No. 3–09–0443

Order filed February 7, 2011

IN THE

APPELLATE COURT OF ILLINOIS

THIRD JUDICIAL DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
Plaintiff-Appellee,	)	Peoria County, Illinois,
	)	
v.	)	No. 07–CF–625
	)	
TEWKUNZI E. GREEN,	)	Honorable
	)	James E. Shadid,
Defendant-Appellant.	)	Stewart P. Borden,
	)	Judges Presiding

JUSTICE WRIGHT delivered the judgment of the court.
Justice Lytton concurred in the judgement.
Justice Holdridge specially concurred.

ORDER

Held: The trial court did not err by admitting the State's evidence of another offense between defendant and victim in order to establish defendant's intent. In addition, defendant has forfeited the trial court's failure to strictly comply with Supreme Court Rule 431(b), and defendant did not establish that the trial court's error constituted plain error. Defendant's conviction for first degree murder is affirmed.

Following a trial, a jury found defendant guilty of the offense of first degree murder. On appeal, defendant claims that she is entitled to a new trial because the trial court erred in allowing

the State to present evidence to the jury of another offense between defendant and the victim and because the trial court failed to strictly comply with the mandates of Supreme Court Rule 431(b) when examining the prospective jurors during *voir dire*. We affirm defendant's conviction.

FACTS

On June 26, 2007, a Peoria County grand jury issued a bill of indictment alleging defendant committed the offense of first degree murder on June 6, 2007, by stabbing Montral Fleming with a knife, without lawful justification, knowing such act created a strong probability of death or great bodily harm and thereby caused the death of Montral Fleming in violation of section 9-1(a)(2) of the Criminal Code of 1961 (720 ILCS 5/9-1(a)(2) (West 2006)).

On October 15, 2007, the State filed a notice of intent to offer evidence of a previous offense by defendant toward this victim as substantive proof of her intent, motive, *modus operandi* and general attitude toward the victim with regard to the current offense. On December 20, 2007, Judge Borden conducted a hearing on the State's notice of use of other crimes evidence and took the matter under advisement to review the relevant information offered by the parties.

On December 28, 2007, defense counsel argued that the court should not allow the State to present this evidence due to the lack of similarity between the two incidents, the remoteness in time, and because the probative value was outweighed by prejudice to the defense. Judge Borden found the evidence "very probative" and not remote in time. The court believed that there was enough similarity between the two incidents. Finally, the court noted that the evidence was "prejudicial," but the court could not "find that the prejudicial value in this case substantially outweighs the probative value." Judge Borden ruled that the State could "use that evidence at trial to show intent, motive, and the general attitude toward the victim." However, Judge Borden

advised the parties that since a different judge would be trying the case, "Judge Shadid can look at this again."

On January 3, 2008, defendant filed a motion *in limine* seeking to exclude the State's evidence of other crimes between defendant and the victim, Fleming, which occurred on June 22, 2005. After hearing arguments from counsel on January 3, 2008, Judge Shadid said that he had not heard anything that would indicate that Judge Borden's ruling was incorrect. The court stated that evidence of other crimes was admissible if the evidence is "relevant for any purpose other than to show a propensity to commit crimes." The court denied defendant's motion *in limine*.

On March 5, 2009, defendant filed notice with the court that she would seek the affirmative defense of self defense. On March 9, 2009, defendant's jury trial began.

After the entire jury pool was seated in the courtroom, the trial court made the following introductory comments to the entire jury pool:

> "At this time I'll give you some basic principles of law that apply to all criminal cases. This will help you follow the law and the evidence. These are not your final or complete instructions. Those will come after you have heard all of the evidence and final arguments in the case.
>
> ***
>
> You must follow the law as I give it to you.
>
> ***
>
> The defendant is presumed to be innocent of the charges against her. That presumption remains with her throughout every

stage of the trial and during your deliberations on the verdict and is not overcome unless, from all the evidence in the case, you are convinced beyond a reasonable doubt that the defendant is guilty.

The State has the burden of proving the guilt of the defendant beyond a reasonable doubt. This burden remains on the State throughout the case. This defendant – the defendant is not required to prove her innocence. She may rely on the presumption of innocence. She is not required to testify; and if she does not do so, it cannot be used against her. You must be able to accept this principle of law to serve as a juror."

The court then called prospective jurors in panels of four for questioning. The judge asked each of the jurors selected if each juror agreed with the "principle" or "principles" of law that he "stated" but did not individually question any of the jurors selected regarding the principles set out in Supreme Court Rule 431.

After selecting a jury, the State called Violet Hnilica, a forensic pathologist, to testify as an expert witness in the areas of forensic science and cause of death. She told the jury that on June 6, 2007, she performed an autopsy on Montral Fleming and found a single stab wound to the left upper chest. Hnilica explained that a knife entered Fleming's body between the fourth and fifth rib, six inches from center and halfway between the breast and the shoulder, which punctured Fleming's left lung. Hnilica further explained that the knife was oriented downward, front to back with an irregular, scalloped edge, and with an estimated three inch tract inside Fleming's body. Hnilica formed an opinion within a reasonable degree of medical certainty that

Fleming died of a stab wound to the chest.

