FIRST DIVISION
December 3, 2012

No. 1-11-2275

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. 10 CR 13546
	)	
TYRONE JONES,	)	Honorable
	)	Rosemary Higgins-Grant,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Karnezis concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction of burglary and his sentence of 12 years' imprisonment and 3 years' mandatory supervised release (MSR) was affirmed where trial counsel committed no ineffective assistance and where the trial court correctly imposed a 3-year MSR term as part of his Class X sentence.

¶ 2 Following a bench trial, the trial court convicted defendant, Tyrone Jones, of burglary and sentenced him to 12 years' imprisonment and 3 years' mandatory supervised release (MSR). On appeal, defendant contends: (1) his trial counsel committed ineffective assistance by failing to file a motion to suppress his second statement to police; and (2) his MSR term should be two years

instead of three years. We affirm.

¶ 3 At trial, Detective Andrew Burns testified he had been with the Chicago police department for 17 years. At about 5:30 a.m. on July 3, 2010, he was at his residence at 8016 South Whipple Street in Chicago, when he was awakened by his home alarm system. The alarm system indicated that someone was either going into or coming out of his unattached garage, which is located in his back yard, 15 feet from his house. Detective Burns and his wife went into the kitchen, looked out the window, and saw an African-American male wearing blue jeans, overalls, with a black scarf on his head, entering the garage. Detective Burns viewed the man for about five seconds and saw the "the side and the front view of his face." Detective Burns made an in-court identification of defendant as the man he saw entering his garage. Detective Burns did not know defendant and had not given him permission to enter the garage.

¶ 4 Detective Burns testified that in less than a minute, he got dressed and grabbed his police star, wallet, and handgun. Detective Burns went outside, where he saw that the latch to the gate on the chain link fence surrounding his back yard was bent, that the side door to the garage was open, and that the knob on the door was "shaken off." The door knob and gate latch were not damaged when Detective Burns had last seen them earlier that morning at 12 or 1 a.m.

¶ 5 Defendant was no longer in the garage, so Detective Burns got into his car and drove around looking for defendant. Detective Burns testified that about 20 or 30 feet away from his home, he spotted defendant walking with a bicycle at 80th and Whipple Streets, going northbound toward 79th Street. Approximately five minutes had elapsed from the time Detective Burns had first seen defendant enter his garage.

¶ 6 Detective Burns testified he pulled up alongside defendant, identified himself as a police officer, and asked defendant what he was doing in "my" garage. At this point, the trial court granted defense counsel's request to conduct a simultaneous motion to suppress any statement defendant made to Detective Burns on the basis that Detective Burns was acting as a police officer and did not give defendant *Miranda* warnings.

¶ 7 Detective Burns proceeded to testify that he exited his car and had his handgun out. He was about one foot away from defendant. When asked by the Assistant State's Attorney whether he was acting as a police officer at that point, Detective Burns testified he "was acting as a victim who had just [had] his garage *** burglarized." Detective Burns testified further that after asking defendant what he was doing in the garage, defendant said he was "looking for something to sell." Detective Burns then told him to put his hands up, placed him in custody, and called 911. Patrol officers arrived within five minutes.

¶ 8 On cross-examination, Detective Burns testified that the gate on the chain-link fence surrounding his yard had been locked prior to the alarm going off at 5:30 a.m. Detective Burns testified that after hearing the alarm and looking out the kitchen window, he saw the African-American male (defendant) entering the garage through the side door. As he was entering the garage, defendant turned and looked at Detective Burns through the window and then proceeded inside the garage. Detective Burns went outside and saw that the latch on the gate had been pried open. Detective Burns did not take any photographs of the damage to the latch or to the doorknob on the side door of the garage. When Detective Burns subsequently stopped defendant at 80th and Whipple Streets, he did not see any tools on defendant. Detective Burns searched defendant and

found a metal pipe in his pocket. Detective Burns did not give defendant his *Miranda* warnings.

¶ 9 Detective Burns testified that Officer Stark and his partner arrived on the scene and inventoried the metal pipe. Detective Burns told Officer Stark that defendant admitted to entering the garage to find something to sell. Officer Stark and his partner placed defendant in a police vehicle, after which Detective Burns returned to his garage and looked to see if anything was missing. He discovered nothing missing, but he did notice that his radio and some tools had been moved around inside the garage.

