2019 IL App (5th) 160084-U

NO. 5-16-0084

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 03-CF-774
	)	
MARK BURRIS,	)	Honorable
	)	Zina R. Cruse,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE BARBERIS delivered the judgment of the court.
Justices Cates and Moore concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's order is affirmed where plain-error review was not warranted because the evidence was not closely balanced; the court did not abuse its discretion in admitting a letter into evidence that was found near the crime scene, which demonstrated the defendant's state of mind and that it had been written close in time to the incident; and trial counsel's decision not to object to the admission of a photograph, later admitted and presented to the jury, was based on sound trial strategy.

¶ 2 The defendant was convicted of first degree murder (720 ILCS 5/9-1(a)(1) (West 2002)) by a jury for the death of his wife, Melanie Burris (Melanie), after he stabbed her 11 times with a knife on June 8, 2003. The defendant was sentenced to 30 years in prison with 3 years of mandatory supervised release.

¶ 3 On appeal, the defendant argues that (1) the circuit court erred by failing to comply with Illinois Supreme Court Rule 431(b) (eff. July 1, 2012) during *voir dire*; (2) he was denied a fair trial when the circuit court admitted People's Exhibit 3, the defendant's handwritten letter to Melanie; and (3) he was denied effective assistance of counsel. For the following reasons, we affirm.

¶ 4 I. Background

¶ 5 On October 18, 2004, the defendant pled guilty to first degree murder after accepting a plea agreement with a recommended sentence of 20 years in prison without the possibility of parole. Shortly thereafter, the defendant filed a motion to withdraw his guilty plea, claiming ineffective assistance of counsel.

¶ 6 On December 6, 2004, the circuit court sentenced the defendant to 20 years in prison. Following sentencing, the defendant filed an amended motion to withdraw his guilty plea, which the court denied on June 2, 2005. The defendant filed a timely notice of appeal on June 13, 2005.

¶ 7 On March 22, 2006, this court, holding that the defendant had established a substantial violation of his constitutional rights, vacated the defendant's conviction and remanded the cause with directions to allow the defendant to plead anew. See *People v. Burris*, No. 5-05-0362 (2006) (unpublished summary order under Illinois Supreme Court Rule 23(c)).

¶ 8 On remand, the case proceeded to a two-day jury trial on September 22, 2008, and September 23, 2008. Prior to testimony, the circuit court addressed the defendant's

motion *in limine*, the testimonies of Donnella Scruggs and Tamyia Blake, and a prior conviction of domestic battery. With regard to the letter, the court stated the following:

> "I believe that the *** [letter] having been found on a made bed tends to be great evidence that it was very close to the alleged incident, and the Court would at this time believing that this is a pertinent piece of evidence to show motive and that the prejudice is outweighed by the probative value would allow the letter in."

The court also denied the defendant's request to exclude the testimonies of Scruggs and Blake, finding that their testimonies "go hand in hand with the letter *** [to] show the state of mind of this Defendant during the course of his relationship *** going into the year of the alleged murder ***." The court granted the defendant's request to exclude his prior conviction of domestic battery.

¶ 9 Next, the parties stipulated that the defendant was the author of the handwritten letter to Melanie (People's Exhibit 3), and that Michael Brown, a forensic scientist and expert in DNA testing, employed by the Illinois State Police (ISP), would testify that he had identified a DNA profile, matching that of Melanie, from a toxicology sample, blood on the blade of the knife, and the left leg of the jeans worn by the defendant at the time of his arrest.

¶ 10 During *voir dire*, the circuit court advised potential jurors of the legal principles set forth in Illinois Supreme Court Rule 431(b) (eff. July 1, 2012), specifically, that (1) the defendant was presumed innocent until proven guilty, (2) the State had the burden to prove the defendant guilty beyond a reasonable doubt, (3) the defendant was not required to offer any evidence, and (4) if the defendant chose not to testify, the jurors

could not presume that to be evidence against him. The court did not inquire whether each juror, individually or in a group, understood and accepted the above principles.

¶ 11 Following opening statements, the State presented its case in chief. Donnella Scruggs, Melanie's sister, testified to the following. In 2002, at the defendant's home, Scruggs heard the defendant say to Melanie: "Bitch, if I can't have you, nobody else will." Approximately four weeks before her death on June 8, 2003, Melanie moved out of the defendant's home to live with her other sister, Sharon Brown (Sharon). Scruggs indicated on cross-examination that she never liked the defendant.

¶ 12 Next, Tamyia Blake, Melanie's niece, testified to the following. Roughly six weeks before the incident, Melanie asked Blake to pick her up from the defendant's home. After Blake arrived, the defendant stated to Melanie: "You better not be here when I get back or I'll do something to you." After the defendant left, Blake helped Melanie pack her bags and then drove her to Jackie Brown's home.

¶ 13 Ricky Perry, a detective with the East St. Louis Police Department, testified to the following. Detective Perry, the first officer on the scene, arrived at the defendant's home on June 8, 2003, to investigate a report of a female stabbing. When he arrived, the defendant answered the door and allowed him to enter the home. Detective Perry observed an "[e]normous amount of blood" on the defendant's upper body. The defendant also appeared "jittery and nervous" when he informed Detective Perry that Melanie had tried to stab him with a knife.

¶ 14 The defendant escorted Detective Perry to the dining room, then the living room, and finally to the kitchen. Detective Perry noticed "blood all over the floor" and walls,

and there were multiple items on the floor, including jewelry, a drill, and a bottle of Hennessy. When Detective Perry entered the kitchen, Melanie was lying on her side on the kitchen floor with multiple stab wounds to the chest. Melanie was visibly bleeding, and it did not appear that she was breathing. Melanie was subsequently taken to the hospital via ambulance, and the defendant was arrested. After Detective Perry recovered the knife in the kitchen, he entered the bedroom where he observed a photograph of the defendant and Melanie on a made bed (People's Exhibit 23). On cross-examination, Detective Perry could not recall what the defendant was wearing when he arrived at the defendant's home on June 8, 2003.

