

during the trial-court proceedings.

In this direct appeal, from a jury's verdict, finding defendant, Charmell D. Brown, guilty of first-degree murder and aggravated battery with a firearm, he raises several contentions of reversible error. First, he claims the trial court erred in failing to allow his attorney time to adequately prepare for trial when the State, on the day of trial, revealed there had been a mix-up in the paperwork related to a witness's identification of defendant from a photo array.

Second, he claims the trial court failed to fully comply with Illinois Supreme Court Rule 431(b) (eff. May 1, 2007) during *voir dire* by failing to ask each individual juror if he or she accepted the four principles set forth in that rule. Third, he challenges the State's use of one of its preemptory challenges during jury selection. The State asked that an African-American male be excused from service. Defendant objected on the basis that the State's decision was based solely on potential juror's race. The trial court overruled defendant's objection, finding defendant had failed to make a *prima facie* case of racial discrimination. Here, defendant challenges that decision.

Fourth, defendant claims that the trial court erred in allowing one of the State's witnesses, the eyewitness to the shooting, make a comment on the witness stand that could reasonably be interpreted to imply that defendant had been involved in other crimes, including other murders. Defense counsel objected at the time, but not on the grounds that the testimony constituted other-crimes evidence. Because defendant did not challenge the testimony on the same grounds as he does in this appeal, we find he forfeited that issue for review.

Fifth, defendant claims that the prosecutor's (1) failure to reveal, until the day of trial, there was a mistake on the photo array, (2) failure to agree that defendant should be granted a continuance to adequately prepare for trial in light of the State's late disclosure, (3) intentional

withholding of the information until the day of trial, (4) failure to correct the trial court's admonitions to the jury of the four principles set forth in Rule 431(b), (5) request to remove an African-American male as a juror, (6) motive in eliciting other-crimes evidence from the State's pivotal witness and repeating that testimony to the jury during closing arguments, and (7) use of a photograph of the decedent during closing arguments, when taken together, constituted prosecutorial misconduct and served to undermine defendant's right to a fair trial. Because we disagree that any of the above-claimed errors jeopardized defendant's right to a fair trial, we affirm defendant's convictions.

I. BACKGROUND

In January 2008, defendant was indicted on three counts of first-degree murder (720 ILCS 5/9-1(a)(1), (a)(2) (West 2006)) and two counts of aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2006)) for shooting three people outside of the American Legion hall (also referred to as the club) in Champaign. One victim, Tyrone Greer, died and the other two victims, Eric Lucas and Johnny Valcourt, were injured. Prior to the start of defendant's trial, the State announced it was dismissing one count of aggravated battery with a firearm as it related to the shooting of Valcourt.

On December 7, 2009, the first day of defendant's trial, before jury selection, the parties presented the trial court with various preliminary matters. The State indicated there had been a typographical error on the two photo arrays shown to one of the State's witnesses. Apparently, defense counsel had not known there was an error and claimed the State had violated the rules of discovery. The State insisted that defense counsel had been produced everything regarding the witness's identification of defendant as the shooter. Noting that the parties' explanations were "incredibly confusing," the trial court stated that it would allow the State to present an "offer of proof

before the jury hears any of this testimony." Defense counsel requested a continuance. The court assured counsel that should the offer of proof indicate the State had committed a discovery violation, or what the court called "a violation of the *Brady* material" (referring to *Brady v. Maryland*, 373 U.S. 83 (1963)), it would impose sanctions, which could include barring the evidence, a mistrial, or "any number of things." However, "on the eve of trial," the court wanted to hear "what it is we're talking about." The State again insisted that counsel had "all the documents" and this was something the State had "figured out in trial preparation."

The trial court proceeded with the selection of the jury. The pertinent facts related to the court's *voir dire* as it relates to defendant's Rule 431(b) claim of error and the facts related to his *Batson* challenge are set forth in the respective section in which we analyze defendant's claims of error below.

The trial continued over the course of eight days with a total of 33 witnesses testifying. Defendant did not testify. As the testimony of a number of the witnesses is of little consequence to our decision, we will summarize in detail only that which is either pertinent to the issues discussed below or necessary to an understanding of the circumstances surrounding the incident.

On December 29, 2007, Tyrone Greer, who lived in Springfield, had traveled with a group of friends to Champaign where Tamika Kirkwood lived. Kirkwood had planned a birthday celebration at the American Legion for her brother, LaWayne Johnson, Greer's friend, who also lived in Springfield. The group of friends met at Kirkwood's house and then arrived at the club at approximately 11 p.m. Apparently, the club was open to the public, as there were several other birthday celebrations occurring at the same time. By all accounts, it was fairly crowded by midnight.

At approximately 1 a.m., the bouncers working security asked Greer, who was involved in some type of verbal altercation either (there were varying reports) with a female patron, defendant, or defendant's brother, Charnell Brown, who was wearing a black fur coat that evening, to leave the club. Johnson approached as one security employee was talking with Greer. Johnson assured the employee that Greer would leave without incident. In the meantime, Kirkwood and the rest of their group, including Tegan Milam, gathered each other and their belongings to leave with Greer. As Greer and Johnson were standing outside of the club at the front door and while other patrons were waiting in a line to enter, Greer was shot three times in the upper body. Two other people standing in line were shot in the leg. Greer stumbled into the club, collapsed on the floor, and died.