Larry Deppe, a general surgeon and a senior surgical resident at St. Francis at the time of the incident, testified that he treated Fleming on the night of June 5, 2007. Deppe explained that he performed a three hour surgery on Fleming and found that the upper and lower lobes of Fleming's left lung had been lacerated. Deppe said that Fleming died during surgery.

Debra Minton, a forensic scientist with the Illinois State Police crime lab, testified as an expert witness in the field of DNA analysis. She told the jury that she concluded within a reasonable degree of medical certainty that the DNA profile for the blood swabbed from the knife, submitted to her by the police officers in this case, matched the DNA profile of Fleming, but not defendant.

Latasha Robinson testified that on June 5, 2007, she and her daughter, Mykeal, lived with her cousin, Fleming, and defendant at their residence in Peoria, Illinois. Robinson told the jury that on June 5, 2007, Fleming worked until 9 p.m., and defendant left the house that evening in order to pick up Fleming from work and brought him home. After defendant and Fleming returned to the house, Robinson said that she and defendant went to Starr Street Liquors.

After they returned home from the liquor store, Robinson explained that she began preparing to leave because she and her daughter were going to visit someone on Martin Street. Fleming was going to drive her to that location. After she got ready, she went outside onto the porch and waited for Fleming. While Robinson waited on the porch, she heard defendant ask Mykeal if Mykeal had picked up defendant's money. Robinson testified that she came back into the house and told defendant that if her daughter had the money, she would give it to defendant. After this exchange between Robinson and defendant, Robinson stated that defendant and

Fleming began to argue, and Robinson then went outside. Other than the argument, she could not see anything else happen between defendant and Fleming inside the house and did not hear any screaming or anyone asking for help while she stood on the porch.

Robinson said that her daughter came outside onto the porch. At that point, Robinson told her daughter "to go in there and tell Montral [Fleming] to come on." Robinson waited for Fleming for about five minutes when she observed her daughter and Fleming running from the house. Robinson testified that she heard Fleming say "she stabbed me" and her daughter say "Mama, she stabbed him." Fleming entered the car where Robinson was waiting and told her that he needed to get to the hospital because he was not "going to make it."

Mykeal Robinson testified that she was nine-years-old and attended third grade. Mykeal said that the last time she saw Fleming "was when he was running to the car." The prosecutor asked her to describe what happened just before Fleming ran to the car. Mykeal explained that she went into the house to tell Fleming that she and her mom were ready to leave. Mykeal said that she was standing by the door in the living room and heard "them arguing." Mykeal thought they were arguing about $50 but was not completely sure.

Mykeal observed defendant talking on the telephone and heard Fleming ask "what was she calling the police for." She explained that she could see half of their bodies and described Fleming standing by the stove in front of defendant and defendant standing by the kitchen drawers with her back to the sink. Mykeal also observed Fleming grab for the telephone "and that's when she stabbed him." Mykeal identified defendant in court as the person who stabbed Fleming. Mykeal testified that she did not see Fleming hit or push defendant. After the stabbing, Mykeal and Fleming ran out of the house. On cross-examination, she stated that she saw

defendant moving her arm up and then downward toward Fleming, and initially, she thought defendant had a hairbrush. However, when she saw Fleming bleeding, Mykeal knew that it was a knife.

Scott Goforth, a Peoria police officer, testified that on the night of June 5, 2007, he arrived at 1517 Livingston Street, Peoria, Illinois, where he found a "broken-handle knife in the sink with what appeared to be some blood on the tip of it." Goforth took the knife into evidence.

Tim Wong, a member of the Peoria police department crime scene unit, testified that on June 5, 2007, he went to 1517 Livingston Street, Peoria, Illinois, and found the house to be a single story residence with three large rooms from front to back, namely a living room, bedroom and kitchen. Wong said that the doors to the three rooms were aligned such that a person could travel straight through the house from the front door to the rear door. He further explained that you can look into the kitchen from the living room.

After swabbing the knife located at the residence, he took the knife into evidence and processed the knife for latent prints. Wong testified that he located prints on the knife and found one identifiable print which belonged to defendant. He described to the jury that he located defendant's right, middle finger on the knife positioned on the "top of the knife and extended over to the side of the knife, which indicated that the knife was in her hand as opposed to an incidental touch." Further, he told the jury that the knife was blade down in a stabbing position when defendant held the knife.

Eric Ellis, a Peoria police officer, testified that on June 5, 2007, he went to 1517 Livingston Street, Peoria, Illinois, where he collected a piece of die case metal located on the kitchen floor of the residence. He later learned that the metal object was a piece to a cellular

telephone and that detective Ledbetter provided other parts of the telephone to him on the following day.

Outside the presence of the jury, the attorneys and the court discussed the upcoming witnesses and the State's other crimes evidence. At that time, the State offered jury instruction No. 11A to the court which provided as follows:

> "Evidence has been received that the defendant has been involved in conduct other than that charged in the indictment.
>
> This evidence has been received on the issues of the defendant's intent, motive, modus operandi and general attitude toward the victim and may be considered by you only for that limited purpose.
>
> It is for you to determine whether the defendant was involved in that conduct and, if so, what weight should be given to this evidence on the issues of intent, motive, modus operandi and general attitude toward the victim."

