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FIFTH DIVISION
May 27, 2011

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	No. 05 CR 27655
)	
OSCAR GRISSETT,)	Honorable
)	Sharon Sullivan,
Defendant-Appellant.)	Judge Presiding.

JUDGE EPSTEIN delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Howse concurred in the judgment.

ORDER

Held: Trial court's failure to conduct inquiry described in *People v. Medina* did not rise to the level of plain error; thus, defendant forfeited review of issue. Where court could not consider matters outside of the record, defendant failed to establish ineffective assistance of counsel. Trial court's decision to delay ruling on State's motion to include defendant's prior convictions did not rise to level of plain error; thus defendant forfeited review of issue.

Following a jury trial, defendant Oscar Grissett was acquitted of aggravated robbery and convicted of theft, and sentenced to 9 years and 6 months in prison. On appeal, defendant

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contends that (1) he was denied a fair trial when the trial judge failed to admonish him about his right to decide whether to offer a jury instruction on the lesser-included offense of theft, and (2) he is entitled to a new trial pursuant to *People v. Patrick*, 233 Ill. 2d 62 (2009). We affirm.

BACKGROUND

Defendant was charged with one count of aggravated robbery. At trial, Renay Kerkman, testified that, on November 15, 2005, she worked from 3 p.m. until 10 p.m. at the Hollywood Lounge. Afterwards, she talked with her boss and a co-worker for a “couple [of] hours,” went to a restaurant with the co-worker and then drove him home. Before driving back to her neighborhood near North and Damen in Chicago, she stopped at a Citgo gas station at Kedzie and Bryn Mawr. At around 3 a.m. on November 16, 2005, she parked her car on Wabansia Street, east of Milwaukee Avenue, two and a half to three blocks from her apartment.

She left her car, locked it, and walked east on the south sidewalk of Wabansia towards Damen. The street was deserted except for one other person walking northbound on Damen, “sort of erratically and zigzagging.” She identified the other person as the defendant, Oscar Grissett. He crossed Wabansia and then started to “zigzag” back toward her fast and she saw that he had a gun. He then pushed her into a doorway between two hedges, pulled the gun up to the left side of her head, and said, “Give me your purse.”

Ms. Kerkman testified that she believed the gun was a real gun and urinated in her pants because she thought she was going to die. When Mr. Grissett told her to give him her purse, Ms. Kerkman told him her money was not in her purse and that it was in her pocket. When Mr. Grissett then said to give him her money, she reached in her pocket and handed him a “wad” of

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money in the amount of \$30.

Mr. Grissett then ran west on Wabansia and Ms. Kerkman ran east towards Damen. When she reached Damen Ms. Kerkman took her cell phone out of her purse, dialed 911, and told the operator that she had been robbed and that someone had pointed a gun at her. She also provided her location and described the person as a black male with a blue wind breaker and a knitted hat. She told the operator that he had a gun and had taken \$30 or a “wad” of money from her and she had seen him going westbound on Wabansia.

Although the operator told Ms. Kerkman to remain where she was, she testified that she ran toward her apartment because she was afraid Mr. Grissett would return. She testified that, as she got halfway toward North Avenue, she saw him peeking out from a doorway. As she continued running down the middle of Damen Street toward North Avenue, a police car turned north on Damen from North Avenue and she flagged it down.

Ms. Kerkman testified that she told the police she had been robbed, described the person, said he had a gun, had taken \$30 from her, and ran west on Wabansia. She then drove with the officers to the location where her car was parked and saw about ten squad cars there. She saw defendant there in the middle of the street and identified him as the person who had robbed her at gunpoint. The police then drove her to the police station where they returned her \$30 in an envelope.

Mr. Grissett testified to a different version of events. He testified that shortly before midnight on November 15, 2005, he was at work at the Howard Area Community Center at Howard and Paulina. He finished work at 2 a.m. on November 16 and headed home in his car.

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He lived on North Pulaski in Chicago. He stopped at a Gas Depot at North Avenue and Ashland. He went inside the store, saw Ms. Kerkman and struck up a conversation because he liked her. They talked while waiting in line to pay for their purchases and continued talking when they left the store. Mr. Grissett asked her if she would like to get a cup of coffee across the street at the Hollywood Grill. She agreed but said she wanted to make a quick stop first. She asked him to follow her in his car. He followed her down North Avenue to Milwaukee, then to Hoyne, then to Wabansia. She parked her car and then got in the front seat of Mr. Grissett's car on the passenger side.

Mr. Grissett testified that he was planning to go back to the Hollywood Grill, but that once Ms. Kerkman got in his car, she asked him to go buy drugs. That was the first time she had ever said that to him. Mr. Grissett testified that she gave him \$10 and he assumed that she probably wanted some marijuana. When he asked, she said, no, she wanted a "blow," which is a street term for heroin.

Mr. Grissett testified that he became upset because he felt like he was being used and had thought she was in the car because she liked him and wanted to talk to him. He stopped his car at Damen and Wabansia, parked and told her to get out because he felt she was using him. She did not get out of the car. There were unfriendly words between the two, so Mr. Grissett got out of his car. He then stood at the front hood of his car because he was upset that she would not leave his car. He stood there for two or three minutes.

