No. 128609

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	On Appeal from the Appellate Court of Illinois, First Judicial
Plaintiff-Appellee,	)	District, No. 1-18-2170
v.	)	There on Appeal from the the Circuit Court of Cook County, Illinois, No. 18 CR 3154
FRANCISCO LOZANO,	)	The Honorable James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

BRIEF OF PLAINTIFF-APPELLEE
PEOPLE OF THE STATE OF ILLINOIS

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POINTS AND AUTHORITIES

NATURE OF THE ACTION

Following a bench trial, the Circuit Court of Cook County found defendant guilty of burglary and possession of burglary tools, C34, and sentenced him to concurrent terms of three and two years, respectively, C47.[1] Defendant appeals from the appellate court's judgment rejecting his claims that the trial court erred in denying his pretrial motion to suppress evidence and his midtrial request to suppress his statements to police. *People v. Lozano*, 2022 IL App (1st) 182170. No question is raised concerning the charging instrument.

ISSUES PRESENTED FOR REVIEW

1. Whether, under the totality of the circumstances, police officers had reasonable suspicion to conduct a *Terry* stop when they saw defendant running at a fast pace while holding a bulky object underneath his sweatshirt and then attempt to enter an abandoned building when the officers drove in his direction.

2. Whether defendant forfeited his argument that his statements should have been suppressed, when he failed to make that argument before trial despite having officer body camera footage depicting the questioning and

[1] Citations to the common law record appear as "C__," to the report of proceedings for the bench trial as "R__," to the supplemental record as "Sup. R__," to the secured record as "Sec. C__," to the body camera footage as "Pet. Exh. 1," to defendant's brief as "Def. Br. __," and to defendant's appendix as "A__," with page numbers referring to the pages in the order that they appear.

despite the fact that defendant was aware that he was questioned without *Miranda* warnings.

3. Alternatively, if defendant did not forfeit his argument that his statements should have been suppressed, whether admission of the statements was harmless error when there was other overwhelming evidence where defendant was found acting evasively one block away from the victim's car, carrying two screwdrivers and the stolen car radio and wallet, with his hand bleeding from a fresh cut.

JURISDICTION

On September 28, 2022, this Court allowed defendant's petition for leave to appeal. Accordingly, this Court has jurisdiction under Supreme Court Rules 315 and 612(b).

STATEMENT OF FACTS

The People charged defendant with burglary (Count 1) and possession of burglary tools (Count 2). Sec. C 6-7. The charges alleged that on February 20, 2018, defendant entered Jenelly Cherrez's motor vehicle with the intent to commit a theft while possessing a screwdriver. *Id.*

Hearing on Motion to Suppress Evidence

Before trial, defendant moved to suppress evidence (a car radio, two screwdrivers, and a wallet) recovered after police stopped and patted him down pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968). C26-28. At a hearing on his motion, defendant presented testimony from Chicago Police Officer

Eulalio Rodriguez as well as footage from his partner's (Officer Jennifer Soto's) body worn camera. Sup. R 8; Sup. R 20-21.

Rodriguez, who had been employed by the Chicago Police Department for about five years, testified that he was on duty with Soto on February 20, 2018, driving in an unmarked car. Sup. R 9-13. It was "wet outside and raining that day" with body camera footage showing light precipitation. Sup. R 17; Pet. Exh. 1 at 19:20:00. Around 1:30 that afternoon, Rodriguez saw defendant running at a fast rate of speed in jeans with his hands in the pocket of his sweatshirt. Sup. R 10, 13-14; Pet. Exh. 1 at 19:20:04. The officers made a U-turn so they could stop and speak with defendant. Sup. R 14. As they made the U-turn, defendant changed course and ran up the stairs of a nearby building. Pet. Exh. 1 at 19:22:14; Sup. R 14. A piece of plywood served as the building's door, the front lawn was flooded, and trash was scattered against its fencing and in the lot next door. Pet. Exh. 1 at 19:20:00-04. Defendant made it up the few entry stairs and attempted to get into the building. Sup. R 14. Rodriguez approached defendant to "conduct a field interview" and noticed a "big bulge" in the front of defendant's sweatshirt where the defendant was keeping his hands. Sup. R 14-15, 18. Rodriguez believed could have been a weapon. *Id*. He then asked defendant to walk down the stairs towards him, and defendant complied. Sup. R 17-18.

The recorded body camera footage captures when Soto left the police vehicle and joined Rodriguez, who at that time was walking with defendant

away from the building. Pet. Exh. 1 at 19:20:00-09. Soto asked defendant to take his hand out of his pocket. *Id*. Defendant did not comply. *Id*. Rodriguez also asked defendant to take his hand out of his pocket. Sup. R 15; Pet. Exh. 1 at 19:20:05. Defendant again failed to comply. Pet. Exh. 1 at 19:20:05-06. As shown on the video, defendant kept one hand on the large, bulky item; the video also shows a small white piece of plastic hanging out from the bottom of defendant's sweatshirt. Pet. Exh. 1 at 19:20:04. Rodriguez guided defendant away from the building for approximately twelve steps before they reached the officers' vehicle parked in front of the building. *Id*. at 19:20:00-11.

Rodriguez then told defendant to place his hands on the hood of the police vehicle, and he attempted to bring defendant's hands behind his back in order to handcuff him. *Id*. Defendant propped the bulky item underneath his sweatshirt on the car. *Id*. Wires capped with plastic plugs were visible at the bottom of the sweatshirt. *Id*. Rodriguez asked defendant, "Where were you going? Cause you just saw us, then you turned back." Pet. Exh. 1 at 19:20:14-15. Defendant moved his right hand in the direction of the building and said he was trying to go to the house. *Id*.

