2017 IL App (1st) 140900-U

FIFTH DIVISION
Order filed September 29, 2017
Modified upon the denial of rehearing November 9, 2017

Nos. 1-14-0900 & 1-14-1380 (Cons.)

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

	)	Appeal from the
THE PEOPLE OF THE STATE OF ILLINOIS,	)	Circuit Court of
	)	Cook County
Plaintiff-Appellee,	)	
	)	
v.	)	No. 11 CR 18454 (03)
	)	
JAMAL STREETER,	)	
	)	Honorable
Defendant-Appellant.	)	Vincent M. Gaughan,
	)	Judge Presiding.

PRESIDING JUSTICE REYES delivered the judgment of the court.
Justices Lampkin and Rochford concurred in the judgment.

ORDER

Held: Defendant's conviction for first degree murder is affirmed where: (1) the trial court did not err in denying defendant's motion to suppress his inculpatory statement; (2) the State proved defendant guilty of first degree murder beyond a reasonable doubt under an accountability theory; (3) defendant's trial counsel was not ineffective; and (4) defendant failed to establish that the fairness of his trial was affected.

¶ 1 Following a jury trial in the circuit court of Cook County, defendant Jamal Streeter[1] was found guilty of first degree murder (720 ILCS 5/9-1(a)(1) (West 2010)) and sentenced to serve 40 years in the Illinois Department of Corrections (IDOC). On appeal, defendant argues (1) the trial court erred in denying his motion to suppress, (2) the State failed to prove him guilty of first degree murder beyond a reasonable doubt, (3) his trial counsel was ineffective at the suppression hearing and at trial, and (4) the trial court denied him a fair trial when it improperly defined reasonable doubt to the jury. We address each issue in turn.

¶ 2 I. BACKGROUND

¶ 3 On August 3, 2011, Darius Brown (Brown) was shot and killed in Metcalfe Park located on South State Street in Chicago. During the shooting, the same shooter shot at Steve Barron but he was not hit. In October 2011, defendant and his codefendants Aramis Beachem (Beachem) and Vito Richmond (Richmond) were charged by indictment with first degree murder of Brown (720 ILCS 5/9-1(a)(1), 9-1(a)(2), 9-1(a)(3) (West 2010)), attempted first degree murder of Barron (720 ILCS 5/8-4(a) (West 2010)), and aggravated discharge of a firearm (720 5/24-1.2(a)(2) (West 2010)).[2] At trial, the jury found defendant guilty of first degree murder of Brown but not guilty of the attempted murder of Barron. The jury further found the State had failed to prove that defendant had used a firearm in the commission of the offense. We will recount only those facts and testimonies that are relevant to this appeal.

¶ 4 A. Pretrial Proceedings

¶ 5 Prior to trial, defendant filed a motion to suppress his oral and written statements to the police following his arrest. In his motion, defendant asserted his statements should be excluded

[1] Defendant is referred to as "Jermal Streeter" in defendant's opening brief. At trial, however, defendant stated that his name is "Jamal Streeter." For consistency, he will hereinafter be referred to as "Jamal Streeter."

[2] Defendant is the only party to this appeal.

because (1) defendant's statements to the police were taken after he had expressed his desire to stop communicating to the police, in violation of the constitutions of the United States and Illinois and (2) the police denied defendant's repeated requests to call his family, in violation of section 103-3 of the Code of Criminal Procedure (the Code) (725 ILCS 5/103-3 (West 2010)).

¶ 6 At the suppression hearing, defendant testified that on October 12, 2011, he was arrested and placed in custody at a police station. He further testified that he remained in custody until October 14, 2011. Defendant acknowledged he was advised of his *Miranda* rights at the police station. He understood his *Miranda* rights and agreed to communicate with the police. Defendant also testified that when he had repeated his account of the offense three or four times, he stated he was "done talking." The police, however, continued to question him. Thereafter, defendant stated on several occasions, "I've already told my story," "I'm done," and "I don't wish to talk more, I have nothing else to say." Defendant testified the police still continued the questioning on each of these occasions. He never specifically stated he wished to "remain silent." Defendant further testified that at one point during the interviews, a female detective asked, "Do you have anything more to say?" Defendant testified he did not say anything and that he shook his head from side to side. He also testified he never asked to speak with an attorney. Defendant testified, however, that he did ask eight different police officers to call his sister, Passion Jordan (Jordan), but that he was not allowed to make a phone call until he arrived at the Cook County jail. Defendant testified the police did not ask him why he wished to call Jordan and they did not inform him that she was at the police station.

¶ 7 Chicago police detective Daniel Stanek (Detective Stanek) testified that a day prior to the offenses in question, an individual matching defendant's description fired a firearm on South Michigan Avenue. The individual was with Jordan at the time of the shooting. Detective Stanek

further testified that thereafter, on October 13, 2011, he interviewed defendant at the police station. During the interview, defendant asked to call his sister Jordan on several occasions. Detective Stanek testified that defendant was not allowed to make the calls because Jordan had not been formally interviewed and Detective Stanek believed she could have been a witness to the offenses. Further, Detective Stanek was aware that the police were still looking for an additional firearm that had been utilized in the homicide of Brown. Detective Stanek also testified that at one point during the interview, he and his partner asked defendant why he wanted to call his sister. Defendant answered he wanted her to know where he was. Detective Stanek testified that he had, in fact, contacted Jordan and communicated with her over the phone on numerous occasions. After Detective Stanek informed defendant that his sister knew where he was, defendant stopped asking to call her. Detective Stanek testified that defendant never asked for an attorney. Detective Stanek further testified that while he did not allow defendant to call Jordan, defendant was allowed to make calls in the "lockup."

¶ 8 Following the testimony of Detective Stanek, the parties rested. The circuit court then reviewed portions of an electronically recorded interview (ERI) that had been admitted into evidence. The ERI video recording commences on October 12, 2011, and concludes on October 14, 2011, and depicts the entire time that defendant was in custody at the police station. In the video, on October 12, 2011, at 4:26 p.m., a female detective asked defendant, "Do you have any questions for me about anything you've learned so far?" Defendant shook his head from side to side and answered, "No, Ma'am." The female detective further asked, "you still got nothing to say about it?" In response, defendant again shook his head from side to side.

