

No. 1-09-2441

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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. 06 CR 24151
)	
PATRICK BRYANT,)	
)	
Defendant-Appellant.)	The Honorable
)	Neera Lall Walsh
)	Judge Presiding.

PRESIDING JUSTICE LAVIN delivered the judgment of the court.
Justice Sterba concurred in the judgment.
Justice Salone specially concurred.

ORDER

Held : While the trial court did err with regard to Supreme Court Rule 431(b), its error was harmless and the error did not amount to a structural error that would require automatic reversal or rise to the level of plain error. Next, the trial court did not err in permitting the State to use defendant's prior conviction for impeachment. Finally, the court's sentence was not excessive based on the nature of the crime committed and despite the mitigating circumstances offered for the court's consideration.

¶ 1 Defendant Patrick Bryant was charged with shooting and killing Devon Henderson in the

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aftermath of a dispute over the care of a young child who briefly went missing on Chicago's Southeast Side. Following a jury trial, defendant was found guilty of first degree murder and the jury also returned a special verdict finding that he personally discharged the firearm which proximately caused the victim's death. The trial judge sentenced defendant to 40 years' imprisonment for murder and an additional 25 years' imprisonment for personally discharging a firearm, to be served consecutively. Defendant appeals, contending that the trial court erred during jury selection, improperly admitted evidence of a prior conviction for aggravated battery and excessively sentenced him to the point where he will never be restored to productive citizenship.

¶ 2

I. BACKGROUND

¶ 3 This unfortunate tale emanates from a simple enough domestic argument. A number of witnesses testified to the pertinent events and while there were some minor discrepancies, Nadia Pearson, the 20-year-old girlfriend of the victim, Devon Henderson, was present for most of the significant events and Cornelius Johnson observed the shooting. Defendant also offered some testimony of the events in question, but essentially testified that he did not observe some critical events including the shooting itself, because he was drunk and nauseous at the time. A brief review of their testimony will supply the necessary factual background for our findings.

¶ 4 Pearson testified that on September 8, 2006, a 13-year-old child named Ciara was babysitting a 4-year-old boy. When the young boy was briefly missing, his 13-year-old sister, Francselee, got into a fight with Ciara, the babysitter. This fight took place in front of the two siblings' home on East 101st Street in the Roseland neighborhood of Chicago. It lasted all of

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five minutes. Sometime later, however, Carl Mason, the father of the young child drove up to his house in a pickup truck. He was accompanied by three girls. Another vehicle pulled up behind Mason. Defendant was in that second car, accompanied by one girl and three men. The girls in both vehicles were said to be carrying baseball bats.

¶ 5 Defendant and Mason briefly went into the house with another man, came back to the pickup truck, opened the passenger side door for a few seconds and then walked to the nearby home where the babysitter's uncle lived. During this walk, Pearson observed Mason hand defendant a gun from under his shirt. Defendant was then observed putting the gun under his own shirt. After a brief visit at the babysitter's uncle's home, defendant and Mason returned to Mason's home. While enroute, they ran into the victim, Devon Henderson, and two of Henderson's friends, who were socializing in the area. Defendant confronted Henderson and asked him who he was. Henderson replied that he was "the peacemaker," to which defendant retorted, "Nah, I hear you're the goon." Shortly thereafter, defendant pulled out the gun and pointed it at Henderson's forehead. Henderson swatted it away. Defendant pointed the gun at Henderson's a second time and Henderson again swatted the gun away. At this point, defendant took a step back, aimed the gun at Henderson's chest and fired, causing Henderson to fall backward into the grass.

¶ 6 Cornelius Johnson, who described himself as a "semi-friend" of Mason's, testified that he was on 101st Street drinking with Devon Henderson and others when Mason and others arrived in some vehicles. They were, according to Johnson, "roused up and ready to fight" over the treatment of Mason's son by the babysitter. Johnson observed Mason and defendant walk over to

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the babysitter's uncle's house. Johnson pleaded with Mason to "chill out." After a quiet moment, however, Defendant began exclaiming that he "don't give a fuck whose block this is. He don't give a fuck about shorty." Johnson testified that defendant then began yelling at him. Mason then grabbed Johnson and pulled him out of the fracas, just as defendant pulled a gun and twice aimed it at Henderson, who twice smacked it down. Defendant then stepped back, took a deep breath, and shot Henderson in the chest.

