

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

NO. 4-09-0559

Filed 01/06/11

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Macon County
MICHAEL R. BURRIES,)	No. 09CF78
Defendant-Appellant.)	
)	Honorable
)	James R. Coryell,
)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Appleton and Myerscough concurred in the
judgment.

ORDER

Held: Pursuant to *Anders v. California*, no meritorious issue can be raised on appeal. Accordingly, OSAD's motion to withdraw as counsel on appeal is allowed and the trial court's judgment is affirmed.

This appeal comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel on appeal on the ground that no meritorious issues can be raised in this case. For the reasons that follow, we agree.

I. BACKGROUND

On January 16, 2009, the State charged defendant, Michael R. Burries, with two counts of aggravated battery (720 ILCS 5/12-4 (West 2008)). Following a March 2009 trial, the jury was unable to reach a unanimous verdict. Defendant moved for a mistrial, and the trial court granted the motion. On June 9,

2009, after defendant's second trial, the jury found defendant guilty of two counts of aggravated battery.

On June 8, 2009, at defendant's second trial, Officer Timothy Wittmer testified he was dispatched to 985 West Sawyer Drive, Decatur, Illinois, on January 13, 2009, at approximately 1:51 a.m. for a domestic-violence complaint. He arrived at the residence in full police uniform. Officer Lonny Lewellyn and recruit officer Massey were also dispatched to the residence. When the officers entered the apartment, defendant, Trina Sims, and her daughter, Danielle Burries, were in the living room. In an attempt to separate defendant and Sims, Officer Lewellyn and recruit officer Massey took Sims and Danielle Burries to the kitchen, while Officer Wittmer and defendant went to the bedroom. According to Officer Wittmer, when dealing with a domestic-violence complaint, the policy is to separate the arguing parties by both line of sight and hearing to prevent further argument, and then interview each subject to find out if a domestic battery has been committed. Officer Wittmer testified defendant had no direct line of sight from where he was located in the bedroom to the area where Sims was being interviewed.

While in the bedroom, defendant became argumentative with Officer Wittmer about a cell phone that Sims had in her possession. He asked Officer Wittmer to retrieve the cell phone from Sims and was upset when Officer Wittmer refused without

proof of ownership. Defendant then proceeded to yell at Officer Wittmer because he was blocking the doorway to prevent defendant from leaving the bedroom. To move Officer Wittmer away from the door, defendant placed his hands on either side of the doorframe and pulled himself forward until he made contact with Officer Wittmer. Defendant struck Officer Wittmer in the leg with his wheelchair, causing a sharp pain in Officer Wittmer's shin. Officer Wittmer testified defendant's contact was both insulting and provoking.

Upon observing the confrontation, Officer Lewellyn approached to assist with defendant. Officer Wittmer warned defendant he would be arrested for battery if defendant hit him again with his wheelchair. Defendant ignored the warning and once again attempted to push past the officers. Defendant hit both officers in the leg with his wheelchair. Officer Lewellyn told defendant he was under arrest for battery. Defendant continued pushing forward. Officer Lewellyn then put his hands on defendant's chest and attempted to push him back into the bedroom, while Officer Wittmer pried defendant's hands from the doorframe. As a result of the struggle, defendant's wheelchair flipped over.

After both officers helped defendant back into his wheelchair, Officer Massey accompanied Sims into the bedroom and let her collect some of her belongings. When Sims entered the

bedroom, defendant attempted to grab her. Because Officer Lewellyn was standing between defendant and Sims, defendant pushed Officer Lewellyn's leg to move him out of the way. However, defendant was unable to reach Sims but was able to grab a bag she was holding. Officer Wittmer then placed defendant in handcuffs to prevent further trouble.

Officer Wittmer further testified throughout the entire incident, defendant was completely naked and appeared to be intoxicated. According to Officer Wittmer, defendant smelled strongly of alcohol and had slurred speech. Additionally, Officer Wittmer observed an open bottle of alcohol on the floor in the bedroom. Defendant was offered assistance in getting dressed before he was transported to jail, but defendant refused the officers' assistance.