¶ 9 The next day, on October 13, 2011, at 1:09 a.m. defendant asked a detective if he could make a phone call and was informed that he will get his call in "lockup." Later that day at 2:25

p.m., defendant asked another detective about a phone call and was informed, "not right now." At 4:13 p.m., defendant asked Detective Stanek about a phone call and was informed, "not for awhile yet." Detective Stanek then asked defendant who he wanted to call and defendant replied he wished to speak with his sister. Detective Stanek informed defendant, "They know where you're at." Detective Stanek then informed defendant that "they" have been at the police station. A few hours later at 6:34 p.m., defendant asked about his phone call and Detective Stanek responded that it might be "quite awhile still."

¶ 10 Later, between October 13, 2011, at 11:40 p.m. and October 14, 2011, at 12:02 a.m., a detective engaged in conversation with defendant and tried to convince him to tell the truth about what had happened. A few minutes later, the following exchange occurred:

> "DETECTIVE: Come on, Jamal (inaudible) don't do that. Pull your face up.
>
> DEFENDANT: I ain't got nothing to say.
>
> DETECTIVE: So you're just going to let those guys put you down for this, huh?
>
> DEFENDANT: I keep telling you the truth. It don't make no difference to anybody (inaudible) keep asking me the same questions."[3]

¶ 11 After hearing oral arguments and reviewing portions of the ERI video recording that were admitted into evidence, the circuit court denied defendant's motion to suppress his statements. In denying defendant's motion, the circuit court found that defendant did not unequivocally

[3] There are also portions of the ERI video relevant to defendant's ineffective assistance claim that were not submitted into evidence at the suppression hearing but are part of the record on appeal. In those portions of the video, on October 12, 2011, at 7:58 p.m., a detective dismissed a question from defendant regarding whether his family knew where he was. Defendant responded, "I'm done." The detective, however, continued the questioning. Defendant replied, "I am done talking" and did not respond to further questions. A few hours later at 10:23 p.m. that same day, defendant made a request to call his family, which was denied. Later, on October 13, 2011, defendant asked about his phone call on four more occasions but his requests were all denied. On October 14, 2011, at approximately 2 a.m., three detectives woke up defendant, showed him Beachem's videotaped statement, and demanded that he confess.

invoke his right to remain silent. Regarding the exchange on October 12, 2011, at 4:26 p.m., when a detective asked defendant if he had anything to say and defendant shook his head in response, the circuit court concluded, "that's not an invocation." Further, regarding the exchange on October 14, 2011, at 12:05 a.m., when defendant stated, "I ain't got nothing to say," the circuit court interpreted this to mean defendant had nothing else to tell the police and that he would keep telling them the same story if they continued to interrogate him. The circuit court further found the police had a legitimate basis for denying defendant an opportunity to call his sister, who was reasonably deemed to have been a potential witness, if not a potential offender.

¶ 12 B. Trial Proceedings

¶ 13 The matter proceeded to a jury trial. During *voir dire*, the trial court made the following comments:

> "These are not your final and complete instructions. Those will come after you've heard all of the evidence and the final arguments of the lawyers. When the time for giving instructions come[s], I will read them to you and you will get them in writing."

¶ 14 After explaining to the potential jurors the concept of the State's burden of proof, the trial court stated:

> "The next constitutional principle is the burden of proof. Some of you may have sat on civil cases. The definition of – in that case is [*sic*] the burden of proof is preponderance of the evidence, and the definition there, it's more likely than not that the event occurred. If you look at a scale, all you have to do is just balance it a little bit; tip it towards one side and that would be a preponderance of the evidence. * * * This is criminal trial. So, the burden here is much higher. It's proof beyond a reasonable doubt. Does anybody in the inner or outer part of the courtroom not understand the principle beyond a reasonable

> doubt, please raise your hand."

No potential juror responded. Thereafter, the trial court reiterated:

> "After you've heard all of the evidence, the arguments of the lawyers, and my instructions on the law, you will receive written instructions and retire to the jury room to determine your verdicts."

Then prior to opening statements, the trial court stated again:

> "Following closing arguments, I will read the instructions of law that you are to follow in this case. Then you will get those instructions in writing when you go back to the jury room."

¶ 15 During opening statements, defense counsel challenged the voluntariness and credibility of defendant's statement to an Assistant State's Attorney (the ASA). The State then presented the testimony of the following thirteen witnesses.

¶ 16 Barron testified that in 2011, he was affiliated with the Welch World street gang. A few weeks prior to the shooting on August 3, 2011, Richmond and defendant approached Barron and asked if he was affiliated with Welch World. The two men indicated they would "jump" Barron because they had "just took a loss." Barron understood this to mean that defendant's sister Princess Streeter (Princess) had died. She was a member of the 37th Avenue Boys street gang and had been shot as part of a gang dispute between Welch World and the 37th Avenue Boys. Barron ran away. When asked to identify defendant in court, Barron pointed to Beachem and referred to him as "Ace." When asked to identify Beachem, Barron pointed to defendant.

¶ 17 Barron further testified that on the evening of August 3, 2011, he was at Metcalfe Park on South State Street playing basketball with Brown. Barron had a red Washington Nationals hat and a tattoo of a "W" on the back of his right hand, which indicated he was a member of Welch

World. During the game, Barron heard four or five shots behind him and started running. Brown, who was running next to him, "said he got hit." Barron then observed an automobile he identified as a gray Charger driving southbound on State Street. He could not identify anyone inside the vehicle. The following day, on August 4, 2011, Barron informed the police he had heard shots and ran during the incident. Thereafter, on November 29, 2011, Barron informed an ASA that he had observed shots coming from a gray Charger and "some dreads and a hand come out of the window." Barron, however, was unable to identify anyone in the vehicle. When asked to identify defendant in a photo lineup, Barron selected a photo of defendant and a photo of Preston O'Neil (O'Neil).

¶ 18 Ronald Craig (Craig) testified that on August 3, 2011, at approximately 5 p.m. in the evening, he was at Metcalfe Park. A black or silver Chrysler or Charger approached and slowed down in front of the bench where he was sitting. Craig observed an individual who either had dreadlocks or was wearing a hood through the back window of the vehicle. Craig could not observe the individual's face. Then Craig heard and observed six gunshots coming from the back windows of the automobile. Brown said he was "hit" and collapsed to the ground.

