2011 IL App (1st) 091384-U
No. 1-09-1384

SIXTH DIVISION
November 23, 2011

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IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 04 CR 21140
	)	
ARTHUR DENT,	)	
	)	The Honorable
Defendant-Appellant.	)	Mary M. Brosnahan,
	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Cahill and Garcia concurred in the judgment.

O R D E R

¶ 1 *HELD*: The trial court failed to comply with Supreme Court Rule 431(b); however, the error did not constitute plain error. The trial court did not abuse its discretion in prohibiting defendant from asking the venire members questions regarding police coercion and false confessions. The trial court did not abuse its discretion in refusing to allow expert eyewitness testimony.

¶ 2 Defendant, Arthur Dent, was convicted of first degree murder and sentenced to natural life imprisonment. On appeal, defendant contends he was denied a fair trial where the trial court: (1) failed to comply with the dictates of Supreme Court Rule 431(b) (Ill. S. Ct. R. 431(b) (eff.

May 1, 2007)); (2) refused to question prospective jurors regarding police coercion and false confessions; and (3) refused to allow defendant to call an eyewitness identification expert. Based on the following, we affirm.

¶ 3 FACTS

¶ 4 A jury found defendant guilty of the shooting death of Aaron Seay and the attempted murder of Alonso Washington. The evidence presented by the State is summarized as follows. On July 8, 2004, Seay and Washington were walking home from a liquor store when they heard someone shout from behind, "get out the way." Seay and Washington were chatting with one another and were also on their cellular phones at the time. Seay and Washington turned around and saw an older man riding a bicycle while wearing a "do-rag," a black-hooded sweatshirt, and black pants. The man rode his bicycle between Seay and Washington and continued riding away. Once past, the man looked back at Seay and Washington; however, the pair "paid him no mind." Seay and Washington continued walking toward Washington's home at "Ellis Towers" located at 4624 S. Ellis Avenue, in Chicago, Illinois. The Gangster Disciples gang "hung around" Ellis Towers, but Washington was not a gang member. When Seay and Washington returned to Ellis Towers, they stood at the front gate near the parking lot. Again, the man rode his bike past Seay and Washington. Washington was able to see the man's face under the street lights. The man then made a u-turn on his bike and rode through the Ellis Towers parking lot toward Seay and Washington. When the man was within reach of Washington, he pulled out a "Clint Eastwood kind of gun" and shot at Seay first then at Washington. The man shot Seay twice. Washington attempted to run away. Washington ran across the street, but was shot twice,

in the elbow and in the buttocks. Washington entered a church where a group was meeting and realized that he had been shot.

¶ 5 Chicago Police Officer Denise Leet testified that he was on patrol near Ellis Towers at approximately 9:44 p.m. on the date in question when he heard three gunshots. Shortly thereafter, Washington approached Officer Leet reporting that he had been shot. Officer Leet called an ambulance and proceeded to investigate the scene. When he got to the Ellis Towers' parking lot, Officer Leet interviewed a security guard who did not see the shooting. Meanwhile, a resident from the second or third floor yelled down to Officer Leet indicating that an individual was laying in the parking lot. Officer Leet then saw Seay near the fence and called for another ambulance and backup. Seay was pronounced dead at Northwestern Hospital. The autopsy revealed that he died from a gunshot wound to the head. Washington was transported to Provident Hospital.

¶ 6 Detective Thomas Vovos testified that he was assigned to investigate the Ellis Towers' shooting with his partner, Detective Daniel Kienzle. On July 8, 2004, Detectives Vovos and Kienzle responded to the scene and canvassed the area for witnesses. The detectives spoke to Woodrow Page. Page described the offender as a black male in his 30s with a thin, tall build. Page reported that the offender rode his bicycle up to Seay and Washington and fired a handgun at them. The detectives also interviewed Jonelle Smith, who described the offender as a black male in his 30s, wearing dark clothing with a thin, tall build. Smith reported that the offender rode his bicycle up to Seay and Washington and fired a revolver at the men. Detective Vovos, his partner, and other officers additionally spoke to individuals gathered on the street and those

living in the surrounding homes. After the initial investigation, Detective Vovos did not have a name for the suspect.

¶ 7 Detective John Halloran testified that he assisted in the Ellis Towers' shooting investigation. On the night of the shooting, Detective Halloran interviewed Washington at Provident Hospital. Washington identified the shooter as a dark-complected black male between 35 and 38 years old, standing approximately 6 feet to 6 feet 2 inches tall with a thin build. The offender was wearing a "doo-rag" and dark clothing, was riding a bicycle, and carried a revolver like the one used in Dirty Harry.

¶ 8 On July 9, 2004, Washington viewed an extensive photographic array. Washington was still in the hospital at the time and had been administered pain medicine both intravenously and orally. According to Washington, he viewed up to a thousand photographs, some single photographs and some pieces of paper containing multiple photographs. Although he testified that he made a positive identification of the shooter during his deposition testimony, Washington testified at trial that he did not identify anyone on that date. Instead, Washington testified that he viewed one photograph for several minutes, but asked the police to conduct a lineup to determine the identity of the shooter. Washington further testified that Detectives Vovos and Kienzle came to his home on July 12, 2004, to show him another photographic array. Washington identified a photograph of defendant. According to Washington, he went to the police station on August 2, 2004, and identified defendant in a lineup.

¶ 9 Sergeant Victor Green testified that, on July 10, 2004, at approximately 10:35 p.m., he, Sergeant Brian Blackman, and Sergeant Joseph Patterson were on patrol near the 4500 block of

South Cottage Grove and saw four men shooting dice and gambling in a vacant lot behind a school. The officers approached the group, detained the men, and questioned them. Defendant and Romelle Coleman were in the group. The officers ran a name check on defendant and learned that he was wanted on a parole matter. After initially providing several fictitious names, Coleman eventually provided his real name. A name check revealed that Coleman was wanted on a probation warrant. The men were transported to the police station. The officers separated the men and asked them questions regarding known area gang activity. Sergeant Green testified that Coleman said he knew about a couple of shootings that occurred near Ellis Towers. As a result, Coleman was transferred to the detective's division for further questioning. Sergeant Green was aware that Coleman alleged Sergeant Blackman hit him. Sergeant Green testified that he was with Sergeant Blackman while Coleman was interviewed and never witnessed Sergeant Blackman strike Coleman.