Defense counsel objected, but the trial court ruled that State's instruction No. 11A would be given to the jury.

Richard Ledbetter, a former detective with the Peoria police department, testified that in the early morning hours of June 6, 2007, he went to the residence located at 1517 Livingston Street, Peoria, Illinois, where he met with defendant's mother who provided him with two pieces of a cellular telephone. He delivered those pieces to officer Ellis to determine whether these pieces matched a piece previously located at the house.

The trial court advised the jury that for efficiency the defense would be allowed to call detective Ledbetter as its own witness, despite the fact the State had not rested. On behalf of the defense, Ledbetter testified that as part of his investigation, he spoke with Latasha Robinson. During his conversation with her, Robinson indicated that defendant accused Mykeal of stealing her money and that she confronted defendant about the accusation. Ledbetter also testified that Robinson told him that there had been an ongoing argument between defendant and Fleming, and she told him that she had heard the same argument on previous occasions.

After Ledbetter's testimony, the trial court then advised the jury that the State would resume its case with the next two witnesses testifying about another previous incident between defendant and Fleming. The court advised the jury that it was going to read an instruction which would assist the jury in understanding the evidence. The court then read State's jury instruction No. 11A to the jury.

After the court read the instruction to the jury, the State called Marques Broadway to testify. Broadway testified that on June 22, 2005, he visited with his brother, Fleming, and defendant at their house located on Latrobe Street in Peoria, Illinois. Broadway testified that defendant and Fleming argued throughout his visit. At one point, he looked toward defendant and observed that she had Fleming's clothes in one hand and a knife in the other hand. Broadway heard defendant say that she was going to cut up Fleming's clothes with the knife. Fleming responded that if she cut his clothes, he would break the glass table in the living room. Broadway said that defendant began to cut Fleming's clothes with the knife, and in response, Fleming picked up a bowl to "bust the table." Broadway said that defendant then took the knife and just started swinging at Fleming.

According to Broadway, he grabbed defendant's arm and saw Fleming grab defendant's other arm. At that time, Broadway attempted to remove the knife from defendant's hand. During this struggle, Broadway saw his cousin, Tempesst, enter the room from the kitchen area. Tempesst helped separate them, and defendant dropped the knife. Broadway observed defendant walk into the kitchen while Fleming started walking out the door. Broadway told the jury that as Fleming was walking out the door, defendant "comes out the kitchen with another knife" and followed Fleming outside.

Broadway walked outside and observed defendant and Fleming "goin' at it again, and she is over him again, and he's holdin' her." Broadway said defendant had another knife in her hand. Broadway attempted to get this knife from defendant. At this point, he saw defendant biting Fleming. Broadway stated that as he was "just getting the knife out of her hand, the knife had slipped past my hand and slapped me." He stated that the knife cut his hand, but he was able to get the knife away from defendant.

Fleming started walking across the street to the neighbor's house. At this point, defendant entered the house, grabbed pieces of glass from the broken table and began throwing the glass pieces at Fleming. Fleming charged defendant, and they resumed fighting again. Eventually, the fight ended, and Broadway called the police. Broadway identified photographs of the scene and the knife for the jury, along with photographs of the injury to his hand and the bite marks on Fleming.

Tempesst Tate testified that in June 2005, she lived on Latrobe Street in Peoria, Illinois, with Fleming and defendant. She told the jury that on June 22, 2005, she was awakened by a loud noise and hurried upstairs from the basement. She observed defendant and Fleming

"tusslin' around" and Broadway was trying to break them up. Tate said she broke up Fleming and defendant. She tried to push Fleming outside because defendant was trying to throw anything within her reach at Fleming. While outside, she observed defendant with a knife and saw her cousin, Broadway, get cut with the knife. She also saw bite marks on Fleming. Tate said that she did not see a fight outside but only observed defendant throwing things at the car, trying to irritate Fleming. Tate stated that Fleming went across the street and then the police arrived.

Tate told the jury that she recalled the night Fleming was stabbed and taken to the hospital. On that night, defendant called her at "around 9:32 that evening." Tate explained that defendant did not say anything about Fleming being stabbed. During the telephone conversation, defendant appeared calm and asked Tate for her uncle's telephone number "and where he was at and that was it." Following Tate's testimony, the State rested.

Defendant then testified in her own defense. She stated she briefly met defendant while in high school in 1998. After moving back to Peoria in November 2003, Fleming contacted her, and they began dating one month later and living together in February or March 2004. Defendant stated their relationship involved little altercations over various things.