¶ 19 Oaklei Lofton (Lofton) testified that on August 3, 2011, at approximately 5:21 p.m., he was playing basketball at Metcalfe Park with Brown and Barron. Lofton then noticed a white four-door automobile slow down on State Street near the park. Three or four seconds later, Lofton heard gunshots. He observed "hands" holding "objects" come out of the right hand passenger side window of the vehicle. He did not observe the faces of the individuals inside the vehicle. Brown yelled he was "hit." His shirt was covered in blood. Shortly after the shooting, Lofton was asked to view two photo lineups at the police station to identify the "suspect." He identified Richmond in one lineup and two other individuals including defendant in the second

lineup.

¶ 20 Stephanie Brown testified she was Brown's mother. Brown was 13 years old when she last saw him alive on August 3, 2011.

¶ 21 Clarence Whitelow (Whitelow) testified he had known defendant for five or six years. He had also known Beachem for seven or eight years. Whitelow identified defendant and Beachem in court. Whitelow further testified that, a few days prior to August 3, 2011, Beachem came to his house and gave him a silver .45-caliber handgun. Then, during the day on August 3, 2011, Beachem returned with defendant to Whitelow's house to retrieve the handgun. A few days later, Beachem returned the handgun to Whitelow. Later, Whitelow sold the handgun to Keith Daniels (Daniels). As Whitelow was leaving, however, he was stopped and searched by the police. He was later charged with possession of the handgun. Thereafter, Whitelow gave a statement to an ASA. In the statement, Whitelow stated he heard while watching television that a 13-year old boy had been shot. A few days later, Beachem came to Whitelow's house and returned the .45-caliber handgun, which Whitelow then sold to Daniels.

¶ 22 Chicago police officer Elmore Metcalfe testified he was assigned to recover video images from a building on South State Street in relation to the shooting of Brown.

¶ 23 Chicago police detective David Hickey testified he executed a controlled purchase of the .45-caliber handgun from Whitelow. Daniels was working as an informant. After the purchase was completed, Whitelow was stopped and later arrested.

¶ 24 Chicago police sergeant Jose Lopez testified as a gang expert. In August 2011, the 37th Avenue Boys and Welch World engaged in a series of shootings and retaliation shootings. Defendant's sister Princess was killed as a result of this conflict.

¶ 25 Chicago police officer Michael Scarriot (Officer Scarriot) testified that on August 3,

2011, at approximately 6:39 p.m., he was assigned to process the crime scene on South State Street. During his investigation, he recovered nine fired cartridge casings from the street. There were five .45-caliber Winchester casings and four "S and B" 9-millimeter casings.

¶ 26 Justin Barr (Barr), a forensic scientist employed with the Illinois State Police, testified as an expert in firearms identification. On August 12, 2011, Barr examined the .45-caliber casings that had been recovered from the crime scene and found they were fired from the recovered .45-caliber handgun, *i.e.*, the handgun that Whitelow had sold to Daniels. The 9-millimeter casings were all fired from the same handgun but not the .45-caliber handgun that was recovered.

¶ 27 Chicago police detective Robert Garza (Detective Garza) testified that on August 4, 2011, he interviewed Barron at the police station. During the interview, Barron mentioned defendant and Richmond. Barron also indicated he had observed a Charger that was possibly involved in the shooting. Thereafter, on October 12, 2011, defendant, Richmond, and Beachem were arrested and placed in custody. Their entire interviews were recorded electronically. On cross-examination, Detective Garza confirmed that during a photo lineup, Barron identified O'Neil as defendant.

¶ 28 The ASA testified that on October 14, 2011, at approximately 11 a.m., she interviewed defendant 45-and-a-half hours after defendant had been arrested. Detectives Scott Reiff and Stanek were also present for various parts of the interview. Prior to questioning defendant, the ASA informed him of his *Miranda* rights and that the interview was being recorded by an ERI video surveillance system. The ERI video recording was admitted at trial.

¶ 29 In the video recording, defendant stated that on the afternoon of August 3, 2011, he was at Jordan's apartment located on South Michigan Avenue. He was with Richmond, Beachem, Beachem's brother "Vince," Beachem's girlfriend Michelle Lawrence (Lawrence), and

Beachem's friend "C4."[4] When defendant came downstairs, Beachem informed him they were going to "fire the park up." Defendant understood this to mean that Beachem would "shoot the park up." Beachem was already inside Vince's Charger. He had a silver .45-caliber handgun that defendant had not seen before. Beachem handed the handgun to defendant. Defendant entered the vehicle and passed the handgun to Richmond who was in the back seat. Richmond already had a "three-eighty" handgun with 9-millimeter shells in it. He said, "I already got a gun." Defendant responded, "[D]on't use that jinky * * * gun." Defendant knew Richmond would shoot the handguns at the park. Defendant then tied a t-shirt around his face because he did not want anyone to recognize him.

¶ 30 Vince then drove the Charger with defendant and Richmond to Metcalfe Park. Lawrence drove her white Nissan with Beachem and C4 as passengers and followed the Charger to the park. When the Charger was a block or two away from the park, defendant and Richmond covered their faces with t-shirts. The Charger slowed down when they arrived at the park but defendant did not observe anyone he recognized as a member of Welch World. He informed Richmond. Richmond responded, however, "I'm [gonna] show y'all what I'm about." He then put both of his arms out of the vehicle window and started firing the .45-caliber handgun and the "three-eighty" handgun. Defendant heard the .45-caliber handgun stop shooting but the "three-eighty" handgun continue firing. When the shooting stopped, Vince drove away with defendant and Richmond. Defendant did not observe anyone being shot.

¶ 31 Shortly thereafter, defendant, Richmond, and Vince returned to the building on South Michigan Avenue. Richmond still had the two handguns. Defendant later found out that Whitelow received the .45-caliber handgun. He also found out on the news that an individual had been killed during the shooting.

[4] The full names of Vince and C4 are not indicated in the record on appeal.

¶ 32 The video recording further discloses that the ASA informed defendant he "initially denied that [he] knew anything about what happened." In response, defendant stated he initially "denied everything about a *white* car." Defendant added, "I'm taking responsibility for my actions. I understand I'm going to be arrested." After defendant gave his statement to the ASA, Detective Stanek agreed to allow him to make a phone call to his family.

