2017 IL App (1st) 150099-U

No. 1-15-0099

Order filed: October 20, 2017

Sixth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 14 CR 2549
	)	
TROY LEE,	)	Honorable
	)	Evelyn B. Clay,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Connors and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the defendant's convictions over his contention that the trial court improperly admitted three prior convictions for impeachment purposes in violation of *People v. Montgomery*, 47 Ill. 2d 510 (1971), where he is not able to establish plain error as a result. We vacate and reduce the defendant's sentence for possession of burglary tools and further remand for a proper preliminary inquiry under *People v. Krankel*, 102 Ill. 2d 181 (1984).

¶ 2 Following a bench trial, the defendant, Troy Lee, was convicted of burglary (720 ILCS 19-1(a) (West 2014)) and possession of burglary tools (720 ILCS 19-2 (West 2014)), and

sentenced to two concurrent terms of six years' imprisonment. On appeal, the defendant argues that the trial court: (1) failed to conduct an adequate inquiry into his posttrial claims of ineffective assistance of counsel; (2) erred in admitting his prior convictions; and (3) improperly imposed an extended-term sentence. For the following reasons, we affirm the defendant's convictions, vacate and reduce his sentence for possession of burglary tools, and remand for a proper inquiry into his *pro se* claims of ineffective assistance of counsel.

¶ 3 At the defendant's July 29, 2014, trial, Cathy Whinna testified that, on January 14, 2014, she was working as the director of facility services at Catholic Charities, located at 651 West Lake Street in Chicago. Whinna explained that the basement of the Catholic Charities building has a lunchroom, a bathroom, and storage rooms, which contain donations of toys, clothes, and small household items. In order to reach the basement, a guest must check-in with the receptionist, who then contacts the person the guest is visiting. There is another entrance located at the back of the building, which is unlocked at certain hours of the day. Guests are not allowed to go downstairs to look for services unescorted.

¶ 4 Whinna received a call from the front desk, spoke with Ricardo Guerra and Martin Garcia, and went to the front desk area. She viewed a security video of a locked, basement storage room and saw an individual wearing a long gray coat inside, who did not have permission to be there. The individual, later identified in court as the defendant, was picking through boxes of children's coats, bags of toys, and other household items. The defendant had a "carrying case" and was collecting boxes and bags near the door. Eventually, the defendant turned off the light and exited the storage room. Whinna called the police and went downstairs where Carlos Loera and Garcia had detained the defendant.

¶ 5 Whinna viewed the door to the storage room and did not initially see any damage. After the defendant was detained, she noticed that the doorknob was broken and there were pry marks "all up and down the door." The defendant did not have permission to enter the basement storage area of Catholic Charities and he was not receiving any services that day.

¶ 6 Whinna testified to the events captured in the security video, which she stated accurately depicted the events she witnessed when watching at the front desk. The video, which was entered into evidence and which we have reviewed, shows the defendant enter the room and place something from his hand into his shoulder bag. He then leaves the camera's view for a short period of time, before returning. The defendant picks up various boxes and bags of clothes and moves them around. He takes more boxes and stacks them on top of each other. He then appears to press something into the boxes and places his fingers inside them like gripping a handle. The defendant continues to move the boxes and bags around and stack them into different piles. The lights turn off momentarily but turn back on. Eventually, the defendant walks past the boxes, opens the door slightly, pauses, and walks out of the storage room, closing the door behind him.

¶ 7 Carlos Loera testified that he was ending his shift as a security guard at Catholic Charities when he received a call from Garcia and returned to the front desk area. He observed on the security monitor a suspicious individual dressed in a gray jacket going through boxes and bags in a storage room. Loera went downstairs, saw Garcia, and observed the individual, identified in court as the defendant, exiting from the storage room depicted on the security monitor. The defendant was holding a black bag. Loera asked the defendant what he was doing in the basement, and the defendant stated that he was looking for a restroom.

¶ 8 Loera asked to see the defendant's identification and escorted him to the lunchroom area until police arrived. Loera did not "buzz" the defendant into Catholic Charities during his shift as a security guard.

