

NOTICE
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2012 IL App (4th) 110894-U

Filed 8/20/12

NO. 4-11-0894

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Livingston County
JOSEPH J. CALIENDO,)	No. 10CF310
Defendant-Appellant.)	
)	Honorable
)	Mark A. Fellheimer,
)	Judge Presiding.

JUSTICE COOK delivered the judgment of the court.
Justices Steigmann and Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* The State proved defendant guilty of aggravated battery beyond a reasonable doubt, and the trial court did not err in allowing the State to admit impeachment evidence of defendant's prior convictions.

¶ 2 Following a March 2011 trial, the jury convicted defendant, Joseph Caliendo, of aggravated battery, a Class 2 felony (720 ILCS 5/12-4(b)(18), (e)(2) (West 2008)). In September 2011, the trial court sentenced defendant to six years in prison, with three years of mandatory supervised release, to run consecutively to his sentences in Livingston County case No. 09-CF-330 and Cook County case No. 09-CR-275401.

¶ 3 Defendant appeals, arguing that (1) he was not proved guilty beyond a reasonable doubt, and (2) the trial court substantially prejudiced defendant's right to a fair trial when it allowed the State to impeach him with four convictions. We disagree and affirm.

¶ 4

I. BACKGROUND

¶ 5 In November 2010, the State charged defendant with aggravated battery, a Class 2 felony (720 ILCS 5/12-4(b)(18), (e)(2) (West 2008)), alleging that defendant knowingly caused bodily harm to a correctional officer when he knowingly butted the correctional officer in the chin with his head. A jury trial commenced in March 2011.

¶ 6 Correctional officer Joel Starkey testified that he works at Pontiac Correctional Center (Pontiac). On August 9, 2010, Officer Starkey was a gallery officer in charge of 40 to 50 inmates, and it was his responsibility to move the inmates throughout the prison for various reasons. Officer Starkey escorted defendant from the gallery to the Bureau of Identification (Bureau) for photos to be taken of defendant. Defendant had his hands cuffed behind his back and his feet shackled. Once Officer Starkey brought defendant to the Bureau, defendant began yelling obscenities and "cussing" at the technician. Defendant cooperated in having his photo taken from the front, but he refused to have his photo taken from the side. As Officer Starkey escorted defendant out of the Bureau, defendant attempted to spit on the technician. He "hocked up phlegm in his throat, puckered his lips, [and] moved his head towards [the technician] like he was going to spit on him." Officer Starkey guided defendant out of the room and back toward his cell.

¶ 7 To reach defendant's cell, Officer Starkey and defendant had to walk down three flights of stairs. As they were descending the stairs, Officer Starkey was walking behind defendant. Defendant jumped backward "with full force" and struck Officer Starkey in the chin with his head. Officer Starkey's head "flipped" to the ceiling and they fell backward a "step or two." Officer Starkey then placed defendant on the ground and called for assistance on his radio.

When Officer Starkey took defendant to the ground, defendant hit his head on a window sill, and defendant had to receive stitches. Officer Starkey's supervisor instructed him to go to the health-care unit. Officer Starkey testified that he hurt his chin and was "sore for a few days." Officer Starkey was not bleeding and did not require any stitches.

¶ 8 Officer Daniel Tovera testified that he is a guard at Pontiac and was standing in the medical room with another inmate, approximately 20 feet away from the stairwell, when the incident took place. Officer Tovera heard a "commotion" outside the medical room and went out into the stairwell. Officer Tovera observed Officer Starkey holding defendant to the ground and noticed "a bunch of blood" coming from defendant's head.

¶ 9 Following Officer Tovera's testimony, defense counsel asked the trial court, out of the presence of the jury, to make a ruling on what impeaching evidence concerning defendant's criminal record it would allow the State to present if defendant were to testify. The State tendered five matters from Cook and Livingston Counties: (1) possession of a controlled substance, 2001; (2) burglary, 2006; (3) theft, 2006; (4) possession of a stolen motor vehicle, 2008; and (5) aggravated battery, 2009. Defense counsel asked the court not to allow the State to present evidence of defendant's 2009 aggravated-battery conviction. Defense counsel also asked the court to restrict the State to presenting "a couple" of the charges, as the State could demonstrate that defendant is a convicted felon without presenting all four, and presenting all four would be unduly prejudicial. The court decided that the State would be allowed to impeach defendant with the burglary, theft, possession-of-a-controlled-substance, and possession-of-a stolen-motor-vehicle convictions, but the court excluded the aggravated-battery conviction.