Before summarizing the specific testimony presented at trial, we will summarize the testimony presented as part of the State's offer of proof, which occurred in the middle of the trial. The State called Tawanda Handy, who testified that she was sitting at the bar at the club when she heard an argument between two males, later identified as defendant and Greer. She said she did not pay much attention to them, as Greer walked away from the argument. However, she then heard defendant say to the man in the fur coat that security had not searched him at the door and he had a "mf pistol" in his sock. She said the comment alarmed her, so she retrieved her friend and started to leave.

A few days after the incident, detectives showed her a photo array, asking if any of those pictured were the men she saw at the American Legion that night. She recognized photo number four as the man who made the comment about the gun in his sock. From the second photo array, she recognized photo number two as the man with the black fur coat. She said she was not shown a list of names of the individuals that appeared in the photo arrays. She acknowledged

signing the instruction sheets after she made her identifications. Those sheets and photo arrays were introduced into evidence.

Detective Donald Shepard testified that he and Detective Mary Bunyard showed Handy the photo arrays two days after the incident at her place of employment. The arrays were compiled by another detective, who used two because there were two suspects, defendant and his brother. The array identified as photo lineup number one contained defendant's photo in the number-four spot. Detective Shepard said Handy pointed to photo number four and identified him as the man who made the comment that he had a pistol in his sock. Photo lineup number two contained Charnell Brown's photo in the number-two spot. Handy pointed to Charnell's photo, identified him as the man in the fur coat, and said she knew of him by his street name "Stretch." Shepard said Handy did not show any hesitancy in identifying either suspect. The photos and the corresponding names are correct. He watched Handy pick out the photos herself and she completed the forms correctly.

Detective Shepard explained that the instruction and answer sheets for each photo array got mixed up or mislabeled. The instruction or answer sheet which indicated that Handy had selected photo number four had "photo array number two" written on top, when it should have been labeled as "photo array number one." Detective Bunyard testified consistently with Detective Shepard's testimony, stating that Handy had selected the photos of defendant and his brother and the mistake occurred in the labeling of the corresponding instruction/answer sheets.

After considering this testimony, the trial court found that, based on the testimony presented, it was the instruction sheet that was in error and not the fact that Handy had identified people other than defendant and his brother. Defense counsel argued that the State acted in bad faith

in not revealing the error until the day of trial. Counsel accused the State of intentionally preventing him from making an argument of misidentification and of violating the discovery rules. The court held that the State had not committed a *Brady* violation, as it did not want "to go that far," but it had committed a discovery violation. The court decided it would allow Handy to testify at trial for the State about what she saw that night, but bar any testimony regarding her identification of defendant or his brother from the photo arrays.

As for the evidence presented at trial, the State called Robert Sallee, manager at the American Legion, who described the general layout of the club for the jury. The interior was comprised of two separate areas separated by a fireplace. One side contained the bar and the other side, the dance floor. According to Sallee, sometime during the night, security personnel became aware of a problem between Greer and a female patron. They asked Greer to leave and he did so in a cooperative manner. Approximately 20 minutes later, Sallee said he was notified there had been a shooting outside. He saw Greer stumble into the club and collapse on the floor. He then saw a man, who was approximately 23 or 24, dark skinned, 170 to 180 pounds, 6 feet tall in a black fur coat standing over Greer. The man mumbled something and then left.

Vernon King, one of Greer's friends who had also traveled from Springfield for Johnson's party, testified that he saw Greer talking to security, while a friend was trying to get Greer to "calm down." Greer had said he "got into it with somebody" at the bar. He pointed to the man with a black fur coat. King saw the two stare at each other, but did not see any physical altercation. King said Greer and Johnson walked out of the club while he gathered everyone else to join them. As he was doing so, King heard gunshots and saw Greer stumble back into the club. King saw the man Greer "was in conflict with" come back inside the club, screaming "'that's what you get mother

f***." The man, wearing the black fur coat, turned around and left. King rushed over to Greer and saw blood coming from his mouth. King, another man, and a female began performing cardiopulmonary resuscitation (CPR) on Greer. When paramedics arrived, they took over assisting Greer, and everyone was told to leave the premises.

Alvin Mims, Johnson's and Kirkwood's brother who was also at the party, testified that Greer had mistakenly bumped into a female on the dance floor. They exchanged words. Greer left the dance floor and went to the bar. The female followed Greer and they exchanged more words. Security then asked Greer to leave the club. Mims said he started "rounding everybody up" to leave. Mims was standing by the door when he heard gunshots. He said he saw Greer run back inside the club after being shot. Mims said he could not describe "what the guy looked like[,] but some guy ran in behind him, in a black coat, stood over him and said a few words to him that was very disrespectful." Mims had seen the man in the coat earlier standing inside the club, but had not seen any altercation between him and Greer. After the man said the few words while standing over Greer, he "ran back out" and "jump[ed] in a white car with some rims on it, and drove off." On cross-examination, Mims admitted he had told the detectives during their investigation that the man in the black coat had something black in his hand when he came back into the club.

Kirkwood testified that at the time of the incident she was dating Greer. She had not seen any altercation between Greer and anyone at the party. She said the bouncer informed her that Greer needed to leave the club. She started "round[ing] up the crowd" to leave. She handed her keys to Tegan Milam to warm up the car. As they were getting ready to go out the door, Greer "was running in the door." Kirkwood ran out the door, looking for Johnson. She saw Milam, who she described as "hysterical" and "yelling out a license plate number." Milam told Kirkwood that Greer

had been shot. Milam repeated the license plate number over and over until the police arrived.