On June 22, 2005, Fleming picked her up from work. After arriving home, she saw that the windows to the house were open. She questioned Fleming about leaving the windows open, and defendant started complaining and calling her names. Defendant said that she was in the bedroom cleaning and packing clothes because she was going to do laundry and then visit her mother. She said that she told Fleming to get out of her face. Defendant said that Fleming told her that if she left, he would break the table. Defendant responded that if he broke the table, she

would cut up a pair of his pants. She told the jury that she could cut the clothes with a knife she saw "in between the mattress" which they kept there after a previous "break-in." After she retrieved the knife, Fleming broke the table. She told the jury that she dropped Fleming's clothes and the knife and walked toward Fleming. Defendant described Fleming swinging at her, and then they started physically fighting next to the couch. She further described Broadway and Tate trying to break them up. She denied having the knife and said Tate broke up the fight between her and Fleming. Fleming ran out of the house. She grabbed pieces of glass, went outside, and threw the glass pieces.

When asked how Broadway's finger was injured, she said, "[m]e and Marques was wrestlin' in the yard. 'Cause I had the knife and I had his – one of Montral's pants, and I was gonna to cut it, but Marques was tryin' to wrestle the knife out of my hand." Defendant stated that after she threw the glass outside, she went back into the house and grabbed the knife from the bedroom. She said that she bit Fleming because he was punching her.

According to defendant, she and Fleming "broke up" until the middle of August or beginning of September 2005. Thereafter, she and Fleming started living together again, and in April 2006, she learned that she was pregnant. Defendant described their relationship as "okay" until midterm of the pregnancy. At that point, defendant said that Fleming was "[c]omin' in. Bein' all aggressive when he come from the club and stuff." Defendant said that she and Fleming had physical altercations on two occasions. Defendant stated she called the police one time in either July or August 2006. In December 2006, she and Fleming had an altercation where he hit her and pushed her to the ground. Defendant said she was injured but did not call the police or go to the hospital.

In May 2007, she and Fleming moved to the residence on Livingston Street. On June 5, 2007, she picked Fleming up from work in the evening. After they arrived home, she and Latasha Robinson went to the store. At the store, she noticed that she was missing money from the pocket of her coat. When she returned home, defendant looked for the money, and defendant asked Mykeal if she saw defendant drop the money somewhere.

Defendant explained that Robinson then "snapped" at her about questioning Mykeal. Fleming started talking to defendant about the money. Defendant told Fleming that she wanted Robinson out of the house and called her mother because she was going to stay with her mother due to the "argument that was goin' on in the house." When Fleming started arguing with defendant about an earlier incident with a male, she told Fleming to get out of her face because she was talking to her mother on the telephone at the time. Defendant said that after she ended her telephone conversation, Fleming started pushing her and pushing at the side of her head.

She grabbed the baby and told Fleming to get out of her way because she was leaving. Instead of leaving, she sat on the bed and looked for the telephone number to the police station. She explained that she did not intend to call 911 because 911 was for emergencies, and she wanted to call the non-emergency line. Defendant wanted the police to come to the house so she could leave. After defendant told Fleming she was leaving, Fleming said that she "wasn't goin' nowhere." When asked what she thought at that time, defendant said that "he [Fleming] told me once before, but I just knew that he probably be serious this time."

Defendant walked toward the front door, but Fleming stopped her at the bedroom doorway. Defendant turned around and walked toward the back door. Defendant described Fleming stopping her again and pushing her against the kitchen sink. She said her back was to

the sink, and defendant told Fleming that she was leaving with the baby. Defendant said she tried to call her mother on her telephone, but Fleming grabbed the telephone, broke it and threw it to the floor.

Defendant told the jury that Fleming choked her while she was holding the baby in her arm, standing next to the kitchen sink. She said that she thought Fleming was trying to take her life. While Fleming choked her, defendant tried to keep a "grip" on the baby and then she "end up reachin' back into the dish thing, tryin' to see what I can get to get him off me." Defendant said she did not know what she "grabbed at first until afterwards." After she grabbed something, defendant testified, "I guess I had hit him with the object that I had in my hand and he just got off of me." Defendant saw Fleming run out the door.

Then, defendant realized she had picked up a knife out of the drainer. At this point, she dropped the knife, went to the bedroom, and grabbed her baby's blanket. Then, she locked the front door, and "ran out the back door through the alley." When asked if she thought to call anyone, she testified, "I was tryin' to but I didn't know nobody around in that neighborhood." When questioned about dialing 911, she said, "I was tryin' to get to a place farther from the house where I don't know if he would go get somebody to come back and do something to me or what, but I just got far away from that part of the area."

After she left the house, she walked to Washington Street where she saw a person she knew standing on a porch and asked the person if she could use his telephone to call her mother. Defendant called her mother. Thereafter, her sister and brother picked her up, but she did not contact the police because she was scared and did not know what to do. Defendant said she did not go the hospital but learned what happened to Fleming at 4:30 a.m. or 5 a.m. on June 6, 2007.

When questioned by the prosecutor about not dialing 911 on the night in question after Fleming allegedly pushed and hit her, defendant said that she "just go by the nonemergency 'cause really wasn't no emergency." Defendant considered it a little situation. Defendant said that when she stood in front of the sink, she held the baby in her left hand and reached behind her with her right hand. She again said that she did not know what she grabbed until after she stabbed Fleming and dropped the knife on the floor.

