

No. 1-10-2015

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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. 08 CR 14004
)	
MARTEZ SMITH,)	Honorable
)	Diane Gordon Cannon,
Defendant-Appellant.)	Judge Presiding.

ORDER

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

HELD: Defendant's conviction upheld where the trial court did not err in allowing the State to impeach and cross-examine his alibi witness and where the trial court's error in admonishing prospective jurors about the principles set forth in Supreme Court Rule 431(b) did not prejudice defendant.

¶ 1 Following a jury trial, defendant Martez Smith was convicted of attempt first degree

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murder and aggravated battery with a firearm and was sentenced to 34 years' imprisonment.

Defendant appeals, arguing that: (1) the trial court erred in allowing the State to cross-examine and impeach his alibi witness with his curfew records; and (2) the trial court deprived him of his constitutional right to a fair and impartial jury when it failed to comply with the mandates of amended Illinois Supreme Court Rule 431(b) (Ill. S. Ct. R. 431(b) (eff. May 1, 2007)). For the reasons explained herein, we affirm the judgment of the circuit court.

¶ 2

I. BACKGROUND

¶ 3 On the evening of July 12, 2008, Draivon Dixon was shot at several times as he was leaving Euclid Park. Dixon was struck once in the chest and survived. Defendant was subsequently charged in connection with the shooting. In pertinent part, defendant was charged with attempt first degree murder (720 ILCS 5/8-4, 5/9-1 (West 2008)) and aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1), (a)(2) (West 2008)). Defendant elected to proceed by way of a jury trial.

¶ 4 The trial judge presided over the jury selection process and commenced the *voir dire* by swearing in the venire and advising the potential jurors of the rules of law applicable to the trial, including the four *Zehr* principles (*People v. Zehr*, 103 Ill. 2d 472 (1984)) enumerated in Illinois Supreme Court Rule 431(b) as amended in 2007 (Ill. S. Ct. R. 431(b) (eff. May 1, 2007)). Specifically, in accordance with Rule 431(b), the trial judge informed the entire group of prospective jurors that: every criminal defendant is presumed innocent of the charges against him; the State bears the burden of proving the defendant guilty of the charged offenses beyond a reasonable doubt; the defendant is not required to prove his innocence and is not required to

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testify or present evidence on his behalf; and a defendant's decision not to testify may not be considered evidence against him. The judge did not inquire whether the prospective jurors understood the principles. After the jury was selected, the State proceeded with its case-in-chief.

¶ 5 At trial, Draivon Dixon, age 19, testified that in July 2008, he was living at home with his grandmother, mother, father, aunt, and his half-brother, Jason Kemp. They resided near the intersection of 96th and Normal, which was located near Euclid Park. On the evening of July 12, 2008, Draivon attended a family birthday party for his cousin. Draivon went there with his brother, Jason, and his friend Anthony Sayles. At approximately 9:45 p.m., Draivon left the party with Jason and Anthony to pick up something to eat. Draivon's father gave him permission to leave the party, but instructed his son to be home by 11 p.m. Draivon testified that they were on their way home after getting food from Kentucky Fried Chicken (KFC), when Anthony received a phone call from his girlfriend, who was at Euclid Park, located around 98th and Lowe, with some of her girlfriends. After Anthony received the phone call, Draivon decided to stop by the park instead of driving directly home even though his parents did not want him to go to the park at night.

¶ 6 They arrived at the park at approximately 10:15 p.m. and went to talk to Anthony's girlfriend and her friends. Although it was nighttime, Draivon testified that Euclid Park was well lit and had a "huge spotlight" that illuminated approximately 3/4 of the park. As Draivon, Jason and Anthony were talking to the girls, he saw a group of four guys walking toward them. Draivon was not familiar with the other guys and did not want to "get in any trouble" so he told Anthony and Jason that they should leave. As they started walking back to Draivon's car, three

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of the four guys approached him and asked if he was a member of a street gang. As they walked closer, Draivon recognized one of the guys as Denzel Kennedy, and explained that they rode the bus to Simeon High School together. Draivon identified defendant as one of the other guys with Denzel and testified that he had never seen him before that evening. Draivon tried to ignore Denzel and defendant and did not respond to their questions and he continued walking to his car. Denzel, however, kept "forcing the question," and defendant threatened to "steal off [him]" if he did not respond. Draivon interpreted defendant's statement to mean that he would start a fight if Draivon did not answer the question, so Draivon responded that he was not a gang member. He continued walking to his car, but turned around to tell defendant that he did not want to fight. When Draivon turned around, he saw that defendant holding a gun. Dixon testified that he was able to get a good look at defendant's face. Defendant was approximately 15 to 20 feet away from him when Draivon heard the first gun shot. He then "felt something warm going down the side of [his] chest" and realized he had been shot and fell to the ground. When Draivon fell to the ground, he heard another gun shot and "heard the bullet hitting the grass." Draivon was able to pick himself off of the ground and ran to his car.