¶ 10 Detective Burns admitted that contrary to his trial testimony, he testified at a preliminary hearing that he saw defendant *exiting* his garage.

¶ 11 Officer Stark testified that between 5:30 a.m. and 5:40 a.m. on July 3, 2010, he was in uniform and driving a marked wagon with his partner, Officer Conrath, when they received a call to assist an off-duty police officer who was holding an offender at 7950 South Whipple Street. They drove to the location and saw Detective Burns standing next to defendant, who was handcuffed. Officer Stark had a conversation with Detective Burns, after which Officer Stark gave defendant his *Miranda* warnings at 5:45 a.m.; Detective Burns was not present when the warnings were given. Officer Stark then asked defendant "what he was doing." Defendant replied "he was in the detective's garage looking for scrap metal to recycle."

¶ 12 On cross-examination, Officer Stark first testified Detective Burns told him he saw defendant entering the garage. Officer Stark subsequently testified he prepared an arrest report stating that Detective Burns had only told him he saw defendant exit the garage.

¶ 13 Officer Stark testified he did not ask Detective Burns whether he had questioned defendant.

Detective Burns did not tell Officer Stark that he had asked defendant what he was doing in the garage, and that defendant had replied he was looking for something to sell.

¶ 14 Officer Stark testified that when he first arrived on the scene, he did not see defendant in possession of any sort of burglary tools. Officer Stark did not recall whether Detective Burns gave him any object, such as a metal pipe, that he had recovered from defendant. Officer Stark searched defendant and did not discover any burglary tools or a pipe that could be used to pry open a metal lock. Nothing was recovered from defendant that was identified as belonging to Detective Burns.

¶ 15 Officer Stark testified he later went back to the garage and observed that the gate on the chain link fence surrounding the back yard had a lock which had been pried open. Officer Stark observed the side entry door to the garage and saw that the lock had been damaged. Officer Stark asked Detective Burns whether anything was missing from the garage, but he could not remember Detective Burns's response.

¶ 16 After Officer Stark testified, the State rested. The trial court granted defendant's motion to suppress the statement defendant made to Detective Burns but allowed into evidence the statement defendant gave to Officer Stark.

¶ 17 Following all the evidence, the trial court found there was no significant impeachment of Detective Burns with respect to whether defendant was entering or exiting his garage when he saw him, and there was only minor impeachment with regard to whether a pipe was found on defendant. Based on Detective Burns's positive identification of defendant, defendant having been found a short distance from the garage, and defendant's statement to Officer Stark, the trial court convicted defendant of burglary.

¶ 18 During the sentencing hearing, the trial court indicated it had read the presentence report, which stated that defendant was born on May 19, 1958, and that he had a 10th grade education and an extensive criminal background. The State argued in aggravation that defendant was eligible for a Class X sentence as a recidivist, having 11 previous felony convictions since 1976. The defense argued in mitigation that nobody was hurt in the burglary and no property was taken. The trial court subsequently sentenced defendant within the Class X sentencing range to 12 years' imprisonment, with a corresponding 3-year term of MSR. Defendant appeals.

¶ 19 First, defendant contends his trial counsel was ineffective for failing to move to suppress his statement to Officer Stark. To determine whether defendant was denied his right to effective assistance of counsel, we apply the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). First, defendant must show "counsel's representation fell below an objective standard of reasonableness" (*Strickland*, 466 U.S. at 688), and second, that he was substantially prejudiced such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. When the deficient performance involves a failure to file a motion to suppress, substantial prejudice exists if there is a reasonable probability that the motion would have been granted and that the outcome of the trial would have been different had the evidence been suppressed. *People v. Orange*, 168 Ill. 2d 138, 153 (1995). A failure to show substantial prejudice, in itself, disposes of the ineffective assistance claim. *People v. Albanese,* 104 Ill. 2d 504, 527 (1984). In deciding whether counsel provided ineffective assistance, we employ a bifurcated standard of review, wherein we defer to the trial court's findings of fact unless they are against the manifest weight of the evidence, but we consider *de novo* the

ultimate legal issue of whether counsel's actions support an ineffective assistance claim. *People v. Stanley*, 397 Ill. App. 3d 598, 612 (2009).