Mr. Grissett then testified that before he went to the front of his car, Ms. Kerkman had said that she was going to call the police. He testified that he responded "call the police, you

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[sic] the one trying to get high.” He also testified that in an effort to get her out of the car, he had “indicated like I had a gun.” He was shown People’s Exhibit No. 1 and testified that it was a toy gun that he had in his car. According to Mr. Grissett, the reason he had it in his car was because of where he lived and that “a lot of drug dealings, crime, a lot of stuff going on over there.”

Defendant stated that after Ms. Kerkman said she had called the police, she got out of the car and he then locked the doors to prevent her from getting back in. He then went back to the driver’s side, got in and drove away. He testified that he did not return her \$10.

Mr. Grissett testified that he drove down an alley towards where she parked her car because he was upset and was saying to himself “I’m going to let her walk back to her car and maybe give her her money back.” He said that he never returned to her car because as he was driving in the alley going back towards where she had parked her car, he saw a police car. He was later arrested and testified that, at that time, he had \$20 of his own and Ms. Kerkman’s \$10.

On cross examination, Mr. Grissett testified that, later at the police station, he told a detective that he took money from Ms. Kerkman and decided he was going to keep her money. He also testified that he told the detective that she was asking for her money back and he refused to give her her money back.

In rebuttal, the State called Detective Murphy to testify about defendant’s initial statement following his arrest. The detective testified that Mr. Grissett did not say that he and Ms. Kerkman had agreed to go for coffee. Instead, he said that Ms. Kerkman approached him on foot outside the gas station and asked him for crack cocaine. Defendant did not mention “blows” or heroin. He did describe Ms. Kerkman’s car and told the detective that he followed her while

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she was in her car. He also told the detective that Ms. Kerkman gave him money for drugs and he decided to keep it. Detective Murphy said Mr. Grissett claimed that this caused Ms. Kerkman to get mad and they had an argument, during which he showed her the butt handle of a toy gun to get her out of his car.

During the jury instruction conference, at which defendant was present, defense counsel requested an instruction for theft and the State objected. The State contended that the crime was a robbery even under Mr. Grissett's version since Ms. Kerkman would not leave Mr. Grissett's car without her money until she was shown the gun, which was a threat of force. The trial judge gave the theft instruction over the State's objection. The trial judge did not ask defense counsel whether he had advised defendant of the potential penalties associated with the lesser offense or ask Mr. Grissett whether he agreed with the tender. The jury found defendant not guilty of aggravated robbery and guilty of theft.

After the jury was discharged, defense counsel addressed the court as follows:

“[DEFENSE COUNSEL]: Your Honor?

[THE COURT]: Yes.

[DEFENSE COUNSEL]: In regards to the matter, the jury found [defendant] guilty of theft and it was only \$10. I would argue that this is a misdemeanor theft. He has served over a one-year sentence on this matter. I would ask - -

[THE COURT]: It's theft of [*sic*] person.

[DEFENSE COUNSEL]: Theft of [*sic*] person. Theft.

[THE COURT]: State, do you want to respond?

[ASSISTANT STATE’S ATTORNEY]: Judge, according to the statute, theft of property from a person not exceeding \$300 in value is a Class 3 felony.

[THE COURT]: That is my understanding.

[DEFENSE COUNSEL]: Your Honor – okay. I’ll stand on what I indicated before in regards to this matter.

[THE COURT]: I believe that the – it’s 516-1(a). Under (b)(4), it reads, “Theft of property from the person not exceeding \$300 in value or theft of property exceeding \$300 in value and not exceeding \$10,000 in value is a Class 3 felony.

[DEFENSE COUNSEL]: I understand. I understand, your honor.”

Mr. Grissett later was sentenced to 9 years, 6 months in prison. This appeal followed.

ANALYSIS

I. *People v. Medina*

Defendant first argues that he was denied a fair trial because the trial court failed to admonish him about his right to decide whether to offer a jury instruction on the lesser-included offense of theft. In support of this argument, defendant cites *People v. Medina*, 221 Ill. 2d 394 (2006) and *People v. Brocksmith*, 162 Ill. 2d 224 (1994). This is a case of first impression.

In *Brocksmith*, our supreme court concluded that the decision to tender an instruction on a lesser-included offense belongs to a defendant rather than defense counsel.¹ The *Brocksmith*

¹This court, in *People v. Turner*, 337 Ill. App. 3d 80 (2003), has subsequently noted that the *Brocksmith* court relied upon the ABA Standards for Criminal Justice sec. 4-5.2, Commentary, at 4-68 (2d ed. 1980) which stated: “It is also important in a jury trial for the defense lawyer to consult fully with the accused about any lesser-included offenses the trial court may be willing to submit to the jury. Indeed, because this decision is so important as well as so

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court stated that the decision to tender a jury instruction on a lesser-included offense is analogous to the decision to plead guilty to a lesser charge, since both decisions “directly relate to the potential loss of liberty on an initially uncharged offense.” *Brocksmith*, 162 Ill. 2d at 229.