¶ 33 On cross-examination, the ASA acknowledged that defendant gave his statement 45-and-a-half hours after arriving at the police station. She also acknowledged that defendant had communicated to her that he was "scared" during the interview.

¶ 34 The parties then stipulated that, if called to testify, Dr. Hillary McElligott (Dr. McElligott), an assistant medical examiner employed by the Cook County Medical Examiner's Office, would testify as an expert in the field of forensic pathology. Dr. McElligott performed an autopsy on the body of Brown. She would opine with a reasonable degree of medical and forensic certainty that the cause of death was a gunshot wound and the manner of death was homicide.

¶ 35 Following the stipulated testimony, the State entered into evidence the certified vehicle registration of a 2002 Nissan Altima registered to Lawrence. The State also entered into evidence (1) a certified statement of conviction for Lofton, for the offense of robbery and (2) two certified copies of conviction for Whitelow, one felony gun charge and one misdemeanor gun charge. The State then rested.

¶ 36 The parties then stipulated that, if called to testify, Chicago police lieutenant McFarlane (Lieutenant McFarlane) would testify that on August 3, 2011, a witness had informed him that an unknown offender in a white four-door vehicle that was traveling southbound on State Street

"shot" into a crowd of people on the basketball court in Metcalfe Park. [5] The defense then rested.

¶ 37 The trial court then stated: "Following closing arguments I will read the instructions of law that you are to follow in this case, and these are the instructions you'll get in writing."

¶ 38 In closing argument, defense counsel attacked the reliability of defendant's statement to the ASA based on the evidence presented. After hearing closing arguments, the trial court instructed the jury and twice stated that the State had the burden of proving defendant's guilt beyond a reasonable doubt, a burden that remained on the State throughout the case. Following deliberations, the jury found defendant guilty of first degree murder of Brown. The jury, however, found defendant not guilty of attempt first degree murder of Barron and did not find that defendant had personally discharged a firearm.

¶ 39 C. Posttrial Proceedings

¶ 40 Defendant then filed a motion for a new trial. Defendant argued, *inter alia*, that the trial court erred in denying defendant's motion to suppress his statement. After hearing arguments on the matter, the trial court denied defendant's motion for a new trial and sentenced him to serve 50 years in the IDOC. Upon defendant's amended motion to reconsider sentence, the trial court resentenced defendant to serve 40 years in the IDOC. This appeal followed.

¶ 41 II. ANALYSIS

¶ 42 On appeal, defendant argues (1) the trial court erred in denying his motion to suppress, (2) the State failed to prove him guilty of first degree murder beyond a reasonable doubt, (3) his trial counsel was ineffective at the suppression hearing and at trial, and (4) the trial court denied him a fair trial when it improperly defined reasonable doubt to the jury. We address each issue in turn.

[5] The record on appeal does not disclose Lieutenant McFarlane's full name.

¶ 43 A. Motion to Suppress Statement

¶ 44 Defendant argues the circuit court erred when it denied his motion to suppress his statement to the ASA. According to defendant, the police violated his fifth amendment right to remain silent on two occasions while he was in custody: (1) on October 12, 2011, at 4:26 p.m.; and (2) on October 14, 2011, at 12:05 a.m. Defendant also maintains the police violated his statutory right to make a phone call to his family. In addition, defendant asserts that the circumstances of his detention and interrogation rendered his statement to the ASA involuntary.

¶ 45 When reviewing a trial court's ruling on a motion to suppress, we apply a two-part standard of review. *People v. Luedemann*, 222 Ill. 2d 530, 542 (2006). Under this standard, we accord great deference to the trial court's findings of fact and reverse those findings only if they are against the manifest weight of the evidence. *People v. Cosby*, 231 Ill. 2d 262, 271 (2008). A trial court's factual findings are against the manifest weight of the evidence "only when an opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based on the evidence." *People v. Harris*, 2015 IL App (1st) 133892, ¶ 20. We, however, review *de novo* the trial court's ruling as to whether suppression is warranted. *People v. Chambers*, 2016 IL 117911, ¶ 76. In reviewing a trial court's ruling on a motion to suppress, we may consider evidence adduced at trial as well as at the suppression hearing. *People v. Richardson*, 234 Ill. 2d 233, 252 (2009).

¶ 46 We will first determine whether defendant invoked his right to remain silent. The United States and Illinois Constitutions provide that no person shall be compelled in any criminal case to be witness against himself. U.S. Const. amend. V; Ill. Const. 1970 art. I, § 10; *People v. Kronenberger*, 2014 IL App (1st) 110231, ¶ 33. Once an individual indicates in any manner prior to or during questioning that he wishes to remain silent, interrogation must cease. *Miranda*

v. Arizona, 384 U.S. 436, 473-74 (1966). " '[A]ny statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise.' " *People v. Hernandez*, 362 Ill. App. 3d 779, 785 (2005) (quoting *Miranda*, 384 U.S. at 474). An invocation of the right to silence, however, must be unambiguous, unequivocal and clear. *Kronenberger*, 2014 IL App (1st) 110231, ¶ 33 (citing *Berghuis v. Thompkins*, 560 U.S. 370, 381 (2010)). An individual may invoke his or her right to silence either verbally or through nonverbal conduct that clearly indicates a desire to end questioning. *People v. Diaz*, 377 Ill. App. 3d 339, 347 (2007); *People v. Nielson*, 187 Ill. 2d 271, 287 (1999) (finding that the defendant had invoked his right to remain silent when he placed his hands over his ears, turned his head, and said, " 'nah, nah, nah' "). If verbal, the individual's demand to end the interrogation must be specific. *Diaz*, 377 Ill. App. 3d at 347. Nevertheless, a statement made by a defendant who earlier had invoked his right to remain silent is admissible if the police scrupulously honored the defendant's right to cut off questioning. *People v. Edwards*, 301 Ill. App. 3d 966, 977 (1998).

¶ 47 In this case, defendant asserts that on October 12, 2011, at 4:26 p.m, he had invoked his right to remain silent by shaking his head when a detective asked him if he "still got nothing to say about it?" Based on our careful review of this portion of the videotaped interrogation, we find that defendant did not unequivocally invoke his right to silence. It is unclear from defendant's response, which lacked specificity, whether he wished to invoke his constitutional right to silence or whether he was merely denying knowledge of the crime. Thus, we find that defendant's response did not rise to the level of an unambiguous and unequivocal invocation of the right to silence. *Kronenberger*, 2014 IL App (1st) 110231, ¶ 33.

