

2012 IL App (1st) 110076-U

SIXTH DIVISION  
October 26, 2012

No. 1-11-0076

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

---

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. 09 CR 8621
	)	
FREDDIE COOKS,	)	Honorable
	)	William H. Hooks,
Defendant-Appellant.	)	Judge Presiding.

---

PRESIDING JUSTICE LAMPKIN delivered the judgment of the court.  
Justices Hall and Robert E. Gordon concurred in the judgment.

**ORDER**

¶ 1 *Held:* Defendant's claim of ineffective assistance of trial counsel for failing to impeach a detective about an inconsistency arising from a police inventory report, and stipulating to defendant's prior conviction, failed for lack of resulting prejudice.

¶ 2 Following a bench trial, defendant Freddie Cooks was found guilty of residential burglary and sentenced to four years' imprisonment. On appeal, he contends that trial counsel was ineffective for failing to impeach a key witness with an inconsistent statement in a police inventory report and to exclude evidence of his prior conviction.

¶ 3 Defendant was convicted on evidence showing that about noon on April 24, 2009, he broke into the home of Chicago police officer Richard Bell, intending to commit a theft therein. Bell testified that he left the house briefly and returned about 35 minutes later to find defendant standing inside by an open window in the stairwell. Bell did not notice that his wedding band and a pair of diamond earrings were missing from his house until the next morning, at which time he called the police department and learned that those items had been inventoried.

¶ 4 Detective Rita Schergen testified that she took defendant into custody, performed a custodial search and recovered a pair of diamond earrings, a diamond ring, and a bracelet from defendant's right pocket. The jewelry was initially inventoried as defendant's personal property, then subsequently returned to Bell when he called and described his missing jewelry. At the police station, her partner, Detective William Sotak, Mirandized and questioned defendant, who related that he kicked in the back door of Bell's house and went inside to see if he could find anything to sell, but Bell returned before he could take anything.

¶ 5 On cross-examination, Detective Schergen clarified that defendant was searched at the scene for weapons and the custodial search that produced the jewelry took place at the police station. Neither she, nor her partner informed Bell about the jewelry because defendant said it belonged to him.

¶ 6 Defendant testified that the back door of Bell's house was unlocked, that he stepped inside and was surprised by a man who may have been Bell, but he was uncertain. Although disoriented from ingesting cognac and tranquilizers that morning, he immediately knew that he was out of place. At the time, the only jewelry in his pocket was a silver necklace that he bought for a girlfriend the day before. He denied kicking in the door, taking anything from the house, or telling police he was looking for something to steal.

¶ 7 On cross-examination, defendant stated that he was "just trying to find shelter" when he entered the house. Inside, he was immediately confronted by a man in boxer shorts with something in his hand. The man told him to lie down on the floor and he complied because he was "coming back to reality" and scared. He recalled getting into a police car, but not entering the police station or speaking to the officers about the incident. In rebuttal, the parties stipulated that defendant was convicted of retail theft on June 1, 2005.

¶ 8 In finding defendant guilty of residential burglary, the trial court credited the testimony of Detective Schergen concerning the items recovered from defendant, and the portion of Officer Bell's testimony concerning defendant's unauthorized entry and removal from the dwelling place of certain items. On the other hand, the court stated that "defendant's suggestion of intoxication by alcohol and some type of another drug did not offset that to a degree that the State failed in its burden of proof beyond a reasonable doubt."

¶ 9 On appeal, defendant first contends that trial counsel was ineffective for failing to impeach Detective Schergen with regard to her testimony that jewelry belonging to Officer Bell was recovered from defendant's person and inventoried, with a prior inconsistent statement in "the Chicago Police Department property inventory, electronically signed by Detective Schergen, that stated that the police only recovered a 'colored 4x6 photograph' from [him], with no mention of any inventoried jewelry." Defendant asserts that this testimony was crucial in establishing that he had the requisite intent to commit the charged offense because Bell's testimony was both unbelievable and conflicting, and the trial court recognized that portions of Bell's testimony were not credible. He argues that the police inventory report, which does not mention any stolen jewelry, "completely controverted" Schergen's testimony, and had trial counsel effectively impeached Schergen with the report, the trial court would have determined that her testimony was unreliable. We disagree.