Rodriguez handcuffed defendant's hands behind his back, and then conducted a pat down. *Id*. at 19:20:23-26; Sup. R 19. He asked defendant what he had on him, and defendant said, "Nothing." Pet. Exh. 1 at 19:20:20. Rodriguez reached into the front pocket of defendant's sweatshirt and

recovered two screwdrivers and a wallet. Sup. R 19-20. He then grabbed the bulky item from underneath defendant's sweatshirt and discovered it was a car radio. Pet. Exh. 1 at 19:20:27-38. While Rodriguez questioned defendant about these items, Soto noticed that one of the defendant's hands was cut and bleeding. *Id*. at 19:21. Soto asked for defendant's identification, and he replied that he did not have an I.D, so Soto requested and took down defendant's name, date of birth, and address. *Id*. Rodriguez stayed with defendant while Soto ran his information in their vehicle. Pet. Exh. 1 at 19:21:50. The video was then stopped and both sides rested. Sup. R 21-22. [2]

At the close of the hearing, the court denied defendant's motion to suppress the evidence Rodriquez recovered during his pat down of defendant. Sup. R 26-27. The court found Rodriguez to be credible, and that the officers had reasonable suspicion to stop and search defendant because they saw him running with a large, bulky item in his clothing, he changed course when he saw them, he tried to enter what appeared to be an abandoned building, and he refused repeated requests to show his hands. Sup. R 26-27.

Bench Trial

In June 2018, the case proceeded to a bench trial. R6; C36 (jury waiver). Both sides adopted the testimony and exhibits that were introduced at the hearing on defendant's motion to suppress. R7.

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[2] While the trial court only watched until 19:21:55, the entire video was entered into evidence and included in the record on appeal. The video continues from 19:21:55 to 19:27:28.

In addition, Rodriguez testified about statements defendant made after he was stopped but before he received *Miranda* warnings. R13. Rodriguez testified that defendant told him he "got" the radio at Ferdinand and Pulaski and "found" the wallet in an alley. R10. Defense counsel requested a sidebar and asked for defendant's statements to be suppressed. R13. The trial court told defense counsel that his request was untimely because such requests are to be made pretrial, and they were currently in the middle of trial. *Id.* Defense counsel responded: "I believe the law says that motion can be made in the middle of trial if the issue comes up." *Id.* The court replied:

> I'm not sure he hasn't Mirandized [sic] at this particular point of the investigation. Police officer stopped him, thought he had weapons, he's got a bulge. Trying to elude the officer, finds a radio. Just asks him simply what is this. I'm not sure that Miranda attaches at that point. Let's move on.

R13-4. Defense counsel then stated, for the record, that his argument was that defendant was "in custody" and "subject to questioning, which could lead to an incriminating response," and that "he was not given Miranda." R14.

Soto testified that after she found a student identification card in the name of Jenelly Cherrez in the wallet recovered from defendant, her investigation led her to Westinghouse College Prep High School, R16-18. Soto went to the nearby school to speak to Cherrez. R17-18.

Cherrez testified that she was a junior at the school. R19-20. On the morning of February 20, 2018, she drove to school and parked about half a block away. R20-21. She left her wallet in the middle compartment of her

car and put her purse on the floor behind the passenger seat. R21, 23. At a little after 2:00 pm, she was pulled out of class to speak to Soto. *Id*. Cherrez verified that the wallet recovered from defendant belonged to her and led Soto to her parked vehicle, which was about a block away from the location where the officers stopped defendant. R21, 24. Cherrez's passenger side window was shattered. R22. Inside the vehicle, the radio was missing, the glove compartment was wide open, and the right passenger seat had been moved up. R21-23. Her purse, which had been behind the seat, was now on the floor in front of the seat. R23. Cherrez never gave anyone permission to enter her vehicle that day or to take her wallet or car radio. R24-25.

Following closing arguments, the trial court found defendant guilty of burglary and possession of burglary tools. R32-33.

Post-Trial Motion and Sentencing

Defendant moved for a new trial, arguing that the trial court erred when it denied his pretrial motion to suppress evidence and did not allow him to argue his midtrial request to suppress statements. Sup. C 35, 37. The court denied this motion, Sup. C 39, and sentenced defendant to concurrent terms, the longest of which was three years, Sup. C 45.

Appellate Court Proceedings

On appeal, the appellate court, in a 2-1 decision, affirmed defendant's convictions, rejecting defendant's arguments that the trial court erred in

denying his pretrial motion to suppress evidence and his midtrial request to suppress statements. *Lozano*, 2022 IL App (1st) 182170, ¶ 1.

As to the pretrial motion to suppress evidence, the appellate court found that Rodriguez had reasonable suspicion to conduct a *Terry* stop of defendant. *Id*. ¶ 34. The officer saw defendant running on a rainy day, alone, with his hands in or holding the front pocket of his sweatshirt. *Id*. The body camera video established that the bulge in defendant's front pocket was "noticeably larger and shaped differently than" it would be had it been caused by defendant's hands alone, supporting an inference that defendant had "one or more objects of considerable size" in his pocket. *Id*. After Rodriguez made a U-turn and drove in defendant's direction, defendant ran towards and tried to enter what appeared to be an abandoned building, "suggesting that defendant acted evasively upon seeing the officers." *Id*. Taken together, defendant's actions supported a finding of reasonable suspicion sufficient to justify the *Terry* stop. *Id*. The officers could also reasonably conclude that the building had been abandoned and that defendant may have been trespassing by attempting to enter it. *Id*. ¶ 36.