¶ 9 Ricardo Guerra testified that he was working as a security guard at Catholic Charities when he observed on the security monitor a suspicious person, identified in court as the defendant, in the basement. Guerra did not "buzz" the defendant into the building or allow him permission to go into the basement. He then called Garcia and remained at the front desk. On the monitor, Guerra observed Loera go into the basement.

¶ 10 Chicago police officer Traan testified that he responded to a call of a burglary in progress at Catholic Charities. After arriving, he was "buzzed" in and proceeded to the lunch room area in the basement. Traan observed an individual, identified in court as the defendant, being detained by three security guards. After speaking with the security guards, Traan placed the defendant in custody and searched him and his black bag. Traan recovered a chisel, screwdriver, and a roll of tape from the black bag.

¶ 11 The defendant testified that he had been receiving assistance from Catholic Charities at a different location for the past 10 or 12 years, in the form of financial aid, food, and clothing. Seeking financial assistance for his rent payment, he drove to the Catholic Charities location at 651 West Lake for the first time. The defendant parked his car on Des Plaines Street and entered the unlocked front door of Catholic Charities. He learned from the directory that Catholic Charities was located on the third floor of the building, so he took the elevator to that floor. The defendant asked a receptionist about financial assistance; then, asked to use the bathroom. He took the elevator to the basement to use the bathroom.

¶ 12 In the basement, the defendant encountered dead ends and several doors but could not find the bathroom. Eventually, he found an open door to a storage room. The defendant walked in because he "wanted to see what it was" and looked around by reading the labels on boxes. He looked around to see if there was anything he could use that he could then ask Catholic Charities to provide him for free, as it has done in the past. As he left the storage room, he encountered three or four security guards who surrounded him. The defendant denied breaking into the storage room with a chisel and screwdriver. He testified he had on him two screwdrivers which he used to "pop" the locks of his car when the cold weather caused them to "stick."

¶ 13 On cross-examination, the defendant testified that he "wasn't in [the storage room] that long" and was only reading the labels on the boxes. He denied stacking the boxes by the front door, but explained that, after he took a box and read the label, he would then move the next box over. The defendant denied cutting into the boxes, and testified that he "was trying to see to read the label." He further denied parking his car in the alley behind Catholic Charities. The defendant was shown a photograph, People's Exhibit No. 6, and admitted that the car depicted in it looked like his and appeared to be parked in an alley. However, he testified that he did not park his car where it was depicted in the photograph.

¶ 14 In rebuttal, Whinna testified that she observed a blue car parked in the alley behind Catholic Charities about an hour after the incident with the defendant took place. She identified People's Exhibit No. 6 as a photograph of the blue car she saw parked in the alley behind Catholic Charities. This photograph was admitted into evidence.

¶ 15 The State then offered certified copies of the defendant's previous convictions. The following colloquy occurred:

"[ASSISTANT STATE'S ATTORNEY]: State would like to offer People's Exhibit No. 7, 8, and 9 in rebuttal, which People's Exhibit No. 7 is a certified copy of conviction under docket No. 08 CR 2248901 for [the defendant] for a retail theft conviction, May 11, 2009—

THE COURT: Just one moment.

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[ASSISTANT STATE'S ATTORNEY]: People's [E]xhibit No. 8 for identification is a certified copy of conviction under docket 03 CR 137501, [the defendant], which is a conviction for burglary, on five—May 6, 2004, and People's [E]xhibit No. 9, which would be a certified statement of conviction under docket No. 01 CR—

[DEFENSE COUNSEL]: Objection, your Honor, that's not within 10 years.

[ASSISTANT STATE'S ATTORNEY]: It is, Judge, if you exclude time spent in custody.

[DEFENSE COUNSEL]: Overruled.

[ASSISTANT STATE'S ATTORNEY]: 01 CR 12721 for [the] defendant *** for the offense of possession of a controlled substance from November 19, 2001.

[DEFENSE COUNSEL]: Your Honor, again, that was not within 10 years.

THE COURT: It's admitted over [the] defendant's objection

Anything else, State?

[ASSISTANT STATE'S ATTORNEY]: No, your Honor, State would rest in rebuttal."

