

No. 1-10-2324

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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
 Plaintiff-Appellee,) of Cook County
)
)
 v.)
) No. 10 CR 3482
)
)
 JULIO MARTHA,)
)
) Honorable
 Defendant-Appellant.) James B. Linn,
) Judge Presiding.

JUSTICE KARNEZIS delivered the judgment of the court.
Justices Hall and Rochford concurred in the judgment.

ORDER

¶ **Held:** Defendant satisfied the first prong of plain error and is granted a new trial where the trial court erroneously instructed the jury to consider defendant's prior conviction as an element of the offense of aggravated unlawful use of a weapon.

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¶ 2 Following a jury trial, defendant Julio Martha was convicted of one count of unlawful possession of a firearm by a street gang member (720 ILCS 5/24-1.8(A)(2) (West 2008)) and four counts of aggravated unlawful use of a weapon (AUUW) (720 ILCS 5/24-1.6 (A)(1) (West 2008)). Defendant argues: (1) the State failed to prove him guilty beyond a reasonable doubt; (2) he was denied due process and fundamental fairness where the court mistakenly believed that his prior conviction was an element of the offense of AUUW; (3) counsel was ineffective; (4) the trial court gave the jury a misleading and confusing instruction on constructive possession; (5) the court violated Supreme Court Rule 431(b); and (6) his convictions violate the one-act-one-crime rule. For the following reasons, we reverse defendant's conviction and remand for new trial.

¶ 3 BACKGROUND

¶ 4 The following evidence was adduced at trial. Officer Candelario testified he was on duty the night of February 6, 2010, with his partner, Officer Leonardo Prieto. He testified that he was conducting a gang suppression mission. During the mission, the two officers set up surveillance from inside their vehicle. Officer Candelario had binoculars and saw defendant standing on 19th Street. Defendant was standing at the mouth of an alley which was lit by a light about 10 feet from defendant and directly above him.

¶ 5 Officer Candelario testified he saw defendant stand at the mouth of the alley for a minute or two before he removed a blue steel firearm from his waistband. Officer Candelario told Officer Prieto that he saw a weapon and they drove toward defendant. Officer Candelario stated that as they approached, defendant walked into the alley and they lost sight of him. Once they arrived at

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the mouth of the alley, they saw defendant walking toward them out of the alley. No one else was in the alley. Officer Candelario described defendant as having his hands to his sides.

Officer Prieto conducted a pat-down of the defendant and found no weapon on his person.

¶ 6 Officer Candelario stated he then conducted a systematic search of the alley with the use of a flashlight. He found a semi-automatic weapon with a blue steel finish next to a garbage can. Officer Candelario observed the firearm had no frost on it despite the cold weather and snow on the ground. Officer Candelario picked up the firearm by its handle with his bare hands and it appeared warm. He then secured the weapon and checked to see if it was loaded. The firearm was fully loaded with nine millimeter rounds. Officer Candelario testified that there was no one else in the alley.

¶ 7 On cross-examination, Officer Candelario denied that he and Officer Prieto were targeting defendant. Officer Candelario testified that his report stated that they "set up surveillance on Julio Martha, the offender, because R/Os, responding officers, were aware that offender was on parole for aggravated battery with a firearm and had a history of weapons violations." Officer Candelario testified once he saw defendant standing in the area he purposely set up surveillance on him because he was "on parole for aggravated battery and an active gang member." Officer Candelario also testified that although he was aware that police procedure is to have a weapon examined for fingerprints prior to handling the weapon if the existence of fingerprints is pertinent to the case, Officer Candelario did not follow that procedure because he was concerned about securing the weapon for officer safety.

¶ 8 Next, Officer Prieto testified that he was on duty and working with Officer Candelario the

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night of February 6, 2010. On the night in question, the two officers set up surveillance and watched defendant. Officer Prieto testified that defendant was a known gang member and the officers were on a zero tolerance mission. Officer Prieto testified that he saw defendant reach toward his waistband, and begin to walk to the mouth of the alley. Officer Candelario said that he saw a gun with the binoculars. Officer Prieto stated that he never saw the weapon and that he was not using binoculars that night. Officer Prieto testified that as the officers drove up, he saw defendant walking out of the alley toward him and officer Candelario. Officer Prieto immediately detained defendant and began to pat him down. Officer Prieto testified that Officer Candelario went straight down the alley to look for the weapon. Officer Prieto further explained that after Officer Candelario found the weapon, he was told to place defendant under arrest. After the officers transported defendant to the station, defendant divulged information regarding his prior gang affiliation with the La Raza street gang.

