

No. 1-09-3588

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SECOND DIVISION
May 31, 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. 08 CR 22068
)	
ANTONIO POLK,)	Honorable
)	Stanley Sacks,
Defendant-Appellant.)	Judge Presiding.

JUSTICE KARNEZIS delivered the judgment of the court.
Presiding Justice Cunningham and Justice Harris concurred in the judgment.

ORDER

Held: Defendant's burglary conviction affirmed over his claim that the trial court erred in allowing evidence of a prior burglary and theft conviction to be used for impeachment.

Following a jury trial, defendant Antonio Polk was found guilty of burglary, then sentenced to 10 years' imprisonment. On appeal, defendant contends that the trial court erred in allowing

the State to use evidence of his prior theft and burglary convictions for impeachment.

The record shows, in relevant part, that defendant was charged with burglary in that he knowingly entered a building at 2341 North Kedvale, in Chicago, with the intent to commit a theft therein. 720 ILCS 5/19-1(a) (West 2008). Defendant filed a pretrial motion *in limine* to prevent the State from using evidence of his prior felony convictions to impeach his credibility in the event he testified.

At the hearing on that motion, the State informed the court that, if defendant testified, it intended to introduce: two concurrent burglary convictions from 2005, two concurrent convictions for felony theft from 2004, and a conviction for possession of a controlled substance from 2002. Defense counsel argued that introducing these convictions, especially the prior burglary convictions, would be highly prejudicial in light of defendant's burglary charge and risked influencing the jurors' opinion on it. Counsel also argued, in the alternative, that the court should only allow one of defendant's prior convictions, thus letting the jury know he was a convicted felon, and that neither of his prior burglary convictions should be admitted.

At the court's request, the State proffered its version of the evidence, but defense counsel declined to provide the substance of defendant's proposed testimony on the basis of

privilege. The State volunteered that defendant had made a statement after his arrest that he did not enter the building to take anything, but only to sleep. The State then asserted that the burglary and theft convictions were crimes of dishonesty, and probative in that the jury was entitled to know how many times defendant had been dishonest when assessing his credibility.

The court found that defendant's credibility would be at issue if he testified to his version of the events, and acknowledged that the standard for admitting prior convictions is whether their probative value outweighs their prejudicial effect. The court proceeded to balance those two concerns, stating:

"[F]irst of all, burglaries and thefts have always been considered crimes of dishonesty or moral turpitude. They are felonies that carry the least sentence of one year in the penitentiary. They are also all relatively recent, 2005, 2004. The 2004 burglary he was released in 2008. So not a whole long period of time before this burglary in 2009."

The court ultimately prohibited the State from introducing defendant's 2002 possession of a controlled substance conviction, but allowed the admission of one of his 2005 burglary convictions and one of his 2004 theft convictions. As the court saw it, "That way the jurors are aware of two of his four priors that are

admissible, and the recent ones, 2004 and 5, are pretty recent compared to the incident in this case."

A jury trial commenced, and the State presented evidence showing that about 11:40 a.m., on November 13, 2008, Abigail Flores was preparing to drive to the library in his father's mini-van, which was parked outside his home at 2341 North Kedvale, in Chicago. He paused and conversed with his uncle who had called-out to him, and stepped out of the vehicle. Flores then entered the backyard through a small gate on the side of the property, and called 911 when he heard noises coming from inside the garage located at the back of the house.

Chicago police officer Karl Kruger and his partner arrived at the scene and briefly spoke with Flores. Officer Kruger entered the garage through the service door, which had pry marks on it and a forced lock. Inside, he found defendant holding a circular saw and took him into custody. He recovered a green nylon bag and long screwdriver from defendant during the custodial search that followed.

Defendant testified and initially acknowledged his 2005 felony conviction for burglary and his 2004 felony conviction of theft. He also testified that on November 13, 2008, he was homeless and unemployed, after being laid off the previous spring from his fork lift driver job with Waste Management. He had obtained that job through an ex-offender program, and lost his

housing when the half-way house that he resided in lost its funding. Although he had worked some day-labor jobs, he stopped receiving calls and then had to do what he could to survive. He sought shelter wherever he could find it, such as in gangways and under back porches, and would get food by asking people for change and going through garbage cans.

On the day in question, defendant was tired from not having slept the night before and was walking around the area of 2341 North Kedvale. As he was going through garbage cans, he noticed that the house at that address did not have a fence in front. He walked to the garage in back of the house, twisted the door knob open, and went inside to get some rest. He took a tarp and some plastic off one of the shelves and used them to make a bed on the garage floor, but then an officer came in and arrested him. Defendant testified that he did not have a saw in his hands, had never seen the screwdriver allegedly recovered from him, and did not pry open the garage door; he did, however, claim ownership of the nylon bag.

The jury received the following instruction:

"Evidence of a defendant's previous conviction of an offense only may be considered by you only [sic] as it may affect his believability as a witness and must not

be considered by you as evidence of his guilt
of the offense with which he's charged."

After deliberating, the jury returned a verdict of guilty to the charge of burglary.