Defense then called Terry M. Killian, a board certified psychiatrist in the State of Illinois, as an expert witness in the field of forensic psychiatry. Killian stated that he had worked in the area commonly known as battered woman's syndrome. Killian interviewed defendant on September 10, 2008, for a little more than two hours. Killian was not able to determine a specific diagnosis for defendant, other than battered woman's syndrome. Further, it was his opinion that defendant believed Fleming was going to seriously hurt her on the night in question and that she acted in self defense. According to Killian, defendant told him that Fleming repeatedly threatened to kill her if she left the relationship. On cross-examination, Killian said that simply because a woman has battered woman syndrome, "it doesn't mean that everything she does is related specifically to that." He acknowledged that it was within the realm of possibility that such women can do things simply because they are angry without being threatened.

The defense then called Brianna Sargent who testified that she knew defendant for six years and met Fleming as a result of her friendship with defendant. Sargent recalled visiting defendant on December 3, 2006, and found defendant crying in the bedroom with a "cut above her eye." Sargent recalled seeing cuts or abrasions on defendant on one or two other times

during the summer of 2006. However, she did not take defendant to the hospital. Sargent described defendant and Fleming's relationship as "[s]ometimes good, sometimes bad." When asked what that meant, she stated "[a]rguing." She stated that Fleming would argue with defendant regarding little things and then he would leave. During her time with Fleming and defendant, she never heard Fleming threaten defendant, and she indicated that she visited with them multiple times per week.

At the conclusion of Sargent's testimony, the defense rested. As rebuttal, the State presented a stipulation for the jury's consideration which provided that Mike Bornsheuer, an investigator with the Peoria County state's attorney office, would testify that on March 10, 2009, he looked at Tempesst Tate's cellular telephone and observed that Tate received a call from defendant at 9:32 p.m. on June 5, 2007.

The State then called Rich Ledbetter to testify. On June 6, 2007, he and other police officers looked for defendant following the stabbing. At approximately 2 p.m. that day, he interviewed defendant at the Peoria police station. Ledbetter testified that defendant did not tell him that she noticed money missing while shopping at the store on June 5, 2007. Further, defendant never told Ledbetter that Fleming hit her in the head while in the bedroom of their home on June 5, 2007, but only that they were arguing. During the interview when discussing the incident in the kitchen, defendant never said that she told Fleming she was leaving with the baby. Further, when she left the house after the stabbing, defendant told him that she waited in a shed but never said that she walked down the street and used a male subject's house telephone. On cross-examination, Ledbetter said that defendant voluntarily came to the police department in the afternoon of June 6, 2007, with her attorney.

The jury found defendant guilty of first degree murder on March 12, 2009. On May 29, 2009, the trial court denied defendant's motion for new trial and then sentenced defendant to 34 years imprisonment in the Illinois Department of Corrections. On June 2, 2009, the trial court denied defendant's motion to reconsider sentence and directed the clerk of the court to file a notice of appeal on defendant's behalf.

ANALYSIS

Defendant requests this court vacate her conviction and remand the cause for a new trial on two grounds. First, defendant argues that the trial court erred by allowing the State to introduce evidence of another crime involving defendant and the victim to show defendant's intent, motive, *modus operandi*, or general attitude toward the victim. Second, defendant argues that the trial court committed reversible error by failing to comply with the mandates of Supreme Court Rule 431(b).

Evidence of Other Crimes

On appeal, defendant argues that the other crime evidence was inadmissable because the evidence was irrelevant. In addition, defendant claims the 2005 event was not sufficiently similar to the offense in this case, too remote in time to be relevant, and that the prejudicial effect far outweighed any probative value. Accordingly, defendant asserts the trial court erred in admitting the other crime evidence. The State responds that the evidence was admissible since the previous incident was not remote in time, was similar in nature, and relevant to refute defendant's contention that she unknowingly grabbed a knife to defend herself.

The general rule is that other crime evidence is not admissible if offered only to establish a defendant's propensity to commit crimes. *People v. Speight*, 153 Ill. 2d 365, 372 (1992);

People v. Lindgren, 79 Ill. 2d 129, 137 (1980). However, evidence of another crime committed by a defendant is admissible to show motive, intent, identity, absence of mistake or *modus operandi* provided that the probative value of such evidence is not substantially outweighed by the danger of unfair prejudice to a defendant. *People v. Illgen*, 145 Ill. 2d 353, 364-65 (1991) (citing *People v. McKibbins*, 96 Ill. 2d 176, 182 (1983)).

Evidence which is relevant is admissible, and relevant evidence is evidence that has any tendency to make the existence of a fact more or less probable. *People v. Illgen*, 145 Ill. 2d at 365-66; *People v. Monroe*, 66 Ill. 2d 317, 321-22 (1977). The admissibility of evidence is within the sound discretion of the trial court. *People v. Illgen*, 145 Ill. 2d at 364. A reviewing court will only reverse a trial court's decision as to the admission of evidence where the trial court abused its discretion. *People v. Ward*, 101 Ill. 2d 443, 455-56 (1984).