As to defendant's argument that the subsequent search of defendant "exceeded any frisk within the bounds of *Terry*," *id*. ¶ 44, the appellate court found that "Rodriguez's *Terry* frisk was justified to determine whether defendant was holding a weapon in his sweatshirt pocket," *id*. ¶ 46. And when Rodriguez patted down defendant's pocket and found a hard

rectangular object, it was reasonable to for Rodriguez to remove and examine it to determine whether it was a weapon. *Id.* ¶ 47. The court also found that Rodriguez acted reasonably when he recovered the screwdrivers from defendant's pocket because they could be used as a weapon, *id.* ¶ 48, and when he recovered the car radio from beneath defendant's sweatshirt because he had probable cause to believe that it was contraband, *id.* ¶ 49.

Next, the appellate court found that defendant had forfeited his midtrial request to suppress statements because the grounds for a motion to suppress were apparent before trial. *Id.* ¶ 54. The body camera video showed the officers questioning defendant prior to reciting *Miranda* warnings, and the defense was aware of this video well before trial. *Id.* ¶ 55. The appellate court also rejected defendant's request that it excuse his forfeiture as plain error because, the court explained, *Miranda* warnings were not required in this situation so the trial court did not make a clear or obvious error in denying the motion to suppress statements. *Id.* ¶ 63.

The concurring justice found the *Terry* question close, but ultimately agreed that it was a valid *Terry* stop. *Id.* ¶ 75 (Ellis, J., concurring). He agreed with the dissenting justice, however, that the officers violated *Miranda* when they questioned defendant, and therefore that it was error to introduce defendant's statements. *Id.* ¶¶ 87-93. But, the concurring justice concluded, the error was harmless beyond a reasonable doubt because "the evidence of [defendant's] guilt was airtight," and thus "[w]hether the trial

court did or did not hear defendant's incredible explanation would not possibly have impacted the verdict." *Id*. ¶ 96.

The dissenting justice would have held that the officers lacked reasonable suspicion to make the stop, *id*. ¶ 116 (Gordon, J., dissenting), that they should have provided *Miranda* warnings before questioning defendant, *id*. ¶¶ 117-127, and that, because in his view the *Miranda* issue was not forfeited, the People bore the burden to prove the error harmless beyond a reasonable doubt, which they did not argue, *id*. ¶ 127.

STANDARDS OF REVIEW

When reviewing a trial court's order denying a motion to suppress evidence, this Court applies the two-part standard of review announced in *Ornelas v. United States*, 517 U.S. 690, 699 (1996). Pursuant to that standard, the Court upholds the trial court's factual findings unless they are against the manifest weight of the evidence. *People v. Timmsen*, 2016 IL 118181, ¶ 11. Where, as here, the facts are uncontested, this Court reviews *de novo* whether the police had reasonable suspicion to stop and pat down defendant, *People v. Brooks*, 2017 IL 121413, ¶ 21, and whether defendant's statements should have been suppressed, *People v. Hunt*, 2012 IL 111089, ¶ 22.

Whether defendant forfeited a claim and whether that claim is reviewable as plain error are questions of law reviewed *de novo*. *People v. Johnson*, 238 Ill. 2d 478, 485 (2010).

ARGUMENT

I. The Officers had Reasonable Suspicion to Conduct a *Terry* Stop.

Defendant's attempt to flee from officers and enter an abandoned building while concealing a bulky object in his sweatshirt gave Officers Rodriguez and Soto reasonable suspicion to conduct a *Terry* stop.

A. The *Terry* Standard

Both the United States Constitution and the Illinois Constitution protect against unreasonable searches and seizures. U.S. Const., amend. IV; Ill. Const. 1970, art. I, § 6. *See United States v. Sharpe*, 470 U.S. 675, 682 (1985) ("The Fourth Amendment is not, of course, a guarantee against *all* searches and seizures, but only against *unreasonable* searches and seizures.") (emphasis in original); *People v. Hill*, 2020 IL 124595, ¶ 19 ("The cornerstone of the fourth amendment is reasonableness, which seeks to balance the interest in according discretion in enforcing the law for the community's protection and safeguarding against invasions of citizens' privacy.").

Under *Terry v. Ohio*, 392 U.S. 1 (1968), a police officer may briefly detain a person for investigatory purposes if the officer reasonably suspects the person has committed or is about to commit a crime. *Id.* at 20-21; *see People v. Close,* 238 Ill. 2d 497, 505-06 (2010) (this Court follows *Terry* and adheres to its standards when reviewing the propriety of an investigatory stop under the Illinois Constitution). The officer must have a "reasonable, articulable suspicion" of criminal activity, *Illinois v. Wardlow*, 528 U.S. 119,

120 (2000), which is a less demanding standard than probable cause but more than an "inchoate and unparticularized suspicion or 'hunch,'" *Terry*, 392 U.S. at 27; *see also Wardlow*, 528 U.S. at 123 (reasonable suspicion "is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence"). Ultimately, determining whether reasonable suspicion existed "must be based on commonsense judgments and inferences about human behavior." *Wardlow*, 528 U.S. at 125.