¶ 48 Similarly, we do not find that the evidence supports defendant's argument that he invoked his right to silence on October 14, 2011, at 12:05 a.m. Based on our repeated review of

this portion of the videotaped interrogation and the context of the circumstances leading up to defendant's response, we find that defendant did not unequivocally invoke his right to silence. Rather, the videotaped interrogation demonstrates that between October 13, 2011, at 11:40 p.m. to October 14, 2011, at 12:02 a.m., a detective engaged in conversation with defendant and tried to convince him to tell the truth about the shooting. Following this 22-minute conversation, at 12:05 a.m., the detective asked defendant to "[p]ull your face up." We find that defendant's response, "I ain't got nothing to say," was without specificity, and did not indicate a desire to end all questioning so as to rise to the level of an unambiguous and unequivocal invocation of the right to silence. It is unclear from defendant's response whether he wished to invoke his constitutional right to silence or whether he, after having spoken with the detective already for 22 minutes, had nothing else to tell the detective. See *People v. Aldridge*, 79 Ill. 2d 87, 95 (1980); *People v. Aldridge*, 68 Ill. App. 3d 181, 187 (1979), aff'd, 79 Ill. 2d 87 (1980) (finding that the defendant did not attempt to terminate the questioning but merely resisted answering questions concerning particular details of the offense when he said, "there's nothing I want to add to it," and "you've got everything you need here now"); *Kronenberger*, 2014 IL App (1st) 110231, ¶¶ 36-37 (the defendant's response of "yeah" to the detective's question of "Are you done talking to all of us?" was not an invocation of his right to silence where it was unclear whether he was invoking his right or had nothing else to tell the detective after his 14-minute conversation with the detective); *People v. Pierce*, 223 Ill. App. 3d 423, 429-30 (1991) (defendant did not invoke his right to silence when he stated, "You got all the stuff there right now. You don't need no more"). Further, because we find that defendant did not invoke his right to silence on October 12, 2011, at 4:26 p.m. or on October 14, 2011, at 12:05 a.m., we need not address his argument that the police did not scrupulously honor his invocations. *Edwards*, 301 Ill. App. 3d at 977.

¶ 49 We also reject defendant's contention that he was denied the statutory right to make phone calls to his family. Section 103-3 of the Code (725 ILCS 5/103-3 (West 2010)) provides, in part, that "[p]ersons who are arrested shall have the right to communicate with an attorney of their choice and a member of their family by making a reasonable number of telephone calls or in any other reasonable manner." This section is intended to allow a person held in custody to notify his family members of his whereabouts "to enlist their help for procedural safeguards such as hiring an attorney." *People v. Green*, 2014 IL App (3d) 120522, ¶ 55. Based on our review of the record, we agree with the trial court that the detectives' actions with respect to defendant's requests for telephone calls were reasonable. In the case at bar, Detective Stanek denied defendant's requests to call Jordan because he believed she could have been a witness to the offenses but had not been formally interviewed. Further, Detective Stanek was aware that the police were still looking for an additional firearm that had been used in the homicide of Brown. Detective Stanek also testified he had informed Jordan that defendant was in custody at the police station. In addition, the record does not demonstrate that defendant's requests to call Jordan were made for legal advice. Moreover, during his testimony at the suppression hearing, defendant admitted he never asked to speak with an attorney. In addition, defendant was advised of his right to counsel and waived such right. See *id.* ¶¶ 54-58 (defendant was not deprived of his right to telephone calls where his family knew of his whereabouts, he did not indicate that his requests for his family were made for legal advice, and he waived his right to counsel).

¶ 50 We further reject defendant's argument that the totality of the circumstances surrounding his interrogation rendered his statements involuntary. In determining whether a defendant's statements are voluntarily made, this court must look to the totality of the circumstances surrounding the making of the statements. *Richardson*, 234 Ill. 2d at 253. The factors to

consider include the defendant's age, intelligence, background, experience, mental capacity, education, and physical condition at the time of questioning; the legality and duration of the detention; the presence of *Miranda* warnings; the duration of the questioning; and any physical or mental abuse by police, including the existence of threats or promises. *Id.* at 253-54. No single factor is dispositive as to the voluntariness of a confession. *People v. Murdock*, 2012 IL 112362, ¶ 30. Rather, "the test of voluntariness is whether the individual confessed freely and voluntarily, without compulsion or inducement of any kind, or whether the individual's will was overborne at the time of the confession." *Id.* When reviewing the voluntariness of a defendant's confession, the trial court's factual findings will be upheld unless they are against the manifest weight of the evidence. *People v. Braggs*, 209 Ill. 2d 492, 505 (2003). As aforementioned, factual findings are against the manifest weight of the evidence "only when an opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based on the evidence." *Harris*, 2015 IL App (1st) 133892, ¶ 20. The ultimate legal question of whether the statement was voluntarily made, however, is reviewed *de novo*. *Braggs*, 209 Ill. 2d at 505.

¶ 51 Here, the parties do not dispute that defendant received his *Miranda* rights more than once during the questioning. He was also not physically abused or threatened. He was not promised anything in return for his confession. In addition, it appears that defendant possessed the requisite intelligence and had contact with the criminal justice system on at least one prior occasion. The video also demonstrates that the police provided defendant with food, breaks, and naps. Further, although defendant was held for approximately 46 hours before he gave his statement to the ASA, there is no indication of unreasonable delay. *People v. Nicholas*, 218 Ill. 2d 104, 116 (2005) (citing *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991) (a judicial determination of probable cause within 48 hours of arrest generally passes constitutional

muster)). Based on the totality of the circumstances, the evidence supports the trial court's determination that defendant's statements were made voluntarily, and we uphold the trial court's denial of defendant's motion to suppress. *Braggs*, 209 Ill. 2d at 505.

¶ 52 B. Sufficiency of the Evidence

¶ 53 Defendant contends the State failed to prove beyond a reasonable doubt that he was guilty of first degree murder because, without his unreliable statement to the ASA, no reasonable trier of fact could have found him guilty. Defendant further argues, in the alternative, that he did not share the criminal intent of Richmond, and thus, cannot be proven guilty of first degree murder. In addition, defendant asserts that because the jury found he was not guilty of the attempt murder of Barron, he cannot be held accountable for the murder of Brown.