In this case, the State filed notice prior to trial advising defendant that it intended to offer evidence of a 2005 altercation between defendant and the same victim wherein defendant selected and brandished a knife while threatening to damage Fleming's clothes and ultimately, injured another person who attempted to intervene on behalf of Fleming. The State claimed that the evidence was admissible to show intent, motive, *modus operandi*, and defendant's general attitude toward the victim.

We agree that the evidence of defendant's prior attempted assault on Fleming with a knife following a domestic argument was probative of defendant's criminal intent since defendant asserted self defense and claimed that she was unaware that she picked up a knife before striking Fleming with the object. See *People v. Illgen*, 145 Ill. 2d at 366-67. "Evidence which shows that an event was not caused by accident tends to show that it was caused intentionally." *People*

v. Illgen, 145 Ill. 2d at 366 (citing 2 D. Louisell & C. Mueller, Federal Evidence § 140, at 224-25 (1985)) (defining intent as "merely the absence of an accident").

Here, the stabbing incident, standing alone, might appear accidental and justified based upon defendant's testimony that Fleming choked her and that she "had hit him with the object that I had in my hand" and did not know what she "grabbed at first until afterwards." However, when considered together with the evidence of defendant's prior attempt to attack Fleming with a knife in response to another verbal altercation, the circumstances then suggest that defendant acted with the criminal intent required for murder and less probable that her actions were justified. Consequently, we conclude the evidence offered by the State was relevant.

Having determined the prior crime evidence was relevant on the issue of intent, we next consider whether the 2005 incident was too remote in time to support the trial court's decision on admissibility. Our supreme court has ruled that "the admissibility of other-crimes evidence should not, and indeed cannot, be controlled solely by the number of years that have elapsed between the prior offense and the crime charged." *People v. Illgen*, 145 Ill. 2d at 370. A trial court's decision to admit or exclude such evidence must be made on a case-by-case basis, and a reviewing court may not substitute its judgment for that of the trial court. *People v. Illgen*, 145 Ill. 2d at 370-71.

In this case, the other crime evidence occurred two years before the incident in question. The case law provides that a two year period of time between the incident offered as other crime evidence and the offense in question is not too remote in time. See *People v. Illgen*, 145 Ill. 2d 353 (evidence of last incident of abuse which occurred three years prior to spouse's death not too remote in time for prosecution of murder); *People v. Brown*, 199 Ill. App. 3d 860 (1990)

(evidence that defendant caused death of another child three years earlier was not too remote in child abuse prosecution); *People v. Barber*, 116 Ill. App. 3d 767 (1983) (evidence that defendant wrote threatening letter to victim two years before victim's death not too remote to be relevant). Based on our review of existing case law, we conclude the incident was not too remote in time to be relevant in this case.

Next, we consider defendant's contention that the separate incidents lacked sufficient similarity to allow the other crime evidence to be admissible at trial. "Where evidence of prior bad acts is offered to prove *modus operandi* or that the crime charged was part of a common design or plan, there must be a high degree of identity between the facts of the crime charged and the other offense in which the defendant was involved." *People v. Illgen*, 145 Ill. 2d at 373. However, the same degree of similarity between the two offenses is not necessary when evidence of the other crime is offered for some other purpose, such as intent and motive, and in those instances, mere, general similarity is sufficient. *People v. Illgen*, 145 Ill. 2d at 373.

In this case, the evidence was offered to prove defendant knowingly *intended* to harm the victim rather than a desire to simply defend herself against the victim's actions. In the 2005 incident, defendant attempted to attack Fleming with a knife, but instead defendant injured Broadway who intervened in defense of Fleming. In the 2007 incident, no one was present in the room to intervene, and defendant stabbed Fleming with a knife. Both incidents involved similar circumstances which began with a heated argument between Fleming and defendant at their home and culminated with defendant grabbing a knife from within the residence. Based upon these facts, we conclude both events were sufficiently similar.

Accordingly, we conclude the trial court did not abuse its discretion and affirm the trial

court's decision to admit the other crimes evidence and deny defendant's request for a motion *in limine* to exclude the evidence. Moreover, the judge carefully instructed the jury, both before hearing the evidence and at the conclusion of the trial, that the evidence regarding the 2005 incident should be considered for the limited purposes of establishing defendant's intent, motive, *modus operandi*, and general attitude toward the victim. These instructions limited any prejudicial effect created by the admission of the evidence. See *People v. Illgen*, 145 Ill. 2d at 375.

Supreme Court Rule 431(b)

Defendant argues that she is entitled to a new trial because the trial court failed to comply with Supreme Court Rule 431(b) (eff. May 1, 2007) which requires the trial court to ask each prospective juror if he or she understands and accepts the four fundamental principles of law set forth in *People v. Zehr*, 103 Ill. 2d 472 (1984). First, defendant argues that the trial court's failure to strictly comply with Supreme Court Rule 431(b) constituted error and denied defendant of a substantial right. Second, defendant argues that this court should find plain error because the evidence was closely balanced and the error undermined the fairness of her trial.