¶ 20 In the present case, defendant argues he gave a statement to Detective Burns at gunpoint without first receiving *Miranda* warnings, which the trial court correctly suppressed. However, defendant claims his trial counsel was ineffective for not moving to suppress the second, nearly identical statement he gave to Officer Stark after *Miranda* warnings were given. Defendant argues that the "question first, warn later" technique utilized here requires suppression of the second confession.

¶ 21 The fifth amendment protects against involuntary self-incrimination. *People v. Lopez*, 229 Ill. 2d 322, 355 (2008). In *Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966), the United States Supreme Court held that statements made by a defendant in response to custodial interrogation must be suppressed unless police officers warn defendant of certain rights, including the right to remain silent and the right to an attorney, and obtain a voluntary waiver of those rights. *Arizona*, 384 U.S. at 478-79.

¶ 22 In *Oregon v. Elstad*, 470 U.S. 298 (1985), the United States Supreme Court addressed the situation where a defendant makes inculpatory statements without first being given *Miranda* warnings and then repeats those statements after the warnings are given. In *Elstad*, police officers went to defendant's house with a warrant for his arrest for burglary. *Elstad*, 470 U.S. at 300. One officer explained the arrest warrant to defendant's mother in the kitchen, while another officer spoke with defendant in the living room and asked him questions without advising him of his *Miranda* rights. *Elstad*, 470 U.S. at 300-01. Defendant made an incriminating statement. *Elstad*, 470 U.S.

at 301. Later, at the police station, officers gave defendant his *Miranda* warnings, after which he confessed. *Elstad*, 470 U.S. at 301.

¶ 23 The trial court suppressed defendant's prewarning statement. *Elstad*, 470 U.S. at 302. On appeal, the United States Supreme Court considered whether the postwarning statement also should have been suppressed, and concluded:

> "[A]bsent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion. A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement. In such circumstances, the finder of fact may reasonably conclude that the suspect made a rational and intelligent choice whether to waive or invoke his rights." *Elstad*, 470 U.S. at 314.

¶ 24 The United States Supreme Court revisited *Elstad* in *Missouri v. Seibert*, 542 U.S. 600 (2004). In *Seibert*, defendant was arrested for murder and questioned by police without being given *Miranda* warnings. *Seibert*, 542 U.S. at 604-05. Defendant made an incriminating statement, after which she was given a 20-minute break. *Seibert*, 542 U.S. at 605. The officer then gave defendant her *Miranda* warnings, obtained a signed waiver of her *Miranda* rights, and resumed questioning while confronting her with her prewarning statements. *Seibert*, 542 U.S. at 605. Defendant made a second confession. *Seibert*, 542 U.S. at 605.

¶ 25 Defendant moved to suppress her prewarning and postwarning statements. *Seibert*, 542 U.S.

at 605. At the hearing on the motion, the police officer testified "he made a 'conscious decision' to withhold *Miranda* warnings, thus resorting to an interrogation technique he had been taught: question first, then give the warnings, and then repeat the question 'until I get the answer that she's already provided once.' " *Seibert*, 542 U.S. at 605-06.

¶ 26 In a plurality opinion authored by Justice Souter, the United States Supreme Court stated that the question-first, warn-later technique used by the officer rendered defendant's postwarning statement inadmissible. *Seibert*, 542 U.S. at 617. The plurality distinguished the police conduct in *Elstad* from the question-first, warn-later technique utilized in *Seibert* by "treating the living room conversation [in *Elstad*] as a good-faith *Miranda* mistake, not only open to correction by careful warnings before systematic questioning in that particular case, but posing no threat to warn-first practice generally." *Seibert*, 542 U.S. at 615. By contrast, the plurality opinion found the officer's questioning in *Seibert* was "systematic, exhaustive, and managed with psychological skill." *Seibert*, 542 U.S. at 616.

¶ 27 The plurality created a new test to determine whether *Miranda* warnings given after questioning could effectively protect a suspect's rights. The test required consideration of "the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first." *Seibert*, 542 U.S. at 615. Applying this test, the plurality held that the defendant's statements were inadmissible as they were obtained by a police strategy designed to undermine *Miranda*. *Seibert*, 542 U.S. at 616.

