2019 IL App (1st) 162196-U

No. 1-16-2196

Order filed January 24, 2019

Fourth 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. 15 CR 11511
	)	
TOWALO JOHNSON,	)	Honorable
	)	Matthew E. Coghlan,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice McBride and Justice Gordon concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm defendant's conviction for delivery of a controlled substance over his contention that the trial court abused its discretion by allowing the State to introduce evidence of his prior convictions to impeach his credibility.

¶ 2 Following a bench trial, defendant Towalo Johnson was convicted of delivery of a controlled substance (720 ILCS 570/401(d)(i) (West 2014)) and sentenced to three and a half years' imprisonment. On appeal, defendant asserts that the trial court erred by allowing the State to use his prior convictions to impeach his credibility where the prejudicial effect of the

convictions outweighed their minimal probative value. He additionally asks that we correct his mittimus to reflect one conviction for delivery of a controlled substance. For the following reasons, we affirm and order the mittimus corrected.

¶ 3 Defendant was charged with two counts of delivery of a controlled substance within 1,000 feet of a school and two counts of delivery of a controlled substance. Prior to trial, the State informed the court that, in the event that defendant testified, it would seek to introduce evidence of defendant's prior convictions in rebuttal. The prior convictions consisted of a November 2, 2011, conviction for manufacture and delivery of cannabis, and four March 11, 2009, convictions for manufacture and delivery of cannabis, aggravated unlawful use of a weapon, aggravated fleeing and eluding, and possession of a defaced firearm.

¶ 4 The State argued that the prior convictions fell "under the parameters of *Montgomery*," and asked that "they be used in *Montgomery*." Defense counsel made an "oral *Montgomery* motion," and argued that defendant's prior convictions were more prejudicial than probative because they were "similar charges, almost identical" to the instant charges. In response to the parties' arguments, the court ruled, "The matter is within the Court's discretion. The Court must weigh the probative value versus the prejudice. I'll allow the State to offer those as impeachment, if the Defendant chooses to testify. I believe I can give it appropriate weight. Defense motion, *Montgomery* motion, is denied."

¶ 5 At trial, Chicago police officer Melvin Ector testified he was on duty as an undercover narcotics officer at approximately 12:20 p.m. on June 29, 2015, in the vicinity of the 7400 block of South Stewart Avenue. While on foot, he observed defendant, whom he identified in court, standing on the sidewalk. Ector approached defendant and asked him if he had "rocks."

Defendant asked "how many" Ector wanted. Ector responded he wanted two, and defendant removed from his pocket clear, knotted plastic bags, containing a white, rock-like substance of suspected crack cocaine. Defendant gave Ector the bags, and Ector gave defendant $20 in prerecorded police funds.

¶ 6 Following the exchange, Ector gave his surveillance team members a prearranged signal, alerting them that there had been a positive narcotics transaction. Ector then returned to his vehicle, where he notified his team via radio transmission of the transaction. He also gave his team a description of defendant and defendant's last known location. Shortly thereafter, Ector identified defendant as the narcotics seller after defendant had been detained on South Eggleston Avenue, approximately one block from where the transaction occurred.

¶ 7 Upon Ector's return to the police station, Officer McHale gave him the $20 prerecorded bill used in the transaction with defendant. Ector then put the bill back into circulation as a prerecorded fund. He gave the suspected narcotics to McHale, who was the designated inventory officer on his team.

¶ 8 On cross-examination, Ector testified that he identified defendant on Eggleston approximately 10 minutes following the transaction. About three other people were nearby when he identified defendant. The transaction between Ector and defendant was brief and lasted only 10 to 15 seconds.

¶ 9 Chicago police officer John Zinchuk testified that he was a surveillance officer on the day in question. Zinchuk observed Ector engage in the narcotics transaction. He identified defendant in court as the other person involved in the transaction. At approximately 12:20 p.m., Zinchuk saw Ector walk up to defendant and have a brief conversation. Defendant then retrieved an item

from his pocket and handed it to Ector in exchange for prerecorded funds. Ector then gave a visual indication that the transaction occurred. When Ector was clear from the area, he contacted the team via radio and informed them of the buy.

¶ 10 After the transaction, defendant ran to 75th Street. Zinchuk informed his team of where defendant was running. The team was keeping "roving surveillance," and defendant was observed entering a residence on Eggleston. Zinchuk waited outside the residence, and defendant eventually emerged. Defendant walked down the street and Zinchuk observed him engage in another, similar hand to hand transaction with a person Zinchuk later learned was Lloyd Taylor. Zinchuk alerted his team members to the second transaction and gave the location and description of both defendant and Taylor. He also directed his team to approach and detain defendant. The enforcement officers detained both defendant and Taylor at approximately 12:26 p.m. Zinchuk was present while the men were detained. Ector subsequently drove by the area and positively identified defendant as the person from whom he purchased the narcotics.

