

No. 1-09-3009

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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. 09CR684
)	
FRED YOAKUM,)	Honorable
)	Maura Slattery-Boyle,
Defendant-Appellant.)	Judge Presiding.

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

ORDER

HELD: Defendant's conviction affirmed and his mittimus corrected where: the State proved him guilty of the charged offense beyond a reasonable doubt; he did not receive ineffective assistance of counsel; the trial court's failure to comply with Supreme Court Rule 431(b) did not prejudice defendant; and the mittimus failed to reflect 6 additional days of presentencing credit.

Following a jury trial, defendant Fred Yoakum was convicted of one count of possession of a stolen motor vehicle and was sentenced to 8 years' imprisonment. Defendant appeals his conviction, arguing: (1) the State failed to prove him guilty of the charged offense beyond a

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reasonable doubt; (2) he was denied his right to effective assistance of counsel; (3) the trial court failed to properly admonish the jury in accordance with Supreme Court Rule 431(b) as amended in 2007; and (3) his mittimus must be corrected. For the reasons contained herein, we affirm defendant's conviction and correct the mittimus.

BACKGROUND

On December 12, 2008, a vehicle owned by Christopher Gruenke was stolen. Defendant was subsequently charged with one count of possession of a stolen motor vehicle (625 ILCS 5/4-103(A)(1) (West 2008)).

Defendant elected to have a jury trial. During the jury selection process, the trial court made a series of introductory remarks to the entire venire. In particular, the court informed the jurors of three of the four *Zehr* (*People v. Zehr*, 103 Ill. 2d 472 (1984)) principles enumerated in 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). Accordingly, the prospective jurors were instructed about the defendant's presumption of innocence, the prosecution's burden of proof, and the right of the defendant not to present evidence. The trial court failed to address the fourth *Zehr* principle: that the defendant was not required to testify and that his decision not to testify could not be used against him. The trial court then questioned the group of prospective jurors about their acceptance of the principles concerning the defendant's presumption of innocence, and the State's burden of proof. The trial court failed to inquire whether each of the prospective jurors understood and accepted the principles preventing his decision not to testify from being used against him. After the *voir dire* process was concluded and the jury impaneled, the State

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proceeded with its case.

Julio Tapia testified that on the morning of December 12, 2008, he was working as a valet at a Holiday Inn Hotel located at 506 West Harrison Street in Chicago. Sometime between 6:30 and 7:30 a.m., Tapia retrieved a black Suburban vehicle owned by Christopher Gruenke, a guest that regularly frequented the hotel, from the Holiday Inn's parking lot and parked it in front of the hotel's main entrance. Because it was a cold day, Tapia left the motor running in the vehicle so it would warm up. Tapia then walked approximately 20 to 25 feet away to a covered canopy located between the hotel building and the parking lot. Tapia explained that the canopy was partially enclosed in plastic, but that the main entrance of the canopy was open, allowing him to see Gruenke's parked Suburban. From his vantage point inside the canopy, Tapia saw defendant enter the vehicle via the driver-side door. At that time, Tapia had been standing closer to the vehicle's passenger-side door. Tapia chased defendant as he started to drive the vehicle away from the hotel. When the car made a turn to exit the hotel property, defendant made eye contact with Tapia. Tapia acknowledged that the incident occurred "very fast," but he indicated that he got a "really good look" at defendant's face.

A cab driver at the hotel subsequently contacted the Chicago Police Department about the theft. Tapia's shift ended at 3 p.m. and he did not remember talking to any police officers that day. He indicated, however, that there was a lot of confusion after the theft. Tapia remembered providing a description of the offender to someone, but did not recall the person to whom he spoke. Tapia did remember that he described the offender as a "dark" colored male with braids in his hair; however, he was unsure if he provided age, height, or weight estimates.

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The following afternoon, Tapia received a call from Detective Takaki. Tapia was informed that officers had recovered the stolen vehicle and that they had taken a suspect into custody. Tapia was then asked to view a lineup. When he arrived at the police station, Tapia signed a lineup advisory form. He understood that he was not required to make an identification and that the police did not necessarily know whether the car thief was a participant in the lineup. After viewing the lineup, Tapia identified defendant as the perpetrator. Tapia explained that there were four men in the lineup, and that he was able to identify defendant within “two seconds” of viewing the lineup. Tapia explained that he recognized defendant “immediately because of his big eyes.”

