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Kevin L. Smith

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MAY, Judge

Santana Gray was convicted of the murder of Anthony Jenkins and the attempted murder of Wayne Williams.¹ He raises two issues on appeal: (1) whether the trial court erred by admitting evidence obtained as a result of a warrantless stop; and (2) whether there was sufficient evidence he intended to kill Williams. We affirm.

FACTS AND PROCEDURAL HISTORY

On September 16, 2008, Gray broke into Anthony Jenkins' home on Dearborn Street in Indianapolis. Jenkins caught Gray, made him take off his clothes, and forced him to leave naked. A neighbor, David McDonald, saw Jenkins push Gray out of his house.

Soon thereafter Jenkins went down the street to where his aunt, Keisha Journey, lived. Williams, one of Jenkins' uncles, was at Journey's house working on a car. Jenkins told Journey and Williams about the incident, but did not mention Gray's name. Jenkins left Journey's house and returned after a few minutes. A man quickly approached Jenkins and fired several shots. Williams ran up to the shooter and "bear hugged" him. (Tr. at 103.) The man shot Williams in the thigh, and Williams fell to the ground. Williams and Journey heard the gun click several more times, but the gun did not fire. The shooter then ran away.

Jenkins' wounds were fatal. Williams was hit in his femoral artery and had blood "squirting out" from the wound. (*Id.* at 295.) Some neighbors applied pressure with a shirt and used a belt as a tourniquet, and Williams survived.

Several people called 911, but before the dispatch was sent out, someone flagged down Officer Michael Leepper. Officer Leepper broadcast a description of the shooter, and a

¹ Ind. Code § 35-42-1-1 (murder); Ind. Code § 35-41-5-1 (attempt).

perimeter was set up around the scene. Officer Matthew McDonald was stationed at 9th and Tuxedo Streets as part of the perimeter. After about half an hour, Officer McDonald drove a short distance down 9th Street and noticed a car stopped three or four feet from the curb. Gray approached the car. Officer McDonald called out to Gray, but Gray did not respond and got in the car; however, Officer McDonald was not certain Gray heard him.

Officer McDonald followed the car and stopped it about three blocks from Journey's house. He had Gray get out of the car, and he placed Gray in handcuffs. As he was handcuffing Gray, Officer McDonald noticed Gray had blood splatter on his arms and legs. Other officers brought David McDonald and Journey to the traffic stop to see if they recognized Gray. David identified Gray as the person Jenkins had thrown out of his house, and Journey identified him as the shooter.

The police then took Gray to the police station, where they photographed him and took his clothing he was wearing as evidence. Blood on Gray's shoes matched Williams' DNA profile. The police searched Jenkins' house and found the clothing Jenkins had forced Gray to remove earlier that day. In Gray's pants, police found keys for Gray's blue Camaro, which was parked behind Jenkins' house.

Gray was charged with the murder of Jenkins, the attempted murder of Williams, and carrying a handgun without a license.² Gray filed a motion to suppress the evidence obtained as a result of the warrantless stop, arguing Officer McDonald did not have reasonable suspicion. After a hearing, the trial court denied the motion.

² Ind. Code § 35-47-2-1.

The case was tried to a jury, and Gray renewed his objection to the evidence obtained as a result of the warrantless stop.³ That evidence was admitted over his objection, and he was found guilty as charged. The trial court entered judgments on the murder and attempted murder counts, but not the carrying a handgun without a license count due to double jeopardy concerns.

DISCUSSION AND DECISION

1. Admission of Evidence

Gray argues the admission of the evidence obtained as a result of the warrantless stop violated his rights under both the Fourth Amendment of the United States Constitution and Article 1, Section 11 of the Indiana Constitution. He argues Officer McDonald did not have reasonable suspicion to detain him because he did not sufficiently match the description of

³ The State argues Gray waived his challenge to State's Exhibits 86-90, which were photographs of Gray taken after his arrest and the clothing he was wearing at the time of the arrest, because he did not make a contemporaneous objection at trial. When the State moved to admit the photographs, defense counsel stated, "No objection." (Tr. at 56.) The court stated, "We'll show State's 86, 87, 88, and 89 admitted without objection." (*Id.* at 56.) The State then laid the foundation for the admission of the clothing and moved to admit it into evidence. Defense counsel stated, "No objection, Judge," and the court said, "We'll show State's 90 admitted without objection." (*Id.* at 58.) Immediately thereafter, defense counsel asked to approach, and stated, "Caveat. All of this was recovered from our client after the stop, and being stopped in the vehicle which we moved to suppress, which was denied. So I think I need to actually make an objection to preserve that." (*Id.* at 59.) She then requested a continuing objection based on the grounds argued in the motion to suppress. The court responded, "All right, so we'll show 86 through 90 admitted over objection for reasons made previously in the record." (*Id.* at 60-61.)