Johnson testified that he saw Greer talking to security. He approached them and discovered that security was "putting [Greer] out" of the club. He took Greer outside after telling Kirkwood to gather everyone else so they could leave. Johnson and Greer stopped outside the front door to wait for everyone else. Johnson asked Greer to explain what had happened inside. As he was doing so, Johnson heard gunshots. He saw two people, but did not see the person who had fired the gun. Greer was shot. Johnson at first ran away from the area, but he then went back inside the club to check on his friends. He saw Greer lying on the floor inside with a female and King performing CPR. On cross-examination, Johnson recalled that he had told the detectives that there were two people shooting.

Milam testified to the events fairly consistently with the other witnesses. She said once she learned Greer had been asked to leave, she got the car keys from Kirkwood. She walked out of the club toward the parking lot, walking past Johnson and Greer. She turned around to say something to Johnson when she saw defendant and the man in the fur coat exit the club from the side door. She saw defendant reach into his clothes, lift his right arm, and start shooting. She said the first shot hit Greer in the shoulder. Defendant kept walking and shooting and eventually stood in front of Milam while firing. The man in the fur coat ran into the club. He came out and got into a white car that was parked in front of the building. Two other people standing outside were shot as well. Milam watched defendant, who she identified in court as the gunman, get into his car, a red or maroon newer model car. Milam yelled at him that "he wouldn't get away with this one." Defendant drove off. Milam memorized defendant's license plate number by repeating it over and over until the police arrived.

Milam testified that a few days after the incident, Detective Nathan Rath spoke with her and showed her a photo array. Milam chose number four as the photo of the person who had shot Greer. She did not recognize anyone from the second set of photographs.

Richard Carroll, a Champaign police officer, testified that he was patrolling near the American Legion. He heard an officer call for backup regarding the shooting. When he got to the club, Milam and Kirkwood approached. Milam was repeating what he learned was a license plate number of a suspect. Officer Carroll repeated the information over the police radio. Kirkwood described a white car. Milam corrected her, telling Kirkwood that the shooter got into a red or maroon car with the license plate number she had memorized. Officer Carroll described both vehicles over the radio.

Eric Lucas testified that he had arrived at the American Legion by himself at approximately 12 a.m. He was waiting in line to get in when he heard gun shots but did not see who was shooting. He started running when he was shot in the leg. He was treated and released from Carle Hospital.

Detective Rath testified that he went to Carle Hospital immediately after the shooting to talk with Milam. The next day, he met with Milam to show her a photo array. Showing her the first photo array, Milam immediately pointed to defendant's photo (photo number four), stating "oh, my God. That's him. Oh, my God." In the original photo array that Rath showed Milam immediately following the incident at the hospital, Milam was unable to identify a suspect. Rath said defendant's photo was not included in that array. Dr. John Scott Denton, a forensic pathologist, testified that he performed the autopsy on Greer, who had suffered three gunshot wounds. According to Dr. Denton, it appeared Greer had been shot from more than 18 to 24 inches away. He had one

gunshot wound in his back where the bullet had traveled through his aorta, one on his shoulder, and one in his upper arm. According to Dr. Denton, Greer died from all three gunshot wounds.

Brian Long , a forensic scientist with the Illinois State Police, testified that he found no fingerprints on the four bullet casings that he had examined. Caroline Kersting, another forensic scientist, testified that the four bullets had been fired from the same weapon.

Detective Mary Bunyard testified that she was present when Charnell Brown was arrested in relation to this incident. At the time, she took into evidence a black fur coat and two T-shirts.

Finally, for the State, Twanda Handy testified that she was at the American Legion that night. As she was sitting at the bar, she heard two men arguing, but "didn't think anything of it." One was wearing a green jacket. The other, she identified in open court as defendant. A man in a black fur coat approached. Defendant made a statement to the man in the fur coat "that he had a pistol in his sock." She said his exact words were "'the mother*** didn't search me, I have a pistol in my sock.'" She said she immediately "got up and grabbed [her] girlfriend, and it was time to go." By the time she had found her girlfriend and proceeded to the front door, security was not allowing anyone to leave. She saw the man in the green jacket stagger into the club from the front door. When she was able, she proceeded to her vehicle. She said she did not see defendant or the man in the fur coat.

On cross-examination, defendant's counsel questioned Handy about how she could characterize the interchange between the two men as an argument when she was unable to hear the exact words exchanged and when the music was so loud. Handy responded that the two men were very loud and "it was apparent that they were arguing." Handy believed it was approximately 10 to

15 minutes before the man in the fur coat approached defendant.

Defendant presented the testimony of Stephen Campbell, who testified that he was working as security for the American Legion on the night of the incident. Campbell noticed a man (presumably Greer) continuously bumping into people on the dance floor. Campbell asked him to go sit down. He did, but not long after, he was on the dance floor again "causing problems." Campbell led the man off the floor over to the bar area. The man told two girls that "he was going to slap them." Campbell said that was "the last time, he was going to have to leave." Campbell escorted him to the front door and asked him to wait until he could get someone else to "take him out." Campbell went to find a member of the man's party. He said by the time he got back, the man "ran back in" and "was on the floor." Someone told Campbell the man had walked outside on his own and had been shot.

Jamila Thomas testified that she was at the American Legion that night celebrating another birthday. As she was trying to leave the club, she was stopped "because there was a guy out of control." She was told to wait "until they get him out the door." She described the man as wearing a green vest (presumably Greer). She believed he "had got a little too tipsy in the club." When she was cleared to go, the man was standing outside. A man in a black fur coat was standing with the man in the green vest. "They were having words with each other." Thomas got in her car, but saw the man in the fur coat walk around the corner. He came back "without a coat on, and just opened fire towards the door where people were standing." When he came back, he was wearing a white T-shirt. After he fired his gun, he went back around the corner, got into a older-model Pontiac or Oldsmobile four-door car, and left.