¶ 54 In considering a challenge to a criminal conviction based upon the sufficiency of the evidence, this court must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); accord *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011). The reviewing court does not retry the defendant or substitute its judgment for that of the trier of fact with regard to the credibility of witnesses and the weight to be given to each witness' testimony. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). We accept all reasonable inferences from the record in favor of the State. *Beauchamp*, 241 Ill. 2d at 8. Further, this court must carefully examine the record while bearing in mind that it was the fact finder who observed and heard the witnesses. *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004). Nevertheless, while the fact finder's decision to accept testimony is entitled to great deference, it is not conclusive and does not bind the reviewing court. *Id.* A conviction will be reversed only when the evidence is so improbable or unsatisfactory that reasonable doubt

exists about the defendant's guilt. *Ross*, 299 Ill. 2d at 272.

¶ 55 Here, defendant was found guilty of first degree murder under an accountability theory. A person commits the offense of first degree murder if "in performing the acts which cause the death * * * he either intends to kill or do great bodily harm to that individual * * * or knows that such acts will cause death to the individual." 720 ILCS 5/9-1(a)(1) (West 2010). A person is legally accountable for the conduct of another when (1) either before or during the commission of the offense, (2) he or she solicited, aided, abetted, agreed, or attempted to aid another person in the planning or commission of the offense, (3) with the intent to promote or facilitate the commission of the offense. 720 ILCS 5/5-2(c) (West 2010).

¶ 56 To prove that the defendant possessed the intent to promote or facilitate the crime, the State must present evidence, which establishes beyond a reasonable doubt that either (1) the defendant shared the criminal intent of the principal, or (2) there was a common criminal design. *People v. Perez*, 189 Ill. 254, 266 (2000). "A defendant's intent may be inferred from the nature of [his] actions and the circumstances accompanying the criminal conduct." *People v. Williams*, 193 Ill. 2d 306, 338 (2000). The "common design rule" provides that if two or more persons engage in a common criminal design, any acts in the furtherance of that common design committed by one party are considered to be the acts of all parties to the design or agreement and all are equally responsible for the consequences of such further acts. *People v. Cooper*, 194 Ill. 2d 419, 434-35 (2000).

¶ 57 Further, while mere presence at the crime scene with knowledge that a crime was being committed is by itself insufficient to establish accountability (*In re W.C.*, 167 Ill. 2d 307, 338 (1995)), active participation has never been a requirement for guilt under an accountability theory (*People v. Taylor*, 164 Ill. 2d 131, 140 (1995)). A defendant may "aid and abet without

actively participating in the overt act." *Id.* Words of agreement are unnecessary to establish a common purpose to commit an offense. *Perez*, 189 Ill. 2d at 267. Moreover, accountability may be established through a person's knowledge of and participation in the criminal scheme, even when there is no evidence that he directly participated in the criminal act itself. *Id.* In addition, evidence that a defendant voluntarily attached himself to a group "bent" on illegal acts, with knowledge of the group's plan, also supports an inference that the defendant shared the common purpose and will sustain his conviction under an accountability theory. *Id.* Similarly, the trier of fact may consider the defendant's presence during the offense, his flight from the scene, his continued affiliation with his companions, and his failure to report the crime. *Id.*

¶ 58 After reviewing the evidence in the light most favorable to the State, we find there was sufficient evidence for a rational trier of fact to find defendant guilty of first degree murder under an accountability theory. Here, according to defendant's videotaped statements to the ASA, he was aware prior to the shooting that Beachem planned to "shoot the park up," that Beachem and Richmond were each armed with a firearm, and that Richmond would shoot the firearms in the park. Knowing this, defendant voluntarily entered the gray Charger that was used in the shooting. Further, most importantly, defendant handed Richmond a .45-caliber handgun, knowing that Richmond would use it to shoot individuals at the park, so that defendant was not merely present at the crime scene but also participated in the crime. A reasonable trier of fact could infer that, in handing Richmond a handgun under such circumstances, defendant knew that the group (and he) was creating a strong probability of death or great bodily harm to individuals at the park. Then, when the group arrived at the park and Richmond covered his face with a t-shirt, defendant also covered his face with a t-shirt because he did not want anyone to observe him during the shooting. Richmond then opened fire, using two weapons, including the handgun

that defendant had handed to him. After the shooting, defendant remained with the group, fled the crime scene with the group, and failed to report the incident. At no time did defendant withdraw from the group nor indicate any opposition to the group's planned actions. Defendant's acts are indicative of his knowing participation in a criminal design.

¶ 59 Furthermore, evidence found at the scene corroborates the jury's verdict of guilty. A forensic scientist testified that the .45-caliber bullet casings that Officer Scarriot recovered from the crime scene were fired from the recovered .45-caliber firearm. Defendant's statement was also corroborated by Craig's testimony that he observed a "Chrysler or Charger" pull up to the park and gunshots coming from the back window. Defendant's statement is further corroborated by Barron's testimony that he observed a gray Charger driving southbound after the shooting.

¶ 60 To the extent that defendant's statements and trial testimony conflicted, including Lofton's testimony that he observed firearms coming out of a white vehicle as opposed to the gray Charger, it was the responsibility of the trier of fact to resolve any inconsistencies or conflicts in the evidence and draw reasonable inferences from the testimony presented. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). Based on this evidence, it was reasonable for a trier of fact to conclude that defendant solicited, aided, abetted, agreed or attempted to aid another person in the planning or commission of the shooting, and as part of that common design, Richmond killed Brown. 720 ILCS 5/5-2(c) (West 2010); *Beauchamp*, 241 Ill. 2d at 8. We thus conclude that all of the evidence, when viewed in the light most favorable to the State, proved defendant guilty beyond a reasonable doubt of first degree murder under an accountability theory. *Beauchamp*, 241 Ill. 2d at 8.

¶ 61 We further reject defendant's argument that, because the jury found he was not guilty of the attempt murder of Barron, he cannot be held accountable for the murder of Brown.