¶ 10 Sergeant Blackman testified that he never struck Coleman and that none of the four individuals arrested on July 10, 2004, were struck or intimidated.

¶ 11 Detective Halloran interviewed Coleman during the early morning hours of July 11, 2004. Coleman identified "Face Mob" as the Ellis Towers' shooter. In response, Detective Halloran spoke to fellow detectives to learn the identity of "Face Mob." Detective Halloran then compiled a photographic array that included a picture of "Face Mob." Coleman, however, identified someone else as "Face Mob." Nevertheless, Coleman said that he and the individual he identified as the shooter "had a face off with each other." They flashed handguns, but did not have an opportunity to shoot because of police presence. Coleman reported that he and fellow

Black P-Stone members chased "Face Mob" from the area and recovered his bicycle. As a result, Detective Halloran and another detective took Coleman to the area near 46th Street and Ellis Avenue in an attempt to recover the bicycle. Coleman could not find it.

¶ 12 Detective Halloran and another detective then performed a photographic array for Washington at his apartment in Ellis Towers. According to Detective Halloran, the photographic array included several photos on separate sheets of paper, one which included the real "Face Mob" and one which included the man Coleman identified as "Face Mob." According to Washington, he viewed five or six photographs on a single sheet of paper. Detective Halloran testified that Washington did not identify the shooter in any of the photos. Detective Halloran returned to the police station and confronted Coleman with his lies about "Face Mob." Coleman then identified defendant as the offender. Coleman added that he witnessed the shooting. Detective Halloran never hit or choked Coleman.

¶ 13 On July 11, 2004, Detective Vovos learned from Detective Halloran that Coleman was in custody and that defendant was the suspected offender. On that date, Detective Vovos assisted in interviewing Coleman. Coleman implicated defendant as the shooter and himself as a lookout.

¶ 14 On July 12, 2004, Detectives Vovos and Kienzle went to Ellis Towers to present Washington with another photographic array. Washington identified and initialed a photo of defendant. Detectives Vovos and Kienzle also performed a photographic array for Smith. Smith did not identify anyone.

¶ 15 On July 13, 2004, Detective Vovos interviewed Ashley Miller. Miller reported that he

was with Coleman and Coleman's girlfriend, Connika, in Drexel Park at the time in question. Detective Vovos testified that he told Miller the police knew he was not being truthful because Coleman implicated Miller as a lookout for the shooting. Miller then admitted his involvement.

¶ 16 On August 2, 2004, Detective Vovos arranged for Washington to view a lineup that included defendant and "fillers" from the lockup. Washington identified defendant.

¶ 17 On cross-examination, Detective Vovos testified that he interviewed defendant's girlfriend, Dora Whiteside, and she confirmed defendant's report that he was at her home in Matteson, IL when the shooting took place. Detective Vovos added that, when initially investigating the shooting, no one reported an earlier shooting involving a chase of someone on a bicycle. Detective Vovos did not canvass the nearby church for witnesses and he was not aware, as the lead investigator, of any other officers having done so. Detective Vovos testified that Page indicated the offender was dark-skinned. Detective Vovos admitted that defendant was the only common individual in the photographic array and lineup viewed by Washington. The photographic array and lineup had different "fillers." Detective Vovos said that all the individuals in the lineup were seated when viewed by Washington.

¶ 18 Coleman testified that he was a member of the Black P-Stones in July 2004. The gang hung around 45th Street and Drexel Boulevard. On July 8, 2004, Coleman saw defendant[1] riding

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[1]At the time, defendant was affiliated with the rival gang the Mickey Cobras, but had been hanging around with the Black P-Stones that summer. Defendant was friends with Leonard McKinnis, a high ranking member of the Black P-Stones, and had been offered a position in the Black P-Stone gang.

his bicycle while being shot at. After the shooting ceased, defendant exclaimed that "these bitch ass niggas don't know what they got theyself into" and that he was "going to kill one of them." Coleman, defendant, and another gang member then proceeded to drink alcohol and smoke "blunts" for approximately one hour, after which time defendant instructed Coleman to tell McKinnis that he had been shot at by Gangster Disciples. At about 4 p.m. or 5 p.m., Coleman saw defendant riding his bicycle near 45th Street and Drexel Boulevard. Defendant stopped to talk to McKinnis. Miller and a few other gang members were also present. Defendant said he planned to kill one of the Gangster Disciples. The group talked and got drunk, remaining together until approximately 9 p.m. or 10 p.m. At some point, defendant left to change out of his gray sweatsuit. When defendant returned, he was wearing a black sweatsuit, a cap, and a "doo-rag." McKinnis gave defendant a revolver that the group called "Dirty Harry."

¶ 19 McKinnis found two Gangster Disciples members and advised defendant of their location. McKinnis instructed Coleman and Miller to act as security. Coleman was told to stand at 47th Street and Ellis Avenue. While standing at his post, Coleman watched two men walk past him. Defendant followed the men on his bicycle. The two men walked to Ellis Towers and stood in front of the building. Coleman said it was dark outside, but the streetlights illuminated the area. Coleman walked toward Ellis Towers and defendant rode past him down the middle of the street. Defendant then rode his bicycle onto the sidewalk and up to the two men. Defendant pulled out the revolver and began shooting. Coleman witnessed defendant shoot two people and then ride his bicycle down Ellis Avenue away from the scene. One of the men fell to the ground and the other man attempted to run. Coleman returned to 45th Street and Drexel Boulevard

where a group of Black P-Stones had gathered, including Miller and McKinnis. Defendant returned about 10 minutes later. Defendant reported giving a "nugget shot," *i.e.*, a shot to the head.