Thomas testified that the detectives had shown her a photo array of 12 individuals,

but she was unable to identify any of them as the shooter. Defendant's counsel asked Thomas if defendant was the shooter. She said: "No (shakes head back and forth) I don't, no, no he's not even the right color. I didn't see his skin tone color. It was darker." However, on cross-examination, Thomas admitted that she could not pick the shooter out of the photo array because she did not see his face.

Jeffrey Palmer, a private investigator, testified that he investigated this case at defense counsel's request. In April 2008, Palmer had contacted Milam, the eyewitness to the shooting, and scheduled a time to meet with her. Shortly before the meeting time, Milam called Palmer and said she had spoken with someone who had informed her that Palmer was "working for the other side" and told her not to speak about the case. Milam refused to provide any details of the incident. However, she did say that, in her opinion, the police had not done a "complete job, that there should have been more people in custody relating to the incident."

After Palmer's testimony, the defense rested. The trial court asked defendant if he wished to testify and defendant said he did not. Defendant moved for a directed verdict, which the court denied. After closing arguments and instructions, the jury retired to deliberate. Four hours later, the jury returned guilty verdicts.

Defendant filed two posttrial motions, preserving the issues he raises in this appeal, except for the Rule 431(b) issue. The trial court denied defendant's motions and sentenced him to 60 years in prison for first-degree murder and 30 years in prison for aggravated battery with a firearm. The sentences were ordered to be served consecutively. This appeal followed.

II. ANALYSIS

In this appeal, defendant contends he is entitled to a new trial due to several trial

errors. His claims center on his position that, despite the jury's verdicts, the State failed to prove beyond a reasonable doubt that he was the gunman. He claims that, due to these purported trial errors, the information submitted to the jury was misleading and prejudicial to defendant. We will address each contention of error in turn.

A. Police Officer's Error in Labeling Photo Arrays

First, defendant argues that, during his trial, "significant questions developed" as to the witness's identification of him as the "shooter." One such question arose after his counsel learned, on the day of trial, that there had been an error relating to the two photo arrays shown to Handy. Counsel claimed he was surprised at the prosecutor's announcement that the photo arrays had been incorrectly labeled.

In ruling on defense counsel's motion to continue, the trial court noted that it was clear from the testimony presented during the offer of proof that Handy had identified defendant and his brother in the photo arrays. It was equally clear, according to the court, that the mistake came when one of the two detectives labeled the answer sheet as those were being passed among them and Handy. However, defendant argues that it was possible that Handy had actually selected photos of two other men, not defendant nor his brother, and that the answer sheets were correctly labeled.

Defendant claims he was deprived of a fair trial by the State's failure to timely disclose the photo-array discrepancy, an error compounded by the trial court's denial of his motion for a continuance upon his discovery of the mix up. He accuses the State of "purposefully undermin[ing]" a fair trial by "intentionally avoiding" its duty to disclose.

We fail to recognize the gravity of the situation as described by defendant. For instance, in his brief, defendant makes the following representation: "All pre-jury *voir dire*

discovery revealed [Handy] failed to identify defendant as the speaker." It was not until the day of trial, counsel claims, that he learned that Handy had, in fact, identified defendant as the man claiming he had a gun in his sock at the American Legion. The record indicates otherwise. At a pretrial hearing in November 2008, one year before trial, counsel informed the trial court "there's only one individual that ***has identified the defendant." Counsel was referring to Milam, not Handy. Thus, it is apparent he indeed believed, at that point, that Handy did not pick defendant's photograph from the array. The prosecutor did not correct him and, in fact, had just represented to the court that she "believe[d] so" that only one individual was shown a photo lineup. Though, at the same hearing, Detective Dale Radwin testified that, from his perusal of the various reports and records in the case file, he learned that the witness seated at the bar (Handy) had identified defendant "through a photo spread."

Further, in Detective Shepard's interview of Handy on December 31, 2007, at her place of employment, Handy told Shepard that photo number four from photo array number two was a picture of the individual who had made the gun-in-his-sock comment. And, photo number two from photo array number one, was the man in the black fur coat who had approached as the two men argued. Although according to Handy's interview, it appears she did not identify defendant or his brother, Detective Shepard's supplemental narrative report dated January 16, 2008, should have put defendant on notice that Handy had, in fact, picked defendant and his brother as the two suspects. The report indicated the photo arrays had been mislabeled as number one and two.

In his supplemental report, Detective Shepard wrote:

"I showed her [(Handy)] two photo line-ups. She positively identified Charnell Brown as the person with the black fur coat on.

She positively identified Charmell Brown as the person that was in the argument and made the comment he had a pistol in his sock.

I used the same six photo line-ups with several people I spoke to. I have entered them into evidence at CPD and attached a copy of them to this report. They are labeled 'Line-Up #1' and 'Line-Up #2.' Line-Up #1 has photo #4 as Charmell Brown and Line-Up #2 has photo #2 as Charnell Brown."