Subsequently, in *Medina*, the supreme court stated:

“Where a lesser-included offense instruction is tendered, a defendant is exposing himself to potential criminal liability, which he otherwise might avoid, and is in essence stipulating that the evidence is such that a jury could rationally convict him of the lesser-included offense. Consequently, when a lesser-included offense instruction is tendered, we believe the trial court should conduct an inquiry of defense counsel, in defendant's presence, to determine whether counsel has advised defendant of the potential penalties associated with the lesser-included offense, and the court should thereafter ask defendant whether he agrees with the tender.” *Medina*, 221 Ill. 2d at 409. (*Medina* inquiry)

Thus, a trial court should take two steps when a lesser-included offense instruction is tendered by defense counsel: (1) ask defense counsel, in the defendant's presence, “whether counsel has

similar to the defendant's decision about the charges to which to plead, the defendant should be the one to decide whether to seek submission to the jury of lesser-included offenses.” The *Turner* court observed that section 4-5.2 was subsequently revised and the commentary following the current version now states only: “It is also important in a jury trial for defense counsel to consult fully with the accused about any lesser-included offenses the trial court may be willing to submit to the jury.” ABA Standards for Criminal Justice § 4-5.2, Commentary, at 10 (3d ed.1993). Courts in other jurisdictions have declined to follow *Brocksmith* based upon its reliance on the now “outdated edition of the ABA standards” (*Arko v. People*, 183 P.3d 555, 560 (Colo. 2008) or “on the pre-1993 ABA commentary, without addressing or acknowledging the current commentary.” *Simeon v. State*, 90 P.3d 181, 184 (Alaska App. 2004).

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advised the defendant of the potential penalties associated with the lesser-included offense”; and (2) then ask the defendant “whether he agrees with the tender.” *Medina*, 221 Ill. 2d at 409. This required inquiry has been described as a “procedural safeguard for the right created in *Brocksmith*.” See *People v. DuPree*, 397 Ill. App. 3d 719, 731 n.1 (2010).

The State concedes the trial court here did not conduct the inquiry described in *Medina*, but contends that: (1) defendant has forfeited review of this issue, and (2) the trial court did not commit any error. Where, as here, there is no factual dispute regarding the content of the admonitions, our standard of review is *de novo*. See *People v. DePaolo*, 317 Ill. App. 3d 301, 310 (2000), citing *People v. Smith*, 191 Ill. 2d 408, 411 (2000).

A. Forfeiture

We first address the State’s argument that defendant has forfeited the issue of the trial court’s failure to conduct the *Medina* inquiry by failing to object at trial and failing to include this allegation in his motion for a new trial. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Defendant concedes this to be the case but, citing *People v. Whitfield*, 217 Ill. 2d 177 (2005), argues that this court should find that no forfeiture occurred because a defendant need not ensure the adequacy of his own admonishments.

In *Whitfield*, the Illinois Supreme Court addressed the forfeiture issue in the context of a postconviction proceeding. The defendant there had pleaded guilty to first degree murder and armed robbery pursuant to a negotiated plea agreement with the State, but the trial court had failed to admonish the defendant that he was required to serve a three-year mandatory supervised release (MSR) term. The defendant did not file a postjudgment motion to withdraw his guilty

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plea or a direct appeal. However, while in prison, he learned of the three-year MSR term and filed a motion for relief from judgment that was treated as a postconviction petition. The *Whitfield* court concluded, “it would be incongruous to hold that defendant forfeited the right to bring a postconviction claim because he did not object to the circuit court’s failure to admonish him.” *Whitfield*, 217 Ill. 2d at 188. The *Whitfield* court stated, “To so hold would place the onus on defendant to ensure his own admonishment in accord with due process.” *Id.*

Whitfield is distinguishable both factually and procedurally. Factually, the defendant in *Whitfield* could not have raised the error in a motion to withdraw his plea or a direct appeal because it was not until he was in prison that he learned of the MSR term. See *People v. Newman*, 365 Ill. App. 3d 285, 290 (2006) (noting that the supreme court's forfeiture decision in *Whitfield* was based upon the particular facts of that case). Procedurally, *Whitfield* involved a postconviction proceeding in which the defendant had failed to file either the requisite postjudgment motion or direct appeal. The instant case is a direct appeal. Also, defendant filed a posttrial motion and failed to raise the issue.

In *People v. Bannister*, 232 Ill. 2d 52 (2008), which involved a direct appeal, defendant argued that his jury waiver was not knowing and voluntary because the trial court incorrectly informed him of the minimum and maximum penalties for his several charged offenses. The *Bannister* court concluded that defendant forfeited review of his challenge to the incorrect admonitions by the trial court because defense counsel failed to object at trial and failed to include some of them in his posttrial motion. *Bannister*, 232 Ill. 2d at 64-65. The supreme court has also explained that “the mere fact that an alleged error affects a constitutional right does not

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provide a separate ground for review, for ‘even constitutional errors can be forfeited.’ ”

[Citation.] *People v. Cosby*, 231 Ill. 2d 262, 272-73 (2008). Thus, we conclude that defendant here has forfeited review of the issue of the trial court’s noncompliance with the *Medina* inquiry.

