No. 1-09-1393

SIXTH DIVISION
February 4, 2011

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JIMMY CRUMP, Defendant-Appellant.	)	Appeal from the Circuit Court of Cook County 07 CR 16024 07 CR 16025 Honorable James Linn, Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.

Justice Cahill concurred in the judgment.
Presiding Justice Garcia specially concurred.

ORDER

HELD: The judgment of the circuit court of Cook County was affirmed where: (1) Other-crimes evidence was properly admitted in order to explain the course of the police investigation; (2) under the circumstances of this case, the trial court did not abuse its discretion by joining two armed robbery charges for trial; (3) the trial court did not abuse its discretion in denying defendant's motion to suppress lineup identifications where defendant failed to establish that the lineups were unduly suggestive; (4) defendant's claim that money order records were improperly admitted into evidence because the State failed to lay an adequate foundation was forfeited and was not

reviewable under the plain-error doctrine where defendant did not raise the issue in the trial court; (5) defendant was proven guilty of armed robbery beyond a reasonable doubt; (6) defendant's claim that the trial court failed to comply with Supreme Court Rule 431(b) was forfeited and was not reviewable under the plain-error doctrine where defendant did not raise an objection during trial and where the trial court complied with the rule.

Following a jury trial, defendant Jimmy Crump was found guilty of two counts of armed robbery. The trial court subsequently sentenced him to concurrent terms of ten years' imprisonment. On appeal, defendant contends that: (1) the trial court abused its discretion by admitting other-crimes evidence; (2) the court erred by joining the two armed robbery charges; (3) the court erred by denying his motion to suppress the lineup identifications; (4) the court abused its discretion by admitting evidence without a proper foundation; (5) the State failed to prove him guilty beyond a reasonable doubt; and (6) the court failed to properly question the prospective jurors pursuant to Supreme Court Rule 431(b) (Official Reports Advance Sheet No. 8 (April 11, 2007), R. 431(b), eff. May 1, 2007). For the reasons that follow, we affirm.

Defendant was arrested and charged by indictment with the October 29, 2006, armed robbery of Ruth Potes and with the November 13, 2006, armed robbery of Annie Kang. Prior to trial, defendant filed a motion to suppress photo array and lineup identifications of him as the offender. The trial court denied defendant's motion. The State elected to proceed on the Kang robbery and subsequently filed a motion seeking to introduce other-crimes evidence relating to the Potes robbery into the trial for the Kang robbery. The trial court granted the State's motion and the two cases were thereafter joined for one jury trial. The following evidence was presented at that trial.

Ruth Potes testified that at approximately 11:30 p.m. on October 29, 2006, she was

walking to her home in the Wicker Park neighborhood with her date, Brian Petit, when she heard footsteps approaching from behind. A man walked past and stopped in front of Potes and Petit and then held out a gun and screamed "give me your purse, give me your wallet." Potes and Petit complied with this order and the offender ran from the scene. Potes identified defendant as the person who robbed her. She also testified that defendant was an "arm's length away" when he demanded her purse and that she was standing almost directly under a street light at the time and got a "good look" at defendant's face and the gun he was holding. Inside her purse were Potes' wallet, cell phone, driver's license, credit cards, and keys. Petit called the police on his phone and then walked Potes to her apartment.

Police officers arrived at Potes' apartment approximately 10 to 15 minutes later and she described the offender to them as an African American male, 20 to 30 years old, a "larger man," having broad shoulders, and wearing a black overcoat and a hat. After speaking with the police, Potes called her credit card and cell phone carriers and reported that these items had been stolen.

Potes received her cell phone bill approximately three weeks later and it showed that phone calls had been made after the robbery that Potes did not make. One of these calls was made an hour after the robbery to the number 800 225-5227. Potes sent her cell phone bill to Detective Hillman, who subsequently contacted her and asked her to view a lineup at the police station. On July 24, 2007, Potes identified defendant in a lineup as the person who robbed her. Potes also identified defendant in court as the person she identified in the lineup at the police station. She denied ever placing a money order in her name payable to "Jimmy Crump."

On cross-examination, Potes acknowledged that she had two drinks over the course of the three hours prior to the robbery. With respect to the lineup she viewed at the police station, Potes indicated her agreement when defense counsel asked if two of the four people in the lineup were eliminated because they were older than the offender and that one of the people in the lineup was much smaller than the offender. Potes responded "yes" when counsel asked if this was how she identified defendant. On redirect, Potes confirmed that she got a "good look" at the suspect's face and that defendant was the person who robbed her. .

Annie Kang testified that at approximately 10:30 p.m. on November 13, 2006, she and a friend, Emily Hillard, went to a bar in the Wicker Park neighborhood. Kang had two or three beers at the bar but testified that she was "fine." At approximately midnight, she and Hillard left the bar and were walking to Kang's car, which was parked near the park known as "Wicker Park." Kang was talking on her cell phone when she noticed a man approximately 25 feet away wearing a long coat approaching them on the same side of the street. The man looked at Kang and Hillard and then pulled a dark-colored gun out of his right pocket and lunged at them. Kang identified defendant as the man with the gun.

Defendant pointed the gun at Kang and put it toward her neck. Defendant said, "get off your f****** phone" and knocked the phone out of Kang's hand. Defendant then pulled on Kang's purse until she gave it to him and he then fled the scene. Kang testified that the entire incident took approximately 45 seconds. The police arrived shortly thereafter and Kang described the offender to them as an African-American male, between 25 and 30 years old, 6'2" to 6'3" tall, tall, with broad shoulders and a medium complexion. She also described the man as

wearing a black skull cap and a tan or light brown coat.

Kang testified that although it was midnight and dark at the time of the robbery, the area was "well lit" by streetlights and a nearby dog park. Defendant was approximately 10 feet away when he pulled the gun out of his pocket and he and Kang were "face to face" and only "inches" apart when defendant put the gun to her neck. Kang testified that she had a clear view of defendant's eyes, nose and mouth, and that if the scarf covered any part of defendant's face, it was "just his chin."

Kang met with Detective Hillman on January 18, 2007, and she identified defendant from a photo array as the person who robbed her. On July 24, 2007, Detective Hillman contacted Kang and asked her to come to the police station to view a lineup. Kang identified defendant in that lineup as the person who robbed her. Kang denied telling a police officer that defendant pulled a handkerchief over his face when he approached her with a gun.

Emily Hillard testified to substantially the same sequence of events as Kang and she also identified defendant in court as the person who robbed Kang. She first saw defendant when he was 60 feet away and she ran into the street to yell for help when defendant grabbed Kang's purse. When the police arrived, Hillard described the offender as an African-American male, between 25 and 35 years old, 6'2" tall, 200 pounds, with brown eyes and medium brown complexion. On July 24, 2007, she also identified defendant in a lineup as the offender. She testified that defendant had a scarf around his neck but that it did not obstruct her view of his face. She denied telling police that defendant pulled a handkerchief over his face when he approached or telling the detective that she did not get a close look at the offender because his

face was concealed by a scarf.

Detective John Hillman was assigned to investigate the Potes robbery. Several weeks after the robbery, Potes gave the detective her cell phone records and the detective noticed that several phone calls were made on that phone immediately after the robbery. One of these calls was to a "1-800" number, which the detective called and learned was an automated answering machine for Western Union. He contacted Western Union and learned that a money order had been placed payable to "Jimmy Crump" using Potes' cell phone. Western Union provided the detective with a name and "landline" phone number that had been given to Western Union as a contact number for the corresponding money gram. That phone number led the detective to an address in Chicago and he went to that address and spoke to Tasha Brown. After the detective spoke with Brown, "Jimmy Crump" became a suspect in the Potes robbery and the detective obtained defendant's photograph.

While investigating the Potes robbery, Detective Hillman learned of another robbery that had occurred in the same area. The victim in that case was Annie Kang, and the detective noted the similarities between the two crimes. Detective Hillman testified that the Kang robbery took place two weeks after the Potes robbery and that the two robberies occurred only two blocks apart. The robberies also took place at approximately the same time of day and were carried out in a similar manner. Both Kang and Potes provided a similar physical description of the offender and in each robbery the offender used a black handgun.