¶ 7 Defendant testified in his own defense that he was out "drinking Hennessy" with his girlfriend on the South Side of Chicago when he learned his friend Mason's son was missing. Mason asked defendant and his girlfriend to go with him. Altogether, three vehicles went from their location on 51st and Winchester to 101st street to Mason's home. Some of the occupants were carrying baseball bats. When they got to 101st street, defendant went into Mason's house and vomited. He went outside and vomited again, near Mason's truck. It was at this point that he observed some of the argument in the street between Mason and others. As he sat in Mason's truck with his head hanging outside the window for some fresh air and collected himself, still woozy from the cognac and the vomiting, defendant heard a gunshot. Mason then ran into the truck and defendant asked him about the gunshot. Mason shrugged off the suggestion of a gunshot by attributing the observation to defendant's drunkenness and they drove off, back to 51st street. A couple weeks later, when questioned by police, defendant testified that he lied because Mason was his friend and he did not want a confrontation with him. He denied shooting Henderson and denied being in possession of a gun on that day.

¶ 8 Prior to the start of trial, defendant made a motion *in limine* to prohibit the State from

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using defendant's prior aggravated battery conviction to impeach his testimony, in the event that he testified. The court inquired whether the charge had occurred within 10 years. Defense counsel acknowledged that the conviction did fall within the last 10 years. At that point, the trial court ruled that the State would be allowed to use a certified copy of the conviction to impeach defendant's testimony. The trial judge said she conducted a balancing test and that the conviction would not be unfairly prejudicial to defendant. Defendant renewed this motion just prior to the start of trial and asked the court to reconsider its ruling. Defendant argued that no element of aggravated battery relates to honesty or integrity. Defendant further contended that the evidence of the prior conviction would only serve to prejudice and enflame the passions of the jury against him. The trial judge maintained her prior ruling.

¶ 9 Shortly thereafter, the court began the jury selection process. Once the entire venire had entered the courtroom they were informed as to the basic principles of law that apply to all criminal cases. Next, the court told the venire the basic facts of the case, the witnesses that may testify in the case and the charges being brought against defendant. Finally, the court gave several legal instructions to the entire venire and following each instruction, the court asked that anyone who would not follow the instructions to raise their hand. The following legal instructions were given: 1) Under the law, the defendant is presumed to be innocent of the charges against him. This presumption remains with him throughout every stage of the trial and during the deliberations of the verdict. This burden is not overcome unless, from all the evidence, the jury is convinced beyond a reasonable doubt that the defendant is guilty; 2) The State has the burden of proving the guilt of the defendant beyond a reasonable doubt, and this

burden remains on the State throughout the case; 3) The defendant is not required to prove his innocence, nor is he required to present any evidence on his behalf; 4) If the defendant chooses not to testify, the fact that he chooses not to testify may not be considered in anyway in arriving at a verdict. After the court read the fourth legal instruction to the venire a juror raised their hand informing the court that they would not be able to follow the fourth instruction. That juror was excused by the court.

¶ 10 After three days of testimony, the State rested their case. At this point defendant renewed their motion to preclude the prior aggravated battery conviction and the court again denied this motion. Following six hours of deliberation, the jury returned a verdict of guilty on the murder charge along with a separate verdict form finding that the defendant personally discharged the firearm that proximately caused the victim's death. The trial judge noted that after having considered all factors, she believed that defendant was not eligible for the minimum sentence (20 years) but at the same time should not be sentenced to the maximum sentence (60 years). The court sentenced defendant to 40 years in the Illinois Department of Corrections on the murder charge, along with the mandatory consecutive sentence of 25 years for the personal discharge of a firearm for a total of 65 years. Defendant now appeals the conviction and sentence.

¶ 11

II. ANALYSIS

¶ 12

A. 431(b) Violation

¶ 13 Defendant first alleges that he was denied his constitutional right to trial by a fair and impartial jury. Defendant cites to Illinois Supreme Court Rule 431(b) (Rule 431(b)) arguing that

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the trial court erred when it failed to ask any of the prospective jurors if they understood and accepted the four Rule 431(b) principles.

¶ 14 In order for a defendant to preserve an issue on appeal, he must object to the purported error at trial as well as include it in his posttrial motion. *People v. Glasper*, 234 Ill.2d 173, 203 (2009). We note that a recent decision in which our supreme court held that there is no compelling reason to excuse the forfeiture rule when the moving party failed to make an objection to Rule 431(b) questioning. *People v. Thompson*, 238 Ill. 2d 598, 612 (2010). Here, defendant failed to object to the procedure used by the trial court during *voir dire* and did not include the issue in his posttrial motion, thereby forfeiting the issue. Defendant argues, however, that the forfeiture rule should be relaxed here because the judge's conduct is at issue and that the trial court's noncompliance can be reviewed as plain error.