¶ 20 When he was arrested in July 2004, Coleman was on probation and was aware that he had violated his probation. Coleman told the police that a man by the name of "Face Mob" was responsible for the murder at Ellis Towers. Coleman identified an inaccurate picture of "Face Mob." According to Coleman, the police left him in the interview room for a few hours. He was handcuffed. When the police returned, they informed Coleman that they knew he was lying and "smacked [him] around a little bit" in the face. Coleman testified that he initially denied having any involvement in the shooting, but eventually identified defendant. Coleman had said he was with his girlfriend, Connika Gaddy, in the park at 45th Street and Drexel Boulevard at the time of the shooting. However, when the police advised him that they were going to investigate his alleged alibi by talking to Connika, Coleman admitted he was present for the shooting.

¶ 21 Coleman testified that, in 2007, he entered into an agreement with the State's Attorney's Office in which he agreed to plead guilty to attempted murder and conspiracy in exchange for a 10 year prison sentence "at 85 percent for *** truthful testimony." However, before entering into the agreement, defendant advised Coleman "don't say anything." In addition, McKinnis visited Coleman in jail and told him "don't say nothing." Coleman said he was in protective custody in prison because his life had been threatened. Prior to trial, Coleman and Miller attempted to renegotiate their plea agreement, but were unsuccessful. Coleman testified that he could not read.

¶ 22 On cross-examination, Coleman testified that he had been shot 10 times by two members of the Mickey Cobras gang. Coleman said he talked to Miller everyday while in jail. Prior to his arrest, Coleman's mother was his guardian and he was on supplemental security income because he had been diagnosed with mental retardation.

¶ 23 According to Coleman, the officers that initially arrested him on July 10, 2004, began beating him right away. Coleman stated that he remained in the interview room while he was questioned on and off for four days. He was not given food until the third day. He was not given his asthma inhaler for part of the time spent in questioning. Coleman admitted that he provided several untrue stories to the police, finally providing a statement after four days. When asked about a photograph taken while he was being interviewed, Coleman noted that he was wearing a puffy coat to cover his bruises while the assistant state's attorney (ASA) and the detective only wore shirts. Coleman specified that the coat was intended to cover bruises on his neck from being choked. Coleman testified that he lied when he told the ASA that he had been treated well by the police. According to Coleman, the police beat him after he implicated "Face Mob." Coleman provided stories to the police that he thought they wanted to hear in order to protect himself.

¶ 24 Coleman admitted that, in an attempt to secure a better plea deal, he told the ASA that he was not involved in the shooting and he only inculpated himself as a result of being beaten by the police. Coleman further admitted that he would say anything to avoid a lengthy prison term.

¶ 25 Officer Arthur Carr testified that he processed Coleman's admission into the lockup on

July 13, 2004. He obtained Coleman's fingerprints, took his photograph, and conducted a screening that included a number of standard questions. Coleman notified Officer Carr that he had asthma. Coleman, however, did not make any complaints about his physical condition and Officer Carr did not notice anything unusual. Pursuant to standard procedure, if Coleman had presented with physical injuries, Officer Carr would have noted the injuries on Coleman's intake form and notified his supervisor. Coleman's intake form only noted that he had asthma.

¶ 26 ASA Melanie Fialkowski testified that, late on July 12, 2004, she interviewed Coleman. After the initial interview, Coleman agreed to memorialize his statement through videotape. Prior to memorializing the statement, ASA Fialkowski spoke to Coleman alone and he reported that the police had been "cool" to him. ASA Fialkowski did not notice any physical injuries on Coleman. Once the videographer arriver, Coleman provided his statement in the presence of ASA Fialkowski and Detective Kienzle. ASA Fialkowski testified that the interview room at the police station was "very well air conditioned. It was cold."

¶ 27 Miller testified that he was charged for acting as a lookout in connection with the shooting. At the time in question, Miller was a member of the Black P-Stone gang. On July 8, 2004, Miller lived two blocks from Ellis Towers. At approximately 11 a.m. or noon, Miller was outside when he heard gunshots coming from the direction of the park near 47th Street and Drexel Boulevard. When he turned his attention toward 46th Street, Miller saw three people shooting at and chasing defendant, who was riding a bicycle. Defendant was wearing a white jogging suit with NBA logos on the sleeves and legs. After the shooting stopped and the three men got into their car, Miller approached defendant. Defendant told Miller to notify McKinnis

that "it's on." Miller testified that Drexel Boulevard was the dividing line between his gang and the rival gang the Gangster Disciples.

¶ 28 At approximately 8 p.m. on July 8, 2004, Miller was at 819 East 45th Street, about one half of a block away from where he lived. When he walked to the front of the building on 45th Street, Miller saw McKinnis, Coleman, and defendant, who was on a bicycle and had changed into a black sweatsuit. The group was discussing the earlier incident wherein defendant was shot at by the Gangster Disciples. McKinnis instructed Miller to act as a lookout for defendant on Drexel Boulevard between 45th and 46th Streets. Prior to taking his post, Miller saw defendant ride his bicycle toward Ellis Avenue. After walking to Drexel Boulevard near 46th Street, Miller saw defendant ride past Ellis Avenue. Approximately five minutes later, Miller heard gunshots. When he heard the gunshots, Miller moved toward Ellis Avenue. Defendant rode his bicycle past Miller. Miller noticed police approaching the area and watched as the police chased defendant while he fled. Miller returned to 819 East 45th Street and went inside for about an hour. Thereafter, Miller emerged outside to the front of the building where a group of Black P-Stones had gathered. McKinnis and defendant were in a car together. Defendant reported that he "got two of them" and "got one in the nugget shot."

¶ 29 Miller was shown a photograph of himself at the police station after his arrest on July 13, 2004. In it, Miller was wearing a blue puffy coat. Miller testified that "[i]t was cold, it was real cold in the [interview] room. Very cold in the room." Miller said the police offered the coat and he accepted because the air conditioning was blasting in the room. When Miller was initially interviewed on July 13, 2004, he told the police that he "didn't know nothing" about the

shooting. Later on, the police returned to the interview room and informed Miller that Coleman had said they were on "lookout for the murder." Miller continued to deny his involvement. The police left the interview room and returned again later, urging Miller to cooperate. At that time, Miller "told them the truth, told them what had happened."

