NO. 4-09-0681 Filed 01/07/11

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. KEVIN GLOVER, Defendant-Appellant.	)))))))	Appeal from Circuit Court of McLean County No. 08CF1272 Honorable Charles G. Reynard, Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Presiding Justice Knecht and Justice Pope concurred in the judgment.

ORDER

Held: (1) The trial court erred by failing to comply with Supreme Court Rule 431(b), but the error was not so serious as to rise to the level of plain error, as there was no evidence the jury was biased.

(2) The trial court erred by denying defendant's motion to redact certain statements from the transcript of his recorded interview with police in light of the court's decision on defendant's motion to suppress. However, error was harmless beyond a reasonable doubt as evidence of defendant's guilt was overwhelming.

In March 2009, a jury found defendant, Kevin Glover, guilty of burglary after he and an accomplice broke into a convenience store in Bloomington. In May 2009, the trial court sentenced defendant to six years in prison. Defendant files this direct appeal, challenging his conviction on two grounds: (1) the trial court failed to comply with Supreme Court Rule 431(b) (Official Reports Advance Sheet No. 8 (April 11, 2007), R. 431(b), eff. May 1, 2007) during *voir dire*, and (2) the court erred in denying defendant's motion to suppress certain statements made during his police interview. Though we agree

with both contentions of error, we affirm, finding neither error justifies reversal.

I. BACKGROUND

In November 2008, the State charged defendant with one count of burglary under a theory of accomplice liability. A jury was selected on March 16, 2009. Pursuant to Supreme Court Rule 431(b) (Official Reports Advance Sheet No. 8 (April 11, 2007), R. 431(b), eff. May 1, 2007), the trial court was required to ask each potential juror whether they understood and accepted that (1) defendant was presumed innocent of the charge, (2) the State had the burden of proving him guilty beyond a reasonable doubt, (3) defendant was not required to present any evidence, and (4) his decision against testifying could not be held against him. During jury selection, the court, without objection from defendant, informed the prospective jurors as a group as follows:

> "There are certain general propositions of law which are applicable to criminal cases, and each juror must be willing to accept and follow these basic principles of law. I'll go over them with you now, and then ask you later whether or not you believe that you accept and follow them.
>
> One, the defendant is presumed innocent of the charge against him; two, before a defendant can be convicted, the State must prove the defendant guilty beyond a reasonable doubt; three, the defendant is not required to offer any evidence on his own behalf; and four, the defendant's failure to testify, if he chooses not to testify, cannot be held against him."

The trial court later addressed a 14-member panel of potential jurors, as

follows:

"THE COURT: Thank you. Anyone else?

Okay. Referring you back to those propositions of law that I earlier described to you, are each of you willing to accept and follow those principles of law? And if you think not, raise your hand.

(No response.)

I'm seeing no hands. And the bottom-line question which you'll hear me ask several times, forgive the repetition, this is the first time: Do you believe that you can give both sides in this case a fair trial? If you think not, raise your hand.

(No response.)

Thank you. At this point, I will tender this panel to Ms. Patton [(assistant State's Attorney)] for inquiry."

The court then questioned a second 14-member panel of potential jurors, as follows:

"THE COURT: Are each of the 14 of you willing and able to follow and apply the propositions of law that I mentioned to you at the beginning of the case?

(All said yes.)

Anybody think not?

(No response.)

No hands. Okay. And do each of you believe you can give both sides in this case a fair trial?

(All said yes.)

All are indicating yes. Thank you."

Following selection of the jury, which was comprised solely of members from each of the two above-mentioned pools, the testimony at trial established that Gary Irwin, the owner of First Edition Hair Salon in Bloomington, was working in the building upstairs from his salon at approximately 1 a.m. on November 12, 2008, when he heard men arguing and glass breaking. He looked out the window and saw two men, one in black (later identified as Cortez Gleghorn) and one in red (later identified as defendant). Irwin called the police based on this disturbance. He went downstairs to the salon and found a rock had been thrown through his front window. He again called the police, reporting the damage.

Meanwhile, Clifford Heard, an admitted convicted felon, was walking toward Franzetti's Pantry Plus, a convenience store located approximately one block from the hair salon, when he saw a man throw a rock through the glass front door and enter the store. He saw another man in a red shirt standing in front of the store. Heard called the police from the pay telephone on the side of the building and then told the man in the red shirt that police were on their way. The man in the red shirt hollered at the man inside the store to hurry.