Whether reasonable suspicion existed is "judged against an objective standard: would 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?" *Terry*, 392 U.S. at 21-22 (internal quotations omitted). And the facts available to the officer must be viewed from the perspective of a reasonable officer at the time she was confronted with the situation, rather than in hindsight. *People v. Thomas*, 198 Ill. 2d 103, 110 (2001); *accord United States v. Richmond*, 924 F.3d 404, 417 (7th Cir. 2019) ("Officers must make quick decisions in the field, so we judge from the perspective of a reasonably prudent person in the circumstances before us, not 20/20 hindsight."); *see also Kentucky v. King*, 563 U.S. 452, 466 (2011) ("The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving.") (citations and

quotations omitted). Moreover, when assessing the reasonableness of an officer's conduct, courts consider "the totality of the circumstances — the whole picture." *United States v. Sokolow*, 490 U.S. 1, 8 (1989) (internal quotations omitted). "This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person." *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (internal quotations and citations omitted).

B. The officers had reasonable suspicion based on defendant's evasive behavior, his attempt to enter an abandoned building, and his efforts to hide a large, bulky object under his sweatshirt.

Here, given the totality of the circumstances, Officers Rodriguez and Soto could have reasonably concluded that defendant was either carrying and concealing contraband or trying to break into an abandoned building, or both. Several facts, when taken together, would have contributed to that reasonable belief: defendant was running at a fast pace in jeans and holding the front pocket of his sweatshirt, Sup. R 13-14, 17; Pet. Exh. 1 at 19:20:04; when he spotted the officers, defendant changed course and attempted to enter what looked like an abandoned building, Sup. R 14; Pet. Exh. 1 at 19:20:14; and defendant was visibly hiding a large, bulky object underneath his sweatshirt, Sup. R 14-15; Pet. Exh. 1 at 19:20:04. Given these facts and circumstances, it would have been reasonable for the officers to believe defendant was engaged in criminal activity, justifying an investigatory stop.

For starters, defendant first drew the officers' attention when they saw him running at a fast pace and holding the front of his sweatshirt. Sup. R 13-14, 17. The officers made a U-turn so they could undertake further investigation, and then observed defendant change course and appear to flee as soon as he saw them travelling in his direction. *See* Pet. Exh. 1 at 19:20:14 (Rodriguez asked defendant, "where are you going? 'Cause you saw us and turned back"); Sup. R 14. As both this Court and the United States Supreme Court have recognized, such evasive behavior may justify a *Terry* stop. *See People v. Thompson*, 198 Ill. 2d 103, 113 (2001) (citing *Wardlow*, 528 U.S. at 125-26) (unprovoked flight in face of potential encounter with police may raise enough suspicion to justify investigatory stop); *see also Florida v. Rodriguez*, 469 U.S. 1, 6 (1984) (strange movements in attempt to evade officers contributed to finding of reasonable suspicion).

Indeed, defendant's conduct was similar to that of suspects in other cases where courts held that officers had reasonable suspicion to justify a *Terry* stop. *See Wardlow*, 528 U.S. at 124 (Court found reasonable suspicion based on defendant's having fled on foot when he saw officers patrolling in a high-crime neighborhood); *Timmsen*, 2016 IL 118181, ¶ 14 (Court found reasonable suspicion based on defendant having made U-turn fifty feet before police roadblock); *United States v. Wilson,* 963 F.3d 701, 703-04 (7th Cir. 2020) (court found reasonable suspicion based on officers having observed conspicuous bulge in defendant's front pocket as they approached him,

followed by defendant grabbing the bulge and then fleeing on foot); *United States v. Richmond*, 924 F.3d 404, 411 (7th Cir. 2019) (similar).

That defendant entered what looked like an abandoned building was an additional fact supporting reasonable suspicion. *See Wardlow*, 528 U.S. at 124 ("Officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation."). Based on the building's appearance, it would have been reasonable for Rodriguez and Soto to believe it was not defendant's home: a piece of plywood served as the building's door, the front lawn was flooded, the windows were dark, and trash had accumulated along the fencing and in the abandoned lot next door. Pet. Exh. 1 at 19:20:00-04. Indeed, as the appellate court noted, defendant's entry into this building gave the officers "at a minimum," reasonable suspicion to believe that he was committing a crime by "attempting to break into an abandoned building." *Lozano*, 2022 IL App (1st) 182170, ¶ 34.

Finally, defendant's visible efforts to conceal a large, bulky object beneath his sweatshirt would have given Rodriquez and Soto reasonable suspicion to believe that he was carrying a weapon or other contraband. *See Richmond*, 924 F.3d 404 at 408 (medium-sized bulge in "kangaroo" pocket in front of defendant's t-shirt provided reasonable suspicion to believe defendant was concealing firearm). The video from Soto's body camera shows that defendant kept one hand on the bulge at all times until the officers placed

him in handcuffs, that the bulge was larger and shaped differently than a person's hands would be, and that a small plastic cap was hanging out from under defendant's sweatshirt. Pet. Exh. 1 at 19:20:00-09, 19:20:16-18; *see also* Sup R 17-18. As the appellate court noted, the size and shape of the bulge would support "an inference that one or more objects of considerable size were in [defendant's] pocket." *Lozano*, 2022 IL App (1st) 182170, ¶ 34.

In short, based on the facts and circumstances available to Rodriguez and Soto, a reasonable officer in their circumstances could have believed that defendant had committed, or was about to commit, a crime, and therefore that an investigatory stop was appropriate to further investigate defendant's possible possession of contraband, attempt to break into a building, or both.