¶ 15 Benjamin Koch, a crime scene investigator with the ISP, testified to the following. At 4 p.m. on June 8, 2003, Koch arrived at the defendant's home where he met Detective Desmond Williams of the East St. Louis Police Department. After Koch entered the home, he proceeded through the living room and into the dining room. When he entered the kitchen, he viewed Melanie's body on the kitchen floor. Koch identified a photo that depicted a "red blood-like substance and a Hennessy bottle" near the hallway that led to the bathroom and two bedrooms (People's Exhibit 16). Koch observed the couple's bedroom in disarray with open dresser drawers and an overturned piece of furniture. Koch also photographed a pad of paper, a pen, and an envelope on a made bed. The envelope, addressed to Melanie, contained a handwritten letter. There was also a picture of Melanie and the defendant "on the pillow, at the top of the bed ***." Finally, Koch discovered a knife, with red blood-like stains, on the microwave in the kitchen. Koch was present during Melanie's autopsy, performed by Dr. Raj Nanduri, on June 9, 2003, where

he observed stab wounds to Melanie's torso and abdomen. The crime scene report, prepared by Koch, indicated that Melanie had multiple stab wounds to her body and signs of blunt trauma to her head.

¶ 16 The State, without objection, moved to admit a photograph of the defendant's blue jeans (People's Exhibit 5), and the defendant's handwritten letter to Melanie (People's Exhibit 3), with objection. The circuit court admitted both exhibits. Subsequently, the State read aloud the defendant's letter to the jury:

> "Dear Melanie, I decided to write you this letter to let you know how I feel. Maybe I can express my true feelings like this, rather than trying to speak. There comes a time in your life when you know that you have found the right person, your soul mate. That time for me is now. You, I think is my soulmate. I feel that you think the same about me, but there are a lot of ill forces trying to pull us apart.
>
> Life is a strange thing. We have been through a lot. I have no doubt in my mind that you love me as I love you, but life as we know it, is trying to make us go different ways. You think that it is better for you to be in the life you were in before we met. I used to think the same for me, but just look at the situation we are both in. We are trying to[o] hard to let our lives be controlled by the others[']actions. You say that you want to make sure that I will not hurt you again. I want the same thing. If we are to part, it not should [*sic*] be this hard.
>
> I may be the cause of all our grief, but we should look into our souls and really try to seek the truth.
>
> Other people don't know how you feel, other people don't know how I feel, they are on the outside. I feel you. I feel the pain you are experiencing. I hurt too. No one else can cure our pain but us. No matter which way we go. I want us to be happy. I want you to be happy. I want us to be together, I think that's the way nature planned it. I think that if we decide to separate that life for us will not be what it is supposed to be.
>
> I know that you feel good now. You feel that you need to be free. You feel that you have to be on your own, but you were on your own—so to speak—when we met. If your life was to be like that, we would never have got together.
>
> Is it love? Is it fate?
>
> God does not make mistakes, only man make[s] mistakes. You and I were put together by God and we should not let anything other than or anybody other than God break us apart. My heart belongs to you. My soul belongs to you. I can[']t let you out of my soul so easy. If we don[']t come together as one again, I think that it will be just like no more love in the world. I can and will change. I

> don[']t want you to leave me thinking that there is no hope. There can be more love in this marriage than we can immagine [*sic*]. We have to trust each other. You have to trust and I have to trust in love and love each other with all of our heart. It may not be easy at first, but if we believe in love it will work out.
>
> I will always love you[.] I will never hurt you again. Your husban[d], Mark."

¶ 17 On cross-examination, Koch indicated that when he arrived at the defendant's home, the defendant had been handcuffed and arrested, and Detectives Perry and Williams were in the home. Lastly, when Koch seized the envelope addressed to Melanie, he did not observe the contents and could not recall whether the envelope had been sealed.

¶ 18 Detective Williams, lead investigator on the case, testified to the following. Detective Williams discovered Melanie's dead body in the defendant's home on June 8, 2003. On June 11, 2003, Detective Williams executed a search warrant to photograph the defendant's body at the St. Clair County jail. The defendant's right forearm, which contained scabbed over injuries, was photographed by Koch (People's Exhibits 28 and 29). Detective Williams' report specified that the defendant was six foot one and weighed 220 pounds. On June 9, 2003, Detective Williams took a photograph of the defendant wearing a striped, blue shirt (People's Exhibit 30).

¶ 19 On cross-examination, Detective Williams stated that the defendant's injuries could have been healing since the photograph of his forearm had been taken several days after the incident. Detective Williams indicated that People's Exhibit 30 was "taken directly outside [his] office at the East St. Louis Police Department Investigations Division." Detective Williams "didn't see [the defendant] when he was taken into

custody, but whatever he had on at the time [he] took that picture [he] believed is what he had on when he was arrested," although he could not see blood on the defendant's clothing in the photograph.

¶ 20 Next, Dr. Nanduri, tendered as the State's expert witness in forensic pathology, testified to the following. On June 9, 2003, Dr. Nanduri performed Melanie's autopsy. Melanie was five feet seven inches tall and weighed 180 pounds. The autopsy revealed three cranial lacerations, 11 stab wounds—10 to the front and one in the back—to Melanie's body, and bruising on her head, including her eye, nose, and forehead, as well as her arms and legs. One of the lacerations on Melanie's head tore through her scalp and was consistent with "some type of blunt trauma." The bruises on Melanie's forearm were round or oval, which can be caused "by grabbing a person or trying to restrain a person by holding on to the forearm." Melanie also had defensive wounds on her right hand, which could arise when a person tries "to defend one's self, holding the arm in front of" herself. The toxicology report (People's Exhibit 34) did not show drugs or alcohol in Melanie's system at the time of death.

¶ 21 The State then detailed each stab wound. Wound one was a four-inch stab wound to the back, right side of Melanie's chest; wound two, the fatal stab wound, was six inches deep on the front of her body above the right breast; wound three, situated on the outside of the right breast, was two inches deep; wounds 4 through 10 were "really superficial" with a variable depth of 1½ to 3 inches in the abdominal area. Wound 11, another fatal stab wound on the front left chest, went three inches deep into the left lung. Wound 12, a two-inch, "bone deep" laceration tore Melanie's scalp near the right

eyebrow. According to Dr. Nanduri, wound 12 was consistent with blunt trauma because it "went all the way through the layers of the skin" and penetrated to the bone. Dr. Nanduri also opined that wounds 12 and 13 were consistent with a large bottle striking the victim's head.