In this appeal, defendant challenges the partial denial of his motion *in limine* by the trial court. He claims that the trial court abused its discretion by allowing evidence of his prior theft and burglary convictions because the jury likely inferred from them his propensity to commit the charged offense of burglary with intent to commit theft.

It is well-established that prior felony convictions are admissible to impeach a witness' credibility unless the court determines that the probative value of the evidence of those convictions is substantially outweighed by the danger of unfair prejudice. *People v. Montgomery*, 47 Ill. 2d 510, 516 (1971). In balancing those competing interests, the trial court should consider the nature of the prior convictions, their recency and similarity to the charged offense, the circumstances surrounding the prior convictions, and the length of the witness' criminal record. *People v. Atkinson*, 186 Ill. 2d 450, 456 (1999).

In this case, the record shows that the trial court expressly acknowledged that it was required to balance the probative value of defendant's prior convictions with the risk of unfair prejudice to him. *Montgomery*, 47 Ill. 2d at 516. To that

end, the court heard argument from defense counsel regarding the risk of unfair prejudice to defendant if his prior convictions were admitted, and requested proffers from the State, as to its evidence against defendant, and from the defense, regarding the substance of defendant's proposed testimony. After finding that defendant's credibility would be at issue if he testified, the court allowed the State to introduce one of defendant's convictions for burglary and one for theft, noting that they were recent convictions and were crimes of dishonesty and moral turpitude. *Atkinson*, 186 Ill. 2d at 456.

This court will not reverse the trial court's ruling on a motion *in limine* absent an abuse of discretion. *People v. Hanson*, 238 Ill. 2d 74, 96 (2010). For the reasons that follow, we find none here.

The supreme court has admonished trial courts to be cautious in admitting prior convictions for the same crime as that charged; however, that fact alone does not mandate exclusion of the prior convictions (*Atkinson*, 186 Ill. 2d at 463), nor render them inadmissible for impeachment purposes (*People v. Barner*, 374 Ill. App. 3d 963, 971 (2007)). Moreover, the fact that the court only allowed the State to introduce two of defendant's five eligible felony convictions, and provided a jury instruction regarding the narrow use of that evidence, indicates that the court exercised its discretion and attempted to minimize the

potential prejudice to defendant. *People v. Mullins*, No. 108909, slip op. at 13 (Ill. S. Ct. Apr. 21, 2011).

In these important respects, we find this case analogous to *Atkinson*, 186 Ill. 2d 450, where defendant was charged with burglary with the intent to commit theft, and the State introduced evidence of his two prior burglary convictions for the purpose of impeachment. In that case, the supreme court found no abuse of discretion by the trial court in admitting those prior convictions because the only defense evidence was defendant's testimony. *Atkinson*, 186 Ill. 2d at 461-62. Under those circumstances, the court found that his credibility was a central issue and that his prior convictions were necessary to assess it. *Atkinson*, 186 Ill. 2d at 462.

Here, likewise, defendant's sole defense was his testimony that he entered the garage to sleep. His credibility was thus a central issue in the case, and the trial court properly allowed evidence of his prior burglary and theft convictions so that the jury could properly assess his credibility, and gave a limiting instruction for that purpose. *Atkinson*, 186 Ill. 2d at 461-62.

Defendant, nonetheless, claims that the trial court should have admitted his conviction for possession of a controlled substance instead of the burglary and theft convictions because it carried "virtually no risk of unfair prejudice." Contrary to defendant's claim, we find that his conviction for possession of

a controlled substance carried similar potential for unfair prejudice to him in that such a conviction indicates dishonesty (*People v. Walker*, 157 Ill. App. 3d 133, 136-37 (1987)), and could also have led jurors to infer motive or a general criminal propensity. In any event, the decision regarding which convictions had sufficient probative value to outweigh the danger of unfair prejudice to defendant was within the trial court's discretion (*Hanson*, 238 Ill. 2d at 96), and we find no abuse of that discretion here where the court permitted only the most recent convictions to be used for impeachment purposes (*Atkinson*, 186 Ill. 2d at 456).

We also find the instant case distinguishable from *People v. Adams*, 281 Ill. App. 3d 339 (1996), cited by defendant. In that case, defendant was charged with, *inter alia*, aggravated battery, and this court found that the trial court abused its discretion in allowing evidence of his two prior aggravated battery convictions because their probative value with respect to his credibility was "minimal" compared to the resulting prejudice. *Adams*, 281 Ill. App. 3d at 340, 345. However, unlike *Adams*, defendant's prior convictions were for theft and burglary, which defendant readily concedes are crimes of dishonesty. *People v. Diehl*, 335 Ill. App. 3d 693, 704 (2002); *People v. Burba*, 134 Ill. App. 3d 228, 236 (1985). In that sense, they were far more

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probative of defendant's credibility as a witness than the aggravated battery convictions used for impeachment in *Adams*.

For the reasons stated, we conclude that the trial court did not abuse its discretion in allowing the State to use defendant's prior theft and burglary convictions to impeach his credibility (*Montgomery*, 47 Ill. 2d at 516), and affirm the judgment of the circuit court of Cook County.

Affirmed.