Generally, verdicts will only be set aside if legally inconsistent. *People v. Austin*, 264 Ill. App. 3d 976, 979 (1994). Verdicts are legally inconsistent when the verdicts, considered together, necessarily lead to a conclusion that the same essential elements of each offense are found both to exist and not to exist even though the offenses arise out of the same set of facts. *Id.*

¶ 62 Here, as aforementioned, defendant was convicted of first degree murder of Brown under an accountability theory. 720 ILCS 5/9-1(a)(1) (West 2010). To convict defendant for the murder of Brown, the State had to prove that the principal offender Richmond, "either intend[ed] to kill or do great bodily harm to [Brown], or [knew] that such acts will cause death to [Brown]." *Id.* On the other hand, defendant was acquitted of attempt first degree murder of Barron under an accountability theory. To convict defendant for the attempt murder of Barron, it was necessary for the State to prove that Richmond, "with intent to commit [murder of Barron]" committed "any act that constitutes a substantial step toward the commission of that offense." 720 ILCS 5/8-4(a) (West 2010). It appears obvious that since the two offenses involved different victims and do not necessarily involve the conclusion that the same essential elements of each offense are found both to exist and not to exist, the two verdicts are legally consistent. *Austin*, 264 Ill. App. 3d at 979.

¶ 63 C. Ineffective Assistance of Counsel

¶ 64 Defendant raises several claims of ineffective assistance of trial counsel. Specifically, defendant argues that his trial counsel was ineffective for failing to (1) present evidence at the motion to suppress hearing that demonstrated his statement to the ASA was involuntary, (2) present evidence at trial that his statement to the ASA was involuntary, and (3) present additional evidence contained in the ERI video at the motion to suppress hearing and at trial.

¶ 65 To establish a claim of ineffective assistance of counsel, a defendant must prove both

(1) deficient performance by counsel and (2) prejudice to defendant. *People v. Smith*, 195 Ill. 2d 179, 187-88 (2000) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). To establish performance deficiency, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness to deprive defendant of a fair trial. *Smith*, 195 Ill. 2d at 188. To demonstrate prejudice, the defendant must establish there is a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different. *People v. Valdez*, 2016 IL 119860, ¶ 14. A reasonable probability is a probability "sufficient to undermine confidence in the outcome" of the proceedings. *Strickland*, 466 U.S. at 694. The failure to satisfy either the deficiency prong or the prejudice prong precludes a finding of ineffective assistance of counsel. *People v. Peeples*, 205 Ill. 2d 480, 513 (2002).

¶ 66 In order to prove ineffective assistance of counsel, defendant must overcome the strong presumption that counsel's action or inaction was the result of sound trial strategy. *People v. Perry*, 224 Ill. 2d 312, 341-42 (2007). Decisions that involve a matter of trial strategy will generally not support a claim of ineffective assistance. *People v. Simmons*, 342 Ill. App. 3d 185, 191 (2003). Similarly, decisions concerning which evidence to present ultimately rest with defense counsel and are generally immune from ineffective assistance claims. *People v. West*, 187 Ill. 2d 418, 432 (1999). The right to effective assistance of counsel refer to "competent, not perfect representation" and mistakes in trial strategy, tactics, or judgment do not of themselves render the representation incompetent. *Id.* The only exception to this rule is when counsel's strategy is so unsound that he fails to conduct any meaningful adversarial testing. *Id.* at 432-33.

¶ 67 Defendant contends his trial counsel failed to present evidence at the motion to suppress hearing that the detectives misstated evidence in an attempt to coerce him to confess, "fed" him facts which formed his statement to the ASA, and engaged in "extremely coercive interrogation

tactics." The ERI videos, however, do not support defendant's contentions.

¶ 68 In the recordings, the detectives reasonably informed defendant that an eyewitness had identified him, as Barron had provided defendant's name to the police. Further, contrary to defendant's claim, the police never informed him that the video cameras had captured imagery depicting two different people shooting out of a vehicle at the park. Rather, the police had informed defendant they had a video recording of the vehicle, implying that the police would know if defendant was lying. Thus, defendant has not demonstrated how the detectives engaged in deceit to entice defendant to give his inculpatory statement.

¶ 69 Further, the recordings do not establish that the police "fed" defendant facts that formed his statement to the ASA. Rather, based on our review of the ERI video, it is unlikely that defendant's story was provided by the police. When presented with the version of events that the police believed, defendant was quick to contradict them. Further, it was after defendant was provided with Beachem's videotaped statement that defendant confessed.

¶ 70 In addition, while the interrogation was intense at times, we do not find that defendant's will was overcome at the time of his confession. Specifically, defendant points to the ERI video recorded on October 14, 2011, at approximately 2 a.m. At that point in the video, three detectives awoke defendant from sleep, provided him with Beachem's videotaped statement, and demanded that he confess. Based on our review, however, defendant maintained his innocence during this interrogation. He does not point to how the use of fear rendered his later confession involuntary. Defendant also has not cited to any authority finding that the use of profanity during an interrogation amounts to a threat sufficient to weigh in favor of suppressing a confession. Further, defendant's mistakenly relies on *People v. Travis*, 2013 IL App (3d) 110170, for the proposition that waking a defendant for questioning in the middle of the night is coercive. In

Travis, the court focused on the "significance of the defendant's visibly groggy condition," not on the fact that the defendant was awoken from sleep. *Id.* ¶ 64.

¶ 71 Defendant further claims his trial counsel failed to present evidence at trial that his statement to the ASA was involuntary. Defense counsel, however, in opening argument, challenged the voluntariness and credibility of defendant's statement. During the cross-examination of the ASA, defense counsel pointed out that defendant did not give his statement until 45-and-a-half hours after arriving at the police station. Defense counsel also elicited testimony from the ASA that defendant had communicated to her that he was "scared" during the interview. In addition, during closing argument, defense counsel again attacked the reliability of defendant's statement based on the evidence presented. We therefore find that defense counsel's conduct at trial constituted effective representation. That his trial strategy was not successful is not reflective of incompetence. *West*, 187 Ill. 2d at 432.