Bloomington police officer Amy Keil was responding to the disturbance call at the beauty salon when she heard the dispatch of a burglary in progress at Franzetti's. As she approached, she saw two men, one in red and one in black, walking down the street. The man in black was carrying multiple cartons of cigarettes. From her car, Officer Keil told the men to stop. As she parked and exited, both men ran. She caught defendant and arrested him. Other officers later detained Gleghorn and recovered cartons of cigarettes

that Gleghorn had dropped. Officers were able to positively identify Gleghorn as the person on video surveillance inside the convenience store.

Bloomington police detective John Atteberry interviewed defendant the day following his arrest. The video-recorded interview and a typewritten transcript of the interview were published to the jury.

Defendant did not testify but presented the testimony of the police officer who had followed up with Heard about his earlier call to the police. According to this officer's testimony, for unknown reasons, he had not noted in his police report that Heard had told him that Heard saw defendant communicating with Gleghorn while Gleghorn was inside the convenience store.

After closing arguments, the trial court instructed the jury, in pertinent part, as follows:

> "The defendant is presumed to be innocent of the charge against him. This presumption remains with him 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 he is guilty.
>
> The State has the burden of proving the guilt of the defendant beyond a reasonable doubt, and this burden remains on the State throughout the case. The defendant is not required to prove his innocence.
>
> The fact that the defendant did not testify must not be

considered by you in any way in arriving at your verdict."

The jury found defendant guilty of burglary under the theory of accountability for Gleghorn's actions. Defendant filed a motion for a new trial, in which he included both arguments that he now raises on appeal. The court denied defendant's motion and sentenced him to six years in prison for "aiding and abetting" Gleghorn in the commission of the burglary. This appeal followed.

II. ANALYSIS

A. *Voir Dire*

First, defendant argues his conviction must be reversed because the trial court failed to specifically and fully comply with Rule 431(b). Defendant concedes he forfeited this issue by failing to raise a contemporaneous objection at trial. See *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124, 1130 (1988) (to preserve a claim for review, a defendant must both object at trial and include the error in a posttrial motion). Despite his forfeiture, he claims the issue may be reviewed here, as the court committed plain error by failing to "ensure that each juror in [defendant]'s trial understood and accepted" the four principles set forth in Rule 431(b).

Our supreme court recently addressed this issue and held that such an error does not necessarily render a trial fundamentally unfair or unreliable and does not require automatic reversal. *People v. Thompson*, No. 109033, slip op. at 9-10 (October 21, 2010), ___ Ill. 2d ___, ___, ___ N.E.2d ___, ___. In *Thompson*, the supreme court held that the trial court violated Rule 431(b) in that it failed to ask the prospective jurors if they understood and accepted the third principle and failed to ask if they accepted the first principle. *Thompson*, slip op. at 7, ___ Ill. 2d at ___, ___ N.E.2d at ___. While

compliance with Rule 431(b) is certainly important, the *Thompson* court determined, as it did in *Glasper*, that this was not a structural error requiring reversal. *Thompson*, slip op. at 9-10, ___ Ill. 2d at ___, ___ N.E.2d at ___. Since the defendant forfeited appellate review of this issue by failing to object at trial or raise the issue in his posttrial motion, the court also considered the forfeiture rule and the plain-error doctrine. It concluded that, where there was no compelling reason to relax the forfeiture rule, such as evidence of a biased jury, the only option for review was to analyze the error and determine whether application of the plain-error rule was appropriate. *Thompson*, slip op. at 10-11, ___ Ill. 2d at ___, ___ N.E.2d at ___.

In doing so, the supreme court noted that the defendant had not argued that the evidence was closely balanced, but instead claimed only that the error was so serious it affected the fairness of the trial. *Thompson*, slip op. at 11-12, ___ Ill. 2d at ___, ___ N.E.2d at ___. The court noted that, despite the amendment, Rule 431(b) compliance is not indispensable to the selection of an impartial jury or the conduct of a fair trial. *Thompson*, slip op. at 12, ___ Ill. 2d at ___, ___ N.E.2d at ___. Only upon the defendant's presentation of evidence that the jury was biased would his fundamental right to a fair trial be questioned. *Thompson*, slip op. at 12, ___ Ill. 2d at ___, ___ N.E.2d at ___. The court confirmed its holding in *Glasper*, again finding that a Rule 431(b) violation does not always implicate a fundamental right or constitutional protection. *Thompson*, slip op. at 13, ___ Ill. 2d at ___, ___ N.E.2d at ___. The defendant failed to present any evidence of jury bias and, therefore, failed to meet his burden of showing that the error affected the fairness of his trial. In other words, he did not satisfy the second prong of the plain-error doctrine. *Thompson*, slip op. at 13, ___ Ill. 2d at ___, ___ N.E.2d at ___. The

court concluded by rejecting the defendant's request to impose a bright-line rule of reversal upon every violation of Rule 431(b). *Thompson*, slip op. at 14, ___ Ill. 2d at ___, ___ N.E.2d at ___.

