

failed to determine whether a defense witness's prior conviction was admissible for the purposes of impeachment, and did not assess whether the probative value of this evidence outweighed the prejudicial effect. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 At trial, Officer Roberts testified that he and his partner, Officer McDonnell, were on routine patrol in an unmarked squad car on the evening of November 24, 2013. Officer Roberts stated that he smelled a strong odor of cannabis coming from a nearby parked car. Officer McDonnell, who was driving, made a U-turn and pulled up behind the vehicle. Officer Roberts got out and approached the parked car from the rear. As he approached, the passenger in the front seat, who he identified in open court as defendant, got out and ran. Officer Roberts stated that he saw defendant make a motion to his front right waistband and that he saw a gun in defendant's waistband.

¶ 5 After seeing the gun, Officer Roberts chased defendant, who ran down a gangway of a residence and dropped the gun on the ground. Officer Roberts was 15 feet away when he saw defendant drop the gun. Defendant ran behind the house and Officer Roberts lost sight of him. Officer Roberts waited for backup and when Officer McDonnell arrived, the officers searched the rear of the house and found defendant hiding behind a garbage can. Defendant was detained and Officer Roberts returned to where he saw defendant drop the weapon and recovered a loaded .38 caliber pistol with seven rounds from the gangway.

¶ 6 Defendant was taken to the police station and the pistol was inventoried. Defendant was advised of his *Miranda* rights. Defendant then indicated that "we couldn't charge him with the gun; it wasn't his, that it was Bernard Smith's."

¶ 7 On cross-examination, Officer Roberts testified that he could not remember if the parked car had its windows up or if he saw smoke coming out of it. Officer Roberts testified that he had his gun drawn when he was chasing defendant and gave him verbal commands to stop, which defendant ignored. He stated that he did not initially recover the gun when he saw defendant drop it in the gangway, but did stand about 10 to 15 feet away from it and kept it under surveillance until defendant was arrested and he returned to recover the weapon.

¶ 8 In addition to Officer Robert's testimony, the State presented two certified copies of defendant's prior convictions for delivery of a controlled substance, a Class 2 felony, and unlawful use of a weapon by a felon, a Class 2 felony.

¶ 9 Defendant called Bernard Smith to testify. At the time of trial, Smith was incarcerated for theft. On the evening in question, defendant and another man were in his car, parked. Smith saw a police car make a U-turn and then saw officers jump out of their car with their guns drawn. The officer removed Smith and defendant from the car and searched it for 30 minutes. They also searched the alley and went through some gangways. No gun was recovered from his car, but an officer did indicate that a gun was recovered from a gangway. Smith denied seeing defendant run from his car while carrying a weapon.

¶ 10 On cross-examination, the State began to questions Smith about his prior convictions. Defense counsel objected and asked for the dates of the convictions to determine whether they were admissible under Montgomery. The State noted that it tendered Smith's criminal history in discovery and informed the trial court that it had a signed discovery receipt from defense counsel indicating Smith's previous convictions had been disclosed. The defense did not pursue the objection further. The State proceeded to ask Smith if he had two prior convictions for armed

robbery, to which Smith answered affirmatively. Smith testified that no marijuana was recovered from the car.

¶ 11 Defendant testified that he was sitting in Smith's car, with Smith and another man. He did not remember if anyone was smoking marijuana. He saw a police car turn around and then saw the police flash their lights in his face. The officers told everyone not to move. All three of the men were taken out of the car. Defendant denied running from the police, and denied having a weapon on his person. When asked if he discarded a weapon in the gangway, the transcript of the proceeding shows the defendant answered affirmatively. There was no gunshot residue test performed at the police station.

¶ 12 After hearing all of the evidence, the trial judge found defendant guilty of armed habitual criminal. He was sentenced as a Class X offender to 7 years' imprisonment. This appeal followed.