It is apparent there was a discrepancy in the labeling of the two photo lineups when comparing the transcript of Handy's interview to Detective Shepard's January 16, 2008, report. This discrepancy should have been sufficient to put counsel on notice that, at a minimum, the matter needed clarification. We agree with the State that it seemed clear that defendant's photo appeared in spot number four on photo array number one, not photo array number two, as it had been labeled at the time of her interview. Defendant does not claim that he did not receive in discovery Detective Shepard's January 16, 2008, supplementary police report, which contained the quotes set forth above. In sum, this evidence from the record belies defendant's representation that he never knew Handy had identified defendant in the photo array until the day of trial. Because this information was of record, the clarification or explanation of that information on the day of trial cannot be described as "earth-shattering," as defendant claims in his brief.

Although we agree with the trial court that the State should have divulged the discrepancy when it became aware of it, we conclude that defendant did not suffer sufficient prejudice as a result of the State's failure so as to justify reversal.

"The failure to comply with discovery requirements does not in all

instances necessitate a new trial. [Citation.] A new trial should only be granted if the defendant is prejudiced by the discovery violation and the trial court failed to eliminate the prejudice. [Citation.] Among the factors to be considered in determining whether a new trial is warranted are the strength of the undisclosed evidence, the likelihood that prior notice could have helped the defense discredit the evidence, and the willfulness of the State in failing to disclose. [Citation.]" *People v. Harris*, 123 Ill. 2d 113, 151-52 (1988).

Defendant had the opportunity to notice the discrepancy and probe the State for an explanation, rather than building his defense around a questionable issue. Given the information contained in the record, we find the trial court properly denied defendant's motion to dismiss and his request for a continuance. We further find that, because the State failed to timely disclose the discrepancy, regardless of how "obvious" the discrepancy was, the court did not err in prohibiting the State from presenting testimony regarding Handy's identification of defendant in the photo array as a discovery sanction. The imposition of the sanction was sufficient to cure the error, as it did not rise to the level of jeopardizing defendant's right to due process. See *People v. Lipscomb*, 215 Ill. App. 3d 413, 437-38 (1991) (trial court's admonition to the jury cured any prejudicial impact of the State's failure to tender one page missing from the police officer's report; the defendant's due-process rights were therefore not implicated).

Further, we conclude that defendant was not denied his right to the effective assistance of counsel based on the court's denial of his motion for a continuance. Contrary to the State's argument in response, defendant did not claim he was denied the effective assistance of

counsel due to counsel's substandard performance--a claim which would trigger a *Strickland* analysis (see *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Rather, defendant claims the trial court deprived him of his right to the effective assistance of counsel by forcing counsel to proceed to trial arguably ill-prepared based on defendant's perceived ambush by the State. This argument is without merit. As explained above, we conclude that defendant was not prejudiced by (1) the State's late disclosure, (2) the court's denial of a continuance, or (3) the court's denial of defendant's motion to dismiss. We find no reversible error.

B. Jury Selection

Next, defendant argues that the selection of the jury was improper for two reasons: (1) the trial court failed to comply with questioning pursuant to Supreme Court Rule 431(b) and (2) a juror was excused for no reason other than he was an African- American male.

1. *Rule 431(b)*

At the start of defendant's jury trial, in the presence of the entire venire, the trial court stated the following principles: (1) defendant is presumed innocent and that presumption remains with him throughout the trial; (2) the State has the burden of proof and must prove defendant guilty beyond a reasonable doubt; (3) defendant does not have to testify; and (4) defendant's decision not to testify cannot be held against him. On separate occasions, the court advised each panel of four prospective jurors and two alternates in substantially the same manner as follows:

"As I've indicated to you, the defendant is presumed to be innocent of the charges against him. And that the defendant is not required to offer any evidence on his own behalf. But should the defendant offer evidence and decides to call witnesses or present

evidence on his behalf, will you weigh this evidence just as you would the evidence presented by the State?"

All jurors answered yes. After the court and both counsel had the opportunity to question each panel of four and the two alternates, the following exchange (or an exchange substantially similar) occurred:

"THE COURT: All right. For the four of you, the four of you understand that the defendant is presumed to be innocent of the charges against him. That before the defendant could be convicted, the State must prove him guilty beyond a reasonable doubt. That the defendant is not required to offer any evidence on his own behalf. And that if the defendant chooses not to testify, his failure to testify cannot be held against him in any way. The four of you understand those instructions. Is that correct?

FOUR JURORS: (Indicating in the affirmative).

THE COURT: And again, they answer in the affirmative.

Now, if the four of you will please raise your right hands."

Each juror was impaneled and sworn in substantially the same way. Defendant's counsel did not object. Prior to their deliberations, the jury was instructed on all of these principles as well.

In this appeal, defendant argues that the trial court failed to fully comply with Rule 431(b). Though the court asked each juror if he or she "underst[oo]d those instructions" (meaning the four principles set forth in Rule 431(b)), the court failed to give each juror the opportunity to state whether he or she *accepted* those principles--an error, defendant claims, justifying reversal.

Defendant concedes the contention of error was not preserved in the trial court proceedings, and therefore, in order for this court to review the error, we must do so under the plain-error doctrine. Specifically, defendant contends that plain-error review is appropriate in this case because the evidence of defendant's guilt was closely balanced. We review the issue of the trial court's compliance with a supreme court rule *de novo*. *People v. Garner*, 347 Ill. App. 3d 578, 583 (2004).

Rule 431(b) was adopted in 1997 to ensure compliance with *Zehr*. See *People v. Zehr*, 103 Ill. 2d 472, 477 (1984); Ill. S. Ct. R. 431(b), Committee Comments (eff. May 1, 1997). The *Zehr* court held that "essential to the qualification of jurors in a criminal case is that they know that a defendant is presumed innocent, that he is not required to offer any evidence in his own behalf, that he must be proved guilty beyond a reasonable doubt, and that his failure to testify in his own behalf cannot be held against him." *Zehr*, 103 Ill. 2d at 477. As originally enacted, Rule 431(b) provided that the trial court was not obligated to ask potential jurors whether they understood and accepted the *Zehr* principles absent a request from defense counsel. See *People v. Glasper*, 234 Ill. 2d 173, 187 (2009).

