree with the State.

¶ 68 1. *Applicable Law*

¶ 69 a. Plain Error

¶ 70 Our supreme court has explained plain-error review as follows:

> "To preserve a purported error for consideration by a reviewing court, a defendant must object to the error at trial and raise the error in a posttrial motion. [Citation.] Failure to do either results in forfeiture. There is, however, a well-established exception to that principle. Illinois Supreme Court Rule 615(a) provides that insubstantial errors 'shall be disregarded' but that substantial or what have become known as plain errors 'may be noticed although they were not brought to the attention of the trial court.' Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). As the language of the rule indicates, a reviewing court may exercise discretion and excuse a defendant's procedural default. [Citation.] We have traditionally identified two instances when it is appropriate to do so: (1) when 'a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error,' or (2) when 'a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.' [Citation.] ***
>
> The initial analytical step under either prong of the plain error doctrine is determining whether there was a clear or obvious error at trial. [Citation.]" *People v. Sebby*, 2017 IL 119445, ¶¶ 48-49, 89 N.E.3d 675.

¶ 71 b. Rule 431(b) Procedure

¶ 72 Rule 431(b) was adopted to ensure compliance with our supreme court's holding in *People v. Zehr*, 103 Ill. 2d 472, 476, 469 N.E.2d 1062, 1063-64 (1984). Specifically, Rule

431(b) requires the trial judge inquire of all potential jurors in a criminal case whether they both "understand" and "accept" (1) the defendant is presumed innocent, (2) the State bears the burden of proving the defendant guilty beyond a reasonable doubt, (3) the defendant has no obligation to present evidence, and (4) the defendant's choice to not testify cannot be held against him. Ill. S. Ct. R. 431(b) (eff. July 1, 2012). This court reviews whether the trial court complied with the requirements of Rule 431(b) *de novo*. *People v. Kinnerson*, 2020 IL App (4th) 170650, ¶ 59, 170 N.E.3d 142.

¶ 73 Rule 431(b) "mandates a specific question and response process." *People v. Thompson*, 238 Ill. 2d 598, 607, 939 N.E.2d 403, 409 (2010). However, "Rule 431(b) has no requirement that the trial court ask separate questions of the jurors about each individual principle. [Citation.] Nor does the rule require separate, individual answers from each juror." *People v. Willhite*, 399 Ill. App. 3d 1191, 1196-97, 927 N.E.2d 1265, 1270 (2010); see also *People v. Birge*, 2021 IL 125644, ¶ 27 (holding no error occurred where the trial court listed all four *Zehr* principles together, rather than individually, prior to asking each jury group whether they understood and accepted the principles).

¶ 74 2. *This Case*

¶ 75 As stated *supra*, we must first determine whether a clear or obvious error occurred at all. Defendant argues the trial court failed to comply with Rule 431(b) when it asked whether the jurors understood and disagreed with any of the principles, rather than whether they understood and accepted them. Defendant also takes issue with the manner in which the trial court questioned the prospective jurors. We conclude defendant has failed to show a reversible error occurred with respect to the trial court's Rule 431(b) admonishments.

¶ 76 a. Forfeiture

¶ 77 As an initial matter, we address defendant's contention in his reply brief that the State has forfeited "any argument on this subject" because the State cites to *Birge* in its brief but fails "to explain how *Birge* relates to this case." In his initial brief, defendant acknowledges "our Supreme Court recently found in [*Birge*] *** the [trial] court was not required to explain the [*Zehr*] principles separately." Defendant distinguishes *Birge* from the instant case, arguing the trial court here was less "clear" in its presentation of the four principles than the trial court in *Birge*. In its brief, the State references defendant's citation to *Birge*, asserts *Birge* "is instructive," and states, "the Supreme Court recently held that the trial court did not err regarding Supreme Court Rule 431(b)." In this context, we do not find the State's citation to *Birge* so lacking as to find the State has forfeited review "on this subject."