Detective Hillman therefore included defendant's photograph in the photo array that he showed to Kang. After Kang identified defendant as the person who robbed her, the detective

issued an investigative alert that defendant was a suspect in a crime and that there was probable cause to arrest him. Defendant was arrested by Chicago police officers during the course of a traffic stop on July 23, 2007. At the time of his arrest, defendant was 32 years old, approximately 6'2" tall, and weighed 200 pounds.

On July 24, 2007, Detective Hillman put together two lineups for the victims to view. Potes and Kang each viewed the same lineup separately and each identified defendant as the offender. Hillard viewed a separate lineup and she also identified defendant as the person who robbed Kang. The detective testified that Kang and Hillard told him that defendant attempted to pull something up around the lower part of his face when he approached, but that neither witness told him that they did not get a good look at the offender because his face was partially concealed with a scarf. He acknowledged that the arrest report indicated that the victims did not get a close look at the defendant because his face was partially concealed with a scarf.

Daniel Asher, a fraud investigator for Western Union Financial services, testified regarding the money orders that were placed with Western Union. He testified that money order transaction records are kept in the ordinary course of Western Union business and that Western Union regularly prepared these records. He also testified that the records are made by operators who work for Western Union and who have knowledge of the information appearing in those records. The records are prepared at or near the time of the events reported therein and are stored electronically. The money transfers records documenting two attempts to place money orders payable to "Jimmy Crump" were received into evidence without objection.

Asher testified that the first transaction was a credit card money transfer from Ruth R.

Aguilar Potes to payee Jimmy Crump for $500. The transaction was recorded by the Western Union operator at approximately midnight on October 30, 2006. The expected payout location for the transfer was Chicago, Illinois. The phone number that appeared on the operator's caller identification did not match the phone number associated with the credit card, and the caller told the operator that he or she was at a friend's house and that was why the numbers did not match. The billing number was 908 852-5698. The individual making the money order also reported that he or she was 32 years old. The Western Union operator contacted the bank that issued the credit card and was told that the transaction was not authorized. The operator therefore cancelled the transaction. A second telephone money order was recorded at approximately 12:30 a.m. on October 30, 2006. The payor for this money order was Ruth R. Aguilar Potes and the payee was Jimmy Crump. The location where the transfer was to be picked up was the same as the first transaction. Asher testified that this transaction was also cancelled by the operator because the bank indicated that the transaction was not authorized. Asher concluded that in his opinion, the money orders were cancelled by the operators because the address verification "did not come back correct" and because the bank contacted by the operator would not authorize the transaction.

On cross-examination, Asher testified that the information relating to an attempted money order is entered by a live operator and is not done "by automation." The first money order was placed from the phone number (773) 261-0942. This phone number was given by the person who ordered the first money order and it matched the number that appeared on the operator's caller identification. That number did not match the phone number that Potes had given her

credit card company as her home phone number, which had a 908 area code. When the second money order was placed, the caller provided a number that began with a 908 area code. There was no caller identification available to the operator for this money order. When the operator attempted to enter the money order, it came back as not authorized. For both transactions, the amount that would have been debited to the credit card was $553. For each transaction, there was information which allowed Asher to determine which Western Union operator recorded the transactions.

Defendant called Chicago police officer Joseph Arroyo, who spoke to Kang and Hillard immediately after the robbery. He did not recall if either told him that the offender pulled a handkerchief over his face when he approached, although this was written in his police report.

The jury found defendant guilty of two counts of armed robbery. The trial court sentenced defendant to concurrent terms of 10 years' imprisonment. This appeal followed.

Defendant first contends that the trial court erred by ruling that the State could introduce other-crimes evidence into defendant's trial for the Kang robbery. The determination as to whether evidence is relevant and admissible is within the sound discretion of the trial court, and its ruling will not be reversed absent a clear abuse of discretion resulting in manifest prejudice to the defendant. *People v. Morgan*, 197 Ill. 2d 404, 455 (2001). An abuse of discretion will be found only where the trial court's decision is "arbitrary, fanciful or unreasonable" or where no reasonable person would take the trial court's view. *Morgan*, 197 Ill. 2d at 455. While evidence of other crimes is not admissible if it is relevant merely to establish defendant's propensity to commit crime, such evidence may be admissible when relevant for any other purpose. *People v.*

McKibbins, 96 Ill.2d 176, 182 (1983).

Defendant claims that the trial court allowed the State to introduce evidence of the Potes incident into a trial for the Kang robbery as evidence of *modus operandi*. Defendant asserts that this ruling was error because there was no "substantial or meaningful link" between the two crimes and because evidence of the Potes robbery served only to imply that defendant had a propensity to commit crime.

Contrary to defendant's assertion, the trial court did not rule that the other crimes evidence was admissible as evidence of *modus operandi*. The record shows that the State filed a motion *in limine* prior to trial seeking to admit evidence of the Potes robbery and the subsequent police investigation into the trial for the Kang robbery as evidence of *modus operandi* and the course of the police investigation. In ruling on that motion, the trial court stated that the jury had a right to know "how [defendant] got implicated in this case" and that the State had the right to explain to the jury "how [defendant] got here, that they had this MoneyGram that was used with stolen property from an armed robbery with Jimmie Crump, they located photos, he was put in a lineup and picked out." When defense counsel questioned why the jury could not be told that photo arrays were provided to the alleged victims and that defendant was identified, the court explained that doing so would not "give[] any context as to how out of all the photos in the world they put a photo of him in the array." The court further explained that prohibiting the State from explaining the steps of the police investigation risked "misleading the jury and letting them think he fell off a cloud and ended up in this courtroom when in fact there's a very easily explainable logical reason that the police put his photo in the photo array and the fact is that it was because of

one investigation leading to another."

The trial court's comments make clear that *modus operandi* was not the basis for the court's ruling on the other crimes evidence. Rather, the evidence was admitted in order to explain the course of the police investigation and specifically to explain how defendant became a suspect in the Kang robbery.

The only challenge defendant raises to the trial court's other-crimes ruling that is not based upon *modus operandi* is that the reason police learned of his name while investigating the Potes robbery was hearsay and irrelevant to any issue in a trial on the Kang robbery. We disagree. "Our supreme court has recognized that evidence of the course of the investigation into a crime and the events leading up to an arrest are relevant when necessary and important to a full explanation of the State's case." *People v. Gonzalez*, 379 Ill. App. 3d 941, 950 (2008); citing *People v. Hayes*, 139 Ill. 2d 89, 130 (1990) (police testimony regarding unsuccessful attempts to locate defendant admitted to explain the two-week delay between when defendant was identified by a witness and when he was arrested), *overruled on other grounds*; *People v. Tisdel*, 201 Ill. 2d 210, 219 (2002); *People v. Johnson*, 114 Ill. 2d 170, 193-94 (1986) (witness testimony that she notified police of an unrelated incident with defendant, which ultimately led to defendant's identification and arrest, admitted to rebut suggestion that police unjustifiably targeted defendant eight months after the offenses occurred); *People v. Byrd*, 43 Ill. App. 3d 735, 742 (1976) ("Informing the trier[] of fact of consequential steps in the investigation of a crime is normal procedure and is important to the full presentation of the State's case").

In this case, the testimony at trial established that while investigating the Potes robbery,

Detective Hillman learned that phone calls were made to Western Union on Potes' cell phone immediately after the robbery. He subsequently learned that these calls had been made to order money transfers using Potes' credit card that were payable to "Jimmy Crump." The detective obtained an address and telephone number from Western Union and, after he spoke to someone at that address, defendant became a suspect in the Potes robbery and Detective Hillman obtained his photograph. Subsequently, while investigating the Potes robbery, the detective learned of the Kang robbery and noted the similarities between the two crimes. He therefore included defendant's photograph in the photo array he showed to Kang. Kang identified defendant from that photo array as the person who robbed her. Based on that identification, the detective issued an investigative alert that defendant was a suspect in a crime and that there was probable cause to arrest him. After defendant's arrest, the detective put together lineups for the victims to view, and Potes, Kang and Hillard identified defendant as the offender.