¶ 22 On cross-examination, Dr. Nanduri testified that she was unable to determine whether the stab wounds or blunt trauma occurred first. Additionally, she acknowledged that the contusions on Melanie's forearm could have been offensive or defensive wounds. Lastly, in viewing the images of the defendant's injuries, Dr. Nanduri believed one of the wounds "looked like a nail marking," another wound was probably a scratch rather than a stab wound, and the last injury "could be a superficial poke with a knife."

¶ 23 The State then rested its case, and defense counsel moved to dismiss the case for failure to make a cause of action. After the circuit court denied defense counsel's motion, the defendant presented his case in chief.

¶ 24 The defendant testified to the following. The defendant and Melanie married on September 25, 1999. During the couple's one week separation in November 1999, the defendant wrote Melanie a letter to address Melanie's excessive drug and alcohol use. In response, Melanie also wrote the defendant a letter, indicating her desire to reconcile. When the couple reunited, the defendant stored the letters in a bedroom dresser drawer and never took them out. In 2001, the couple separated again for a short period after Melanie's adult son moved in with them. With regard to Scruggs' testimony, the defendant denied ever arguing with Melanie in front of Scruggs. Instead, the defendant

admitted that he did not get along with Scruggs and recalled calling Scruggs a "big head bitch" before he asked her to leave his home.

¶ 25 Approximately six weeks before the incident, the couple separated again after Melanie became angry with the defendant for taking photos of his son on prom night at his son's mother's home. In contrast to Blake's testimony, the defendant stated that he was not present when Melanie moved out, thus, he denied that he threatened Melanie. Although the couple was separated, Melanie initiated communication, although they both expressed a desire to reconcile. On June 6, 2003, and June 7, 2003, Melanie visited the defendant at his home, and they spent the day and night together.

¶ 26 On June 8, 2003, the defendant drove Melanie to work in the morning. An argument ensued after the defendant informed Melanie that he could not pick her up from work that afternoon because he wanted to attend his son's birthday party. When Melanie called at approximately 12:30 p.m., the defendant agreed to pick her up and drop her off at Sharon's home in East St. Louis, Illinois. The defendant returned to his home at approximately 2:30 p.m. Roughly 5 to 10 minutes later, Melanie arrived at his home, and the defendant let her inside. Melanie confronted the defendant in the bedroom and accused him of infidelity because his ex-girlfriend's number was on his phone. As the defendant walked to the bathroom, Melanie walked to the dining room. When the defendant entered the dining room, Melanie, five or six steps away from him, lunged at the defendant with a knife. The defendant and Melanie wrestled and the knife fell to the floor. After Melanie regained possession of the knife, the defendant "had her by the hand, by the arm, trying to *** take the knife from her." During the physical altercation,

Melanie squeezed the defendant's testicles while she wrestled on top of him. Once the wrestling ended, Melanie went into the kitchen, and the defendant followed to find his cell phone. The defendant remembered seeing blood on Melanie but not on himself. Realizing Melanie was hurt, the defendant called 9-1-1. During the phone call, Melanie collapsed to the floor.

¶ 27 When police arrived, the defendant was arrested and escorted to the East St. Louis Police Department where he realized he had blood on his clothing. The defendant was wearing a red and blue shirt, blue jeans, and shoes. The police took the defendant's clothing into evidence and provided him with a paper gown for two days until he was given an orange jumpsuit. Defense counsel, without objection, admitted a photograph of the defendant wearing a paper gown on June 9, 2003 (Defendant's Exhibit 2). The defendant testified that People's Exhibit 30 had been taken at the East St. Louis Police Department in March 2003 by Detective Gilda Johnson when the defendant picked up his son following issues with his son's truancy officer. Lastly, the defendant asserted that he never intended to kill Melanie, but he believed his life was in danger when she attacked him.

¶ 28 On cross-examination, the defendant stated that Melanie had smoked marijuana on the morning of June 8, 2003. Despite this, the defendant acknowledged that Melanie did not appear high or drunk at his home at 2:30 p.m. that day, and he acknowledged that the toxicology report did not show any sign of drug or alcohol use. The defendant asserted that Melanie, unprovoked, lunged at him with a knife in the dining room "because she seen [*sic*] my ex-girlfriend's phone number on my telephone." The defendant recalled

specifics before and after the stabbing, but he did not remember how many times he stabbed Melanie. The defendant remembered that he was lying on his back with the knife in his left hand while Melanie was on top of him squeezing his testicles. When he stabbed her, the defendant was "trying to get her hand away from my testicles." The defendant admitted that "I must have stabbed her. I was the only one in the house" and that he must have swung hard to inflict four to six-inch stab wounds.

¶ 29 The defendant did not remember if he hit Melanie with the Hennessy bottle, although he recalled that she hit him with it. The State then asked the defendant if he recalled testifying at a prior proceeding that he had grabbed the Hennessy bottle with his hands and pushed it back towards Melanie's face after she swung at him. The defendant answered in the affirmative. The defendant could not explain how the handwritten letter, written three years prior to save their marriage, and the couple's photograph were on the made bed. Moreover, despite having asserted that their marital problems stemmed from Melanie's excessive drug and alcohol use, the defendant's letter did not make a single reference to such issues. The defendant testified the he did not write the letter to anger Melanie, but to inform her that he would be "more lenient" by allowing her to smoke marijuana as long as she decreased her drinking and stopped using cocaine.

¶ 30 On redirect, the defendant testified that he did not specifically reference Melanie's drug and alcohol problems in the letter because he was attempting to save their marriage, not upset her. Lastly, on recross, the defendant admitted that Melanie was unarmed when he stabbed Melanie 11 times. After the defendant rested his case, defense counsel renewed his motion to dismiss, arguing that the State had failed to establish a *prima facie*

case. Defense counsel requested a verdict to be entered in favor of the defendant, either for an acquittal based upon self-defense or, alternatively, finding the defendant guilty of second degree murder. The circuit court denied the defendant's motion.