¶ 7 Jason and Anthony were already in the car when Draivon got there. Draivon sat in the drivers' seat, but realized that he had dropped his keys and his cell phone when he had fallen. After he saw defendant run away, Draivon ran back into the park, got his keys, and drove home. Draivon's aunt drove him to Little Company of Mary Hospital to receive treatment for his gunshot wound, but he was subsequently transferred to Christ Hospital because it was equipped with a trauma center. After receiving treatment, Draivon spoke to some of the doctors and told

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them that he had been in his car, which had been parked “a little bit away from” Euclid Park when he was shot. Draivon explained that he told the doctors “a story” to “avoid getting into trouble” with his parents because they had told him to stay away from the park. He eventually told the doctors the truth about where he really was at the time of the shooting.

¶ 8 Draivon was released from Christ Hospital's trauma center the following day. At the time he was released, the bullet was still in his chest and was not taken out until later that summer. That evening, two police officers came to his house to investigate the shooting. Draivon told them that he knew one of the guys who approached him in the park the previous night because they went to school together. He told the officers that he would be able to “point him out” from his high school yearbook. Draivon was shown a yearbook and he identified Denzel from his yearbook picture. Draivon did not tell the officers that Denzel was the shooter; rather, he said that Denzel was the one who kept asking questions about Draivon’s gang affiliation. Draivon reported that Denzel was known to spend time “on the other side of Halsted between 95th and 99th.” When asked to describe the shooter, Draivon told the officers that defendant was a little taller than 5'11", that he was dark skinned, and that he had been wearing a white shirt.

¶ 9 After providing this preliminary information to the police, the officers returned to Draivon’s house later that evening and showed him several photographs. He identified defendant from the pictures and informed the officers that defendant was “the shooter.” On July 14, 2008, Draivon’s parents drove him to the police station to view a physical lineup. When he arrived at the police station, Draivon spoke to a detective, signed a lineup advisory form, and viewed the lineup. Defendant was included in the lineup and Draivon identified him as the shooter. Jason

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and Anthony were also at the police station at that time, but each of them viewed the lineup separately and were not permitted to speak to each other until each of them viewed the lineup.

¶ 10 On cross-examination, Draivon acknowledged that he was not supposed to visit Euclid Park and admitted that he lied to his parents about going there. Before the shooting, Draivon claimed he had not visited the park in about 2 years. When Denzel asked Draivon about his gang affiliation, the exact question he asked Draivon was whether he was “alls well or Mo.” Although Draivon was not involved in a street gang, he knew that Denzel was asking him if he was a member of the Black Stones, which was a gang known to frequent Euclid Park.

¶ 11 Although he recalled that defendant had been wearing a white shirt when he fired the gun, Draivon acknowledged could not recall the type of pants or shoes that defendant had been wearing. When he first noticed defendant holding the gun, Draivon indicated that his attention was directed at the muzzle of the gun, not defendant’s face. Draivon also acknowledged that after he was initially shot by defendant, his attention was focused on getting out of the park and to his car, rather than on defendant. Draivon admitted that he could not be certain that defendant was the one who kept firing in his direction because his back was turned.

¶ 12 Draivon also admitted that he initially lied to police and hospital personnel about his whereabouts at the time of the shooting and made up a story about someone reaching through the window and shooting him while he was in his car. When the police told Draivon that they had found his cell phone on the ground in the park and that his parents would not be mad at him for going to the park, Draivon told the officers the truth. Draivon acknowledged that he had never seen or spoken to defendant before the night of the shooting. Defendant did not attend his high

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school. Draivon denied telling Officer Korbas that the shooter attended Simeon High School.

¶ 13 Jason Kemp, Draivon's half-brother, confirmed that he was with his brother on the night of the shooting. At approximately 9:30 p.m., he, Anthony, and his brother left their cousin's birthday party to pick up something to eat. After Anthony received a phone call from his girlfriend, they made a detour to Euclid Park even though neither he nor his brother were allowed to go there. When they arrived at the park, Jason testified that they walked toward the playground area and began to talk to Anthony's girlfriend and some other girls that were there with her. Jason testified that they were only at the park for five to ten minutes before they decided to leave. He explained that they decided to leave when they saw four to five guys "come walking toward [their] way" and "felt trouble." Jason, Anthony and his brother began walking back to Draivon's car, but two of the guys began speaking to his brother. Jason said the two guys were speaking to his brother from a distance of approximately 2 feet. Although neither of the guys were speaking to him, Jason was able to see their faces and was able to hear what they were saying. Jason identified defendant as one of the two guys who approached his brother that night.

¶ 14 Jason stopped briefly by his brother before continuing to walk with Anthony to the car. He "felt like trouble was going to come." When Jason reached the car, he looked back and saw defendant "pull out a gun from his waist area." Jason then saw defendant point the gun at his brother and begin shooting. Draivon began to run to the car, but he fell and Jason saw him grab his side. Draivon was able to get up and began looking for his car keys. After finding his keys on the grass, Draivon got into the car and drove back to their house, which was only about two blocks away. Jason later accompanied his brother to the hospital.

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¶ 15 On July 14, 2008, two days after the shooting, Jason testified that he went to the police station with his brother and Anthony. At the station, Jason spoke to Detective Carlassare, signed a lineup advisory form and viewed a physical lineup. Jason identified defendant as the individual who shot his brother.