We find that the trial court could have reasonably concluded that the investigations into the two robberies were inextricably linked and that testimony regarding the investigation into the Potes robbery was relevant and necessary to explain to the jury how defendant became a suspect in the Kang robbery, why the police included defendant's photograph in the photo array that was shown to Kang, and why defendant was placed in the lineups for the victims to view. As the trial court stated, precluding testimony as to the course of these investigations would have deprived the jury of the context under which defendant's photograph was placed in the photo array and under which defendant was arrested and placed in a lineup for the victims to view. See *Gonzalez*, 379 Ill. App. 3d at 950 (finding that testimony regarding the investigation into the

1996 death of defendant's mother, in which defendant was a suspect, was relevant and necessary to explain to the jury the lengthy course of the investigation which began with the 1991 death of the victim, the defendant's half sister, and culminated with defendant's arrest in 2002, and observing that "[w]ithout such testimony, the jury could have been left to wonder why police focused their investigation on defendant, [the victim's] half brother"); *Byrd*, 43 Ill. App. 3d at 742 (noting that the State must be permitted to make some explanation why a previously unidentified defendant was arrested and shown to the victim of a crime because "[i]f this were not permitted defense counsel could play upon it in argument, asking why the defendant - of all the men in the world - was on trial, insinuating that the accused was arrested without reason"). Under these circumstances, we cannot say that the trial court's ruling was "arbitrary, fanciful or unreasonable" or that no reasonable person would take the trial court's view. *Morgan*, 197 Ill. 2d at 455. Accordingly, the court's ruling was not an abuse of discretion.

Defendant next contends that the trial court erred in joining the two armed robberies for trial because there was no evidence indicating that the crimes were part of the same comprehensive transaction. The State initially responds that defendant has waived this claim because he agreed to have the two cases joined. Defendant disagrees and asserts that defense counsel raised an objection in the trial court and included that objection in his posttrial motion.

The record establishes the following facts. On July 1, 2008, the trial court asked if either the defendant or the State felt that joinder was appropriate. The court explained that joinder would give the State more evidence at trial but that it would only give the State one chance to prosecute defendant instead of two. Defense counsel stated that he would not be opposed to

joinder and the State indicated that it did not feel joinder was appropriate. However, on July 15, the State and defense counsel moved to join the cases. The trial court explained the implications of such a decision to defendant, who indicated to the court that he understood.

The parties appeared in court on December 22, 2008, and defendant was represented by a different public defender at that time. The trial court began to discuss the status of the elected case, the Kang robbery, and the prosecutor asked the court about joinder. Defense counsel responded that she was not requesting that the cases be joined. The trial court therefore set the cases for separate trials.

On January 30, 2009, the court heard arguments on the State's motion to admit other-crimes evidence. Defense counsel stated that allowing the evidence of other crimes would allow the State to introduce the other identifications of defendant into the elected case and the court asked defense counsel if she was making a motion for joinder. The prosecutor stated that in the alternative he was making a motion for joinder. The court stated it would revisit the issue because the cases were "very, very intertwined." The court explained how the investigation into the non-elected case led directly to the elected case and that "whether you call it proof of other crimes or joinder I don't know how to sanitize it without misleading the jury." The court then ordered that the cases be joined and noted defense counsel's objection.

The parties appeared in court for trial on April 6, 2009, and defense counsel stated that she wanted to renew her request to have the cases severed because, although the parties had already argued the issue, counsel was unsure if it was formally done for the record. The court explained how the cases were "intimately involved" and denied defense counsel's motion. The court

explained that it had "balanced" the issue and considered it "carefully" but that it did not know how it could avoid discussing the non-elected case in a trial on the elected case.

Later in that day, the trial court had the following discussion with defense counsel in order to clarify defendant's position regarding the other-crimes evidence and joinder.

> "THE COURT: All right, I just want to clear up a couple of little matters on the record first
>
> We talked today about proof of other crimes and joinder and let me reference the colloquy that was had in court on July 15 of 2008 on this topic.
>
> And it was made known that on the elected case when we talked about this first July the 1st of 2008 and then July the 15th, 2008, on the elected case the government wanted to bring up the circumstances of the non-elected case to show the nature of the police investigation particularly this business about the cell phone and the Western Union transaction. The Court felt that was extremely relevant by far more appropriate than prejudicial and the government would be allowed to do that, that is to talk about the non-elected case while explaining to the jury what the police investigation was as to the elected case.
>
> After the court had made that ruling my records reflect and my recollection is that the parties agreed to have a joinder, not that

they, not that the defense ever agreed to allow the State to talk to the jury about the non-elected case per se but once that ruling was made it was at that point that joinder was done by agreement.

Is that your recollection also, Ms. Brean, or anything else you want to say about that?

Since the jury was going to hear about it anyway it was thought better that the defense didn't object to the jury - -

MS. BREAN [DEFENSE COUNSEL]: Right, Judge.

THE COURT: Rendering a verdict as to both cases thereby saving Mr. Crump whatever the reality would be being prosecuted twice as opposed to once.

DEFENSE COUNSEL: Judge, my recollection is that we objected strenuously to the evidence and once the Court made its ruling about the, allowing both crimes to be heard in front of the same jury then we agreed to try both charges together.

THE COURT: Right. And the reason I'm just talking about this now is because I was concerned that the way we talked about it today it appears that there may have been some compulsory joinder and that is not exactly what happened. Exactly what happened we talked about the government being allowed to talk about the circumstances of the police investigation which would involve the

non-elected case. And once that was accomplished over the defense objection then joinder was agreed to.

Correct?

DEFENSE COUNSEL: Judge, that is fair to say.

THE COURT: All right, and your objection remains and that is what you renewed today. It wasn't joinder per se it was more about revisiting that initial ruling about talking about the non-elected case, correct?

DEFENSE COUNSEL: Yes."

We initially note that in this court defendant does not acknowledge the existence of the above discussion between defense counsel and the trial court or attempt to explain his position that joinder was not agreed to in light of this discussion. Nevertheless, we believe that this exchange makes it clear that once the trial court ruled on the State's motion to introduce evidence of other crimes, defendant agreed to joining both cases for trial. Defendant claims that defense counsel repeatedly objected to joinder and moved to sever the cases. The problem with defendant's claim is that the issue of joinder was essentially decided on January 30, 2009, when the court heard arguments on the State's motion to admit other-crimes evidence and on the issue of joinder. During that hearing, the discussions of the two issues became intertwined such that the nature of defense counsel's objection at that time is unclear. Defendant claims that "the fact that defense counsel's arguments against joinder discussed other-crimes evidence was the fault of the judge, who erroneously linked the other-crimes and joinder issues." We do not see this claim as

relevant in light of the effort the trial court made to clarify any ambiguities in the record and to confirm the actual nature of defense counsel's objection to the court's ruling.

It is true that when the parties appeared in court on April 6, defense counsel told the court she wanted to renew her request to have the cases severed. However, counsel stated that she wanted to renew her request because, although the issue had previously been argued, counsel did not know if her request was formally made on the record. The issue had previously been argued on January 30, 2009, when the court heard arguments on the State's motion to admit other-crimes evidence and the issue of joining the two cases. It is evident that defense counsel was referencing that discussion and simply making a formal objection to the ruling that the court made on January 30, 2009. On that January 30 court date, the trial court allowed joinder and noted defense counsel's objection. However, the discussion between defense counsel and the trial court detailed above places the objection defense counsel made on January 30 in context and makes it clear that counsel's objection at that time was not actually to joinder but, rather, to the court's ruling on the State's motion to admit other-crimes evidence and that defense counsel agreed to joinder once the court ruled in favor of the State on that motion. This is consistent with the fact that when defense counsel previously told the court she was not requesting that the cases be joined, which occurred on December 22, 2008, the court had not yet made its ruling on the other-crimes evidence. Finally, in his posttrial motion, defendant claimed that the court erred by joining the two cases for trial. However, we again believe that the discussion between defense counsel and the trial court set forth above places this objection in context and establishes that counsel's objection was not to joining the two cases for trial.

Based upon our review of the entire record before us, we conclude that defendant agreed to have the trials for both armed robberies joined. The rule of "invited error" provides that a party cannot complain of an error on appeal which the party induced the court to make or to which the party consented. *People v. Major-Flisk*, 398 Ill. App. 3d 491, 500 (2010). In this case, because defendant consented to the two charges being joined, he cannot now argue that the court's ruling on this issue was an abuse of discretion.