¶ 31 During closing arguments, the State addressed the defendant's testimony that his handwritten letter, supposedly written three years prior, had "magically appeared" on the made bed. This letter, the State averred, demonstrated the defendant's state of mind on June 8, 2003, that is, " 'If I can't have you, nobody else is going to.' " The State, in arguing that the evidence demonstrated first degree murder, stated the following:

> "Well, ladies and gentlemen, you get a chance to look at that letter, it was published to you, if you want to see it again, I encourage you to look at it. He's talking about he wants to be together and that I'm the problem, I will change and I'm responsible for all the trouble we're having. And then perhaps one of the more ironic things I've ever see in my career as a prosecutor: 'I will never hurt you again. Love, Mark.' "

The circuit court interrupted, stating that the statements contained in the defendant's letter were admitted solely to show motive and intent, and that a jury instruction would be provided to that effect.

¶ 32 Next, defense counsel clarified that People's Exhibit 30 was a photograph of the defendant that had been taken several months before the incident. Defense counsel then addressed both People's Exhibit 30 and Defendant's Exhibit 2:

> "[People's Exhibit 30] shows Mr. Burris smiling. Now why would they want to put that in there?
>
> * * *
>
> They want to somehow or other paint Mr. Burris as this monster, that two days, three days after this horrible thing happened to his wife, that he's smiling about it. What a horrible, horrible thing.
>
> * * *

> If you look at these pictures, and I want you to look at them, and the reason it's important, and I'll explain it to you in a little bit, I want you to look at these two pictures, and you tell me whether you believe that both of these were taken within a day or two of each other. *** [L]ook at the face here[.] *** Significantly heavier. Look at the neck. These are almost not the same people. Mr. Burris has told you this picture was taken several months, maybe even a year before *** this happened.
>
> Now, again, why *** do we care? The reason we care is that someone at some point *** decided that it was appropriate to put this picture out there and to try to convince you that this is a picture of a man smiling a few days after his wife died.
>
> [Y]ou have to ask the question that if somebody—*** the police? An investigator?—if somebody is willing to do that, then are they willing to find a letter that's been put away for two or three years and decide that it would be better if it was sitting on the bed?"

Defense counsel asserted that the evidence did not demonstrate the defendant's state of mind but that someone had planted the letter and the photograph of the couple to frame the defendant.

¶ 33 In rebuttal, the State asserted that there was no "police conspiracy" to plant items to "frame Mark Burris," but that the defendant's letter served as "a truth detector about what was going through his mind." The State argued that the defendant's testimony was incredible. First, the State highlighted the defendant's testimony that Melanie was smoking marijuana on the morning of June 8, 2003, although the toxicology report failed to show drugs or alcohol in her system. Next, the State addressed the fact that the defendant could remember details before and after the stabbing, but he could not remember stabbing Melanie 11 times. The State asked the jury to think about how plausible it would be, given the close proximity between their bodies and the depth of the stab wounds, for the defendant to stab Melanie 10 times in the chest and once in the back

if the defendant was lying on his back and Melanie on top of him was squeezing his testicles. The State requested a finding of first degree murder.

¶ 34 Following closing arguments, the circuit court instructed the jury on the offense of first degree murder, second degree murder, and the affirmative defense of justified use of deadly force. Specifically, the court stated that to sustain either first degree or second degree murder, the State had the burden of proving the following:

> "First proposition: That the Defendant performed the acts which caused the death of Melanie Burris.
>
> And Second proposition: That when the Defendant did so, he intended to kill or do great bodily harm to Melanie Burris. Or he knew that such acts would cause death to Melanie Burris. Or he knew that such acts created a strong probability of death or great bodily harm to Melanie Burris.
>
> Third proposition: That the Defendant was not justified *** in using the force which he used."

In addressing second degree murder, the court stated that the State had to prove beyond a reasonable doubt all elements of first degree murder. If the State was successful in doing so, the defendant then had the burden of proving by a preponderance of the evidence that a mitigating factor was present to reduce the offense of first degree murder to the lesser offense of second degree murder. The court stated the following:

> "By this, I mean that *** it's more probably true than not true that either of the following mitigating propositions is present:
>
> That the Defendant at the time he performed the acts which caused the death of Melanie Burris believed the circumstances to be such that they justified the deadly force he used, but his belief that such circumstances existed was unreasonable, or acted under a sudden and intense passion resulting from serious provocation by the deceased.
>
> * * *
>
> A person is justified in the use of force when and to the extent that he reasonably believes that such conduct is necessary to defend himself against the

> imminent use of unlawful force, however a person is justified in the use of force which is intended or likely to cause death or great bodily harm only if you reasonably believe that such force is necessary to prevent imminent death or great bodily harm to himself."

Following deliberations, the jury found the defendant guilty of first degree murder.

¶ 35 On October 22, 2008, the defendant filed a posttrial motion, arguing that the circuit court erred in admitting the defendant's letter and the testimonies of Blake and Scruggs because the State had failed to establish appropriate proximity in time. As such, the defendant asserted that the prejudicial nature of the admissions outweighed their probative value. The defendant also averred that the State had engaged in prosecutorial misconduct by introducing People's Exhibit 30, an irrelevant photograph of the defendant that had been taken months before the incident.

¶ 36 In January 2009, the defendant's counsel moved for leave to withdraw, which the circuit court granted. The defendant was subsequently appointed new counsel. On March 31, 2009, counsel for the defendant filed a motion for a new trial, asserting that the circuit court had erroneously failed to comply with Illinois Supreme Court Rule 431(b) (eff. July 1, 2012) during *voir dire*. Shortly thereafter, counsel requested leave to withdraw as counsel, which the court granted. The defendant was subsequently appointed new counsel.

¶ 37 On November 2, 2012, newly appointed counsel for the defendant filed a supplemental posttrial motion, arguing, *inter alia*, that the defendant was denied a fair trial when the State erroneously introduced, and trial counsel failed to object to, the admission of People's Exhibit 30. The supplemental posttrial motion also asserted that

Detective Perry, the first officer to respond to the crime scene, had credibility issues, given that his police misconduct had been addressed by the State in a previous case. The defendant filed a second supplemental posttrial motion on September 29, 2014, asserting the same arguments set forth above.

¶ 38 On May 20, 2015, the circuit court held a hearing on the defendant's supplemental posttrial motions, dated October 22, 2008, March 31, 2009, and September 29, 2014, with the November 2, 2012, motion incorporated by reference. Detective Williams, Jim Stiehl, trial counsel for defendant, and the defendant testified.