B. Plain Error

In a criminal case, a forfeited issue may still be raised on appeal under Supreme Court Rule 615(a) (134 Ill. 2d R. 615(a)), which provides:

“Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court.”

Thus, where a defendant forfeits review, the reviewing court can consider an issue under the doctrine of plain-error. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). The plain-error rule, however, is not a general savings clause that preserves review of all errors affecting substantial rights. *People v. Herrett*, 137 Ill. 2d 195 (1990). Plain-error applies only

“when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant’s trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.” *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

Before a defendant is entitled to application of the plain-error doctrine, the court must consider whether any error occurred at all. *People v. Hudson*, 228 Ill. 2d 181, 191 (2008).

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In asserting that there was no error here, the State relies on *People v. DePaolo*, 317 Ill App. 301 (2000), *People v. Castillo*, 298 Ill. App. 3d 839 (1998), and *People v. Sinnott*, 226 Ill. App. 3d 242 (1992) for the proposition that the trial court has the discretion to ask the questions in the *Medina* inquiry. These cases predate *Medina* and the State's argument fails to recognize the distinction, as discussed by the *Medina* court, between the trial court's responsibilities in the situation where a defendant *does not* tender a lesser-included offense instruction and the entirely different situation where the defendant *does* tender the instruction. In the first instance, the trial court need not generally admonish the defendant because a trial court inquiring into the decision *not* to tender the instruction runs the risk of "improperly intruding on the attorney-client relation and interfering with the defense strategy counsel has pursued." *Medina*, 221 Ill. 2d at 409. In sum, when a defendant does not tender a lesser-included offense instruction, the trial court generally should not interfere with what might be a defense strategy and need not give generalized admonishments to the defendant, but the trial court *should* ask the *Medina* questions when the instruction *is* tendered by defense counsel due to the potential criminal liability created by the decision. The distinction between these two situations has been recognized by other courts. See *People v. DuPree*, 397 Ill. App. 3d 719 (2010) and *McDonald v. McCann*, 2008 WL 4696164 (N.D. Ill. May 16, 2008). In *People v. DuPree*, the defendant, in a post-conviction proceeding, argued that he had a right to attend the jury instructions conference to protect the right created in *Brocksmith*. While the issue here is different, the *DuPree* court's discussion of *Medina* is instructive. The *DuPree* court recognized that *Medina* had not modified the general rule that a trial court need not inquire if a defendant has voluntarily waived a jury instruction on a

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lesser-included offense, but noted that an inquiry is required when a lesser-included offense instruction has been sought. The *DuPree* court clarified that, with respect to the proposition “that no such duty of inquiry exists *at all*, it has been superseded by *Medina*.” (Emphasis added.) *DuPree*, 397 Ill. App. 3d at 731, n.1. In *McDonald v. McCann*, 2008 WL 4696164 at 10 (N.D. Ill. 2008), the court recognized that the Supreme Court of Illinois had “distinguished between the decision to tender a jury instruction on a lesser-included offense (analogous to a guilty plea) and the decision not to tender a jury instruction on a lesser-included offense (trial strategy).”

The State also asserts that there was no error here because, since the defendant in *Medina* did not tender a lesser-included offense instruction, the *Medina* guidelines are *dicta*. “*Dicta* is a much maligned legal expression.” *Wolf v. Meister-Neiberg, Inc.*, 194 Ill. App. 3d 727, 730 (1990). Even if the *Medina* guidelines could be deemed *dicta*, they are judicial *dicta*. See *Wolf v. Meister-Neiberg, Inc.*, 194 Ill. App. 3d at 730 (“If a particular rule stated in a case is the expression of opinion upon a point in a case deliberately passed on by the court it is judicial *dictum*”). Judicial *dicta* have the force of a determination by a reviewing court and should receive dispositive weight in a lower court. *People v. Williams*, 204 Ill. 2d 191, 206-207 (2003) citing *Cates v. Cates*, 156 Ill. 2d 76, 80 (1993). Thus, because defendant’s counsel here *did* tender a lesser-included offense instruction, the trial court was required to follow *Medina* by asking defense counsel, in defendant's presence, whether counsel had advised defendant of the potential penalties associated with the lesser offense; and, additionally, by then asking defendant whether he agreed with the tender.

The State additionally contends, however, that because the *Medina* court listed questions

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that “should” be asked, and did not state that they “shall” be asked, the inquiry established in *Medina* is not a mandatory requirement but simply “provides guidelines” to trial judges. The State argues that the inquiry in *Medina* is permissive, and additionally argues that the inquiry is directory. In cases involving statutory construction, our supreme court has explained that the issue of whether statutory language is mandatory or directory is separate from the question of whether a statute is mandatory or permissive. *People v. Ousley*, 235 Ill. 2d 299, 310 (2009); *People v. Robinson*, 217 Ill. 2d 43, 51 (2005). The State seeks to impose principles of statutory construction upon our interpretation of a supreme court opinion. The State has not cited, nor has our own research found, any case that follows such an analysis. We agree with defendant that “[n]othing in the [*Medina*] Court’s opinion portrays those questions as optional, and the Court clearly did not intend that a defendant’s fundamental rights be protected only when the trial judge so chooses.” It is our view that the supreme court, in listing the questions that “should” be asked when a lesser-included offense instruction is tendered, in the context of the extensive discussion and the analogy to a plea of guilty, intended to make the inquiries obligatory, not permissive or discretionary. Nor does the reference to the *Medina* inquiry as a “directive” by the court in *People v. Calderon*, 393 Ill. App. 3d 1, 11 (2009) change our conclusion. The *Calderon* court later characterized the *Medina* questions as “necessary.” *Calderon*, 393 Ill. App. 3d at 11. We conclude that the trial court’s failure to conduct the *Medina* inquiry constituted an error.