¶ 16 The trial court found the defendant guilty of burglary and possession of burglary tools. It found that the video clearly showed the defendant in the storage room handling boxes, cutting into them, and stacking them near the door. It noted, "clearly [the defendant] was not looking for a washroom." The defendant made unauthorized entry into the building and "jimmied" and "pried" the door and lock to the storage room. It found the defendant was planning to take these products through the back door, where his car was parked.

¶ 17 The defendant filed a written motion for a new trial, which was denied. Prior to sentencing, the defendant filed a *pro se* motion to be sentenced and treated as a drug addict. In response the trial court stated, "[y]our motion is stricken. You're not allowed to file a *pro se* motion while being represented by counsel. As a matter of fact, I will tender these motions to your attorney."

¶ 18 At a subsequent court date, defense counsel told the court that the defendant wished for her to be removed from the case. The defendant stated that he filed a *pro se* motion at an earlier date, but the trial court had stricken the motion. He stated, "I filed a complaint because I am not satisfied with my attorney with ARDC." The court stated, "[t]hat's the proper agency for such a complaint. That's the proper agency for your complaint there." The parties then proceeded to sentencing.

¶ 19 In aggravation, the State argued that the defendant was subject to Class X sentencing due to his background. It asserted that the defendant's criminal history was "extensive" and asked for 10 years' imprisonment in the Illinois Department of Corrections (IDOC).

¶ 20 In mitigation, defense counsel argued that the defendant suffered from mental illnesses and other health issues. Counsel noted that the defendant participated in the Safe Haven program

and was found eligible for substance abuse treatment services, commonly known as TASC, despite being a Class X offender by background.

¶ 21 After determining that the defendant was ineligible for TASC treatment probation, the trial court sentenced the defendant to six years' imprisonment in the IDOC for burglary and stated, "it's the same sentence, and it merges, on burglary tools." The defendant filed a written motion to reconsider sentence, which was denied. The defendant filed a timely notice of appeal.

¶ 22 On appeal, the defendant raises the following claims of error: (1) the trial court failed to adequately consider his *pro se* claims of ineffective assistance of counsel pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984); (2) the trial court erred in admitting his prior convictions for impeachment under *People v. Montgomery*, 47 Ill. 2d 510 (1971); and (3) the trial court erred in imposing an extended-term sentence of six years' imprisonment for possession of burglary tools where it already imposed a Class X sentence for his more serious burglary conviction arising out of the same conduct. The State concedes the trial court erred in failing to conduct a proper inquiry into the defendant's *pro se* claims of ineffective assistance of counsel under *Krankel* and in imposing an extended-term sentence for possession of burglary tools. It further concedes that one prior conviction was improperly admitted under *Montgomery* as it was outside the 10-year limit.

¶ 23 We first address the defendant's argument that the trial court erred in admitting three prior convictions under *Montgomery* where one conviction was over 10 years old and the other two convictions were not subjected to *Montgomery*'s balancing test. The defendant admits his forfeiture of the issue, but argues that it is reviewable under both prongs of the plain-error

doctrine. The State argues that the defendant forfeited the argument on appeal and cannot establish plain error.

¶ 24 In order to preserve an issue for review, the defendant must object at trial and raise the issue in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). However, unpreserved claims of error can be reviewed under the plain-error doctrine when: (1) the evidence at trial is closely balanced; or (2) the error is so serious it affected the fairness of the trial and challenged the integrity of the judicial process. *People v. Sebby*, 2017 IL 119445, ¶ 48. When a defendant fails to establish plain error, that procedural default must be honored. *People v. Naylor*, 229 Ill. 2d 584, 593 (2008).

