2018 IL App (3d) 150793-U

Order filed May 8, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 21st Judicial Circuit,
	)	Iroquois County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-15-0793
v.	)	Circuit No. 12-CF-183
	)	
ANDREW CONDON,	)	Honorable
	)	Gordon L. Lustfeldt,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Lytton and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The defendant opened the door to introduction of his prior arrests and the court balanced the prejudicial effect with the probative value. (2) The trial court did not abuse its discretion in giving the modified jury instruction. (3) Defense counsel's decision not to request redaction of drug references from the stipulated letter was trial strategy. (4) The trial court did not err in allowing the State to question the defendant about the meaning of "LOUD."

¶ 2 The defendant, Andrew Condon, appeals his conviction of first degree murder, arguing that (1) the trial court erred in allowing the State to present evidence of the defendant's prior arrests, (2) the trial court erred in giving the jury a modified jury instruction that misstated the

law, (3) defense counsel was ineffective for stipulating to a letter without requesting that references to the defendant's drug activity be redacted, and (4) the trial court erred in allowing the State to question the defendant about the meaning of LOUD referenced in a letter he had written.

¶ 3 FACTS

¶ 4 The defendant was charged with two counts of first degree murder (720 ILCS 5/9-1(a)(1), (2) (West 2012)) for repeatedly firing a gun at Jonathan Rubin in the early morning hours of October 27, 2012, knowing that such act would cause great bodily harm or a strong probability of death. Before the jury trial, the defendant filed a motion *in limine* seeking to bar mention of the defendant's pending drug case during the murder trial. The court granted the motion subject to the defendant's "opening the door" during his own testimony.

¶ 5 Sergeant Eric Starkey testified that he had been employed with the Iroquois County Sheriff's Department for 10½ years. He received a call to go to the gas station the morning of October 27, 2012. He arrived around 4:10 a.m. He received permission to review the surveillance video from the store manager. He first watched the portion of the video depicting the shooting. After watching the video, he determined that the shooter was "a Caucasian male, thin build, shorter, wearing a dark colored sweat pants or wind suit pants of some sort, long sleeved gray shirt or sweat shirt, black scarf around his neck and some sort of mask or he ha[d] his face concealed." Starkey noted that, upon viewing the video, he noticed that the shooter made no attempts to take anything from the gas station, but appeared to be looking for someone. On the cash register counter was "a sign that says that cashier attendant is stocking the cooler and to knock on the cooler for assistance." The shooter walked toward the "back storage room access to the cooler area," raised his arm, and fired the gun. Rubin was standing in the doorway of the

back storage room. The shooter moved toward Rubin. Rubin then fell backwards into the storage room. Starkey noticed that the mask the shooter was wearing "appear[ed] to [him] to be a Halloween mask, a child's Halloween mask, some sort of character possibly from Transformers." Looking at a different camera angle, Starkey saw that the mask resembled "Bumblebee" from the Transformers movie. The shooter was in the store for approximately 35 seconds and nothing was taken from the store. The video showed that the shooter used "a solid black firearm semi-automatic with an extended magazine." At the scene, 16 empty shell casings were recovered that were Sellier & Bellot 9-millimeter shells.

¶ 6 Starkey then viewed the videotape from transactions happening prior to the shooting. While watching the surveillance footage, the only significant event occurred at 1:55 a.m. At that time, he observed what appeared to be a verbal confrontation at the counter. Rubin was behind the counter speaking to a man when the defendant entered the store. The video was shown in court. Starkey identified the defendant, the defendant's wife, Amanda Condon, and a man named Jamie Poynter. He ran the defendant and Amanda's information through the State of Illinois database and found out that they both possessed FOID cards. Starkey further determined that the defendant had purchased a Cobray Mac 11, 9-millimeter handgun in April 2011 from Chris's Gun Shop in Onarga. Starkey stated that the Cobray Mac 11, 9-millimeter handgun is a solid black, semi-automatic firearm that comes standard with an extended magazine, like the firearm he observed on the surveillance video. Starkey was able to obtain from the gun shop the serial number of the Cobray. Starkey, thereafter, requested and obtained a search warrant for the defendant's residence. He executed the search warrant at 2:26 p.m. on October 27. The residence was a white farmhouse with a detached garage, some silos, and a large farm equipment building. There was also a shooting berm on the property. When executing the search warrant, Starkey

was looking for the Cobray handgun the defendant owned, ammunition, and clothing that matched that seen on the surveillance video. He did not find the Cobray firearm with the serial number that he was looking for nor did he find the clothing. However, he did find a second Cobray Mac 11, 9-millimeter handgun with a different serial number. He sent the gun to the state crime laboratory for ballistics testing. He also found a plastic ammunition holder containing 9-millimeter ammunition. The case held 50 rounds of ammunition of different brands, including 34 rounds of Sellier & Bellot ammunition. He did not find any other Sellier & Bellot ammunition in the house.