Moreover, even assuming that defendant did not agree to join the two cases for trial, we conclude that the trial court's decision to join the cases was not an abuse of discretion. A defendant may be tried in one proceeding for separate offenses if the offenses are based on separate acts that are part of the same comprehensive scheme. *People v. Slater*, 393 Ill. App. 3d 977, 992 (2009). The trial court has substantial discretion to determine whether joinder is proper, and its decision will not be reversed absent an abuse of that discretion. *People v. Trail*, 197 Ill. App. 3d 742, 746 (1990). There is no precise criteria to determine whether separate offenses are part of the same comprehensive transaction. *Slater*, 393 Ill. App. 3d at 992. Nevertheless, factors that may be considered included similarity of offenses, a common method of operation, proximity in time and location of the offenses, a common type of victim, and the identity of evidence needed to demonstrate a link between the offenses. *Trail*, 197 Ill. App. 3d at 746.

In this case, defendant was charged with two armed robberies that occurred within two weeks of each other and only two blocks apart. Each case involved similar victims, two people who had just exited bars late in the evening. In both cases, defendant approached the victims at approximately midnight, pulled out a handgun, and took a victim's purse. Additionally, as we

have already found, the facts of the Potes robbery were properly admitted into the trial for the Kang robbery as "other crimes" evidence in order to explain the course of the police investigation and why defendant became a suspect and was later arrested for the Kang robbery. The fact that this other crimes evidence was properly before the jury greatly diminished the potential that defendant was prejudiced as a result of being tried for both offenses in the same proceeding. See *Slater*, 393 Ill. App. 3d at 993, quoting *Trail*, 197 Ill. App. 3d at 746 ("When evidence of other crimes is admissible, 'the potential prejudice to a defendant of having the jury decide two separate charges is greatly diminished because the jury is going to be receiving evidence about both charges anyway'"). Under these circumstances, we conclude that the trial court's decision to try these offenses together was not an abuse of discretion.

Defendant suggests that he was prejudiced because joining the two cases "allowed the jury to hear evidence of two unrelated crimes without the benefit of the limiting instruction that normally accompanies other-crimes evidence." We find that this claim is waived because defendant did not request a limiting instruction. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (failure to raise objection at trial and include the objection in a posttrial motion results in waiver of that issue on appeal). This claim is also waived under Supreme Court Rule 341(h)(7) because defendant does not explain what limiting instruction should have been given considering that the two charges were joined for trial. See *People v. Patel*, 366 Ill. App. 3d 255, 268-69 (2006) (a point raised but not sufficiently presented fails to comply with Supreme Court Rule 341(h)(7) and is therefore waived).

Defendant's next contention is that the trial court erred in denying his motion to suppress

the lineup identifications. Prior to trial, defendant filed a motion to suppress the photo array and lineup identifications. The trial court held a hearing on the motion and the court was given the photo array and photographs of the lineups. The parties stipulated at the hearing that Potes described the offender as a black male, 6' to 6'3", 20 to 25 years of age, 220-250 pounds, with a blue or dark winter hat and a black leather jacket. The parties stipulated that Kang described the offender as a black male, 6'2", 200 pounds, 25 to 35 years of age, wearing a tan jacket, a black skullcap, and a black handkerchief around his neck. The parties further stipulated that police compiled a photo array that included defendant's photograph and that police showed that array to Kang on January 18, 2007. The parties finally stipulated as to dates that defendant was arrested and that Potes, Hillard and Kang viewed the lineups. At the hearing, defense counsel raised the same arguments that defendant raises on appeal and counsel acknowledged that defendant was wearing the orange shirt at the time he was arrested.

The trial court denied defendant's motion to suppress. The court stated that it had looked at the photo array and the lineup photos and that although the people in the lineups were in some ways distinct, they also shared similarities. This included their race, the fact they were all in civilian clothes, and appeared to be the same age. The court further stated that defendant was put in the lineup in the clothes he was wearing at the time of his arrest and that defendant's shirt was "obviously" not a prison uniform. The court concluded that considering the totality of the circumstances, the police did not purposefully or carelessly assemble a suggestive photo array or lineup and that any differences would go the weight given to the identifications.

Defendant claims that this ruling was error and that the lineups were "unduly suggestive"

because he appeared in each lineup wearing a bright orange shirt that had "PSYCH WARD" and a series of numbers across the front that drew attention to him and resembled a prison uniform. Defendant also claims that he was the only person in the lineup with physical characteristics similar to those given by the eyewitnesses.

The determination of whether a pretrial identification "is ' "so unnecessarily suggestive and conducive to irreparable mistaken identification that [defendant] [is] denied due process * * * depends on the totality of the circumstances surrounding it." ' [Citations.]" *People v. Simpson*, 172 Ill. 2d 117, 140 (1996). An identification should be suppressed only when it is so unnecessarily suggestive that there is a substantial likelihood of misidentification. *People v. Peterson*, 311 Ill. App. 3d 38, 48 (1999). Defendant bears the burden of showing that a pretrial identification was impermissibly suggestive. *Simpson*, 172 Ill. 2d at 140. The admissibility of evidence rests within the sound discretion of the trial court, and we will not disturb its ruling on review absent an abuse of discretion. *Peterson*, 311 Ill. App. 3d at 48.

We find that defendant has failed to establish that the lineups were unduly suggestive because he was the only participant with physical characteristics similar to those described by the eyewitnesses. Participants in a lineup are not required to be physically identical. *Simpson*, 172 Ill. 2d at 140; *Peterson*, 311 Ill. App. 3d at 48; *People v. Love*, 377 Ill. App. 3d 306, 311 (2007). Any differences in appearance go to the weight of the identification, not to its admissibility. *Peterson*, 311 Ill. App. 3d at 48; *People v. Kelley*, 304 Ill. App. 3d 628, 638 (1999). Moreover, there is ample precedent holding that allegedly distinct characteristics go to the credibility of the identification and do not make a lineup unduly suggestive. See, *e.g.*, *People v. Johnson*, 104 Ill.

App. 3d 572, 578 (1982) (court stated that "substantial differences in age and appearance between suspects and others exhibited in a lineup do not in themselves establish that a lineup was unnecessarily suggestive," such matters go to the credibility of the identification); *People v. Coleman*, 203 Ill. App. 3d 83, 91-92 (1990) (where victim described suspect as wearing a dark shirt and defendant was the only individual in lineup wearing a black shirt, the lineup was nonetheless not impermissibly suggestive or prejudicial to taint the identification); *People v. Washington*, 182 Ill. App. 3d 168, 175 (1989) (court upheld the denial of defendant's motion to suppress where defendant was the only person in the lineup with braided hair, noting that the police did not force the defendant to wear his hair in braids and that the witnesses provided accurate descriptions of the defendant beyond his hair).

In this case, we initially note that none of the eyewitness described defendant as wearing an orange shirt at the time of the robbery but instead testified that he was wearing a dark coat. Defendant was wearing the orange shirt at the time he was arrested and the police did not force him to wear it in the lineup. Further, the eyewitnesses were able to accurately describe defendant's age, height, weight, shoulder size, and skin color. See *Washington*, 182 Ill. App. 3d at 175 (one witness correctly described the defendant's height and weight, while another accurately described defendant's facial hair). There is nothing to suggest that defendant was identified based upon the orange shirt. In fact, Kang identified defendant in a photo array prior to the lineup identification and there is no suggestion defendant was wearing the orange shirt in that photograph. Additionally, the trial court saw a picture of the lineup and stated that the shirt was "obviously" not a prison uniform. This conclusion is supported by the fact that defendant is

wearing jeans in the lineup photos. Moreover, while there are some differences between the lineup participants, we cannot say that those differences are so great that they create a "substantial likelihood of irreparable misidentification" and therefore those differences went only to the weight the jury assigned to the identifications. All of the participants in the lineup are the same race as defendant and some also have broad shoulders similar to defendant's and are of a similar height. Additionally, each of the eyewitnesses was able to see the offender's face under good lighting conditions that permitted a positive identification and the witnesses recognized defendant's face in the lineups that they saw.

Defendant claims that Potes testified that the physical discrepancies among the individuals in the lineup left her no choice but to identify defendant as the offender. Defendant overstates the significance of this testimony. While Potes did state that she eliminated participants because they did not match the suspect's physical description, she also testified that she recognized defendant in the lineup as the person who robbed her and clarified on redirect examination that she got a good look at defendant's face during the robbery. Thus, the portion of Potes' cross-examination that defendant references went only to weight the jury assigned to her identification.

