

No. 1-14-2551

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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. 11 CR 2222
)	
BRAYANT ROGERS,)	Honorable
)	Timothy Joseph Joyce,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Gordon and Justice Reyes concurred in the judgment.

O R D E R

- ¶ 1 *Held:* Defendant's convictions affirmed over his contention that the trial court abused its discretion in allowing the State to introduce his prior conviction for attempted murder as impeaching evidence against him.
- ¶ 2 Following a jury trial, defendant Brayant Rogers was convicted of first-degree murder (720 ILCS 5/9-1(a)(1) (West 2010)) and aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2010)), and sentenced to 53 years' imprisonment. On appeal, defendant contends

that the trial court abused its discretion when it allowed the State to introduce his prior conviction for attempted murder to impeach his credibility. We affirm.

¶ 3 The State charged defendant with, and proceeded to trial against him on, three counts of first-degree murder, one count of aggravated battery with a firearm and one count of aggravated discharge of a firearm.

¶ 4 Prior to trial, the State filed a motion *in limine* to admit defendant's prior conviction for attempted murder and two prior convictions for possession of a controlled substance with intent to deliver as impeachment evidence should he testify at trial. On the same date, defendant filed a motion *in limine* to bar the State from introducing his prior drug convictions as impeachment evidence but did not include his conviction for attempted murder.

¶ 5 At the hearing on the motions, the State argued that, because defendant's answer listed no other possible witnesses, the convictions would be "crucial" for the jury in assessing his credibility should he testify. Defense counsel responded, arguing that, because defendant would be the only witness who could testify to his state of mind at the time of the offenses, allowing his prior attempted murder conviction, which he committed in 2001, "would have a chilling effect" on his right to testify. Counsel further asserted that the conviction would "over persuade" the jury to believe he committed first-degree murder simply because he had previously been convicted of attempted murder. Counsel concluded that the admission of the conviction was "more prejudicial than probative."

¶ 6 The trial court noted that, according to *People v. Montgomery*, 47 Ill. 2d 510 (1971), it had to conduct "an appropriate balancing test" of the probative value of admitting the conviction

against the potential for undue prejudice. The court granted the State's motion regarding his prior drug convictions. The court then found:

“Attempt murder is – I don't want to say more problematic – but it's [*sic*] argument, as Defense notes, it is an offense which tends to be a little more potentially similar to the charges at hand, although there is no attempt first degree murder charge in this case. By virtue of what counts the State is proceeding on, nonetheless the serious charge convincing, would be serious disrespect for the law at a time within the ten-year *Montgomery* period. *** Balancing the probative value against the danger of unfair and undue prejudice, I'm going to deny the Defendant's request to grant – the State's request – and the attempt murder charge will be admissible to impeach [defendant's] testimony should he testify.”

¶ 7 The case proceeded to a jury trial, where the evidence showed that, at around noon on January 4, 2011, Kabreisha Hall was with Hayward Hudson, David Thompson and Kenny Wilson in a van driven by Brian Green. After Green drove the group to a Subway located on the 4500 block of North Magnolia Avenue in Chicago, he parked the van, and both he and Hudson exited the vehicle and walked into the Subway. Hall, Thompson and Wilson remained in the vehicle, talking to each another. The van's windows were closed.

¶ 8 Green received his food first and returned to the vehicle, entering the driver's seat. As he ate his food with the seat reclined, he looked at his side mirror and exclaimed “[i]t look like he got a gun.” Thompson looked out the window and observed a man, identified at trial as defendant, dressed in all black approaching them with a firearm in his hands pointed at the van. Suddenly, defendant fired his weapon at the driver's side of van several times. Everyone in the

van attempted to duck and drop to the floor. Hudson, who had just left the Subway, ducked behind the van. When the gunshots stopped, Hudson entered the van and made his way into the driver's seat. Green had been shot in the back and died as a result of the gunshot wound. Wilson had been shot in the finger. Hudson drove the van until he observed police officers and alerted them of the shooting.

¶ 9 Chicago police officer Thomas Hope was in his covert vehicle near the Subway conducting undercover surveillance of drug activity when he observed defendant pull out a firearm and run toward the driver's side of the van. He did not see anyone in the van doing anything or hear any shouting coming from the parking lot. When defendant reached the van, the van obstructed Hope's view of defendant, but he heard several gunshots and immediately reported the shooting. Hope, who was in plainclothes, followed defendant for a block and a half and observed him enter a building that had its door propped open with an object. Defendant kicked the object away and slammed the door shut. Hope could not enter the building because the door was locked, but, because part of the door was glass, he saw defendant enter a garden apartment. Hope requested assistance, directing the officers to go to the rear of the building.