¶ 7 Starkey conducted a videotaped interview of the defendant. The video of the interview was played in court. The defendant told Starkey that he had arrived at the gas station that night to purchase cigarettes. When he entered, he heard an African-American man at the counter demanding cigarettes from Rubin. The defendant stated that Rubin told the man that he could not sell him cigarettes since the man did not have his identification (ID). The man was getting upset with Rubin. The defendant said that he asked the man what kind of cigarettes he wanted. Rubin asked the defendant and the man if they wanted him to call the cops, stating that the defendant had just witnessed Rubin refuse to sell the man cigarettes and the defendant was going to buy them for him, which could be contributing to the delinquency of a minor. As soon as Rubin mentioned calling the cops, the man left. As he left, he stated, “I’ll get mine. He’ll get his.” The defendant told Rubin that he understood that Rubin was doing his job and that he would send his wife in to buy his cigarettes so Rubin would know that the defendant was not buying them for the other man. The defendant walked out of the gas station and heard the African-American man say to another man, “That’s the one, cuz.” The defendant and his wife then went back in to buy the cigarettes.

¶ 8 A second search warrant was executed on the defendant's property on November 1, 2012, to search the shooting berm for shell casings and projectiles. The defendant was arrested on November 9, 2012. Starkey then had a conversation with Amanda (the defendant's wife). He asked for her consent to search their firearm safe to look for a 9-millimeter Glock, which the crime laboratory had identified as the murder weapon. She consented to his search of the safe, but he did not find a 9-millimeter Glock. A third search warrant was executed on the property in search of a Glock. Nothing was found. In Starkey's investigation, he never found any evidence that the defendant ever owned a 9-millimeter Glock.

¶ 9 Poynter testified that on October 26, 2012, he had gone to a bar with a friend. He was there from about 10:30 p.m. until 1:30 a.m. He consumed four to six beers and one or two shots during that time period. He stopped drinking between 12 or 12:30 a.m. At 1:30 a.m., he left the bar with his friend to go to a party. They stopped at the gas station to get a couple of fountain drinks so they could have mixed drinks at the party. When he was over by the fountain beverage area, he "heard somebody yelling, saying fuck you, give me my shit, and continued to yell obscenities to the clerk himself." The clerk was Rubin. Rubin kept saying "I just need your ID." Poynter thought there was going to be a fight, so he looked over his shoulder to see what was happening. He saw the defendant and said, "[The defendant] was saying give me my fucking shit, don't give me no fucking problems, just give me my fucking shit, and just kept repeating it, just give me my shit." He said it in "a pretty aggressive voice." Poynter approached the defendant and told him to "chill out" because Rubin was "just doing his job." Poynter noticed the defendant was buying a pack of cigarettes and Rubin had asked him for his ID so Poynter said, "why don't you just run outside, grab your ID real quick, take you 30 seconds, come right back in." The defendant said to Poynter, "fuck off, it's none of your fucking business." Poynter told

the defendant, "it's [Rubin's] job, he has to card you or he will get in trouble if you don't get carded." Poynter noticed that Rubin looked shaken up and scared, so he said, "it's all right, man, nothing's go[ing] to happen if I'm in the store here with you." The defendant walked up to Poynter and said, "you don't know who the fuck I am. You need to mind your own fucking business. Don't worry about what the fuck is going on." Poynter said, " I don't care *** who you are. You don't know who I am." The defendant stated that he knew two state police officers. Poynter said, "[The defendant] was saying you are about to have some fucking problems. You keep bumping into me you are going to see what happens. I'm like if I did bump into you I'm sorry. I did have a little bit to drink. I might be a little lopsided so I'm sorry if I did bump into you." The defendant left the store and returned with his wife, who purchased the cigarettes. Poynter and the defendant shook hands and patted each other on the back and walked away with neither of them upset. Poynter stated he did not recall the defendant ever threatening Rubin, but he did not hear if the defendant said anything to Rubin when he left.

¶ 10 Robert Sinn testified that on October 27, 2012, he got off work around 1:30 a.m. On his way home, he saw the defendant's truck at the gas station around 2 a.m. When Sinn saw the defendant's truck, he stopped at the gas station. The defendant was having a party the next night, and Sinn wanted to see if he could drop speakers off at the defendant's house. Sinn said that, when the defendant came out of the gas station, he "was angry for something that had just happened inside the gas station." Sinn followed the defendant and Amanda back to their house. Sinn noticed a child's Bumblebee mask laying on the kitchen table. The first time Sinn talked to Starkey, he did not mention a Bumblebee mask. Sinn said he did not remember the mask the first time that they spoke, but remembered it after thinking more about the night. He then called Starkey and told him about the mask in a second interview.