¶ 15 The plain error rule bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved claims of error in specific circumstances. *Id.* This court will apply the plain error doctrine to an unpreserved error when a clear and obvious error had occurred and: (1) the evidence is closely balanced; or (2) that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *People v. Bannister*, 232 Ill. 2d 52, 65 (2008). The defendant bears the burden of persuasion when asking the court to review the purported error pursuant to plain error analysis. *People v. McLaurin*, 235 Ill. 2d 478, 495 (2009).

¶ 16 In addressing the defendant's plain error contention, we must first determine whether there was any error at all in the trial court's application of Rule 431(b). *People v. Blakenship*,

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406 Ill. App. 3d 578, 581 (2010). Rule 431(b) is a codification of our supreme court's decision in *People v. Zehr*, 103 Ill. 2d 472 (1984), which held that the trial court erred by refusing the defendant's request to ask the venire about four fundamental principles of law. *Id.* at 476-78. The four *Zehr* principles are: (1) the defendant is presumed innocent; (2) the defendant must be proved guilty beyond a reasonable doubt; (3) the defendant is not required to produce any evidence; and (4) the defendant's failure to testify cannot be held against him. *Id.* Pursuant to Rule 431(b), the trial court must address the *Zehr* principles, even in the absence of a specific request by the defendant and "shall ask each potential juror, individually or in a group, whether the juror understands and accepts" those principles. (Ill. S. Ct. R. 431(b) (eff. May 1, 2007)). In addition, "the courts method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section." *Id.* Our supreme court held in *Thompson* that: "The trial court must ask each potential juror whether he or she understands and accepts each of the principles in the rule. The questioning may be performed either individually or in a group, but the rule requires an opportunity for a response from each prospective juror on their understanding and acceptance of those principles." *Thompson*, 238 Ill. 2d at 607.

¶ 17 In the case *sub judice*, the trial court stated the four *Zehr* principles to the entire venire, however, the court violated Rule 431(b) when it failed to ask the prospective jurors if they understood and accepted those four principles. As was the case in *Thompson*, the trial court's failure in this case to ask whether the potential jurors both understood and accepted each of the enumerated principles constitutes technical noncompliance with Rule 431(b). *Thompson*, 238

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Ill. 2d at 607. Accordingly, we will now consider whether this error rises to plain error.

¶ 18 Defendant contends that the trial court's failure to comply with Rule 431(b) violated the second prong of the plain error rule because it denied defendant a fair and impartial jury. Under the second prong of the plain error doctrine, the defendant must prove that a plain error occurred and that the error was of the nature that it had an affect over the fairness of the entirety of defendant's trial and challenged the integrity of the judicial process. *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005).

¶ 19 Recently this court decided a case which had a very similar Rule 431(b) issue. In *People v. Snowden*, No. 01-09-2117, slip op. at 32 (Ill. App. Jun. 10, 2010), it was uncontested that the trial court informed the venire of all four *Zehr* principles and asked the venire to raise their hands if they would not follow those principles. The defendant in *Snowden* asserted however, that the court erred when it failed to ask the venire if they understood those principles. *Id.* Despite the fact that the defendant failed to object to this alleged error at trial and failed to raise it in a timely posttrial motion, defendant argued for the court to review the issue under the plain error rule. *Snowden* denied the defendant's argument, stating that a trial court's failure to comply with Rule 431(b) is subject to the rule of forfeiture and must be objected to during jury selection and raised in posttrial motion, and furthermore that such an error does not constitute plain error under the second prong, absent a showing that a juror was biased. *Id.* at 33. In the case at hand, defendant never argues that this error led to a biased juror or jury, simply that an error occurred.¹

¹ In fact, despite the fact that the court did not comply perfectly with the four *Zehr* principles, the process still identified and eliminated a potentially biased juror in the process.

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Therefore, despite the fact that defendant is correct in contending that an error occurred when the lower court failed to follow all of the procedures of Rule 431(b), that error did not rise to plain error.

¶ 20 B. Impeachment With Prior Conviction

¶ 21 Defendant next contends that the trial court erred by allowing the State to use defendant's prior conviction for impeachment purposes. The supreme court in *People v. Montgomery*, 47 Ill. 2d 510, 516 (1971), held that evidence of a witness' prior conviction is admissible to attack that witness' credibility where:

“(1) the prior crime was punishable by death or imprisonment in excess of one year, or involved dishonesty or false statement regardless of the punishment, (2) less than 10 years has elapsed since the date of conviction of the prior crime or release of the witness from confinement, whichever is later, and (3) the probative value of admitting the prior conviction outweighs the danger of unfair prejudice.”

