

No. 1-09-2806

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

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. 07 CR 16756
)	
JIMMIE CLEGGETTE,)	Honorable
)	Matthew E. Coghlan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hall and Karnezis concurred in the judgment.

ORDER

¶ 1 **Held:** Because defendant did not object to the trial court's failure to comply with Supreme Court Rule 431(b) (eff. May 1, 2007), nor objected to the conducting of a balancing test pursuant to *People v. Montgomery*, 47 Ill. 2d 510 (1971), and include these issues in his posttrial motion, he has forfeited those claims on appeal.

¶ 2 After a jury trial, during which he represented himself, defendant, Jimmie Cleggette, was convicted of possession of a controlled substance and sentenced to an extended term of six years in prison. On appeal, defendant contends the trial court failed to comply with Illinois Supreme Court Rule 431(b) (eff. May 1, 2007), when it did not ask potential jurors whether they understood and accepted that a defendant's failure to testify could not be held against him. Defendant also contends he was denied a fair trial because the trial court did not conduct a balancing test pursuant to *People v. Montgomery*, 47 Ill. 2d 510 (1971), prior to admitting six of a witness's prior convictions for impeachment purposes. We affirm.

¶ 3 In 2007, defendant was arrested and subsequently charged by indictment with several counts of possession of a controlled substance with intent to deliver. During pretrial hearings, defendant repeatedly expressed dissatisfaction with his appointed attorneys, requested the appointment of counsel other than a public defender, and stated he would rather represent himself than proceed with a public defender. Ultimately, after a fitness hearing, defendant was deemed fit to stand trial and permitted to proceed *pro se*.

¶ 4 The State filed a motion *in limine* seeking to enter into evidence the prior felony convictions of witness, Deonta Davis, and defendant, for purposes of impeachment should either testify. At the hearing on the motion, the court stated, while acknowledging defendant's objection:

"These [convictions] are all within ten years. Mr. Davis is a witness, not a defendant. The rules are different. If Davis testifies, he can be cross examined on his prior convictions."

The court then examined defendant's prior convictions. After performing a balancing test pursuant to *Montgomery*, the court ruled that two of defendant's prior convictions could be used to impeach him should he testify.

¶ 5 During *voir dire*, the court explained to the potential jurors that the State has the burden of proving guilt beyond a reasonable doubt, and a defendant: (1) is presumed innocent; (2) must be proven guilty beyond a reasonable doubt; and (3) is not required to offer any evidence on his own behalf or prove his innocence. The court asked the venire, after each principle, if anyone did not understand and/or accept these principles. However, the court did not ask whether potential jurors understood and/or accepted that a defendant's failure to testify could not be held against him. Defendant did not object and a jury was selected.

¶ 6 Officer Dave Salzman testified he was conducting narcotics surveillance with his partner Officer Lacny when he saw defendant standing on a street corner. Defendant was located approximately 145 feet away and Officer Salzman used binoculars to observe him. Officer Salzman saw a person approach and speak to defendant. That person then gave defendant money in exchange

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for an item defendant removed from a cigarette box. A second individual approached approximately five minutes later and a similar exchange took place. After observing three such exchanges, Officer Salzman concluded defendant was selling narcotics and the officers "broke" surveillance.

¶ 7 When the officers arrived at defendant's location, defendant still had the cigarette box in his hand and was speaking with Mr. Davis. Defendant was detained and the cigarette box was recovered. None of the individuals who spoke to defendant were taken into custody.

¶ 8 When Officer Lacny showed Officer Salzman the contents of the cigarette box, Officer Salzman observed six small ziplock bags, each containing a white rock-like substance, which he believed was suspect crack-cocaine. Officer Salzman subsequently inventoried the contents of the cigarette box.

¶ 9 Officer Lacny testified that he observed Mr. Davis while Officer Salzman observed defendant because defendant and Mr. Davis were standing on different street corners. Officer Lacny saw Mr. Davis engage in three suspect-narcotics exchanges, but did not see Mr. Davis exchange any hand signals with defendant or give anything to defendant. However, at some point between when the officers broke surveillance and their arrival at defendant's location, Mr. Davis had moved to the corner where defendant was standing.

¶ 10 Officer Lacny retrieved the cigarette box from defendant, opened it, and saw that it held six small ziplock bags, each containing a white rock-like substance. He took defendant into custody, and performed a custodial search. Officer Lacny recovered \$47 from defendant. Mr. Davis was also arrested. Additionally, ten bags of suspect heroin contained in a black magnetic box were recovered from the side of the street where Mr. Davis was observed standing.

¶ 11 Forensic scientist, Denise Sylvester, testified the contents of the small ziplock bags weighed 1.146 grams and tested positive for cocaine.

¶ 12 At the close of the State's case, defendant presented the testimony of Mr. Davis. Mr. Davis testified he had a "history" of narcotics possession and was currently in prison.