¶ 11 Melissa Nally testified that, at the time of the crime she worked for the Illinois State Police at the Joliet forensic science laboratory as a forensic scientist specializing in firearms identification. She had been a forensic scientist for about 14 years. She was able to determine that all 16 shell casings were fired from the same gun. She determined that the gun used was a Glock. She fired the Mac Cobray 11 recovered from the defendant's home and determined that it was not the gun that had been used in the shooting. However, she also tested the shell casings that were found at the berm. She determined that one of the casings found at the berm was fired from the same firearm as the casings found at the scene. The matching casing was a Winchester.

¶ 12 The parties stipulated that if Dr. Valerie Arangelovich were called to testify she would testify that she was a medical examiner for the Iroquois County coroner. She performed the autopsy on Rubin and determined that the cause of death was multiple gunshot wounds including (1) one to the face, (2) two to the upper right arm, (3) one to the right thigh, (4) one to the right side of the abdomen, and (5) 10 to the chest, groin, abdomen, and back.

¶ 13 The parties further stipulated that Katelyn Bruno of the Federal Bureau of Investigation would testify that she examined a four-page, handwritten document, purported to have been written by the defendant in 2014. Based on sample writings given to Bruno to compare against the letter, she concluded that it was written by the defendant. By stipulation, the letter was read on the record and stated:

> "Read first + discard destroy. Give original Affidavitt to my wife Red Truck (MOBIL GAS Station.)
>
> Jamie,
>
> You don't know me but you met me once when was it Oct. 27, 2012 at the Gas Station if you recall you were drunk—you had closed Roosters down. I was

kidding with the clerk about needing an ID ‘cuz I had a full beard you came over and shoved/elbowed me and I asked ‘what’s your problem?’ You said just go get your ID so I walked out and had my Girl buy my smokes but I came back in with her ‘cus I didn’t know you and she was pregnant. Now I came straight to you at the foutain pop despencer and told you you couldn’t be shoving/Elbowing people around what if I was a cop off Duty? You said my bad I’m just drunk and I said it was all good and we shook hands—at No Point did I threaten the clerk but Perzee told the court that ‘A Witness’ who was in the gas station earlier with me (you) said I threatened the clerk with bodily harm but there is no record of this statement. Please do the right thing I shouldn’t go to prison for something I didn’t do. You could write an affidavit stateing the fact that you <u>never</u> heard me threaten the clerk with bodily harm which was how the cops obtained a search warrent for My Place. I’m a family man and provided all that <u>LOUD</u> for this Area. The cops had no right to search but <u>you</u> gave them a reason by saying I threatened the clerk when we both know I didn’t. If you could write an affidavit stateing that Perzee Lied by saying you said on Oct 28th 2012 that I threatened the clerk and yet theres no record of this statement at all. I think Perzee played the system trying to get a malicious search warrent and Just told the judge/Starkey that you said this—without your knowledge. They used the system to get a warrent and then search my place for LOUD and asked me where it was All at. Bro I’m asking you to do the right thing I’ve got kids and a wife and you know I never threatened the clerk. The cops just wanted to come snoop around my spot. And when they couldn’t find the LOUD they came back to my house on Nov. 1 2012 and searched my

> place again Finding an empty shell casing and trying to pin this horrindous crime on me. Please do the right thing write an affidavit stateing you Never Said I threatened the clerk with Bodily harm, that Perzee lied sign it and have a witness sign it then mail it to my Attorney's office *** and a copy to my Dan Blair this would stop this case from ruining my life. This is My life on the line so please think back about that night. Do not discuss this with anyone in the Judicial/Investigators offices, so it may clear me. Thank you."

The top of the letter further said, "Married have 3 kids. Never been in trouble Before, connected Pip with all that LOUD, and I am a peacefull person." Attached to the letter was an affidavit the defendant had written out for Poynter to sign.

¶ 14 Prior to the defendant's testimony, the defense moved to prohibit the State from asking the defendant about the "LOUD" referenced in the letter he wrote Poynter. The defense based its motion on the previously granted motion *in limine* barring reference to the pending drug case. In allowing the State to question the defendant about the references to "LOUD," the court said:

> "[T]he [motion *in limine*] specifically references the charges that were filed and it says he be barred from referring to any of the foregoing so it's directly I think related to that. It says he was arrested October 31 for unlawful possession with intent to deliver, possession of cannabis, possession of cannabis sativa plants and so forth. And it goes on to say that mention of these charges [would] deprive[] [him] of a fair trial. So [the motion *in limine* is] 100 percent related to those charges, not to any reference to drug usage, number 1. Number 2, I said when I ruled on it if the door got opened then it's a whole different ballgame. Now, whether the door has been opened to bring that up because of the letter is a

separate issue, but I don't think the prior motion has anything to do with [the defendant's] statements in the letter, number 1. Number 2, they've already had the letter read to them. Number 3, in the letter he basically accuses the police of some kind of, I don't know if you want to say conspiracy, or whatever, basically saying that the whole thing was made up because all they really wanted was a chance to search [the defendant's] house for drugs. Now, the jury has heard that. They may not know what LOUD is, but, you know, I'm going to deny the motion.