Officer Lewellyn testified on January 13, 2009, he was dispatched to defendant's residence for a domestic-violence complaint. When he entered the apartment, Trina Sims and Danielle Burries were in the living room. He testified he could hear defendant but was unable to see him. Shortly thereafter, he saw defendant inside the bedroom. Defendant and Sims began yelling at each other, and Officer Lewellyn asked Officer Wittmer to watch defendant, while recruit officer Massey took Sims into the kitchen to interview her. Officer Lewellyn testified defendant was unable to see Sims from his position in the bedroom.

From Officer Lewellyn's position in the living room, he observed defendant grab the bedroom doorframe and pull himself forward until his wheelchair struck Officer Wittmer. Officer Lewellyn positioned himself in the doorway next to Officer Wittmer to assist with defendant. Defendant again pulled his wheelchair forward until it struck both officers. Officer Lewellyn told defendant he was under arrest, but defendant continued pushing forward in his wheelchair. Officer Lewellyn put his hands on the armrest of defendant's wheelchair and attempted to push defendant out of the doorway. Defendant was able to pry Officer Lewellyn's hand off the armrest. Officer Lewellyn then placed his hand on defendant's chest and started pushing, while Officer Wittmer pried defendant's hand off the doorframe. Once defendant's hand was released from the doorframe, the momentum of Officer Lewellyn's pushing caused defendant's wheelchair to flip over. Officer Lewellyn testified he did not intentionally flip defendant's wheelchair over. Officer Lewellyn testified he and Officer Wittmer helped defendant off the floor and back in his wheelchair.

Because defendant was no longer in the doorway, Officer Lewellyn told Sims to gather some personal belongings in the bedroom and leave the apartment. Officer Lewellyn and Officer Wittmer stood in front of defendant when Sims entered the room. As soon as she entered the room, defendant attempted to reach

around Officer Lewellyn to grab her. He was unable to reach Sims, so he put his hand on Officer Lewellyn's thigh and attempted to shove him. Defendant shoved Officer Lewellyn back a step and lunged at Sims. He was still unable to reach Sims, but managed to grab the bag she was holding. Officer Lewellyn told Officer Wittmer to handcuff defendant to prevent further problems.

Officer Lewellyn further testified defendant's contact was of an insulting and provoking nature. Additionally, Officer Lewellyn testified defendant filed a complaint against him, but the complaint was found to be unsubstantiated.

Trina Sims testified she had dated defendant for approximately four years and had lived with him for approximately seven months. On January 13, 2009, she called the police because she wanted assistance in moving out of their apartment. When Sims made the phone call, defendant was in the bathroom. The police arrived at the apartment approximately 15 to 20 minutes later, and defendant was still in the bathroom. Shortly after the police arrived, defendant exited the bathroom.

Sims testified while she was being interviewed, she observed the altercation between the officers and defendant. Sims heard defendant ask one of the officers how he felt about Obama being president. The officer responded by telling defendant to shut up and by pushing him. The push caused defendant's

wheelchair to flip over. While on the ground, defendant told the officer he was going to file a complaint for the officer's treatment of him. The officer responded by telling defendant he was under arrest for aggravated battery. Sims testified defendant's wheelchair did not strike anyone prior to the shove.

On cross-examination, Sims testified she had called the police because she was angry at defendant, and she wanted assistance in gathering her belongings. She also testified she was not arguing with defendant while the officers were in the apartment. The only communication between her and defendant that night was defendant politely asking her to return the cell phone. However, she testified defendant was not loud or threatening.

Defendant testified he arrived home on January 13, 2009, and went straight into the bathroom. Although Trina Sims was home when he returned, he did not speak with her before going into the bathroom. Before entering the bathroom, he removed both footrests from his wheelchair. While in the bathroom, he saw a light flash. He jumped in his wheelchair and exited the bathroom without putting the footrests back on the chair. He was in the bedroom doorway when he saw three police officers in the living room. Officer Wittmer walked toward defendant and informed him Sims had called the police because she wanted to collect her personal belongings from the apartment and leave. Defendant

responded he did not want Sims taking things in the apartment that belonged to him. In particular, defendant wanted Officer Wittmer to retrieve a cell phone Sims had in her possession. Defendant testified he was not being argumentative.