¶ 28 Justice Kennedy wrote a concurrence advocating a narrower test:

> "The admissibility of postwarning statements should continue to be governed by the principles of *Elstad* unless the deliberate two-step strategy was employed. If the deliberate two-step strategy has been used, postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made. Curative measures should be designed to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver." *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring).

¶ 29 In *People v. Lopez*, the Illinois Supreme Court (hereinafter the supreme court) considered *Seibert* and held that, absent a majority opinion therein, the holding is viewed as that position taken by the justices who concurred on the narrowest grounds. *Lopez*, 229 Ill. 2d at 359 (citing *Marks v. United States*, 430 U.S. 188, 193 (1977)). The supreme court found that Justice Kennedy's concurrence in *Seibert* "resolves the case on the narrowest grounds and is therefore controlling authority" with respect to how to analyze the situation where a defendant makes inculpatory statements without first being given *Miranda* warnings and then repeats those statements after the warnings are given. *Lopez*, 229 Ill. 2d at 360. The supreme court noted that the appellate court also has adopted this interpretation of *Seibert*. *Id*. at 360 (citing *People v. Montgomery*, 375 Ill. App. 3d 1120 (2007) and *People v. Loewenstein*, 378 Ill. App. 3d 984 (2008)).

¶ 30 In applying Justice Kennedy's concurrence, the supreme court held that the first step in addressing the admissibility of defendant's postwarning inculpatory statements is to determine

whether officers deliberately used a question-first, warn-later technique when interviewing defendant. *Id*. " '[I]n determining whether the interrogator deliberately withheld the *Miranda* warning, courts should consider whether objective evidence and any available subjective evidence such as an officer's testimony, support an inference that the two-step interrogation procedure was used to undermine the *Miranda* warning.' " *Id*. at 361 (quoting *United States v. Williams*, 435 F. 3d 1148, 1158 (9th Cir. 2006)). The supreme court acknowledged that police officers generally refuse to admit on the record to using a question-first, warn-later interrogation technique to secure a confession. *Id*. at 361. However, by considering the objective evidence in addition to any subjective evidence, such as an officer's testimony, the court may be able to determine whether the officer employed the question-first, warn-later technique to circumvent *Miranda*. *Id*. To review the objective evidence, the supreme court set forth the following factors as guidelines for consideration: the timing, setting and completeness of the prewarning interrogation; the continuity of police personnel; and the overlapping content of the unwarned and warned statements. *Id.* at 361-62 (citing *Williams*, 435 F. 3d at 1159).

¶ 31 Looking at the subjective evidence before it in *Lopez*, the supreme court noted that the detective involved explicitly denied using the question-first, warn-later technique. *Id*. at 362. Looking at the objective evidence, the supreme court noted that the police brought the 15-year-old defendant into an interrogation room at the police station at approximately 1 p.m. on July 21, 1998, one week after the murder, and told him that another person (Mr. Leal) had implicated him in the murder. *Id*. After leaving defendant for four or five hours in the interrogation room, the same detectives reinterviewed Mr. Leal, who admitted his own involvement and again implicated

defendant. *Id*. The detectives arrested Mr. Leal, returned to the police station, and spoke with defendant at 6 p.m. and again informed him that Mr. Leal had implicated him in the murder. *Id*. Without providing *Miranda* warnings, the detectives asked defendant whether he was involved in the murder. *Id*. Defendant responded by making an oral incriminating statement. *Id*. After his confession, the detectives gave defendant his *Miranda* warnings. *Id*. Defendant subsequently gave a handwritten statement again confessing to his part in the crime. *Id*. at 365.

¶ 32 Viewing the evidence in its totality, the supreme court determined that the detectives engaged in a "question first, warn later" interrogation when, after about five hours at the police station, the same detectives who had initially confronted defendant with Mr. Leal's statement confronted defendant again with Mr. Leal's statement and obtained an oral confession without benefit of any *Miranda* warnings. *Id*. at 362-63. Noting the testimony of one of the detectives that defendant would not have been free to leave the police station at 6 p.m. after Mr. Leal's incriminating statement had been obtained, the supreme court stated it could "think of no legitimate reason why the detectives failed to give defendant his *Miranda* warnings prior to the 6 p.m. confrontation, other than a deliberate decision to circumvent *Miranda* in hopes of obtaining a confession, which would ultimately lead to a handwritten statement." *Id*. at 363-64.