¶ 39 Detective Williams testified to the following. At the time of trial, Detective Williams believed the photograph of the defendant in People's Exhibit 30 had been taken after the defendant was in custody on June 8, 2003. After he testified on September 22, 2008, Detective Williams realized, however, that People's Exhibit 30 had not been taken on June 8, 2003. Following this, he and the State "did a comparison from what was in [People's Exhibit 30], to what clothing we had evidence-wise, and it didn't match." In addressing the error, Detective Williams explained that, although the computer system ordinarily uploaded the most recent photograph in the database of the person listed on the booking arrest form, the system incorrectly generated a photograph of the defendant that had been taken prior to June 8, 2003. Detective Williams acknowledged that Defendant's Exhibit 2, the photograph of the defendant wearing a paper gown, was "definitely taken after the incident."

¶ 40 Next, Stiehl testified that, during pretrial discussions, he learned from the defendant that People's Exhibit 30 had been taken prior to the incident. The defendant

believed that the State had intentionally included the photograph in its exhibit list to make him look "flippant and frivolous and reacting inappropriately to the circumstances." Although Stiehl was aware that People's Exhibit 30 was an inaccurate photograph, Stiehl allowed, as trial strategy, admission of the photograph to highlight the State's errors. As such, after the State acknowledged, and the jury was advised, that People's Exhibit 30 was incorrect, Stiehl discussed the inaccuracy in closing arguments to bolster the theory that other evidence, specifically, the defendant's letter to Melanie and the photograph of the couple, was untrustworthy because it had been planted to frame the defendant.

¶ 41 Lastly, the defendant testified that he disagreed that it was trial strategy when Stiehl allowed the State to introduce and admit People's Exhibit 30 into evidence because he had informed Stiehl of the inaccuracy during trial. Following the defendant's testimony, the circuit court took the matter under advisement.

¶ 42 On December 29, 2015, the circuit court denied the defendant's October 22, 2008, posttrial motion, finding that the admission of the defendant's letter was proper; the admission of Scruggs' and Blake's testimonies was proper; the State did not engage in prosecutorial misconduct; and the jury verdict was not against the manifest weight of the evidence. Next, the court denied the defendant's March 31, 2009, motion for a new trial, finding that the court's noncompliance with Illinois Supreme Court Rule 431(b) (eff. July 1, 2012) during *voir dire* was harmless; there was no evidence that the defendant was tried by a biased jury; and the evidence was not so closely balanced that the error alone threatened to tip the scales of justice against the defendant. Lastly, the court denied the defendant's September 29, 2014, supplemental posttrial motion, with November 2, 2012,

incorporated by reference, finding that the introduction of the wrong lineup photograph was cured during trial; the defendant's claim of ineffective assistance of counsel was baseless; and Detective Perry's testimony did not give rise to any violation of the defendant's constitutional rights.

¶ 43 On December 28, 2015, the defendant filed a motion to reconsider, which the circuit court dismissed as procedurally improper. On February 8, 2016, the court sentenced the defendant to 30 years in prison with 3 years of mandatory supervised release. The defendant filed a timely notice of appeal on February 29, 2016.

¶ 44 II. Analysis

¶ 45 On appeal, the defendant's argument is threefold: (1) the circuit court erred by failing to comply with Illinois Supreme Court Rule 431(b) (eff. July 1, 2012) during *voir dire*; (2) the circuit court denied him a fair trial when it admitted People's Exhibit 3, the defendant's handwritten letter to Melanie; and (3) the defendant was denied effective assistance of counsel. We address each contention in turn.

¶ 46 A. Illinois Supreme Court Rule 431(b)

¶ 47 The defendant argues, and the State concedes, that the circuit court erred by failing to comply with Illinois Supreme Court Rule 431(b) (eff. July 1, 2012) during *voir dire.* Although unpreserved, because the defendant failed to object, he urges this court to consider this issue under the first prong of the plain-error doctrine because the evidence presented at trial was closely balanced. In response, the State asserts that the defendant's claim is forfeited and that, despite the admonishment error, the evidence was not closely balanced.

¶ 48 As an initial matter, we agree that the defendant failed to properly preserve this claim for review. To preserve a claim for review, a defendant must object at trial and include the alleged error in a written posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186-87 (1988). As stated above, the defendant failed to object, thus, his claim is forfeited. Nevertheless, the defendant requests plain-error review.

¶ 49 The plain-error doctrine bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved claims of error. *People v. Averett*, 237 Ill. 2d 1, 18 (2010). Forfeited claims are reviewable under the plain-error doctrine (1) where 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) where a clear or obvious 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, 564-65 (2007). Under a plain-error analysis, the defendant bears the burden of persuasion. *People v. Wilmington*, 2013 IL 112938, ¶ 43; see also *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). The first step of plain-error review is to determine whether an error occurred. *Thompson*, 238 Ill. 2d at 613.

¶ 50 Here, we agree that the circuit court failed to comply with Illinois Supreme Court Rule 431(b) (eff. July 1, 2012) by failing to ask the jurors, individually or as a group, if they understood *and* agreed with the specific legal principles. Because each juror was not provided the opportunity to respond whether he or she understood and accepted each principle, the court clearly erred. See *Thompson*, 238 Ill. 2d at 607.

¶ 51 Next, we must determine whether the defendant has shown that "the evidence was so closely balanced the error alone severely threatened to tip the scales of justice." *People v. Sebby*, 2017 IL 119445, ¶ 51. In determining whether the evidence adduced at trial was close, a reviewing court must evaluate the totality of the evidence and conduct a "qualitative, commonsense assessment" of the evidence within the context of the case. *Id.* ¶ 53. "A reviewing court's inquiry involves an assessment of the evidence on the elements of the charged offense or offenses, along with any evidence regarding the witnesses' credibility." *Id.*

¶ 52 Here, the defendant was convicted of first degree murder under section 9-1(a)(1) of the Criminal Code of 1961 (720 ILCS 5/9-1(a)(1) (West 2002)), which provides:

> "(a) A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death:
>
> (1) he either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another[.]"