We next consider whether the trial judge’s error rises to the level of plain error. Under both prongs of the plain-error doctrine, “the burden of persuasion remains with the defendant.” *Id.*, quoting *People v. Herron*, 215 Ill. 2d at 187. Defendant here raises both prongs.

Under the first prong, where the evidence is closely balanced, the question is whether the “error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error.” *Piatkowski*, 225 Ill. 2d 565. Defendant asserts that, absent the lesser-included instruction, the jury could not have reached the same result. The “error” here, however, is not the submission of the lesser-included offense instruction of theft. The “error” is the trial court’s failure to follow the procedure described in *Medina* to ascertain if counsel advised defendant of the potential penalties associated with the offense of theft and to assure that the decision to tender the instruction on theft was that of defendant, and not his counsel. From this record, without knowing what was actually communicated to defendant by his attorney, we cannot say that, had the *Medina* inquiry been made, the instruction would not have nevertheless been submitted. It is entirely possible that both defense counsel here would have answered in the affirmative had the trial court asked him if he had advised defendant of the potential penalties. It is also possible that defendant, if he had been asked by the trial court, would have stated he agreed with the decision to tender the theft instruction. Thus, we cannot say that the error, *i.e.*, the trial court’s failure to conduct the *Medina* inquiry threatened to tip the scales of justice against the defendant. More importantly, the evidence in this case was not closely balanced, despite the differences between Ms. Kerkman’s testimony and that of defendant. Defendant testified that he refused to give Ms. Kerkman her money, admitted he had a toy gun in his vehicle and testified that he showed her the gun. Defendant has failed to satisfy his burden of showing the first prong of plain error applies here. As a final matter, we note that the submission of the theft instruction may well have provided substantial benefit to defendant by providing the jury

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with an option to avoid conviction on the greater charge of aggravated robbery.

We next address whether defendant has satisfied his burden under the second prong of the plain-error doctrine by showing that the trial court's error in failing to follow the *Medina* procedure was "so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *Piatkowski*, 225 Ill. 2d at 565.

The stated purpose of the *Medina* inquiry is "to determine whether counsel has advised defendant of the potential penalties associated with the lesser-included offense, and *** whether [the defendant] agrees with the tender [of the lesser-included offense instruction.]" *Medina*, 221 Ill. 2d at 409. The ultimate purpose of this procedure is to protect the right established in *Brocksmith*, and reaffirmed in *Medina*, – a defendant's right to make the decision of whether to tender a lesser-included offense instruction. The *Brocksmith* and *Medina* courts expressly concluded that a defendant's decision to tender a lesser-included offense instruction is analogous to a defendant's decision to enter a plea of guilty.

Despite the analogy to a guilty plea, however, we believe that there are distinctions which impact our analysis. Where a defendant pleads guilty, the required admonitions have been codified in Supreme Court Rule 402 (134 Ill. 2d R. 402). There is no similar supreme court rule pertaining to the procedure described in *Medina* in the instance where a defendant tenders a lesser-included offense instruction. Additionally, during the hearing on a plea of guilty, a court is required to provide admonitions to a defendant, which include "the minimum and maximum sentence prescribed by law." Supreme Court Rule 402(a) (177 Ill. 2d R. (402(a))). *Medina* imposes no similar requirement upon the trial court to provide direct admonitions to the

defendant regarding the minimum and maximum sentence prescribed by law. Instead, *Medina* states that the trial court's function is to ascertain if *counsel* has so informed the defendant of the potential penalties. This latter distinction is understandable since the concern of the *Medina* court was to "strike the appropriate balance of inquiry and confirmation without overreaching and undue intervention in the attorney-client relationship." *Medina*, 221 Ill. 2d at 409.²

Nonetheless, because the supreme court has analogized a defendant's decision to tender a lesser-included offense instruction to a defendant's decision to enter a plea of guilty, we look for guidance to those cases involving the consequences that have followed from the trial court's failure to provide the proper admonitions during the hearing on a plea of guilty. Both parties here cite *People v Davis*, 145 Ill. 2d 240 (1995), in which the court applied plain-error review in a case involving a plea of guilty.

In *Davis*, the defendant moved to vacate his plea of guilty based upon the trial court's incorrect admonition regarding his sentence. The *Davis* court stated:

"The failure to properly admonish a defendant, alone, does not automatically establish grounds for reversing the judgment or vacating the plea. [Citation.]