¶ 16 On cross-examination, Jason acknowledged that the park was “pretty dark” on the night of the shooting. When they got to the park at approximately 10:15 p.m., they had not yet picked up food to eat. Jason estimated that he was approximately 20 feet away when defendant began shooting at his brother. He had been talking on the phone when he heard the first gunshot and turned around. Before defendant fired the gun, Jason heard defendant tell Draivon that “he was going to steal off.” Defendant was not the one who did most of the talking, however. Jason identified Denzel as the “leader of the group” and the one who did most of the talking. Although Jason was not involved in a gang, he knew what Denzel was referring to when he spoke of “Mo’s” because he was familiar with some gang terminology. Jason estimated hearing approximately 3 gunshots and testified that defendant was the one who fired all of the shots. Jason did not recall the type of clothing any of the guys in the other group was wearing that night. He was also unable to recall any specific hairstyles worn by defendant or his friends.

¶ 17 Anthony Sayles, the final eyewitness to the shooting, testified that he met Draivon and Jason in school and confirmed that he was with them on the evening of July 12, 2008. At approximately 10:15 p.m. that evening, Anthony, Draivon and Jason left a birthday party and drove to Euclid Park so that he could meet up with his girlfriend. Anthony's girlfriend was with some of her friends by the playground in the park. Anthony testified that he, Draivon and Jason

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were only at the park for approximately five to ten minutes before they decided to leave. He explained that a group of guys were approaching them and he "felt kind of uncomfortable" and that "it was time to leave." Anthony identified defendant as one of the four guys who approached his group as they tried to leave the park. Although the other guys were not talking directly to Anthony, "words were being said." The other guys were close enough to touch, but Anthony explained that he was not really looking at them at that point because he "was really trying to get as far away as [he] could." Before Anthony reached the car, he "heard [gun]shots." When Anthony turned around, he saw Draivon on the ground and observed defendant shooting at him. Draivon was able to get off the ground and reach the car. After returning to the park to get his car keys, Draivon drove home and he was taken to the hospital.

¶ 18 On July 14, 2008, two days after the shooting, Anthony went to the police station to view a physical lineup. After meeting with a detective and signing a lineup advisory form, Anthony viewed the lineup and identified defendant as the shooter. Although Draivon and Jason were also at the police station at that time, Anthony viewed the lineup and made the identification alone.

¶ 19 On cross-examination, Anthony acknowledged that the park was dark on the night of the shooting. Although he heard the other guys make comments to Draivon and heard phrases such as "split your lick" and "steal on you," Anthony was unsure which individual was speaking to Draivon. Anthony only recalled defendant saying that he was going to "steal on" Draivon and believed that someone other than defendant was the one who was doing most of the talking. Anthony estimated that he was approximately 10 to 15 feet away from defendant and his friends

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when the shots were fired. Anthony acknowledged that he spoke to Jack Burn, a private investigator, sometime in August 2009, and recalled that he told Burn that the shooter was the one who was doing most of the talking that night. Anthony also told Burn that he only got a "quick glimpse" at the shooter. He confirmed that he had never seen or spoken to defendant prior to July 12, 2008. Anthony testified that defendant and his friends were all dressed similarly on the night of the shooting and were all wearing white shirts and blue jeans. Defendant and his friends were all young African American males.

¶ 20 Dwayne Dixon, Draivon and Jason's father, testified that Draivon was living with him in July 2008 in a residence located at 96th and Normal, which was near Euclid Park. Jason was not living with them at the time; rather, he was living with his mother but visited them every other weekend. Dwayne described the area around Euclid Park as "a little dangerous" and confirmed that he instructed his sons not to spend time in the park because there was "a lot of activity, gang activity" that took place there. On July 12, 2008, the night of the shooting, Dwayne was with his sons at a family party. Before he left, he told his sons to start making their way home sometime around 9:30 and 9:45 p.m. He did not want his sons staying out too late because the streets were "dangerous out there." At approximately 10:30 p.m. that evening, Dwayne received a call from his wife. She was "hysterical." Dwayne learned that Draivon had been shot and met his wife at the hospital. His son received medical treatment and was discharged the next day. On July 14, 2008, after receiving a phone call from detectives, Dwayne took his sons and Anthony Sayles to the police station, where they each took turns viewing a physical lineup.

¶ 21 Chicago Police Officer Brandon Rodekhor testified that on July 13, 2008, he was a

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member of the Chicago Police Department's Gang Enforcement Unit and received an assignment to conduct a follow-up investigation on a shooting that occurred the previous night at Euclid Park. After receiving the assignment, Officer Rodekhor and his partner, Officer Matteson, went to speak with Draivon. During the interview, Draivon informed them that he had never seen the shooter until the previous night, but that he knew Denzel Kennedy, one of the individuals who had been present with the offender at the time of the shooting. Draivon told Officer Rodekhor that he had previously seen Kennedy at the bus stop located in the vicinity of 76th and Halsted, and identified Denzel's picture from his high school yearbook. Draivon also provided them with a description of the shooter. He described the shooter as a "male black, approximately six feet tall, [and] 17 to 19 years of age."