When a prior crime satisfies either the first or second prong, it is admissible unless, after application of the judicial balancing test, the judge concludes that its probative value is outweighed by its prejudicial impact. *People v. Robinson*, 299 Ill. App. 3d 426, 441(1998). The third *Montgomery* factor requires the trial judge to conduct a balancing test, in which they weigh the prior conviction's probative value against its potential prejudice. If, after the judicial balancing, the trial court finds that the prejudice substantially outweighs the probative value of admitting the prior conviction, then the evidence of the prior conviction must be excluded. *Montgomery*, 47 Ill. 2d at 517-18. It is entirely within the discretion of the trial court to

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determine whether a witness' prior conviction is admissible for impeachment purposes. *Id.* A trial court's decision to admit evidence of prior convictions for impeachment purposes is reviewed under an abuse of discretion standard. *People v. Daniels*, 287 Ill. App. 3d 477, 483-84 (1997).

¶ 22 In 2004, defendant was convicted of aggravated battery causing great bodily harm. Defendant orally moved in chambers to prevent the State from using the aggravated battery conviction for impeachment purposes, in the event that defendant testified. The court denied defendant's motion stating that if the crime was within the last 10 years that the State would be allowed to use the prior conviction for impeachment purposes. The court stated: "I have conducted a balancing test, and I do believe that it is not unfairly prejudicial." Later, prior to opening statements, defendant again moved the court to reconsider its prior motion *in limine* to preclude the State from introducing defendant's aggravated battery conviction. Defendant twice asked the trial court to reconsider her ruling in this regard. On each occasion, the court respectfully declined to reverse her ruling.

¶ 23 It is uncontested that the aggravated battery offense occurred within the past 10 years and that it is punishable by more than a year in prison, thus the only issue remaining is whether the probative value of evidence outweighs the prejudicial nature. Defendant first contends that the balancing test that the trial court used was merely mechanical. In support of this argument, defendant cites to *People v. Cox*, 195 Ill. 2d 378 (2001), which cited *People v. Williams*, 161 Ill. 2d 1 (1994) (*Williams I*), in expressing concern over the recent trend of trial courts taking a more mechanical approach to the *Montgomery* balancing test allowing for more prior conviction

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evidence. *Cox*, 195 Ill. 2d at 384 (citing *Williams I*, 161 Ill. 2d at 38-39). The supreme court warned that it was vital that the trial court not overlook the danger of unfair prejudice in admitting a prior conviction, which is particularly relevant in circumstances where it is the defendant himself who is testifying and the State is attempting to impeach with a prior conviction(s). *Cox*, 195 Ill. 2d at 384. Despite defendant's reliance on *Williams I*, *Cox* made it clear that *Williams I* does not modify the standard set in *Montgomery*. *Id.* Furthermore, *Williams I* is distinguishable from the case at hand.

¶ 24 In *Williams I*, the defendant sought to prevent the State from using his prior voluntary manslaughter conviction as impeachment evidence. *Williams I*, 161 Ill. 2d at 35. *Williams I* found that the conviction was clearly offered and admitted as relevant to the question of the defendant's guilt of victim's murder, and not for impeachment, in direct contravention of *Montgomery*. *Id.* at 44. In the case *sub judice*, we are persuaded that the trial court clearly articulated that she was using a balancing test in order to determine whether this evidence should be permitted. In this regard, the court was clearly in the exercise of its considerable discretion. Furthermore, there is nothing in the record that demonstrates that the State's argument or the court's reasoning involved using this prior conviction as propensity evidence against the defendant, as was the case in *Williams I*.

¶ 25 Defendant next contends that the balancing test was cursory at best because the court did not comply with factors outlined in *Robinson*, 299 Ill. App. 3d at 441. In *Robinson*, this court stated that when reviewing a decision to determine if a judicial balancing occurred in the lower court "it would be *helpful* if the record reflected" that the trial court examined certain factors

including but not limited to (emphasis added):

“(1) whether the prior conviction is veracity related; (2) the recency of the prior conviction; (3) the witness' age and other circumstances surrounding the prior conviction; (4) the length of the witness' criminal record and his conduct subsequent to the prior conviction; (5) the similarity of the prior offense to the instant offense thus increasing the danger of prejudice; (6) the need for the witness' testimony and the likelihood he would forego his opportunity to testify; and (7) the importance of the witness' credibility in determining the truth.” *Id.*

¶ 26 This court observes defendant's argument and concedes that this court has recognized that it would be helpful for appellate review if the lower court articulated their analysis of all these factors on the record. Additionally, defendant is correct in his assertion that the court did not explicitly evaluate on the record each of the *Robinson* factors, however, as stated above, the *Robinson* factors are only helpful in determining if a balancing test did in fact occur and is by no means required. *People v. Johnson*, 110 Ill. App. 3d 965, 968 (1982).