C. Defendant's contrary arguments lack merit.

To begin, defendant argues that the sole basis for the stop was the fact that the officers observed defendant running in the rain with his hands in his pocket. Def. Br. 17-18.[3] This argument fails to consider the additional information known to the officers at the time of the stop, including their observations of defendant's evasive behavior, *i.e.*, that, when defendant saw the officers approach, he changed course and attempted to enter what appeared to be an abandoned building, and that he appeared to be concealing

[3] The parties agree that Rodriguez seized defendant when he told defendant to stop and walk back down the stairs of the abandoned building. Def. Br. 14-16; *see People v. Luedemann*, 222 Ill. 2d 530, 550 (2006) (seizure occurs when officer restrains suspect's liberty by physical force or show of authority).

a large, bulky item underneath his sweatshirt. *See supra* Part I.B. Because both these events occurred before defendant was stopped and were known to Officer Rodriguez, both the trial and appellate courts correctly considered these additional facts when deciding whether there was reasonable suspicion for the stop. *Lozano*, 2022 IL App (1st) 182170, ¶ 34.

Second, defendant's argument that the appellate court improperly engaged in "the hypothecating of reasons" to justify the stop instead of assessing whether the officers' actual motives or intentions were valid, Def. Br. 22-27, also is incorrect. It is well settled that, when applying the *Terry* reasonableness standard, courts should consider 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." *Timmsen*, 2016 IL 118181, ¶ 9 (quoting *Terry*, 392 U.S. at 21-22). This analysis does not turn, as defendant would have it, on the officer's intent or motivation for conducting the stop. Indeed, the Supreme Court and this Court have repeatedly rejected defendant's proposed approach. *See Brigham City, Utah v. Stuart*, 547 U.S. 398, 404 (2006) (actions are reasonable under Fourth Amendment, regardless of the officer's state of mind, so long as the circumstances when viewed objectively justify the action); *Bond v. United States*, 529 U.S. 334, 338 (2000) (issue is not the officer's state of mind, but the objective effect of his actions); *Whren*, 517 U.S. at 812 ("not only have we never held . . . an officer's motive invalidates objectively justifiable behavior

under the Fourth Amendment; but we have repeatedly held and asserted the contrary"); *People v. McDonough*, 239 Ill. 2d 260, 272 (2010) (whether stop was reasonable for purposes of *Terry* requires assessment of officer's actions objectively and not officer's actual motivations); *see also Kentucky v. King*, 563 U.S. 452, 464 (2011) ("evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer") (internal quotations omitted). For the same reasons, Officer Rodriguez's testimony that he initially considered talking to defendant when he first saw him, *see* Def. Br. 17, 20, 26; *see also* Sup. R 14, 17-18, is not relevant to the analysis. In any event, what the defendant describes as "hypothecated" bases, *i.e.*, that the officers could reasonably have believed that he was attempting to break into an abandoned building and that he had changed direction to evade them, are objective observations either testified to or seen in Soto's body camera footage. Def. Br. 22; Sup. R 14; Pet. Exh. 1 at 19:20:14. And so, the appellate court was correct to consider these facts and circumstances available to the officers.

Finally, the fact that some of defendant's actions might have been susceptible to an innocent explanation does not mean that the officers lacked reasonable suspicion. *See* Def. Br. 18-20. A suspect's conduct can be both "ambiguous and susceptible of an innocent explanation" and sufficient to establish reasonable suspicion for a *Terry* stop. *Wardlow*, 528 U.S. at 125; *see*

also People v. Close, 238 Ill. 2d 497, 511 (2010) ("officers are 'not required to rule out all possibility of innocent behavior' before initiating a *Terry* stop") (quoting 4 W. LaFave, Search & Seizure § 9.5(b), at 481 (4th ed. 2004)). The relevant inquiry is "not whether particular conduct is "innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts." *United States v. Sokolow*, 490 U.S. 1, 10 (1989) (citing *Illinois v. Gates*, 462 U.S. 213, 243-44 (1983)).

Moreover, because *Terry* prescribes a totality of the circumstances test, which precludes individual facts from being viewed in isolation, defendant's argument that each individual fact known to the officers had a potentially innocent explanation, Def. Br. 26-27 ("zero plus zero plus zero does not equal one"), is foreclosed by Supreme Court precedent. *See Arvizu*, 534 U.S. at 274 (*Terry's* totality of the circumstances test "precludes this sort of divide-and conquer analysis"); *see also Wesby*, 138 S. Ct. at 588 (appellate court erroneously viewed each fact in isolation, rather than as one fact in totality of circumstances). As the Seventh Circuit recently explained:

> Often 0 + 0 = 0. But not always. One persistent error in legal analysis is to ask whether a piece of evidence "by itself" passes some threshold — to put evidence in compartments and ask whether each compartment suffices. . . . The "totality of the circumstances" requires courts to consider "the whole picture." Our precedents recognize that the whole is often greater than the sum of its parts — especially when the parts are viewed in isolation. . . . The totality-of-the-circumstances test "precludes this sort of divide-and-conquer analysis."

United States v. Vaughn, No. 22-2427, 2023 WL 2522728 (7th Cir. Mar. 15, 2023), *4 (quoting *Wesby*, 138 S. Ct. at 588).

Here, considered in their totality, the facts of defendant running at a fast pace, holding a concealed bulky object, changing course when he saw the officers, and attempting to enter an abandoned building established reasonable suspicion.