¶ 22 After completing their interview with Draivon, Officer Rodekhor and his partner returned to the police station and utilized their "data warehouse system" to compile a photo array. After compiling the photo array, Officer Rodekhor returned to Draivon's house, showed him the pictures and asked him if he could identify the shooter. Draivon identified defendant. After obtaining Draivon's identification, Officer Rodekhor and his partner went to defendant's house and arrested him. At the time of his arrest, defendant was living at 9822 South Carpenter, which was "within a half mile" of Euclid Park.

¶ 23 On cross-examination, Officer Rodekhor acknowledged that when he began his investigation, he knew that Denzel Kennedy had been involved somehow in the shooting, but he denied being told that Draivon had identified him as the shooter. When he compiled the photo array in this case, he included defendant's picture as well as five other pictures. The five fillers

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ranged in age from 16 to 20 years' old. They were between 5'5" and 6'3" tall and their weights varied from 140 pounds to 225 pounds. Officer Rodekhor testified that when he compiled photo arrays, he tried to put together pictures of people who appear similar to the offender. He confirmed that Draivon made the identification at approximately 10:30 p.m. on July 13, 2008, which was approximately 24 hours after the shooting.

¶ 24 James Carlassare, a detective with the Chicago Police Department, testified that he received an assignment at approximately 8:30 a.m. on July 14, 2008, to investigate the recent Euclid Park shooting. After speaking to Officer Rodekhor, Detective Carlassare conducted a lineup. He met with Draivon Dixon, Jason Kemp and Anthony Sayles and had them sign lineup advisory forms before taking them to view the lineup. Detective Carlassare clarified that each of the witnesses viewed the lineup individually and explained that they were not permitted to speak to each other while the lineup was being conducted. Defendant was a participant in the physical lineup and Draivon, Jason and Anthony each identified him as the shooter. Neither of the witnesses displayed any hesitation before identifying defendant.

¶ 25 On cross-examination, Detective Carlassare confirmed that prior to conducting the physical lineup, he knew that Draivon had previously identified defendant as the shooter after viewing a photo array. Detective Carlassare acknowledged that there were four participants in the lineup and that they ranged in age from 17 to 29 years of age. The participants were all different sizes. He acknowledged that when he assembled a physical lineup, he tried to include people that are relatively the same size and height. In this case, he "did the best [he] could" to assemble a good lineup.

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¶ 26 After Detective Carlassare's testimony, the State proceeded by way of stipulation. The parties stipulated that on July 12, 2008, Edwin Jones, an evidence technician with the Chicago Police Department processed the crime scene at Euclid Park. In a grassy area approximately four inches west of the curb, Jones recovered a cell phone and a fired bullet and inventoried those items in accordance with police protocol.

¶ 27 The parties further stipulated that Doctor Deshmuk recovered a bullet from Draivon in September 2008 and the bullet was subsequently turned over to Yvonne Cary, an evidence technician with the Chicago Police Department. This bullet was also inventoried in accordance with police protocol.

¶ 28 After presenting the aforementioned stipulations, the State rested its case. The defense moved for a directed finding, which the trial court respectfully denied. Thereafter, defendant proceeded with an alibi defense.

¶ 29 Nicole Williams, defendant's mother, testified that in July 2008, she resided with her son at 9822 Carpenter, which was "quite a distance" away from Euclid Park. Her son attended Julian High School. In the summer of 2008, her son was under a court ordered curfew. Pursuant to the terms of the curfew, defendant had to remain in the house between the hours of 10 p.m. and 7 a.m. Williams explained that she took steps to ensure that her son abided by his court ordered curfew. She required her son to be at home around 3:30 p.m. each day, which was the time that she typically ended her work day. Williams testified that she "specifically ensured that [her son] did not violate his curfew." In addition, she explained that someone from pre-trial services would check on her son approximately four times per week. Pre-trial services would either come

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to the house or call the house to ensure that her son was present and in compliance with the terms of his curfew.

¶ 30 On July 12, 2008, Williams remembered arriving home around 3:30 p.m. At that time, defendant was in the house and was playing video games as she began to do housework. At approximately 10 p.m. that evening, Williams was in the basement of her house doing laundry and her son was upstairs playing games with his father. Defendant remained in the house all evening. Williams did not finish doing laundry until after 11:30 p.m. and defendant was still awake and playing games with his father when she went to sleep. As far as she was aware, defendant was "absolutely" in compliance with his court ordered curfew that evening. Williams did not recall any time that her son had violated his mandated curfew.

¶ 31 On cross-examination, Williams acknowledged that a non-compliance violation had been entered against her son on May 29, 2008. She denied, however, that her son had violated the terms of his curfew at that time. Williams explained that on May 29, 2008, someone from pre-trial services attempted to call the house and speak with her son to ensure that he was abiding by the terms of his curfew, but that their phone was not in working order that evening. Even though their phone was not working properly, Williams testified that her son was at home and did not violate the terms of his curfew. Although she usually required her son to be home by 3:30 p.m. every day, Williams testified that her son came home "a little bit before 8 o'clock" on July 12, 2008. She explained that she allowed him to go outside that day because it was summertime and he was not working then.