After carefully reviewing the lineup photographs, we find no evidence of an attempt by police to focus the witnesses' attention on defendant and we cannot say that the lineups were "unduly suggestive" or "conducive to irreparable mistaken identification." *Simpson*, 172 Ill. 2d at 140. Therefore, the trial court did not abuse its discretion by denying defendant's motion to suppress.

Defendant next contends that the Western Union records were improperly admitted into

evidence because the State failed to lay an adequate foundation for their admission. The State initially responds that defendant has waived review of this claim by failing to raise it in the trial court. See *Enoch*, 122 Ill. 2d at 186. The record shows that when the State sought to introduce the Western Union records into evidence, defense counsel stated that he had "no objection." Defendant nevertheless claims that he did raise an objection and included that objection in his posttrial motion. However, the record shows that prior to trial, defense counsel argued that evidence indicating that a call was made to Western Union from Potes cell phone and that an attempt to purchase a money order using defendant's name was hearsay. In his posttrial motion, defendant claimed that the testimony regarding the call to Western Union and the subsequent order of a money transfer were hearsay. Defendant did not object to the admission of Western Union records based upon the lack of an adequate foundation and therefore any such claim is waived. See *People v. Leak*, 398 Ill. App. 3d 798, 829 (2010) (an objection upon a specific ground is a waiver of all grounds not specified).

The issue here, however, goes beyond mere waiver. Our supreme court has held that "when a defendant procures, invites, or acquiesces in the admission of evidence, even though the evidence is improper, []he cannot contest the admission on appeal." *People v. Bush*, 214 Ill. 2d 318, 332 (2005). The rational behind this rule is that "by acquiescing in rather than objecting to the admission of allegedly improper evidence, a defendant deprives the State of the opportunity to cure the alleged defect." *Bush*, 214 Ill. 2d at 332; see also *People v. Trefonas*, 9 Ill. 2d 92, 98 (1956) ("A party cannot sit by and permit evidence to be introduced without objection and upon appeal urge an objection which might have been obviated if made at the trial"). In *People v.*

Bynum, 257 Ill. App. 3d 502 (1994), the rule was explained in the following manner in response to the defendant's objection that evidence was admitted without a proper foundation:

> "The rule requiring defendant to make a specific objection is particularly well-suited for application when a defendant argues on appeal that the State has failed to lay the proper technical foundation for the admission of evidence. This is so because a timely and specific objection allows the State the reasonable opportunity to correct any deficiency in the foundation proof."
> *Bynum*, 257 Ill. App. 3d at 514-15.

In this case, defendant raised no objection to the foundation of the Western Union records when the State sought to introduce them into evidence. By failing to do so, defendant deprived the State of the opportunity to cure the alleged defect and deprived the trial court of the opportunity to rule on the issue. Accordingly, we find that defendant's claim is waived.

Defendant argues that even if the alleged error was not preserved, it should be reviewed under either prong of the plain-error doctrine. The plain-error doctrine bypasses normal forfeiture principles and "allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatens to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007), citing *People v. Herron*, 215 Ill. 2d

167, 186-87 (2005). In both instances, the burden of persuasion remains on the defendant. *Herron*, 215 Ill. 2d at 187.

Even if we were to find error in this case, it would not be reversible under either prong of the plain-error doctrine. Defendant first argues that the error is reviewable under the first prong because the evidence against him was weak and the Western Union records served as critical evidence for the jury to consider. We disagree. Potes observed defendant's face under adequate lighting conditions and identified him in court as the person who robbed her. Her identification was positive and credible and was not impeached in any meaningful manner. Potes also identified defendant in a lineup as the person who robbed her. Even without the Western Union records, Potes' identification of defendant as the offender was more than sufficient to prove his guilt beyond a reasonable doubt. The evidence was not closely balanced and was more than sufficient to convict defendant even without the Western Union records.

Defendant cites *Piatkowski* and *People v. Friedland,* 202 Ill. App. 3d 1094 (1990) in support of his claim that the alleged error is reversible under the first prong of the plain-error doctrine. We find these cases distinguishable. In *Piatkowski*, the jury was instructed as to how it should evaluate the reliability of the identification testimony of an eyewitness. The instruction was found to be error because it used the conjunction "or" between each of the five factors and thus directed jurors to consider one of the five factors regarding the reliability of the identification. *Piatkowksi*, 225 Ill. 2d at 561-62, 566-67. The court found the error to be reversible under the first prong of the plain-error doctrine because the only evidence linking the defendant to the crime was the testimony of two eyewitnesses and the erroneous instruction

specifically related to how the jury should evaluate the reliability of that testimony. *Piatkowksi*, 225 Ill. 2d at 567. As the court stated, "[t]his case turned on the credibilty of the witnesses' identification testimony and the erroneous instruction involved how the jury would weigh and evaluate such identification testimony." *Piatkowski*, 225 Ill. 2d at 570. The present case is markedly different from *Piatkowski*. Here, the strongest evidence of defendant's guilt was Potes' identification testimony. However, unlike in *Piatkowski*, the alleged error does not relate directly to that identification testimony and instead relates only to evidence corroborative of that identification and of defendant's guilt.

Friedland is likewise distinguishable. Initially, we point out that the court in that case did not evaluate the alleged error under the plain-error doctrine but instead considered whether the error was harmless. *Friedland*, 202 Ill. App. 3d at 1101. Moreover, the defendant in that case had been convicted of theft from the store where he was a manager, and the court found that the error was not harmless because the bank statements that were admitted into evidence without an adequate foundation provided the only evidence that money was missing from the store's account. *Friedland*, 202 Ill. App. 3d at 1101. Thus, similar to *Piatkowski*, the error in *Friedland* had a far greater potential to prejudice the jury's verdict than the alleged error did in the present case because it related directly to evidence that was critical to the State's case and that was not supplied by any other competent evidence at trial. In this case, the alleged error did not relate to the primary evidence of defendant's guilt, Potes' identification testimony, but rather to other evidence that supported the proof of armed robbery. Accordingly, we find that any error in the admission of the Western Union records is not error under the first prong of the plain-error

doctrine.

Defendant also claims that the alleged error deprived him of a fair trial and is reversible under the second prong of the plain-error doctrine. However, defendant does not articulate any reason why the alleged error was "so serious that it affected the fairness of the [his] trial and challenged the integrity of the judicial process." *Piatkowski*, 225 Ill. 2d at 565. Instead, he simply claims that the error is reviewable under this prong of the plain-error doctrine and cites to *Piatkowski* and *People v. Thomas*, 220 Ill. App. 3d 110 (1991). *Piatkowski* is inapposite because the court reviewed the error under the closely-balanced standard. In *Thomas*, the issue was whether the jury's verdict was based upon a comment made by the trial court as opposed to properly admitted evidence. The defendant argued that the error was reviewable under the plain-error doctrine "because a substantial right was involved, *i.e.*, defendant's due process right to be tried only by competent evidence duly admitted at trial." *Thomas*, 220 Ill. App. 3d at 123. In response, the court stated that "[i]n light of the plain error doctrine, we choose to review the instant issue" and ultimately found no reversible error. *Thomas*, 220 Ill. App. 3d at 123. Clearly, *Thomas* does not stand for the proposition that the type of error alleged in this case affects a substantial right and is reviewable under the second prong of the plain-error doctrine. In light of the above, we conclude that even if it was error to admit the Western Union records, the error does not involve a substantial right and it is therefore waived.

Defendant next contends that the State failed to prove him guilty of armed robbery beyond a reasonable doubt. When reviewing a challenge to the sufficiency of the evidence, the relevant question is whether, after viewing the evidence in a light most favorable to the State, any rational

trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004). The trier of fact is responsible for assessing the credibility of the witnesses, weighing the testimony, and drawing reasonable inferences from the evidence. *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001). A criminal conviction will not be set aside on appeal unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to the defendant's guilt. *People v. Cox*, 195 Ill. 2d 378, 387 (2001).