Therefore, the State had to prove that the defendant intended to kill or cause great bodily harm to Melanie, or knew that stabbing Melanie would cause her death, or he knew such acts created a strong probability of death or great bodily harm to Melanie.

¶ 53 The defendant contends that, similar to *Sebby*, the evidence was so closely balanced and the outcome was dependent on an assessment of the defendant's credibility that he did not commit premeditated murder. Thus, he asserts that his claims of self-defense and, alternatively, second degree murder are plausible because no direct evidence rebutted his assertion that he acted out of fear for his life. He further argues that the State's theory of premeditated murder was based only on alleged threats, brought forth by

Scruggs' and Blake's testimonies, that had been made remotely in time from the incident at issue. Specifically, the defendant, citing *People v. Hawkins*, 296 Ill. App. 3d 830 (1998), asserts that where his "non-rebutted, credible testimony was the only evidence presented regarding the actual events involved in Melanie's death," "the evidence was closely balanced with respect to his defense of self-defense, or that he believed he had the right to use self-defense but his belief was unreasonable." We disagree.

¶ 54 When evaluating the totality of the evidence, including the physical evidence; the prior, credible threats; and the autopsy report and accompanying testimony, the defendant's version of the events is rebutted, and his claims of self-defense or, as an alternative argument, second degree murder are unsupported. First, we note that the defendant's claims that the couple's marital problems stemmed from Melanie's excessive drug and alcohol use and that she was high on marijuana the morning of June 8, 2003, are unsupported by the evidence. The toxicology report demonstrated that Melanie had no drugs or alcohol in her system at the time of death. Additionally, the defendant admitted that Melanie did not appear to be under the influence of drugs or alcohol during their argument on June 8, 2003. Moreover, the defendant's letter, which addressed the couple's marital problems, failed to make a single mention of Melanie's drug and alcohol issues. Rather, it contained statements, such as: "I may be the cause of all our grief" and "I will never hurt you again." The defendant testified the he did not write the letter to anger Melanie, but to inform her that he would be "more lenient" as long as she decreased her drinking and only smoke marijuana.

¶ 55 Second, we note that the defendant's testimony lacked credibility concerning the details of the stabbing. The defendant testified that Melanie, the initial aggressor, lunged at him after she became angry with him for communicating with an ex-girlfriend. Although the defendant admitted that he "must have stabbed her," he had no recollection of inflicting 11 stab wounds, ranging from 1½ to 6 inches in depth, to Melanie's body. Moreover, the defendant initially testified that he could not remember if he hit Melanie with the Hennessy bottle, although she had three cranial lacerations. However, when the State asked if he recalled testifying at a prior proceeding that he grabbed the Hennessy bottle with his hands and pushed the bottle back towards Melanie's face, the defendant answered in the affirmative. Considering the totality of the evidence, we cannot conclude that the defendant's testimony concerning the details of the incident was credible.

¶ 56 We note, instead, that Dr. Nanduri's testimony demonstrated that one of the three lacerations on Melanie's head was consistent with "some type of blunt trauma" that tore through her scalp. Melanie also had bruising on her head, around her eye, on her forehead and nose. Moreover, Melanie's bruises were round to oval contusions, which Dr. Nanduri testified had likely been caused "by grabbing a person or trying to restrain a person by holding on to the forearm." Melanie also had wounds on her right hand, which could arise when a person tries "to defend one's self, holding the arm in front of" herself.

¶ 57 When viewing the images of the defendant's forearm, taken days after the incident, Dr. Nanduri believed that one of the wounds "looked like a nail marking," another wound was probably a scratch, and the last wound "could be a superficial poke with a knife." As such, the defendant essentially came away from the physical altercation

uninjured, whereas Melanie suffered 11 stab wounds that ultimately led to her death. Moreover, the defendant, who was approximately 40 pounds heavier and six inches taller than Melanie, testified that he stabbed Melanie while he was lying on his back and she was on top of him squeezing his testicles. More importantly, the defendant admitted that Melanie was unarmed when he stabbed her 11 times, and that his reasoning for stabbing her was "to get her hand away from my testicles."

¶ 58 Lastly, we note that the testimonies of Blake and Scruggs were used to demonstrate the defendant's motive and state of mind at the time of the incident. Blake testified that just six weeks before the incident, the defendant told Melanie, as she packed her belongings to the leave the defendant: "You better not be here when I get back or I'll do something to you." Scruggs also testified that she was present at the defendant's home in 2002 when the defendant told Melanie: "Bitch, if I can't have you, nobody else will." Although Scruggs admitted that she did not have a cordial relationship with the defendant, Blake and the defendant did not have an issue with one another. Even if we were to view the testimonies of Blake and Scruggs with caution, "it is the function of the jury to assess the credibility of the witnesses, the weight to be given their testimony, and the inferences to be drawn from the evidence" (*People v. Manning*, 182 Ill. 2d 193, 210 (1998) (citing *People v. Tye*, 141 Ill. 2d 1, 13 (1990))). Thus, we cannot substitute our judgment for that of the jury.

¶ 59 We conclude that a detailed review of the record does not demonstrate that the evidence was so closely balanced to constitute plain error. In evaluating the totality of the evidence, including the physical evidence; the prior, credible threats; and the autopsy

report and accompanying testimony, the evidence demonstrates a lack of justified deadly force to support the defendant's claims of self-defense or second degree murder. Given that the evidence is overwhelmingly against the defendant, it is reasonable that the jury concluded the defendant intended to kill or cause great bodily harm to Melanie, or knew that stabbing Melanie would cause her death, or he knew such acts created a strong probability of death or great bodily harm to Melanie. Accordingly, based on the totality of the evidence and our commonsense assessment of the evidence, we cannot say that the evidence was so closely balanced that the error alone threatened to tip the scales of justice against the defendant.