¶ 32 On redirect, Williams clarified that defendant was at home at 3:30 p.m. on July 12, 2008,

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when she arrived home from work but that he left the house briefly and returned shortly before 8 p.m. that night.

¶ 33 Chicago Police Officer Dean Korbis testified that on July 12, 2008, he was assigned to investigate the Euclid Park shooting. After receiving his assignment, he arrived at Christ Hospital, where he spoke to Draivon Dixon. At that time, Draivon informed him that the person who shot him was a student at Simeon High School. Draivon indicated he had seen the shooter's picture in his high school yearbook and had seen him catch the bus at the intersection of 96th Street and Halsted Avenue.

¶ 34 On cross-examination, Officer Korbis acknowledged that his conversation with Draivon took place in the emergency room of Christ Hospital and lasted only five minutes. He did not memorialize their conversation in any way.

¶ 35 Defendant was admonished about his right to testify, and elected not to provide any testimony. Thereafter, the defense rested its case.

¶ 36 The State elected to call rebuttal witnesses and re-called Officer Rodekohr to testify. He testified that when he arrested defendant on July 13, 2008, at approximately 11 p.m., he read defendant his *Miranda* rights. At that time, defendant indicated that he understood his rights and elected to remain silent. When they arrived back at the 22nd District, Officer Rodekohr re-*Mirandized* defendant. Defendant, again acknowledged that he understood his rights, but this time, he indicated that he wanted to give a statement. During their conversation, defendant told Officer Rodekohr that he had been at Euclid Park the previous day playing basketball when he heard gunshots. Defendant said he saw several people in white T-shirts running out of the park.

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Defendant then ran back to his house. Detective Rodekohr included the substance of this conversation in his written report, but he did not ask defendant to provide a handwritten statement or use audio or video equipment to record their conversation.

¶ 37 Detective Carlassare also testified as a rebuttal witness. He testified that he spoke to defendant after he had been identified by three eyewitnesses from the physical lineup. Their conversation occurred in an interview room at approximately 6:15 p.m. on July 14, 2008.

Defendant was read his *Miranda* rights and indicated that he wanted to make a statement at that time. Defendant told Detective Carlassare that he was playing basketball at Euclid Park at the time of the shooting. He heard gunshots but did not see who was shooting and did not see anybody get shot. Defendant then ran home. When Detective Carlassare informed defendant that he had been identified from the physical lineup, defendant responded that he was at the park with two friends, Denzel and "T." Defendant said that it was his friend "T" who had the gun. On re-cross, Detective Carlassare confirmed that defendant's statement was a verbal statement and that it had not been recorded with audio or visual equipment or physically memorialized.

¶ 38 Michael J. Koziol, an officer of the court in Cook County's Pre-Trial Services Division, was the final rebuttal witness called by the State. Koziol testified that he was responsible for monitoring defendants on bond to ensure that they are compliant with the conditions of their bond. Pursuant to policy, curfew checks are made either in person or over the phone. He explained that curfew checks on defendants were performed "randomly. It could be two or three times a night. It could be two or three times a week [or] [o]nce a month." Checks are performed randomly "to keep the defendants on their toes as to when somebody is actually coming out."

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Koziol further explained that a defendant's compliance or noncompliance with the terms of his curfew is documented after each curfew check and that the records are submitted to the court.

¶ 39 Koziol indicated that he was a member of the curfew team that was assigned to monitor defendant in 2008. He and other team members were responsible for documenting the curfew checks that were made on defendant. Defendant's records indicate that on May 29, 2008, pre-trial services personnel made two attempts to contact defendant to determine whether he was compliant with the terms of his curfew. At approximately 12 a.m. a phone call was placed to defendant's residence, but no one answered the phone. Thereafter, a member of pre-trial services went to defendant's house, rang the bell and knocked on the door several times, but no one answered the door. Defendant was deemed not compliant with the terms of his curfew that day. Based on the notations contained in defendant's pre-trial services document, there was never a time that curfew checks were performed several times per week. Only two checks were initiated from June 7, 2008 to June 26, 2008, and no curfew checks were made from June 26, 2008 to July 12, 2008.

¶ 40 Following Koziol's testimony, the State rested its rebuttal case and the parties delivered closing arguments. After hearing closing arguments, the jury returned with a verdict finding defendant guilty of aggravated battery with a firearm and attempt first degree murder. The jury also made a special finding that during the commission of attempt first degree murder, defendant personally discharged the firearm that caused great bodily harm to Draivon. Following the denial of defendant's posttrial motion, the court presided over a sentencing hearing. After hearing the evidence advanced in aggravation and mitigation, the court merged the convictions and

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sentenced defendant to 34 years' imprisonment for attempt first degree murder.

¶ 41 This appeal followed.