II. Defendant Forfeited His Argument that His Statements Should Have Been Suppressed Because He Failed to Make It Before Trial, and He Cannot Demonstrate Plain Error.

Defendant forfeited his argument that his statements should have been suppressed because he failed to pursue this argument before trial. A motion to suppress should be filed before trial unless "opportunity therefor did not exist or the defendant was not aware of the grounds for the motion." 725 ILCS 5/114-11(g*); see People v. Givens,* 237 Ill.2d 311, 332 (2010) (trial court has discretion to allow a motion to suppress made during trial if statutory circumstances are satisfied). "Where the defense was aware of grounds prior to trial, and had time and opportunity to make the motion, the trial court's denial of an untimely motion will be upheld." *People v. Washington*, 182 Ill. App. 3d 168, 173 (1st Dist. 1989). Defendant does not dispute this proposition but argues that he was unaware of the basis for his request to suppress his statements until the middle of trial: he states that "until the officers testified that they had not Mirandized Lozano, it

might not have been clear to defense counsel that those warning were not given." Def. Br. 38-39.

Not so. As the appellate court correctly pointed out, defendant knew he was questioned at the scene before he was provided the *Miranda* warnings. *Lozano*, 2022 IL App (1st) 182170, ¶ 55. He also received Officer Soto's body camera footage in discovery, and it showed defendant being questioned without *Miranda* warnings. Indeed, defendant introduced the video at the hearing on his motion to suppress evidence. Sup. R 21. "Thus, grounds for a motion to suppress statements were apparent prior to trial." *Lozano,* 2022 IL App (1st) 182170, ¶ 55.; *see* 725 ILCS 5/114-11(g); see *also Washington*, 182 Ill. App. 3d at 173-74 (court did not abuse discretion in denying defendant's midtrial motion to suppress statement where grounds for motion were apparent before trial; defendant was informed of possible grounds for motion to suppress by People's answer to discovery and defendant acknowledged receipt).

Nor is there merit to defendant's argument that the trial court ruled on his midtrial request, such that forfeiture principles do not apply. Def. Br. 39. The court explained that it was denying defendant's request because he raised the issue in the middle of the trial. R13. Defense counsel responded, "I believe the law says that motion can be made in the middle of trial if the issue comes up." *Id*. The trial court then said they were "not sure he hasn't [sic] Mirandized at this particular point. . . . Let's move on." R13-14. This

was not a merits ruling. The court denied the motion as untimely because it was made midtrial. That the court also expressed some uncertainty about whether defendant had received *Miranda* warnings does not change that fact. As such, defendant forfeited his argument that his statements should have been suppressed.

Defendant attempts to excuse his forfeiture as plain error, Def. Br. 41, but that attempt fails at the threshold because he fails to make any argument as to why either of the two plain error prongs is satisfied. Supreme Court Rule 615(a) allows a reviewing court to excuse a defendant's forfeiture in limited circumstances. *People v. Sebby*, 2017 IL 119445, ¶ 48; Ill. S. Ct. R. 615(a). Under Illinois's plain error doctrine, a reviewing court may consider a forfeited claim when: "(1) 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) 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." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). But here, defendant's plain error argument amounts to a single sentence asserting that "either prong of plain error review applies where evidence of Lozano's guilt was closely balanced, and this issue affects Lozano's substantial constitutional right to remain silent." Def. Br. 41. Defendant has therefore forfeited his plain error

argument. *People v. Hillier*, 237 Ill. 2d 539, 545-46 (2010) ("when a defendant fails to present an argument on how either of the two prongs of the plain-error doctrine is satisfied, he forfeits plain-error review."); *People v. Nieves*, 192 Ill. 2d 487, 503 (2000) (where defendant's plain error argument consisted "of a single sentence asking us to employ the plain error rule because the right to a fair death penalty sentencing hearing is a fundamental right," defendant waived plain error argument).

Forfeiture aside, defendant cannot demonstrate plain error because he cannot establish that a clear or obvious error occurred. *People v. Jackson*, 2022 IL 127256, ¶ 21 (first analytical step in plain error review is determining whether a clear or obvious error occurred).

Defendant contends that his statements should be suppressed because he was subject to custodial interrogation without the benefit of *Miranda* warnings. Def. Br. 29-30. Under *Miranda*, warnings are necessary only when the person is in custody and being interrogated by the police. *Miranda v. Arizona,* 384 U.S. 436, 467 (1966). *Terry* stops are generally not subject to dictates of *Miranda*, as the character of the detentions differ from a formal arrest. *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984); *People v. Gonzalez*, 184 Ill. 2d 402, 423 (1998); *see also United States v. Patterson*, 826 F.3d 450, 457 (7th Cir. 2016) ("The temporary and relatively nonthreatening detention involved in a . . . *Terry* stop . . . does not constitute *Miranda* custody.") (citing *Maryland*

v. Shatzer, 559 U.S. 98 (2010)). Thus, during a *Terry* stop, an "officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions" without first providing *Miranda* warnings. *Berkemer*, 468 U.S. at 439; *accord Gonzalez*, 184 Ill.2d at 423 (following *Terry* stop, "*Miranda* warning not required prior to general on-the-scene questioning as to facts surrounding that scene"). The danger of compelled self-incrimination is mitigated by the brief and public nature of a *Terry* stop and the fact the person is typically confronted by only one or two officers. *See Berkemer*, 468 U.S. at 437-39.

