

FOURTH DIVISION
FEBRUARY 3, 2011

No. 1-09-1648

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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. 07CR1691
)	
DEREC BELL,)	Honorable
)	Lawrence P. Fox,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Gallagher and Justice Lavin concurred in the judgment.

O R D E R

HELD: Defendant's conviction upheld where: the trial court maintained its neutral role during the course of defendant's jury trial; the trial court properly permitted the State to admit the prior inconsistent statements of two witnesses; and the trial court's failure to strictly comply with Supreme Court Rule's 431(b) admonishments did not prejudice him.

Following a jury trial, defendant Derec Bell was convicted of first degree murder and aggravated battery of a firearm and was sentenced to 40 years' imprisonment and 6 years' imprisonment, respectively. Defendant appeals his convictions arguing: (1) the trial court abandoned

its neutral role and assumed the role of the prosecutor during the State's examination of a hostile witness; (2) the trial court abused its discretion when it permitted the State to introduce the prior consistent statements of two crucial witnesses; and (3) the trial court deprived him of his right to a fair and impartial jury when it failed to comply with the mandates of Illinois Supreme Court Rule 431(b) as amended in 2007, and inquire whether the jury members understood and accepted each of the principles of law articulated therein. For the reasons detailed within, we affirm the judgment of the trial court.

BACKGROUND

On November 18, 2006, Lamont Loggins was shot and killed. Defendant and co-defendant Durrell Davis were charged in connection with the offense. Specifically, defendant was charged with two counts of first degree murder (720 ILCS 5/9-1(a)(1) (West 2006)), two counts of attempt first degree murder (720 ILCS 5/8-4(a) (West 2006); 720 ILCS 5/9-1(a)(1) (West 2006)), two counts of aggravated battery with a firearm (720 ILCS 5/12-4(a) (West 2006)), two counts of unlawful use of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2006)) and one count of aggravated battery with a firearm (720 ILCS 5/12-4.2 (West 2006)). The State *nolle prosequi*ed all of the charges except for the first degree murder and aggravated battery with a firearm charges. Defendant elected to proceed by way of jury trial and elected to be tried jointly with co-defendant Davis.

The trial court presided over the jury selection process and admonished the three panels of potential jurors of the rules of law applicable to the trial including the four *Zehr* principles (*People v. Zehr*, 103 Ill. 2d 472 (1984)) enumerated in Illinois Supreme Court Rule 431(b) as amended in 2007 (Official Reports Advance Sheet No. 8 (April 11, 2007), R. 431(b), eff. May 1, 2007).

Specifically, during the first panel, the trial court recited each of the four *Zehr* principles, informing the first group of potential jurors that: every criminal defendant is presumed innocent of the charges against him; the State bears the burden of proving the defendant guilty of the charged offenses beyond a reasonable doubt; the defendant is not required to prove his innocence and is not required to testify or present evidence on his behalf; and a defendant's decision not to testify may not be considered evidence against him. The court then went on to address the principles individually. Accordingly, the court reiterated the first two principles and then inquired: "Does anyone have any problem with that concept?" The court then addressed the principle protecting a defendant's right not to testify and queried: "Is there anyone who would hold the decision not to testify against the defendant regardless of what I've just said to you?" During the second and third panels, the court repeated the procedure with respect to three of the *Zehr* principles, but failed to inquire as to the potential jurors' understanding and acceptance of the principle protecting a defendant's right not to present evidence on his behalf. After the venire was so admonished, the jury selection process concluded and the State proceeded with its case.

Marcel Burns testified that on November 18, 2006, at approximately 9:30 p.m., he parked across the street from Anna's Food & Liquor, located at the corner of 13th Street and Kedzie Avenue. After making a purchase, Burns returned to his vehicle. As he was sitting in his car, Thomas Barfield, whom he knew as "Little Tone," knocked on the drivers'-side window and Burns lowered the window. Burns then heard six or seven gunshots, saw Barfield fall to the ground, and ducked down in his vehicle. After the shots stopped, Burns looked out of his rear window and observed two men enter a white four-door Chevrolet that was parked facing eastbound on 13th

Street. Both of the men were wearing hooded sweatshirts and one was holding a gun. The men turned left on Kedzie Avenue and drove away from the scene. Once the men left, Burns exited his vehicle and called 911. He spoke to Barfield, who informed him that his friend, Lamont Loggins, had also been shot. Burns looked and saw Loggins, whom he knew as "Ray-Ray" lying on the curb. Barfield and another man pulled Loggins into the backseat of Barfield's car, which was parked behind Burns' vehicle, and the men left the scene and drove to the hospital. Burns indicated that he did not see the faces of either of the shooters and did not identify defendant or co-defendant as the perpetrators of the crime.

The State next called Thomas Barfield, who acknowledged that he was a convicted felon with a 2007 felony conviction for possession of a controlled substance and a 2006 weapons conviction. He further admitted that he was currently in police custody because he had failed to appear in court in this case. Barfield testified that on November 18, 2006, at approximately 9:40 p.m., he parked his Buick Regal on Kedzie Avenue behind his friend Marcel Burns' vehicle. Barfield knew Burns as "Chris." Lamont Loggins, "Rayshawn," and Darius Finley were passengers in Barfield's car. After parking his vehicle, Barfield observed a white Chevrolet Caprice stop nearby. He approached Burns' car and knocked on the window, but before Burns had an opportunity to roll down his window, a man wearing a hooded sweatshirt, skullcap and blue jeans exited the white Chevrolet from the front passenger-side door. The man was holding a silver gun in his hand. Barfield indicated that he had seen the man on one prior occasion two to three years earlier, but he did not "know" him. The man stayed by the Chevrolet and fired two or three shots. Barfield observed that he had been shot in his right hip and fell to the ground in front of Burns' vehicle. He heard four

more shots fired and then heard tires squealing as the Chevrolet left the scene. Barfield stood up and saw Loggins lying on the ground. Barfield and Finley put Loggins in the backseat of Barfield's vehicle and Finley drove them to Mount Sinai Hospital. After receiving treatment for his gunshot wound, several police officers came to talk to him about the shooting. Barfield characterized their demeanor as "aggressive" and "told them what they wanted to hear" because he had just been shot and he felt they were "harassing" him.