¶ 33 Having determined the detectives deliberately used a question-first, warn-later technique when questioning defendant, the supreme court next considered whether any curative measures were taken to make defendant's statements admissible. *Id.* at 364. The supreme court noted that "[t]he relevant question is whether, after receiving midstream *Miranda* warnings, a reasonable person, in defendant's situation, would have understood that he retained a choice about continuing to talk to

police." *Id.* Factors to consider include: the passage of time between the warned and unwarned statements; the location where the statements were taken; whether the questioning for the warned and unwarned statements was conducted by the same officer; whether details from the unwarned statement were used during the questioning following the warnings; whether defendant was told that the unwarned statement was likely to be inadmissible against him; and whether it was reasonable to look at the unwarned and warned interviews as part of a continuum, in which it would have been unnatural to refuse to repeat the statement during the questioning following the warnings. *Id*. at 364-65.

¶ 34 The supreme court noted that defendant's unwarned and warned statements were taken close in time (within about three hours of each other), in the same place, with one of the detectives present for both, and defendant never was advised that his oral statement would be inadmissible. *Id*. at 366. The supreme court held that a reasonable juvenile in defendant's situation would not have understood he had a genuine choice about whether to continue talking to police and, therefore, defendant's handwritten statement was involuntary for fifth amendment purposes and should have been suppressed. *Id*.

¶ 35 Applying the *Lopez* analysis to the case at bar, we begin by examining the subjective evidence, such as the officers' testimony, to determine whether the officers deliberately used a question-first, warn-later technique when interviewing defendant. Detective Burns never admitted to using a question-first, warn-later technique, or even that he was acting in the role of a police officer when he questioned defendant. Rather, Detective Burns testified that when he questioned defendant, he was acting as a victim who had just had his garage burglarized. Defendant contends

Detective Burns's testimony that he was only acting as a victim and not as a police officer, is implausible given that he identified himself as an officer to defendant and approached with his badge out and gun drawn. Regardless of whether Detective Burns was acting as a victim or as an officer though, we again note he never admitted to using the question-first, warn-later technique.

¶ 36 Officer Stark also never admitted to using a question-first, warn-later technique and, in fact, testified he was unaware defendant had been questioned prior to the giving of *Miranda* warnings.

¶ 37 Defendant contends Officer Stark's testimony, that he was unaware defendant had been questioned prior to the giving of *Miranda* warnings, conflicted with Detective Burns's testimony that he told Officer Stark defendant had been questioned and had admitted to entering the garage to find something to sell. Defendant argues that Officer Stark's testimony, that he was unaware defendant had been questioned, was incredible, and the reason for Officer Stark's incredible testimony was that he did not want to admit he and Detective Burns had coordinated a strategy to deliberately circumvent *Miranda* warnings. Defendant is effectively asking us to make a credibility determination between Officer Stark and Detective Burns; however, the credibility of the witnesses is the province of the trier of fact, who saw the witnesses and heard their testimony and is in a better position to assess credibility than the reviewing court. *People v. Lomax*, 2012 IL App (1st) 103016, ¶ 19. The trial court here made no explicit finding as to whether it believed Detective Burns's testimony that he told Officer Stark he had questioned defendant, and we are unable to resolve this issue on the written record before us. However, even assuming for the sake of argument that Detective Burns *did* tell Officer Stark about his questioning of defendant, there was still no testimony from either of the officers that said questioning was done to circumvent *Miranda*. Thus, there is no

subjective evidence that the officers deliberately used a question-first, warn-later interrogation technique to evade the *Miranda* requirements.

¶ 38 As discussed above, the supreme court has recognized that police officers rarely will admit on the record to deliberately using the question-first, warn-later interrogation technique to secure a confession (*Lopez*, 229 Ill. 2d at 361), therefore, objective evidence must be considered. As discussed, such evidence includes: the timing, setting and completeness of the prewarning interrogation; the continuity of police personnel before and after warnings are given; and any overlapping content of the unwarned and warned statements. *Id*.