The parties then stipulated to the testimony of Christopher Gruenke, the owner of the stolen vehicle. Per the stipulation, Gruenke would testify that on December 12, 2008, he was a patron of the Holiday Inn Hotel located at 506 West Harrison in Chicago. At that time, he owned a 2001 Chevrolet Suburban vehicle with Ohio license plate number DM80JJ, which he left in the care of the hotel’s valet. Police returned Gruenke’s stolen vehicle the following day. Gruenke did not know defendant and did not give defendant permission to use his car. The only person authorized to drive his vehicle was the hotel’s valet.

Detective Michael Takaki, a member of the Chicago Police Department’s robbery, burglary and theft division, testified that he received an assignment on December 12, 2008, to investigate the theft of Christopher Gruenke’s car. Detective Takaki confirmed that he assembled a lineup for Julio Tapia to view. Defendant was included in the lineup along with three “fillers.” Detective Takaki explained that when he assembles lineups he makes an effort to

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use fillers who bear some resemblance to the suspect in terms of race, gender, age, height, and weight. He acknowledged, however, that while defendant had braids in his hair, none of fillers used in the lineup wore braids in their hair.

On December 13, 2008, Detective Takaki met with Tapia and provided him with a lineup advisory form, which Tapia read and signed. Prior to viewing the lineup, Tapia provided him with a general description of the offender: “about five six and 150, [1]60 pounds, male, African American.” After viewing the lineup, Tapia identified defendant as the offender, and remarked that he specifically remembered defendant’s “big” brown eyes. Detective Takaki denied that he told Tapia who to identify or that he informed Tapia that the person who stole the car had been taken into custody. Detective Takaki explained that he did not inform Tapia that the suspect was part of the lineup because he did not wish to prejudice Tapia when he viewed the lineup. Detective Takaki also acknowledged that he did not include Tapia’s description of the offender in any of the reports that he generated or the handwritten notes that he completed during his investigation of the theft.

Officer Michael Pinzine testified that he was on patrol duty on December 12, 2008, at approximately 11 p.m. with his partner, Officer Fry. At that time, he and his partner were riding in a marked squad car traveling eastbound on 63rd Street when Officer Pinzine observed a black Chevrolet Suburban with the Ohio license plate DM80JJ parked approximately three feet away from the curb. Officer Pinzine used the computer terminal in his squad car to run the license plate, and found that the vehicle had been reported stolen. He and his partner drove back to the Suburban and parked their squad car in front of the vehicle and they waited for another squad car

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to arrive at the scene. Officer Pinzine then walked up to the vehicle and saw defendant was sitting in the driver's seat. The keys were in the car's ignition and the vehicle's engine was running. Officer Pinzine asked defendant to step out of the vehicle and defendant complied. Officer Pinzine confirmed that defendant never attempted to move the vehicle or evade the police; rather, he was cooperative. Defendant and the stolen vehicle were then taken into the police station and the vehicle was subsequently returned to Christopher Gruenke. There was no damage to the vehicle's door locks or steering column.

Officer Kevin Fry confirmed the account of defendant's arrest provided by his partner. At the time that he and his partner learned that the Surburban had been stolen, they did not have a physical description of a suspect. Following defendant's arrest, however, Officer Fry prepared an arrest report in which he included defendant's physical description, including his height, weight, hairstyle and complexion.

At the conclusion of Officer Fry's testimony, the State moved to admit four exhibits into evidence. The exhibits included Julio Tapia's signed lineup advisory form, a photograph of the lineup participants, the stipulated testimony of Christopher Gruenke, and a certified vehicle record from the Ohio Bureau of Motor Vehicles. Defense counsel did not object to the admissibility of any of the exhibits, and all four exhibits were admitted into evidence. Thereafter, the State rested its case.

Darnell Hite testified on defendant's behalf. He indicated that he and defendant grew up together and knew each other for about twenty years. On December 12, 2008, Hite and defendant were in Milwaukee, Wisconsin, visiting their friend, Mario Bailey. The three returned

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to Chicago sometime between 4 and 5 p.m. that day because Bailey was having a birthday party that evening. When they arrived in the city, Bailey drove Hite and defendant to a pool hall located at 63rd Street and Calumet Avenue, and left them to run some errands before the party. Defendant then left Hite at the hall to go to a local currency exchange. As Hite was standing alone outside of the pool hall, Mark Blakely, an old friend of his, drove up in a Black Suburban. Although Hite knew Blakely for years, he did not know Blakely's address or telephone number. Hite asked Blakely if he would drive him to a clothing store so he could purchase clothes for Bailey's birthday party. Blakely then offered to rent Hite his car for a few hours so Hite could go shopping. Hite agreed to rent Blakely's vehicle for two hours in exchange for payment of \$40. Hite explained that he had rented a vehicle from Blakely on two prior occasions and that it was common for people in his neighborhood to rent vehicles from each other because cabs did not regularly drive through the area.