¶ 25 In *Montgomery*, our supreme court held that evidence of a witness' prior conviction is admissible to impeach the witness' credibility when: (1) the prior conviction was punishable by death or imprisonment in excess of one year, or involved dishonesty or false statements regardless of the punishment; (2) less than 10 years have passed since the conviction date or the witness' release from confinement, whichever date is later; and (3) the prior conviction's probative value outweighs the danger of unfair prejudice. *People v. Atkinson*, 186 Ill. 2d 450, 456 (1999) (citing *Montgomery*, 47 Ill. 2d at 516). "This last factor requires the trial judge to conduct a balancing test, weighing the prior conviction's probative value against its potential prejudice." *Id.*

¶ 26 The trial court need not specify on the record the factors used in the balancing test as long as it actually applies the test. *People v. Melton*, 2013 IL App (1st) 060039, ¶ 17. " 'However, the trial court should not apply the balancing test mechanically [citation], and the record must include some indication that the trial court was aware of its discretion to exclude a prior

conviction [citation].' " *People v. White*, 407 Ill. App. 3d 224, 233 (2011) (quoting *People v. Whirl*, 351 Ill. App. 3d 464, 467 (2004)). We will not reverse a trial court's ruling on the admissibility of a defendant's prior convictions for impeachment absent an abuse of discretion. *Melton*, 2013 IL App (1st) 060039, ¶ 17.

¶ 27 The defendant argues, and the State correctly concedes, that his November 19, 2001, conviction for possession of a controlled substance (case no. 01 CR 12721) was improperly admitted. This conviction occurred over 10 years before the defendant's July 29, 2014, trial and no evidence was offered by the State indicating the date of the defendant's subsequent release from confinement. Accordingly, this conviction offered as impeachment evidence is prohibited under *Montgomery*. See *Naylor*, 229 Ill. 2d at 597-98 (finding that where no evidence was offered regarding a defendant's release from confinement, "a trial court must not resort to any presumptions regarding a release date and must employ the date of conviction").

¶ 28 Turning next to the defendant's May 11, 2009, conviction for retail theft (case no. 08 CR 2248901) and his May 6, 2004, conviction for burglary (case no. 03 CR 137501), the defendant does not challenge the remoteness of these convictions or that they involved punishment exceeding one year or otherwise involved dishonesty. Rather, he argues that the trial court failed to conduct a balancing test pursuant to *Montgomery*. Our supreme court has found the trial court is not required to explicitly state that it is applying the *Montgomery* balancing test as long as the record makes clear the court was applying the *Montgomery* standard. See *People v. Mullins*, 242 Ill. 2d 1, 18-19 (2011) (holding that the trial court properly considered the balancing test where, by barring two of the defendant's convictions, it "clearly [showed] that it was exercising its discretion and attempted to minimize the potential prejudice to [the] defendant"); *People v.*

Williams, 173 Ill. 2d 48, 83 (1996) (finding that, while the trial court did not explicitly reference the balancing test, "[a] review of the transcripts shows that the judge was fully aware of the *Montgomery* standard and the balancing test it requires" where the parties argued whether the defendant could be impeached with an earlier conviction). Here, neither the trial court nor counsel explicitly referenced the *Montgomery* balancing test with respect to the defendant's prior convictions. Counsel did not argue the probative or prejudicial nature of these two convictions prior to their admission, and the record does not indicate that the trial court was aware of the balancing test. Further, as previously discussed, the trial court improperly admitted the defendant's 2001 conviction, such that we are unable to find it was exercising its discretion and attempting to minimize prejudice to the defendant as the trial court in *Mullins* had done. See *Mullins*, 242 Ill. 2d at 18-19. In these particular circumstances, we are unable to determine whether the trial court properly considered the *Montgomery* balancing test before admitting the defendant's prior convictions. However, any error did not amount to plain error.

¶ 29 Despite any error, the defendant must still establish it constituted plain error. The defendant argues that the admission of all three convictions amounts to plain error under both prongs because the evidence at trial was closely balanced, and the fairness of the trial and integrity of the judicial process was affected.

¶ 30 We find that the evidence presented at trial was not closely balanced and thus, the defendant cannot establish first-prong plain error. Here, all three employees of Catholic Charities testified to what the security video depicted. Whinna and Loera testified that the video showed the defendant picking through boxes of children's coats, bags of toys, and other items. Guerra testified that the video showed a suspicious individual in the storage room. Our review of the

video confirms this as it shows the defendant picking up various boxes and bags of clothes, and moving them around. It further shows him take more boxes and stack them on top of each other. He then appears to press something into the boxes and places his fingers inside them.