¶ 13 On the night in question, Mr. Davis had stopped to talk with defendant and, after two to five minutes, police officers arrived with their guns drawn. Mr. Davis and the officers knew each other. The officers grabbed the men, asked where "the gun" was, and began searching the area. Officer Salzman crossed the street, came back, and then put Mr. Davis and defendant in a car. Mr. Davis did not see any narcotics transactions take place and did not see an officer retrieve narcotics from defendant. At the police station, Mr. Davis was questioned about a pistol, then released. He was later charged with drug possession.

¶ 14 During cross-examination, Mr. Davis admitted he had six prior narcotics convictions, four for possession of a controlled substance and two for possession of a controlled substance with the intent to deliver.

¶ 15 Defendant then rested. After closing argument, the jury was instructed, *inter alia*, that the fact a defendant did not testify must not be considered, in any way in arriving at a verdict, and that evidence of a witness's prior conviction should only be considered as it affected the witness's "believability." The jury subsequently convicted defendant of the lesser-included offense of possession of a controlled substance. He was sentenced, based on his criminal history, to an extended term of six years in prison.

¶ 16 On appeal, defendant contends the trial court violated Rule 431(b) and the holding in *People v. Zehr* 103 Ill. 2d 472, 477 (1984), when it did not ask potential jurors whether they understood and accepted that a defendant's failure to testify could not be held against him. He also contends he was denied a fair trial because the trial court did not conduct a balancing test pursuant to *Montgomery*, before admitting six of Mr. Davis's prior convictions for the purposes of impeachment. Defendant admits he has forfeited these issues for purposes of this appeal by failing to object at trial and raise them in his posttrial motion (see *People v. Enoch*, 122 Ill. 2d 176, 186 (1988)), but asks this court to review them for plain error (*People v. Herron*, 215 Ill. 2d 167, 186-87 (2005)).

¶ 17 Although defendant initially argued that the trial court's noncompliance with Rule 431(b)

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was a structural error requiring reversal, and that his failure to object should be excused because he was objecting to the trial court's conduct, he acknowledges in his reply brief that this argument is "foreclosed" in light of *People v. Thompson*, 238 Ill. 2d 598 (2010). However, defendant contends the trial court's failure to ask the venire whether it understood and accepted all four of the *Zehr* principles constituted plain error under the first prong of the plain-error doctrine, because the evidence at trial was close. See *Herron*, 215 Ill. 2d at 186-87 (a reviewing court may address forfeited errors "when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence.").

¶ 18 Here, defendant would have this court reach his *voir dire* contentions through the closely-balanced-evidence prong of plain error review. In considering whether the first prong of the plain-error doctrine has been satisfied, this court must consider whether the outcome of defendant's trial may have been affected by the trial court's failure to ask potential jurors whether they understood and accepted that a defendant's failure to testify could not be held against him. In order to prevail on this claim, defendant must establish this error alone could have led to his conviction, that is, the verdict "may have resulted from the error and not the evidence" properly adduced at trial. *Id.* at 178; see also *People v. Naylor*, 229 Ill. 2d 584, 593 (2008) (defendant bears the burden of persuasion under both prongs of the plain error doctrine).

¶ 19 Defendant has not met this burden, as it is clear having reviewed the record, that defendant cannot show prejudice. The trial court's failure to ask potential jurors whether they understood and accepted that a defendant's failure to testify could not be held against him, in and of itself, did not tip the scales of justice against defendant when the evidence at trial was not closely balanced. Although Mr. Davis testified no crimes were committed and he did not see any narcotics recovered from defendant, the State's witnesses established that the cigarette box recovered from defendant contained items which tested positive for cocaine and the trial court instructed the jury after closing argument that defendant's failure to testify must not be considered in any way when arriving at a

verdict. Accordingly, because defendant has failed to establish that it was the trial court's noncompliance with Rule 431(b), in and of itself, that resulted in his conviction, the court's error does not rise to the level of a first prong plain error exception. *Id.* at 593.

¶ 20 Defendant next contends, and the State agrees, that the trial court erred when it failed to conduct a *Montgomery* balancing test before admitting six of Mr. Davis's prior convictions for purposes of impeachment. However, defendant admits that he failed to preserve the error, and the State contends the error was not plain error.

¶ 21 In *Montgomery*, our supreme court determined that evidence of a witness's prior conviction is admissible to attack his credibility when: (1) the prior crime was punishable by death or a prison sentence of more than one year or involved dishonesty or false statements regardless of punishment; (2) less than 10 years had passed since the date of conviction or the date of release, whichever was later; and (3) the probative value of admitting the prior conviction outweighed the danger of unfair prejudice. *Montgomery*, 47 Ill. 2d at 516-17. Subsequently, in *People v. Patrick*, 233 Ill. 2d 62 (2009), the court determined that a trial court's blanket refusal to rule on all motions *in limine* regarding the admissibility of prior convictions until after a defendant testified was an abuse of the trial court's discretion, *i.e.*, the court's refusal to exercise any specific discretion amounted to an abuse of that discretion. *Id.* at 74-75. The court then subjected that abuse of discretion to a harmless-error analysis, ultimately determining that the court's error was not harmless beyond a reasonable doubt. *Id.* at 75-76; see also *People v. Averett*, 237 Ill. 2d 1, 10 (2010).