¶ 9 Officer Armando Alonso testified that he has been a Chicago Police officer for twenty years. Officer Alonso currently works for the Forensic Service in the firearm unit and testified as to his assignment in the current case. He test fired the handgun recovered in the case on February 11, 2010 to see if it was in working order. Officer Alonso testified that the weapon was in working order and that he did not test it for fingerprints or DNA. Alonso further explained that if it was requested, DNA testing would have occurred in a different unit.

¶ 10 The State offered evidence by way of stipulation. It was stipulated that Master Sergeant Michael Vorreyer is a FOID Enforcement Manager with the Firearm Bureau of the Illinois State Police. Vorreyer confirmed that as of March 17, 2010, defendant had never been issued a FOID

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card.

¶ 11 The parties also stipulated that defendant had been convicted of the offense of aggravated battery with a firearm on October 7, 2003.

¶ 12 Defendant's sister, Cristela Martha, testified as to her brother's whereabouts the day and night of February 6, 2010. Cristela Martha testified that she and her older sister Liliana Cabrera picked up defendant at 4:45 p.m. from his house. Shortly thereafter, they went to the Gurnee Mills mall. Cristela stated that her sister Liliana, her brother-in-law, and their three children accompanied defendant and her on the trip. After grabbing a bite to eat at the food court, they decided to go home. They stayed at the mall until closing time around 9:00 p.m. Cristela stated that she hugged defendant that day. She also testified that her nieces and nephews always hug defendant. Cristela testified that she and defendant were dropped off at their father's house. At around 11 p.m. defendant wanted to get food so he left his father's home.

¶ 13 Next, defendant's older sister, Liliana Cabrera testified. Liliana testified that she picked defendant up at around 4:45 p.m. on the day in question. Liliana testified that she also hugged her brother on that day. She also stated that she did not see any weapon on her brother. Her children played with defendant on that day and searched his pockets for money. She further stated that the last time she saw her brother that night was at 10:30 p.m. when she dropped him and Cristela off at their father's house.

¶ 14 Defendant testified in his own defense. He stated that he worked as a machinist from 4 a.m. to 1 p.m. on February 6, 2010. According to defendant, he was at the mall that day for approximately six hours. After the mall he went back to his father's house in the Pilsen area.

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Defendant stated that he became hungry around 11:30 p.m and left his father's house alone to go to Tito's restaurant. As he was walking down the street, he saw a police car approaching him. He had his black and chrome cell phone in his hand and was texting someone. As the officers pulled up, they told defendant to approach the car. Defendant stated that both Officer Prieto and Officer Candelario had their weapons drawn and to their sides. Officer Prieto searched him and recovered nothing. Officer Candelario went to search the alley. Defendant testified that Officer Candelario's coat was zipped up when he went into the alley and unzipped when he was walking out of the alley after finding a gun. Defendant testified that there was no one else around the alley during this time. On that night, defendant denied that the weapon was his or that he was in the alley. The officers then handcuffed defendant and put him in the squad car.

¶ 15 Defendant testified that at the police station, the officers were trying to get information out of him regarding the La Raza street gang and the gun found in the alley. The defendant stated that he was no longer a member and that he had no such information. The defendant stated that he was a member of the La Raza street gang since the age of 12, but is no longer an active member.

¶ 16 The defense called Officer Candelario as a witness. Officer Candelario testified that the defendant did not have a cell phone in his hand on the night of February 6, 2010.

¶ 17 In rebuttal, the State called Officer Candelario. Officer Candelario testified that defendant was not carrying a cell phone. While at the police station, the defendant never mentioned to Officer Candelario that he was an inactive La Raza street gang member. Officer Candelario further testified that his coat is always unzipped because it is tight with the bullet

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proof vest on underneath.

¶ 18 After hearing all of the evidence, the jury found defendant guilty of one count of unlawful possession of a firearm by a street gang member (720 ILCS 5/24-1.8(a)(2)(West 2010)) and four counts of AUUW (720 ILCS 5/24-1.6. (West 2010)). It is from this judgment that defendant now appeals.

¶ 19 ANALYSIS

¶ 20 Defendant contends his right to a fair trial was violated when the trial court, due to its misapprehension that defendant's prior felony conviction was an element of the offense of AUUW, repeatedly informed the jury of his previous conviction throughout the proceedings in violation of section 111-3(c) of the Code of Criminal Procedure of 1963. 725 ILCS 5/111-3(c) (West 2008).