Effective May 1, 2007, Rule 431(b) was amended to impose "a *sua sponte* duty on the trial court to question each potential juror as to whether he understands and accepts the *Zehr* principles." *People v. Gilbert*, 379 Ill. App. 3d 106, 110 (2008). That is, such questioning was no longer dependent upon a request by defense counsel. *Gilbert*, 379 Ill. App. 3d at 110. Rule 431(b) currently provides as follows:

"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." Ill. S. Ct. R. 431(b) (eff. May 1, 2007).

The committee comments provide as follows:

"The new language is intended to ensure compliance with the requirements of *People v. Zehr*, 103 Ill. 2d 472 (1984). It seeks to end the practice where the judge makes a broad statement of the applicable law followed by a general question concerning the juror's willingness to follow the law." Ill. S. Ct. R. 431(b), Committee Comments (eff. May 1, 1997).

In this case, the trial court advised each venireperson of all four *Zehr* principles, asking each if he or she understood them. However, the court never gave each juror the opportunity to state whether he or she accepted each principle. The rule specifically provides that the court *shall* ask whether each juror "understands and accepts" the principles. In carrying out this duty, the court

is required to allow each juror an opportunity to respond. *People v. Chester*, No. 4-08-0841, slip op. at 7 (Ill. App. Apr. 11, 2011), ___ Ill. App. 3d ___, ___. Because the court did not ask each juror whether he or she accepted each principle, nor gave them an opportunity to respond to such an inquiry, we find the court in this case did not follow the precise mandate of Rule 431(b), and this failure to comply was error.

Having found error, we next determine whether the error qualifies as one justifying plain-error review. This court may review an error under the plain-error doctrine if (1) the evidence is closely balanced or (2) the error is "so substantial that it affected the fundamental fairness of the proceeding, and remedying the error is necessary to preserve the integrity of the judicial process." *People v. Hall*, 194 Ill. 2d 305, 335 (2000). Defendant seems to place a share of the burden of ensuring compliance with the rule upon the State. He insists that our review "should be pursuant to 'ordinary' error because to do otherwise would be rewarding the State for its reticence." Yet, defendant also suggests we review the error under the plain-error doctrine. In making that argument, he attempts to distinguish *People v. Thompson*, 238 Ill. 2d 598 (2010), a case which discusses only the second prong, while arguing only the merits of the first prong--that the evidence presented at trial was closely balanced.

We first note that the supreme court in *Thompson* held that a trial court's failure to comply with Rule 431(b) does not necessarily render a trial fundamentally unfair or unreliable and does not require automatic reversal. *Thompson*, 238 Ill. 2d at 614-15. Only upon the defendant's presentation of evidence that the jury was biased would his fundamental right to a fair trial be questioned. *Thompson*, 238 Ill. 2d at 614. The supreme court stated: "We cannot presume the jury was biased simply because the trial court erred in conducting the Rule 431(b) questioning."

Thompson, 238 Ill. 2d at 614. Thus, in analyzing the issue under a second-prong, plain-error analysis, the critical question is whether the defendant has shown that the trial court's Rule 431(b) error resulted in impaneling a biased jury. See *Thompson*, 238 Ill. 2d at 613.

As stated above, defendant in this case does not argue the trial court committed a substantial error and has offered no evidence of bias. Thus, without such evidence, defendant cannot demonstrate that the error affected the fairness of his trial or challenged the integrity of the judicial process. See *Thompson*, 238 Ill. 2d at 615.

Defendant insists that his conviction be reversed and the matter remanded for a new trial due to the trial court's error based on the fact that the evidence was closely balanced. Defendant bears the burden of persuasion in attempting to convince this court that the evidence against him was not overwhelming, such that the error could have affected the jury's verdict. See *People v. Herron*, 215 Ill. 2d 167, 187 (2005) (defendant bears the burden of persuasion to demonstrate that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against the defendant). He fails to do so. Instead, he claims only that "because the evidence was closely balanced, the blended failures of the trial court, State and defense regarding 'understand and accept' should culminate in reversal and remand for trial anew." This conclusory statement is not sufficient to sustain his burden.

Rather, we find that, contrary to defendant's assertions, the evidence at trial clearly established defendant's guilt. One witness, Handy, identified defendant in open court as the man who was arguing with the victim and who subsequently made a comment to another man that he had a gun in his sock. Another witness, Milam, testified that she saw a man exit a side door of the club, walk around to the front, reach into his clothing, and shoot Greer. She watched him get into a red

newer model car as she memorized his license plate. The next day, Milam selected defendant's picture from a photo array as the suspect. She also identified him in open court as the shooter.

Based solely on these witnesses, we conclude that the evidence presented at defendant's trial overwhelmingly implicated him and established his guilt. He has failed to carry his burden of persuasion that the evidence against him was closely balanced. As a result, the trial court's Rule 431(b) error is not reversible under the first prong of the plain-error doctrine either. Thus, after our analysis of the facts of this case, we conclude that the trial court's failure to strictly comply with the requirements of Rule 431(b) did not rise to the level of plain error. Accordingly, defendant has forfeited his claim and we affirm defendant's convictions.