¶ 11 On cross-examination, Zinchuk testified that he was approximately three to four houses, or 90 feet, away from the transaction. He acknowledged he could not see the actual item exchanged. Defendant was in the residence on Eggleston for approximately five minutes. When enforcement officers detained defendant, they recovered the prerecorded funds used in the transaction but did not recover any narcotics.

¶ 12 Chicago police officer Scott Hall testified he was part of the team conducting surveillance. Defendant was taken into custody during the course of the investigation. Hall was present when Officer Ivy performed a custodial search of defendant and recovered $20 in prerecorded funds. Hall and Ivy later returned to the police station and Hall observed Ivy give

the prerecorded funds to McHale, the evidence officer that day. Hall did not handle the prerecorded funds; rather, Ivy read the number on the bill aloud and Hall verified the number with the prerecorded funds sheet.

¶ 13 Chicago police officer Brian McHale testified he was the designated inventory officer on the June 29, 2015. Following the investigation, McHale returned to the police station and received two bags of suspect crack cocaine from Ector and one twenty dollar bill in prerecorded funds from Ivy. McHale inventoried the bags and the bill. He then "did a turn-over" and returned the money to Ector. There were no drugs to inventory from defendant's person.

¶ 14 The parties stipulated that the inventory of the suspected narcotics contained .1 gram of cocaine. The trial court granted the defense motion for a directed finding on the counts of delivery of a controlled substance within 1,000 feet of a school.

¶ 15 Defendant testified that on June 29, 2015, he lived at a residence on South Eggleston. He was going to buy cigarettes and had an exchange with someone he knew that went by the name "Mo." Defendant did not know Mo's real name. Mo asked him for change for a $20 bill, and defendant gave him two $10 bills. Following the exchange, defendant bought four loose cigarettes, but did not go inside a store. He subsequently went to his house, went upstairs, and then "forgot." Defendant wanted to play the lottery and buy a drink, but when he walked outside, the police "got" him. Outside defendant's house, two officers approached him by pulling their vehicle onto the sidewalk in front of where he was walking. The officers had their guns drawn and told him to "get down." They put defendant in the police vehicle and transported him to the police station.

¶ 16 Defendant did not know why the officers detained him and they did not tell him when he inquired. He denied participating in any drug transactions that day and had never seen Officer Ector before. The lockup officer later informed defendant that he was charged with delivery of a controlled substance.

¶ 17 On cross-examination, defendant testified he had $60 with him when he left his house originally to buy loose cigarettes. He did not drop off anything when he went inside the house. Defendant denied speaking to anyone other than Mo and the "people" from whom he purchased loose cigarettes that "stand out there in the crowd."

¶ 18 After the defense rested, the parties stipulated "for purposes of impeachment" that defendant had a November 2, 2011, conviction for manufacture and delivery of cannabis, and March 11, 2009, prior convictions for aggravated fleeing and eluding, aggravated unlawful possession of a firearm, possession of a defaced firearm, and manufacture and delivery of cannabis.

¶ 19 Following arguments, the court found defendant guilty of two counts of delivery of a controlled substance and merged the counts, finding one count "duplicitous." The court subsequently denied defendant's motion for a new trial and sentenced him to three and a half years' imprisonment. The court reiterated that the two counts merged.

¶ 20 On appeal, defendant first contends that the trial court abused its discretion by admitting his prior convictions to impeach his credibility where they did not relate to his veracity and two of the convictions were so similar to the charged offense of delivery of a controlled substance that they tended to indicate defendant's propensity to commit the charged offense. Defendant alleges that the prior convictions' prejudicial effect outweighed their probative value.

¶ 21 Initially, defendant acknowledges that this claim is unpreserved because it was not raised in his posttrial motion. See *People v. McCarter*, 385 Ill. App. 3d 919, 927 (2009) (to preserve an issue for appeal, a defendant must object at trial and raise the issue in a posttrial motion). Nevertheless, defendant asks that we review it under the first prong of the plain error doctrine or, alternatively, as a claim of ineffective assistance of counsel. The plain-error doctrine permits a reviewing court to consider unpreserved errors when " '(1) the evidence in a criminal case is closely balanced or (2) where the error is so fundamental and of such magnitude that the accused was denied a right to a fair trial.' " *People v. Harvey*, 211 Ill. 2d 368, 387 (2004) (quoting *People v. Byron*, 164 Ill. 2d 279, 293 (1995)). Prior to addressing plain error, however, we must first determine whether the error occurred. *People v. Herron*, 215 Ill. 2d 167, 187 (2005).

¶ 22 If a defendant testifies, the State may use a prior conviction to discredit him as a witness, but 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). Our supreme court has established that evidence of a defendant's prior conviction is admissible to impeach the defendant's 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 defendant's release from confinement, whichever date is later; and (3) the prior conviction's probative value outweighs the danger of unfair prejudice. *People v. Montgomery*, 47 Ill. 2d 510, 516 (1971). Because defendant disputes only the third element of the *Montgomery* test, we confine our analysis to that element.