¶ 10 To succeed on a claim of ineffective assistance of trial counsel, defendant must demonstrate that not impeaching the detective, in the manner he claims counsel should have done, was both objectively unreasonable and that, but for this error, there is a reasonable probability that the outcome of the proceeding would have been different. *People v. Campbell*, 332 Ill. App. 3d 721, 729-30 (2002) (citing *Strickland v. Washington*, 466 U.S. 668, 687-94 (1984)). The decision whether to cross-examine or impeach a witness is a matter of trial strategy, and, accordingly, the failure to do so is not objectively unreasonable. *Campbell*, 332 Ill. App. 3d at 730. Moreover, if the ineffectiveness claim can be resolved on the lack of resulting prejudice, we need not decide whether counsel's performance was deficient. *People v. Graham*, 206 Ill. 2d 465, 476 (2003). Our review of this issue is *de novo* (*People v. Williams*, 391 Ill. App. 3d 257, 269 (2009)), and we find, for the reasons to follow, that defendant cannot convincingly demonstrate that he was prejudiced by trial counsel's representation (*People v. Edmondson*, 106 Ill. App. 3d 716, 726 (1982)).

¶ 11 In this case, the State was required to prove that defendant knowingly and without authority, entered Bell's house with the intent to commit therein a theft (720 ILCS 5/19-3(a) (West 2008)). The offense of residential burglary is complete upon entering with the requisite intent, and the actual commission of the intended offense, *i.e.*, theft, is irrelevant. *People v. Woodrum*, 223 Ill. 2d 286, 307 (2006). " 'A [fact finder] may infer the offender's intent to commit a residential burglary from proof that the offender unlawfully entered a building containing personal property that could be the subject of a larceny.' " *People v. Moreira*, 378 Ill. App. 3d 120, 129 (2007) (quoting *In re Matthew M.*, 335 Ill. App. 3d 276, 282-83 (2002)).

¶ 12 At trial, defendant claimed that he was intoxicated and that he entered Bell's house "just trying to find shelter," but any indication that he was intoxicated came solely from his self-serving statements, which the trial court discredited. *People v. Green*, 288 Ill. App. 3d 402, 406

(1997). The State's evidence, on the other hand, was sufficient to support the inference that defendant's entry was made with the intent to steal. Accordingly, Detective Schergen's failure to include the stolen jewelry in the police inventory report was completely irrelevant to defendant's guilt or innocence of residential burglary, and any attempted impeachment relating to Schergen's omission in the police inventory report would have added little, if anything, to defendant's position regarding the intent with which he unlawfully entered the house. *People v. Peterson*, 248 Ill. App. 3d 28, 41 (1993).

¶ 13 The purpose of impeachment is to attack the credibility of the witness and not to show the truth of the impeaching material. *People v. Douglas*, 2011 IL App (1st) 093188, ¶ 47. Police reports may be used for impeachment, but not as substantive evidence and, in this case, the State directly questioned the detective, who testified that the jewelry was initially inventoried as defendant's personal property, then subsequently returned to Bell when he called and described his missing jewelry. *People v. Wilder*, 356 Ill. App. 3d 712, 724 (2005). Officer Bell identified defendant as the individual he discovered inside his house and the trial court heard defendant's custodial statement admitting his involvement in the offense. Accordingly, we fail to see how the use of the police inventory report would have undermined the witnesses' in-court testimony, including defendant's concession that he entered Bell's house, or the inference arising from his unlawful entry into a residence at noon on an April day, and lead to an acquittal. *Wilder*, 356 Ill. App. 3d at 724. Thus, his claim fails for lack of prejudice.

¶ 14 In reaching this conclusion, we also find this case distinguishable from *People v. Salgado*, 263 Ill. App. 3d 238 (1994), upon which defendant relies and quotes, "the complete failure to impeach the sole eyewitness when significant impeachment is available is not trial strategy and, thus, may support an ineffective assistance claim." In *Salgado*, 263 Ill. App. 3d at 247, trial counsel was found ineffective for completely failing to impeach the sole eyewitness

who directly implicated defendant as the offender. Unlike *Salgado*, the subject matter of the impeachment here concerns an immaterial aspect of the case. *People v. Flores*, 231 Ill. App. 3d 813, 826 (1992); *Peterson*, 248 Ill. App. 3d at 41. The alleged inconsistency in Detective Schergen's testimony regarding the inventory of property does not raise a reasonable doubt regarding defendant's guilt, or the veracity of Bell's testimony regarding defendant's unauthorized entry into his house and the removal of certain items from therein. *People v. Nitz*, 143 Ill. 2d 82, 116 (1991).

