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No. 3-09-0614

Order filed January 20, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2011

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THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of the 10 <sup>th</sup> Judicial Circuit
	)	Peoria County, Illinois,
Plaintiff-Appellee,	)	
	)	No. 08 CF 1428
v.	)	
	)	
NATHANIEL W. THOMPSON,	)	The Honorable
	)	Michael Brandt,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE McDADE delivered the judgment of the court.  
Justices O'Brien and Schmidt concurred in the judgment.

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**ORDER**

*Held:* Because the plain language of the Rule 431(b) does not require that jurors be asked about each individual *Zehr* principle, the trial court did not commit error in inquiring about the jurors understanding and acceptance of the *Zehr* principles in compound form. Because the record reveals that the trial court understood and applied the balancing test set out in *People v. Montgomery*, 47 Ill. 2d 510 (1971), the court did not abuse its discretion in admitting defendant's prior conviction for theft. Because defendant suffered no prejudice from counsel's failure to file a motion *in limine* to exclude evidence of his prior conviction, defendant's ineffective assistance claim fails.

## FACTS

On December 2, 2008, defendant, Nathaniel W. Thompson, was indicted for the offense of burglary (720 ILCS 5/19-1(a) (West 2008)). Specifically, the indictment alleged that defendant, “without authority knowingly enter[ed] \*\*\* a motor vehicle of Terrie Steubinger \*\*\* with the intent to commit a theft therein.”

During jury selection, the trial court admonished the entire panel on several concepts and principles of law. In particular, the trial court advised:

“Under the law the defendant is presumed to be innocent of the charge brought against him. This presumption remains with him throughout every stage of the trial and during your deliberations on the verdict, and is not overcome unless from all the evidence in the case you are convinced that the defendant is guilty. 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.

The defendant is not required to prove his innocence, nor is he required to present any evidence on his own behalf, he may rely on the presumption of innocence.

Further, the defendant has a right not to testify, and no inference of guilt may arise from the defendant’s failure to testify.”

The trial court then explained that jurors would be selected in panels of four. After the first panel was seated, the court addressed the panel as follows:

“I’ll be asking you a series of questions, and please answer out loud, the court reporter needs to transcribe what we say. All the questions are the same, and I’ll be addressing you individually.”

The court proceeded to ask each of the four members of the panel if they were acquainted with any party involved in the case or whether there was anything about the charge of burglary that would interfere with an ability to be an impartial juror. The court continued:

“ Q Do you understand and do you accept the following principles: That the defendant is presumed to be innocent of the charge against him, before he can be convicted the State must prove him guilty beyond a reasonable doubt, he’s not required to offer any evidence on his own behalf, and his failure to testify cannot be held against him.

Do you understand and accept those principles, Ms. Anderson?

A Yes.

Q Mr. Morse?

A Yes.

Q Ms. Potts?

A Yes.

Q And, Mr. Garcia?

A Yes.”

The trial court employed this identical procedure with subsequent panels of four, as well as with individual jurors who were selected to replace jurors excused from each panel of four. Additionally, the parties were afforded the opportunity to questions to the prospective jurors. Defendant did not object to the *voir dire* proceedings and the matter proceeded to trial.

Terri Steubinger testified that she worked as a sales person at Green Chevrolet in Peoria. On November 14, 2008, Terri left her purse, along with other items, on the floor of her unlocked car as she went into the detail building at Green Chevrolet. When Terri exited the building she discovered that her purse, wallet, cell phone and camera were no longer in her car.

Kyle Dearing, a lot attendant at Green Ghevrolet, was in the company lot when he saw a man open Terri's car door and enter the front passenger side. Dearing saw the man grab several items and then run around the side of the building. Dearing identified defendant as the man he saw on November 14, 2008. When defendant saw Dearing, he started to run toward the street. Dearing yelled for defendant to "stop." Dearing then jumped into the car of another employee, Michael Halsted, and the two followed defendant as he ran. They caught up to defendant and stopped him at the corner of Pioneer Parkway. Dearing demanded that defendant return the items he took from Terri's car. Defendant took Terri's wallet, digital camera and cell phone out from his coat and gave them to Dearing.<sup>1</sup> Halsted testified that he called the police from Terri's cell phone. The police arrived shortly after Halsted called the police.