¶ 23 Under the third element, the trial court is required to conduct a balancing test, weighing the risk of the potential prejudice against the probative value from the conviction's admission. *People v. Mullins*, 242 Ill. 2d 1, 14 (2011). In conducting such a 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 prior conviction has probative value if it could impair the defendant's credibility. *People v. McKibbins*, 96 Ill. 2d 176, 188 (1983).

¶ 24 Although the court must apply the balancing test, it need not specify the factors used on the record. *People v. Melton*, 2013 IL App (1st) 060039, ¶ 17. " 'However, the trial court should not apply the balancing test mechanically, and the record must include some indication that the trial court was aware of its discretion to exclude a prior conviction.' " (Internal citations omitted.) *People v. White*, 407 Ill. App. 3d 224, 233 (2011) (quoting *People v. Whirl*, 351 Ill. App. 3d 464, 467 (2004)). We review a trial court's ruling on the admissibility of a defendant's prior convictions for impeachment for an abuse of discretion. *Melton*, 2013 IL App (1st) 060039, ¶ 17.

¶ 25 Here, defendant's prior convictions were all punishable by more than one year imprisonment and within the 10 year time frame set forth in *Montgomery*. Therefore, subject to the requisite balancing test, they were all admissible for use as impeachment. Although defendant claims the drug convictions were too similar to the charged crime, similar convictions are not necessarily more prejudicial than probative. See, *e.g.*, *People v. Sykes*, 341 Ill. App. 3d

950, 976 (2003) ("Similarity between the prior conviction and the offense charged does not mandate exclusion of the prior conviction.")

¶ 26 Importantly, the record shows the trial court knew both that it was required to weigh the probative value versus prejudicial effect and that it was "aware of its discretion to exclude a prior conviction." *White*, 407 Ill. App. 3d at 233. The parties expressly raised the *Montgomery* case and balancing test during arguments to the court: defense counsel when arguing that the convictions were more prejudicial than probative, and the State when it argued the convictions fell "under the parameters of *Montgomery*." Further, the court specifically mentioned its discretion, that it was required to weigh the probative value versus prejudicial effect, and stated it believed it could give the convictions the appropriate weight. Thus, the record shows the court conducted the appropriate analysis pursuant to *Montgomery* and did not abuse its discretion in allowing the admission of defendant's prior convictions for impeachment purposes.

¶ 27 Defendant essentially asks us to disregard the trial court's determination and conduct the balancing test on appeal. However, because our review of the trial court's admission of defendant's prior convictions is for an abuse of discretion, we will reverse the trial court's ruling only where it is arbitrary or unreasonable. See *Melton*, 2013 IL App (1st) 060039, ¶ 18. Given the record before us, where it is clear the court conducted the proper balancing test and knew it had discretion to exclude the convictions, we cannot say that the court's decision was arbitrary and unreasonable.

¶ 28 Moreover, despite defendant's contention that the convictions "posed a danger of improper use as evidence of guilt or propensity," we presume the trial court knew the law and applied it appropriately, absent affirmative evidence to the contrary. See *People v. Howery*, 178

Ill. 2d 1, 32 (1997) ("the trial court is presumed to know the law and apply it properly"; only "when the record contains strong affirmative evidence to the contrary" is "that presumption *** rebutted"). The record before us contains no such evidence. Critically, the court explicitly stated that, if defendant testified, it would allow the State to introduce the convictions for impeachment purposes, thereby demonstrating its recognition of the limited purpose for which this evidence could be considered. Accordingly, we find the record shows that the trial court did not abuse its discretion in allowing the State to introduce evidence of defendant's prior convictions for impeachment purposes. Because we find no error, there can be no plain error. *People v. Spicer*, 379 Ill. App. 3d 441, 449 (2007) (without error, there is no plain error). Similarly, as the court did not err in admitting the prior convictions, trial counsel was not ineffective for failing to preserve the "error."

¶ 29 Next, the parties agree, and the record reflects, that defendant's mittimus should be corrected because it incorrectly lists two convictions for delivery of a controlled substance rather than one. The record clearly demonstrates that the court merged the two guilty findings of delivery of a controlled substance, calling the second count "duplicitous." Therefore, pursuant to our authority under Illinois Supreme Court Rule 615(b)(1) (eff. Jan. 1, 1967), we order the clerk of the circuit court to correct the mittimus to reflect one conviction for delivery of a controlled substance. See *People v. Young*, 2018 IL 122598, ¶ 29) (noting that a mittimus may be corrected at any time, and the appellate court has the authority to order the correction of a mittimus inconsistent with the judgment entered by the trial court "by virtue of" Illinois Supreme Court Rule 366(a)(5) (eff. Feb. 1, 1994)).

¶ 30 Based on the foregoing, we order the clerk of the circuit court to correct defendant's mittimus and affirm the judgment of the circuit court of Cook County.

¶ 31 Affirmed; mittimus corrected.