It's—I mean, [the defendant] wrote the letter. He chose what to put in it. He cannot now complain about what he did. And the jury has heard it already without objection and if he's going to make this accusation that this was some kind of police conspiracy, well, then he can be asked about it. He chose to say that. So, I mean, I—you know, whether it rebuts the character evidence, you know, that's another issue and it may, it may not. I mean, I don't know that being, you know, selling LOUD means you are a violent person. I'm not—I'm not 100 percent sure about that. And I don't know that the statements he's made in here causes to open the door in the other. So I'm going to leave the prior ruling on the motion *in limine* in tact. Let's not mention the other court case, but I don't think that motion has anything to do with this."

¶ 15 The defendant testified that it took 20 minutes to get from his house to the gas station. He said he did not own a 9-millimeter Glock and never had. He kept a written record of all the guns he owned in his safe. He said "hundreds" of people used his berm for target practice. He had found people using his berm for shooting practice without his permission about five or six times. He gave a taped statement to Starkey, but testified that he lied through a lot of it because he was

scared and was trying to get the police to look at a different suspect. The defendant said he had been drinking and smoking marijuana before going to the gas station to buy cigarettes. He was not allowed to purchase the cigarettes because he did not have his ID. The defendant did yell obscenities at Rubin when he would not sell him the cigarettes without an ID. He admitted that he was "rude and obnoxious," but he never threatened Rubin. The defendant said:

> "A gentleman came up and elbowed or shoved me to the side and told me I needed to go out and get my ID. I asked what his problem was and he said it will only take 30 seconds, go out and get your damn ID and me and him kind of got in a little argument. I exited. I went out to the vehicle and got my wife because she had her ID, went back in with her. She was 6 months pregnant. I didn't know the gentleman that elbowed me so I went in with her."

He said when he went back in, the man nudged him, and then they talked. The defendant stated, "I told him if he would have been elbowing an off duty cop he would be going to jail. I go my brother is a police officer, what if I would have been him. You can't go around elbowing people in public." However, the defendant testified that he also used profanities and called the man names. The defendant stated that they ended things on a good note, stating, "He said, you know what, I closed down Roosters, I'm drunk, you know, and I told him I had a buzz, let's end this on a good note, we shook hands." They then patted each other on the back.

¶ 16 At that point, Amanda had finished purchasing the cigarettes. The defendant said, "I walked up, I patted the counter, I gave the clerk a thumbs up, I said thank you for selling my wife cigarettes, I'm sorry for being an asshole." They then left the gas station and saw Sinn. The defendant told Sinn, "there was a guy in there nudging, sorry it took so long, are you ready to head out to my house to set up the speakers." The defendant said he did not tell Sinn he wanted

"to go back in there and beat his ass." He did not mention the clerk to Sinn. They left to drive back to their house. On the way, the defendant mentioned Poynter to Amanda, stating that Poynter "was being an asshole" and he could not "believe he came up and elbowed [the defendant]." He did not mention Rubin because he was not upset with him. Sinn followed them back to their house. The defendant stated that he did not believe that Sinn entered the house. They arrived at the house between 2:20 and 2:25 a.m. He changed clothing because he was cold. He put on a pair of blue Adidas pants. The defendant testified that by this point, he had "calmed down." He never mentioned that he was upset with Rubin. Sinn left between 3 and 3:30 a.m. The defendant then went to bed at 5 a.m. The defendant stated that he never left the property. He did leave the barn a few times to go into the house to grab some beers or use the bathroom. He never went into the safe or retrieved a gun. He heard about what happened the next day on the radio and was shocked. The defendant testified that he did not shoot Rubin.

¶ 17 The defendant stated that he sent the letter to Poynter because he "was desperate." He had heard that Poynter told the police that he had threatened Rubin, which the defendant said was not true. The defendant said that he had read the initial search warrant and it had said that a witness had overheard the defendant threaten Rubin with bodily harm. The defendant believed that witness was Poynter.

¶ 18 The defendant stated that he told the police that there were two African-American males in the gas station, but that was a lie. He said he lied to the police because "[t]hey use[d] scare tactics to get [him] to [make] a statement." On cross-examination, the following exchange occurred:

"[STATE]: And you had [the right to an attorney.] You waived that right on camera. Do you remember they gave you that piece of paper, they said here's your *Miranda* rights?"

[THE DEFENDANT]: Yes, I do remember that.

[STATE]: And Detective Starkey he showed that to you?

[THE DEFENDANT]: Yes.

[STATE]: Read that to you?