¶ 10 The police eventually gained access to the building and the apartment. After defendant ran from the apartment, they arrested him in a gangway at the rear of the building. The occupant of the apartment testified that he allowed defendant to keep a firearm there, and defendant had stopped by the apartment earlier in the day to pick it up. The police searched the apartment and recovered a .38-caliber revolver and a black hoody. Forensic testing revealed that the bullet recovered from Green's body came from that revolver. The police performed a gunshot residue

test on defendant, and the test came back positive. The police conducted a gunshot residue test on Green, but no one else in the van. The results of Green's test were not offered at trial.

¶ 11 Hall, Hudson, Wilson and Thompson testified consistently that no one in the group flashed gang signs, had a firearm, yelled anything from the van or engaged defendant in any manner. Several of the State's witnesses testified that the area near the Subway was dangerous because of numerous shootings and drug activity. Additional evidence showed that, in July 2010, defendant and Aaron Carter had been shot on the same block where the Subway was located. Carter died as a result of the gunshot wounds he suffered that day.

¶ 12 Defendant testified and acknowledged pleading guilty to attempted murder when he was 16 years old as well as pleading guilty in two drug cases. Defendant testified that, in July 2010, while he was in the neighborhood, he was walking with his friend, Carter. A vehicle drove up to them and someone shot at them. Defendant was shot in the left leg. Carter was shot and killed. Defendant testified to knowing of other shootings in the neighborhood between July 2010 and January 2011 involving people he knew. He stated he had been shot at five additional times besides the time he was with Carter. Because of the shootings and drug activity, the neighborhood was dangerous, and defendant often would carry a .38-caliber revolver while there.

¶ 13 Defendant testified that, at around noon on January 4, 2011, while he was walking to the Subway to get food, he saw Hudson exit the Subway, walk toward a van, and yell "there go one of the Mo's right there." Defendant explained that a "Mo" is a member of the Black P Stones gang to which he belonged at the time. Defendant thought that Hudson "resembled" the man who had shot him, but he "didn't know for sure if it was him or not" and did not "stare at [Hudson]

too long.” Asked to identify Hudson at trial, defendant stated he did not recognize him and believed he had “[j]ust a slight resemblance” to the man who shot him. Defendant stated that, whenever “somebody pulls up, walks up and yells something to one of us, some shots are always fired.” Defendant thought that, because Hudson yelled out, Hudson was going to shoot him, so defendant took cover near the Subway. Defendant also observed that the driver of the van was “moving.” It “looked like he was reaching down,” but defendant could not see if anyone else was in the van.

¶ 14 Suddenly, the driver stood up, the driver’s door opened and the driver pointed something at defendant, but he could not see what it was. Defendant became “scared” of being shot again. Because he thought the driver was about to shoot him, he pulled out his firearm and shot toward the back of the van several times. He explained that he was not trying to hit anyone, but rather wanted to prevent the driver from doing anything to him. Defendant acknowledged he did not actually know if Hudson was connected to the van, and the driver did not say anything to him. Defendant did not see a firearm on anyone but explained he was not “going to stand there and wait to see” if anyone had one.

¶ 15 In rebuttal, the State introduced certified copies of convictions showing defendant had pled guilty to attempted murder in case number 01 CR 1749102 and pled guilty to possession of a controlled substance with intent to deliver in case numbers 11 CR 247102 and 11 CR 2472.

¶ 16 During argument, defense counsel argued that defendant’s shooting of Green was second-degree murder based on an unreasonable belief of self-defense. The trial court provided the jury with an instruction, informing it that defendant’s prior convictions may only be considered “as it

may affect his believability as a witness and must not be considered *** as evidence of his guilt” for the charged offenses.

¶ 17 After deliberation, the jury found defendant guilty of first-degree murder, aggravated battery with a firearm and aggravated discharge of a firearm. Defendant filed an unsuccessful motion for new trial, arguing, *inter alia*, that the trial court erred in allowing the State to use his prior conviction for attempted murder to impeach his credibility.

¶ 18 The trial court subsequently merged defendant’s conviction for aggravated discharge of a firearm into his conviction for aggravated battery with a firearm. It sentenced him to 47 years’ imprisonment for first-degree murder, including a mandatory 25-year firearm enhancement, and 6 years’ imprisonment for aggravated battery with a firearm, to be served consecutively. This appeal followed.

¶ 19 Defendant contends that the trial court abused its discretion when it allowed the State to use his prior conviction for attempted murder to impeach his credibility where the conviction did not bear on his credibility as a witness and was too similar to the charged first-degree murder. Defendant asserts that the admission of the prior conviction created an undue prejudice that substantially outweighed its probative value.¹

¶ 20 When a defendant testifies, a prior conviction is admissible for the purpose of discrediting him as a witness and not “for the purpose of proving the defendant’s guilt or innocence of the crime for which the defendant is being tried.” *People v. Naylor*, 229 Ill. 2d 584, 594 (2008). A prior conviction is admissible to discredit the defendant’s credibility if: (1) the

¹ Defendant does not contest the trial court’s decision to allow the State to introduce his prior drug convictions as impeachment evidence.

conviction was punishable by imprisonment for more than one year or death, or the offense involved a false statement or dishonesty, regardless of the punishment; (2) less than 10 years had passed since the date of the conviction or the defendant's release from confinement, whichever occurred later; and (3) "the probative value of admitting the prior conviction outweighs the danger of unfair prejudice." *People v. Mullins*, 242 Ill. 2d 1, 14 (2011) (citing *Montgomery*, 47 Ill. 2d at 516). Defendant only contests the third element of the *Montgomery* test, thereby conceding that his attempted murder conviction satisfied the first two elements.