¶ 31 The defendant testified that he had previously received assistance from Catholic Charities before the date of the incident. When he arrived at Catholic Charities on January 14, 2014, he testified that, after inquiring about a restroom, he was directed to the basement of the building. He then walked into an unlocked storage room and began to look at boxes, asserting that he was examining the labels on boxes in order to determine whether any of the items could be of use to him, such that he could then ask for those items as assistance. However, the defendant was impeached as to where his car was parked. While the defendant claimed he had parked on the street, the evidence presented at trial showed his car parked in the alley, near the back door to Catholic Charities.

¶ 32 The trial court found the video clearly showed the defendant in the storage room handling boxes, cutting into them, and stacking them near the door. It noted, "clearly [the defendant] was not looking for a washroom." The defendant made unauthorized entry into the building and "jimmied" and "pried" the door and lock to the storage room. It further found that the defendant planned on taking these items through the back door where his car was located.

¶ 33 Given the testimony of the State's witnesses, the defendant's testimony, and our review of the security video, the evidence presented at trial was not closely balanced such that the defendant can establish plain error as a result of the improper admission of his prior convictions. Whinna testified that the storage room's doorknob was broken and there were pry marks "all up and down the door." Further, the defendant's activities inside the storage indicate his intent to

commit a theft. Not only was the defendant rifling through the boxes and bags, he was creating holes in the boxes in order to aid in transporting them to his car. The defendant's assertion that he was simply reading the labels is not credible given the stack of boxes he created near the door of the storage room. The defendant cannot establish plain error under the first prong.

¶ 34 The defendant further cannot establish plain error under the second prong because the errors he identified cannot be considered so serious that they affected the fairness of the trial and challenged the integrity of the judicial process. We find this type of error is not cognizable as second-prong plain error because it would simply be "an error within the trial proceedings." See *People v. Averett*, 237 Ill. 2d 1, 12-14 (2010) (noting that the trial court's refusal to rule on a motion *in limine* to bar the defendant's prior convictions until after the defendant testified does not render a trial fundamentally unfair or unreliable). Similar to *Averett*, any failure here by the trial court in admitting the prior convictions would simply be an error that occurred within the trial proceedings and would not challenge the integrity of the judicial process. The defendant cannot establish plain error under the second prong.

¶ 35 The defendant also argues that he received ineffective assistance of counsel based on counsel's failure to move *in limine* to bar admission of his prior convictions for impeachment purposes. We disagree. In order to establish ineffective assistance of counsel, the defendant must establish both that: (1) trial counsel's representation was deficient; and (2) that deficiency prejudiced the defendant. *People v. Petrenko*, 237 Ill. 2d 490, 496 (2010) (citing *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). "Defense counsel's decision to file or not to file a motion is a matter of trial strategy." *People v. Muhammad*, 257 Ill. App. 3d 359, 365 (1993).

Trial strategies "are generally immune from claims of ineffective assistance of counsel." *People v. Smith*, 195 Ill. 2d 179, 188 (2000).

¶ 36 However, because the defendant cannot establish prejudice as a result of counsel's failure to file a motion *in limine*, we need not determine whether this constituted deficient performance. See *People v. Graham*, 206 Ill. 2d 465, 476 (2003); *People v. Gilbert*, 2013 IL App (1st) 103055, ¶ 32 (finding that the defendant was not prejudiced after assuming, but not deciding, that counsel's performance was deficient for failing to file a *Montgomery* motion, but the evidence of guilt was overwhelming). As we noted above, the evidence showed that the defendant was in a storage room of Catholic Charities, without authorization, rummaging through boxes and bags. Whinna testified that the door to the storage room was damaged with pry marks and that the doorknob was broken. The security video showed him creating holes in the boxes apparently in order to aid in carrying the boxes away to his car. The defendant, therefore, cannot show a reasonable probability that the outcome of trial would have been different if defense counsel had filed a motion *in limine* to bar his prior convictions.