Consequently, the fact that the court improperly admonished defendant as to his minimum sentence should not, in and of itself, provide grounds for reversal of the

²We also note that the *Medina* admonition is not a guarantee that counsel has correctly advised defendant of the possible penalties on the lesser offense. A mistaken impression by defense counsel would not be discovered by simply asking counsel if he had informed his client of the potential penalties. Assurance of defendant's knowledge of the penalties could only be achieved through the court stating those potential penalties directly to the defendant, an obligation that *Medina* does not place on the court.

trial court's decision. Whether reversal is required depends on whether real justice has been denied or whether defendant has been prejudiced by the inadequate admonishment. [Citation.]" *Davis*, 145 Ill. 2d at 250.

Accord Medina, 221 Ill. 2d at 407, quoting *Whitfield*, 217 Ill. 2d 177 (“ ‘an imperfect admonishment is not reversible error unless real justice has been denied or the defendant has been prejudiced by the inadequate admonishment’ ”). After first concluding that the error was reversible, the *Davis* court concluded that plain error was present and affirmed the decision of the appellate court which had reversed and remanded to allow defendant to withdraw his plea. The factual and procedural differences between the instant case and *Davis* renders it helpful but not dispositive. *Davis* clarifies that an improper admonishment during a guilty plea is not grounds for automatic reversal.

Faced with this record, where it is unclear who made the ultimate decision to tender the lesser-included offense instruction, we find relevant the court's analysis in *People v. Williams*, 275 Ill. App. 3d 242 (1995). Despite it being a pre-*Medina* decision, we believe the *Williams* analysis of *Brocksmith* applies equally to the present case. In *Williams*, after a tentative decision had been made to submit a lesser offense instruction, defense counsel made a strategic decision not to include the instruction. Defendant argued on appeal that *Brocksmith* mandated automatic reversal, but the court disagreed. As the court explained: “The record before us is inconclusive on the issue that controlled in *Brocksmith*: who made the ultimate decision not to tender the instruction on a lesser offense.” *Williams*, 275 Ill. App. 3d at 246.

The *Williams* court distinguished the *Brocksmith* case and explained that, in making its

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decision, the *Brocksmith* court noted that it was uncontested that defense counsel, and not the defendant, had made the ultimate decision to tender the lesser-included offense instruction. *Id.* In *Brocksmith*, which involved a post-conviction proceeding, the affidavits of both defense counsel and defendant showed the decision had not been defendant's. Defendant's affidavit explicitly stated that he was not asked to make a decision on whether to tender a lesser-included offense instruction and, had he been asked, he would not have agreed to submit it. *Id.* Similar to the instant case, the record in *Williams* contained "nothing comparable" to the affidavits in *Brocksmith*.

The *Williams* court concluded:

We will not assume, as the defendant urges, that the silence of the defendant, coupled with the trial court's characterization of the decision as a strategic one made by defense counsel, is conclusive. We could just as well assume from this record that trial counsel consulted fully with his client, assessed the risks of tendering or not tendering the instruction, and that the defendant made the ultimate decision after weighing his lawyer's advice. That is what *Brocksmith* requires. *Williams*, 275 Ill. App. 3d at 247.

Although *Medina* has now created a procedural safeguard for the defendant's right to make the decision to tender the lesser-included offense, the trial court's failure to follow that procedure does not mandate automatic reversal, similar to cases of incorrect admonishments in a guilty plea case as earlier discussed.

While an individual defendant's right to make the personal decision to tender a lesser-

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included offense instruction might be injured by the trial court's failure to ask the questions that the *Medina* court said a trial court "should" ask, defendant has not shown that to be the case here. Rather, he essentially requests automatic reversal. We decline to do so as there is no indication in the record here that defendant did not make the decision to tender the instruction. More importantly, defendant does not claim that he did not make the decision. Even though defendant was present at the jury instructions conference, he essentially argues that the trial court's failure to ask him if he agreed with the tender, *automatically* means he did not agree to the tender. The trial court's failure to ask the question does not mean that defendant did not *in fact* make the decision to submit the instruction on the lesser offense. If the record showed, as it did in *Brocksmith*, that defendant did not in fact make the decision, our disposition would be different. In the context of the record before this court, on a direct appeal, defendant has failed to establish that he was denied a fair trial as the result of the trial court's error here in failing to conduct the *Medina* inquiry. Defendant has not established his burden of showing that the trial court's failure to follow the procedure outlined in *Medina* was "so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *Piatkowski*, 225 Ill. 2d at 565

Our decision is in conformance with our supreme court's reasoning in *People v. Thompson* in which, despite the trial court's error, *i.e.* violating Supreme Court Rule 431(b) by not correctly questioning potential jurors, defendant had failed to establish that the trial court's error resulted in a biased jury. *Thompson*, 238 Ill.2d at 615. The court held that under the second prong of plain error review, defendant failed to meet his burden of showing the error affected the

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fairness of his trial and challenged the integrity of the judicial process. *Id.* The same analysis applies in the instant case.