When Hite entered the vehicle, he did not observe any damage to the Suburban's steering column or locks, or any broken windows. Hite then drove to his house located at 59th Street and Indiana, stopped briefly inside, and then returned to the pool hall where he picked up defendant. Together, Hite and defendant drove to JB Clothing Store located at 47th Street and Prairie and they both purchased clothes to wear to the party. Hite then drove to his house to change his clothes and let defendant take the rented Suburban to his own house so that he could get ready for the party. After he changed his clothes, Hite's girlfriend drove him to a hair salon located on 63rd Street and Evans so that he could have his hair "retwisted."

At approximately 11 p.m., defendant and Blakely came by the salon to pick up Hite. At

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that time, it had been more than two hours since Hite had rented Blakely's vehicle. Hite watched as defendant and Blakely conversed outside of the salon. When Blakely left shortly thereafter without the vehicle, Hite assumed defendant gave Blakely more money so they could continue using his car. Because Hite was still getting his hair styled, defendant left the area for a while to do "whatever he had to go do" and then returned to the salon. When defendant stopped the vehicle in front of the salon, Hite saw police approach defendant with their guns drawn and watched as they arrested defendant and drove off with the Suburban. Hite then finished getting his hair braided and left to go to the party.

When Hite arrived at the party, he informed Bailey that defendant had been arrested and borrowed Bailey's car to drive to the police station. He spoke to an officer at the station and was informed that defendant would be released soon. Hite then left to return to the party. After defendant's arrest, Hite never informed anyone that defendant had been with him in Milwaukee on the morning of December 12, 2008. When Hite rented the vehicle from Blakely, he never knew the car was stolen. Defendant was also unaware that the car had been stolen. At the conclusion of Hite's testimony, the defense rested its case.

After hearing closing arguments, the jury returned with a verdict finding defendant guilty of possession of a stolen motor vehicle. The trial court then presided over a sentencing hearing, and after considering the arguments advanced in aggravation and mitigation, the court sentenced defendant to 8 years' imprisonment. The court then agreed to stay the mittimus for one week so that defendant could visit with his children before serving his sentence. Defendant's posttrial motion was denied and this appeal followed.

ANALYSIS

I. Sufficiency of the Evidence

On appeal, defendant first argues that the State failed to prove him guilty of possession of a stolen motor vehicle beyond a reasonable doubt. Specifically, he contends that Jose Tapia's identification testimony was unreliable and that his behavior at the time of his arrest provided circumstantial evidence of his innocence.

The State responds that Tapia's identification was not unreliable and observes that he was able to identify defendant both in a lineup and at trial as the offender. The State also contends that there was no credible evidence to support defendant's defense. Because the jury found defendant guilty of the charged offense beyond a reasonable doubt after hearing all of the evidence and weighing the credibility and demeanor of the witnesses, the State argues that there is no basis to disturb the verdict.

Due process requires proof beyond a reasonable doubt to convict a criminal defendant. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). In reviewing a challenge to the sufficiency of the evidence, it is not a reviewing court's role to retry the defendant; rather, we must view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found each of the essential elements of the crime beyond a reasonable doubt. *People v. Ward*, 215 Ill. 2d 317, 322 (2005); *People v. Hayashi*, 386 Ill. App. 3d 113, 122 (2008). The trier of fact is responsible for evaluating the credibility of the witnesses, drawing reasonable inferences from the evidence, and resolving any inconsistencies in the evidence (*People v. Bannister*, 378 Ill. App. 3d 19, 39 (2007)), and a reviewing court should not substitute

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its judgment for that of the trier of fact (*People v. Sutherland*, 223 Ill. 2d 187, 242 (2006)).

Ultimately, a reviewing court will not reverse a defendant's conviction unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to his guilt. *People v. Carodine*, 374 Ill. App. 3d 16, 24 (2007).

To sustain a conviction for the offense of possession of a motor vehicle, the State must prove beyond a reasonable doubt that: the defendant possessed a vehicle; the defendant was not entitled to possess the vehicle; and that the defendant knew the vehicle was stolen. 625 ILCS 5/4-103(a)(1) (West 2008); *People v. Cox*, 195 Ill. 2d 378, 391 (2001). In addition to the elements of the crime, the State also bears the burden of proving beyond a reasonable doubt the identity of the person who committed that crime. 720 ILCS 5/3-1 (West 2006); *People v. Slim*, 127 Ill. 2d 302, 307 (1989). Vague and doubtful identification testimony is insufficient to sustain a criminal conviction; however, the identification testimony of a single witness is sufficient to sustain a conviction if the witness viewed the accused under circumstances that allowed for a positive identification. *People v. Lewis*, 165 Ill. 2d 305, 356 (1995); *Slim*, 127 Ill. 2d at 307; *People v. Grady*, 398 Ill. App. 3d 332, 341 (2010). Ultimately, the reliability of a witness's identification testimony is a question for the trier of fact. *In re Keith C.*, 378 Ill. App. 3d 252, 258 (2007). In assessing a witness's identification testimony, courts employ the factors set forth by the Supreme Court in *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972), which include: (1) the opportunity the witness had to view the perpetrator at the time of the offense; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the offender; (4) the certainty of the witness's identification; and (5) the length of time