The State was permitted to treat Barfield as a hostile witness and conducted an inquiry regarding prior statements Barfield had given in connection with the case, in which he definitively identified defendant and codefendant as the shooters. On December 18, 2006, Barfield spoke with a detective and Assistant State's Attorney (ASA) Lauren Brown about the shooting and he provided a statement, which he signed. In the statement, Barfield indicated that he had known defendant, whom he knew as "Cuz," and co-defendant, whom he knew as "Double-D," since 2001. On the day of the shooting, Barfield stated that he went over to talk to Burns who was sitting in his vehicle. At that time, he observed defendant, co-defendant, and another man he did not know exit a white Chevrolet with guns in their hands. Defendant had a .9 mm gun in his hands and co-defendant was holding a silver weapon. They started shooting at him and his car. Barfield was hit in the hip and fell to the ground and observed Loggins get shot. After they finished shooting, defendant and co-defendant entered the rear of the Chevrolet and the car drove away. Barfield helped to put Loggins in the backseat of his vehicle and Finley drove the two of them to the hospital to receive medical treatment. During his conversation with the detective and ASA Brown, Barfield was shown photographs of defendant and codefendant and identified them as the shooters. Later, on January

7, 2007, Barfield provided grand jury testimony in connection with the case. His grand jury testimony was consistent with the account of the shooting that he had provided to ASA Brown and he identified defendant and codefendant as the shooters.

Barfield acknowledged identifying defendant and codefendant as the shooters in his written statement and in his grand jury testimony, but testified that he only provided those accounts of the shooting because police threatened to “put cases on” him and one of the officers pointed a gun at him. Barfield indicated that he was forced to provide those statements implicating defendant and codefendant in the shooting and was also forced to identify their pictures. When he provided his statement to ASA Brown, Barfield lied and told her that he had been treated “fine” by the police and did not inform her of the threats because he was “scared.”

On cross-examination, Barfield indicated that the first statement he made to detectives in the hospital after receiving medical treatment was the truth. In that account, Barfield informed them that the shooting was performed by one man. The shooter was between 20 and 25 years’ old, and was wearing a black “hoody” and skullcap, which made it hard for Barfield to see his face. On December 12, 2006, the day he viewed the photo array, Barfield was handcuffed and brought to the police station by four police officers. Once they arrived at the station, Barfield was handcuffed to a rail in a holding room. The officers circled the pictures of defendant and codefendant that were in the photo array and instructed him to identify them as the shooters. On the occasion that he spoke to ASA Brown, Barfield denied that he had been handcuffed or threatened by police because the officers informed him that if he did not say what they wanted him to say, Barfield would get a lot of jail time. The threats had been made in the police vehicle as he was transported to the police

station. His grand jury testimony was also the result of police threat. Barfield denied that he ever saw defendant or codefendant at the time of the shooting.

On redirect examination, Barfield acknowledged that the photo array that he initialed on December 12, 2006, did not contain any circles.

Marcus Beck testified next. He acknowledged he was a convicted felon, with 2004 and 2007 drug conviction offenses and admitted he had been arrested the previous night for a DUI. He denied he was present in the area of the shooting on November 18, 2006, at approximately 9:40 p.m.; rather, he was staying in a hotel with two females at that time. Beck further denied that he met with Detectives Crane and Raschke on December 6, 2006. He indicated he did not remember signing his name and identifying two pictures from a photo array and explained that he “pop[ped] pills,” which affected his memory. Beck acknowledged that he was arrested and placed in custody on a drug charge on December 14, 2006.

Despite denying his presence at the shooting scene at trial, Beck acknowledged that he provided a handwritten statement and grand jury testimony in which he acknowledged he was present at the time of the shooting and identified defendant and codefendant as the shooters. Specifically, on December 18, 2006, Beck viewed a physical lineup and identified defendant and codefendant as the shooters. Thereafter, he met with ASA Brown and a detective, and after speaking with them, he signed a handwritten statement. In the statement, Beck stated that on November 18, 2006, he was in the area of 13th Street and Kedzie visiting family. He went to the liquor store and observed a white Chevrolet driving around in the area. Beck then saw the white Chevrolet stop at the corner of 13th Street and Kedzie. Codefendant Davis exited the vehicle from the front passenger

door and defendant exited from the rear passenger seat. Beck indicated that he knew defendant “from the neighborhood for several years” and knew co-defendant from high school. Defendant and codefendant both had guns and Beck observed them shoot at a green Buick Regal parked on the street. Beck signed each page of the written statement as well as pictures of defendant and codefendant, whom he identified in a photo array. Beck’s grand jury testimony, delivered on January 10, 2007, corresponded to the written statement he provided ASA Brown the prior month. Before the grand jury, Beck denied that he was forced or threatened to provide that statement to ASA Brown. He also denied he was promised leniency on his drug charge in exchange for his statement.