Defendant challenges the reliability of his identification as the offender in both the Potes and Kang robberies. With respect to the Potes robbery, defendant maintains that Potes' identification is unreliable because she had only a minimal opportunity to view the offender, she provided only a general description of the offender, and there was an almost nine-month lapse between the robbery and the lineup identification. Defendant further maintains that Potes lacked credibility as a witness because she admitted to having drinks prior to the robbery. Defendant concludes that when these circumstances are considered in light of the lack of "other competent evidence" linking defendant to the crime, Potes' identification of defendant was doubtful and insufficient to prove him guilty beyond a reasonable doubt.

We initially observe that regardless of the other evidence presented at trial, a single witnesses' identification of the accused is sufficient to sustain a conviction provided the witness is credible and observed defendant under circumstances that would permit a positive identification. *People v. Slim*, 127 Ill. 2d 302, 307 (1989). The test of a positive identification is whether the witness was close enough to the accused for a sufficient length of time under conditions adequate for observation. *People v. Thomas*, 72 Ill. App. 3d 186, 195-96 (1979). Circumstances to be

considered in evaluating an identification include: "(1) the opportunity the victim had to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the victim at the identification confrontation; and (5) the length of time between the crime and the identification confrontation." *Slim*, 127 Ill. 2d at 308.

In this case, Potes positively identified defendant in court as the person who robbed her at gunpoint. There is nothing in the record to suggest that her identification of defendant was vague or doubtful. Rather, the record shows that the robbery lasted approximately 20 seconds and that Potes had an opportunity to view defendant during this time under adequate lighting conditions. She testified that although it was late at night and dark at the time, she was standing almost directly under a street light when she was robbed. She also testified that she was only an "arm's length away" from defendant when he demanded her purse and that she got a "good look" at defendant's face. This evidence supports the conclusion that Potes observed defendant under conditions that would permit a positive identification to be made.

Moreover, Potes identified defendant in a lineup and she gave police a description of the offender approximately 15 minutes after the robbery that matched defendant's appearance at the time of his arrest. She described the offender to police as an African-American male, 20 to 30 years old, and as a "larger man" with broad shoulders who was wearing a black coat and hat. Detective Hillman described defendant at the time of his arrest as being African-American, 29 to 30 years old, approximately 6'2" tall and weighing nearly 200 pounds. Finally, Potes' identification of defendant as the offender was corroborated by the evidence regarding money

orders being made with Western Union. Specifically, Potes testified that defendant took her purse during the robbery and that her cell-phone was located inside of that purse. The evidence further established that immediately after the robbery, a call was placed to Western Union from Potes' cell phone. Additional evidence established that someone attempted to use Potes' credit card to place two money orders payable to "Jimmy Crump," and Potes testified that she did not place the calls to Western Union or attempt to place a money order payable to Jimmy Crump. Viewed in the light most favorable to the State, we conclude that there was sufficient evidence for the jury to find Potes' identification of defendant as the offender to be reliable. That identification as well as the other circumstantial evidence proved defendant guilty beyond a reasonable doubt.

Defendant nevertheless argues that Potes admitted to not having paid close attention to the offender's face and to looking at what the offender was wearing and the gun that he was holding. However, our review of the record has found no instance in which Potes testified that she did not pay close attention to defendant's appearance. To the contrary, as noted, Potes testified that defendant was only an "arm's length" away from her and that she got a "good look" at defendant's face. While Potes also noticed defendant's clothing and the gun he was holding, there is nothing in the record to suggest that this prevented her from observing defendant's appearance and positively identifying him as the offender.

Defendant also claims that Potes' identification is unreliable because she provided only a general description of the offender. However, Potes' description of the offender was far from general and defendant does not point to any particular physical characteristic that Potes failed to notice or mention to police. Regardless, discrepancies and omissions as to physical characteristics

are not fatal but instead only affect the weight to be given to the identification testimony. *Slim*, 127 Ill. 2d at 319. Moreover, it is well established that a witness is not expected or required to distinguish individual features of a suspect in making an identification and that a witness's positive identification can be sufficient even though the witness gave only a general description based on the overall impression the accused's appearance made. *Slim*, 127 Ill. 2d at 308-09.

Defendant also maintains that the approximate nine-month lapse between the crime and Potes' in-court identification supports his assertion that Potes' identification was unreliable. However, the lapse of time goes only to the weight of the testimony and raises a question for the jury. *People v. Holmes*, 141 Ill. 2d 204, 242 (1990). Moreover, courts have upheld identifications that were made a considerable length of time after the crime was committed and that were made after a much longer lapse of time than is found in the present case. See, *e.g.*, *People v. Rodgers*, 53 Ill. 2d 207, 214 (1972) (identification made two years after the crime); *Holmes*, 141 Ill. 2d at 241-42 (eighteen month lapse of time); *People v. Dean*, 156 Ill. App. 3d 344, 352 (1987) (two and one-half year lapse upheld). Again, when the evidence is viewed in the light most favorable to the State, including Potes' positive identification of defendant and the corroborating evidence regarding the Western Union money transfers, the approximate nine-month lapse of time is not significant and does not create a reasonable doubt as to defendant's guilt. See *Holmes*, 141 Ill. 2d at 242.

Defendant also claims that Potes' identification is unreliable because she admitted to having had two drinks prior to the robbery. However, whether Potes had drinks prior to the robbery did not pertain directly to her identification of defendant as the robber and instead only

raised a question for the jury as to her credibility as a witness and the weight to be given to her identification. See *People v. Calabrese*, 398 Ill. App. 3d 98,123-24 (2010) (noting that whether the witnesses were drinking or smoking marijuana on the night of the murder did not directly relate to their identification of defendant as the shooter but instead only raised questions for the jury as to the witnesses' credibility and the weight to be given to their testimony). The jury was made aware that Potes had two drinks over the course of three hours prior to the robbery and it nevertheless found her to be a credible witness. We have no basis in the record to disturb this determination.

Finally, defendant maintains that the deficiencies in Potes' identification create a reasonable doubt as to his guilt given that there was no other competent evidence linking defendant to the crime. Defendant specifically maintains that the Western Union records were admitted without a proper foundation and that the lineup identification is tainted by the suggestiveness of the lineup. However, we have already found that the lineups were not unduly suggestive and that defendant has waived his claim regarding the Western Union records. Defendant also attempts to refute the Western Union evidence by claiming that the caller having given the name "Jimmy Crump" as the payee does not identify defendant as the person who placed the money order. However, the jury is responsible for drawing inferences from the evidence and in this case the evidence presented at trial was more than sufficient for the jury to infer that it was defendant who attempted to place the money orders.

Defendant also challenges his conviction for the armed robbery of Kang on similar grounds, claiming that Kang and Hillard provided unreliable identifications. He argues that

neither witness had a sufficient opportunity to view the offender given that Kang was talking on the phone when the offender approached, that both witnesses looked at the gun the offender was holding, and that Hillard walked into the street to yell for help. Defendant also claims that each witness provided only a vague description of the offender and that their identifications were impeached because they told police that the offender pulled a handkerchief over most of his face prior to the robbery. Finally, defendant claims that the witnesses' provided inconsistent accounts of the robbery.

Kang testified that defendant was only 10 feet away from her when he pulled out a gun and that she and defendant were "face to face" and only six inches apart when defendant put the gun to her neck. She also testified that the area was well lit by streetlights and a nearby dog park and that she had a clear view of defendant's eyes, nose and mouth. Kang's account of the facts surrounding her opportunity to view the offender was corroborated by Hillard, who testified to substantially the same sequence of events. Hillard added that defendant was only 8 feet away when he pulled out the gun and that the scarf he was wearing did not prevent her from seeing his face. This evidence, viewed in the light most favorable to the State, supports the conclusion that the witnesses observed the accused under conditions that would permit a positive identification to be made.

Moreover, although Kang was initially on her cell phone and Hillard later walked into the street to call for help, there is nothing in the record to suggest that either witnesses' degree of attention during the robbery was inadequate. Kang and Hillard gave similar descriptions of the offender immediately following the robbery that matched defendant's description at the time of

his arrest. Kang described the offender as an African-American male, between 25 and 30 years old, 6'2" to 6'3" tall, with broad shoulders and a medium complexion. Similarly, Hillard described the offender as an African American male, between 25 and 35 years old, 6'2" tall, approximately 200 pounds, with brown eyes and medium brown complexion. Contrary to defendant's assertion, these descriptions were not "vague" and the level of detail in the witnesses' descriptions goes only to the weight to be given to their identifications by the jury. See *Slim*, 127 Ill. 2d at 319. In addition to their in-court identifications, Kang and Hillard both identified defendant from a lineup as the offender and Kang also identified defendant from a photo array as the person who robbed her. We conclude that this evidence, viewed in the light most favorable to the State, was more than sufficient to prove defendant guilty of robbing Kang beyond a reasonable doubt.