¶ 13 ANALYSIS

¶ 14 Defendant argues that his conviction for armed habitual criminal should be reversed because the evidence against him was insufficient to establish the necessary elements of armed habitual criminal. Specifically, defendant claims that the State failed to introduce the gun or any other physical evidence at trial. The only evidence against him was the implausible testimony of a single police officer.

¶ 15 In assessing the sufficiency of evidence on appeal, a reviewing court considers whether, after viewing the evidence in the light most favorable to the State, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *People v. Collins*, 106 Ill. 2d 237, 261 (1985) (emphasis in original) (quoting *Jackson v. Virginia*, 443 U.S.

307, 319 (1979)). The reviewing court “determine[s] whether the record evidence could *reasonably* support a finding of guilt beyond a reasonable doubt.” *People v. Cunningham*, 212 Ill. 2d 274, 280 (emphasis added) (quoting *Jackson*, 443 U.S. at 318). The court’s function is not to retry the defendant. *Collins*, 106 Ill. 2d at 261. For a reviewing court to reverse a criminal conviction due to insufficient evidence, the evidence presented must be “so unreasonable, improbable or unsatisfactory as to create a reasonable doubt of the defendant’s guilt.” *People v. Rowell*, 229 Ill. 2d 82, 98 (2008).

¶ 16 A person commits the offense of being an armed habitual criminal if he “receives, sells, possesses, or transfers any firearm” after having been convicted of at least two triggering offenses. 720 ILCS 5/24-1.7 (West 2012). Here, viewing the evidence in the light most favorable to the State, the evidence showed that as defendant fled the vehicle after the police approached, Officer Roberts saw defendant move his hand to his waistband and saw a gun. While running from the police, Officer Roberts saw defendant make a motion to his front right waistband and then he saw a gun in defendant’s waistband. As Officer Roberts chased defendant, defendant dropped a gun in the gangway. The same gun was later recovered and inventoried by the police. Defendant does not dispute that his prior convictions qualify under the armed habitual criminal statute.

¶ 17 The positive and credible testimony of even a single witness is sufficient to convict. *People v. Gray*, 2017 IL 120958, ¶ 36. Defendant’s attack on the sufficiency of the evidence here is merely an attack on the credibility of Officer Roberts. Defendant urges this court to consider his version of the events over Officer Roberts, and insinuates that Officer Roberts fabricated his testimony altogether. The trial judge, as the trier of fact in this case, heard the

testimony presented by both the State and the defense and the decision of which version to believe rested with him. *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001). “[A] reviewing court will not reverse a criminal conviction unless the evidence is so unreasonable, improbable or unsatisfactory as to create a reasonable doubt of the defendant's guilt.” *People v. Rowell*, 229 Ill. 2d 82, 98 (2008). A reviewing court does not retry the defendant or substitute its judgment for that of the trier of fact with regard to the credibility of witnesses or the weight to be given to each witness's testimony. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009). The evidence that defendant possessed a firearm was not so unreasonable, improbable, or unsatisfactory that the finding of guilty cannot stand. The fact that the gun was not introduced into evidence is irrelevant where Officer Robert’s testimony was found to be credible by the trial court. *People v. Daheya*, 2013 IL App (1st) 122333, ¶ 76.

¶ 18 Next, defendant argues that the trial court erred when it failed to determine whether defense witness Smith’s prior convictions were admissible for the purposes of impeachment, and failed to conduct any balancing test to determine whether the probative value of the evidence outweighed its prejudicial effect. Alternatively, defendant argues that defense counsel was ineffective for failing to preserve this issue for appeal.

¶ 19 During cross-examination of Smith, the prosecutor began asking Smith questions about the fact that he was serving time for theft at the time of trial and that he had two prior armed robbery convictions. Defense counsel objected and asked the State for the dates of the convictions pursuant to *People v. Montgomery*, 47 Ill. 2d 510, 516 (1971). The State referred defense counsel to the criminal history it tendered in discovery. The court stated, “all right” and the State continued to question Smith regarding his prior convictions. Defense counsel did not

renew his objection, nor was the issue included in defendant's posttrial motion. Defendant acknowledges forfeiture, but urges this court to consider the issue for plain error because the evidence was closely balanced.