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between the offense and the witness's identification. *Lewis*, 165 Ill. 2d at 356; *Slim*, 127 Ill. 2d at 307-08.

With respect to the first factor, defendant argues that Tapia's opportunity to view the offender was "minimal at best" noting that Tapia only saw the offender "for a few seconds, from a significant distance, with limited lighting." Here, the record reflects that the theft took place sometime between 6:30 and 7:30 a.m. Although Tapia was in a canopy approximately 25 feet away from the vehicle when he saw defendant enter the car, he testified that the entranceway of the canopy was open and that there was nothing to obstruct his view of the car. Moreover, when Tapia chased the vehicle, he was able to make eye contact with defendant as he turned the vehicle to exit the hotel's property. Although the length of the encounter was brief and may have occurred with less than perfect lighting conditions and from a distance, these factors do not undermine a witness's identification testimony. See, e.g., *People v. Moore*, 264 Ill. App. 3d 901, 911 (1994) (finding that witness had sufficient opportunity to view the offender when he viewed his face for a "few seconds" in a dark viaduct); *People v. Herrett*, 137 Ill. 2d 195, 201, 204 (1990) (finding that the witness had sufficient opportunity to view the offender when he saw him for a "several seconds" in a "dim[ly]" lit shop); *People v. Rodriguez*, 134 Ill. App. 3d 582, 589-90 (1985) (identification testimony sufficient where witness viewed the offender for a short period from a second-story window); see also *People v. Negron*, 297 Ill. App. 3d 519, 531-32 (1998) (recognizing that under *Neil*, a witness's limited opportunity to view the offender is only a single factor in a test based on the totality of the circumstances). Here, we do not find that the circumstances surrounding Tapia's ability to view the offender were so unreliable that they

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undermined his identification testimony.

Defendant concedes, and we agree, that the second factor supports the reliability of Tapia's identification testimony. As a valet, Tapia was responsible for the vehicles of the hotel patrons. When he observed defendant enter Christopher Gruenke's vehicle, he focused his attention on defendant and the vehicle. When defendant began to drive off in the car, Tapia ran after the Suburban and made eye contact with defendant as he made the turn to exit the hotel's property. Accordingly, at the time of the theft, it is clear that Tapia's degree of attention was high.

Turning to the third factor, the accuracy of the witness's prior description of the offender, defendant argues that Tapia did not provide the investigating officers with any description of the perpetrator, thereby undermining the reliability of his testimony. At trial, Tapia remembered providing a description of the car thief to someone, but did not recall the person to whom he spoke. He recalled that he described the offender as a "dark" male with braids in his hair. Tapia did not remember providing a description to Detective Takaki; however, Detective Takaki testified that Tapia informed him that the offender was an African American male, who was approximately 5'6" tall and weighed between 150 and 160 pounds. We acknowledge that any of the prior descriptions that Tapia provided were not very detailed; however, we observe that courts have consistently recognized that vague or discrepant descriptions do not necessarily render identifications unreliable because very few witnesses are trained to be keen observers. See, e.g., *People v. Williams*, 118 Ill. 2d 407, 413-14 (1987); *People v. Nims*, 156 Ill. App. 3d 115, 121 (1986); *People v. Bias*, 131 Ill. App. 3d 98, 104-05 (1985). Indeed, "[t]he credibility

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of an identification does not rest upon the type of facial description or other physical features which the complaining witness is able to relate. *** It depends rather upon whether the witness had a full and adequate opportunity to observe the defendant.’ ” *People v. Robinson*, 206 Ill. App. 3d 1046, 1051 (1991), quoting *People v. Witherspoon*, 33 Ill. App. 3d 12, 19-20 (1975). Here, Tapia had an adequate opportunity to observe defendant, and the descriptions that he did provide, although not detailed, did not conflict with or rule out defendant as the perpetrator. Moreover, he unequivocally identified defendant as the perpetrator after viewing a line-up as well as in the courtroom. See *Negron*, 297 Ill. App. 3d at 530 (finding that the testimony of two eye-witnesses were sufficiently reliable even though their prior descriptions of the offender were not detailed because the descriptions they did provide did not rule out defendant as the perpetrator and they were able to positively identify him).