In reaching this conclusion, we reject defendant's assertions that Kang and Hillard's identifications were unreliable. The lapse of time between the crime and the various instances in which defendant was identified as the offender by Kang or Hillard went only to the weight the jury gave to the identifications. See *Holmes*, 141 Ill. 2d at 242. We also find unpersuasive defendant's argument that Kang was unlikely to choose anyone but defendant in the lineup given that she had already identified him in the photo array. Kang and Hillard each had an adequate opportunity to view the offender's face during the robbery. Detective Hillman testified that Kang recognized defendant in the photo array and identified him as the offender. He also testified that each witness positively identified defendant in the lineup. There is nothing in the testimony of Kang, Hillard or Detective Hillman to suggest that the witness identifications were equivocal or uncertain.

Further, defendant's argument that Kang and Hillard were impeached by having admitted to drinking on the night of the robbery and by allegedly telling police that the offender pulled a scarf over his face does not create a reasonable doubt as to defendant's guilt. Under cross-examination, each witness denied telling the police that they were unable to get a close look at the offender because he pulled a scarf or handkerchief over his face. This issue was further presented to the jury when Officer Arroyo testified that he did not recall if Kang or Hillard told him the offender pulled a handkerchief over his face but that this was written in his police report. Whether Kang and Hillard told police that they could not get a close look at defendant's face and the fact that they admitted to having drinks the night of the robbery were fully explored at trial and went only to the weight that the jury assigned to the witnesses' identifications. See *Calabrese*, 398 Ill. App. 3d at 123-24.

Defendant finally claims that Kang and Hillard provided inconsistent accounts of the incident, such as when they left the bar and how far away defendant was when they first noticed him. However, these alleged variations are minor in nature, are to be expected given the circumstances, and only presented issues of credibility for the jury to resolve. See *Calabrese*, 398 Ill. App. 3d at 124 (differences among the witnesses' accounts presented inconsistencies to be resolved by the jury); *People v. Brooks*, 187 Ill. 2d 91, 133 (1999) (noting that minor variances in witnesses' accounts are to be expected anytime several people see an event under traumatic circumstances). Regardless of these alleged inconsistencies, it is evident that the jury determined that the important portions of their testimony were credible and consistent in that they each saw defendant retrieve a handgun from his pocket, point the gun at Kang's neck, take Kang's purse,

and then flee the scene. The jury's determination is supported by the evidence in the record and therefore will not be disturbed on appeal. For these reasons, we find that defendant was proven guilty of both armed robberies beyond a reasonable doubt.

Defendant's final contention is that he was denied a fair trial because the trial court failed to question the prospective jurors on their understanding and acceptance of the legal principles set forth in Supreme Court Rule 431(b) (Official Reports Advance Sheet No. 8 (April 11, 2007), R. 431(b), eff. May 1, 2007). We review defendant's contention *de novo*. See *People v. Tlatenchi*, 391 Ill. App. 3d 705, 721 (2009) (a trial court's compliance with supreme court rules is reviewed *de novo*).

The current version of Rule 431(b) provides the following:

> "The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that the defendant's failure to testify cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's failure to testify when the defendant objects.
>
> The court's method of inquiry shall provide each juror an

> opportunity to respond to specific questions concerning the principles set out in this section." Official Reports Advance Sheet No. 8 (April 11, 2007), R. 431(b), eff. May 1, 2007.

In the present case, prior to selecting the jury, the trial court admonished and questioned the venire in the following manner:

> "But there are some principles, *** and they will apply to this trial as well. And among those principles are that when a criminal trial begins the person accused of a crime walks in the court presumed to be innocent. That is how criminal trials start. Whoever is accused of a crime begin proceedings presumed to be innocent.
>
> ***
>
> Is there anybody here who has a problem with that most fundamental proposition of American justice that when a criminal trial starts the accused is presumed to be innocent. If you have a problem with that please raise your hand.
>
> No hands raised.
>
> ***
>
> How is it that someone can go from the status of a citizen accused of a crime to someone who may be guilty of a crime, how can that happen? ***. *** the only way somebody accused of a

crime can be guilty of a crime is if the government who brought the charges against the accused is able to prove their case beyond a reasonable doubt.

*** Criminal charges must run through the government. The government has the burden of proof, they have to prove their case beyond a reasonable doubt. We don't guess somebody guilty or think they're guilty or make a hunch about it, the only way somebody can be guilty in a criminal case is if the government can prove guilt beyond a reasonable doubt.

With that said, is there anybody here who has a problem with that proposition that the only way you can be guilty in a criminal case is if the government who brought the charges can prove their case beyond a reasonable doubt. If you have a problem with that please raise your hand.

No hands raised.

The last proposition I'll discuss with you is that in a criminal case the person accused of a crime does not have to prove their innocence. An accused does not have to testify, they don't have to call witnesses in your own behalf. It is their perfect right to not call witnesses or to not testify.

In a criminal case the burden of proof is on the government

> they have to prove their case beyond a reasonable doubt. And the accused does not have a responsibility to prove anything. Hypothetically speaking there could be a criminal trial, the government may call a hundred witnesses against the accused. The accused which is their perfect right does not testify which is also their right does not call witnesses on your own behalf. After hearing from a hundred people on one side and no people on the other it could be a reasonable doubt in the jury's mind as to whether the government has proved their case.
>
> With that said is there anybody here who has a problem with that proposition. Anybody who thinks that well the defendant needs to testify or they better explain the evidence, anybody who thinks that the defendant the accused has some responsibility in a criminal case to prove their innocence. You have feelings like that could you please raise your hands.
>
> No hands raised, okay."

Defendant claims that the trial court failed to comply with Rule 431(b) because it did not inform potential jurors that defendant's decision not to testify could not be held against him. Defendant also claims that although the trial court informed the prospective jurors of the three other principles set forth in the rule, it did not ask whether they "understood and accepted" those principles. Defendant acknowledges that his claim is subject to forfeiture because he did not raise

an objection in the trial court. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (failure to raise objection at trial and include the objection in a posttrial motion results in waiver of that issue on appeal). Defendant claims that the rule of forfeiture should be relaxed because "it is the [trial] judge's conduct that is at issue." However, our supreme court recently held that a defendant's failure to object in the trial court to allegedly insufficient Rule 431(b) questioning cannot be excused on the basis of the trial court's conduct being at issue. See *People v. Thompson*, No. 109033, slip op. at 10-11(October 21, 2010).

Alternatively, defendant asks that we review the issue under either prong of the plain error doctrine. However, we find no error in this case because we conclude that the trial court complied with the requirements of Rule 431(b). In both of his arguments against the sufficiency of trial court's Rule 431(b) questioning, defendant essentially complains that the trial court did not use the precise language of the rule. However, there is no requirement that a trial court use the exact language of the rule and the rule does not "prescribe a precise formula for trial judges to use in ascertaining jurors' prejudices or attitudes." *People v. Emerson*, 122 Ill. 2d 411, 426-27 (1987); *People v. Strickland*, 399 Ill. App. 3d 590, 604 (2010); *People v. Vargas*, 396 Ill. App. 3d 465, 471 (2009). We have reviewed the trial court's admonishments in this case and, although the court did not employ the precise language of the rule, we find that the court's admonishments sufficiently informed the jury that it could not hold defendant's decision not to testify against him and confirmed the jury's understanding and acceptance of all the principles set forth in the rule.

We also note that the alleged error would not be reviewable under either prong of the plain-error doctrine. First, as we have already discussed, the evidence in this case was not closely

balanced. Moreover, our supreme court recently held that a trial court's failure to comply with Rule 431(b) "does not implicate a fundamental right or constitutional protection, but only involves a violation of [the Supreme Court's] rules." *Thompson*, slip op. at 13. The court also held that while a finding that a defendant was tried before a biased jury would satisfy the second prong of plain-error review, "the failure to conduct Rule 431(b) questioning does not necessarily result in a biased jury." *Thompson*, slip op. at 12. In this case, the trial court complied with Rule 431(b) and it also admonished and instructed the jury on all of the Rule 431(b) principles prior to deliberations. Defendant has failed to meet his burden of establishing that the court's admonishments resulted in a biased jury. Accordingly, the plain-error doctrine does not provide a basis for excusing defendant's procedural default.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Affirmed.