¶ 21 Before we proceed to the merits of defendant's claim however, we must agree with the State that defendant has forfeited review of this issue by not objecting at trial and not including this issue in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Defendant claims that this court should apply the *Sprinkle* doctrine (*People v. Sprinkle*, 27 Ill. 2d 398 (1963)) and relax the forfeiture rule because this claim concerns the trial court's conduct. Alternatively, defendant argues that this court may properly review his claim under either prong of plain error.

¶ 22 Our supreme court recently explained that under the "*Sprinkle* doctrine," the forfeiture rule may be relaxed when a trial judge oversteps his or her authority in the presence of the jury or when counsel has been effectively prevented from objecting because it would have "fallen on deaf ears." *People v. McLaurin*, 235 Ill. 2d 478, 488 (2009). The failure to preserve an error for

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review will be excused under the *Sprinkle* doctrine only in extraordinary circumstances, such as when a judge makes inappropriate remarks to a jury or relies on social commentary instead of evidence in imposing a death sentence. *McLaurin*, 235 Ill. 2d at 488.

¶ 23 In this case, the trial court mistakenly believed that proof of a prior felony conviction was an element of AUUW that had to be pled and proven to the jury beyond a reasonable doubt.

When the State attempted to clarify its position on the issue, *i.e.*, "that the prior felony listed on the indictment was noticed as an enhancement and that "the State did not believe it was an *Apprendi* issue," the trial court made it clear that "that's exactly what *Apprendi* is about."

Defendant does not argue that the trial court overstepped its authority in the jury's presence.

Furthermore, there is nothing that prevented defense counsel from voicing a similar objection to the trial court's determination as to the necessity to admit the prior conviction substantively.

Accordingly, we conclude there is no compelling reason to relax the forfeiture rule under *Sprinkle*.

¶ 24 We next examine defendant's contentions pursuant to the plain error doctrine. Plain error bypasses normal forfeiture principles and allows a reviewing court to consider unreserved claims of error in specific circumstances. Plain error applies to a forfeited error affecting the substantial rights of a defendant when: (1) the evidence in a case is so closely balanced that the guilty verdict may have resulted from the error and not the evidence; or (2) the error is so serious that the defendant was denied a substantial right, and thus a fair trial. *People v. Herron*, 215 Ill. 2d at 178-79. To establish the first prong of plain error, the defendant must show both that there was plain error and that the evidence was so closely balanced that the error alone severely threatened

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to tip the scales of justice against him. *Herron*, 215 Ill. 2d at 187. To establish the second prong of plain error, defendant must establish that the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *Herron*, 215 Ill. 2d at 187. Defendant has the burden of persuasion of establishing plain error. *McLaurin*, 235 Ill. 2d at 495.

¶ 25 The first step of plain error review is determining whether error occurred. *People v. Walker*, 232 Ill. 2d 113, 124-25 (2009). Defendant in this case was charged with AUUW, the aggravating factors being that the firearm was "uncased, loaded and immediately accessible" and that he had not been issued a currently valid FOID card. 720 ILCS 5/24-1.6(a)(3)(A), (a)(3)(C) (West 2008). Each count of the indictment for AUUW in this case alleged that defendant violated a subsection of 5/24-1.6 (a) and that defendant "has been previously convicted of a felony, to wit: aggravated battery with a firearm, under case number 03CR-10006."

¶ 26 Unlike the offense of unlawful use of a weapon by a felon, a prior felony conviction is not an element of the crime of AUUW. See 720 ILCS 5/24-1.1(a) (West 2008). See *People v. Zimmerman*, 239 Ill. 2d 491, 499-501 (2010) (it is clear from the plain language and structure of section 111-3(c) that a prior felony conviction is a sentencing enhancement factor of AUUW and not an element of the offense.) For purposes of the AUUW statute, a prior felony conviction appears in the "Sentence" portion of the AUUW statute and raises the class of felony from a Class 4 to Class 2 felony. "Aggravated unlawful use of a weapon by a person who has been previously convicted of a felony * * * is a Class 2 felony for which the person shall be sentenced to a term of imprisonment of not less than 3 years and not more than 7 years." 720 ILCS 5/24-

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1.6(d) (West 2008).