After defendant's request had been repeatedly denied by both Officer Wittmer and Officer Lewellyn, defendant asked Officer Lewellyn how he felt about Obama being president. Defendant testified Officer Lewellyn responded by shoving him and telling him to shut up. As a result of the shove, defendant's wheelchair flipped over, causing defendant to fall out of the chair. Defendant testified he never hit the officers with his wheelchair prior to the shove. While on the ground, defendant informed Officer Lewellyn he would be filing a complaint against him. Officer Lewellyn responded by placing defendant under arrest for assaulting a police officer. Defendant testified he was not placed under arrest prior to being knocked out of his wheelchair. He also testified he had consumed a couple of beers that night, but he was not intoxicated.

On March 25, 2009, defendant filed a motion *in limine* asking the trial court to exclude evidence of defendant's and his witness Sims' prior convictions. On that same day, the court granted the motion in part and denied it in part. Following the March 2009 trial, the jury was unable to reach a unanimous verdict. Defendant moved for a mistrial, and the court granted

the motion. Defendant's second trial was held in June 2009. On June 8, 2009, defendant's counsel renewed the motion *in limine*, and the court adopted the court's prior ruling. Pursuant to the court's ruling, defendant's 2006 conviction for attempt (unlawful possession of a converted vehicle) and 2008 conviction for obstruction of justice were introduced into evidence. Additionally, Sims' 2001 aggravated-battery conviction and 2005 conviction for unlawful possession of a controlled substance were allowed into evidence.

On June 9, 2009, a jury found defendant guilty of two counts of aggravated battery. On July 6, 2009, defendant filed a motion for judgment notwithstanding the verdict or, alternatively, motion for new trial. On July 28, 2009, the trial court denied defendant's motion, stating this case involved an issue of witness credibility, which is a question of fact for the jury. Additionally, on July 28, 2009, the court sentenced defendant to serve concurrent terms of six years in prison on each count of aggravated battery, with credit for time served from January 13, 2009, to July 27, 2009. Defendant was on parole for the 2008 obstruction-of-justice conviction when he committed the instant offense.

On July 29, 2009, defendant filed a notice of appeal, and the trial court appointed OSAD to represent him. On August 31, 2010, OSAD moved to withdraw, attaching to its motion a brief

in conformity with the requirements of *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493, 87 S. Ct. 1396 (1967). The record shows service of the motion on defendant. On its own motion, this court granted defendant leave to file additional points and authorities by October 4, 2010, but defendant has not done so. After examining the record and executing our duties consistent with *Anders*, we grant OSAD's motion and affirm the trial court's judgment.

II. ANALYSIS

A. Charging Instrument

First, OSAD contends no colorable argument can be made the information failed to state an offense. We agree.

According to section 111-3(a) of the Code of Criminal Procedure of 1963 (Criminal Procedure Code), the charging instrument must specifically set forth the name of the offense, the statutory provision alleged to have been violated, the nature and elements of the offense charged, the date and county where the offense occurred, and the name of the accused. 725 ILCS 5/111-3(a) (West 2008). When a defendant challenges the sufficiency of a charging instrument, the standard of review is whether the charging instrument "states the nature of the offense and adequately sets forth each element of that offense." *People v. Williams*, 266 Ill. App. 3d 752, 758, 640 N.E.2d 1275, 1280 (1994).

According to section 12-3 of the Criminal Code of 1961 (Criminal Code), a battery results when a person, without legal justification, intentionally or knowingly (1) causes bodily harm to an individual or (2) makes insulting or provoking physical contact with an individual. 720 ILCS 5/12-3 (West 2008). Additionally, an aggravated battery arises when a battery is committed against someone known to be a police officer. 720 ILCS 5/12-4(b)(18) (West 2008).

On January 16, 2009, defendant was charged with two counts of aggravated battery. Count I of the information stated that on or about January 13, 2009, defendant committed the offense of aggravated battery in violation of section 12-3 of the Criminal Code, by knowingly making contact of an insulting or provoking nature by repeatedly striking Officer Wittmer in the leg with his wheelchair. Additionally, count II stated that on or about January 13, 2009, defendant committed the offense of aggravated battery in violation of section 12-3 of the Criminal Code, by knowingly making contact of an insulting or provoking nature by repeatedly striking Officer Lewellyn in the leg with his wheelchair.