¶ 72 Next, defendant contends his trial counsel was ineffective for failing to introduce additional evidence in the ERI video during the motion to suppress hearing and at trial. According to defendant, his trial counsel should have introduced the recording on October 12, 2011, at 7:58 p.m. where a detective dismissed defendant's question regarding whether his family knew where he was, and defendant responded, "I'm done." As the detective continued to question him, defendant said, "I'm done talking." Based on our careful review of this portion of the videotaped interrogation and the context of the circumstances leading up to defendant's response, we find that defendant did not unambiguously invoke his right to silence. It is unclear from defendant's response whether he wished to invoke his constitutional right to silence or whether he was merely resisting answering questions from the specific detective with whom he was growing visibly frustrated. We thus find that defendant's response did not indicate a desire

to end all questioning so as to rise to the level of an unambiguous and unequivocal invocation of the right to silence. *Kronenberger*, 2014 IL App 110231, ¶ 33.

¶ 73 Defendant further asserts his trial counsel should have introduced portions of the ERI video depicting instances where defendant's requests for telephone calls were denied and where detectives employed "highly coercive statements." As aforementioned, however, the detectives' actions with respect to defendant's requests for telephone calls were reasonable and their interrogation tactics did not render defendant's statement to be involuntary. Further, as previously discussed, "[d]ecisions concerning what witnesses to call and what evidence to present on a defendant's behalf are viewed as matters of trial strategy. Such decisions are generally immune from claims of ineffective assistance of counsel." *People v. Munson*, 206 Ill. 2d 104, 139-40 (2002). In addition, defendant has not demonstrated how viewing these portions of the 46 hours of the ERI video would have created a reasonable probability that the result of the trial would have been different. *Valdez*, 2016 IL 119860, ¶ 14. Accordingly, defendant's ineffective assistance claim fails. *Id.*

¶ 74 D. Fair Trial

¶ 75 Defendant next contends he was denied his right to a fair trial because the trial judge improperly defined "reasonable doubt" to the venire by using a scale analogy and comparing it to the civil "preponderance of the evidence" standard. Further, while defendant acknowledges that he did not preserve this issue for our review by failing to raise it below (*People v. Enoch*, 122 Ill. 2d 176, 186 (1988)), he contends that it may be analyzed under the plain-error rule. Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967); *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005).

¶ 76 Initially, we agree that defendant failed to properly preserve this issue for our review. To preserve an issue for review, defendant must object both at trial and in a posttrial motion. *Enoch*,

122 Ill. 2d at 186. Failure to do so operates as a forfeiture as to that issue on appeal. *People v. McCarty*, 223 Ill. 2d 109, 122 (2006). Under the plain-error doctrine, however, this court may consider unpreserved error when (1) the evidence is closely balanced or (2) the error was so serious it affected the fairness of the defendant's trial. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Nevertheless, the plain-error doctrine is not a general saving clause. *Herron*, 215 Ill. 2d at 177. Rather, the plain-error doctrine provides a narrow and limited exception to the general waiver rule. *Id.* The burden of persuasion remains with the defendant under both prongs of the plain-error test. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009).

¶ 77 Illinois is among the jurisdictions that do not define reasonable doubt. *People v. Downs*, 2015 IL 117934, ¶ 19. It is well settled that attempts to define the term "reasonable doubt" for jurors are discouraged in Illinois. *Id.* "Reasonable doubt" is self-defining and needs no further definition. *Id.* Moreover, no definition of reasonable doubt is provided in our pattern jury instructions and the committee notes recommend that no instruction be given to define the term. Illinois Pattern Jury Instructions, Criminal, No. 2.05, Committee Note (4th ed. 2000); *Downs*, 2015 IL 117934, ¶ 20.

¶ 78 In the instant case, while we do not condone the trial judge's reference and comparison to the civil standard during *voir dire*, we conclude that even if the trial court had committed error, such error did not deprive defendant of a fair trial. "[U]nder Illinois Supreme Court precedent, it remains the law in Illinois that defining 'reasonable doubt' is discouraged but is not reversible error *per se*." *People v. Thomas*, 2014 IL App (2d) 121203, ¶ 28. Any instruction defining reasonable doubt is not reversible error, so long as the instruction did not improperly minimize the State's burden of proof or attempted to shift that burden to the defendant. *Id.* ¶ 26. Further, an instruction defining reasonable doubt violates a defendant's due process rights, only if there is

a reasonable likelihood that the jurors understood the instructions to allow conviction upon proof less than beyond a reasonable doubt. *Downs*, 2015 IL 117934, ¶ 18.

¶ 79 Based on our review of the record, we conclude defendant has failed to establish that the fairness of his trial was affected. The record discloses that the trial court's comments did not suggest to the jury that the State had no burden of proof nor did it attempt to shift the burden of proof to defendant. Prior to *voir dire*, the trial court admonished the potential jurors that "[t]hese are not your final and complete instructions" and that the jury would be provided with such instructions in writing after closing arguments. Further, before opening statements and again before closing arguments, the trial court admonished the jury that they would be provided with written jury instructions to determine the verdict. Moreover, at the conclusion of the presentation of evidence, the trial court twice instructed the jury that the State had the burden of proving defendant's guilt beyond a reasonable doubt without providing a definition. We further note that the jury did not express any confusion nor request a definition of reasonable doubt. Thus, the trial court's comments did not amount to reversible error. *Thomas*, 2014 IL App (2d) 121203, ¶ 26; *People v. Speights*, 153 Ill. 2d 365, 374-75 (1992) (no prejudice where the prosecutor attempted to define reasonable doubt for the jury but did not attempt to shift the burden of proof to the defendant). In addition, the record does not indicate the jury used a lesser standard when determining defendant's guilt. *Downs*, 2015 IL 117934, ¶ 18. Therefore, the trial court's remarks during *voir dire* cannot reasonably be construed as inviting the jury to convict defendant on less than the reasonable doubt standard. *Id.* Thus, the trial court's comments did not violate defendant's due process rights. *Id.*

¶ 80 Further, we note that the trial court's subsequent formal instructions regarding the reasonable doubt standard cured any error. See *People v. Gray*, 215 Ill. App. 3d 1039, 1052

(1991) (where the trial judge misstated a jury instruction when it was read to the jury, the subsequent written instruction provided to the jury cured any error). Accordingly, the trial court's reference to the civil burden of proof, if error, was not so serious that the second prong of the plain-error test provides a basis for excusing defendant's procedural default. *People v. Thompson*, 238 Ill. 2d 598, 615 (2010).

¶ 81 III. CONCLUSION

¶ 82 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 83 Affirmed.