¶ 42 **II. ANALYSIS**

¶ 43 **A. Improper Cross-Examination and Impeachment**

¶ 44 On appeal, defendant first contends that the trial court committed reversible error when it allowed the State to cross-examine defendant's mother and alibi witness about his curfew records, which reflected that defendant violated the terms of his curfew approximately one month prior to the shooting because the records pertained to a collateral matter and were thus, not proper evidence of impeachment. Similarly, defendant maintains that the court erred in permitting the State to introduce defendant's curfew records into evidence during rebuttal because those records were not relevant to his mother's testimony on direct or cross-examination regarding his whereabouts at the time of the shooting.

¶ 45 The State, in turn, initially responds that defendant has forfeited these arguments on appeal. The State acknowledges that defense counsel objected to the State's cross-examination of defendant's mother and its use of defendant's curfew records in rebuttal, but argues that he did not cite improper impeachment as the basis for his objections. Accordingly, the State contends that these issues may only be reviewed for plain error. On the merits, the State argues that the cross-examination of defendant's mother and the use of his curfew records was proper. It observes that the crux of defendant's alibi defense was that he was required to abide by the terms of a court-ordered curfew and was monitored by both his mother and court personnel. Accordingly, the State argues that the trial court did not err in allowing the State to cross-examine defendant's

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mother or use his curfew records to refute the suggestion that defendant could not have violated curfew on the night of the shooting.

¶ 46 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).

¶ 47 In this case, at trial, defense counsel objected to the State's cross-examination of defendant's mother regarding prior curfew violations on the grounds of relevancy. In his posttrial motion, defendant objected on different grounds to the State's cross-examination of his mother, citing improper impeachment. With respect to the State's use of defendant's curfew records during rebuttal, counsel initially objected because he had not been provided with a copy of the records in a timely manner and because the records contained information that exceeded the scope of the testimony brought out on direct examination. Later, in the posttrial motion, defendant argued that the introduction of the records into evidence was improper impeachment. Accordingly, although defendant made objections at trial, the basis for the objections are different than the challenges that defendant raised in his posttrial motion and on appeal. We reiterate that where a purported error is not objected to with specificity at trial or included with specificity in a posttrial motion, the issue has not been properly preserved for appellate review. *Enoch*, 122 Ill. 2d at 186; *Piatkowski*, 225 Ill. 2d at 564.

¶ 48 The plain error doctrine, however, provides a limited exception to the forfeiture rule. Ill.

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S. Ct. R. 615(a) (eff. Jan. 1, 1967); *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. Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967); *Bannister*, 232 Ill. 2d at 65. The first step in any such analysis is to determine whether any error actually occurred *People v. Walker*, 232 Ill. 2d 113, 24-25 (2009). If an error is discovered, the defendant then bears the burden of persuasion to show that the error prejudiced him under either prong. *People v. McLaurin*, 235 Ill. 2d 478, 495 (2009). Keeping these principles in mind, we turn now to address the merit of defendant's claim.

¶ 49 "Meaningful cross-examination is central to our adversarial system of justice." *People v. Safford*, 392 Ill. App. 3d 212, 224 (2009). It is within the purview of the trial court to determine the latitude to be permitted on cross-examination. *People v. Hall*, 195 Ill. 2d 1, 23 (2000); *People v. Brazziel*, 406 Ill. App. 3d 412, 429 (2010); *People v. Baugh*, 358 Ill. App. 3d 718, 739 (2005). Generally, the scope of cross-examination is limited to matters discussed by the witness on direct examination as well as to any matters pertaining to witness credibility. *People v. Terrell*, 185 Ill. 2d 467, 498 (1998); *Brazziel*, 406 Ill. 2d at 429. This limitation, however, is to be "construed liberally to allow inquiry into whatever subject that tends to explain, discredit, or destroy the witness' direct testimony. *Id.*; see also *Hall*, 195 Ill. 2d at 23 (recognizing that "any permissible kind of impeaching matter may be developed on cross-examination, since one of the primary purposes thereof is to test the credibility of witnesses"). Impeachment, however, must be confined to relevant matters, not irrelevant collateral matters. *People v. Sandoval*, 135 Ill. 2d

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159, 181 (1990); *People v. Hays*, 353 Ill. App. 3d 578, 584 (2004). " 'A matter is collateral if it is not relevant to a material issue of the case.' " *People v. Santos*, 211 Ill. 2d 395 (2004), quoting *Esser v. McIntyre*, 169 Ill. 2d 292, 304-05 (1996). Whether something is a collateral matter is a determination that "is best left 'largely in the control of the trial court.' " *People v. Collins*, 106 Ill. 2d 237, 270 (1985), quoting 3A Wigmore, Evidence sec. 1003, at 964 (Chadborn rev. 1970)). Ultimately, the trial court's rulings regarding the scope of cross-examination will not be disturbed absent an abuse of discretion that resulted in manifest prejudice to the defendant. *Hall*, 195 Ill. 2d at 23; *Brazziel*, 406 Ill. App. 3d at 429; *Baugh*, 358 Ill. App. 3d at 739.