"It is well established that a motion to suppress is insufficient to preserve error for appeal. A defendant must instead reassert his objection at trial contemporaneously with the introduction of the evidence to preserve the error for appeal." *Jackson v. State*, 890 N.E.2d 11, 15 (Ind. Ct. App. 2008) (citations omitted). Requiring the defendant to make an objection at trial "affords the trial court the opportunity to make a final ruling on the matter in the context in which the evidence is introduced." *Culver v. State*, 727 N.E.2d 1062, 1066 (Ind. 2000), *reh'g denied*. It is true that defense counsel did not object before the evidence was admitted. However, she quickly realized her mistake and requested a continuing objection, which the trial court recognized. The court reconsidered, but did not change, its ruling, and it was willing to recognize a continuing objection. Counsel's slightly belated objection permitted the trial court to make a final ruling within moments of the State's introduction of the evidence, and therefore we decline to find Gray waived the issue. *See Sevits v.*

the shooter. In the alternative, Gray argues Officer McDonald exceeded the scope of a *Terry*⁴ stop by placing him in handcuffs.

A. Fourth Amendment

“Under *Terry*, an officer is permitted to stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity may be afoot, even if the officer lacks probable cause.” *Armfield v. State*, 918 N.E.2d 316, 319 (Ind. 2009) (internal quotations omitted).

The “reasonable suspicion” requirement of the Fourth Amendment is satisfied if the facts known to the officer at the moment of the stop are such that a person “of reasonable caution” would believe that the “action taken was appropriate.” In other words, the requirement is satisfied where the facts known to the officer, together with the reasonable inferences arising from such facts, would cause an ordinarily prudent person to believe that criminal activity has occurred or is about to occur. Reasonable suspicion entails something more than an inchoate and unparticularized suspicion or hunch, but considerably less than proof of wrongdoing by a preponderance of the evidence.

Crabtree v. State, 762 N.E.2d 241, 246 (Ind. Ct. App. 2002) (citations omitted). We review a determination of reasonable suspicion *de novo* rather than for abuse of discretion, but we give due weight to inferences drawn from the facts by the trial court. *Bannister v. State*, 904 N.E.2d 1254, 1255 (Ind. 2009) (citing *Ornelas v. United States*, 517 U.S. 690, 699 (1996)). “The State has the burden to show that under the totality of the circumstances its intrusion was reasonable.” *Id.* at 1256.

State, 651 N.E.2d 278, 280 n.4 (Ind. Ct. App. 1995) (holding evidentiary issue was not waived although defendant did not object immediately after the State’s first question on the topic).

⁴ *Terry v. Ohio*, 392 U.S. 1 (1968).

Officer Leepper testified he broadcast a description of “a late teens to early twenties black male, approximately five foot seven to nine, somewhere around there, thin build, with braids or matted dreadlock hair, and . . . jeans shorts and a, I believe black tank top or t-shirt.” (Tr. at 161.) Officer Leepper stated he described the suspect as a “light skinned black male,” (*id.* at 176), and testified he would consider Gray to have “roughly light to medium skin.” (*Id.* at 177.) Officer McDonald testified the description of the suspect was updated at least once, and ultimately he received a description of “a black male, about five foot eight, thinner build, got on a red t-shirt, blue[]jeans. He had matted dreadlocks.” (*Id.* at 194.) A CAD report, which summarizes the radio traffic regarding a particular event, shows that the shooter’s shirt was at one point described as “blk/red.” (Defendant’s Ex. A.) Officer McDonald interpreted that to mean the shirt was black and red.

Gray claims he did not sufficiently match this description, such that Officer McDonald would have reasonable suspicion to stop him. He notes the shooter was reported to have on a black shirt or a black and red shirt, but his shirt was solid red. He also claims his skin tone is “medium to dark,” (Appellant’s Br. at 13), not light. Finally, he notes the shooter was known to be carrying a silver handgun, but Officer McDonald did not find a gun on him.

Gray’s arguments are unpersuasive. Officer McDonald spotted Gray about three blocks from the scene of the shooting approximately thirty minutes after it occurred, and Gray fit many of the descriptors provided by the witnesses. He does not dispute that he

matches the age, height, and build reported to Officer McDonald.⁵ There was some dispute as to whether Gray's hairstyle was braids or dreadlocks, but the officers testified those hairstyles look similar. Pictures of Gray after his arrest show he was wearing jean shorts and a red shirt. Descriptions of the shirt were inconsistent, but apparently at least one witness described the shirt as containing some red, and Officer McDonald testified he was given a description of a red shirt. Reasonable minds could differ regarding the relative lightness or darkness of Gray's skin, and the presence of a handgun is not something Officer McDonald necessarily could ascertain without frisking Gray. Therefore, we conclude Officer McDonald had reasonable suspicion to detain Gray for a brief investigatory stop. *See Arcuri v. State*, 775 N.E.2d 1095, 1096-99 (Ind. Ct. App. 2002) (finding reasonable suspicion to stop Arcuri where he was found near scene of crime and fit victim's description of a short man with an accent, although there was no indication he was carrying a gun or wearing the clothes described by victim), *trans. denied*.