As a result, a suspect can be subject to a *Terry* stop and briefly questioned without requiring *Miranda* warnings as long as the suspect is not in custody for *Miranda* purposes. *Id.* *Miranda* warnings are intended to assure that any inculpatory statement made by a defendant is not "simply the product of the compulsion inherent in custodial surroundings." *People v. Slater*, 228 Ill. 2d 137, 149 (2008) (citing *Yarborough v. Alvarado*, 541 U.S. 652, 661 (2004)). Thus, the question is whether, at the time the challenged statements were made, the defendant was subjected to restraints comparable to those associated with formal arrest. *Berkemer,* 468 U.S. at 441. Relevant factors include:

> (1) the location, time, length, mood, and mode of questioning; (2) the number of police officers present during the interrogation; (3) the presence or absence of family and friends of the individual; (4) any indicia of a formal arrest procedure . . . ; (5) the manner by which the individual arrived at the place of questioning; and (6) the age, intelligence, and mental makeup of the accused.

Slater, 228 Ill. 2d at 150.

Defendant's detention did not have characteristics akin to the coercive custodial restraints of a formal arrest and interrogation, such as at a station house. As the video shows, defendant was stopped near a public street, only two officers were present, neither officer had their weapon drawn, and questioning occurred sporadically over four to six minutes. Pet. Exh. 1 at 19:20:10-19:26:06; *see People v. Jeffers*, 365 Ill. App. 3d 422, 430 (2d Dist. 2006) (30-minute stop did not transform into arrest when defendant was alongside public street with officer and paramedics); *People v. Briseno*, 343 Ill. App. 3d 953, 958-59 (1st Dist. 2003) (two officers asking defendant questions on side of major thoroughfare was not custody for *Miranda* purposes). The video also demonstrates the calm atmosphere after defendant had been handcuffed for officer safety. Pet. Exh. 1 at 19:25:34-40. The location in public, short duration of questioning, and relaxed atmosphere after defendant was secured for safety shows defendant was not in custody for *Miranda* purposes.

Defendant incorrectly suggests that whenever an individual is handcuffed and patted down, he are in custody for *Miranda* purposes. Def. Br. 30-32. But not all restraints on freedom of movement amount to *Miranda*

Note, typographical error reported 4/19/23, by Attorney Jalan Jaskot. See below

custody. *See Howes v. Fields*, 565 U.S. 499, 509 (2012) (curtailment of freedom is not necessarily custody; court must also ask whether environment presented same type of station house questioning at issue in *Miranda*). Indeed, the Supreme Court has "decline[d] to accord talismanic power" to the freedom-of-movement inquiry. *Id.* As no single fact or circumstance results in *Miranda* custody, the isolated facts of handcuffing and patting down ~~does~~ do not establish that *Miranda* warnings were required. *See Berkemer*, 468 U.S. at 441; *see also Slater*, 228 Ill. 2d at 150 (indicia of formal arrest, such as physical restraints, is but one of six factors used to determine whether defendant is in custody requiring *Miranda* warnings); *see also People v. Patterson*, 146 Ill. 2d 445, 454-55 (1992) (defendant's wearing of handcuffs during interview, given other circumstances, did not create custody requiring *Miranda* warnings.)

Indeed, handcuffs and pat downs are often used in *Terry* stops to ensure officer safety. Officers may handcuff individuals they believe are armed and dangerous "to protect themselves and other prospective victims of violence in situations where they may lack probable cause for arrest." *Terry*, 392 U.S. at 24. It would be "clearly unreasonable" to deny officers the power to take necessary measures to determine whether the individual is carrying a weapon and to neutralize any potential threat while asking questions to dispel reasonable suspicion. *Id.* Here, the officers could reasonably have believed they were in danger when defendant refused to remove his hand

from the unidentified bulge, which could have been a gun or other dangerous weapon. Pet. Exh. 1 at 19:20:00-20. Defendant had also made evasive movements leading up to the stop that could reasonably have contributed to officers' caution. Sup. R 14. Thus, the handcuffing of defendant was reasonable under these circumstances to neutralize any danger and the brief physical restraint of defendant did not transform the stop into a custodial interrogation requiring *Miranda* warnings.

Other factors, including that defendant was stopped in public and questioned for less than six minutes, also weigh against a conclusion that defendant was in *Miranda* custody. In the video, when Officer Soto returns after running defendant's information, defendant and Officer Rodriguez are standing calmly next to one another. Pet. Exh. 1 at 19:25:34-40. Defendant was not forced to the ground or placed in the officers' vehicle. *See United States v. Coulter*, 41 F.4th 451 (5th Cir. 2022) (despite being handcuffed for officer safety, defendant was not in custody for *Miranda* purposes when questioning lasted fifteen minutes, along a public road, with one officer); *United States v. Rabbia,* 699 F.3d 85, 92 (1st Cir. 2012) (use of handcuffs, pat-and-frisk, or officer display of firearm do not, considered individually, necessarily convert *Terry* stop into custodial arrest requiring *Miranda* warnings); *United States v. Leshuk,* 65 F.3d 1105, 1109-10 (4th Cir. 1995) ("drawing weapons, handcuffing a suspect, placing a suspect in a patrol car for questioning . . . does not necessarily elevate a lawful stop into a custodial

arrest for *Miranda* purposes"); *United States v. Bautista*, 684 F.2d 1286, 1292 (9th Cir. 1982) ("[h]andcuffing a suspect does not necessarily dictate a finding of custody . . . [because] [s]trong but reasonable measures to ensure the safety of the officer or the public can be taken without necessarily compelling a finding that the suspect was in custody")