¶ 15 Defendant nonetheless complains that the importance of the jewelry "as evidence of intent" is highlighted by the fact that the trial court found portions of Bell's testimony incredible. However, the trial court is free to accept or reject as much, or as little, of a witness's testimony (*People v. Nelson*, 246 Ill. App. 3d 824, 830 (1993)); and here, the trial court specifically found Bell's testimony credible as to the elements of the offense. Based on our review of the record, we are not convinced that trial counsel's failure to impeach Schergen regarding the police inventory report would have changed the outcome of the trial (*Flores*, 231 Ill. App. 3d at 826-27), when the evidence was sufficient to establish the essential elements of the offense beyond a reasonable doubt.

¶ 16 Defendant next contends that trial counsel was ineffective for failing to exclude evidence of his prior conviction of retail theft. Specifically, he argues that there is a reasonable probability that his prior conviction would have been excluded as highly prejudicial had trial counsel submitted a motion to exclude under *People v. Montgomery*, 47 Ill. 2d 510, 517 (1971). Defendant cites *People v. Elliot*, 274 Ill. App. 3d 901, 909 (1995), for the proposition that evidence of prior convictions for substantially the same conduct should be admitted sparingly, and *People v. Adams*, 281 Ill. App. 3d 339, 345 (1996), for the proposition that evidence of a

prior crime that does not go to the veracity of the accused is a highly prejudicial maneuver that offers little in the way of probative value.

¶ 17 A defendant who testifies may be impeached by proof of a prior conviction. *People v. Harden*, 2011 IL App (1st) 092309, ¶ 44. The *Montgomery* rule provides that the credibility of a witness may be attacked by evidence of a prior conviction only if (1) the crime was punishable by death or imprisonment in excess of one year, or (2) the crime involved dishonesty or false statement regardless of the punishment. *People v. Stewart*, 366 Ill. App. 3d 101, 112 (2006). In either case, evidence of a prior conviction is inadmissible if the judge determines the probative value of the evidence is substantially outweighed by the risk of unfair prejudice, or if more than 10 years has passed since the date of conviction or release from confinement, whichever is later. *Stewart*, 366 Ill. App. 3d at 112 (*citing Montgomery*, 47 Ill. 2d at 516). Whether to file a motion is regarded as a matter of trial strategy which must be given great deference. *People v. Shlimon*, 232 Ill. App. 3d 449, 458 (1992).

¶ 18 Here, defendant does not dispute that his prior conviction falls within the *Montgomery* time limitation. He argues, however, that his prior conviction was of limited probative value where there was no showing that it impacted his credibility and its admission did little but establish his prior conviction of an offense with many of the same elements as the offense in this case, the very practice he claims the supreme court wished to avoid in *Montgomery*, and later in *People v. Williams*, 161 Ill. 2d 1, 39 (1994). Similarity alone, however, does not mandate exclusion of the prior conviction, and we note several cases in which the credibility of a defendant on trial for burglary was properly impeached by evidence of a prior conviction for misdemeanor theft. See, e.g., *People v. Diehl*, 335 Ill. App. 3d 693, 704-05 (2002) (*citing People v. Flowers*, 306 Ill. App. 3d 259, 264-65 (1999); *People v. Collins*, 227 Ill. App. 3d 670, 675

(1992)). This court has recognized that theft is a crime that speaks directly to a person's truthfulness (*Diehl*, 335 Ill. App. 3d at 704) and, here, defendant's credibility was at issue.

¶ 19 Furthermore, in *People v. Williams*, 173 Ill. 2d 48, 83 (1996), the supreme court disagreed with the *Williams* case (161 Ill. 2d at 39) cited by defendant insofar as it is construed as leaving eligible for impeachment only those prior " 'convictions for offenses that involve dishonesty or false statement.' " *Harden*, 2011 IL App (1st) 092309, ¶ 49 (*quoting Williams*, 173 Ill. 2d at 83). "[D]ecisions indicating that the 'nature of the prior conviction must bear on the witness's truthfulness before it can be considered for use as impeachment are trumped' by *Williams*." *Harden*, 2011 IL App (1st) 092309, ¶ 49 (*quoting Stokes v. City of Chicago*, 333 Ill. App. 3d 272, 278-79 (2002)).

¶ 20 In sum, the evidence of defendant's prior retail theft conviction was admissible under the factors set forth in *Montgomery (Collins)*, 227 Ill. App. 3d at 675), and defendant has failed to establish prejudice resulting from counsel's decision to stipulate, rather than challenge, its entry in this bench trial. The record shows that the trial court based its decision on the credible testimony of the detective and the victim and made no reference to defendant's prior conviction. We, therefore, find this claim of ineffective assistance of trial counsel without merit.

¶ 21 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 22 Affirmed.