¶ 39 In the present case, the timing of Detective Burns's interrogation occurred only about five minutes after he first saw defendant enter his garage, and the setting of the interrogation was 7950 South Whipple Street, 20 or 30 feet away from his home, where Detective Burns saw defendant walking with a bicycle. Unlike *Lopez*, where the interrogation occurred at the police station one week after the murder, the setting and immediateness of the interrogation here indicates Detective Burns did not have the time, opportunity, or motivation to think up a strategy to circumvent *Miranda*. Rather, the evidence that Detective Burns immediately chased after defendant and questioned him to discover why defendant had entered the garage indicates that the failure to first give *Miranda* warnings was a mistake made in haste instead of a deliberate attempt to violate defendant's constitutional rights. Further, Detective Burns's interrogation of defendant consisted of one question (asking defendant "what was he doing in my garage"), and one response, unlike the questioning in *Seibert*, which was "systematic, exhaustive, and managed with psychological skill." *Seibert*, 542 U.S. at 616. The brevity of the questioning further indicates that Detective Burns was

acting hastily to discover why defendant had entered his garage, and that the failure to first give *Miranda* warnings was an oversight and not deliberate. Also, the evidence indicates that Officer Stark was not present when Detective Burns initially questioned defendant, but only arrived after receiving a call to assist an off-duty police officer, which further belies defendant's argument that the officers collaborated together and deliberately decided to engage in a question-first, warn-later interrogation technique to circumvent *Miranda*. Also, Officer Stark gave defendant his *Miranda* warnings within minutes of arriving on the scene and only about 10 minutes after Detective Burns questioned defendant. The immediacy of the *Miranda* warnings upon Officer Stark's arrival on the scene, coupled with the fact that defendant was not questioned by the same police officer before and after those warnings, are further objective indicators that the officers did not deliberately attempt to engage in the question-first, warn-later interrogation technique.

¶ 40 Thus, viewing all the objective evidence in its totality, we conclude the officers did not deliberately engage in a question-first, warn-later interrogation technique to circumvent the *Miranda* requirements.

¶ 41 Where, as here, the officers did not deliberately engage in the question-first, warn-later interrogation technique, *Elstad* governs the admissibility of postwarning statements. *People v. Loewenstein*, 378 Ill. App. 3d 984, 992 (2008); *People v. Montgomery*, 375 Ill. App. 3d 1120, 1127 (2007). As *Elstad* applies, "[t]he relevant inquiry is whether, in fact, the second statement was also voluntarily made. As in any such inquiry, the finder of fact must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements." *Elstad*, 470 U.S. at 318. Among the elements considered are age,

education, intelligence, experience with the criminal justice system, the length of detention and interrogations, whether the accused was advised of his constitutional rights, and whether he was mistreated or abused. *People v. Williams*, 230 Ill. App. 3d 761, 776 (1992).

¶ 42 Defendant here was a 52-year-old male with a 10th grade education and an extensive criminal background who was subject to a short interrogation and given *Miranda* warnings prior to the making of the second statement. There is no indication that the warnings were incomplete, and there is no evidence the officers used any coercive tactics to obtain the second statement. Thus, there is no evidence suggesting defendant's second statement was in any way involuntary. As the second statement was voluntarily made, *Miranda* does not require suppression, and accordingly defense counsel was not ineffective for choosing not to file a motion to suppress said statement.

¶ 43 Moreover, we note that even *if* the officers engaged in a deliberate question-first, warn-later technique to circumvent *Miranda*, defense counsel committed no ineffective assistance of counsel in failing to file a motion to suppress the second statement, because curative measures were taken to allow for its admissibility. "If there is evidence to support a finding of deliberateness, then we must consider whether curative measures were taken, such as a substantial break in time and circumstances between the statements, such that the defendant would be able to 'distinguish the two contexts and appreciate that the interrogation has taken a new turn.' " *Lopez*, 299 Ill. 2d at 360-61 (quoting *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring)). The relevant question is whether a reasonable person in defendant's situation would have understood, after receiving midstream *Miranda* warnings, that he retained a choice about continuing to talk to police. *Id*. at 364. As discussed above, factors to consider, in addition to the passage of time between the warned and

unwarned statements, include: the location where the statements were taken; whether the questioning for the warned and unwarned statements was conducted by the same officer; whether details from the unwarned statement were used during the questioning following the warnings; whether defendant was told that the unwarned statement was likely to be inadmissible against him; and whether it was reasonable to look at the unwarned and warned interviews as part of a continuum, in which, it would have been unnatural to refuse to repeat the statement during the questioning following the warnings. *Id*. at 364-65.