¶ 27 Normally, it is assumed that the trial court gives adequate consideration to all relevant factors without being required to necessarily articulate all of these factors in open court. *Johnson*, 110 Ill. App. 3d at 968. This is particularly true when a lower court rules on a motion to exclude use of prior convictions for impeachment. *Id.* In fact this court has held that it is not necessary for the court to articulate any of the factors it considered in its application of the *Montgomery* balancing test so long as the record reveals that the trial court was aware of its discretion. *People v. White*, 407 Ill. App. 3d 224, 233 (2011). Our supreme court in *People v.*

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Atkinson, 186 Ill. 2d 450, 462 (1999), found that the trial judge's comments demonstrated that he was aware of the *Montgomery* balancing test, and that an error did not occur due to the fact that he did not articulate the factors he considered in his application of the balancing test. Finally, the supreme court in *People v. Williams*, 173 Ill. 2d 48, 83 (1996) (*Williams II*), found that even though the judge did not expressly articulate that he was following the *Montgomery* standard and was balancing opposing interests, there was no reason to find that the judge disregarded the well established standard of *Montgomery*. Therefore, despite the fact that the lower court here did not explicitly articulate each and every *Robinson* factor on the record, it is nonetheless clear from the record that the trial court was aware of the *Montgomery* standard and applied all three necessary factors to its decision.

¶ 28 Defendant finally argues that even if the trial court did conduct a proper balancing test, it nonetheless erred in allowing the prior conviction evidence because of the similarities between the prior offense and the charged offense. Defendant also argues that there is no specific relationship between veracity and aggravated battery. While this argument does track some of the edicts of the relevant case law, it does not in any way demonstrate that this trial judge abused her discretion in this specific ruling and as previously stated, absent a clear abuse of discretion, we will not reverse such a ruling. *White*, 407 Ill. App. 3d at 233. "An abuse of discretion occurs where the trial court's ruling is arbitrary, fanciful or where no reasonable person could take the view adopted by the trial court." *Id.* While we note that allowing a prior conviction similar to the instant offense could potentially cause unfair bias, the record clearly indicates that the lower court examined this issue. Furthermore, our supreme court has allowed evidence of a prior

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conviction identical to the charged offense for impeachment purposes. See *People v. Mullins*, 242 Ill. 2d 1, 18 (2011) (citing *People v. Tribett*, 98 Ill. App. 3d 663 (1981)). Finally, other courts have found a nexus between the elements of assault and battery and veracity. See *People v. Graves*, 142 Ill. App. 3d 885, 897 (1986) (where defendant was impeached with prior conviction of aggravated battery during his murder trial, his "conviction for aggravated battery only four years prior to the crime was extremely probative of his credibility").

¶ 29 Assuming, *arguendo*, that this ruling was in error, based upon the overwhelming evidence in the record, it is our considered opinion that the error was harmless and could not lead to a reversal. Anticipating this very holding, defendant argues that the allowance of the prior conviction for impeachment cannot be considered harmless due to the fact that it took the jury nearly six hours to reach a verdict and during that time the jury asked the court for all of the defense exhibits as well as a transcript of defendant's testimony.

¶ 30 Despite the fact that this case, like many, ultimately comes down to the credibility of the State's witnesses versus defendant's testimony, the record reflects that the State's reliance on the conviction was minimal. Defendant briefly testified about the conviction, but it was never broached in cross-examination or closing argument. Defendant's reliance on the length of the jury's deliberation to buttress this argument are of no avail. Arguing that the deliberations were "long" because the evidence was close is the apogee of speculation. First off, six hours of deliberations is entirely consistent with a dutiful and careful jury. Six hours of deliberation by a jury in a case such as this with the overwhelming evidence of defendant's guilt is more consistent with the jury taking its duties in a most serious matter. Furthermore, this court has rejected the

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premise that a lengthy deliberation necessarily means that the evidence in the case was closely balanced. *People v. Nugen*, 399 Ill. App. 3d 575, 584 (2010). Finally, the case cited by defendant, *People v. Walker*, 211 Ill. 2d 317 (2004), is clearly distinguishable from this case. The *Walker* holding was "a very narrow one," in which this court held that the prior conviction evidence should not have been allowed in for impeachment purposes due to its prejudicial impact, as opposed to this case where the prior conviction evidence was deemed more probative than prejudicial. *Id* at 341.