¶ 27 Prior to trial, defense counsel filed a motion *in limine* seeking to prevent the State from informing the jury about the nature of defendant's prior felony conviction. Despite the fact that a prior felony conviction is not an element of the offense of AUUW, the trial court mistakenly believed that it was. The trial court ruled that under *Apprendi v. New Jersey*, 530 U.S. 466 (2000) ("other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."), the State was required to plead and prove the prior felony conviction.

"THE COURT: First of all, Mr. – we had a [sic] with how to read the indictment, because the indictment indicates, in Count 2, that the Defendant has a prior conviction for aggravated battery with a firearm.

That information, of course, is –on the request of the Defense, does not have to be revealed. State does have to plead and prove a prior felony conviction. But the nature of the conviction doesn't have to be revealed unless the Defense wants it to be.

Mr. Goldberg, you indicated that you did not want the jury to be advised about that.

MR. GOLDBERG: Correct.

THE COURT: Okay. You thought it would be prejudicial, the Court agreed to your request, and the jury was just advised that he does have a felony conviction. And I think the parties have agreed that there will be a stipulation in front of the jury that he does have a prior felony conviction. We're not going to tell the jury what the nature of

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the conviction is; correct?

MR. O'MALLEY: That's correct, Judge. The State certainly understands the Court's rationale and, just for the record, it was the State's position that the prior felony listed on the indictment was noticed as an enhancement. The State did not believe it was an *Apprendi* issue. The State believes – the State understands the Court's ruling that it is.

THE COURT: I think that's exactly what *Apprendi* is about. That's number one.

Number two, Mr. Goldberg then made an additional motion, he wanted - - if Mr. Martha testified that [sic] the fact that he does have that prior conviction, I believe it was from 2003?

MR. O'MALLEY: Yes, Judge."

The trial court was incorrect when it ruled that defendant's prior conviction was an element of the offense of AUUW and was required to be pled and proven beyond a reasonable doubt.

¶ 28 Defendant argues that because his prior conviction is a sentencing enhancement and not an element of the offense of AUUW, as the court mistakenly believed, the court was prohibited from presenting it to the jury pursuant to section 111-3(c) of the Code of Criminal Procedure of 1963. Section 111-3(c) essentially codified the rule announced in *Apprendi*. Section 111-3(c) provides that when the State seeks to use a defendant's prior conviction to enhance a defendant's sentence "from one classification of offense to another higher level of classification of offense," "the fact of such prior conviction and the State's intention to seek an enhanced sentence are not elements of the offense and may not be disclosed to the jury during trial unless otherwise

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permitted by issues properly raised during trial." 725 ILCS 5/111-3(c) (West 2008).

¶ 29 As the State points out, section 111-3(c) does not preclude the introduction of a prior felony conviction that is being used to enhance a sentence to the jury in every instance. Indeed, the plain language of section 111-3(c) establishes that the fact that defendant had a prior felony conviction may be disclosed to the jury if "otherwise permitted by issues properly raised during such trial." 725 ILCS 5/111-3(c) (West 2008). In this case, in discussing a pretrial motion, the parties contemplated defendant's felony conviction being used as impeachment if defendant were to take the stand. The following colloquy was had:

THE COURT: For aggravated battery with a firearm not to be made known to the jury. The Court considered, and I've balanced the prejudicial impact that would have, the probative value that would have to the jury. It is a conviction that he has, all witnesses, whether they're the party or not, carries certain baggage with them.

I think it would be more probative than prejudicial for the jury to know that he's got a prior felony conviction. It's unfortunate that it's for a similar type of offense that he was convicted of using a gun. But, with that, I still feel it's more probative than prejudicial.

So, if he testifies, the jury will be allowed to hear that. I'll limit - - give them a limiting instruction that they're only to be considered for credibility. I'll do it when they hear about it the first time, if he testifies, and the State introduces that or - -

MR. GOLDBERG: If he testifies, I'll introduce it.

THE COURT: If you front it, I will give them the limiting instruction. Then I'll

do it again when I read all the instructions to the jury, right before they deliberate."

¶ 30 Defendant took the stand in his defense and the jury heard that defendant committed a crime in 2003 and was incarcerated. The admission of a prior conviction to impeach the credibility of a witness is governed by the test set forth in *People v. Montgomery*, 47 Ill. 2d 510 (1971). When attacking credibility, evidence of a prior conviction is relevant if: (1) the crime was punishable by death or more than one year imprisonment, or the crime involved dishonesty or false statement regardless of the punishment; (2) less than 10 years elapsed since either the conviction or the release from confinement, whichever is later; and (3) probative value of the conviction outweighs the danger of unfair prejudice. *Montgomery*, 47 Ill. 2d at 519. The determination of whether a witness's prior conviction is admissible for impeachment purposes is within the sound discretion of the trial court. *People v. Atkinson*, 186 Ill. 2d 450, 456 (1999).