Peoria police officer Ronald Hill responded to the dispatch that someone was being detained for stealing something from a car. Upon Hill's arrival, Halsted showed him the wallet,

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<sup>1</sup> Dearing found Terri's purse, with its remaining contents dumped out, on the side of the Green Chevrolet building.

cell phone and camera. Hill placed defendant under arrest and returned defendant to Green Chevrolet where Steubinger identified the items as her belongings. Hill testified that during the investigation, none of the parties told him anything about an argument.

Defendant testified that on November 14, 2008, he had finished a shift at Burger King and walked to Green Chevrolet. Approximately a week earlier, defendant had submitted a job application to the desk inside the detail shop and it was part of his daily ritual to walk to Green Chevrolet and check on the status of his application. On November 14, 2008, defendant walked into the detail shop and asked Dearing, who was working on a car, where the man he submitted his application was. Dearing immediately started yelling at defendant to leave. Defendant and Dearing then engaged in a verbal argument and defendant left the building. Defendant called City Link to locate a nearby bus stop, which was on Sommer Avenue. Dearing came out of the building and the two argued again before defendant walked off toward Pioneer Parkway. Defendant testified he did not touch any car.

When he got to Pioneer Parkway and Sommer, Dearing and another man were already in a car. Dearing jumped out and demanded that defendant “give [him] the shit.” Defendant did not know what Dearing was talking about. Defendant did not give Dearing anything. Defendant never saw Terri’s wallet, cell phone or camera. Halsted proceeded to call someone from a cell phone. Defendant asks Halsted if he was contacting someone about the previous argument he had with Dearing. Halsted replied, “No, I’m just calling my boss.” Defendant stayed at the location because he was waiting for his bus. Police officers subsequently arrived at the location and patted defendant down, but found nothing. The officers, however, took defendant back to Green Chevrolet where he saw Steubinger who said that “nothin[g] was missin[g].” Defendant

did not know what she meant by that statement.

Dearing testified that defendant never had a conversation with him about a job application. He also testified that he never had an argument with defendant prior to confronting him about Terri's belongings. Dearing did not see defendant make a telephone call while defendant was on Green Chevrolet's premise. Neither Dearing or Halsted saw defendant make a telephone call while they waited for the police to arrive.

After the defense rested, the State moved for admission into evidence for impeachment purposes People's Exhibit 1, which was a certified copy of defendant's June 1999 conviction for the Class 3 felony theft. Defendant acknowledged having seen the exhibit but objected to its admission on the basis that its prejudicial effect outweighed its probative value. The trial court held that the exhibit was admissible. The jury was instructed defendant's previous conviction could only go to defendant's credibility as a witness, not as evidence of guilt.

The jury found defendant guilty of burglary. The trial court denied defendant's motion for a new trial and sentenced him to fifteen years' imprisonment. The trial court subsequently denied defendant's motion to reconsider sentence.

#### ANALYSIS

Initially, defendant argues that the trial court erred by failing to comply with the mandates of Supreme Court Rule 431(b) (Rule 431(b)). "We review *de novo* the interpretation of a supreme court rule because it is a question of law." *People v. Holmes*, 235 Ill. 2d 59, 66 (2009)

Rule 431(b), as amended, provides:

"The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following

principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that the defendant's failure to testify cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's failure to testify when the defendant objects.

The court's method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section." Official Reports Advance Sheet No. 8 (April 11, 2007), R. 431(b), eff. May 1, 2007.

In the interest of clarity, we note that defendant does not contend that the court failed to admonish the jurors regarding the four *Zehr* principles. Instead, defendant contends the court violated Rule 431(b) by failing to ask the jurors whether they understood and accepted each individual *Zehr* principle. Defendant's argument is grounded in the belief that Rule 431(b) requires the court to ask a separate question as to each principle, rather than in compound form. Because the plain language of the Rule 431(b) does not require that jurors be asked about each individual *Zehr* principle, we find the trial court committed no error in inquiring about the jurors understanding and acceptance of the *Zehr* principles in compound form.