¶ 44 Here, although there was not a significant amount of time that elapsed between defendant's statement to Detective Burns and his postwarning statement to Officer Stark, and although defendant was not informed that the unwarned statement was likely to be inadmissible against him, there still was a substantial change in circumstances between the two contexts such that defendant should have appreciated that the interrogation had taken a new turn. Specifically, when defendant first encountered Detective Burns, the detective was not in uniform, nor was there any indication he was in a marked vehicle. Although Detective Burns identified himself to defendant as a police officer and was holding his gun, Detective Burns proceeded to ask defendant what he was doing "in *my* garage." (Emphasis added.) A reasonable person in defendant's position would have understood Detective Burns was the owner of the burglarized garage and distinguished the context of that conversation from the subsequent conversation with Officer Stark, who arrived on the scene with a partner and in uniform, driving a marked wagon. Officer Stark *Mirandized* defendant when Detective Burns was not present, and his questioning of defendant did not refer back to his earlier statement to Detective Burns. A reasonable person in defendant's situation would have appreciated

the difference in contexts between his questioning by Detective Burns (the owner of the burglarized garage) and his postwarning questioning by Officer Stark, and would have understood, after receiving the *Miranda* warnings, that he retained a choice about continuing to talk to police.

¶ 45 Accordingly, as appropriate curative measures were taken to allow for the admissibility of defendant's second statement, trial counsel was not ineffective for failing to file a motion to suppress said statement.

¶ 46 Finally, there was no ineffective assistance here because there is no reasonable probability that the outcome of the trial would have been different had defendant's statement to Officer Stark been suppressed. Defendant was charged with burglary, which required the State to prove beyond a reasonable doubt that defendant knowingly and without authority entered Detective Burns's garage with the intent to commit therein a theft. "Criminal intent is a state of mind that not only can be inferred from the surrounding circumstances [citation], but usually is so proved. [Citation.] Such circumstances include the time, place, and manner of entry into the premises; the defendant's activity within the premises; and any alternative explanations offered for his presence." *People v. Maggette*, 195 Ill. 2d 336, 354 (2001). "In the absence of inconsistent circumstances, proof of unlawful entry into a building which contains personal property that could be the subject of larceny gives rise to an inference that will sustain a conviction of burglary." *People v. Rossi*, 112 Ill. App. 2d 208, 211-12 (1969).

¶ 47 At trial, Detective Burns testified he was awakened at 5:30 a.m. on July 3, 2010, when his home alarm system went off, indicating an intruder was in his unattached garage. Detective Burns looked out his kitchen window and saw defendant enter the garage without permission. Detective

Burns walked outside and discovered the latch on his gate had been pried open, and the doorknob to the side door to the garage was "shaken off." When Detective Burns later examined his garage, he discovered his radio and some tools had been moved around.

¶ 48 Even without defendant's statement to Officer Stark, the uncontradicted testimony of Detective Burns with regard to the damage to the gate and garage side door, and his discovery of defendant entering the garage without permission at 5:30 a.m., was sufficient to establish beyond a reasonable doubt that defendant knowingly and without authority entered Detective Burns's garage. Detective Burns's uncontradicted testimony regarding the forcible entry into the garage at 5:30 a.m., coupled with his testimony that following defendant's arrest he examined the inside of the garage and discovered that the radio and toolbox were no longer in the same locations therein, gives rise to the inference that defendant's intent when he entered the garage was to commit a theft. There was no evidence presented that suggested any alternative explanation for defendant's presence inside Detective Burns's garage. Thus, Detective Burns's testimony established defendant committed burglary beyond a reasonable doubt even without defendant's statement to Officer Stark. Accordingly, as there is no reasonable probability that defendant would have been acquitted had his statement to Officer Stark been suppressed, defense counsel committed no ineffective assistance for failing to file a motion to suppress said statement.