¶ 30 Miller testified that McKinnis visited him in prison on one occasion and urged him to "hold firm *** [d]on't flip, don't turn state." After accepting the negotiated guilty plea of 10 years' imprisonment "at 85 percent by truthful testimony" for conspiracy to commit first degree murder and attempted murder, Miller was placed in protective custody in the prison. Miller stated that he and Coleman approached the ASA after agreeing to their plea agreement because they wanted to renegotiate. In doing so, Miller told the ASA that "we wasn't there, we didn't have nothing to do with the murder at all, we wasn't there." Miller admitted that the statement was untrue and was made in an attempt to lower the negotiated sentence. In a subsequent meeting with Miller's attorney, Miller agreed to tell the truth in compliance with the plea agreement.

¶ 31 On cross-examination, Miller stated that, as part of his plea agreement, he did not have to testify against Coleman, who had been his friend since childhood, but he did have to testify against defendant, who was also a friend. Miller testified that one of the detectives slapped him while he was being interviewed. Miller was in the interview room for hours. According to Miller, he lied to the ASA when she asked how he had been treated by the police because the detective that hit him was standing in the doorway.

¶ 32 ASA Charles Brinkman testified that he interviewed defendant on July 13, 2004.

Defendant waived his *Miranda* rights and said that he did not know where he was on July 7 and July 8, 2004. Defendant said he had not been shot at by Gangster Disciples members on July 8, 2004. Defendant admitted knowing McKinnis and that McKinnis was a member of the Black P-Stones. Defendant initially said he did not know Coleman or Miller, but when shown their photographs defendant said he knew Miller from the neighborhood and that he had been arrested with Coleman. Defendant admitted that he was a member of the Mickey Cobras. Defendant said that he was on parole, but he had gone AWOL for 64 days after getting into a fight with his parole officer.

¶ 33 ASA George Canellis testified that he interviewed defendant on August 2, 2004. Defendant waived his *Miranda* rights and said "he didn't do the shooting *** people were trying to put a case on him *** all he did was go outside, shoot dice, drink, smoke some weed *** he didn't want to know anybody else's business." According to defendant's statement, his girlfriend, Dora, picked him up on July 4, 2004, and he stayed with her until July 10, 2004, at her home in Matteson, IL. Dora was to have foot surgery and defendant planned to take care of her. Defendant said he did not mention having been at Dora's house because it was a violation of his parole.

¶ 34 The parties stipulated that defendant was incarcerated in July 2004 on an unrelated parole matter. While in prison, as a matter of course, his conversations were taped. Defendant placed four phone calls to his mother, Annie Dent. The tape recording of those calls was published to the jury.

¶ 35 During the first call, on July 24, 2004, defendant asked Annie to contact Dora and

McKinnis because a detective had just been to visit him. Defendant told Annie that he needed to speak to Dora.

¶ 36 On July 27, 2004, defendant spoke to his mother three times. In the morning, defendant provided Dora's phone number and told Annie to instruct Dora that, if questioned by detectives, to say he was with her at her house from July 4th to July 10th. Defendant repeated the instructions several times, imploring Annie to contact Dora that day and to give McKinnis the same information.

¶ 37 Later that morning, defendant called Annie again. Annie told defendant that she told Dora to say she was with defendant on July 4th. Defendant repeated that Dora needed to provide the alibi until July 10th, not just the single day. Defendant additionally instructed Annie to have McKinnis brought to her house to speak to defendant later that day because defendant anticipated being transferred to another prison for something more serious than a gambling charge.

¶ 38 Around 5:15 p.m. on July 27, 2004, defendant called Annie's house yet again and spoke to McKinnis and Dora. While talking to McKinnis, defendant said he got "monkey minded on." Defendant and McKinnis referenced someone in "Division 11" that needed to be "taken care of" because he was "gonna turn loose." They talked about whether it was just the "little stud" or if "it's that other joker *** then we gotta make arrangements." McKinnis assured defendant that he had already "taken care of" the situation. Defendant also asked about the "surviving *** vic." Defendant then spoke to Dora, who said she knew "the lick" about the 4th to the 10th. Defendant repeated that "I was with you, you know what I mean." Defendant told Dora that she

needed "to stand firm" with him.

¶ 39 The defense then called its witnesses.

¶ 40 Page testified that he was attending a party at a home located directly across the street from Ellis Towers on July 8, 2004. According to Page, he was in the front yard using his cellular phone when the shooting occurred. Page saw Seay, whom he had met before, and Washington sitting in front of Ellis Towers. Page then noticed a very dark-skinned man wearing a black-hooded sweatshirt ride a bike toward Seay and Washington and shoot them both. Page added that he gave the police the description of the offender on the night of the shooting, but the police never followed up with him.

¶ 41 Connika testified that she was with Coleman, Miller, her daughter, and her son in a park at 45th Street and Drexel Boulevard at the time in question. Coleman is the father of Connika's son. According to Connika, Coleman remained with her the entire night.

¶ 42 Eugene Banks testified that Seay was his best friend and that he is friends with Washington. On July 8, 2004, Banks lived at Ellis Towers. At the time of the shooting, Banks was working as a cashier at a liquor store. The next day, Banks spoke to Washington on the telephone about the shooting. Washington was in the hospital at the time. When Washington was released from the hospital, Banks spoke to him again. Washington reported seeing the shooter, but not seeing the shooter. According to Banks, Washington was "just confused."

¶ 43 On cross-examination, Banks testified that, after the shooting, Washington reported seeing the shooter's face and being scared. According to Banks, Washington was "confused" because "so much had happened to him." Banks testified that he drove Washington to view the

lineup on August 2, 2004. On the drive home, Washington said he identified the shooter. Banks testified that Washington was not confused at the time of the lineup. Banks, however, testified that he could not be sure Washington correctly identified the offender because Banks never saw the shooter himself.