¶ 50 Here, the crux of defendant's alibi defense was that he was not at Euclid Park on the night that Draivon was shot because he was required to be at home pursuant to the terms of a court ordered curfew. The defense theory was broadcast to the jury during opening statement:

"At the time this happened, which was at 10:24 at night, my client was over a mile and a half away at his house with his mother. And his mother is going to come to court *** [a]nd she will take the stand, and she will testify that he was at the house. And how does she know that? Something happened two years ago. We're going to learn that [defendant] was on a court ordered curfew. Meaning he had to be at his house at 10:00 o'clock at night until 6:00 o'clock in the morning. Being monitored by the Cook County Sheriff.

Nicole Williams, [defendant's] mother will testify that she made sure he did not violate that curfew. And that he was where he was supposed to be each and every night. And that no violation was ever filed against [defendant] on July 12th."

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¶ 51 Thereafter, when called to the stand, Williams testified in a manner consistent with counsel's opening statement. Defense counsel asked Williams specific questions about her son's whereabouts and his compliance with the terms of his curfew on the night of the shooting and she responded that her son was at home playing video games with his father that evening. Counsel, however, asked broader, non-time specific questions about the measures taken by the courts to ascertain defendant's compliance with his court ordered curfew as well as the efforts she personally made to ensure that her son followed the requirements of his curfew. In pertinent part, Williams testified that she required her son to abide by an even stricter curfew and be at home when she returned from work at 3:30 p.m. She testified that she "absolutely" ensured that her son did not violate his curfew.

¶ 52 Based on this testimony, the court allowed the State to ask Williams about her son's previous violations of his court ordered curfew, including a violation on May 29, 2008. We do not find that the trial court erred or abused its discretion in allowing this questioning. Defendant suggests that the court allowed the questioning solely on the basis of defense counsel's opening statement; however, the record does not support his claim. Although Williams was asked time specific questions about her son's compliance with his curfew on the night of the shooting, a review of Williams' testimony about her son's compliance with his court-ordered curfew reveals that it was not strictly limited to the night of the shooting. She provided additional detail regarding the manner in which she "absolutely" ensured that her son followed the terms of his court ordered curfew. The questions asked by the State regarding his previous violation were not improper as they addressed the very substance of defendant's alibi, a matter that can hardly be

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deemed "collateral." In addition, the questions were designed to challenge William's credibility, which is undisputably an appropriate subject for cross-examination. *Terrell*, 185 Ill. 2d at 498; *Brazziel*, 406 Ill. 2d at 429. Here, we do not find that the trial court erred in allowing the State to engage in the aforementioned cross-examination.

¶ 53 We similarly reject defendant's argument that the trial court erred in allowing the State to use his curfew records during its rebuttal case.

¶ 54 Courts may allow the State to present rebuttal evidence " 'where the evidence tends to explain, contradict or disprove the evidence of the defendant.' " *People v. Woods*, 2011 IL App (1st) 091959, ¶ 34, quoting *People v. Daugherty*, 43 Ill. 2d 251, 255 (1969); see also *People v. Carter*, 228 Ill. App. 3d 526, 539 (1992). Business records may be used to rebut and impeach a defense witness. See, e.g., *People v. Freeman*, 85 Ill. App. 3d 1129, 1137 (1980). The trial court's decision to admit rebuttal evidence will not be disturbed absent an abuse of discretion. *Woods*, 2011 IL App (1st) 091959, ¶ 34; *Carter*, 228 Ill. App. 3d at 539.

¶ 55 Initially, we note that although defendant claims his curfew records were entered into evidence, the record does not support this claim. The records were not themselves admitted into evidence during the State's rebuttal;¹ rather, the State called Michael Koziol, an officer of the court in Cook County's Pre-Trial Services Division, to provide testimony about the manner in which curfew checks are performed and recorded as well the content of defendant's records.

¹ Both parties, however, apparently agree that the records could have been admitted into evidence as a business record pursuant to section 5/115(a) of the Code of Criminal Procedure of 1963. 725 ILCS 5/115(a) (West 2008).

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Despite defendant's mis-characterization, we not find that the trial court erred in allowing the State to elicit such evidence in rebuttal because Koziol's testimony had a tendency to "explain" and "contradict" William's testimony about her son's compliance with the terms of his court ordered curfew. *Woods*, 2011 IL App (1st) 091959, ¶ 34; *Carter*, 228 Ill. App. 3d at 539.

Although defendant claims that the trial court erred in allowing the State to ask Koziol about specific notations contained in his record, we note that defendant was afforded the opportunity to cross-examine Koziol and ask him to expand upon and provide further explanation about any entries contained in the report, which he failed to do. Here, we find that defendant cannot show any error, let alone plain error with respect to this claim.

¶ 56

B. Rule 431(b) Violation

¶ 57 Defendant next argues that the trial court failed to abide by the requirements of Illinois Supreme Court Rule 431(b) and adequately inform and question potential jurors about the four *Zehr* principles during the *voir dire* process. He acknowledges that he failed to properly preserve this claim, but he argues that the court's error constituted plain error under the first-prong of plain error review because the evidence against him was so "closely balanced."

¶ 58 The State concedes that the trial court erred in admonishing the prospective jurors about the principles enumerated in Supreme Court Rule 431(b), but maintains that the error does not constitute plain error or warrant reversal because the evidence against defendant was not closely balanced and he cannot establish prejudice under the first-prong of plain error review.