¶ 49 Next, defendant contends the trial court erred by imposing a three-year MSR term accompanying a Class X felony. Defendant here was convicted of burglary, which is a Class 2 felony, after previously having been convicted of multiple Class 2 felonies. Section 5-4.5-95(b) of the Unified Code of Corrections (Code) which provides that when a defendant over the age of 21

years is convicted of a Class 1 or Class 2 felony, and has been convicted of a Class 2 or greater felony twice before, the defendant is to be sentenced as a Class X offender. 730 ILCS 5/5-4.5-95(b) (West 2010). The MSR term that attaches to a Class X offense is three years. 730 ILCS 5/5-8-1(d)(1) (West 2010).

¶ 50 Defendant argues he should be required to serve the two-year MSR term for Class 2 felonies (see 730 ILCS 5/5-8-1(d)(2) (West 2010)) despite receiving a Class X sentence as a recidivist. Defendant argues this result is required by a plain reading of the MSR statute (730 ILCS 5/5-8-1(d)(2) (West 2010)), which states that the MSR term is two years for a Class 2 felony or, alternatively, by the doctrine of lenity. Defendant concedes this issue has been decided against him in *People v. Anderson*, 272 Ill. App 3d 537 (1995), which held that when a defendant qualifies for Class X sentencing, a three-year period of MSR is required under section 5-8-1(d)(1) of the Code, which states that the three-year MSR term"*shall"* be imposed. (Emphasis added.) *Id*. at 541; 730 ILCS 5/5-8-1(d)(1) (West 2010). *Anderson* explained the reasoning behind imposing a three-year period of MSR on an offender who was not convicted of a Class X offense but who was eligible for a Class X sentence because of his criminal background, stating, "the gravity of the conduct offensive to the public safety and welfare, authorizing Class X sentencing, justifiably requires lengthier watchfulness after prison release than violations of a less serious nature." *Anderson*, 272 Ill. App 3d at 541.

¶ 51 However, defendant argues *Anderson* is not controlling because it was decided prior to our supreme court decision in *People v. Pullen*, 192 Ill. 2d 36 (2000).

¶ 52 In *Pullen*, the defendant there who had sufficient prior felony convictions and pled guilty to

five counts of burglary was sentenced as a Class X offender under the Code (730 ILCS 5/5-5-3(c)(8) (West 1994)). *Pullen*, 192 Ill. 2d at 38-39. The trial court sentenced defendant to 15 years' imprisonment on each of the five counts of burglary. *Id*. at 39. The sentences on counts I and II ran concurrently with each other, as did the sentences on counts III, IV, and V. *Id*. However, the 15-year terms on counts I and II ran consecutively to the 15-year terms on counts III, IV, and V, which resulted in an aggregate sentence of 30 years' imprisonment. *Id*. The supreme court determined that because the underlying burglary conviction, a Class 2 felony, had a maximum sentence of 14 years, the aggregate of the consecutive sentences could not exceed 28 years. *Id*. at 43. The supreme court reasoned that the treatment of defendant as a Class X offender did not change the classification of the underlying felonies for which he was convicted. *Id*. The supreme court noted that "[t]he character and classification of the felonies a defendant has committed remain unchanged notwithstanding that he is subject to sentence enhancement under [now section 5-4.5-95(b) of] the Code." *Id.* at 46.

¶ 53 Defendant here argues that as in *Pullen*, the enhanced sentencing provisions of section 5-4.5-95(b) of the Code do not change the underlying class of his offense. Since his underlying offense of burglary was a Class 2 felony, defendant argues he should receive the two-year MSR term for a Class 2 felony.

¶ 54 We have recently examined *Anderson* in light of *Pullen* and concluded that a defendant sentenced as a Class X offender due to his prior convictions is required to serve the Class X MSR term of three years, even where the offense of which he was convicted was a Class 2 felony. See *People v. Brisco*, 2012 IL App (1st) 101612, ¶ 62. We reasoned that *Pullen* merely limits the extent

to which separate sentences for separate offenses may be served consecutively, and that *Pullen* does not disturb the conclusion that an individual subject to Class X sentencing will be subject to the Class X MSR period. *Id*. We decline to depart from *Brisco* and hold that the imposition of the three-year MSR term was appropriate here.

¶ 55 For the foregoing reasons, we affirm the circuit court.

¶ 56 Affirmed.