Defendant concedes, and we agree that the fourth and fifth *Neil* factors support the reliability of Tapia’s identification testimony. Tapia demonstrated a high level of certainty when he identified defendant in the lineup. Upon viewing the lineup, Tapia did not express doubt or hesitation; rather, he was able to identify defendant within “two seconds” of observing the lineup participants. Tapia was also able to positively identify defendant at trial. Finally, we note that the lineup identification took place the day following the offense while the offense and the offender were still fresh in Tapia’s mind, thereby strengthening the reliability of Tapia’s identification testimony. Although Tapia indicated that he knew that Gruenke’s car had been recovered and that a person was in police custody at the time that he viewed the lineup, Tapia’s knowledge did not invalidate his identification testimony; rather, it simply affected the weight

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and credibility of his identification. *People v. Crenshaw*, 15 Ill. 2d 458, 464 (1959).

Ultimately, we reiterate that the reliability of a witness's identification testimony is a matter for the trier of fact (*In re Keith C.*, 378 Ill. App. 3d at 258) and that the identification of a single eye-witness is sufficient to support a conviction if the witness viewed the defendant under circumstances permitting a positive identification (*People v. Gabriel*, 398 Ill. App. 3d 332, 341 (2010)). After reviewing the relevant factors, we cannot conclude that Tapia's identification testimony was insufficient to prove defendant's guilty beyond a reasonable doubt; rather, a reasonable jury could have found his testimony sufficient to establish defendant's identity as the offender.

Defendant nonetheless emphasizes that he provided an alibi witness who testified that defendant was in Wisconsin at the time of the theft and provided a reasonable explanation as to how defendant came to be in possession of a stolen vehicle. We note, however, that the fact finder is not obligated to believe a defendant's alibi witness or afford more weight to the witness's testimony than to the State's witnesses, especially when the defendant's alibi witness has a close relationship with the defendant and failed to come forward during the initial investigation. See *Gabriel*, 398 Ill. App. 3d at 242, citing *People v. Rincon*, 387 Ill. App.3d 708, 723 (2009). Here, Hite was a close friend of defendant's for over twenty years, but acknowledged that he never came forward to tell anyone about defendant's whereabouts at the time of the vehicle's theft until trial. The jury heard Hite's alibi testimony as well as Tapia's identification testimony, and found Tapia's identification to be credible and reliable. We will not disturb the fact-finder's credibility determination where a reasonable jury could have deemed

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Hite's testimony incredible.

We also reject defendant's argument that the circumstantial evidence surrounding his arrest undercut the strength of the State's case against him. Specifically, defendant argues it is noteworthy that he made no attempt to flee when the arresting officers pulled in front of the Suburban and ordered him out of the car. Defendant argues that it is unlikely that he would have remained in the car had he had stolen the car or had known the car was stolen. Although a defendant's lack of attempt to evade arresting officers may lessen the strength of the State's case (see, e.g., *People v. Wright*, 147 Ill. App. 3d 302, 320 (1986)), a defendant's failure to flee does not necessarily provide reasonable doubt as to his guilt (see, e.g., *People v. Baylor*, 25 Ill. App. 3d 1070, 1073 (1975)). Although defendant did not attempt to flee the scene, it does not appear that defendant even had an opportunity to do so. The record reveals that once Officers Pinzine and Fry discovered that the Suburban was stolen, they pulled their squad car in front of the Suburban. Another squad car arrived within moments and parked directly behind the vehicle, effectively preventing defendant from moving the car. Given the fact that defendant was found in possession of a vehicle within hours that it was stolen, we find that a reasonable jury could have rejected defendant's argument that he was innocent simply because he cooperated with the arresting officers. See *State v. Funches*, 212 Ill. 2d 334 (2004) (It is permissible for fact-finder to infer a that a person exercising exclusive, unexplained possession of a stolen vehicle had knowledge that the vehicle was stolen). Ultimately, given the reliability of Tapia's identification testimony and the circumstances surrounding defendant's arrest, we do not find that defendant's cooperation with the arresting officers provides reasonable doubt as to his guilt.