On cross-examination, Beck indicated he never voluntarily talked to police about the case against defendant and co-defendant. All of the information in the written statement as well as his testimony before the grand jury were lies. Beck indicated that he lied because the detectives were “[t]rying to put a murder case on [him.]” He stated he was handcuffed and locked in a room before he met with ASA Brown. Beck testified that he never saw defendant at the scene of the shooting and that he only identified defendant and codefendant as the shooters because he was ordered to do so.

Police Forensic Investigator Brian Smith testified that on November 18, 2006, he received an assignment to investigate a homicide at 1300 South Kedzie. He and his partner arrived at the scene, which had already been secured, and spoke to Detective Voight. Investigator Smith then conducted a “walk through” to collect evidence. During the walk through, Investigator Smith observed firearm evidence in the street and on the pavement, namely bullet evidence and shell casings. He also observed a plastic bag on the ground that contained some phone cords and other miscellaneous items. There was also blood on the sidewalk and street curb. Investigator Smith

videotaped and photographed the crime scene and then collected the physical evidence. After leaving the vicinity of 1300 South Kedzie, Investigator Smith went to Mount Sinai Hospital and received a fired bullet from Nurse Crystal Price. Investigator Smith took the physical evidence from the crime scene as well as the fired bullet and inventoried the items.

Kurt Murray, a forensic scientist employed by the Illinois State police, testified that he received the firearm evidence recovered from the crime scene and conducted firearm identification testing on that evidence. He concluded all of the recovered bullets and other pieces of firearm evidence were not all fired from the same weapon; rather, more than one firearm was used at the crime scene.

Detective Tom Crane testified that he was assigned to investigate the murder of Lamont Loggins. He spoke to Darius Finley a few days after the murder, and based on the information that Finley provided, Detective Crane put together a photo spread and made sure to include pictures of defendant and codefendant in the photo array. He showed the photo spread to Marcus Beck on December 6, 2006, and Beck identified defendant, whom he referred to as "Cuz" and codefendant, as the shooters who fired weapons at the intersection of Kedzie and 13th Street. Detective Crane did not tell Beck whom to identify out of the photo array and he did not circle any of the pictures ahead of time to influence Beck's ability to identify the suspects in the shooting. Defendant and co-defendant were subsequently taken into custody and were both present in a physical lineup shown to Beck and Barfield on December 18, 2006. Beck and Barfield viewed the lineup separately and both identified defendant and codefendant as the shooters. Detective Crane did not instruct Beck or Barfield who they should identify from the lineup nor did he threaten either man physically or

verbally. After the positive identifications, Detective Crane attempted to speak to Darius Finley once more. He went to various residences Finley was known to frequent on approximately 25 different occasions but was not able to locate him.

On cross-examination, Detective Crane acknowledged that he did not know precisely when Beck arrived at the police station on December 6, 2006, to view the photo spread. Detective Crane speculated Beck had probably waited a few hours at the station before they met to view the photographs. Detective Crane denied that he had threatened to charge Beck with a homicide if he did not make identifications from the photographs. Detective Crane acknowledged that he was also present when Beck signed a written statement on December 18, 2006, and denied that Beck was ever handcuffed in an interview room prior to giving his statement. Beck was not in police custody when he came to view the photo spread but was in custody at the time he provided his statement.

Detective Edward Carroll testified that he and his partner, Detective John Haniacek, conducted a photo array viewing with Thomas Barfield on December 12, 2006. Prior to giving Barfield photographs to view, Detective Carroll explained the process, informed Barfield that the individuals involved in the crime were not necessarily pictured and had Barfield sign a photo spread advisory form. Barfield identified defendant and codefendant as the men who shot at him. Detective Carroll never told Barfield who to identify, never circled photographs in the array prior to showing them to Barfield, and never threatened Barfield in any manner.

ASA Lauren Brown testified that she was assigned to assist in the investigation of the fatal shooting of Lamont Loggins. As part of her investigation, she met with Barfield. She explained her role, and informed Barfield that she did not represent him or any of the suspects involved in the

shooting. Barfield indicated that he understood and was willing to speak with her about the shooting. He also agreed to let her transcribe his statement and she documented what he said during the course of their conversation. After she completed the statement, she provided Barfield with an opportunity to review the statement and make corrections and asked him to sign his name to each page if the information contained therein was "true and correct." Barfield did so.

In his statement, Barfield indicated he was in the vicinity of 13th Street and Kedzie and saw the victim get shot and fall to the ground. A few days after the shooting, Barfield was shown photographs and identified defendant and codefendant as the people who shot him and shot and killed the victim. ASA Brown showed Barfield pictures of defendant and codefendant and he confirmed that they were the shooters. Detective Crane was also present in the room when Barfield provided his statement, but ASA Brown indicated that she had an opportunity to speak with Barfield privately. At that time, ASA Brown asked Barfield how he had been treated by the police and inquired whether he had been hurt or threatened in any way. Barfield denied that he had been mistreated or threatened. He told her that he had been given food and had been allowed to use the bathroom freely. Barfield denied that he had been handcuffed at any time.