Applying *Thompson* to the facts of this case, we note that the trial court failed to fully comply with Rule 431(b). Although the court informed the entire venire of the four principles, it did not follow its iteration of those principles with contemporaneous questioning and an opportunity for each potential juror to state whether he or she understood and accepted those principles. Instead, the court and counsel conducted other questioning of the pool. When the court finally addressed the principles with each group of 14 potential jurors, it merely referred those groups to the principles it had mentioned much earlier. The court did not repeat the principles immediately prior to asking one group of potential jurors if they were "willing to accept and follow" the principles, and the other group if they were "willing and able to follow and apply" the principles.

We acknowledge that the rule does not contain a temporal requirement. However, it is reasonable to posit that the jurors' recollection of those precise principles mentioned at the beginning of *voir dire* could have been impaired by the subsequent input of other information and questioning. It is possible that when each juror was eventually given an opportunity to concur with the principles of law and to state whether he or she understood and accepted them, he or she could not recall what the four principles were.

In order to fully comply with the rule, the trial court "shall provide each juror an opportunity to respond to specific questions concerning the principles." Official Reports Advance Sheet No. 8 (April 11, 2007) R. 431(b), eff. May 1, 2007. "Rule 431(b), therefore, mandates a specific question and response process." *Thompson*, slip op. at 6, ___ Ill. 2d

at ___, ___ N.E.2d at ___. Trial courts may not simply give "'a broad statement of the applicable law followed by a general question concerning the juror's willingness to follow the law.'" *Thompson*, slip op. at 6, ___ Ill. 2d at ___, ___ N.E.2d at ___, quoting 177 Ill. 2d R. 431, Committee Comments, at lxxix. Yet, that is precisely what the trial court did here. Therefore, we conclude the court here failed to fully comply with the spirit and explicit requirements of Rule 431(b).

Despite the trial court's error, defendant failed to object during *voir dire*. Though he raised this issue in his written posttrial motion, his failure to pose a contemporaneous objection during trial nevertheless forfeited review of his claim. Defendant concedes forfeiture, but he urges our review under the second prong of the plain-error rule based on the severity of the error. However, as our supreme court noted in *Thompson*, we cannot presume an error so serious as to require reversal occurred based solely on the court's failure to fully comply with the rule. See *Thompson*, slip op. at 9-10, ___ Ill. 2d at ___, ___ N.E.2d at ___. Instead, defendant must present some evidence that the court's error was so serious that it deprived him of a fair trial. Defendant fails to do so. He has not presented any evidence or raised any question that the jury in his case was biased. Rather, he merely claims that the court's failure to strictly comply with the rule "resulted in a complete breakdown of the judicial process that undermined confidence in the jury's verdict." In accordance with *Thompson*, defendant's unsupported conclusion is not sufficient to satisfy the second prong of the plain-error rule so as to excuse his procedural default and to justify reversal.

B. Motion To Suppress

Defendant also claims the trial court erred by failing to suppress certain

statements he made during his recorded interview with police. We review a trial court's ultimate decision on whether certain evidence should be suppressed under a *de novo* standard of review. *People v. Bridgewater*, 235 Ill. 2d 85, 92-93, 918 N.E.2d 553, 557 (2009). We would apply a manifest-weight-of-the-evidence standard, as defendant suggests, only if we were to also review the court's factual findings or credibility determinations. *Bridgewater*, 235 Ill. 2d at 92, 918 N.E.2d at 557. Because such deferential decisions are not at issue, we proceed solely under a *de novo* standard.

The record before us indicates that as defendant was being apprehended and taken into custody on the night of the burglary, Officer Keil, without advising defendant of his rights, asked him the name of the person he had been with that evening. At first, defendant would not say, but he eventually said "Gleghorn." Another officer at the scene asked defendant if he meant Cortez Gleghorn, and defendant said yes. These statements given without the benefit of *Miranda* warnings, were the subject of defendant's pretrial motion to suppress, which the trial court granted. See *Miranda v. Arizona*, 384 U.S. 436 (1966). The court found the officers had elicited the responses from defendant without providing him his *Miranda* warnings. After the court announced its ruling, defendant requested, in light of the court's decision, that it consider redacting related statements from the transcript of defendant's recorded interview with Detective Atteberry. In particular, on page 11 of the transcript, the following exchange had occurred:

> "Q. Well that's funny cuz I read the police report and the police report said they asked you who was the other guy who's inside and you said Corte--, you said Gleghorn.
>
> A. I didn't tell them shit, see what I'm saying they told

me they already knew who he was I didn't have to tell them...