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Instead, we find that the State presented sufficient evidence to prove defendant guilty of the charged offense. In accordance with section 4/103(a) of the Illinois Vehicle Code, the State was required to prove: the defendant possessed a vehicle; he was not entitled to possess that vehicle; and the defendant knew the vehicle was stolen. 625 ILCS 5/4-103(a)(1) (West 2008); *Cox*, 195 Ill. 2d at 391. At trial, Jose Tapia's identification testimony established that he saw defendant enter Christopher Gruenke's Chevrolet Suburban and drive it off hotel property. Christopher Gruenke's stipulation established that defendant did not have permission to possess this car. Officers Pinzine and Fry testified that they arrested defendant after he was found in possession of the vehicle, that was registered to Gruenke and had been reported stolen, later that evening. The fact that defendant was identified as the thief and was found in possession of the vehicle the same day it was stolen sufficiently showed that defendant knew that the vehicle was stolen. Accordingly, we affirm defendant's conviction for possession of a stolen motor vehicle.

II. Ineffective Assistance of Counsel

Defendant next argues that his conviction must be reversed because he was denied his constitutional right to effective assistance of trial counsel. Specifically, he contends that his trial attorney was ineffective for failing to object to the State's admission of Tapia's lineup advisory form. Defendant argues that the form constituted inadmissible hearsay and improperly bolstered the reliability of Tapia's identification testimony.

The State responds that the lineup advisory form was not inadmissible hearsay, and accordingly, counsel's failure to object did not constitute deficient representation or prejudice defendant.

Every criminal defendant has a constitutional right to receive effective assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I § 8; *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 2063, 80 L. Ed. 2d 674, 691-92 (1984). To prevail on a claim of ineffective assistance of counsel, the defendant must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984) and establish that: (1) counsel's performance fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced defendant. *People v. Albanese*, 104 Ill. 2d 504, 525 (1984); *People v. Baines*, 399 Ill. App. 3d 881, 887 (2010). With respect to the first prong, the defendant must overcome the "strong presumption" that counsel's action or inaction was the result of sound trial strategy. *People v. Jackson*, 205 Ill. 2d 257, 259 (2001). Counsel's performance is assessed by using an objective standard of competent performance under the prevailing professional norms. *People v. Ramsey*, 239 Ill. 2d 342 (2010). To satisfy the second prong, the defendant must establish that, but for, counsel's unprofessional errors, there is a reasonable probability that the trial court proceeding would have been different. *People v. Peeples*, 205 Ill. 2d 480, 513 (2002). A reasonable probability that the trial result would have differed is "a probability sufficient to undermine confidence in the outcome— or put another way, that counsel's deficient performance rendered the result of the trial unreliable or fundamentally unfair." *People v. Evans*, 209 Ill. 2d 194, 220 (2004). A defendant must satisfy both the performance and prejudice prongs of the *Strickland* test to prevail on an ineffective assistance of counsel claim. *Evans*, 209 Ill. 2d at 220; *People v. McCarter*, 385 Ill. App. 3d 919, 935 (2008).

The admissibility of evidence falls within the sound discretion of the trial court and,

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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).

An out-of-court statement that is offered to prove the truth of the matter asserted is hearsay, and is generally inadmissible unless it falls within a specific exception to the hearsay rule. *People v. Banks*, 237 Ill. 2d 154, 180 (2010); *People v. Mims*, 403 Ill. App. 3d 884, 897 (2010). One exception to the hearsay rule permits the use of business records as evidence. This exception is set forth in section 115-5 of the Code of Criminal Procedure of 1963 (Criminal Code), which in pertinent part, provides:

“Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in the regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.” 725 ILCS 5/115-5(a) (West 2008).

The business record exception to the hearsay rule is “premised on the recognition that records of an act, occurrence, or event that are routinely made at the time of the occurrence, or within a reasonable time thereafter, are normally sufficiently reliable to be admissible in evidence despite their hearsay nature.” *People v. Tsombanidis*, 235 Ill. App. 3d 823, 835 (1992). Police reports, however, are generally are not admissible under the business record exception. *People v.*

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Shinohara, 375 Ill. App. 3d 85, 113 (2007); *People v. Long*, 316 Ill. App. 3d 919, 928 (2000).

“Since the rationale of the business records exception is the probability of trustworthiness, [police] records prepared * * * during an investigation of an alleged offense, are not normally admissible, even if it is part of the regular course of business to make such records.”

Tsombanidis, 235 Ill. App. 3d at 825. Indeed, the observations and information included in police reports “may well call into question the motivation, the recall, or the soundness of conclusions of the author of the report or the person providing the information contained in the report” and thus “lack the earmarks of trustworthiness and reliability which are the true basis for the business records exception to the rule against hearsay.” *People v. Smith*, 141 Ill. 2d 40, 73 (1990). Documents completed by a public officer that are not investigative in nature, however, are admissible under the business exception. *People v. Russell*, 385 Ill. App. 3d 468, 474 (2008); *People v. White*, 167 Ill. App. 3d 439, 442 (1988).