After speaking with Barfield, ASA Brown conversed with Marcus Beck. Detective Crane was also present for this discussion. Beck also agreed to speak with her about the shooting and to permit her to document his statement. In his statement, Beck admitted he was on his way to the liquor store located at Kedzie and 13th Street when he saw a white Chevrolet Caprice circle the block several times. Shortly thereafter, a green Buick Regal parked across the street from the store. Approximately three to five minutes later, the Chevrolet appeared again and Beck observed

defendant and codefendant in the vehicle. Beck grew up with codefendant, whom he referred to as Double-D, and indicated that he was familiar with defendant, but that he did not know his name. The Chevrolet stopped, and defendant and codefendant exited the vehicle and began shooting at the Regal. After Barfield and the victim were shot, defendant and codefendant fled in the Caprice toward Roosevelt Road. As with Barfield, ASA Brown had an opportunity to speak with Beck privately and inquired as to his treatment by the police. He indicated that the officers had treated him "well" and that he had been provided with food, drink and bathroom access. Beck also denied that he had been handcuffed or that he had been threatened in any manner. Beck signed the statement, confirming the accuracy of his written account.

On cross-examination, ASA Brown acknowledged that she did not know how long Barfield or Beck had been waiting at the police station before speaking with her. Prior to speaking with them, ASA Brown met with three detectives to familiarize herself with the details of the case.

ASA Sabra Ebersole testified that she presented evidence before the grand jury in this case. Barfield appeared before the grand jury and acknowledged the statement he had provided to ASA Brown. He testified in accordance with that statement and confirmed that defendant and codefendant were the shooters. Barfield denied that he had received threats or promises in exchange for his handwritten statement and further denied that his grand jury testimony was the result of any threats or promises. Marcus Beck also testified before the grand jury. ASA Ebersole indicated that Beck also confirmed the accuracy of his prior written statement. He also denied that his cooperation with the police was the result of threats or promises. Defendant, codefendant and the detectives involved in the case were not present in the room when Barfield and Beck testified before the grand jury.

The State then proceeded by way of stipulation. The parties first stipulated to the testimony of Courtney Melendez, a forensic scientist with the Illinois State police, and a qualified expert in the field of fingerprint analysis and identification. Melendez received three discharged cartridge cases, subjected them to tests commonly accepted in the field of fingerprint analysis and concluded that they contained no latent fingerprint impressions suitable for comparison. Next, the parties stipulated to the testimony of Crystal Price, a registered nurse employed at Mount Sinai Hospital who participated in the treatment of the victim. Price would testify that during the course of the treatment, a bullet was removed from the victim's body and she turned that bullet over to Chicago Police forensic investigators David Ryan and Brian Smith. Finally, the parties stipulated to the testimony of Doctor Tera Jones, a licensed physician specializing in the field of forensic pathology, employed as an assistant medical examiner with the Cook County Medical Examiner. Jones would testify that she performed an autopsy on the victim. During her examination, Jones observed a gun shot entry wound to the victim's left shoulder clavicle. The bullet traveled front to back and pierced the victim's left lung. The wound revealed no evidence that the bullet was fired at close firing range. Based on her experience and training, Jones concluded that the victim died of a single gunshot wound to the chest and ruled his death a homicide. After presenting these three stipulations, the State rested its case-in-chief.

Marcel Burns testified for the defense and confirmed that he knew Marcus Beck and was aware that his nicknames included Little Marcus and Pookie Slim. Burns further confirmed that he was present at the scene when the victim was shot and killed. At no time did Burns observe Beck at the scene.

Lajuan Bridges, a convicted felon currently serving a sentence for attempt murder and aggravated discharge of a firearm, testified that he was friends with the victim. Bridges was in the vicinity of 13th Street and Kedzie at approximately 9:30 p.m. on November 18, 2006. He saw Barfield exit his vehicle and observed the victim and Darius Finley in the car. Bridges approached the vehicle and began conversing with the victim, who asked if Bridges had a "swisher." At that time, a dark-colored vehicle appeared and two men wearing hooded sweatshirts exited the vehicle. Both men had the hoods of their sweatshirts over their heads but Bridges was still able to see their faces. Neither defendant nor codefendant were present at the scene that evening. Bridges heard five or six gunshots and observed Barfield fall to the ground. He also saw the victim get shot and was within a couple of feet of Barfield's car when that occurred. Bridges indicated that he had known defendant three or four years before that incident and denied that defendant was the shooter.

On cross-examination, Bridges indicated that approximately one year after the victim's death, he was incarcerated and learned that defendant had been charged with the shooting. Bridges decided to contact defendant's attorney and disclosed that he had been present at the crime scene, observed the shooting, and knew that defendant was not the shooter. Bridges never discussed what happened on the night of the shooting with Barfield or Finley at any time after the offense.

William Dorsch, a licensed private investigator, testified he was retained by defendant's counsel to review the case file. After familiarizing himself with the case, Dorsch traveled to the crime scene, the police station and Cook County jail to speak with individuals involved in the case. Dorsch visited LaJuan Bridges at the Cook County jail on two occasions. Bridges was forthcoming and willing to speak with Dorsch. He informed Dorsch that he was friendly with defendant. Bridges

did not take notes of his first conversation with Bridges but prepared a handwritten statement that Bridges signed on the second occasion that they spoke.

After concluding with live testimony, the defense presented a stipulation. The parties stipulated that Detectives Matias and Loritch were assigned to investigate the homicide of the victim and would testify that they interviewed Barfield at Mount Sinai Hospital on the night of the shooting.

Thereafter, the defense rested and the parties delivered closing arguments. After receiving their instructions, the jury commenced deliberations and returned with a verdict finding defendant and codefendant guilty of first degree murder and aggravated battery with a firearm. The trial court sentenced defendant to 40 years' imprisonment for the first degree murder conviction and 6 years' imprisonment for the aggravated battery with a firearm conviction. Defendant filed a posttrial motion, which the trial court denied and this appeal followed.