¶ 37 The defendant next argues, and the State correctly concedes, that the trial court failed to perform an adequate inquiry into his posttrial claims of ineffective assistance of counsel pursuant to *Krankel* and its progeny. When a defendant presents a posttrial *pro se* claim of ineffective assistance of counsel, the trial court should first consider the factual basis underlying the defendant's claim. *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003). If the court determines that the points raised are meritless or pertain to trial strategy; then, it may deny the *pro se* motion. *Id.* at 78. "If the allegations show possible neglect of the case, then new counsel should be appointed" to evaluate the defendant's claim. *People v. Chapman*, 194 Ill. 2d 186, 230 (2000).

¶ 38 Here, the trial court erred by failing to inquire into the defendant's claims of ineffective assistance of counsel by striking the motion and erroneously telling him that he cannot file any *pro se* motions because he is represented by counsel. We, therefore, must remand the cause to allow the trial court to inquire into the defendant's ineffective assistance claims based on his representation at trial. *Moore*, 207 Ill. 2d at 81.

¶ 39 Finally, the defendant argues, and the State correctly concedes, that the trial court erred in imposing a six-year extended-term sentence on his Class 4 conviction for possession of burglary tools. The defendant acknowledges that the issue is forfeited because he did not object at trial and raise the issue in his motion to reconsider sentence. However, he argues, and we agree, that the issue can be reviewed under the second prong of the plain-error doctrine. See *People v. Palen*, 2016 IL App (4th) 140228, ¶ 78.

¶ 40 Here, given the defendant's criminal background, his Class 2 conviction for burglary required him to be sentenced as a Class X offender with a range of 6 to 30 years in prison. See 730 ILCS 5/5-4.5-95(b) (West 2014); 730 ILCS 5/5-4.5-25(a) (West 2014). His Class 4 conviction for possession of burglary tools carried a sentencing range of one to three years in prison, or three to six years if an extended-term range was imposed. 720 ILCS 5/19-2(b) (West 2014); 730 ILCS 5/5-4.5-45(a) (West 2014). The trial court sentenced him to six years' imprisonment for burglary and an extended-term sentence of six years' imprisonment for possession of burglary tools, to be served concurrently.[1] However, our supreme court has found that, in interpreting section 5-8-2(a) of the Unified Code of Corrections, extended-term sentences can only be imposed on offenses within the most serious class. *People v. Jordan*, 103 Ill. 2d 192,

[1] Although the trial court stated that the convictions merge, the mittimus does not reflect the merger.

205-06 (1984); 730 ILCS 5/5-8-2(a) (West 2014). An exception to this rule applies when an extended-term sentence is imposed "on separately charged, differing class offenses that arise from unrelated courses of conduct." *People v. Coleman*, 166 Ill. 2d 247, 257 (1995).

¶ 41 Here, the defendant was charged with burglary, a Class 2 offense, and possession of burglary tools, a Class 4 offense, in the same information based on his actions on January 14, 2014, at Catholic Charities. Therefore, his extended-term sentence of six years' imprisonment for possession of burglary tools is improper, and we find that it amounts to plain error under the second prong. See *Palen*, 2016 IL App (4th) 140228, ¶¶ 77-78.

¶ 42 We may modify an improperly imposed sentence without remand to the trial court. See *People v. Robinson*, 2015 IL App (1st) 130837, ¶ 113; Ill. S. Ct. R. 615(b)(4) (eff. Jan. 1, 1967). Therefore, pursuant to Illinois Supreme Court Rule 615(b)(4), we vacate the defendant's extended-term sentence for possession of burglary tools and order the clerk of the circuit court to modify his mittimus to reflect that his sentence for the offense be reduced to three years' imprisonment, to be served concurrently with his six-year sentence for burglary. See *People v. Thompson*, 209 Ill. 2d 19, 29 (2004) (reducing an improperly-imposed extended-term sentence on a less-serious offense to the maximum, non-extended term).

¶ 43 For the reasons set forth above, we affirm the defendant's convictions for burglary and possession of burglary tools, vacate his six-year sentence for possession of burglary tools and reduce it to three years' imprisonment, and remand for a preliminary *Krankel* inquiry.

¶ 44 Affirmed in part; vacated in part; modified in part; and remanded with directions.