In sum, neither prong of plain-error review provides a basis for excusing defendant's procedural default. Where a defendant fails to satisfy his burden of showing plain error, the result is that the “ ‘procedural default must be honored. ’ ” *People v. Walker*, 232 Ill. 2d 113, 124 (2009), quoting *People v. Keene*, 169 Ill. 2d 1, 17 (1995). Thus, defendant has forfeited this issue.

C. Ineffective Assistance of Counsel

We next address defendant's alternative argument that he was denied the effective assistance of counsel. In order to establish ineffective assistance of counsel, a defendant must satisfy a two-prong test and show both that: (1) as determined by prevailing professional norms, counsel's performance fell below an objective standard of reasonableness; and (2) the defendant was prejudiced by counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687–88, 104 S. Ct. 2052, 2064–65, 80 L. Ed.2d 674, 693–94 (1984) (adopted by the Illinois Supreme Court in *People v. Albanese*, 104 Ill. 2d 504, 525–26 (1984)). Whether a trial counsel rendered ineffective assistance is a separate and distinct issue from the trial court's failure to ascertain whether the decision to tender was made by defendant. See *Williams*, 275 Ill. App. 3d at 247. Again, defendant makes no claim that: (1) his counsel failed to advise him of the potential penalties associated with the lesser-included offense of theft; (2) his counsel did advise him but misinformed him of the penalties; or (3) he did not agree with the tender of the lesser-included offense instruction. Instead, in his opening brief, he merely claims counsel was

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ineffective for tendering the instruction without obtaining defendant's "on-the-record" consent. Defendant then apparently concludes that this failure to obtain the on-the-record consent via the *Medina* inquiry, resulted in his conviction for theft. In a separate section of his opening brief, defendant also claims "it is evident that counsel could not have correctly advised Grissett of the sentencing range: after the jury convicted Grissett of theft, counsel asked for Grissett's release, saying that he believed the offense was a misdemeanor [as opposed to a Class 3 felony]." Thus, he argues that this court should reject the State's request that we "presume that Grissett's trial attorney followed the law and adequately advised Grissett about the potential consequences of the tender." Nonetheless, defendant himself is essentially requesting this court "presume" the opposite, namely, that trial counsel did not adequately advise defendant about the potential consequences of the tender.

Again we find the analysis in *Williams* relevant here. As did the *Williams* court, we "confront a record from which the question cannot be answered." *Williams*, 275 Ill. App 3d at 247. As the *Williams* court explained:

"If the record showed that the ultimate decision not to submit the instruction was made as a matter of trial strategy by trial counsel, we would reverse under the holding in *Brocksmith* without reaching the inefficiency issue. If the record revealed that the decision was made by the defendant, but that the decision would not have been made but for the ineffective assistance of counsel, we could, perhaps, even after *Brocksmith*, address the issue. This record does not support either alternative. *Id.*

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While we will not “presume” defendant’s trial counsel misinformed him based on counsel’s “apparent” misapprehension of the penalty associated with the requested offense of theft, defendant is not left without any recourse. Assuming *arguendo*, the decision to tender the lesser-included offense instruction would not have been made but for the ineffective assistance of counsel and the determination of defendant’s ineffective assistance claim requires affidavits and consideration of matters outside the record, defendant may raise this claim in a postconviction proceeding.

In sum, we conclude that the trial court’s failure to follow the procedure outline in *Medina* when a defendant tenders a lesser-included offense instruction did not deny defendant a fair trial.

II. *People v. Patrick*

We next address defendant’s argument that the decision in *People v. Patrick*, 233 Ill. 2d 62 (2009) mandates a new trial because the trial judge refused to rule on the admissibility of his prior convictions until after the State’s case-in-chief. As a threshold matter, defendant did not file a motion *in limine*, object to the trial judge’s decision to delay its ruling until the close of the State’s case-in-chief, or raise the issue in a posttrial motion. To preserve an issue for review, a defendant must raise it before the trial court in a motion *in limine* or an objection at trial, and also in a post-trial motion. *People v. Johnson*, 238 Ill. 2d 478, 484 (2010); *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Thus, defendant has forfeited this issue.

Defendant urges this court to review the issue as plain error. As discussed earlier, where a defendant forfeits review, the reviewing court can consider an issue under the doctrine of plain-

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error. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005).

In *People v. Patrick*, 233 Ill. 2d 62 (2009) our Supreme Court held that the trial court's "application of a blanket policy of refusing to rule on all motions *in limine* on the admissibility of prior convictions until after a defendant's testimony amounted to an abuse of discretion." *People v. Patrick*, 233 Ill. 2d 62, 74-75 (2009). Defendant contends that the instant case is "squarely on point" with *Patrick*. We disagree. Although *Patrick* is distinguishable for many reasons, the primary distinction is that the trial court here ruled on the admissibility of defendant's prior convictions *before* defendant testified. In *Patrick*, the trial court refused to rule on the admissibility of the defendant's prior convictions until after he testified. The record here shows the following additional distinctions: (1) the trial court here did not have a blanket policy of withholding rulings on motions *in limine* on the admissibility of prior convictions until after a defendant's testimony; (2) *Patrick* involved a defendant's motion *in limine*, while the instant case involves the State's motion; (3) the trial court here stated it was inclined to grant the State's motion to include defendant's prior convictions but would reserve ruling until after the State presented its case-in chief; (4) defendant did not object to the trial court's decision to delay its ruling; (5) during the hearing on the State's motion, as the trial court weighed the prejudice against the probative value of admitting defendant's prior convictions for burglary, aggravated possession of a motor vehicle, and murder, defendant only argued against the admission of his prior murder conviction; (6) the trial court ultimately ruled that defendant's prior conviction for murder was inadmissible; and (7) defendant did not object to the ruling.