¶ 60 B. Admission of People's Exhibit 3: The Defendant's Handwritten Letter

¶ 61 Evidentiary rulings are within the sound discretion of the circuit court and will not be reversed absent an abuse of discretion. *People v. Caffey*, 205 Ill. 2d 52, 89 (2001). An abuse of discretion will be found only where the circuit court's ruling is arbitrary, fanciful, unreasonable or where no reasonable person would take the view adopted by the court. *Id.* (citing *People v. Illgen*, 145 Ill. 2d 353, 364 (1991)). In determining admissibility of evidence, a court must ask whether the proffered evidence fairly tends to prove or disprove the offense charged and whether it is relevant in that it tends to make the question of guilt more or less probable. *People v. Wheeler*, 226 Ill. 2d 92, 132 (2007) (citing *Caffey*, 205 Ill. 2d at 114-15). "It is entirely within the discretion of the trial court to 'reject offered evidence on grounds of irrelevancy if it has little probative value due to its remoteness, uncertainty, or possibly unfair prejudicial nature.' " *Id.* (quoting *People v. Harvey*, 211 Ill. 2d 368, 392 (2004), citing *People v. Ward*, 101 Ill. 2d 443, 455 (1984)).

¶ 62 Hearsay is an out-of-court statement offered to prove the truth of the matter asserted, and it is generally inadmissible unless it falls within an exception to the hearsay rule. *People v. Olinger*, 176 Ill. 2d 326, 357 (1997). Under the "then existing mental, emotional, or physical condition" exception to the hearsay rule, the rule will not exclude the following, even though the declarant is available as a witness:

> "(3) *** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including:
>
> ***
>
> (B) a statement of declarant's then existing state of mind, emotion, sensation, or physical condition to prove the state of mind, emotion, sensation, or physical condition of another declarant at that time or at any other time when such state of the other declarant is an issue in the action." Ill. R. Evid. 803(3)(B) (eff. Sept. 28, 2018).

¶ 63 The defendant asserts that he was denied a fair trial and the circuit court abused its discretion in admitting into evidence a three-year-old, undated handwritten letter to show the defendant's state of mind and motive at the time of the incident. The defendant argues that the letter was a highly prejudicial piece of evidence that the State used to unfairly bolster its argument that the defendant had committed premeditated murder. The State, in response, asserts that the court did not err because the letter demonstrated the defendant's state of mind and motive at the time he killed Melanie. We agree with the State.

¶ 64 The defendant cites *People v. Hansen*, 327 Ill. App. 3d 1012 (2002), to argue that the undated letter is irrelevant because the State failed to prove that it was written in proximate time to the incident. In *Hansen* (*id.* at 1018), the State attempted to admit a letter, dated September 16, 1994, and not contained in the record on appeal, to demonstrate defendant had elicited false alibi testimony from a friend concerning his

whereabouts during a murder in October 1955. In affirming the circuit court's exclusion of evidence, the reviewing court determined that defendant's letter did not state specific dates in October 1955, which the court determined would have been necessary to establish an alibi defense. *Id.* at 1019. Moreover, "a far more compelling basis" for the court's finding was whether defendant might have asked a friend to testify that he had visited Texas in October 1955 was "not relevant to show consciousness of guilt unless the defendant did not *** visit *** Texas in October 1955." *Id.*

¶ 65 Here, unlike *Hansen*, the defendant's letter tends to demonstrate proximity in time to the incident at issue where the letter was discovered on a made bed next to a pen, pad of paper, and an envelope addressed to Melanie with a photograph of the couple. Importantly, as discussed by the circuit court at the hearing on the defendant's motion *in limine* prior to trial, the letter was in close proximity to the dining room, where the trail of blood began, and the kitchen, where Melanie's dead body was discovered. In fact, the court stated that the letter "having been found on a made bed tends to be great evidence that it was very close to the alleged incident." Moreover, the contents of the letter were relevant in demonstrating his desire to stay married to Melanie, despite the defendant "caus[ing] *** all our grief" and his promise to "never hurt [Melanie] again." Although the defendant claims that he wrote the letter three years before the incident and then stored it in a bedroom dresser drawer, we cannot conclude that the circuit court abused its discretion in admitting the letter, given its close proximity to the crime scene and that it tends to make the question of guilt more or less probable.

¶ 66 C. Effective Assistance of Counsel

¶ 67 Lastly, the defendant asserts that he was denied effective assistance of counsel when defense counsel failed to object to the admission of People's Exhibit 30, which the State erroneously presented, admitted, and published to the jury. Because defense counsel failed to object, the defendant asserts that "[t]his left the jury with the image of Mr. Burris smiling and indifferent the day after he stabbed his wife to death." In response, the State denies ineffective assistance of counsel where the record supports a finding that defense counsel's decision not to object was sound trial strategy.

¶ 68 Claims of ineffective assistance of counsel are evaluated under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), and adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504, 525-26 (1984). To prevail under *Strickland*, a defendant must demonstrate that counsel's performance was deficient and that the deficient performance so prejudiced defendant that he or she was denied a fair trial. *People v. Cordell*, 223 Ill. 2d 380, 385 (2006). More specifically, defendant must demonstrate that counsel's performance was objectively unreasonable under prevailing professional norms and, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Harris*, 225 Ill. 2d 1, 20 (2007). Additionally, defendant must overcome the strong presumption that the challenged action or inaction was the result of sound trial strategy. *People v. Thompson*, 359 Ill. App. 3d 947, 952 (2005). The defendant cannot rely on speculation or conjecture to justify his claim of incompetent representation. *People v. Holman*, 164 Ill. 2d 356, 369 (1995). The defendant's failure to satisfy either prong of the *Strickland* test defeats an ineffective

assistance claim. *People v. Edwards*, 195 Ill. 2d 142, 163 (2001). Thus, a reviewing court may resolve an ineffective assistance claim based upon only the prejudice component, because a lack of prejudice renders irrelevant the issue of counsel's performance. *People v. Coleman*, 183 Ill. 2d 366, 397-98 (1998).

¶ 69 At the defendant's trial, defense counsel cross-examined Detective Williams regarding the defendant's identification in People's Exhibit 30. The following colloquy took place:

> "Q. Are you absolutely certain that that picture was taken the day after Mr. Burris was taken into custody?
> A. Yes, sir.
> Q. Okay. And the clothing that he apparently is wearing there, can you tell what he's wearing?
> A. All I know that that was just according to this picture was a blue—what appeared to be a blue polo, striped polo.
> Q. Pull over?
> A. Yes, sir.
> Q. Sweater?
> A. Something to that effect.
> Q. I mean you don't specifically recall what he was wearing, do you?
> A. No, sir, I don't.
> Q. That wouldn't have been what he was wearing when he was taken into custody?
> A. Whatever he was wearing—I didn't see him when he was taken into custody, but whatever he had on at the time I took that picture I believe is what he had on when he was arrested.
> Q. Do you see any evidence of any blood on that?
> A. On the photo?
> Q. Yeah.
> A. No, sir."