We begin our analysis by pointing out that defendant failed to preserve his 431(b) contention for review. See *People v. McGee*, 238 Ill. App. 3d 864, 876 (1992) (holding to preserve a trial error for appellate review a defendant must both object at trial and raise the issue

in his written post-trial motion). Recently, the supreme court held that a trial court's failure to comply with Rule 431(b) is not a structural error requiring automatic reversal. *People v. Thompson*, No. 109033, 2010 Ill. LEXIS 1536, \*10-11 (October 21, 2010). Because there is no structural error for Rule 431(b) violations, we may only grant relief on defendant's forfeited contention if there was plain error. *Thompson*, 2010 Ill. LEXIS 1536 at \*17.

“Under the plain-error doctrine, a reviewing court may consider an unpreserved and otherwise forfeited error when (1) ‘the evidence in the case is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence; or (2) where the error is so serious that the defendant was denied a substantial right, and thus a fair trial.’ ” *People v. Willhite*, 399 Ill. App. 3d 1191 (2010), quoting *People v. McLaurin*, 235 Ill. 2d 478, 489 (2009). However, before we consider application of the plain-error doctrine to the instant case, we must determine whether the trial court erred in its application of Rule 431(b). *Willhite*, 399 Ill. App. 3d at 1194.

The Appellate Courts for the First District and Fourth District both recently considered the precise issue pending before this court in cases equally identical on their facts (*People v. McCovins*, 399 Ill. App. 3d 323 (2010); *People v. Willhite*, 399 Ill. App. 3d 1191 (2010)). The trial courts in *McCovins* and *Willhite* each admonished the jurors regarding the four *Zehr* principles. The courts then inquired as to the jurors' understanding and acceptance of those principles. Each juror indicated that they understood the principles and would apply them. On appeal, the defendants argued that the trial courts violated Rule 431(b) by asking the jurors, in compound form, whether they understood and accepted the *Zehr* principles. The *McCovins* court held that “there is no requirement under Rule 431(b) that the trial judge question the jurors about

each individual principle. Rather, Rule 431(b) provides that ‘the court shall ask each potential juror, individually or in a group, whether that juror understands and accepts’ the four Rule 431(b) principles.” *McCovins*, 399 Ill. App. 3d at 327, quoting Official Reports Advance Sheet No. 8 (April 11, 2007), R. 431(b), eff. May 1, 2007. Likewise, the *Willhite* court found that “the plain language of the rule does not require the trial court to ask jurors individually about each principle.” *Willhite*, 399 Ill. App. 3d at 1196. Thus, both courts rejected the contention that the trial court violated Rule 431(b) by not questioning the jurors about each individual principle. *McCovins*, 399 Ill. App. 3d at 327; *Willhite*, 399 Ill. App. 3d at 1196.

We agree with the reasoning espoused in both *McCovins* and *Willhite*. Here, the trial court admonished the jurors regarding the four *Zehr* principles and inquired as to their understanding and acceptance of those principles. Each juror answered “yes” to the court’s inquiry. Moreover, we note that the record is devoid of any evidence indicating that the trial court acted in a manner that would discourage a juror from responding if he or she did not understand or agree with any of the *Zehr* principles. Because we find that the trial court’s manner of questioning the jurors was in compliance with Supreme Court Rule 431(b), we need not consider defendant’s contention under plain-error analysis.

Next, defendant asserts that the trial court erred in admitting defendant’s prior conviction for impeachment purposes. “A trial court’s decision to permit a defendant in a criminal case to be impeached by a prior conviction will not be disturbed absent an abuse of discretion.” *People v. Flowers*, 306 Ill. App. 3d 259, 264 (1999).

At the outset, we note that defendant has waived this contention on appeal because he failed to include the issue in his motion for a new trial. See *McGee*, 238 Ill. App. 3d at 876.

Waiver aside, defendant's contention is without merit.

Defendant argues admission of his prior conviction for theft was inappropriate due to the trial court's failure to conduct an adequate probative versus prejudicial balancing test. While defendant acknowledges that the court did in fact "note the similarity between the prior conviction and the crime charged, he alleges that the "required balancing fell far short" of what is required under Illinois law. Because the record reveals that the trial court understood and applied the balancing test set out in *People v. Montgomery*, 47 Ill. 2d 510 (1971), we will not disturb its decision.