ANALYSIS

I. Trial Court's Abdication of its Neutral Role

Defendant first contends that the trial court improperly assumed the role of the prosecutor during the State's examination of hostile witness Thomas Barfield. Specifically, defendant argues that the trial court aggressively questioned Barfield, answered a question on his behalf and discredited his testimony in the presence of the jury. Because Barfield was one of only two witnesses who identified defendant as the shooter, defendant contends that the trial court's interjections were highly prejudicial and constituted an abuse of discretion. Defendant acknowledges that he failed to properly preserve this issue for appeal, but urges us to review the issue for plain error.

The State responds that defendant mischaracterizes the role the trial court assumed during the trial and maintains that it acted within the proper scope of its authority during Barfield's direct examination. Accordingly, the State contends that the trial court did not abuse its discretion.

To properly preserve an issue for appeal, a defendant must object to the purported error at trial and specify the error in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988); *People v. Bannister*, 232 Ill. 2d 52, 65 (2008). A defendant's failure to abide by both requirements results in forfeiture of appellate review of his claim. *Enoch*, 122 Ill. 2d at 186; *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007). Here, it is undisputed that defendant failed to object to all of the allegations of purported trial court misconduct, and therefore failed to properly preserve this issue for appellate review.

The plain error doctrine, however, provides a limited exception to the forfeiture rule. 134 Ill. 2d R. 615(a); *Bannister*, 232 Ill. 2d at 65. It permits review of otherwise improperly preserved issues on appeal if the evidence is closely balanced or the error is of such a serious magnitude that it affected the integrity of the judicial process and deprived the defendant of his right to a fair trial. 134 Ill. 2d. R. 615(a); *Bannister*, 232 Ill. 2d at 65. The first step in any such analysis is to determine whether any error actually occurred. *People v. Walker*, 232 Ill. 2d 113, 24-25 (2009). If an error is discovered, the defendant then bears the burden of persuasion to show that the error prejudiced him under either prong. *People v. McLaurin*, 235 Ill. 2d 478, 495 (2009). Keeping these principles in mind, we review defendant's claim.

Every criminal defendant is afforded a constitutionally protected due process right to a

fair and impartial trial. U.S. Const. amend. XIV; Ill. Const. 1970, art. I, § 2. Although a trial court is afforded great discretion while presiding over a trial, it may not interject commentary, express opinions that reflect favorably or unfavorably on either party or engage in other behaviors that could influence the jury. *People v. Tatum*, 389 Ill. App. 3d 656, 662 (2009). Because the jury is the trier of fact in a jury trial, it is impermissible for a trial court to make comments or insinuations that indicate its opinion regarding the credibility of witnesses or the arguments made by counsel, as those determinations fall within the province of the jury. *People v. Anderson*, 250 Ill. App. 3d 439, 462-63 (1993). The trial court may ask questions and pursue certain lines of inquiry in an effort to ensure that justice is done; however, in doing so, the court must not abdicate its role as neutral arbiter and assume that of advocate. *People v. Faria*, 402 Ill. App. 3d 475, 479 (2010); *People v. Taylor*, 357 Ill. App. 3d 642, 648 (2005). The trial court does not assume the role of prosecutor merely because its inquiries elicit evidence that is material to the State's case. *People v. Harris*, 384 Ill. App. 3d 551, 561 (2008). Whether a trial court abdicates its neutral role and improperly assumes the role of an advocate is reviewed for an abuse of discretion. *Taylor*, 357 Ill. App. 3d at 647. For comments or questions by a trial court to constitute reversible error, the defendant must show that they were prejudicial and constituted a material factor in his conviction. *Anderson*, 250 Ill. App. 3d at 463.

Here, defendant argues that the trial court aggressively questioned Barfield, impermissibly answered a question on his behalf, and discredited his testimony based on several exchanges. The first exchange to which defendant objects is the following:

“[STATE]: Did you go on to state [in your handwritten statement] that

three people with guns in their hands were Cuz [defendant], Double-D [codefendant Davis], and a third person whose name you don't know. Did you tell them that?"

[BARFIELD]: I was told to tell them that.

[STATE]: You will have a chance to tell why you did these things. My question is did you say that.

[DEFENSE]: Objection.

[COURT]: Overruled.

[BARFIELD]: A [sic] Yes, sir.

[STATE]: Did you say those words to that State's Attorney?

[BARFIELD]: But I was told and forced to say that. I didn't want to say it.

[COURT]: *The answer is yes, you did say that. That is his question, did you say that to the State's Attorney.*

[BARFIELD]: Yea." (Emphasis added.)

Based on the court's statement, defendant argues that the court impermissibly answered the question on Barfield's behalf and "undeniably" influenced the jury by informing them of the "critical" evidence that Barfield identified defendant as one of the shooters. We disagree that the court's interjection during Barfield's testimony was improper. The court did not, as defendant suggests, answer the question on Barfield's behalf; rather, the trial court merely repeated and clarified Barfield's response. By indicating that he had been forced in his statement to disclose that defendant was at the scene with a gun in his hand, Barfield implied that he did, in fact,

identify defendant as one of the shooters. The court's interjection was simply a clarification of what Barfield had already stated and fell within the proper scope of its judicial authority.