Gray also argues Officer McDonald exceeded the scope of a *Terry* stop by placing him in handcuffs. Whether placing a person in handcuffs converts an investigatory stop into an arrest depends on the totality of the circumstances. *Willis v. State*, 907 N.E.2d 541, 545 (Ind. Ct. App. 2009). We have approved the use of handcuffs in an investigatory stop when the officer has reason to believe the suspect is armed. *See id.* at 546. Also relevant is "whether the police diligently pursued a means of investigation that was likely to confirm or dispel

⁵ According to the pre-sentence investigation report, Gray is 5'7" tall, weighs 140 pounds, and was eighteen at the time of the offense.

their suspicions quickly.” *Payne v. State*, 854 N.E.2d 1199, 1205 (Ind. Ct. App. 2006) (quoting *Mitchell v. State*, 745 N.E.2d 775, 782 (Ind. 2001)).

Officer McDonald stopped Gray because he closely matched the description of the shooter. Officer McDonald knew a shooting had occurred recently and, if Gray was the shooter, he might be armed. As he was handcuffing Gray, Officer McDonald noticed Gray had blood splatter on his arm and legs, which increased his level of suspicion. Officers brought witnesses to the scene so they could quickly confirm or dispel Officer McDonald’s suspicion. Under the totality of the circumstances, we conclude the use of handcuffs did not exceed the scope of an investigatory stop under the Fourth Amendment. *See Willis*, 907 N.E.2d at 545-46.

B. Art. 1, § 11

Gray also argues the stop violated his rights under Art. 1, § 11 of the Indiana Constitution. The State bears the burden to show that, under the totality of the circumstances, its intrusion was reasonable. *Buckley v. State*, 886 N.E.2d 10, 14 (Ind. Ct. App. 2008). The reasonableness of a search or seizure turns on the balance of: (1) the degree of concern, suspicion, or knowledge that a violation has occurred; (2) the degree of intrusion the method of the search or seizure imposes on the citizen’s ordinary activities; and (3) the extent of law enforcement needs. *Litchfield v. State*, 824 N.E.2d 356, 361 (Ind. 2005).

Gray acknowledges the police had a substantial interest in quickly investigating the shooting. He argues, however, there was not a high degree of suspicion, again noting the discrepancies between the description of the shooter and his appearance. As discussed

above, these discrepancies were minor, and Gray generally matched the description Officer McDonald received.

The State acknowledges handcuffing is a significant intrusion, but argues it was reasonable based on the totality of the circumstances. We agree. Officer McDonald had reason to believe Gray might be armed. As he was handcuffing Gray, Officer McDonald noticed blood splatter on Gray's arms and legs. Police then brought witnesses to the scene to see if they recognized Gray. Given the concern that a serious crime had been committed, the perpetrator was on the loose, and the fact that Gray closely matched the description of the perpetrator, we conclude it was reasonable for the police to briefly detain Gray so witnesses could identify him. *See Masterson v. State*, 843 N.E.2d 1001, 1007-08 (Ind. Ct. App. 2006) (finding warrantless search of vehicle did not violate Art. 1, § 11 where police had strong suspicion that vehicle was recently used in armed robbery and police were “concentrat[ing] their efforts on safeguarding the community by quickly and efficiently pursuing the suspect”), *trans. denied*.

2. Sufficiency of Evidence

Gray argues there was insufficient evidence he intended to kill Williams. In reviewing the sufficiency of the evidence, we do not reweigh the evidence or assess the credibility of the witnesses. *Love v. State*, 761 N.E.2d 806, 810 (Ind. 2002). We consider the evidence most favorable to the verdict and the reasonable inferences drawn therefrom. *Id.* We will affirm if there is probative evidence from which a reasonable jury could have found the defendant guilty beyond a reasonable doubt. *Id.*

To convict Gray of attempted murder, the State had to prove beyond a reasonable doubt that Gray, while acting with the specific intent to kill Williams, engaged in conduct constituting a substantial step toward the killing. *See* Ind. Code §§ 35-41-5-1 and 35-42-1-1; *Blanche v. State*, 690 N.E.2d 709, 712 (Ind. 1998). Gray argues he was trying only to incapacitate Williams so he could get away and he shot Williams in the leg because it was more likely to incapacitate him than kill him. Williams testified he fell to the ground after the first shot and was losing blood rapidly, yet Gray continued to pull the trigger. Williams and Journey both heard Gray’s gun “click” as he attempted to fire additional shots. (Tr. at 105, 129.) Thus, a reasonable jury could conclude Gray was not trying merely to incapacitate Williams, but intended to kill him. *See Blanche*, 690 N.E.2d at 712 (holding there was sufficient evidence Blanche intended to kill Reed when Blanche attempted several times to fire his gun at Reed, but the gun malfunctioned).

CONCLUSION

Because Officer McDonald had reasonable suspicion to stop Gray and his use of handcuffs was reasonable under the circumstances of this case, the stop was valid under both the Fourth Amendment of the United States Constitution and Art. 1, § 11 of the Indiana Constitution. Thus there was no error in the admission of the evidence obtained from the stop. Furthermore, the evidence was sufficient to support Gray’s conviction of attempted murder. Therefore, we affirm.

Affirmed.

BAILEY, J., and BARNES, J., concur.