The information filed on January 16, 2009, met the requirements of section 111-3(a) of the Criminal Procedure Code. The information identified the particular offense and statutory provision defendant was charged with violating. Additionally, it

specifically set out the circumstances under which defendant violated each element of the offense. The information also included the date of offense, county where the incident occurred, and the name of the accused. Therefore, the information was sufficient to inform defendant of the nature and elements of the offense. Because the information was sufficient under section 111-3(a) of the Criminal Procedure Code, no colorable argument can be made the information failed to state an offense.

Additionally, a defendant's sentence can be increased because of prior convictions, even if the prior convictions are not alleged in the charging instrument. *People v. Lathon*, 317 Ill. App. 3d 573, 587, 740 N.E.2d 377, 387 (2000). Therefore, the information was not required to specifically allege defendant's prior convictions before defendant's aggravated-battery charge could be increased from a Class 2 felony to a Class X felony for sentencing purposes. Consequently, no colorable argument can be made the information filed on January 16, 2009, failed to give notice defendant was subject to mandatory Class X sentencing.

B. Admissibility of Prior Convictions

Next, OSAD contends no colorable argument can be made the trial court erred by denying defendant's request to exclude all of defendant's and Sims' prior convictions. We agree.

On March 25, 2009, defendant filed a motion *in limine*

asking the trial court to exclude any evidence of defendant's and Sims' prior convictions. The court denied this motion in part and granted it in part.

"The determination of whether a witness's prior conviction is admissible for impeachment purposes is within the discretion of the trial court." *People v. Meyers*, 367 Ill. App. 3d 402, 415, 854 N.E.2d 286, 298 (2006). Prior convictions are admissible to attack credibility if (1) the prior conviction involved a crime punishable by death or imprisonment for more than one year or the crime involved dishonesty or false statement; (2) less than 10 years have elapsed from either the conviction or release from confinement; and (3) the probative value of the prior conviction substantially outweighs the danger of unfair prejudice. *People v. Montgomery*, 47 Ill. 2d 510, 516, 268 N.E.2d 695, 698 (1971). The third element requires the court to balance the probative value of the prior conviction against the danger of unfair prejudice. *People v. Whirl*, 351 Ill. App. 3d 464, 467, 814 N.E.2d 872, 875 (2004). However, the court should not "mechanically" apply this balancing test. *Whirl*, 351 Ill. App. 3d at 467, 814 N.E.2d at 875.

In the present case, the trial court considered all prior convictions and determined which convictions met the *Montgomery* requirements. *Montgomery*, 47 Ill. 2d at 516, 268 N.E.2d at 698. First, the court excluded introduction of defen-

dant's 1998 burglary conviction, his 2000 conviction for manufacturing and delivering 1 to 15 grams of cocaine, and his parole status. Additionally, the court excluded Sims' 2000 conviction for unlawful possession of a controlled substance. In excluding these convictions, the court stated the danger of unfair prejudice outweighed the probative value because the prior convictions were too remote in time from the present offense. The court then allowed into evidence defendant's 2006 conviction for attempt (unlawful possession of a converted vehicle) and 2008 obstruction-of-justice conviction. Additionally, the court allowed into evidence Sims' 2001 conviction for aggravated battery and 2005 conviction for unlawful possession of a controlled substance with intent to deliver. In allowing these prior convictions into evidence, the court stated the probative value outweighed the danger of unfair prejudice because the case involves an issue of witness credibility, and these convictions were more recent offenses. The record indicates the court did not mechanically apply the balancing test when it determined the admissibility of the prior convictions. Consequently, the court properly applied the *Montgomery* requirements, and no colorable argument can be made the court erred by admitting the prior convictions.

Additionally, in *People v. Patrick*, 233 Ill. 2d 62, 74-75, 908 N.E.2d 1, 8 (2009), the court held the trial court abused

its discretion when it refused to determine the issue of admissibility of prior convictions until after defendant testifies. Here, the trial court correctly addressed the motion *in limine* prior to trial instead of deferring the ruling until a later stage of the proceeding.

C. Sufficiency of the Evidence

OSAD contends no colorable argument can be made that defendant was not proved guilty beyond a reasonable doubt. We agree.