¶ 31 C. Sentencing

¶ 32 Defendant lastly contends that the 65-year sentence is excessive. Defendant failed to file a timely posttrial motion on this issue and therefore has forfeited this issue. Despite this fact, defendant believes that the sentencing error rises to plain error, due to the fact that the lower court never articulated the factors it considered while determining the sentencing. Defendant further argues that while the State provided very little evidence in aggravation to justify the length of the sentence, the defense provided numerous mitigating factors. Defendant maintains that the sentencing error falls under either prong of the plain error doctrine. This court is granted the power to reduce the length of a sentence under Illinois Supreme Court Rule 615(b)4 (eff. May 1, 2007). An abuse of discretion standard is used when determining whether a sentence is excessive. *People v. O'Neal*, 125 Ill. 2d 291, 297-98 (1988).

¶ 33 As mentioned previously, under the plain error analysis, the first step is determining whether an error occurred. Under the Illinois Constitution, all penalties for criminal offenses must be determined by balancing the seriousness of the offense with the objective of restoring

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the offender to useful citizenship. Ill. Const. Art. I, § 11. Although the legislature has prescribed the permissible ranges of sentences, great discretion still resides in the trial judge in each case to fashion an appropriate sentence within the statutory limits. *People v. Cooper*, 283 Ill. App. 3d 86, 95 (1996). Absent an abuse of discretion by a trial court, a sentencing decision shall not be altered upon review. *People v. Hernandez*, 319 Ill. App. 3d 520, 526 (2001). A trial judge is in the best position to determine the appropriate sentence, for such judge can consider firsthand “[a] defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age.” *Id.* Nevertheless, an abuse of discretion can be found in a sentence that is within the statutory limitations if such sentence varies greatly with the purpose and spirit of the law. *People v. Velez*, 388 Ill. App. 3d 493, 513 (2009). Finally, where mitigation evidence is before the court, it is presumed the court considered that evidence absent some contrary indication other than the sentence imposed. *People v. Smith*, 214 Ill. App. 3d 327, 339 (1991).

¶ 34 This court accepts defendant’s argument that abuse of discretion can occur even when the sentence is within the statutory limits. We further concede that there are numerous cases as cited in defendant's brief in which a reviewing court reduces a sentence despite the fact that the original sentence was within sentencing guidelines. Nevertheless, we find that there was no error by the lower court, that the judge handed down an appropriate sentence and that there was no abuse of discretion. The trial judge made sure to explain on the record that the court took into consideration all of the factors prior to sentencing, stating:

"I did hear all the facts in this case. I did have an opportunity to consider what the State

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presented in aggravation, including the case that they used in aggravation. And I also considered what the defense presented in mitigation, and also what the defendant had to say as he chose to make the statement. I've considered the proper statutory factors in aggravation and mitigation."

Despite defendant's contention that the lower court never expressly mentioned what factors she looked at in mitigation, as stated above, it is assumed that the court considered the evidence minus some contrary indication, which is neither present in the record nor argued in defendant's brief.

¶ 35 Defendant next argues that his current sentence of 40 years for the murder and a consecutive 25 year sentence for the firearm enhancement (a 65 year total sentence) virtually eliminates any chance of successful rehabilitation and restoration to productive citizenship. Defendant is correct in contending that a factor in sentencing is to take into account the goal of rehabilitation of the offender and restoring offender to productive citizenship. Ill. Const. Art. I, §11. Seriousness of the crime, however, is an equal factor in determining the sentence. In this case, defendant senselessly murdered a self-described peacemaker who was attempting to defuse a situation in the middle of a public street. The victim twice swatted defendant's gun away in an effort to calm matters. Defendant instead took a deep breath and killed an unarmed man. Defendant's sentence of 40 years for the murder falls in the middle of the statutory guideline and seems appropriate for the nature of this offense. It does not remotely suggest an abuse of discretion. Due to the fact that no error has occurred, there is no further need for plain error analysis.

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¶ 36 Defendant's final argument is that trial counsel was ineffective for failing to file a motion to reconsider the allegedly excessive sentence. The court in *Strickland* established that in order for a claim to be brought for ineffective assistance of counsel, a defendant must show (1) that despite a strong presumption of counsel's professional competence, counsel's allegedly unprofessional acts or omissions in fact were "outside the wide range of professionally competent assistance," and (2) that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 690-92 (1984); *People v. Stewart*, 141 Ill. 2d 107, 118 (1991).