Defendant next argues that the trial court improperly aggressively questioned Barfield based on the following exchange:

"[STATE]: My question again is if on December 18, 2006 when you were interviewed by the Assistant State's Attorney, Lauren Brown, you looked at the two photos I just showed you and identified [State's exhibit] C as Cuz and [State's exhibit] D as Double-D.

[BARFIELD]: How can I identify somebody I don't know?

[STATE]: I will repeat my question. Did you nonetheless identify [State's exhibit] C as Cuz and [State's exhibit] D as Double-D?

[COURT]: *Answer the question. Did you or did you not identify those photos?*

[BARFIELD]: That is what they told me to do.

[COURT]: *The answer is yes?*

[Barfield]: Yea." (Emphasis added.)

We find this contention of error to be similarly without merit. From the record, it is clear that the court's questioning of Barfield was not overly aggressive. The trial court did not engage in a lengthy examination of the witness; rather, it simply repeated the State's question regarding Barfield's identification of defendant as one of the shooters in a photo array and directed Barfield to provide a response. Once Barfield responded, the court sought clarification of his answer, by

inquiring: “The answer is yes?” We do not find that the court’s questioning provides evidence of an overly aggressive examination of the witness.

Finally, defendant argues that the court impermissibly discredited Barfield as a witness based on the following exchange:

“[DEFENSE]: did you ever have an opportunity to view a photo spread with a picture of an individual by the name of Dominick Jakes?

[BARFIELD]: No, sir.

[DEFENSE]: Do you know who Dominick Jakes is?

[BARFIELD]: No, sir.

[COURT]: *So how do you know whether you viewed a photo array with him in it?*

[DEFENSE]: Judge, I would object to your questioning our witness during this. I would ask that the jury be instructed.

[COURT]: I will instruct the jury to disregard that comment I just made. That will be stricken from the record.” (Emphasis added.)

In this instance, it is apparent that the trial court was attempting to clarify Barfield’s two prior seemingly inconsistent statements. Specifically, the trial court was attempting to ascertain how Barfield could assert that Dominick Jakes’ picture was absent from a photo spread if he did not, in fact, know Jakes. We do not find that the trial court was attempting to improperly discredit Barfield. Assuming *arguendo* that this question exceeded the bounds of judicial propriety we cannot conclude that it was a material factor in defendant’s conviction. See

Anderson, 250 Ill. App. 3d at 463 (For comments or questions by a trial court to constitute reversible error, it must be evidence that they were prejudicial and constituted a material factor in his conviction). Ultimately, we do not find that the trial court abandoned its neutral role and improperly assumed the role of prosecutor. Because we find no error, there can be no plain error, and accordingly, we must honor defendant's procedural default. *People v. Strickland*, 399 Ill. App. 3d 590, 604 (2010).

II. Use of Prior Statements

Defendant next argues that the trial court erred when it permitted the State to introduce the handwritten and grand jury statements provided by Beck and Barfield because the admission of both prior statements violated the common law prohibition against prior consistent statements. Defendant acknowledges that the State properly admitted the out-of-court statements that Beck and Barfield provided to ASA Brown under section 115-10.1 of Illinois Code of Criminal Procedure of 1963 (Criminal Code) (725 ILCS 5/115-10.1 (West 2006)) because those statements were inconsistent with their trial testimony. Although Beck and Barfield's grand jury testimonies were also inconsistent with the statements they provided at trial, defendant argues that they were inadmissible because their grand jury testimony was consistent with the handwritten statements and, accordingly, were inadmissible under the common law prohibition against prior consistent statements.

The State responds that the trial court did not abuse its discretion when it permitted the State to introduce Beck and Barfield's prior handwritten statements and grand jury testimonies at trial after both witnesses testified inconsistently with their prior statements. The State argues that

the statements were admissible under section 115-10.1 of the Criminal Code and did not violate the common law prohibition against consistent statements.

The admissibility of evidence falls within the sound discretion of the trial court and, accordingly, such an evidentiary ruling will not be reversed absent an abuse of that discretion.

People v. Caffey, 205 Ill. 2d 52, 89 (2001); *People v. Hatchett*, 397 Ill. App. 3d 495, 506 (2009).

As a general rule, the admissibility of prior consistent statements for the purpose of corroborating trial testimony or bolstering a witness is precluded. *People v. Heard*, 187 Ill. 2d 36, 70 (1999); *People v. McWhite*, 399 Ill. App. 3d 637, 641 (2010). This rule exists because it is likely that a trier of fact will unfairly enhance a witness's credibility simply because his or her statement has been repeated. *McWhite*, 399 Ill. App. 3d at 641; *People v. Johnson*, 385 Ill. App. 3d 585, 608 (2008). Even where admissible under certain limited circumstances, prior consistent statements may not be considered substantive evidence. *McWhite*, 399 Ill. App. 3d at 641. Because prior inconsistent statements cannot bolster a witness's trial testimony, there is no similar general prohibition against their use and they may be considered substantive evidence as long as they meet the requirements of section 115-10.1 of the Criminal Code. 725 ILCS 5/115-10.1 (West 2006); *Hatchett*, 397 Ill. App. 3d at 507; *Johnson*, 385 Ill. App. 3d at 608. That section provides:

“In all criminal cases, evidence of a statement made by a witness is not made inadmissible by the hearsay rule if:

(a) the statement is inconsistent with his testimony at the hearing or trial,

and

(b) the witness is subject to cross-examination concerning the statement,

and

(c) the statement-

- (1) was made under oath at a trial, hearing or other proceeding, or
- (2) narrates, describes, or explains an event or condition of which the witness had personal knowledge, and
 - (A) the statement is proved to have been written or signed by the witness, or
 - (B) the witness acknowledged under oath the making of the statement either in his testimony at the hearing or trial in which the admission into evidence of the prior statement is being sought, or at a trial, hearing or other proceeding ***.” 725 ILCS 5/115-10.1 (West 2006).