[THE DEFENDANT]: Yes, I initial—

[STATE]: All that on camera?

[THE DEFENDANT]: And I signed it.

[STATE]: And you understood it, didn't you?

[THE DEFENDANT]: Yeah, but this is also first time I've ever been in trouble with the law and I was scared shitless."

Based on this statement, the State moved to reopen the motion *in limine* barring the State from mentioning the pending drug case because, the State said, the defendant had opened the door. Specifically, the State called attention to the defendant's claim that he had never "been in trouble with the law." The court said:

"He chose to do that. We've had unsolicited comments and narrative from this witness throughout the defendant's direct and in the State's cross. He talks out of turn and adds stuff. Motion *in limine* is now denied and it can be inquired of. He brought this on himself and we talked about this. I warned you about this and he is not going to sit here and tell the jury he's never been in trouble with the law when he had been arrested the day [of the interview]."

Defense counsel argued that it was unclear what the defendant was referring to. The court stated:

> "I don't know what he thought, but here's the thing, when he was questioned by the police on the video he knew he was in trouble because he had already been arrested on the drug felony, all right.
>
> ***
>
> *** I think this witness has been very cagey in his testimony and, I mean, you know, got out several times about his child, his pregnant wife, all of which was not the subject of any question by counsel. So I don't think this is just some slip of the tongue is what I'm saying."

¶ 19 The court stated that they needed to "set parameters" regarding what the State was allowed to introduce. The State sought to "mention that [the defendant] was being talked to by the police because essentially he was in their custody because he was under arrest for unlawful possession with intent to deliver about 500 xanax, hydrocodone pills and 5 sativa." The court asked, "[I]f we say he had been arrested earlier that night on a different felony, isn't that enough?" The defense argued that saying "he's been arrested for a felony is very prejudicial" and asked that they just mention that he was arrested on separate charges. The State asked that they be allowed to state that he was arrested on drug charges. The court stated that it was worried "about the prejudicial affect of that." The court further mentioned a case in which

> "[t]he defendant took the witness stand and said I've never been in trouble in my life. And at that point the Supreme Court allowed all the arrests to be brought in even though they can't be brought in ordinarily because the defendant had made that statement. So I think there is precedent for the ruling I made. You can't have it both ways."

The court stated that it would limit the questioning on the pending charge to "allow[ing] the State to ask *** isn't it true you [had] been arrested on a separate charge earlier that day." The court then said it would determine whether they should "add separate drug charge." Defense counsel stated that it could be more prejudicial to say drugs. The court said, "if we just tell them separate charge are they liable to imagine that it's something worse than drugs?" The court said, "[Y]ou will be allowed to ask isn't it true that you had been arrested on a separate drug charge earlier that day." The State further noted that the defendant had been arrested 12 times. The State agreed to only use some of the arrests, not all 12. The defense asked whether the State would be allowed to inquire into the nature of the charges or just say he was "arrested 6 times prior to October 31st, 2012?" The court stated:

> "Well, we can talk about that, but then again my concern is that it cuts both ways. And, in fact, *** if you remember there was that practice for awhile, the Fourth District of mere fact impeachment. Justice Steigmann invented this thing where instead of saying you [had] previously been convicted of burglary you would just say you [had] previously been convicted of a felony. His thinking was that made it better for defendant. Supreme Court ended up reversing it saying that by not telling exactly what it was you left them to speculate and they might have speculated that it would be something worse."

The court ultimately decided to allow the State to "go down the list" and ask the defendant if he had been arrested on a certain date for a certain charge.

¶ 20 The following exchange was then held:

> "[DEFENSE COUNSEL]: "I would ask the court to admonish the jury that these are simply arrests and they should not make any assumptions that there

was ever a finding of guilty or plea of guilty. It's not the purpose for which this information is coming.

* * *

THE COURT: So you want me to tell them basically I don't want you to assume anything about the potential outcome of these cases and they are not any evidence of guilt in this case, they are offered only on the issue of his credibility as a witness.

[DEFENSE COUNSEL]: Yeah.

[STATE]: That's fine.

[DEFENSE COUNSEL]: That would be great.

THE COURT: Well, if I can get my hands on the IPI book I would just do it that way."

They then decided to break for lunch. After lunch, the following exchange occurred:

"THE COURT: *** [Y]ou want me to read the actual IPI on that impeachment issue?

[DEFENSE COUNSEL]: Well, if you could because we were looking at it, the one we were looking at is actually for a conviction for impeachment.

THE COURT: I don't think there is one for what we got in mind, but I wondered if we could perhaps paraphrase it.

[STATE]: Modified IPI.

THE COURT: Yeah.

[STATE]: That's fine.

[DEFENSE COUNSEL]: I think if you change the word conviction to arrested, arrested may—

[STATE]: May work.

[DEFENSE COUNSEL]: —work.