Initially, we observe that defendant takes issue with the admission of a lineup advisory form, not a police report. The lineup advisory form did not contain any information pertaining to the investigation or arrest of defendant. Rather, it was simply a form shown to and signed by an eyewitness to a crime, done in the regular course of police business. The form did not involve any observations or conclusions or implicate any issues of motivation or recall. Accordingly, we are not convinced that this document is inadmissible hearsay. See, *e.g.*, *Russell*, 385 Ill. App. 3d at 474 (trial court did not err in admitting police department’s log book for a Breathalyzer machine or a printed read out from the machine because “they were made in the regular course of business and it was the regular course of the police department to make such records at the time

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of the events in question”); *Tsombanidis*, 235 Ill. App. 3d at 835-36 (chemical analysis report completed by a chemist was admissible in prosecution for delivery of cocaine charge under the business exception to the hearsay rule).

We similarly reject defendant’s argument that the form was not admissible because it contained inadmissible prior consistent statements made by Tapia. Although defendant is correct that it is generally impermissible to admit prior consistent statements of a witness for the purpose of corroborating trial testimony or bolstering that witness’s testimony (*People v. Heard*, 187 Ill. 2d 36, 70 (1999); *People v. McWhite*, 399 Ill. App. 3d 637, 641 (2010)), we do not find that the lineup form contained prior consistent statements made by Tapia. The lineup advisory form used was a boiler-plate form that contained the following statements: “I understand that the suspect may or may not be in the lineup/photo-spread. I understand that I am not required to make an identification. I do not assume that the person administering the lineup/photo-spread knows which person is the suspect” and contained a place for the signature of the person viewing the lineup. Although the document bore Tapia’s signature, it did not contain any statements made by him. We do not find that the admission of the form impermissibly bolstered Tapia’s trial testimony.

Even if the lineup advisory form was improperly admitted, we nonetheless find that defendant’s ineffective assistance of counsel claim fails because defendant cannot satisfy the prejudice prong of the *Strickland* test. Indeed, we are unable to conclude that but for counsel’s failure to object to the admissibility of Tapia’s signed lineup advisory form, the trial result would have differed. The jury heard identification testimony from Tapia, testimony about defendant’s

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arrest from Detective Takaki, and Officers Pinzine and Fry, as well as alibi testimony from Darnell Hite. Based on the testimony, the jury found defendant guilty of possession of a stolen motor vehicle beyond a reasonable doubt. We find that the exclusion of the lineup advisory form would not have negated the strong incriminating evidence of defendant's guilt, and accordingly, we reject defendant's claim of ineffective assistance of counsel.

III. Rule 431(b) Violation

Defendant next argues that the trial court failed to abide by the mandates of Illinois Supreme Court Rule 431(b), as amended in 2007, when it failed to inform the jurors of the four principles contained therein and inquire whether the jurors understood and accepted each of those principles. Specifically, defendant observes that the trial court failed to advise the venire that a defendant's failure to testify could not be used against him or inquire whether the venire members understood and accepted that principle. Moreover, when the trial court discussed the other three principles, it simply asked the potential jury members whether they could follow those principles, and did not specifically inquire whether they accepted and understood them. Defendant argues that the trial court's failure to comply with Rule 431(b) deprived him of his right to a trial by a fair and impartial jury.

Initially, the State responds that defendant forfeited review of this issue because counsel failed to object to the trial court's methodology during the jury selection process. On the merits, the State acknowledges that the trial court failed to strictly comply with Rule 431(b), but argues that the trial court's error did not constitute plain error requiring reversal of defendant's conviction.

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 the trial court's purported Rule 431(b) violations at trial or in a posttrial motion, and accordingly, we find that forfeiture applies.

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).

Defendant's 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*, 238 Ill. 2d 598, 607 (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 inquire as to a potential juror's acceptance of all four

¹ Prior to the amendment, Rule 431(b) required questioning only "[i]f requested by

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principles constitutes error. See *Thompson*, 238 Ill. 2d at 607; *Haynes*, 399 Ill. App. 3d at 912; *People v. Magallanes*, 397 Ill. App. 3d 83, 72 (2009).