Defendant's cited cases are easily distinguishable. Def. Br. 32. In *United States v. Perdue*, 8 F.3d 1455 (10th Cir. 1993), the court found a custodial situation requiring *Miranda* warnings when the defendant was forced out of his car at gunpoint and questioned by two officers while face down on the ground, the officers kept their guns pointed at him and his pregnant fiancée, and police helicopters hovered above. *Id*. at 1464. The facts of *Perdue* are drastically different than those of defendant's case. Officers Rodriguez and Soto never drew their guns, defendant was never forced to the ground, and only the two officers were present. *See* Pet. Exh. 1 at 19:20:00-19:27:28

Defendant's two remaining cases, while slightly more similar to his circumstances, are nonetheless distinguishable. *United States v. Smith*, 3 F.3d 1088 (7th Cir. 1993), involved a stop of a taxicab with five suspects involved in potential drug trafficking at a nearby motel. *Id*. at 1092-93. The defendant was handcuffed, directed from the scene of the traffic stop to sit on the grass on the side of the road, and surrounded by an overwhelming police presence, *id.*; defendant in this case, by contrast, remained in the vicinity of

where he was stopped and only two officers were present, *see* Pet. Exh. 1 at 19:20:00-19:27:28. In *United States v. Clemons*, 201 F. Supp. 2d 142 (D.D.C. 2002), the defendant was physically removed from his vehicle, put on the ground, and handcuffed, *id.* at 145; in contrast, defendant here was directed off someone else's property and remained standing throughout the stop, *see* Pet. Exh. 1 at 19:20:00-10. As both *Smith* and *Clemons* present significant factual distinctions absent in this case, they fail to support defendant's argument that he was in custody for *Miranda* purposes.

Finally, because defendant's last cited case, *United States v. Elias*, 832 F.2d 24 (3d Cir. 1987), reached no conclusion on whether the defendant was in *Miranda* custody, it also provides no support for his argument. *See id.* at 27 (reasoning that because "this court is incompetent to determine from the record on appeal whether Elias was in custody for purposes of *Miranda* at the time of his statement, we must remand . . . for further findings of fact").

In sum, after weighing all of the relevant factors, the encounter between defendant and the officers did not amount to custodial interrogation requiring *Miranda* warnings. Therefore, if the Court were to reach defendant's forfeited plain error argument, it should hold there was no error in admitting defendant's statements, much less a clear or obvious error.

III. Alternately, Any Error in Admitting Defendant's Statements Was Harmless.

Even if defendant had preserved his argument that his statements should have been suppressed, and even if those statements were obtained in

violation of *Miranda*, reversal would be unwarranted because any error in admitting the statements was harmless beyond a reasonable doubt. *People v. R.C.,* 108 Ill. 2d 349, 355 (1985) (error of admitting statement not reversible error if "harmless beyond a reasonable doubt"). To demonstrate that an error of this nature was harmless, the People must prove beyond a reasonable doubt that the result would have been the same absent the error. *People v. Salamon*, 2022 IL 125722, ¶ 120 (citing *People v. Jackson*, 2020 IL 124112, ¶ 127); *see also Chapman v. California*, 386 U.S. 18, 24 (1967) (error can be deemed harmless only if it appears "beyond a reasonable doubt that the error . . . did not contribute to the verdict obtained"). This standard is satisfied where the other evidence in the case overwhelmingly supports the conviction. *In re Rolandis G.*, 232 Ill. 2d 13, 43 (2008) (admission of statements was harmless as properly admitted evidence overwhelmingly supported conviction); *People v. Patterson,* 217 Ill. 2d 407, 437 (2005) (harmless error given overwhelming nature of other evidence).

Here, any error in admitting defendant's statements — that someone gave him the radio and that he found the wallet in an alley — was harmless beyond a reasonable doubt. The other evidence of defendant's guilt was overwhelming. Officers Rodriguez and Soto stopped defendant one block from the location of the burglary. R12, 24, 28. He possessed Cherrez's car radio and the wallet containing her student ID. Pet. Exh. 1 at 19:20:27-38; Sup. R 19-20. He also had two screwdrivers and was bleeding from a cut on

his hand, which, circumstantially, support the inference that he used the screwdrivers to break Cherrez's window and/or remove the radio from the car (and cut himself in doing so). Pet. Exh. 1 at 19:21; Sup. R 19-20; *see Patterson*, 217 Ill.2d at 435 (conviction may be based solely on circumstantial evidence and a jury regards the inferences that flow normally from the evidence before it). Additionally, after seeing the officers make a U-turn, defendant attempted to flee into an abandoned building. Sup. R 14; *People v. Harris*, 225 Ill.2d 1, 23 (2007) (flight is evidence of consciousness of guilt). This ample evidence of defendant's guilt is unaffected by defendant's statements.

Thus, even if it were error to admit these statements in violation of *Miranda*, the error was harmless beyond a reasonable doubt in light of the overwhelming other evidence of defendant's guilt.

CONCLUSION

This Court should affirm the judgment of the appellate court.

March 22, 2023

Respectfully submitted,

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RULE 341(c) CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, is 32 pages.

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PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On March 22, 2023, the foregoing **Brief of Plaintiff-Appellee People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the Court's electronic filing system, which provided service to the following:

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