* * *

THE COURT: *** Evidence of the defendant's previous—yeah, we just change conviction to arrest? Arrests?

[DEFENSE COUNSEL]: Yes, that takes care of it, [Y]our Honor.

*** Unless the State has a different opinion.

[STATE]: No.

THE COURT: And when will we give it then? After the State's done or before?

[DEFENSE COUNSEL]: The instructions I thought. You are not going to put those in the instructions, jury instructions?

THE COURT: Well, I would. I think it can also be given right now.

[DEFENSE COUNSEL]: Fine.

THE COURT: That's what you guys were asking me, weren't you?

[DEFENSE COUNSEL]: I think it needs to be worked on a little bit more. His arrests in and of themselves don't affect believability or credibility. In this case it's because of the one statement that was made I've never been in trouble that the arrests impeach that one statement, but does not impeach his testimony as a whole. Conviction would, which is the purpose of this IPI.

> THE COURT: I don't know that I agree with that. I mean, if you make a statement that is false I think the jury considers it for whatever regard it may have. I don't know if we can narrow it down like that. It's up to them to decide whether it has any impact at all. I don't know why an arrest would get a bigger ammunition than a conviction."

Thus, they determined that the jury would get the instruction: "Evidence of a defendant's previous arrest for an offense may be considered by you only as it may affect his believability as a witness and must not be considered by you as evidence of his guilt of the offense with which he is charged." Defense counsel asked that the instruction only be given with the rest of the instructions, not during the defendant's testimony.

¶ 21 The State continued with cross-examination, asking the defendant if it was true he had actually been in trouble on multiple occasions. The defendant said, "Yes, but nothing of this severity." The State read the arrests stating:

> "[L]et me read *** [the] times that you've been arrested, September 10, 2008, driving while license revoked. November 14, 2006, another driving while license revoked. June 1 of 2006 violation of a license restriction and fleeing and eluding. Back in January 1 of 2003 you were arrested for a DUI. Back in June the 6th of 2001 you were arrested for unlawful possession of controlled substance and resisting arrest. Back on March 5, 1997, you were arrested for retail theft. And back on April 11, 1997, you were arrested for criminal damage to property."

The defendant agreed that was true and accurate.

¶ 22 The defendant admitted he had smoked marijuana both before going to the gas station and after. In the defendant's recorded interview, the defendant stated, "I'm a pot smoker, all

right. I smoke pot. So, yes, we were out in the shed drinking and smoking pot and getting the party set up." The defendant stated that the references to LOUD in his letter to Poynter meant marijuana. The defendant said:

> "[The cops] came back to snoop some more. They brought drug dogs out there and everything else. I found it really odd that they had a first degree murder search warrant and the first question out of an investigator's mouth was where is all your marijuana at instead of asking about firearms."

¶ 23 The defendant was found guilty of first degree murder and sentenced to 50 years' imprisonment. The defendant filed a motion for a new trial, which was denied.

¶ 24 ANALYSIS

¶ 25 On appeal, the defendant raises four issues: (1) the court erred in allowing the State to present evidence of the defendant's prior arrests; (2) the court erred when in gave a modified jury instruction regarding the defendant's prior arrests, which misstated the law; (3) defense counsel was ineffective for stipulating to the admission of the defendant's letter to Poynter without requesting redaction of the portions referencing "LOUD"; and (4) the court erred in allowing the State to question the defendant regarding the meaning of "LOUD." We will consider each of the arguments in turn.

¶ 26 I. Evidence of Prior Arrests

¶ 27 The defendant contends that "the trial court abused its discretion by letting the State ask the defendant about all his previous arrests in response to the defendant's general assertion that he had never been in trouble with the law." Specifically, the defendant argues that his testimony did not open the door to a discussion of his prior arrests. The defendant then argues that even if

he did open the door, "allowing the State to introduce all the defendants prior arrests and disclose the offenses for those arrests was overly prejudicial and denied the defendant a fair trial."

¶ 28 Generally, the State cannot cross-examine a defendant about his prior arrests. *People v. Brown*, 61 Ill. App. 3d 180, 183 (1978). However, "[t]here is no question that a defendant can open the door to the admission of evidence that, under ordinary circumstances, would be inadmissible[,]" (*People v. Harris*, 231 Ill. 2d 582, 588 (2008)) including prior arrests (*People v. Johnson*, 42 Ill. App. 3d 194, 198 (1976)). When determining whether a defendant opened the door, we first determine whether the defendant was "attempting to mislead the jury about his criminal background." *Harris*, 231 Ill. 2d at 590. "If he was, then he 'opened the door' and the trial court was well within its discretion to allow the admission of defendant's prior [arrests] for purposes of impeachment. If he was not, then defendant's testimony was not a proper basis for the admission of that evidence." *Id.*