¶ 21 The third element of the *Montgomery* test requires the trial court to conduct a balancing test, weighing the risk of the potential prejudice against the probative value from the conviction's admission. *Id.* In conducting the balancing test, the court "should consider, *inter alia*, the nature of the prior conviction, the nearness or remoteness of that crime to the present charge, the subsequent career of the person, the length of the witness' criminal record, and whether the crime was similar to the one charged." *Id.* at 14-15. "[A]bove all," the court should consider "the extent to which it is more important to the search for truth in a particular case for the jury to hear the defendant's story than to know of a prior conviction." *Montgomery*, 47 Ill. 2d at 518. A prior conviction has probative value if it could impair the defendant's credibility. *People v. McKibbins*, 96 Ill. 2d 176, 188 (1983). We review the trial court's decision for an abuse of discretion (*Mullins*, 242 Ill. 2d at 15), which occurs when the decision is "fanciful, arbitrary, or unreasonable to the degree that no reasonable person would agree with it." *People v. Ortega*, 209 Ill. 2d 354, 359 (2004).

¶ 22 In the present case, the trial court properly allowed the State to admit defendant's prior conviction for attempted murder as evidence to impeach his credibility. Defendant acknowledged

performing the acts that resulted in Green's death, and, as his defense consisted almost entirely of his own testimony that he acted in self-defense, albeit unreasonably, his credibility was the critical issue for the jury to resolve. It had to determine whether defendant shot Green during a perceived need for self-defense or committed an unmitigated murder. His prior conviction for attempted murder was highly probative in the resolution of this question. See *People v. Gomez*, 402 Ill. App. 3d 945, 955-56 (2010) (finding no abuse of discretion to allow the State to admit a defendant's prior conviction for aggravated discharge of a firearm during his first-degree murder and attempted murder trial where he claimed he acted in self-defense and the prior conviction was relevant to the issue of whether he was the initial aggressor).

¶ 23 Although defendant's prior conviction for attempted murder was a similar crime to the charged first-degree murder, "similarity alone does not mandate exclusion of the prior conviction," (*People v. Atkinson*, 186 Ill. 2d 450, 463 (1999)), especially when the jury has been instructed to consider a prior conviction only for impeachment purposes. *Mullins*, 242 Ill. 2d at 16. Here, the jury was instructed to consider the prior conviction only for the limited purpose of impeachment evidence. Further, we find that, when the court decided whether to allow the State to use the conviction, it specifically mentioned the *Montgomery* balancing test. As the prior attempted murder conviction was highly probative of the critical issue at trial and the jury received an instruction on the proper use of the conviction, we cannot find that the trial court's decision to allow the State to introduce it was fanciful, arbitrary, or unreasonable to the degree that no reasonable person would agree. The court therefore did not abuse its discretion.

¶ 24 Defendant argues, however, that, because his attempted murder conviction occurred in the fall of 2000 and the charged first-degree murder occurred in January 2011, the court failed to

consider the prior conviction's remoteness, thus showing it failed to weigh the proper factors when conducting the balancing test. The court, however, did not have to expressly articulate the factors it considered when conducting the balancing test. See *Atkinson*, 186 Ill. 2d at 463.

Moreover, based on the court's express use of the *Montgomery* balancing test, there is no reason to suspect the court failed to weigh the proper factors. See *id.* at 462-63.

¶ 25 Defendant further argues the court failed to comply with *Montgomery* where it noted the seriousness of his attempted murder conviction and observed his "disrespect for the law at a time within the ten-year *Montgomery* period." He asserts that these grounds are impermissible factors upon which to allow the admission of a prior conviction for impeachment. However, "[a] defendant's 'prior felony conviction may by itself evince disrespect for social order and therefore supply a proper basis for impeachment' regardless of whether the crime 'involve[s] dishonesty or false statement.'" *People v. Meyers*, 367 Ill. App. 3d 402, 416-17 (2006) (quoting *People v. Williams*, 173 Ill. 2d 48, 83 (1996)). Consequently, the court could rely on defendant's disrespect for the law when determining whether to allow the State to introduce his prior conviction as impeaching evidence. See *id.* Further, the seriousness of the prior conviction is a permissible factor for the court to consider. See *Atkinson*, 186 Ill. 2d at 456.

¶ 26 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 27 Affirmed.