¶ 59 Because defendant never raised any objection to the trial court's admonishments and failed to properly preserve this claim, we will review this issue for plain error. As set forth

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above, the plain error doctrine provides a limited exception to the forfeiture rule and 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. *Bannister*, 232 Ill. 2d at 65. Here, defendant claims plain error under the first-prong, arguing that the court's error prejudiced him because the evidence against him was closely balanced. Before determining whether defendant can establish plain error under the first-prong, we must first determine whether any error actually occurred. *Walker*, 232 Ill. 2d at 24-25.

¶ 60 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

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respond to the specific questions concerning the principles set out in this section.” Ill. S. Ct. R. 431(b) (eff. May 1, 2007).

¶ 61 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. A trial court’s failure to inquire as to a potential juror’s acceptance and understanding of all four 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). In *Thompson*, our supreme court advised:

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

¶ 62 Here, at the beginning of the jury selection process, the trial court admonished the prospective jurors as follows:

"Ladies and gentlemen in the jury box, again I'm going to go over certain principles of law that govern this case as well as all criminal cases here. As indicated earlier, the defendant is presumed innocent of the charges against him, and the State has a burden of proving him guilty beyond a reasonable doubt.

Is there anyone in the jury box who has any disagreements with that proposition of law? No response.

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The State is required to prove the defendant guilty beyond a reasonable doubt. He is not required to prove his innocence. He is not required to call witnesses, and he is not required to testify. If he chooses not to testify, is there anybody seated in the jury box who would hold that against him? No response.

Should the State meet their burden of proof beyond a reasonable doubt, is there anybody seated in the jury box who could not or would not go back into the jury room with your fellow jurors and the law that governs this cases [*sic*] as I give it to you and sign a verdict form of guilty. No response."

¶ 63 Here, we find that the trial court failed to comply with the requirements of Rule 431(b). Notably, the court failed to ask whether the prospective jurors understood and accepted the individual principles, rather grouped the principles regarding the presumption of innocence and burden of proof together when it addressed the venire. Similarly, the court simultaneously discussed the defendant's right not to testify and right not to present evidence. Moreover, the court concluded its remarks by asking the panel as a group whether they would sign the appropriate verdict form if the State has not met its burden, which we have previously found was "not in compliance with Rule 431(b)." *People v. Anderson*, 2011 IL App. (1st) 071768, ¶ 31. Indeed, in *Anderson*, this court recently found that similar admonishments provided by a trial court constituted error, noting that the amended rule sought to end the practice of providing broad statements of law followed by general questions concerning prospective jurors' willingness to abide by those principles. *Id.* We concluded that the admonishments that the court provided "did not adequately determine whether the majority of the empaneled jurors understood and

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accepted *any* of the four *Zehr* principles." (Emphasis in original.) *Id.* As in *Anderson*, we find that the trial court's admonishments did not fulfill the requirements of Rule 431(b).

¶ 64 In light of this finding, we must determine whether the error requires reversal under the first-prong of plain error. To establish first-prong plain error, a defendant must demonstrate that "the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him." *Herron*, 215 Ill. 2d at 187. Here, we conclude that defendant cannot satisfy that burden.

¶ 65 Although defendant attempts to categorize the evidence against him as "closely balanced," we cannot agree. Draivon Dixon, Jason Kemp, and Anthony Sayles each positively identified defendant as the shooter after viewing a physical lineup two days after the shooting. Draivon also identified defendant as the shooter after he was shown a photo array the day after he was shot. Although it was dark in Euclid Park at the time of the shooting, Dixon, Kemp and Sayles each testified that they were afforded an adequate opportunity to view defendant. Although defendant emphasizes that Officer Korbis recalled that Draivon identified the shooter as someone who attended his high school, this conversation took place during the course of a five-minute span in an emergency room and was never memorialized. Moreover, Officer Rodekohl and Detective Carlassare both testified that Draivon never identified the shooter as someone he went to school with; rather, Draivon informed them that the shooter was in the presence of Denzel Kennedy, someone with whom he did attend Simeon High School. Moreover, neither Officer Rodekohl nor Detective Carlassare recalled ever being informed the Draivon had previously identified a schoolmate as the shooter.

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¶ 66 In response to such testimony, defendant presented an incredible alibi defense.

Defendant's mother testified that her son could not be the shooter because he was home at the time of the shooting because he was under a court ordered curfew, which she took measures to ensure that her son did not violate. However, the State presented evidence that refuted her testimony that she ensured her son's compliance with his curfew and demonstrated that she greatly exaggerated the frequency with which defendant's curfew was monitored by court personnel. Additionally, the State presented evidence of two inculpatory statements made by defendant in which he admitted being in violation of his curfew and present at Euclid Park at the time of the shooting.

¶ 67 Because we find that the evidence against defendant was overwhelming, not closely balanced, we conclude that the trial court's Rule 431(b) error does not constitute plain error warranting reversal of the judgment on appeal.

¶ 68 **III. CONCLUSION**

¶ 69 Accordingly, for the reasons set forth above, we affirm the judgment of the circuit court.

¶ 70 Affirmed.