For a criminal conviction to be set aside, the evidence must be so improbable or unsatisfactory that a reasonable doubt of defendant's guilt remains. *People v. Jimerson*, 127 Ill. 2d 12, 43, 535 N.E.2d 889, 903 (1989). However, it is not this court's function to retry a defendant. *Jimerson*, 127 Ill. 2d at 43, 535 N.E.2d at 903. The trier of fact is responsible for making determinations of witness credibility and drawing reasonable inferences from the evidence. *Jimerson*, 127 Ill. 2d at 43, 535 N.E.2d at 903. This court must carefully review the evidence at trial, while also giving consideration to the trier of fact's opportunity to observe and hear the witnesses. *People v. Young*, 128 Ill. 2d 1, 48, 538 N.E.2d 461, 472 (1989). When presented with a challenge to the sufficiency of the evidence, the question on review is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact

could have found the essential elements of the crime beyond a reasonable doubt." *People v. Byron*, 164 Ill. 2d 279, 299, 647 N.E.2d 946, 956 (1995).

To sustain a conviction for aggravated battery of a police officer, the State must prove the defendant knowingly made insulting or provoking contact with a police officer. 720 ILCS 5/12-3, 12-4(b)(18) (West 2008). During defendant's trial, Officer Lewellyn and Officer Wittmer both testified defendant's actions of repeatedly hitting them with his wheelchair were both insulting and provoking. Additionally, both officers testified that they were in full police uniform during the altercation. Although defendant and Sims contradicted the officers' testimony, it was the jury's function to determine the credibility of each witness. Despite the contradictory testimony, the jury had sufficient evidence to find defendant guilty of aggravated battery beyond a reasonable doubt.

D. Defendant's Sentence

Last, OSAD contends no colorable argument can be made the trial court erred in sentencing defendant to six years in prison on each count of aggravated battery. We agree.

"A trial court's determination regarding the length of a defendant's sentence will not be disturbed unless the trial court abused its discretion or relied on improper factors when imposing a sentence." *People v. Smith*, 318 Ill. App. 3d 64, 74,

740 N.E.2d 1210, 1218 (2000). A court's sentencing decision is afforded great weight. *Smith*, 318 Ill. App. 3d at 74, 740 N.E.2d at 1218. In determining an appropriate sentence, the court must equally weigh defendant's history, defendant's character, defendant's rehabilitative potential, the seriousness of the offense, the need to protect society, and the need for deterrence and punishment. *People v. Bowman*, 357 Ill. App. 3d 290, 303, 827 N.E.2d 1062, 1076 (2005).

On June 9, 2009, defendant was convicted of two counts of aggravated battery of a police officer. On July 28, 2009, the trial court sentenced defendant to serve concurrent terms of six years in prison on each aggravated-battery count. This was the minimum mandatory term for the charges. Accordingly, no legitimate argument can be made the trial court abused its discretion.

Defendant was sentenced within the sentencing range for aggravated battery against a police officer. Under section 12-4(e)(2) of the Criminal Code, aggravated battery of a police officer constitutes a Class 2 felony. 720 ILCS 5/12-4(e)(2) (West 2008). However, defendant was sentenced as a Class X offender because he had at least two previous Class 2 or higher felony convictions. According to section 5-5-3(c)(8) of the Unified Code of Corrections (Unified Code), when a defendant is convicted of a Class 1 or Class 2 felony, after having twice been convicted of a Class 2 or greater class felony, the defendant

must be sentenced as a Class X offender. 730 ILCS 5/5-5-3(c)(8) (West 2008). Under section 5-8-1(a)(3) of the Unified Code, the sentencing range for a Class X felony is 6 to 30 years in prison. 730 ILCS 5/5-8-1(a)(3) (West 2008). After the trial court considered all aggravating and mitigating factors, defendant was sentenced to the minimum sentence of six years in prison on each count. Because defendant's sentence was within the sentencing range for a Class X felony, and the court did not rely on improper factors when imposing defendant's sentence, no colorable argument can be made the court erred in determining defendant's sentence.

III. CONCLUSION

For the reasons stated, we grant OSAD's motion to withdraw and affirm the trial court's judgment.

Affirmed.