¶ 10 Defendant testified that as he was walking down the stairs, Officer Starkey pulled

defendant backward by his arms and hit him in the head. Defendant then fell to the floor and blood started "gushing" from his forehead. After defendant fell to the ground, Officer Tovera approached him and brought him to the medical unit. Defendant did not intentionally strike Officer Starkey.

¶ 11 On this evidence, the jury convicted defendant of aggravated battery. The trial court sentenced defendant as stated.

¶ 12 This appeal followed.

¶ 13 II. ANALYSIS

¶ 14 On appeal, defendant argues that (1) he was not proved guilty beyond a reasonable doubt, and (2) the trial court substantially prejudiced defendant's right to a fair trial when it allowed the State to impeach him with four convictions. The State argues it proved defendant guilty beyond a reasonable doubt and the trial court properly allowed all four convictions to be admitted for impeachment purposes. We consider each argument in turn.

¶ 15 A. The State Proved Defendant Guilty
Beyond a Reasonable Doubt

¶ 16 Defendant first argues the State did not prove him guilty of aggravated battery beyond a reasonable doubt. Specifically, defendant contends the State did not show bodily harm to Officer Starkey, and without doing so, the State cannot prove aggravated battery. The State argues that it did show bodily harm to Officer Starkey.

¶ 17 When reviewing a challenge to the sufficiency of the evidence, a reviewing court considers "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a

reasonable doubt.' " (Emphasis in original.) *People v. Cox*, 195 Ill. 2d 378, 387, 748 N.E.2d 166, 172 (2001) (quoting *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). A conviction will only be reversed if "the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt." *People v. Collins*, 214 Ill. 2d 206, 217, 824 N.E.2d 262, 267-68 (2005).

¶ 18 A person commits aggravated battery when, in committing a battery, that person knows the individual harmed is a peace officer engaged in the execution of his official duties. 720 ILCS 5/12-4(b)(18) (West 2010). To prove aggravated battery, the State must first prove a simple battery. *People v. McBrien*, 144 Ill. App. 3d 489, 496, 494 N.E.2d 732, 737 (1986). A simple battery may be committed in one of two ways: (1) causing bodily harm, or (2) making physical contact of an insulting or provoking nature. *McBrien*, 144 Ill. App. 3d at 496, 494 N.E.2d at 737. Our supreme court has found bodily harm to be some "sort of physical pain or damage to the body." *People v. Mays*, 91 Ill. 2d 251, 256, 437 N.E.2d 633, 635-36 (1982).

¶ 19 Defendant argues the State did not show defendant caused bodily harm to Officer Starkey because Officer Starkey did not suffer lacerations, bruises, or abrasions. In further support of his argument, defendant highlights that on cross-examination, Officer Starkey testified that he did not "ask for anything to be done" when he went to see the nurse after the incident. The State argues that Officer Starkey testified he hurt his chin and neck and was "sore for a few days," which is evidence that Officer Starkey suffered from physical pain. The State argues this physical pain is sufficient to show that defendant caused bodily harm to Officer Starkey. We agree with the State. We conclude, based upon the State's evidence that Officer Starkey suffered from physical pain, a rational trier of fact could have found defendant caused bodily harm to

Officer Starkey and, thus, the State proved defendant guilty of aggravated battery beyond a reasonable doubt.

¶ 20 B. The Court Properly Admitted Defendant's Four Convictions

¶ 21 Defendant next argues the trial court committed reversible error by allowing the State to present impeachment evidence of four of defendant's prior felony convictions.

Defendant argues that the trial court's failure to limit the number of convictions submitted into evidence unfairly prejudiced him and induced the jury to decide the case on improper grounds. Specifically, defendant argues (1) the court erred in admitting a 2001 conviction for possession of a controlled substance because it was too remote in time and any probative value was outweighed by its prejudicial effect, and (2) where the credibility of witnesses was the most significant factor in the case, the court erred in admitting all four convictions. The State argues the court properly admitted all four convictions.