¶ 44 Florence Henderson testified that she was Washington's girlfriend at the time of the shooting. The couple lived together in Ellis Towers then, but were no longer together. Henderson testified that she was not present at the time of the shooting, but she and Washington discussed the shooting on three occasions, the day of the shooting, the day after, and a couple days thereafter. According to Henderson, Washington said he could not see the shooter's face because the shooter wore a "pullover." Washington, however, told Henderson that the offender was on a bicycle and that he had seen the offender at the gas station before the shooting. Washington said he wanted to move from Ellis Towers because he was scared. Henderson refused. Henderson testified that the police were never in her apartment with a photographic array. Henderson, however, reported that Washington was not sure he accurately identified the shooter in the photographic array.

¶ 45 Mirriam Hawthorne testified that she worked at Cermak Health Services as the supervisor of the department that releases inmate information. According to Hawthorne, the department retains documents called "bruise sheets," which contain a medical history of an inmate, a physical exam, and a brief psychological screen. Coleman's "bruise sheet" could not be located. Miller's "bruise sheet" was available.

¶ 46 Ronnie Freeney testified that he participated in a lineup on August 2, 2004. Freeney was

brought in the room with three others from lockup. The group "mingled around for a while" before a fifth person entered the room. The men were told to sit down. According to Freeney, the police told defendant where to sit, namely, in the middle position. Then, the police told defendant to stand.

¶ 47 In rebuttal, Detective Kienzle testified that he made several attempts to contact Page after the shooting without success. Detective Kienzle testified that, on July 12, 2004, Henderson was present at the apartment in Ellis Towers when he and his partner brought a photographic array to Washington. Detective Kienzle added that, in relation to the August 2, 2004, lineup, defendant was asked where he wanted to sit in order to prevent any bias. According to Detective Kienzle, defendant was never told to stand.

¶ 48 DECISION

¶ 49 I. Violation of Rule 431(b)

¶ 50 Defendant first contends he was denied his right to a fair trial where the trial court failed to comply with Rule 431(b). Defendant acknowledges that he did not object at trial or raise the alleged error in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124 (1988) (a defendant forfeits appellate review where he fails to object to the alleged error at trial and fails to include it in a posttrial motion). Defendant, however, argues that the trial court committed plain error by failing to comply with Rule 431(b). The State responds that no error occurred and, in the alternative, any error was not reversible.

¶ 51 We first determine whether there was error. *People v. Hudson*, 228 Ill. 2d 181, 191, 886 N.E.2d 964 (2008). Construction of a supreme court rule is reviewed *de novo*. *Robidoux v.*

Oliphant, 201 Ill. 2d 324, 332, 775 N.E.2d 987 (2002).

¶ 52 Supreme Court Rule 431(b) codified our supreme court's holding in *People v. Zehr*, 103 Ill. 2d 472, 477, 469 N.E.2d 1062 (1984), and was amended effective May 1, 2007, placing a *sua sponte* duty on trial courts to ensure compliance with Rule 431(b). *People v. Thompson*, 238 Ill. 2d 598, 607, 939 N.E.2d 403(2010). The amended rule provides:

> "The court *shall ask* each potential juror, individually or in a group, whether that juror *understands and accepts* the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that the defendant's failure to testify cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's failure to testify when the defendant objects.
>
> The court's method of inquiry *shall provide* each juror an *opportunity to respond* to specific questions concerning the principles set out in this section." (Emphasis added.) Ill. S. Ct. R. 431(b) (eff. May 1, 2007).

Here, prior to conducting *voir dire*, the trial court admonished the potential jurors:

> "So the bottom line is the fact that somebody has been charged, that is no evidence whatsoever of any type of guilt.
>
> Under our law, a defendant is presumed to be innocent of the charges

placed again [*sic*] him in that indictment. The presumption of innocence remains with the defendant throughout all stages of the trial and during deliberations on a verdict. And the presumption of innocence must be kept in your mind at all times during your deliberations on a verdict, during presentation of evidence.

The presumption of innocence is not overcome unless from all of the evidence in the case you're convinced beyond a reasonable doubt that the defendant is guilty.

The defendant in this case, just like every criminal case across the country, is not required to prove his innocence nor is the defendant required to testify or put any evidence on at all with respect to the case, and that is because it's the [S]tate in this case, just like every other case across the country, the State has the burden of proving the defendant guilty beyond a reasonable doubt and that burden remains on the State throughout every stage of the trial and during the deliberations on a verdict.

* * *

As I previously talked about and will say many times because it's so important for you to understand, the defendant in this case, just like every criminal case across the country, is presumed to be innocent of the charges placed against him. That means he doesn't have to put on any evidence at all on his own behalf and he must be proven guilty beyond a reasonable doubt by the State.

Does anybody have any problem with that general cornerstone of our

criminal justice system? If you do, raise your hand.

Nobody is raising their hand.

Also as I have previously stated, which follows from what we just talked about, the defendant doesn't have to present any evidence, meaning specifically he does not have to testify on his own behalf. Again, that's the same rule in this case just like every criminal case across the country.

And if the defendant decides not to testify, you cannot, must not hold that against him. That's one of his rights in our system of law.

If the defendant decides not to testify, is there anybody here who could not follow the law in this regard?

If you could not follow the law, please raise your hand.

All right. Nobody is raising their hand."

¶ 53 Our review of the record demonstrates that the trial court did not comply with Rule 431(b). In *Thompson*, the supreme court advised:

"Rule 431(b), therefore, mandates a specific question and response process. The trial court must ask each potential juror whether he or she *understands and accepts each* of the principles in the rule. The questioning may be performed either individually or in a group, but the rule *requires an opportunity for a response from each prospective juror on their understanding and acceptance* of those principles." (Emphasis added.) *Thompson*, 238 Ill. 2d at 607.

The record clearly reveals that the trial court failed to ascertain whether the potential jurors understood and accepted *each* of the *Zehr* principles provided. *People v. McCovins*, 2011 IL App (1st) 081805 ¶ 36-39. The trial court, therefore, violated Rule 431(b) and erred as a result.