¶ 37 Defendant fails to argue what counsel did during the lower court proceedings that would rise to behavior outside of professional competence. Furthermore, even assuming *arguendo* that counsel's behavior was considered outside the range of professional competence, it had no effect on the proceedings due to the fact that no error was found in sentencing and the lower court's decision is being affirmed.

¶ 38 III. CONCLUSION

¶ 39 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 40 Affirmed.

¶ 41 JUSTICE SALONE, specially concurring:

¶ 42 I concur with the result reached by the majority that the judgment of the circuit court must be affirmed. I write separately, however, to express my dismay regarding the errors of the trial court, though they do not warrant reversal or a new trial under these facts. Specifically, I take issue with the minimization of the trial court's failure to ask the jurors whether they

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understood and accepted the *Zehr* principles, as codified in Rule 431(b), and the majority's holding that the trial court did not abuse its discretion by mechanically applying the *Montgomery* test.

¶ 43 As the majority correctly states, Rule 431(b) is the codification of our supreme court's decision in *People v. Zehr*, 103 Ill. 2d 472 (1984), wherein the court stated, "[e]ach of these *questions* goes to the heart of a particular bias or prejudice which would deprive defendant of his right to a fair and impartial jury' [internal citation omitted], and although they need not have been *asked* in precisely the form submitted, the subject matter of the *questions* should have been covered in the course of *interrogation on voir dire*." (Emphasis added.) *Zehr*, 103 Ill. 2d at 477. The majority also acknowledges that the rule requires the trial court to make an inquiry to the jurors and "allow *each juror* an opportunity to respond***."

¶ 44 It is undisputed that the trial court never made such an inquiry of the jurors regarding their understanding and acceptance of the *Zehr* principles. I take issue, however, with the majority's description of this error as, not perfectly compliant. In my view, the failure to make an inquiry at all defeats the purpose of imposing the duty on the trial court. Absent the inquiry the record on appeal is devoid of any indication that the venire actually heard, understood and accepted the trial court's statement. Thus, we have no basis in the record from which we can affirmatively state that defendant had an unbiased jury. Instead, in affirming, we rely on the defendant's failure to establish a biased jury.

¶ 45 I am also concerned with the majority's conclusion that these omissions "still identified and eliminated a potentially biased juror." The majority seems to assume that because no other

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jurors made their potential biases known the remainder of the venire was without unfair prejudice. However, if this assumption were true there would be no reason to impose the duty on the trial court to inquire whether the potential jurors understood and accepted the principles at all. Indeed, at the core of the *Zehr* decision and Rule 431(b) is the position that we cannot assume defendant received a fair trial from an unbiased jury merely because the record is silent regarding potential bias.

¶ 46 While I recognize the axiom that a defendant is entitled to a fair trial and not a perfect trial, we should not seek to be satisfied with imperfection which potentially impugns the fairness of a defendant's trial. Even the guilty deserve a fair trial. In that vein, this court has recognized, that "the distance between the concepts of fair and perfect cannot be so great as to render the former meaningless." (Internal quotations omitted.) *People v. Griffith*, 404 Ill. App. 3d 1072, 1089 (2010).

¶ 47 The majority correctly notes that our supreme court has concluded that this failure may be forfeited, absent a showing of actual juror bias. *People v. Thompson*, 238 Ill. 2d 598, 612 (2010), That decision is also disquieting because *Thompson* offers no guidance on how a defendant would establish juror bias and creates an almost impossible task, given that evidence of a juror's bias, which was not disclosed in *voir dire* is inadmissible unless it is subject to extraneous proof. *People v. Nitz*, 219 Ill. 2d 400, 426-27 (2006). Ultimately, *Thompson* controls and this court must follow the binding authority of our supreme court (*People v. Artis*, 232 Ill. 2d 156, 164 (2009)). Therefore, I must concur with the majority in affirming the judgment of the circuit court.

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¶ 48 I also disagree with the majority's conclusion that the trial court did not mechanically apply the *Montgomery* test. It remains the law that the mechanical application of the *Montgomery* test is an abuse of discretion. *People v. Williams*, 161 Ill. 2d 1, 38-39 (1994). In my view, it is essential that a reviewing court begin its analysis of the appropriate application of the *Montgomery* test with the facts known to the trial court at the time the trial court made its decision. The record shows that before jury selection, defense counsel made a motion *in limine* and the following colloquy occurred:

DEFENSE COUNSEL: All right. Only other thing is Mr. Bryant has a background of aggravated battery. If he chooses to testify, we're making a motion now to prohibit him being impeached with the aggravated battery charge.

