

**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).

NO. 4-09-0471

Filed 1/27/11

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macon County
JAMES CAROTHERS, JR.,	)	No. 09CF158
Defendant-Appellant.	)	
	)	Honorable
	)	Timothy J. Steadman,
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court. Justices Steigmann and Myerscough concurred in the judgment.

**ORDER**

*Held:* Defendant failed to preserve issue raised on appeal regarding the denial of his motion *in limine* as to his criminal history because he chose not to testify.

On April 29, 2009, defendant, James Carothers, Jr., filed a motion *in limine* seeking, in pertinent part, to preclude the State from impeaching defendant with two prior criminal convictions if he chose to testify. That same day, after jury *voir dire* but prior to the start of defendant's trial, the trial court denied defendant's motion with regard to the State's use of defendant's two prior criminal convictions. Defendant chose not to testify and was found guilty of residential burglary (720 ILCS 5/19-3 (West 2008)). Defendant appeals, arguing he should receive a new trial because the State failed to lay a proper foundation for the admissibility of his two prior convictions

under *People v. Montgomery*, 47 Ill. 2d 510, 268 N.E.2d 695 (1971). We affirm.

#### BACKGROUND

On February 2, 2009, the State charged defendant with residential burglary (720 ILCS 5/19-3 (West 2008)). Because defendant only argues the State failed to lay a proper foundation for the admissibility of defendant's two prior convictions, we focus on defendant's motion *in limine* filed April 29, 2009, which asked the trial court (1) to suppress any testimony from State witnesses regarding defendant's criminal-trespass complaint or his alleged state of intoxication on the night of his arrest and (2) to bar the State from impeaching defendant with his convictions for theft under \$300 (case No. 08-CM-1260) and armed robbery (case No. 92-CF-936).

With regard to defendant's two prior convictions, his motion *in limine* only stated:

"Defendant has prior criminal history which could be used for impeachment in 08-CM-1260 (Theft under \$300, a Class A misdemeanor) and 92-CF-936 (Armed[-]Robbery, a Class X offense for which Defendant served 22 years in the Illinois Department of Corrections). Defendant asserts that the prejudice which

would result from the inclusion of these prior convictions far outweighs the probative value. The Armed[-]Robbery case occurred over 17 years ago, and although *Defendant would have served this sentence into the early 2000s*, it is the age of the case which would cause undue prejudice against the Defendant. The inclusion of the misdemeanor Theft case would also lead to undue prejudice against the Defendant. The inclusion of the misdemeanor theft case would also lead to undue prejudice against the Defendant because jurors might place too much weight on the misdemeanor conviction, thus damaging Defendant's credibility as a witness. Therefore, Defendant requests that the Court bar the State from asking any questions regarding those prior convictions."

(Emphasis added.)

On April 29, 2009, the trial court heard arguments on the motion prior to the start of defendant's trial that same day. The following exchange occurred between the court, the State, and defense counsel:

"[THE STATE]: In so far as the

defendant's previous convictions should the defendant choose to testify, it is entirely relevant that he is an individual, who has at least in the past, engaged in acts of dishonesty and we believe that has a tremendous bearing on his believability as a witness. He is not an honest person and we believe that the jury should be able to hear of the prior convictions and weigh that into an evaluation of his testimony.

THE COURT: All right. Is there any reply.

[DEFENSE COUNSEL]: Only to note that specifically 92-CF-936 the Armed[-]Robbery case is from 1992.

THE COURT: All right. But your motion suggests that your client was released from prison within the parameters of *People versus Montgomery*?

[DEFENSE COUNSEL]: That's correct.

THE COURT: All right. Thank you. \*\*\*

Now, as to the remaining issue, the two prior impeachable convictions, one being fairly recently, I believe in 2008, the other

quite a while ago, but with the release date relatively recently, I believe the jury should be allowed the opportunity to consider if defendant testifies all relevant information including prior impeachable offenses and I've found that the prejudice caused by informing the jury of the these prior convictions is not outweighed by the probative value so the motion will be denied."

Defendant chose not to testify at his trial. The jury found defendant guilty of residential burglary. In May 2009, the trial court sentenced defendant as a Class X offender to 18 years in prison.

This appeal followed.

## II. ANALYSIS

In *Montgomery*, 47 Ill. 2d at 516-19, 268 N.E.2d at 698-700, our supreme court adopted the following rule regarding the use of criminal convictions to impeach a witness. Evidence a witness has been convicted of a crime is admissible for impeaching the credibility of that witness if the crime involved dishonesty or false statement regardless of punishment or if the crime was punishable by death or imprisonment for more than one year. *Montgomery*, 47 Ill. 2d at 516, 268 N.E.2d at 698.

However, evidence of the conviction is not admissible if the trial court determines the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice. *Montgomery*, 47 Ill. 2d at 516, 268 N.E.2d at 698. In addition, evidence of the conviction is inadmissible if more than 10 years have elapsed since the date of conviction or the release of the witness from confinement, whichever occurred later. *Montgomery*, 47 Ill. 2d at 516, 268 N.E.2d at 698.

Defendant argues the trial court erred in denying his motion *in limine*, allowing the State's use of defendant's 1992 armed-robbery conviction to impeach defendant if he testified. According to defendant, the record does not establish when defendant was released from confinement. Defendant contends the State was obligated to establish this information. According to defendant, the court should not have presumed defendant's conviction fell within the 10-year limit. Instead, the trial court was required to use the date of conviction. See *People v. Naylor*, 229 Ill. 2d 584, 597, 893 N.E.2d 653, 662 (2008) ("Absent such evidence, a trial court must not resort to any presumptions regarding a release date and must employ the date of conviction").

However, defendant failed to preserve his argument the trial court erred by denying the motion *in limine* because he did not testify. See *People v. Patrick*, 233 Ill. 2d 62, 908 N.E.2d 1

(2009). Our supreme court recently stated:

"In *Luce v. United States*, 469 U.S. 38, 41-43 (1984), the Supreme Court held that a defendant who did not testify at trial was not entitled to a review of the trial court's denial of a motion *in limine* seeking to exclude his prior convictions. The Court reasoned that any possible harm flowing from the trial court's denial of a motion *in limine* to bar impeachment by a prior conviction is wholly speculative absent the defendant's testimony and the prosecution's attempt to impeach the defendant through use of the prior convictions.

This court adopted the *Luce* reasoning in *People v. Whitehead*, 116 Ill. 2d 425[, 508 N.E.2d 687] (1987)." *Patrick*, 233 Ill. 2d at 77-78, 908 N.E.2d at 10.

In addition, even if we reviewed the substance of defendant's claim, it has no merit. The trial court did not make a presumption about defendant's confinement release date. Defendant's trial counsel essentially conceded defendant's release date was within the applicable 10-year period.

### III. CONCLUSION

For the reasons stated, we affirm the judgment of the trial court. As part of our judgment, we grant the State's request defendant be assessed \$50 as costs for this appeal.

Affirmed.