The State argues defendant has forfeited the error because defendant failed to object during *voir dire* and failed to raise the issue in a posttrial motion. Alternatively, the State alleges if error occurred, reversal is not warranted because the error did not rise to the level of plain error. We review *de novo* issues concerning the application of a Supreme Court Rule. *People v. Reed,* 376 Ill. App. 3d 121, 125 (2007).

First, we note that the amendment to Supreme Court Rule 431(b) became effective on May 1, 2007, and the jury trial in this case began on May 9, 2009. The amended rule assigns the

burden to the trial judge to address certain principles when conducting *voir dire*. These four principles involve (1) the presumption of innocence; (2) the State's burden of proof beyond a reasonable doubt; (3) that defendant need not present any evidence; and (4) that defendant's failure to testify cannot be considered by the jury. Official Reports Advance Sheet No. 8 (April 11, 2007), Ill. S. Ct. R. 431 (eff. May 1, 2007). Defendant argues that the trial court did not individually ask the prospective jurors if they understood and accepted each of these principles.

Recently, our supreme court analyzed a defendant's challenge to a trial court's failure to comply with amended Supreme Court Rule 431(b) in the context of structural error and plain error. *People v. Thompson*, No. 109033 (Ill. Sup. Ct. October 21, 2010). Our supreme court stated that the language of Rule 431(b) is "clear and unambiguous" and mandates a specific question and response process. *People v. Thompson*, No. 109033, slip op. at 6 (Ill. Sup. Ct. October 21, 2010). Failure to conduct such a question and answer process constitutes a violation of the Rule. *People v. Thompson*, No. 109033, slip op. at 7 (Ill. Sup. Ct. October 21, 2010).

In this case, the trial court announced the four principles of law to the entire jury panel. The trial court stated:

> "The State has the burden of proving the guilt of the defendant beyond a reasonable doubt. This burden remains on the State throughout the case. This defendant – the defendant is not required to prove her innocence. She may rely on the presumption of innocence. She is not required to testify; and if she does not do so, it cannot be used against her. You must be able to accept this principle of law to serve as a juror."

When individually questioning the prospective jurors, the trial court asked each of them if he or she agreed with the "principle" or "principles" of law that he previously recited. Here, the trial court's questioning did not comply with mandates of Supreme Court Rule 431(b) (eff. May 1, 2007) due to the summary nature of the questioning, combined with the court's intermingling of the terms "principle" or "principles" when questioning the jurors. Clearly, the trial court failed to discuss with each of the jurors all four principles set forth in Supreme Court Rule 431(b) (eff. May 1, 2007). Therefore, we agree that the trial court did not strictly comply with the mandates of Supreme Court Rule 431(b) and conclude that the trial court erred.

It is well established that in order to properly preserve an issue for appellate review, a defendant must object at trial and raise the issue in a posttrial motion. *People v. Allen*, 222 Ill. 2d 340, 350 (2006); *People v. Enoch*, 122 Ill. 2d 176, 186-87 (1988). A defendant who fails to do both forfeits the issue on appeal. *People v. Enoch*, 122 Ill. 2d at 186. Here, it is undisputed that defendant did not object at trial or include this issue in a posttrial motion. Thus, we must address whether defendant's forfeiture may be excused under the plain error rule.

Plain error applies to a forfeited error affecting the substantial rights of a defendant under two circumstances: 1) "where the evidence in a case is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence;" and 2) "where the error is so serious that the defendant was denied a substantial right, and thus a fair trial." *People v. Herron,* 215 Ill. 2d 167, 178-79 (2005); *People v. Allen,* 222 Ill. 2d at 350. Defendant bears the burden of establishing plain error. *People v. Nicholas*, 218 Ill. 2d 104, 120-21 (2005).

We conclude that the trial court's error does not constitute plain error under the first prong of the plain error analysis because the evidence was not closely balanced. In this case,

defendant asserted self defense. Therefore, it was undisputed that defendant stabbed Fleming with the knife found in their residence and that as a result of the stabbing, Fleming died. The question for the jury was whether or not defendant was justified in her actions.

To support her claim of self defense, defendant claimed Fleming was abusive during the course of their relationship. The defense offered evidence from psychiatrist, Killian, that due to this abusive history, defendant suffered from battered woman's syndrome. However, even the defense expert acknowledged that it was within the realm of possibility that such women can do things simply because they are angry without being threatened.

Contrary to defendant's testimony that she feared for her safety on the night in question, the State offered testimony from Mykeal Robinson and Latasha Robinson regarding the events of June 5, 2007. Latasha Robinson was outside defendant's residence when the stabbing occurred. Robinson never heard any screaming or cries for help from the house. Mykeal stated that she witnessed the stabbing and did not see Fleming attempt to harm defendant that night although they were engaged in a verbal argument. Based on the testimony and exhibits presented at trial, we conclude the evidence was not closely balanced, and plain error did not occur under the first prong of the analysis.