2. *Batson* Challenge

Next, defendant claims that a new trial is warranted because the State used its peremptory challenges to exclude an African-American male from the jury in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). During jury selection, the State used one of its peremptory challenges on potential juror Devon Ware, one of only two African-American males in the entire venire. Defendant objected to excusing Ware for apparently reasons related only to his race. In responding to defendant's objection, the trial court stated:

"The issue on a *Batson* challenge, the first issue is, is there a *prima facie* case that a discriminatory practice is being conducted by the State. And we don't get to a race neutral explanation until the court has made a determination of a *prima facie* case. It's the court's opinion that there is not a *prima facie* case, and I am not going to require the State to provide a race neutral explanation. So the

motion--the objection is overruled. And Mr. Ware is, I believe, properly excused."

A trial court's decision on a *Batson* claim will not be reversed unless it is clearly erroneous; this deferential standard is appropriate because of the court's pivotal role in the evaluation process. *People v. Davis*, 233 Ill. 2d 244, 261 (2009). Defendant has the burden of proving a *prima facie* case and preserving the record, and any ambiguities in the record will be construed against him. *Davis*, 233 Ill. 2d at 262.

In *Batson*, the United States Supreme Court held that the fourteenth amendment's equal-protection clause prohibits the State from using a peremptory challenge to exclude a prospective juror solely on the basis of race. *Batson*, 476 U.S. at 89. Under *Batson*, the equal-protection clause of the fourteenth amendment is violated where the facts show that the State excluded an African-American venireperson on the assumption that the person will be biased in favor of defendant simply because of their shared race. *Batson*, 476 U.S. at 97.

The Court provided a three-step analysis for evaluating claims of discrimination in jury selection. *Rice v. Collins*, 546 U.S. 333, 338 (2006). First, the moving party has the burden to show that the nonmoving party exercised its peremptory challenge on the basis of race. *Rice*, 546 U.S. at 338 (citing *Batson*, 476 U.S. at 96-97); *People v. Easley*, 192 Ill. 2d 307, 323 (2000). If a *prima facie* case is made, the process moves to the second step, where the burden of persuasion shifts to the nonmoving party to present a race-neutral reason for excusing the venireperson. *Rice*, 546 U.S. at 338 (citing *Batson*, 476 U.S. at 97-98); see also *Easley*, 192 Ill. 2d at 323-24. "Although the prosecutor must present a comprehensible reason, 'the second stop of this process does not demand an explanation that is persuasive, or even plausible'; so long as the reason is not inherently

discriminatory, it suffices." *Rice*, 546 U.S. at 338 (quoting *Purkett v. Elem*, 514 U.S. 765, 767-68 (1995)).

Once the nonmoving party presents its reason for excusing the venireperson in question, the process moves to the third step in the analysis. In that third step, the trial court must determine whether the moving party has sustained its burden of establishing purposeful discrimination. *Rice*, 546 U.S. at 338 (citing *Batson*, 476 U.S. at 98). "This final step involves evaluating 'the persuasiveness of the justification' proffered by the prosecutor, but 'the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.'" *Rice*, 546 U.S. at 338 (quoting *Purkett*, 514 U.S. at 768).

First, we will discuss whether defendant established a *prima facie* case of racial discrimination. In making a *prima facie* case, the moving party must produce evidence sufficient to permit the trial court to draw an inference that discrimination has occurred. *People v. Hogan*, 389 Ill. App. 3d 91, 99 (2009). The court may conduct a "comparative juror analysis," as well as consider additional factors, such as: (1) the racial identity between the defendant and the excluded venirepersons; (2) the pattern of strikes against African-American venirepersons; (3) the disproportionate use of peremptory challenges against African-American venirepersons; (4) the level of African-American representation in the venire as compared to the jury; (5) the prosecutor's questions and statements during *voir dire* examination and while exercising peremptory challenges; (6) whether the excluded African-American venirepersons were a heterogeneous group sharing race as their only common characteristic; and (7) the race of the defendant, victim, and witnesses. *People v. Williams*, 173 Ill. 2d 48, 71 (1996).

Here, the trial court found that a *prima facie* case of discrimination under *Batson* was

not established and, accordingly, the analysis did not proceed beyond the first step. After carefully reviewing the record pertaining to the *voir dire* proceedings, we conclude that the court correctly found that defendant failed to establish a *prima facie* case for a *Batson* violation.

Devon Ware was called by the clerk as a potential juror in the first panel of four. The trial court began questioning and asked Ware general questions regarding (1) whether he had heard anything about the case, (2) whether he knew anyone related to the case, (3) whether he knew anyone that was a police officer or an attorney, and (4) if there was any reason why he would not be fair and impartial. Ware answered "no" to each question.

The trial court noted that Ware had indicated on a questionnaire that he or a close family member had been a victim of a crime. He denied the crime was one of violence and denied that it would affect his service as a juror. The court then asked a panel of four if anyone was familiar with the American Legion. Ware said yes, while the other three indicated no. The court asked Ware if he "had occasion to visit the Legion on North Hickory?" Ware answered: "Been on the outside. Not inside." Ware denied that his familiarity with the American Legion would affect his service as a juror. The court tendered questioning to the prosecutor, who immediately requested that Ware be excused, and the court obliged.