Here, the record reveals that the trial court admonished the venire in narrative form about three of the four Rule 431(b) principles before *voir dire* questioning of the prospective jurors commenced. Specifically, in its prefatory comments, the trial court advised the venire that defendant was presumed innocent of the charges brought against him, that defendant was not required to offer evidence on his behalf and that the State bore the burden of proving defendant's guilt beyond a reasonable doubt. The court however, failed to mention the fourth Rule 431(b) principle that prohibits a defendant's decision not to testify from being used against him. After providing the venire with general principles of law applicable to the trial, the court then questioned the venire as a group about their acceptance of the *Zehr* principles pertaining to the defendant's presumption of innocence, the State's burden of proof. Specifically, the court asked the members of the venire to raise their hands if they believed they could not follow those principles.

While 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 terminology that deviated slightly from the precise language contained in the rule. See, e.g., *People v. Digby*, 405 Ill. App. 3d 544, 548

defendant." See *Thompson*, 238 Ill. 2d at 608.

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(2010) (trial court's questioning complied with Rule 431(b) when it inquired whether jurors "had a problem" or "disagreed" with the principles); *People v. Ingram*, 401 Ill. App. 3d 382, 393

(2010) (trial court complied with Rule 431(b) when it admonished the potential jurors of the four *Zehr* principles and inquired whether they had any "difficulty or quarrel" with the principles).

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 and the prosecution's burden of persuasion. More problematic, however, is that the trial court failed to mention and conduct any specific inquiry of the principle protecting a defendant's decision not to testify from being used against him. Moreover, although the court mentioned in its prefatory comments that the defendant was not required to present evidence, the court failed to make inquire about the venire's understanding and acceptance of that principle. Because Rule 431(b) requires a court to address and conduct an inquiry about each of the four *Zehr* principles, the court's failure to do so in this case constitutes error. We do not find, however, that this error rises to the level of plain error.

Initially, we reject defendant's claim that the evidence was closely balanced. Jose Tapia saw defendant steal Christopher Gruenke's Chevrolet Suburban under conditions permitting identification. Tapia identified defendant in a lineup and at trial as the offender. Officers Pinzine and Fry found defendant in possession of the Suburban the same evening it was stolen. The evidence against defendant was strong. Moreover, our supreme court in *Thompson* held that a trial court's failure to comply with Rule 431(b) does not presumptively result in a biased jury or

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infringe on a defendant's right to a fair trial and does constitute *per se* plain error under the second-prong of plain error review. *Thompson*, 238 Ill. 2d at 605-06. Accordingly, when the trial court errs in administering Rule 431(b) admonishments, it is the defendant's burden to prove that the violation resulted in a biased jury, and if he fails to do, his conviction will be upheld. *Thompson*, 238 Ill. 2d at 614. Here, as in *Thompson*, the trial court failed to strictly comply with Rule 431(b). Notwithstanding the trial court's error, 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, while the court failed to inform the venire that defendant's decision not to testify could not be used against him or question their acceptance of that principle or the principle that a defendant need not present evidence during the *voir dire* process, the court did address the jury members before they commenced deliberations, stating: "The defendant is not required to show his innocence. The fact that the defendant did not testify must not be considered by you in any way in arriving at your verdict." 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*, 238 Ill. 2d at 614; *Haynes*, 399 Ill. App. 3d at 914; *Magallanes*, 397 Ill. App. 3d at 100.

IV. Mittimus

Finally, defendant contends, and the State agrees, that his mittimus must be corrected to reflect six additional days that he spent in pre-sentencing custody.

A criminal defendant is entitled to credit for time spent in custody as a result of the

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offense for which his sentence is imposed. 730 ILCS 5/5-8-7(b) (West 2008); *People v. Williams*, 239 Ill. 2d 503, 507 (2011). “[T]he date of the mittimus is the first day of the sentence.” *Williams*, 239 Ill. 2d at 504. Here, defendant was arrested on December 30, 2009, and sentenced on October 19, 2009. The court agreed to stay the mittimus for one week, until October 30, 2009, so that defendant could visit with his children before being placed in the custody of the Illinois Department of Corrections. The court, however, only credited defendant with 316 days for the time he was in custody and did not account for the six additional days during which the mittimus was stayed. *Williams*, 239 Ill. 2d at 504. The mittimus should reflect a total of 322 days that defendant was in custody prior to serving his sentence. Pursuant to Supreme Court Rule 615(b)(1), a reviewing court has the authority to correct a defendant’s mittimus without remanding the cause to the trial court. Ill. S. Ct. R. 615(b)(1); *People v. Davis*, 303 Ill. App. 3d 684, 688 (1999). Accordingly, we correct defendant’s mittimus to reflect six additional days of pre-sentencing custody credit.

CONCLUSION

Accordingly, for the foregoing reasons, we affirm defendant’s conviction and correct the mittimus.

Affirmed; mittimus corrected.