In *Montgomery*, the supreme court held that the State may attack a defendant's credibility with evidence that he has been convicted of a crime if the crime: (1) was punishable by death or more than one year of imprisonment, or (2) involved dishonesty or false statement. *Montgomery*, 47 Ill. 2d 510, 516 (1971). In either case, however, the evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice. *Montgomery*, 47 Ill. 2d 510.

Defendant's prior theft conviction satisfied the first prong of the *Montgomery* rule because theft, as a Class 3 felony, is a crime punishable by more than one year of imprisonment. 720 ILCS 5/16-1(b)(4) (West 2008); 730 ILCS 5/5-8-1(a)(6) (West 2008). The conviction also satisfies the second prong of the *Montgomery* rule in light of the supreme court's holding that theft is a crime involving dishonesty, which is admissible to impeach the credibility of a witness. *People v. Spates*, 77 Ill. 2d 193, 201-04 (1979). Thus, the trial court was required to weigh the probative value of admitting the prior burglary convictions against the danger of unfair prejudice. *Montgomery*, 47 Ill. 2d 510.

Defendant's testimony at trial made up his entire defense. The trial court correctly noted

that defendant's credibility was therefore a central issue, and the prior conviction was crucial in measuring defendant's credibility. While we acknowledge that nine years had passed since the date of defendant's prior conviction, we note that Illinois courts do not "mandate any specific format for the conduct of the balancing test." *People v. Meyers*, 367 Ill. App. 3d 402, 416 (2006), quoting *People v. Elliot*, 274 Ill. App. 3d 901, 911 (1995). Instead, the record must simply "include some indication that the trial court was aware of its discretion to exclude a prior conviction." *Meyers*, 367 Ill. App. 3d at 415, quoting *People v. Whirl*, 351 Ill. App. 3d 464, 467 (2004). The record in the instant case reveals that the trial court understood and applied the balancing test required by *Montgomery*. Accordingly, we will not disturb its decision. See *Flowers*, 306 Ill. App. 3d at 264-65.

Finally, defendant contends that his trial counsel was ineffective for failing to file a motion *in limine* to exclude evidence of his prior conviction for theft. Because defendant suffered no prejudice from counsel's failure to file a motion *in limine*, defendant's ineffective assistance claim fails.

The court in *People v. Jackson*, 2009 Ill. App. LEXIS 1343, \*10 (2009) recently explained:

In order to succeed on a claim of ineffective assistance of trial counsel, a defendant must satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d. 674, 104 S. Ct. 2052 (1984). The defendant must show both that counsel's representation was deficient and that, but for the asserted deficiency, there was a reasonable probability that the outcome of

the proceeding would have been different.

In order to demonstrate ineffective assistance of appellate counsel, a defendant must allege facts showing that the failure to raise an issue or issues on appeal was objectively unreasonable and that counsel's decision prejudiced the defendant. [Citation.] A defendant suffers no prejudice if the underlying issues are nonmeritorious. [Citation.]”

As shown above, defendant's claim requires a showing of prejudice. Both the United States Supreme Court and the Illinois supreme court have indicated that if it is easier to dispose of an ineffectiveness claim on the grounds of lack of sufficient prejudice, it is not necessary to first address whether defense counsel's performance was deficient. *Strickland v. Washington*, 466 U.S. 668, 697, 104 S. Ct. 2052, 2070 (1984); *People v. Albanese*, 104 Ill. 2d 504, 527 (1984).

Here, trial counsel objected when the State attempted to admit the prior conviction. Thus, the question of admissibility was put before the court and argument was heard on the matter. The court ultimately found the prior conviction admissible under *Montgomery*. Defendant is unable to establish prejudice under these facts. While defendant claims that if he had known his prior conviction could be used to impeach his credibility prior to trial, he would not have testified on his own behalf, this argument ignores the fact that defendant's testimony at trial made up his entire defense. Any claim that defendant would not have testified had he known the prior conviction would be used to impeach him is unsupported by the record, as without his testimony he had no defense.

For the foregoing reasons, we affirm defendant's conviction.

Affirmed.