Consistency for the purposes of a statement is measured against a witness's trial testimony.

Johnson, 385 Ill. App. 3d at 607; *People v. Harvey*, 366 Ill. App. 3d 910, 923 (2006); *People v. Thomas*, 354 Ill. App. 3d 868, 884 (2004).

Here, at trial, Beck and Barfield denied that they saw defendant discharge a weapon at the time of the victim's death. These accounts contradicted their prior positive identifications of defendant that they detailed in the handwritten statements they provided to ASA Brown and in their testimony before the grand jury. Defendant does not dispute that the witnesses' handwritten statements and grand jury testimonies meet the requirements for admissibility under section 115-10.1 of the Code; rather, his contention of error concerns the admissibility of *both* of the statements because the prior statements, although inconsistent with the witnesses' trial testimony,

were consistent with each other. We find this argument to be without merit. Because the consistency of a statement is measured at the time of a witness's trial testimony, the trial court does not err in admitting two prior statements that are inconsistent with that testimony, even though they are consistent with each other. See *Maldonado*, 398 Ill. App. 3d at 423. (“[C]onsistency is measured against the trial testimony, not against other statements that conflict with the trial testimony. [Citation.] *** [T]he introduction of more than one statement that is inconsistent with a witness's trial testimony, whether or not such statements are consistent with each other, is proper”); *Johnson*, 385 Ill. App. 3d at 607-08 (the trial court did not err in admitting a witness's prior inconsistent handwritten statement and grand jury testimony despite the fact that the prior statements were consistent with each other); *Harvey*, 366 Ill. App. 3d at 923 (same); *Thomas*, 354 Ill. App. 3d at 884-885 (same). Because defendant's argument does not accord with well-established precedent, we find no merit to his claim; rather, we find that the trial court did not abuse its discretion in permitting the State to admit Beck and Barfield's prior inconsistent handwritten and grand jury statements.

III. Rule 431(b) Violation

Lastly, defendant argues that the trial court denied him his constitutional right to a fair and impartial jury when it failed to abide by the mandates of Illinois Supreme Court Rule 431(b), as amended in 2007, when it specifically failed to ask the prospective jurors whether they “understood and accepted” each of the four *Zehr* principles. Defendant maintains that the trial court's failure to conform to the requirements of Rule 431(b) in this manner constitutes *per se* reversible error. He bases his argument on the 2007 amendment to Rule 431(b), which imposed

a mandatory *sua sponte* duty on trial courts to ascertain whether potential jurors “understand and accept” the enumerated principles contained therein. Because the amendment made the rule mandatory, defendant argues that any violation of Rule 431(b)’s requirements necessarily deprives a defendant of his fundamental constitutional right to be tried by a fair and impartial jury and requires reversal of his conviction.

The State, in turn, responds that defendant forfeited appellate review of this issue because he failed to object to the purported errors at trial or in a posttrial motion. Moreover, the State argues that regardless of forfeiture, the trial court complied with the requirements set forth in Rule 431(b) even though its method of inquiry did not specifically track the language set forth in the rule. The State further argues that the trial court’s failure to strictly comply with the rule does not amount to *per se* reversible error.

Because defendant failed to object to the trial court’s methodology, we review this argument for plain error. As we have already explained, the first step in plain-error review is to determine whether any error actually occurred and, accordingly, we must first determine whether the trial court failed to comply with Rule 431(b). *Bannister*, 232 Ill. 2d at 65. This claim of error concerns the trial court’s compliance with a supreme court rule, which is subject to *de novo* review. *People v. Suarez*, 224 Ill. 2d 37, 41-42 (2007); *People v. Haynes*, 399 Ill. App. 3d 903 (2010). To determine whether an error occurred in this case, we examine amended Rule 431(b), which 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 the specific questions concerning the principles set out in this section."

Supreme Court Rule 431(b) (Official Reports Advance Sheet No. 8 (April 11, 2007), R. 431(b), eff. May 1, 2007)).

The amendment's use of the term "shall" created a mandatory question and response process to address a jury's acceptance of each of the four enumerated principles. *People v. Thompson*, No. 109033, slip op. at 6 (Oct. 21, 2010); see also *Haynes*, 399 Ill. App. 3d at 912 (explaining that "[i]n enacting the amended version of Rule 431(b), our supreme court imposed a *sua sponte* duty on courts to ask potential jurors individually or in a group whether they accept the [four *Zehr*] principles").¹ A trial court's failure to address each of the four principles constitutes error. See *Thompson*, No. 109033 slip op. at 6-7 (Oct. 21, 2010); *Haynes*, 399 Ill.

¹ Prior to the amendment, Rule 431(b) required questioning only "[i]f requested by defendant." See *Thompson*, No. 109033 slip op. at 7 (Oct. 21, 2010).

App. 3d at 912; *People v. Magallanes*, 397 Ill. App. 3d 83, 72 (2009).