THE COURT: Okay. What year was that?

DEFENSE: 2004

THE COURT: It's within the ten years. Okay. And it's just straight aggravated battery did you say?

PROSECUTOR: I think so, Judge.

DEFENSE: I can't remember.

Okay. If it's been solved [*sic*] within the last ten years, I'm letting you know now that the State will be allowed to bring in a certified copy of conviction as to the aggravated battery. I have conducted a balancing test, and I do believe that it is not unfairly prejudicial to the defendant."

DEFENSE: Judge, that would be over our objection?

THE COURT: Absolutely.***"

¶ 49 Thus, from the record before us, the trial court's information used in performing the balancing test was limited to the date of conviction, and the nature of the conviction, of which defense counsel and the State expressed doubt.

¶ 50 Defense counsel prior to trial requested that the trial court reconsider its decision and the court again stated,

"And respectfully, [defense counsel], as I stated yesterday, the court has conducted a balancing test as to whether it would be unfair prejudice to this defendant as all of this evidence against him would be prejudicial, but it is a matter of whether it is unfair prejudice. And I do not believe that this is unfair prejudice; that the jury does have a right to know about this conviction as it does fall within that timeframe [*sic*]."

¶ 51 Defendant's motion was refused a third time, following the court's denial of his motion for a directed verdict.

¶ 52 As the majority points out, this court has provided guidance in what factors should be applied in performing the requisite balancing test. *People v. Robinson*, 299 Ill. App. 3d 426, 441 (1998). Those factors are enumerated in the majority order, although they are relegated to being merely helpful in determining whether an abuse occurred as opposed to indicative of the lack of a meaningful application of the balancing test. While the majority acknowledges that the trial court did not explicitly mention the *Robinson* factors, its analysis falls short of acknowledging that the trial court failed to inquire regarding these factors.

¶ 53 As noted above, the trial court only had information regarding the date and crime of

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which defendant was convicted. The trial court did not inquire of the circumstances surrounding the prior conviction, the length of defendant's criminal record, his conduct subsequent to the conviction, and the likelihood that he would forego his right to testify if admitted, all of which are noted in *Robinson*. In addition to lacking information, the information that the trial court did possess, overwhelmingly weighed in favor of exclusion. Specifically, the crime was not veracity related, defendant actually pled guilty in that case, and defendant had no subsequent convictions. While I acknowledge that defendant's credibility was at issue, his credibility was only implicated by the fact that he had a conviction, and not the substance of the conviction. In my view, this does not weigh for or against disclosure because the *Montgomery* test is *only* applicable to persons with a conviction.

¶ 54 The majority is correct that the trial court need not articulate its reasoning on the record for conducting its balancing test. *People v. Williams*, 173 Ill. 2d 48, 83 (1996). Our supreme court has recognized the potential for abuse where the trial court fails to provide any record of its rationale. See *People v. Patrick*, 233 Ill. 2d 62, 73-74 (2009), quoting *People v. Rivera*, 221 Ill. 2d 481, 508 (2006) "without an adequate record, consisting of all relevant facts, factual findings, and articulated legal bases * * *, the trial court's rulings may be virtually immune from appellate review." Where, as here, the record establishes that the trial court lacked facts necessary to conduct the balancing test, it serves as a strong indication that the trial court mechanically applied the *Montgomery* test. The lack of information, when combined with the trial court's misstatement of the law,² "the jury does have a right to know about this conviction as it does fall

² The trial court's statement that the jury has "a right to know" of defendant's conviction is a misstatement of the law, where *Montgomery* confers no such right, and instead imposes a

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within the timeframe [*sic*]," and the very limited deliberation, as evidenced by the brevity of the discussion and the court's questioning being limited to the date and nature of the crime, is sufficient to establish a mechanical application of the *Montgomery* test. Thus, I would hold that the trial court abused its discretion.

¶ 55 Notwithstanding the error of the trial court, I must concur in affirming its judgment. The trial court's abuse of discretion in allowing the admission of evidence of defendant's prior conviction would not warrant a new trial, under these facts, because the evidence of defendant's guilt was so overwhelming that it renders this error harmless.

¶ 56 For these reasons, I must specially concur in affirming the judgment of the circuit court of Cook County.

balancing test *after* determining that the conviction falls within the ten year limit.