¶ 78 b. Sufficiency of Rule 431 Admonitions

¶ 79 Here, the trial court asked the jurors, grouped by rows in the gallery, both if they (1) "understood" all four *Zehr* principles and (2) if they "disagreed" with any of the principles—rather than whether they "accepted" each principle. Defendant claims the court erred by using the word "disagreed" instead of "accept." Rule 431(b) does not mandate the trial court recite *verbatim* the principles therein. *People v. Atherton*, 406 Ill. App. 3d 598, 611, 940 N.E.2d 775, 787 (2010). In *Atherton*, the Second District noted asking potential jurors if they were "willing to follow" the *Zehr* principles "was just another way of asking the potential jurors if they accepted those propositions." (Internal quotation marked omitted.) *Id.* Thus, the *Atherton* court found the trial court's questioning of the jurors regarding the *Zehr* principles complied with Rule 431(b). *Id.* We note further our supreme court has suggested "it may be arguable that the court's asking for disagreement, and getting none, is equivalent to juror *acceptance* of the [*Zehr*] principles." (Emphasis in original.) *People v. Wilmington*, 2013 IL 112938, ¶ 32, 938 N.E.2d 1015. We find

asking jurors if they both (1) understand each *Zehr* principle *and* (2) do not disagree with any of the principles is "just another way of asking the potential jurors" if they understand and accept those principles. *Atherton*, 406 Ill. App. 3d at 611.

¶ 80 Defendant also argues the manner in which the trial court questioned the prospective jurors was error. In support of his argument, defendant cites *People v. Hayes*, 409 Ill. App. 3d 612, 627, 949 N.E.2d 182, 195 (2011). In *Hayes*, the First District found the trial court erred when it combined the first three *Zehr* principles into one broad principle and failed to ask if prospective jurors "accepted" that principle. *Id.* As noted *supra*, our supreme court in *Birge* recently held the trial court in that case did not err when it listed all four *Zehr* principles together, rather than individually, prior to asking each jury group whether they understood and accepted them. *Birge*, 2021 IL 125644, ¶ 27. Critically, the court here asked the jurors if they understood each of the principles and then further asked if they did not disagree with the principles. See *Wilmington*, 2013 IL 112938, ¶ 32 ("[I]t may be arguable that the court's asking for disagreement, and getting none, is equivalent to juror *acceptance* of the [*Zehr*] principles." (Emphasis in original.)). We conclude the court's procedure here passes muster because it accurately conveyed each of the principles and allowed for the question and response process contemplated by the rule. We find no error occurred with the Rule 431(b) admonishments in this case.

¶ 81 c. Closely Balanced Evidence

¶ 82 Finally, even if we were to find the trial court clearly erred in its Rule 431(b) admonitions, we would not conclude reversal would be required because the evidence in this case, contrary to defendant's assertions, was not closely balanced.

¶ 83 Defendant was charged with possession of a stolen motor vehicle (625 ILCS 5/4-103(a)(1) (West 2018)), which required the State to prove beyond a reasonable doubt defendant (1) possessed Emma Jackson's Kia Optima, (2) was not entitled to possess the vehicle, and (3) knew that the vehicle was either stolen or that it was converted. Under the statute, "Knowledge that a vehicle or essential part is stolen or converted may be inferred: (A) from the surrounding facts and circumstances, which would lead a reasonable person to believe that the vehicle or essential part is stolen or converted; or (B) if the person exercises exclusive unexplained possession over the stolen or converted vehicle or essential part, regardless of whether the date on which the vehicle or essential part was stolen is recent or remote." *Id.* It is undisputed defendant was not entitled to possess Jackson's vehicle, and therefore we focus on the remaining two elements of the offense.

¶ 84 Here, the State presented ample evidence defendant possessed Jackson's vehicle as well as evidence sufficient for the jury to infer defendant was aware the vehicle was stolen. Two eyewitnesses, Christ and Norton, testified they observed defendant driving and subsequently abandoning the smoking Kia outside of Christ's home. They both identified him in open court and testified they were able to observe him for five or six minutes, during the light of day, from approximately 20 feet away. Three police officers—Chief Todd, Officer Merkle, and Deputy Ealey—testified defendant matched the suspect description the eyewitnesses provided. Although defendant contends the descriptions in their testimony contained significant discrepancies which cast serious doubt on the identification, the record shows the descriptions were generally consistent as to defendant's complexion, build, hair, face, and clothing. Based on Jackson's testimony she did not know defendant and had not given him permission to use her car, as well as the fact defendant was observed driving the car in a different city from where

Jackson lived, the jury could have inferred from these facts and circumstances defendant was aware the car was stolen. Because the evidence was not closely balanced, we conclude no plain error occurred.

¶ 85 III. CONCLUSION

¶ 86 For the reasons stated, consistent with Illinois Supreme Court Rule 23(b) (eff. Jan. 1, 2021), we reverse defendant's conviction for driving while his license was revoked in Woodford County case No. 18-TR-996 and affirm the trial court's judgment in Woodford County case No. 18-CF-81.

¶ 87 No. 4-19-0705, Affirmed.

¶ 88 No. 4-21-0103, Reversed.