PRESIDING JUSTICE GARCIA, specially concurring:

I agree with the majority that the record establishes the defendant agreed to join the two indictments in a single trial in July 2008. On July 1, 2008, defense counsel requested the two indictments be joined; the State requested time to consider its response. On July 15, 2008, the court admonished the defendant directly regarding the State's oral motion to join the two indictments consistent with defense counsel's earlier request. As I read the record, the defendant agreed to the joinder:

> "The Court: Your lawyer is agreeing to have [the two indictments] joined with one trial *** -- even though there will be more evidence at the one trial than there would be individually perhaps.
>
> The Defendant: Yes."

On January 30, 2009, after several continuances, with the defendant represented by a different assistant Public Defender, the trial court proceeded as if the joinder had not been agreed to. The trial court then granted the State's motion to admit evidence of other crimes. The trial court ruled that the evidence underlying the nonelected indictment was admissible in the State's elected case. The court's ruling eventually resulted in an order rejoining the two indictments in a single trial. Defense counsel agreed for a second time to a single trial of the two indictments because the evidence of the nonelected case was going to be introduced in the State's elected case in any event.

Because I find the defendant is bound to the agreed joinder of the two indictments of July

15, 2008, I conclude the only issue raised by the record is whether the trial court erred in rejecting the defendant's oral motion to sever the indictments after he agreed to join them. Because no such claim is argued by the defendant, I find the first two issues asserted by the defendant forfeited. See *People v. Major-Flisk*, 398 Ill. App. 3d 491, 500, 923 N.E.2d 324 (2010) (defendant barred from complaining " ' "of an error where to do so is inconsistent with the position taken by the party in an earlier court proceeding." ' "), quoting *McMath v. Katholi*, 191 Ill. 2d 251, 255, 730 N.E.2d 1 (2000), quoting *Auton v. Logan Landfill, Inc.*, 105 Ill. 2d 537, 543, 475 N.E.2d 817 (1984).

Nonetheless, because the majority addresses the merits of the trial court's ruling on the motion to admit evidence of other crimes, I write to express my disagreement with the trial court's reasoning for admitting the underlying evidence of the other case. On January 30, 2009, the trial court stated:

> "The jury has a right to know the truth and the truth includes how he got implicated in this case and the fact that he got implicated because he is alleged to have committed a very similar armed robbery two blocks apart, within half hour [of] the time of day, in the same manner approaching a pair of people, making a similar demand with a gun."

Based on this ruling, there is little wonder the defendant now "claims that the trial court allowed the State to introduce evidence of the Potes incident into a trial for the Kang robbery as evidence of modus operandi." Slip op. at 9. It sure sounds like that was the basis of the trial court's order.

Taking at face value the State's contention that the other crimes evidence was admitted solely to explain the course of the police investigation, I do not agree with the trial court's position, as suggested by the record, that the "course of the police investigation" exception may open the barn door to permit the introduction of the evidentiary details of the Potes armed robbery, in other words, basically the entire second case. My research has revealed no supreme court case permitting such a broad reading to an exception to "the general rule of nonadmissibility of evidence of other crimes." People v. McKibbins, 96 Ill. 2d 176, 185, 449 N.E.2d 821 (1983). Only limited and relevant evidence is permitted under an exception to the general rule of nonadmissibility. "The relevant part of [the other] crime *** would therefore be very limited." McKibbins, 96 Ill. 2d at 183.

As I read the record, the trial court ruled the jury needed to know "how out of all the photos in the world they put a photo of [the defendant] in the array." Based on this ruling, the other crimes testimony should have been limited to, at most, the mere mention of another police investigation resulting in the inclusion of the defendant's photo in the array. See McKibbins, 96 Ill. 2d at 182 ("We agree that it was not necessary to conduct a mini-trial of the [other] robbery in order to establish acts from which defendant's criminal intent with regard to the robbery-murder could be inferred, and *** we advise against such detail evidence of other offenses."). Nothing else needed to be explained to the jury unless and until the defendant, by cross-examination or otherwise, "insinuat[ed] that the accused was arrested for no reason." People v. Byrd, 43 Ill. App. 3d 735, 742, 357 N.E.2d 174 (1976).

Nor do I agree with the trial court's characterization of the two crimes involved in this case

as being so "intertwined" that evidence of each crime had to be presented else the jury would be misled into thinking the defendant "fell off a cloud and ended up in this courtroom when in fact there's a very easily explainable logical reason that the police put his photo in the photo array and the fact is that it was because of one investigation leading to another." That evidence of other crimes may be admitted when it is inextricably linked to the charged offense is clear based on McKibbins and People v. Slater, 393 Ill. App. 3d 977, 924 N.E.2d 1039 (2009). This case, however, is unlike either of those cases.

In McKibbins, the two offenses were inextricably linked because the defendant was arrested in the course of committing an armed robbery of a jewelry store that resulted in recovery of evidence linking the defendant to an earlier armed robbery and murder. "It would be difficult to explain or describe circumstances surrounding the defendant's arrest without introducing a substantial amount of the evidence concerning the jewelry robbery." McKibbins, 96 Ill. 2d at 183.

In Slater, the defendant was charged with murder and domestic battery, which he contended were wrongly joined. The domestic battery, however, was committed a short time prior to the murder and explained the rage the defendant was experiencing before he fired a shotgun at an individual that arrived at the defendant's residence "at the most inopportune time." Slater, 393 Ill. App. 3d at 993. The shotgun blast missed that individual but struck a companion in the car the individual arrived in. The domestic battery evidence was admissible because "the first degree murder and domestic battery occurred at or near the same location and within a very short time of each other. As a result, the domestic-battery evidence would have been admissible

under the continuing-narrative exception had the only charge before the jury been first degree murder." Slater, 393 Ill. App. 3d at 993. In other words, the murder and domestic battery were inextricably linked.

The evidence of the two armed robberies in this case were not so intertwined as in McKibbins where the defendant was arrested while committing another offense or as in Slater where the narrative explaining how the murder occurred necessarily included testimony of the domestic battery that occurred a short time before.

Nor is this case like People v. Trail, 197 Ill. App. 3d 742, 449 N.E.2d 821 (1990), where the defendant was charged with two counts of criminal sexual assault involving two stepdaughters in a single charging instrument. The defendant's motion for severance was denied by the circuit court and affirmed on appeal because the counts were "part of the same comprehensive scheme." Trail, 197 Ill. App. 3d at 746, citing 725 ILCS 5/111-4(a). The State does not suggest that the "same comprehensive scheme" rationale applies here as the defendant was charged with the two armed robberies under separate indictments.

This case also differs from People v. Gonzalez, 379 Ill. App. 3d 941, 884 N.E.2d 228 (2008). In Gonzalez, the defendant objected to the introduction of evidence regarding a murder that occurred subsequent to the one he was charged with committing. "The trial court ruled that the details of [the first murder] could not be used as other crimes evidence because there was no evidence connecting the defendant to that crime and *** barred the State from implying that defendant committed that murder." Gonzalez, 379 Ill. App. 3d at 949. Nonetheless, limited evidence of the first murder was admissible to explain "why the investigation into [the charged]

murder was reopened in 1996, approximately five years after the crime occurred and after the case had gone 'cold.' " Gonzalez, 379 Ill. App. 3d at 950. Ultimately, we held the evidence of the first murder did not constitute evidence of other crimes committed by the defendant. Gonzalez, 379 Ill. App. 3d at 951. In this case, there is no doubt that the State sought to prove the defendant committed both the charged offense and the offense made out by the other crimes evidence.

Accordingly, I specially concur in the judgment of the majority that the trial court did not err in admitting other crimes evidence and in joining the two armed robbery charges because the defendant agreed to the joinder of the two indictments as demonstrated in the record before us, barring consideration of the first two issues he raises on appeal.

I fully concur in the majority's decision as to the remaining issues.