¶ 29 Here, the defendant was asked a series of questions about whether he had received information regarding his *Miranda* rights. The defendant stated, "Yeah, but this is also first time I've ever been in trouble with the law and I was scared shitless." The defendant contends that he only meant that he had never been previously interrogated by the police. While this could be true, "it is just as reasonable to construe defendant's answer as a comprehensive denial of *ever* having engaged in criminal activity, which amounts to an outright lie." (Emphasis in original.) *Id.* at 591. The trial court did not believe that it was "just some slip of the tongue" based in part on the fact that the defendant was acting "cagey" during his testimony. "This court gives great deference to the trial court's interpretation of a witness's testimony." *Id.* at 590. The record provides "no basis for disturbing the trial court's conclusion that defendant was attempting to

mislead the jury." *Id.* at 591. The defendant clearly opened the door to a discussion of his prior arrests.

¶ 30 Next, the defendant contends that, even if he opened the door, allowing the State to introduce all the defendant's prior arrests and disclose the offenses for those arrests was overly prejudicial. At the outset, we note that admission of the arrests was relevant in light of the defendant's own testimony that he had never "been in trouble with the law." Specifically, the arrests impeached the defendant's testimony by showing that the defendant had been untruthful as he had, in fact, "been in trouble with the law." We also note that the court took care in weighing the prejudicial effect of the arrests with its probative value. A long discussion was held on the record regarding the admittance of the prior arrests. The court stated that it was worried "about the prejudicial affect of" telling the jury that the defendant had been arrested on a drug charge. The court also determined that it needed to allow the State to say the name of the charge, because if they did not, as the defense requested, the jury could infer that the defendant was arrested on a more serious charge. The court further demonstrated his consideration of the prejudicial impact by allowing the limiting instruction. The court intended to read the limiting instruction to the jury directly after the questioning on the arrests, but the defense stated they only wanted it read with the jury instructions. We further note that the State questioned the defendant on only 7 of his 12 previous arrests, not "all" of them as the defendant contends. Because the defendant opened the door to discussion of his prior arrests and the court weighed the prejudicial effect with the probative value, we find the court did not abuse its discretion in allowing the State to impeach the defendant with the arrests.

¶ 31 In coming to this conclusion, we reject the defendant's contention that, upon finding that the defendant opened the door, the trial court should have conducted a *Montgomery* analysis to

determine whether the prior arrests should have been allowed in. See *People v. Montgomery*, 47 Ill. 2d 510 (1971).

> "In *Montgomery*, [the supreme court] held that evidence of a witness' prior conviction is admissible to attack the witness' credibility where: (1) the prior crime was punishable by death or imprisonment in excess of one year, or involved dishonesty or false statement regardless of the punishment; (2) less than 10 years has elapsed since the date of conviction of the prior crime or release of the witness from confinement, whichever is 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).

The defendant does not cite, and we do not find, any case law in which a court held that a *Montgomery* analysis was necessary to impeach a defendant in this situation. Curiously, the defendant only actually contends that the court should have utilized one portion of the *Montgomery* analysis: whether the probative value outweighed the prejudicial effect. As stated above (*supra* ¶ 30) we find that the court did so.

¶ 32 II. Modified Jury Instruction

¶ 33 Next, the defendant argues that the trial court erred in giving a modified version of Illinois Pattern Jury Instructions Criminal No. 3.13 (approved July 18, 2014) (hereinafter IPI Criminal No. 3.13). IPI Criminal No. 3.13 states: "Evidence of a defendant's previous conviction of an offense may be considered by you only as it may affect his believability as a witness and must not be considered by you as evidence of his guilt of the offense with which he is charged." The defendant points out that IPI Criminal No. 3.13 is only to be given at the request of the defendant and error occurs when the court gives the instruction without the defendant's request.

See *People v. Gibson*, 133 Ill. App. 2d 722, 726 (1971) ("It should be the prerogative of the defendant to determine whether such an instruction is beneficial to his defense or whether it would only serve to accentuate his past criminal record."); *People v. Fultz*, 2012 IL App (2d) 101101, ¶ 69.

¶ 34 The situation, here, does not fall within the purview of *Gibson* and *Fultz* for two reasons. First, *Gibson*, *Fultz*, and its progeny apply where the defendant does not want the jury instructed about the defendant's prior convictions because he or she believes it will highlight the defendant's prior conviction. Here, defense counsel did in fact ask that an instruction be given regarding the limited purpose for which the jury could consider the defendant's prior arrests. He did not object to the inclusion of such an instruction. Instead, he objected solely to the *scope* of the instruction. Stated another way, defense counsel wanted the jury to be instructed on the purpose for which the jury could consider the defendant's prior arrests, but did not like the form of the instruction. *Gibson* and *Fultz* do not apply where the defendant wants an instruction, but does not like the form or scope of the instruction the court chooses to give.