In support of defendant's claim that the State excused Ware on the sole basis of race, he asserts that another prospective juror, Ms. Chavarria, noted that she was "familiar with the location of the American Legion Hall, but she was 'accepted' and sworn as a juror." However, Chavarria told the trial court that she knew the *address* of the American Legion only and that she had never been to the location and knew nothing about it. It is reasonable to expect the prosecution to seek to excuse any person who had a familiarity with the scene of the crime. A juror who had been

to the scene before could possibly possess preconceived ideas related to the location and layout that the State would prefer to avoid, if possible. This is especially true when the shooting took place outside, the only part of the American Legion with which Ware was familiar.

There was no evidence of any pattern of striking African-Americans from the jury, nor was there any evidence of a disproportionate number of strikes used against African-Americans. The facts pertaining to the other factors were unremarkable in the overall context of this case. The *voir dire* questions posed to Ware and his responses thereto indicated there were significant and legitimate differences that distinguished him from other potential jurors, making them a better choice for the State. Under the circumstances, we find defendant failed to sustain his burden of demonstrating a *prima facie* case of racial discrimination in the jury selection process, and the court's decision to overrule defendant's *Batson* objection was not clearly erroneous.

C. Other-Crimes Evidence

Defendant also argues the trial court erred in allowing Milam, "the State's pivotal witness," to introduce evidence of defendant's other crimes. The excerpted testimony to which defendant refers was as follows: Milam told defendant, as she followed him to his vehicle after she watched him shoot Greer, that "he wouldn't get away with this one." Defense counsel objected, stating: "Your Honor, we make an objection. This is self-serving testimony. It's--it's going to try to bolster the credibility of whatever this witness may say--[.]" The trial court overruled the objection. Defendant also claims the State's closing argument compounded the error when the prosecutor reminded the jury of Milam's testimony as follows: "She tells him, you're not going to get away with this." Defendant claims these "united" errors prejudiced him to the extent they justify reversal.

The State asserts that defendant forfeited this argument on appeal and we agree. Though defense counsel asserted a contemporaneous objection to Milam's testimony at trial, the basis for his objection was that the testimony was bolstering her own credibility. Counsel did not object on the basis that her testimony constituted other-crimes evidence. Nor did defendant raise the issue in his posttrial motion.

"When, as here, a defendant fails to object to an error at trial and include the error in a posttrial motion, he forfeits ordinary appellate review of that error." *People v. Johnson*, 238 Ill. 2d 478, 484 (2010), citing *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). The underlying purpose of the rule of forfeiture is to afford the trial court the opportunity to correct its own errors and determine whether a new trial is warranted (*Herron*, 215 Ill. 2d at 175), which, in turn, affords the reviewing court the benefit of the trial court's judgment and observations (*People v. Pickett*, 54 Ill. 2d 280, 284 (1973)). Because defendant did not allow the trial court to consider his contention of error, we will not now consider it on review.

D. Prosecutorial Misconduct

Defendant pools each of his individual contentions of error raised above into his final argument that, when taken together, those instances constitute improper conduct on the part of the prosecutor. Defendant complains of the following acts:

"(1) failing to disclose critical identification flaws in pretrial discovery provided defendant; (2) withholding that critical information until immediately before jury selection; (3) remaining silent (or opposing) defendant's continuance where defendant was understandably seeking additional time to investigate, prepare, and

for additional discovery; (4) purposefully declining telling the trial court and defendant that they had learned of the critical identification information at least two months before trial after seeking the assistance of the lead detective for clarification in connection with identification photo spread 'mix-up(s)'; (5) refusing to correct the trial court's failure to provide complete Rule 431(b) principles; (6) striking the only African-American juror; (7) presumptively inviting the pivotal identification witness to recite for the jury that [defendant] wouldn't get away with '*this one*'; (8) during summations reminding the jury about '[defendant] not getting away with it,' but resting assured that the jury would clearly recall '*this one*'; and (9) while sitting directly in front of the jury during defense summation, propping up the decedent's photograph."

With the exception of the final complaint regarding the decedent's photograph, we have addressed each claim individually and concluded there existed no impropriety. As to the decedent's photograph, our review of the record indicated defense counsel made no objection regarding the use of a photograph during the State's closing argument. In fact, he began his argument presumably with the photo displayed. It was not until halfway through his argument that he apparently noticed the photo and stated: "I'm sorry, Judge, counsel has the live photo of Mr. --[.]" The court instructed: "Put it down. Thank you."

Not only did defense counsel proceed with his closing argument with the photograph displayed and without objection, but defendant fails to sufficiently present his claim of error in this

appeal. He cites no authority and provides no argument as to how the display of the decedent's photograph during the State's closing argument prejudiced him or constituted prosecutorial misconduct. For these reasons, we reject defendant's contention of error. See *People v. Morales*, 343 Ill. App. 3d 987, 991 (2003) ("Arguments not supported by citation to authority do not comply with the requisites of Supreme Court Rule 341(e)(7) and do not merit our consideration on appeal.").

III. CONCLUSION

For the foregoing reasons, we affirm the trial court's judgment. As part of our judgment, we award the State its \$75 statutory assessment against defendant as costs of this appeal.

Affirmed.

JUSTICE POPE, specially concurring:

I agree the trial court's judgment should be affirmed. I write separately because I do not believe the trial court erred during *voir dire* and therefore any plain-error analysis is unnecessary. In this case, after reviewing the Rule 431(b) principles with the potential jurors, the trial court stated "[Y]ou understand those instructions. Is that correct?" After each juror affirmatively indicated his or her understanding, the trial court stated "and *** you will follow those instructions. Is that correct?" Thus, in my opinion, the court asked the potential jurors whether they understood and would follow the *Zehr* principles. This complied with Rule '431(b) and, consequently, the court committed no error.