Detective Williams testified that, following his testimony on September 22, 2008, he indicated hesitation to the State that People's Exhibit 30 did not depict the defendant after the incident. Following this, he and the State "did a comparison from what was in

[People's Exhibit 30], to what clothing we had evidence-wise, and it didn't match." That evening, Detective Williams confirmed that People's Exhibit 30 was incorrect after finding a timestamped photograph, now Defendant's Exhibit 2, in the database. The State subsequently tendered Defendant's Exhibit 2 to defense counsel on the morning of September 23, 2008.

¶ 70 Following the close of the State's evidence, the defendant testified on his own behalf. Defense counsel, without objection, admitted Defendant's Exhibit 2, which depicted the defendant wearing a paper gown in a solemn state. The defendant testified that Defendant's Exhibit 2 was an accurate representation of the clothing he wore at the East St. Louis Police Department, not the blue and gray sweater in People's Exhibit 30, which had been taken months prior. On redirect, defense counsel, once again, clarified for the jury that People's Exhibit 30 was not taken in proximity to the incident at issue.

¶ 71 Furthermore, the State did not mention People's Exhibit 30 in closing arguments. Defense counsel, however, mentioned that the wrong photograph had been placed in the defendant's file. Defense counsel emphasized the following to the jury:

> "Now why would they want to put [People's Exhibit 30] in there? What's the point?
>
> * * *
>
> I tell you what the point is. They want to somehow or other paint Mr. Burris as this monster, that two days, three days after this horrible thing happened to his wife, that he's smiling about it. What a horrible, horrible thing."

Defense counsel then showed the jury Defendant's Exhibit 2 and stated the following:

> "[H]ere is the picture that was taken. And there's no question about it, this is the picture that was taken right after he was taken into custody. This is—I submit to you this is a picture of a man showing you the anguish, showing what has happened.

> If you look at these pictures, and I want you to look at them, and the reason it's important, and I'll explain it to you in a little bit, I want you to look at these two pictures, and you tell me whether you believe that both of these were taken within a day or two of each other. *** [L]ook at the face here[.] *** Significantly heavier. Look at the neck. These are almost not the same people. Mr. Burris has told you this picture was taken several months, maybe even a year before—before this happened.
>
> Now, again, why—why do we care? The reason we care is that someone at some point *** decided that it was appropriate to put this picture out there and to try to convince you that this is a picture of a man smiling a few days after his wife died.
>
> So then you have to ask the question, that if somebody—and I don't know, the police? An investigator?—if somebody is willing to do that, then are they willing to find a letter that's been put away for two or three years and decide that that would be better if it was sitting on the bed?"

¶ 72 Although the record indicates that the State was unaware that People's Exhibit 30 had been improperly placed in the file at the time it was presented to the jury, defense counsel testified on May 20, 2015, that he was aware that a discrepancy existed before trial. Defense counsel testified to the following:

> "[I]t was my thought that, since there were *** investigators testifying that they found [the letter] on the bed, it was my thought that if we could shed some doubt on their—either their veracity or their—or their thoroughness, by—by demonstrating that they had inappropriately produced this picture, that we could then say, well, you know, they messed up on the picture, maybe they messed up on the—maybe they messed up on the letter.
>
> And I think that we—I think—and at least I believed that we both were confident that at some point we would be able to establish that that picture was—was inappropriately in the file."

As such, defense counsel's strategic decision was to cast uncertainty that both the defendant's letter and the photograph of the defendant and Melanie had been planted to frame the defendant. Once the State acknowledged that People's Exhibit 30 was incorrect, Defendant's Exhibit 2 was generated on the second day of the defendant's trial.

¶ 73 The burden of proving incompetence, and of overcoming the presumption that an attorney's decision is the product of sound trial strategy, rests upon the defendant. *People v. Cloutier*, 191 Ill. 2d 392, 402 (2000). "A defendant can overcome the strong presumption that defense counsel's choice of strategy was *sound* if counsel's decision appears so irrational and unreasonable that no reasonably effective defense attorney, facing similar circumstances, would pursue such a strategy." (Emphasis in original.) *People v. King*, 316 Ill. App. 3d 901, 916 (2000) (citing *People v. Faulkner*, 292 Ill. App. 3d 391, 394 (1997)).

¶ 74 Here, in light of the foregoing, it is evident that defense counsel's strategy, as set forth in his own testimony at the defendant's posttrial hearing on May 20, 2015, was to highlight the State's errors. We first note that the defendant initially requested exclusion of the defendant's letter, Scruggs' and Blake's testimonies, and a prior conviction of domestic battery in the defendant's motion *in limine*. Following the circuit court's order granting the defendant's motion *in limine*, as it pertained only to the prior conviction of domestic battery, defense counsel attempted to promote the idea that police had planted the letter and the couple's photograph on the made bed to frame the defendant. In support, defense counsel testified on May 20, 2015, that he felt confident at trial that he would, first, establish the improperness of People's Exhibit 30 and then argue that "they messed up on the picture *** maybe they messed up on the letter." The record indicates that defense counsel's strategy was to highlight known mistakes to the jury to cast doubt on the entire process used by police to gather evidence after the incident.

¶ 75 Even if we were to conclude that the strategy above was irrational and unreasonable, we cannot conclude that there is a reasonable probability that the outcome of the trial would have been different if defense counsel had objected to People's Exhibit 30. We cannot ignore that Defendant's Exhibit 2 was presented on the second day of trial as the accurate photo of the defendant following the incident. Moreover, given that overwhelming evidence existed that the defendant committed first degree murder, we cannot find that he satisfied the prejudice prong set forth in *Strickland.* Accordingly, his claim of ineffective assistance of counsel fails.

¶ 76 III. Conclusion

¶ 77 For the foregoing reasons, the judgment entered on the jury verdict is affirmed.

¶ 78 Affirmed.