We believe the instant case is similar to *People v. Lampley*, 405 Ill. App. 3d 1 (2010)

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(appeal pending), in which the trial court's ruling was made prior to the defendant's decision to testify. Under the facts of that case, the *Lampley* court concluded that "[b]ased on the record and the trial court's prompt consideration of the motion following denial of defendant's motion for directed verdict, under *Patrick*, we do not find that the trial court abused its discretion." *Lampley*, 405 Ill. App. 3d at 8. Nonetheless, the *Lampley* court assumed error and continued its plain error review. *Id.*

Although we do not believe that the trial court committed error in the instant case, defendant here, as did the defendant in *Lampley*, points to the *Patrick* court's discussion of the impact upon a defendant when a trial court delays ruling on his motion to exclude prior convictions. We note first that the *Patrick* court specifically addressed its holding to the situation where the trial court delays its ruling until *after* a defendant's testimony. In its discussion, however, the *Patrick* court also concluded that "a trial court's failure to rule on a motion *in limine* on the admissibility of prior convictions when it has sufficient information to make a ruling constitutes an abuse of discretion." *Patrick*, 233 Ill. 2d at 72. Defendant now contends that the trial court here abused its discretion because it had sufficient information to make a ruling on the State's motion before trial. The *Patrick* court also noted that the defendant there was substantially prejudiced because his counsel "was unable to inform the jury whether [the defendant] would testify and was anticipatorily unable to disclose [the defendant's] prior convictions to lessen the prejudicial effect the convictions would have on his credibility." *Patrick*, 233 Ill. 2d at 75. Defendant now asserts that because the trial court here did not rule on which, if any, of his prior convictions would be admissible, he was substantially prejudiced because he and

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his counsel “had to decide whether to tell the jury in opening statements that Grissett would testify and whether to mention his prior convictions as early as possible.” Thus, even if we assume error, “[t]he harm of any error *** is limited to defendant’s tactical decision to raise the issue of his prior convictions during opening statements.” *Lampley*, 405 Ill. App. 3d at 8. The *Lampley* court concluded that the “error was not so serious as to call into question the integrity of the judicial process.” *Id.* We believe the same is true in this case.

In *People v. Averett*, 237 Ill. 2d 1, 14 (2010) our supreme court concluded that the trial court’s error of having a blanket policy of refusing to rule on motions *in limine* until after hearing defendant’s testimony did not constitute “structural error.” Our supreme court has equated structural error with the second prong of plain error review, noting that “ ‘automatic reversal is only required where an error is deemed “structural,” *i.e.*, a systemic error which serves to “erode the integrity of the judicial process and undermine the fairness of the defendant’s trial. ” ’ ” *People v. Thompson*, 238 Ill. 2d 598, 613-614 (2010), quoting *People v. Glasper*, 234 Ill.2d 173, 197–98 (2009), in turn quoting *People v. Herron*, 215 Ill.2d 167, 186 (2005). Thus, *People v. Averett*’s conclusion that the trial court’s delay in ruling did not constitute structural error applies and we conclude that any error caused by the trial court’s delay in ruling on the admissibility of defendant’s prior convictions was not so serious that it affected the fairness of the defendant’s trial and challenged the integrity of the judicial process. *Cf. People v. Alexander*, 2011 WL 1346930 at 9 (noting that supreme court has equated second prong of plain error review with structural error and therefore, the discussion regarding structural error was applicable to consideration of the second prong of plain error review). Defendant has failed to establish his

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burden under the second prong of the plain error doctrine.

Because the trial court's delay in ruling on the admissibility of defendant's prior convictions until the end of the State's case-in-chief did not constitute plain error under either prong, there is no basis for excusing defendant's procedural default. See, e.g., *People v. Johnson*, 238 Ill. 2d 478, 495 (2010) ("If the defendant is unable to establish plain error, the procedural default must be honored"); and *People v. Thompson*, 238 Ill. 2d at 615 (same). Defendant has forfeited review of this issue.

CONCLUSION

Defendant forfeited review of the trial court's failure to conduct the inquiry described in *People v. Medina* and failed to establish his burden of showing that it was plain error. Because this court cannot consider matters outside of the record, such as the information conveyed to defendant by his counsel regarding the risks associated with tendering the lesser-included offense instruction, defendant failed to establish ineffective assistance of counsel. The trial court's decision to delay ruling on the State's motion to include defendant's prior convictions did not rise to the level of plain error; thus defendant forfeited review of the issue.

For the foregoing reasons, we affirm the decision of the circuit court of Cook County.

Affirmed.