¶ 22 Initially, the State argues that defendant has forfeited any argument that the 2001 conviction was too remote in time and should not have been admitted. To preserve an issue for appellate review, a defendant must make an objection at trial and include the issue in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124, 1130 (1988). At trial, defense counsel asked the court to limit the State to admitting "two of the felonies of which they wish[ed] to submit" because he did not believe it would be "proper to submit [defendant's] whole criminal history." Defense counsel stated that he would "not argue that the [the four convictions] are unduly prejudicial." In his posttrial motion, defendant vaguely referred to "People's Exhibit No. 1, being previous convictions of [d]efendant" in asserting that the court improperly admitted evidence. Defendant never made a specific objection, at trial or in his posttrial motion, that his

2001 conviction was too remote in time to be admitted. Thus, we agree that defendant has forfeited this argument on appeal.

¶ 23 Regardless of defendant's forfeiture, we still find that the evidence of defendant's 2001 conviction was properly admitted. Prior convictions may be admitted to impeach witness credibility when, among other factors, less than 10 years has passed since the date of conviction, or "release of the witness from confinement, whichever is later." *People v. Patrick*, 233 Ill. 2d 62, 69, 908 N.E.2d 1, 5 (2009). Release from confinement means the actual release of the witness from confinement and not the date on which his or her sentence is completed. *People v. Farrell*, 377 Ill. App. 3d 249, 251, 879 N.E.2d 456, 458 (2007). The record shows defendant was sentenced on his 2001 possession conviction on April 19, 2002. Defendant spent seven days in jail and was released on April 26, 2002. Thus, at the time of trial, 10 years had not elapsed since defendant's release date and the conviction was properly admissible as impeachment evidence.

¶ 24 Defendant further argues, however, even though the conviction may have fallen within the 10-year period, the prejudicial effect of the evidence substantially outweighed its probative value. Defendant argues that his conviction for possession of a controlled substance is not probative of his ability to testify truthfully. We disagree. "Illinois courts have consistently determined that a conviction for the unlawful possession *** of controlled substances would be the type of conviction which would *** afford a basis for impeaching credibility." *People v. Tribett*, 98 Ill. App. 3d 663, 675-76, 424 N.E.2d 688, 697 (1981). Moreover, whether a witness's prior conviction will be admitted for impeachment purposes is "within the sound discretion of the trial court." *People v. Mullins*, 242 Ill. 2d 1, 15, 949 N.E.2d 611, 619-20 (2011). The court

"heard the arguments and considered the past convictions" and ruled to admit the four convictions. We conclude the trial court did not abuse its discretion in admitting the 2001 possession conviction, as it was properly admitted to impeach defendant's credibility.

¶ 25 Finally, defendant argues that because the State did not present any physical evidence that defendant committed aggravated battery, his conviction depended upon the testimony of Officer Starkey, Officer Tovera, and defendant. Thus, he contends, it was improper for the court to admit four of defendant's prior convictions in impeaching his credibility because his credibility was a critical factor to his case. Allowing all four convictions, he argues, was unduly prejudicial.

¶ 26 The State argues that, because defendant's credibility was a central issue, admitting evidence of prior convictions was essential to assessing defendant's credibility. We agree with the State. Our supreme court has held that where a defendant's testimony makes up his or her entire defense, credibility is a central issue and admitting evidence of prior convictions is crucial to measuring his or her credibility. *People v. Atkinson*, 186 Ill. 2d 450, 461-62, 713 N.E.2d 532, 537-38 (1999). Moreover, where a witness's credibility is vital to the determination of truth, the probative value of using a defendant's prior convictions is enhanced. *People v. Hawkins*, 243 Ill. App. 3d 210, 224, 611 N.E.2d 1069, 1079 (1993).

¶ 27 Defendant does not explain how allowing the State to admit evidence of four prior convictions was unfairly prejudicial, other than asserting that four is too many. The trial court has discretionary authority to decide whether prior convictions should be admitted. *People v. McKibbins*, 96 Ill. 2d 176, 187, 449 N.E.2d 821, 826 (1983). "In exercising this discretion, the trial judge is expected to balance the probative value of the evidence of prior convictions against

the prejudicial impact of such convictions upon the jury." *McKibbins*, 96 Ill. 2d at 187-88, 449 N.E.2d at 826. The record shows that the trial judge was familiar with, and applied, this balancing test in determining that the four convictions would be admitted. The court found that the convictions were not unfairly prejudicial and gave the jury a limiting instruction on the convictions. We conclude the trial court did not abuse its discretion in allowing the convictions to be admitted.

¶ 28

III. CONCLUSION

¶ 29 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 30 Affirmed.