¶ 54 This court may review forfeited errors under the doctrine of plain error in two narrow instances:

> "First, where the evidence in a case is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence, a reviewing court may consider a forfeited error in order to preclude an argument that an innocent person was wrongly convicted. [Citation.] Second, where the error is so serious that defendant was denied a substantial right, and thus a fair trial, a reviewing court may consider a forfeited error in order to preserve the integrity of the judicial process." *People v. Herron*, 215 Ill. 2d 167, 178-79, 830 N.E.2d 467 (2005).

It is the defendant's burden to establish plain error. *Thompson*, 238 Ill. 2d at 613.

¶ 55 Defendant contends both prongs of plain error apply here. We take each one in turn.

¶ 56 To establish first-prong plain error, a defendant must demonstrate " 'prejudicial error' by showing both that there was plain error and that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him." *Herron*, 215 Ill. 2d at 187.

¶ 57 Defendant cannot establish the evidence was so closely balanced that the Rule 431(b) error alone severely threatened to tip the scales of justice against him. Washington testified that

he was able to see defendant's face at least four times during the course of the incident: defendant initially called out from behind Washington and Seay, causing Washington to turn and see defendant before he rode his bicycle between the pair; defendant then turned around after biking past; defendant again rode past the pair as they stood in front of Ellis Towers; and defendant finally approached to within reaching distance before shooting the pair. Washington provided a description of the offender on the date of the shooting, identified defendant in a photographic array four days after the incident, and picked defendant out of a lineup within a month of the offense. In addition, Coleman and Miller confirmed that defendant was the shooter, while implicating themselves as lookouts. Moreover, the audiotapes of defendant's prison conversations with his mother, McKinnis, and Dora underscore his involvement.

¶ 58 We recognize there was conflicting testimony, in that defendant's girlfriend corroborated his alibi that he was in Matteson with her at the time of the shooting; Banks and Henderson testified that Washington was not confident in his identification; and Page identified the offender as darker-skinned than defendant. We, however, are reminded of the well established principle that it was the jury's duty to make credibility determinations, weigh the witness testimony, and draw reasonable inferences from the evidence. *People v. Evans*, 209 Ill. 2d 194, 211, 808 N.E.2d 939 (2004). The jury assessed the evidence and determined that defendant was the offender. After reviewing the record, we conclude the evidence was not closely balanced. Consequently, defendant's claim of error pursuant to Rule 431(b) is not reviewable under the first-prong of plain error.

¶ 59 Turning to second-prong plain error, the supreme court in *Thompson* clarified that a Rule

431(b) violation does not amount to second-prong plain error unless it can be shown that the error is structural. *Thompson*, 238 Ill. 2d at 613-14. For structural error, a defendant must demonstrate that the jury was biased in order to establish that his right to a fair trial and the integrity of the judicial process were affected. *Id.* at 614. Defendant has not demonstrated that the jury was biased and the record reveals no evidence of bias. Defendant's argument that the State's closing argument improperly vouched for the credibility of witnesses and demeaned his defense of innocence does not establish that the jury was in fact biased. As a result, defendant has failed to establish second-prong plain error.

¶ 60 II. *Voir Dire* Regarding False Confession

¶ 61 Defendant contends the trial court abused its discretion in granting the State's motion *in limine* to preclude the defense from asking the venire members questions regarding police coercion and false confessions.

¶ 62 *Voir dire* is designed to ensure the selection of an impartial jury free from bias and prejudice. *People v. Williams*, 164 Ill. 2d 1, 16, 645 N.E.2d 844 (1994). It is primarily the trial court's responsibility to conduct *voir dire*, the manner and scope of which lies within its discretion. *Id*. A trial court has great latitude in determining what questions to pose during *voir dire*. *People v. Gregg*, 315 Ill. App. 3d 59, 65, 732 N.E.2d 1152 (2000). An abuse of discretion will be found only where the record demonstrates that the conduct of the trial court thwarted the selection of an impartial jury. *Williams*, 164 Ill. 2d at 16. On review, our inquiry is whether the *voir dire* created "a reasonable assurance that prejudice would be discovered if present." *People v. Tenney*, 347 Ill. App. 3d 359, 807 N.E.2d 705 (2004).

¶ 63 Prior to conducting *voir dire*, the State motioned the court to prohibit the defense from asking questions "regarding police abuse, torture, misconduct, those types of things" because such questions would do "nothing more than indoctrinat[e] the jury." In its ruling on the motion *in limine*, the trial court said:

> "The State is asking that the Defense be precluded to go into issues regarding basically false confessions or, you know, things of that nature, the police officers getting somebody to say something that's not true. I'm not going to allow the defense to do that. Basically I think that would be indoctrinating the jury into the theory of the case.
>
> In support of that I'm citing People versus Klimawicze ***, from 352 Ill. App. 3d at Page 13. It's from 2004. The court there held that there was no error from the trial court's denial of inquiry relating to knowledge of newspaper articles discussing false confessions.
>
> While I know you're not specifically going to ask about newspaper articles, their feelings on those issues in general are not important but rather can they be a fair and impartial juror and listen to all the testimony and follow the law. So I'm not going to allow those particular questions."

¶ 64 Defendant contends the trial court's ruling improperly restrained him from probing the jurors' potential bias regarding police coercion and false confessions. We disagree.