Q. Why would they type that in their police report that...

A. Cuz they needed a reason to go get him, they might have knew who he was if they seen him doing whatever but I didn't tell him who he was.

Q. Well they said you did.

A. Well I didn't.

Q. It's right there in black and white in the fi--, in the police report.

A. Right. Just like it's right there in black and white a witness saw me break a window too."

In support of his request to redact these statements, defendant argued that this exchange constituted "fruit of the poisonous tree," and if not redacted, the jury would be made aware of the statements that were otherwise suppressed. In denying defendant's request, the trial court ruled that the questions and answers would stand because, prior to being interviewed, defendant had been given *Miranda* warnings and thereafter, he answered the detective's questions as transcribed. In other words, defendant's statements in his interview were knowingly and voluntarily made. The court held that the earlier violation of *Miranda* did not affect the voluntariness of defendant's responses in his interview, and therefore, those later responses were not subject to suppression.

In this appeal, defendant renews this argument and contends the trial court's decision to refuse to redact or suppress the statements constituted reversible error. We agree the court erred, though we find the "fruit of the poisonous tree" doctrine does not

apply to this situation. Contrary to the arguments presented in this appeal, the issue is not whether defendant's subsequent statements made during his recorded interview were somehow tainted, as argued by defendant, or whether defendant's statements should be considered voluntary in light of his later *Miranda* warnings, as argued by the State. Not only have the parties missed the mark, but it appears the trial court was also distracted from the real issue. The court questioned whether, and ultimately found that, the subsequent *Miranda* warnings, administered prior to defendant's recorded interview, cured any defect in the admissibility of defendant's pre-*Mirandized* statements identifying Gleghorn. After granting defendant's motion to suppress and while considering defendant's oral request to redact all related evidence, the court noted that the earlier breach of *Miranda* did not cause defendant's subsequent statements to be involuntary. The court noted that defendant had volunteered the statements, knowingly waiving *Miranda*. However, we find that is not the issue. Whether defendant was subsequently administered *Miranda* prior to his interview is irrelevant to the issue presented in this appeal. The issue here is whether the court erred in permitting the jury to hear Detective Atteberry's leading questions posed to defendant about what defendant had told the arresting officers at the scene–the precise evidence that had been ruled suppressed and inadmissible.

The subsequent administration of *Miranda* warnings is not relevant because it is not defendant's "knowing" or "voluntary" statements that are problematic. It is Detective Atteberry's statements and questions that are problematic. In the recorded interview, subsequent to administering defendant his *Miranda* warnings, the detective attempted to encourage defendant to name Gleghorn as his accomplice by referring him to the contents of the police report and reminding him of what he had purportedly told the

officers at the time of his arrest. Though defendant did not comply with the detective's attempts, it was improper for the State to present, through the back door, the same evidence that had been suppressed. It is a fundamental legal principle that ill-gotten evidence is inadmissible. See *Walder v. United States*, 347 U.S. 62, 64-65 (1954).

As the Supreme Court stated in *Miranda*: "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda*, 384 U.S. at 444. In other words, the State may not use defendant's pre-*Mirandized* statements at all, in any form. The State cannot avert this prohibition by introducing the substance of those statements in a different manner. Indeed, Illinois courts have found that it is improper for the State to make reference to incriminating evidence which has been suppressed by the trial court. See *People v. Smith*, 39 Ill. App. 3d 732, 734, 350 N.E.2d 791, 793 (1976) (Third District) (it was error for the State to refer to the defendant's motion to suppress in its cross-examination of him at trial); *People v. Gilmer*, 110 Ill. App. 2d 73, 80, 249 N.E.2d 129, 133 (1969) (First District) (the State improperly referred to suppressed evidence in its closing argument); *People v. Mwathery*, 103 Ill. App. 2d 114, 122-23, 243 N.E.2d 429, 433 (1968) (it was error for the prosecutor to refer to a statement in his closing argument that he had previously, at a hearing on the defendant's motion to suppress the statement, agreed not to introduce for any purpose whatsoever).