¶ 20 Notwithstanding a forfeiture, we may consider an unpreserved error when: (1) the evidence is closely balanced or (2) the error is so fundamental and of such magnitude that the defendant was denied a fair trial. *People v. Harvey*, 211 Ill. 2d 368, 387 (2004). Generally, we first determine whether any error occurred. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). We find no error.

¶ 21 Under the *Montgomery* rule, 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. *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. When conducting this balancing test, the trial judge should consider, *inter alia*, the nature of the prior conviction, its recency and similarity to the present charge, other circumstances surrounding the prior conviction, and the length of the witness' criminal record. *Id.* at 518. If the trial judge determines that the prejudice substantially outweighs the probative value of admitting the evidence, then the evidence of the prior conviction must be excluded. The determination of whether a witness' prior conviction is admissible for impeachment purposes is within the discretion of the trial court. *Id.*

¶ 22 In this case, defendant does not contest the first two factors under *Montgomery*. Rather, he focuses solely on the third factor: whether the prejudicial effect outweighed the probative value. Specifically, defendant complains that there is no indication in the record that the trial court utilized the *Montgomery* balancing test to determine whether defendant would suffer unfair prejudice if Smith’s prior convictions were admitted, especially because this case amounted to a credibility contest.

¶ 23 In *People v. Williams*, 173 Ill. 2d 48, 83 (1996), our supreme court declined to find an error in the admission of a prior conviction where the trial court did not articulate on the record that it was applying the *Montgomery* test.

“Contrary to the defendant's argument, there is no reason to suppose that the trial judge failed to weigh the probative value of the impeachment against its possible prejudicial effect. A review of the transcript shows that the judge was fully aware of the *Montgomery* standard and the balancing test it requires. The parties referred to the balancing test in their arguments to the judge on the question whether the defendant could be impeached with the earlier conviction. In similar circumstances, this court has declined to find error when the transcript makes clear that the trial judge was applying the *Montgomery* standard, even though the judge did not expressly articulate it (see *People v. Redd*, 135 Ill.2d 252, 325–26 (1990)), and the same result must be reached here.

Although the trial judge in this case did not explicitly state that he was balancing the opposing interests, there is no reason to suppose that he disregarded the familiar, well-established *Montgomery* standard in determining that the impeachment was proper.”
Williams, 173 Ill.2d at 83; see also *Naylor*, 229 Ill.2d at 605 n. 3.”

¶ 24 We likewise decline to find error in the instant case. It is clear from the trial judge's comments during the initial objections by defense counsel regarding the admission of Smith's prior convictions that he was aware of the *Montgomery* principles and the balancing test that should be considered. Subsequently, in finding defendant guilty, the court stated, "One of the things that the State brought out was the impeachment of Mr. Smith and the fact that he's a three-time convicted felon are things that I will consider under *Montgomery* which the U.S. Supreme Court has directed the trier of fact to consider where they determine the credibility." The trial judge clearly noted his familiarity with *Montgomery*, and he did not err in failing to articulate the factors he considered in his application of the *Montgomery* balancing test. See *Williams*, 173 Ill. 2d at 83. In light of the trial judge's comments, there is no reason to find that the trial court failed to weigh the probative value of the evidence against its possible prejudicial effect in determining the impeachment evidence to be admissible. We therefore find that the trial court adhered to the *Montgomery* rule. Plain error analysis is unnecessary.

¶ 25 We also reject defendant's argument that trial counsel was ineffective for failing to properly object and preserve this issue for appeal. Where no error occurred, we cannot say that trial counsel was ineffective for failing to object and preserve the issue for appeal.

¶ 26 CONCLUSION

¶ 27 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 28 Affirmed.