¶ 65 A trial court may reasonably limit *voir dire* without thwarting the selection of an impartial jury. *Tenney*, 347 Ill. App. 3d at 368. *Voir dire* should confirm the venire members'

ability to put aside feelings of bias and assess the case based on the evidence presented. *People v. Strain*, 306 Ill. App. 3d 328, 337, 714 N.E.2d 74 (1999). In accomplishing that goal, it is not appropriate to use *voir dire* to indoctrinate the jury or impanel a jury that has a particular predisposition. *People v. Bowel*, 111 Ill. 2d 58, 64, 488 N.E.2d 995 (1986). Moreover, the prospective jurors should not be asked how they would act when facing particular aggravating circumstances. *Tenney*, 347 Ill. App. 3d at 368. In general, inquiries regarding specific defenses are excluded. *People v. Mapp*, 283 Ill. App. 3d 979, 986-87, 670 N.E.2d 852 (1996). Limiting *voir dire*, however, may amount to error where "simply asking jurors whether they could faithfully apply the law as instructed [is] not enough to reveal juror bias and prejudice toward the defense" in matters of intense controversy. *Id.* at 987. Controversial topics that have required pointed questions include the insanity defense, the intoxication defense, abortion, and interracial relationships. *Mapp*, 283 Ill. App. 3d at 987.

¶ 66 In this case, the issues of police coercion and false confessions were not so intensely controversial that relevant juror bias or prejudice could not be vetted through *voir dire*. In fact, defense counsel asked questions in an attempt to reveal any bias, such as whether the venire members gave more credence to police officers as a result of their position, without indoctrinating the jury by expressly inquiring into the defense theory of the case. Simply stated, defendant has failed to demonstrate the trial court thwarted the selection of an impartial jury. We, therefore, conclude the trial court did not abuse its discretion in limiting defendant's ability to inquire into the topic of police coercion during *voir dire*.

¶ 67 III. Expert Witness

¶ 68 Defendant finally contends the trial court abused its discretion by refusing to allow him to present an eyewitness identification expert.

> "Generally, expert witnesses will be permitted to testify if their experience and qualifications afford them knowledge which is not common to lay persons and where such testimony will aid the trier of fact in reaching its conclusion. [Citation.] A trial court is given broad discretion when determining the admissibility of expert testimony, and when considering the reliability of expert testimony, the court should balance its probative value against its prejudicial effect. [Citation.] The court should also consider the necessity and relevance of the expert testimony in light of the facts of the case before admitting it. [Citation.] '[A] trial court's decision to allow or exclude eyewitness identification expert testimony must be made on a case-by-case basis' [citation] and such decision will not be reversed absent an abuse of discretion [citation.]" *People v. Aguilar*, 396 Ill. App. 3d 43, 51, 918 N.E.2d 1124 (2009). citing *People v. Enis*, 139 Ill. 2d 264, 564 N.E.2d 1155 (1990) and *People v. Tisdale*, 338 Ill. App. 3d 465, 788 N.E.2d 1149 (2003).

¶ 69 Defendant disclosed Doctor Solomon Fulero as an eyewitness identification expert, and the State filed an objection and requested a hearing. Dr. Fulero's proposed testimony included: (1) the unreliability of eyewitness testimony in general; (2) the detrimental effects of stress, fear, and arousal on accuracy; (3) the concept of "time overestimation" in that witnesses believe their ability to observe is two to three times longer than actual; (4) the concept of "weapon focus"

wherein a weapon detracts attention from an offender's appearance; (5) the concept of the "forgetting curve" wherein memory rapidly declines after an event; (6) that the photographic array and lineup procedures in the instant case reduced reliability because defendant was the only common individual in both; (7) the affect of "post-event" information on memory; and (8) confidence being unrelated to accuracy. A hearing was held in which both parties argued their positions. In response, the trial court said:

> "I do believe that in most cases, the issue of eyewitness identification expert testimony can be resolved pretrial via proffers. The parties in this case do however, have vastly different views of the evidence. In this particular case, I would say that it does make it having reviewed all of the cases now, it does make it difficult for the court to conduct a meaningful balancing test without hearing firsthand the testimony of the witnesses. As the court did in *In re Keith* *** that I just cited, I'm going to withhold my decision till [*sic*] after hearing the [S]tate's witnesses. I think it is really only at that juncture that I'm going to be able to conduct a meaningful balancing test that's mandated by the court in *Allen*. To do anything less than that on this particular case I think would not do the issue justice and it's obviously an important issue. So that's my ruling on that."

¶ 70 After the State rested its case-in-chief, the court asked both parties to demonstrate the relevance of Dr. Fulero's testimony with regard to Washington's identification. Defense counsel argued that Washington's identification was made under stressful circumstances and the expert eyewitness identification testimony would teach the jury about the mistaken beliefs related to

witness identification, in particular to the distorting effect of weapon focus, which could not be effectively shown through cross-examination. The State argued that Dr. Fulero's testimony would not aid the jury where the issues of identification were covered in the jury instructions and were within the realm of the jurors' common experience. In issuing its ruling, the trial court said:

> "Specifically I want to talk about the testimony of the eyewitness, Alonzo Washington, who Dr. Fulero's testimony would go to. Alonzo Washington talks about viewing the Defendant first on a bike and seeing him two times as he rode between him and his friend, Aaron Seay, and also talked about the defendant looking back toward him. That was found on the record at page 56 from the date of 12-3 of '08.
>
> The testimony indicates that on that date he heard an older guy who is wearing a do rag that he saw when he turned around. He heard him calling, get out of the way. He turned and looked at him and saw the defendant come from behind, rode through the middle of them pretty close and the defendant turned and looked back at them and he kept on walking.
>
> At this point I would say during the course of the incident, certainly none of the factors are in play with respect that would form the basis of a lot of Dr. Fulero's testimony. There is no high stress situation at this point, no obvious threat [that] was testified to by the witness.
>
> The record then goes further in direct, he testifies later on after he, Washington and Seay, the victim, were in front of Ellis Towers, they again see the

same person ride up on the bike on the street. The witness testifies and this is from 12-3 of '08 from pages 59 through 63 that they see the Defendant riding all the way down the street on the bike. They saw him riding up. They saw him do a U-turn and after the U-turn, he rides up on the sidewalk where they are at.

I would say up to this point in time, none of the factors are in play that would form a significant portion of Dr. Fulero's testimony. Up to this point, there is no high stress situation. There is no weapon involved. There is no obvious threat that anything is going to happen.