¶ 22 In the case at bar, defendant failed to raise this issue in his posttrial motion, thus it is subject to plain error review. See *Herron*, 215 Ill. 2d at 181-82 (plain error applies when defendant fails to object, while harmless error applies when a timely objection is made). Our supreme court has previously determined that a trial court's failure to exercise its discretion in this manner is not a structural error requiring automatic reversal. Rather, it is simply an error within the trial proceedings. See *Averett*, 237 Ill. 2d at 12-14 (refusal to rule on a motion *in limine* until after

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hearing a defendant's testimony does not render a trial fundamentally unfair or unreliable). Thus, defendant must persuade this court it was the trial court's failure to conduct the *Montgomery* balancing test and the resulting admission of Mr. Davis's six prior convictions that threatened to tip the scales of justice against him. *Herron*, 215 Ill. 2d at 186-87.

¶ 23 Defendant first contends he was prejudiced by the admission of Mr. Davis's prior convictions because they were for narcotics-related offenses, *i.e.*, similar to the charges against him. He further contends, because Mr. Davis had been repeatedly convicted of the same felonies, the admission of one or two of those convictions "surely" would have sufficed to impeach Mr. Davis's credibility and would not have had the same effect as the admission of all six. The State responds defendant cannot establish how he was prejudiced by the trial court's error, as had the balancing test been performed, "some, if not all" of Mr. Davis's convictions would have been admitted.

¶ 24 Initially, this court rejects defendant's argument that none of Mr. Davis's prior convictions should have been admitted when they were for the same offenses of which defendant stood accused. Our supreme court has determined it is not an abuse of discretion for the trial court to permit the admission of a defendant's prior conviction for the same crime of which he is currently on trial, as it is the nature of a previous conviction, rather than the mere fact that it exists, which aids a jury in determining a particular witness's credibility. *People v. Atkinson*, 186 Ill. 2d 450, 454-58 (1999) (trial court permitted the defendant's two prior convictions for burglary to be admitted for impeachment purposes during his trial on burglary charges). Although a trial court should be cautious when admitting prior convictions for the same crime as the one charged, that similarity alone does not mandate the exclusion of those prior convictions. This is especially true in those cases where the jury is instructed that it is only to consider previous convictions as they relate to a witness's credibility. *Id.* at 463.

¶ 25 While it is true that Mr. Davis's prior convictions were for narcotics-related offenses, the mere fact that Mr. Davis had been convicted of the same crimes that defendant was on trial for did

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not bar the admission of those convictions for impeachment purposes. *Id.* at 458. Here, Mr. Davis was a witness rather than a defendant, so the similarity factor would be less important. This court has previously held that a conviction for the possession or delivery of a controlled substance is the kind of conviction that would be probative of a witness's credibility and could be used to impeach that person's credibility. See *People v. Harden*, 2011 Ill. App. (1st) 092309 at ¶ 49. Additionally, the jury was told during jury instructions that evidence that a witness has been convicted of a crime should only be considered as it affected that witness's credibility. See *Atkinson*, 186 Ill. 2d at 463.

¶ 26 In any event, as discussed above, defendant has failed to persuade this court that the evidence at trial was closely balanced. *Naylor*, 229 Ill. 2d at 593. Here, the State presented testimony establishing the contents of a cigarette box recovered from defendant contained items that tested positive for cocaine. Defendant then presented Mr. Davis, who testified he did not see the officers recover any drugs from defendant. Considering the strength of the State's case, it is doubtful that Mr. Davis's testimony regarding the specifics of his prior convictions contributed to the jury's finding that defendant possessed a controlled substance. While the State cross-examined Mr. Davis regarding the details of his prior convictions and reminded the jury during closing arguments that he had six drug convictions, this is not a case where the State urged the jury not to believe a witness simply because he had multiple prior convictions. Rather, the State focused on the fact that a cigarette box containing narcotics was recovered from defendant. See *Patrick*, 233 Ill. 2d at 75-76 (the impact of the improperly admitted convictions was clear when the State's "focused and repeated argument" urged the jury not to believe a three-time convicted felon). As the evidence against defendant was not closely balanced, his procedural default prevents review of this issue. See *Herron*, 215 Ill. 2d at 186-87.

¶ 27 For the foregoing reasons, the judgment of the trial court is affirmed.

¶ 28 Affirmed.