Defendant moved to suppress his pre-*Miranda* statements and the trial court granted defendant's motion. The court's suppression order encompassed the entirety of this evidence. Detective Atteberry's questions and defendant's responses about what he had

told the officers at the time of his arrest, as those responses appeared in the police report, should have been suppressed and precluded from the jury's consideration in all respects. We note our analysis and holding does not apply to those exchanges in the interview when Detective Atteberry asked defendant outright who he was with that evening. In those instances, the detective did not confront defendant with or refer him to the exact statements that defendant had made at the time of his arrest--the exact statements that had been ordered suppressed.

As the Supreme Court has aptly stated on this issue:

> "The Government cannot violate the Fourth Amendment--in the only way in which the Government can do anything, namely through its agents -- and use the fruits of such unlawful conduct to secure a conviction. [Citation.] Nor can the Government make indirect use of such evidence for its case [citation], or support a conviction on evidence obtained through leads from the unlawfully obtained evidence [citation]. All these methods are outlawed, and convictions obtained by means of them are invalidated, because they encourage the kind of society that is obnoxious to free men." *Walder*, 347 U.S. at 64-65 (1954) (the government cannot affirmatively use illegally obtained evidence, but otherwise suppressed evidence can be used to impeach a defendant who testifies and opens the door to its use).

Presenting the jury with the detective's questions at issue made the

suppression order completely ineffective and inconsequential. We cannot affirm the suppression order, yet allow the same suppressed evidence to be presented to the jury in a different form. " 'To so hold would render the constitutional guaranties sonorous but impotent phrases.' " *People v. Luna*, 37 Ill. 2d 299, 303, 226 N.E.2d 586, 588 (1967), quoting *Safarik v. United States*, 62 F.2d 892, 897 (8th Cir. 1933). This would " 'seriously jeopardize the important substantive policies and functions' " underlying the prophylactic effect of *Miranda*. See *Luna*, 37 Ill. 2d at 307, 226 N.E.2d at 590, quoting *Johnson v. United States*, 344 F.2d 163, 166 (D.C. Cir. 1964). For these reasons, we find the trial court erred in denying defendant's motion to redact or suppress the relevant exchange from defendant's recorded interview.

With the finding of error, we must determine whether the error justifies reversal. In *Arizona v. Fulminante*, 499 U.S. 279, 307-10 (1991), the Supreme Court recognized two categories of constitutional errors in criminal proceedings: "trial errors" and "structural defects." A trial error "occur[s] during the presentation of the case to the jury" and is subject to harmless-error analysis because it can be "quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Fulminante*, 499 U.S. at 307-08. Most constitutional errors in a criminal trial can be harmless and do not require automatic reversal of the conviction. *Fulminante*, 499 U.S. at 306. As the beneficiary of the error, the State has the burden of proving the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967).

An error may be deemed harmless beyond a reasonable doubt if there is overwhelming evidence to support the conviction (*People v. Wilkerson*, 87 Ill. 2d 151, 157,

429 N.E.2d 526, 528 (1981)), or where a reviewing court can safely conclude that a trial without the error would produce no different result (*People v. Warmack*, 83 Ill. 2d 112, 128-29, 413 N.E.2d 1254, 1262 (1980). In this case, the State argues, and we agree, that the evidence of defendant's guilt was overwhelming. First, defendant fled when Officer Keil attempted to stop him. See *People v. Ransom*, 319 Ill. App. 3d 915, 919, 746 N.E.2d 1262, 1267 (2001) (flight may be considered by a jury as evidence of guilt). Second, the owner of the hair salon, Gary Irwin, testified that at approximately 1 a.m., he heard men arguing outside. He looked out the window and saw two men, one in a black shirt and one in a red shirt, standing on the street below approximately one-half block from the convenience store. Third, Clifford Heard testified that he saw a man throw a rock through the window of the convenience store and saw a man in a red shirt telling the person inside the store to hurry. Fourth, police officers had identified Gleghorn from the store's surveillance video. And finally, Officer Keil testified that she was responding to the burglary when she spotted two males fitting the suspects' descriptions. The one in the black shirt was carrying cartons of cigarettes. She asked the men to stop, but they both ran. She caught the man in the red shirt, who was later identified as defendant. Several cartons of cigarettes were found on the ground, and those cartons contained Gleghorn's fingerprints.

Based on this testimony, we find that the evidence supporting the jury's verdict was overwhelming. Given that finding, we conclude that the improper admission of the previously suppressed evidence neither contaminated the jury nor affected the outcome of defendant's trial. We hold the error was harmless beyond a reasonable doubt.

III. CONCLUSION

For the foregoing reasons, we affirm defendant's conviction and sentence. As

part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

Affirmed.