Here, the trial court admonished the first panel of potential jurors of the four *Zehr* principles, informing them about: the defendant's presumption of innocence, the State's burden of proof, the defendant's right not to testify or present evidence on his behalf, and the defendant's right to have his decision not to testify from being used against him. After providing a general admonishment about each of the four principles, the court went on to address the principles individually. Accordingly, the court reiterated the defendant's presumption of innocence and the State's burden of proof and inquired whether any person "had a problem" with those concepts. The court then admonished the panel that a defendant is not required to testify and that his decision may not be held against him and asked: "Is there anyone who would hold the decision not to testify against the defendant regardless of what I've just said to you?" The court repeated this procedure with the second and third panels.

Although defendant takes issue with the trial court's phraseology, reviewing courts have observed that Rule 431(b) "does not dictate a particular methodology for establishing the venire's understanding or acceptance of those principles" and have found that trial courts have met the requirements of the rule when they have utilized similar terminology that deviated slightly from the precise language contained in the rule. *See e.g., People v. Digby*, No. 1-09-0902, slip op. at 7-8 (November 24, 2010) (trial court's use of the phrase "have a problem with" did not constitute error); *People v. Ingram*, 401 Ill. App. 3d 382, 393 (2010) (trial court's inquiry as to whether the venire had any "difficulty or quarrel" with the principles did not constitute error); see also *People v. Vargas*, 396 Ill. App. 3d 465, 472 (2009). We find that the trial court's failure to strictly

adhere to Rule 431(b)'s language does not amount to error. The court's methodology sufficiently ascertained the venire's understanding and acceptance of the defendant's presumption of innocence, the prosecution's burden of persuasion and the right of the defendant not to testify and not to have that decision be used against him. More problematic, however, is that the trial court failed to conduct any specific inquiry about the defendant's right not to present any evidence on his behalf. Because Rule 431(b) requires a court to conduct an inquiry about each of the four *Zehr* principles, the court's failure to make this inquiry constitutes error. We disagree with defendant, however, that this error constitutes *per se* reversible error.

In so finding, we rely on our supreme court's recent decision in *People v. Thompson*, No. 109033 (Oct. 21, 2010), where the court expressly rejected the argument that a trial court's failure to strictly comply with amended Rule 431(b) necessarily infringes upon a defendant's right to a fair and impartial jury, thereby affecting the integrity of the judicial process and constituting plain error under the second prong of plain-error review. *Thompson*, No. 109033, slip op. at 12-13 (Oct. 21, 2010). The court acknowledged that "[a] finding that defendant was tried by a biased jury would certainly satisfy the second prong of plain-error review because it would affect his right to a fair trial and challenge the integrity of the judicial process," but explained that a reviewing court "cannot presume the jury was biased simply because the trial court erred in conducting Rule 431(b) questioning." *Id.* at 12. The court acknowledged that the 2007 amendment to the rule made it mandatory for trial courts to assess every potential juror's acceptance of the four Rule 431(b) principles but explained:

"the failure to conduct Rule 431(b) questioning does not necessarily result

in a biased jury, regardless of whether that questioning is mandatory or permissive under our rule. Although the amendment to the rule serves to promote the selection of an impartial jury by making questioning mandatory, Rule 431(b) questioning is only one method of helping to ensure the selection of an impartial jury. [Citation.] It is not the only means of achieving that objective. A violation of Rule 431(b) does not implicate a fundamental right or constitutional protection, but only involves a violation of this court's rules." *Id.* at 12-13.

Accordingly, because a trial court's Rule 431(b) violation does not necessarily result in a biased jury and constitute plain error, the court concluded that it was the defendant's burden of persuasion to show that the trial court's violation of Rule 431(b) in his case resulted in a biased jury and affected the integrity of the judicial process. *Id.* at 13. The court observed that although the prospective jurors in the defendant's case received some, but not all, of the Rule 431(b) questions, they had been admonished and instructed on all of the principles. *Id.* Ultimately, the court concluded that the defendant failed to meet his burden of showing that the error affected the fairness of his trial and that the second prong of plain-error review did not provide a basis for excusing the defendant's forfeiture. *Id.*

Here, as in *Thompson*, the trial court failed to strictly comply with Rule 431(b). Specifically, although it admonished the venire about the four *Zehr* principles, the court only conducted an inquiry regarding three of the four principles. Nonetheless, although the trial court failed to specifically inquire as to their acceptance of the principle that a defendant is not required

to present evidence on his behalf, we find that defendant has failed to prove that the trial court's Rule 431(b) violation resulted in an unfair trial and affected the integrity of the judicial process. Notably, there is nothing in the record to indicate that the jury was biased. Moreover, we observe that defendant did, in fact, present evidence on his behalf. Accordingly, we find that the second prong of plain-error review does not provide us with a basis to excuse defendant's procedural default. See *Thompson*, No. 109033, slip op. at 12-13 (Oct. 21, 2010); *Haynes*, 399 Ill. App. 3d at 914; *Magallanes*, 397 Ill. App. 3d at 100. Although defendant suggests the error amounts to plain error under the first prong because the evidence was closely balanced based on the discrepancies of the witnesses' testimony, we disagree with his characterization of the evidence. The mere fact that two of the State's eyewitnesses recanted their prior identifications on the stand does not render the State's evidence insufficient. See *People v. Thomas*, 354 Ill. App. 3d 868, 879-80 (2004). Beck and Barfield's prior positive identifications were admitted as substantive evidence and were corroborated by forensic evidence showing that there was more than one weapon fired at the scene. We find no basis to excuse defendant's procedural default under either prong of plain-error review.

CONCLUSION

For the reasons stated herein, we reject defendant's contentions of error and affirm the judgment of the circuit court.

Affirmed.