¶ 35 Second, we note that the court did not give this instruction as written. Instead, it modified the instruction to read: "Evidence of a defendant's previous *arrest* for an offense may be considered by you only as it may affect his believability as a witness and must not be considered by you as evidence of his guilt of the offense with which he is charged. (Emphasis added.)" When there is no instruction covering a subject on which the jury should be instructed, the court has the discretion to give a nonpattern instruction. *People v. Ramey*, 151 Ill. 2d 498, 536 (1992). The court did not give IPI Criminal No. 3.13, but instead gave a nonpattern instruction for the situation that was based on IPI Criminal No. 3.13. As the court did not give IPI Criminal No. 3.13, *Gibson* and *Fultz* further did not apply.

¶ 36 The defendant further contends that the nonpattern instruction misstated the law. Specifically, the defendant states that evidence of prior arrests is not admissible for impeachment and the instruction "improperly directed the jury to consider the defendant's arrests when assessing his credibility." A court's decision to give a nonpattern instruction will not be reviewed absent an abuse of discretion. *People v. Pollock*, 202 Ill. 2d 189, 211 (2002). We do not find that the instruction misstated that law. As stated above (*supra* ¶¶ 27-30), we have already found that the State was allowed to question the defendant about his previous arrests as the defendant opened the door. Moreover, by proving that the defendant had in fact been "in trouble with the law," the State sought to discredit his testimony, which could "affect his believability as a witness." The defense wanted an instruction that would limit the purpose for which the jury could consider the defendant's arrests and the court provided such an instruction. We cannot say that the court abused its discretion in giving the nonpattern instruction.

¶ 37 III. Stipulation

¶ 38 Next, the defendant contends that counsel was ineffective for stipulating to the letter he wrote to Poynter without requesting the redaction of the portions of the letter relating to the defendant's drug activity. To show ineffective assistance of counsel, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668. 687 (1984); *People v. Enis*, 194 Ill. 2d 361, 377 (2000). To show that counsel's representation was deficient, the defendant must overcome the strong presumption that the challenged action or inaction might have been the product of sound trial strategy. *People v. Simms*, 192 Ill. 2d 348, 361 (2000).

> "The decision whether to file a pretrial motion is considered trial strategy, and trial counsel enjoys a strong presumption that the failure to file such a motion was proper. [Citations.] To overcome that presumption, the defendant must demonstrate: (1) that the motion had a reasonable probability of success; and (2) that the outcome of the trial would have been different. [Citation.] A reasonable probability is defined as a probability sufficient to undermine confidence in the outcome." *People v. Morris*, 2013 IL App (1st) 111251, ¶ 116.

¶ 39 Here, defense counsel's decision to stipulate to the entirety of the letter was trial strategy. Like in a contract, parties will enter into a stipulation when they are both receiving some benefit. The benefit to the State was that they did not have to present evidence in order to admit the letter into evidence, and they were able to get the entire letter in, including the portions regarding the LOUD. The benefit to the defendant was that the testimony regarding the letter was brief: the State did not have to establish a foundation for the letter by having Poynter testify about the letter nor did they have a handwriting expert testify that the letter was indeed written by the defendant. The letter was also a way for the defendant to get in his side of the story: that he believed that he was set up as a suspect for the murder solely so that the police could search his house for drugs. The letter also referenced the fact that the defendant had a family. Had defense counsel moved to strike all the portions with any reference to the drugs, the defendant's story of believing he had been set up by the police would have had to have been redacted as well.

¶ 40 IV. Meaning of "LOUD"

¶ 41 Lastly, the defendant contends that the court erred in allowing the State to question the defendant about LOUD. We disagree. A trial court's admission of such evidence is reviewed for

an abuse of discretion. *People v. Wilson*, 214 Ill. 2d 127, 136 (2005). In allowing the State to ask about the LOUD, the court stated:

> "[The jury have] already had the letter read to them. *** [I]n the letter he basically accuses the police of some kind of, I don't know if you want to say conspiracy, or whatever, basically saying that the whole thing was made up because all they really wanted was a chance to search [the defendant's] house for drugs. Now, the jury has heard that. They may not know what LOUD is ***.
>
> *** [The defendant] wrote the letter. He chose what to put in it. He cannot now complain about what he did. And the jury has heard it already without objection and if he's going to make this accusation that this was some kind of police conspiracy, well, then he can be asked about it."

¶ 42 The defendant wrote the letter and included the incriminating statements. The letter included references to LOUD and an explanation of what it meant was necessary for the jury to understand. Moreover, had the defendant not testified that LOUD meant marijuana, the jury could have concluded that LOUD meant something worse. We cannot say that the court abused its discretion in allowing the State to question the defendant about the meaning of LOUD.

¶ 43 CONCLUSION

¶ 44 The judgment of the circuit court of Iroquois County is affirmed.

¶ 45 Affirmed.