It's at this point in time that the witness testifies that a gun does come out. It's close range and the shooting occurs. Certainly I would say at this point when the gun came out that at that moment, Mr. Washington is certainly in a high stress situation. There is testimony that a weapon was involved which would bring into play some of Dr. Fulero's opinions and thoughts on expert witness identification and certainly there is a threat of harm. I would say from that point on when the gun comes out, certainly that testimony could be relevant.

I would point out there was extensive cross examination of Mr. Washington during this case on his opportunity to observe as well as the fact that he was a regular user of marijuana. There was extensive, on cross-examination on Coleman and Miller. Obviously as I said earlier, there is no *Frye* hearing that's required for this type of testimony.

Looking at Dr. Fulero's resume, it's very impressive in this particular field.

He's obviously been working in the field for a significant period of time, years and years and years. He is well qualified as an expert in this field many times. He is certainly not a psychologist who is just dabbling in it or attempting now to enter this area of upcoming eyewitness expert testimony recently. He's been in it from the beginning. He's published and lectured in this area a lengthy period of time. Certainly his qualifications I think, as I said earlier, are impressive in this field.

As I said earlier, I think eyewitness expert identification testimony does have a place in a criminal trial. The question is does it have a place in this particular case? I did look, as I said, all of the case law I am looking at. The *Allen* case which cites back to the [*Enis*] case and there is [a] balancing test of the probative value which there would be some here with respect to a portion of Alonzo Washington's testimony and observations as well as perhaps some of the testimony talked about in the resume tendered with respect to the line-up identification, et cetera.

So there is some probative value certainly of Dr. Fulero's testimony and I am balancing that, taking into account all of the evidence that I heard in the State's case versus any prejudicial effect that expert witness identification testimony would have and in this case, I find when I take everything together as a whole, the risk would be too great that there would be unfair prejudice to the jury. I find in this particular case, cross examination will suffice and it does not require

the testimony of Dr. Fulero."

¶ 71 The record clearly demonstrates that the trial court did not abuse its discretion where the court completed its obligation under *Enis*, *Tisdale*, and *People v. Allen*, 376 Ill. App. 3d 511, 875 N.E.2d 1221 (2007), by conducting a balancing test for the probative value of Dr. Fularo's testimony versus its prejudicial value prior to refusing to admit the testimony. As an aside, it is evident by the context of the court's ruling that it weighed the prejudicial value against defendant and not the jury, as it misstated. The court first considered Dr. Fularo's testimony prior to trial and reserved ruling until the conclusion of the State's case. At that point, the court again entertained arguments and then, based on the State's case and relevant case law, the court concluded that Dr. Fularo's testimony was not relevant and would not assist the jury. See *Aguilar*, 396 Ill. App. 3d at 54; *In re Keith C.*, 378 Ill. App. 3d at 264.

¶ 72 Our review of the proffered testimony supports the trial court's finding. Washington's identification in this case was based on at least four separate opportunities to view defendant prior to, after, and as he rode his bicycle past Washington. These were not stressful interactions. If anything, they were peculiar. Washington testified that, initially, he paid the man on the bicycle "no mind;" however, the man continued riding past Washington and Seay, providing additional opportunities to view him. It was not until defendant was right next to Washington on the third rotation that he revealed his handgun, thereby causing the event to be stressful and making relevant the concept of "weapon focus." Washington provided a description of the shooter on the same night of the offense, identified defendant four days later in a photographic array, and picked him out of a lineup within one month of the offense, thereby eliminating the

influence of the "forgetting curve" and "post-event" information. Washington's testimony that the event felt like it happened within "slow motion" was in reference to the actual shooting, which did not take place until after Washington viewed defendant at least four times. Moreover, Dr. Fularo's testimony regarding the insignificant relationship between confidence and accuracy of eyewitness testimony was represented where Henderson and Banks testified that Washington did not display strong confidence in his identifications. Furthermore, Washington's identification was not the sole evidence supporting defendant's guilt. Coleman and Miller both testified regarding their involvement as lookouts while defendant committed the offenses. And, all three witnesses were cross-examined extensively as to the reliability of their identifications. We, therefore, conclude the trial court did not abuse its discretion.

¶ 73 We are reminded of the supreme court's cautionary advice:

> "We are concerned with the reliability of eyewitness expert testimony ***, whether and to what degree it can aid the jury, and if it is necessary in light of the defendant's ability to cross-examine eyewitnesses. An expert's opinion concerning the unreliability of eyewitness testimony is based on statistical averages. The eyewitness in a particular case may well not fit into the spectrum of these averages. It would be inappropriate for a jury to conclude, based on expert testimony, that all eyewitness testimony is unreliable." *Enis*, 139 Ill. 2d at 289-90.

The facts of this case demonstrate that Washington's identification does not fall within "the spectrum of averages."

¶ 74 In concluding that the trial court did not abuse its discretion, we have found the trial court conducted an adequate inquiry prior to denying Dr. Fularo's testimony. We are satisfied that the court "carefully scrutinize[d] the proffered testimony to determine its relevance" (*Aguilar*, 396 Ill. App. 3d at 53, citing *Allen*, 376 Ill. App. 3d at 523) prior to concluding that Dr. Fularo's testimony would be prejudicial and that the jury could rely on its common knowledge and cross-examination to reveal inadequacies in Washington's identification. Contrary to defendant's argument, there is nothing in *Allen* saying that the court must explain its reasoning for refusing to allow expert identification testimony. *Allen* only requires "an inquiry into the probative value of the proposed testimony and its relevance to the issues in the case" prior to considering "the risk of unfair prejudice, which includes potential confusion." *Allen*, 376 Ill. App. 3d at 526. The trial court did just that in this case where the record demonstrates that it gave serious consideration to the offer of proof.

¶ 75 CONCLUSION

¶ 76 We conclude that, although the trial court erred in failing to follow Rule 431(b), no plain error resulted. We further conclude the trial court did not abuse its discretion in barring defendant from asking the venire members questions regarding police coercion and false confessions. We finally conclude the trial court did not abuse its discretion in refusing to allow the expert eyewitness identification testimony. We affirm defendant's conviction and sentence.

¶ 77 Affirmed.