Next, we turn to the second prong of plain error, which our supreme court has equated with structural error. *People v. Thompson*, No. 109033, slip op. at 13 (Ill. Sup. Ct. October 21, 2010); *People v. Glasper*, 234 Ill. 2d 173, 197-98 (2009). In his introductory comments to all potential jurors, the trial judge outlined the principles of law set forth in Supreme Court Rule 431(b) (eff. May 1, 2007). Further, in individually questioning the prospective jurors, the court asked whether each of the jurors would sign a not guilty verdict if the State failed to meet its

burden of proof. During the trial, defendant testified in her own defense and presented evidence from other witnesses. These facts and circumstances, combined with the jury instructions and defense counsel's closing argument regarding the State's burden of proof and the presumption of innocence, alleviated any potential, undetected bias of the jurors which could have affected the outcome of this trial. Accordingly, we conclude defendant has failed to establish that the violation of Supreme Court Rule 431(b) (eff. May 1, 2007) was so serious that it affected the fundamental fairness of defendant's trial. Consequently, defendant's argument under the second prong of plain error also fails. See *People v. Thompson*, No. 109033, slip op. at 13 (Ill. Sup. Ct. October 21, 2010).

For these same reasons, we also conclude that the trial court's violation of Supreme Court Rule 431(b) (eff. May 1, 2007) did not constitute a structural error requiring an automatic reversal of defendant's conviction. Relying upon the analysis in *People v. Glasper*, 234 Ill. 2d 173, our supreme court held that a violation of Supreme Court Rule 431(b) did not automatically create structural error and declined to adopt a bright line rule of reversal for violations of Supreme Court Rule 431(b). *People v. Thompson*, No. 109033, slip op. at 7-8, 13-14 (Ill. Sup. Ct. October 21, 2010). Accordingly, defendant has failed to prove that she is entitled to a new trial based upon the trial court's violation of Supreme Court Rule 431(b) (eff. May 1, 2007) in this case.

CONCLUSION

The judgment of the circuit court of Peoria County is affirmed.

Affirmed.

JUSTICE HOLDRIDGE, specially concurring:

I agree that the judgement of the circuit court should be affirmed for the reasons stated by the majority. I write separately to clarify the circumstances under which evidence of other crimes or prior bad acts may be admitted to establish *modus operandi*. I also write to clarify the analysis that reviewing courts should apply to forfeited claims of error under the plain error doctrine.

Modus operandi evidence is not relevant where identity is not at issue, *People v. Boyd*, 366 Ill. App. 3d 84, 92 (2006), and typically identity is at issue when the defendant denies he was the offender. *People v. Dupree*, 339 Ill. App. 3d 512, 520 (2003). Here, the defendant did not deny that she stabbed the victim. Rather, she admitted that she stabbed him but claimed that she did so while acting in self defense. Thus, the identity of the offender was not at issue, and *modus operandi* was not a relevant basis to admit evidence of prior bad acts. See, *e.g.*, *Boyd*, 366 Ill. App. 3d at 92; *Dupree*, 339 Ill. App. 3d at 520. Here, the trial court erred by instructing the jury that it could consider the evidence for that purpose. Nevertheless, because the evidence was properly admitted for other relevant purposes (*e.g.*, intent and motive) and the jury was properly instructed regarding those purposes, we can affirm the judgment of conviction notwithstanding this error. *People v. Norwood*, 362 Ill. App. 3d 1121, 1134 (2005) (" '[W]hen jurors receive a limiting instruction that permits them to consider evidence for a number of reasons, and one of those reasons is determined on appeal to be improper, judgment of conviction must be affirmed despite the overly broad instruction.' [Citations.]"); see also *People v. Spyres,* 359 Ill. App. 3d 1108, 1113-14 (2005).

Addressing the plain error issue, the first step in the analysis is to determine whether a "plain error" occurred, and the word "plain" here "is synonymous with 'clear' and is the equivalent

of 'obvious.' " *People v. Piatkowski*, 225 Ill. 2d 551, 564-65, 565 n.2 (2007). When the reviewing court determines that the trial court committed a clear or obvious (or "plain") error, it must proceed to a second step, which is to determine whether the error is reversible. Our supreme court has made it clear that plain errors are reversible only when (1) "the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error," or (2) the 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." *Piatkowski*, 225 Ill. 2d at 565; *People v. Herron*, 215 Ill. 2d 167, 179 (2005).

Although the majority applies this analysis correctly, at times it appears to conflate "plain error" with reversible error. See slip op. at 23-24. Specifically, even though it had already determined that the trial court had committed error in this case, the majority concludes that "plain error did not occur." I assume that the majority means to say, rather, that although plain error *did* occur in this case, the error is not *reversible* because it does not fall within either of the two categories of reversible error discussed above.

Our court of appeals has repeatedly made the same misstatement that the majority makes here. See, *e.g.*, *People v. Haynes*, 399 Ill. App. 3d 903, 914 (2010). Even our supreme court has made this misstatement. See, *e.g.*, *People v. Bean*, 137 Ill. 2d 65, 80 (1990). These instances muddle what I believe to be the proper analysis under the plain error doctrine. Again, I write separately to urge our courts of review to exercise greater analytical clarity in our future plain error decisions.