¶ 31 Here, the trial court weighed the probative value of defendant's prior conviction against any prejudicial effect and determined that the prior conviction was admissible. This finding was not an abuse of discretion. Consequently, defendant's prior felony conviction for aggravated battery with a firearm was admissible in this case as impeachment evidence pursuant to *Montgomery* and therefore section 111-3 was not implicated.

¶ 32 The State concedes that "the only error that potentially occurred in this case was the 'substantive' admission of the conviction, and the instruction to the jury to consider it as such." The substantive admission of the conviction came first from Officer Candelario. Officer Candelario testified on cross-examination that his report stated that they "set up surveillance on Julio Martha, the offender, because R/Os, responding officers, were aware that offender was on

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parole for aggravated battery with a firearm and had a history of weapons violations." Officer Candelario further testified once he saw defendant standing in the area that he purposely set up surveillance on him because he was "on parole for aggravated battery and an active gang member." Also, at the close of the State's case, the parties stipulated that defendant had been previously convicted of aggravated battery with a firearm in 2003. This occurred prior to defendant testifying.

¶ 33 Although defendant had a prior felony conviction that was properly admitted under *Montgomery* as impeachment evidence and would have come out anyway, it is the fact that the jury was informed to consider defendant's prior conviction substantively, as opposed to for believability purposes that is most troublesome. The jury was instructed as follows:

"Ordinarily, evidence of defendant[']s prior conviction of an offense may be considered by you only as it may affect his believability as a witness and must not be considered by you as evidence of guilt of the offense with which he is charged.

However, in this case, because the State must prove beyond a reasonable doubt the proposition that the defendant has previously been convicted of a felony offense, you may also consider evidence of defendant's prior conviction for a felony offense for the purpose of determining whether the State has proved that proposition."

¶ 34 In sum, we find that error occurred when the trial court improvidently determined that defendant's prior felony conviction was a element of the offense of AUUW and therefore had to be pled and proven beyond a reasonable doubt. That set in motion a series of events allowing the prior felony conviction to be presented to the jury through testimony and by stipulation and

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considered as evidence of defendant's guilt, rather than as affecting defendant's believability. This led to the jury being instructed to consider defendant's prior felony conviction for an impermissible purpose. "When a defendant testifies on his own behalf, the record of the defendant's prior conviction is not introduced, and cannot be considered, for the purpose of proving the defendant's guilt or innocence of the crime for which the defendant is being tried; rather, it is admissible only for the purpose of discrediting the defendant as a witness." *People v. Naylor*, 229 Ill. 2d 584, 594 (2008) (citing *People v. Cox*, 195 Ill. 2d 379, 384 (2001)). The jury in this case was instructed to consider defendant's prior conviction for an impermissible purpose.

¶ 35 Given that we have determined that error occurred, defendant argues that a plain error analysis under the first prong necessitates a finding that the evidence is so closely balanced that the guilty verdict may have resulted from the error. Whether the evidence is closely balanced is a separate question from whether the evidence is sufficient to sustain a conviction beyond a reasonable doubt. *Piatkowski*, 225 Ill. 2d at 565. The closely balanced standard errs on the side of fairness and grants a new trial even if the evidence was otherwise sufficient to sustain a conviction. *In re M.W.*, 232 Ill. 2d 408 (2009).

¶ 36 This case was a contest of credibility. Officer Candelario testified that he saw the "blue steel" handle of a gun in defendant's waistband from quite a distance away. After Officer Candelario saw the gun, defendant disappeared from his vision. When defendant was stopped by the officers he had no gun on his person. Instead, a gun was found in the alley, behind a garbage can. Defendant was seen at the mouth of the alley and exiting the alley. The recovered gun was warm and contained no frost, despite the cold temperatures. The gun was never fingerprinted.

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Officer Prieto essentially corroborated the testimony of Officer Candelario, except that Officer Prieto testified that he did not see a gun on defendant's person.

¶ 37 Defendant testified that he became hungry around 11:30 p.m. and left his father's house alone to go to Tito's restaurant. As he was walking down the street, he saw a police car approaching him. He had his black and chrome cell phone in his hand and was texting someone. As the officers pulled up, they told defendant to approach the car. Defendant stated that both Officer Prieto and Officer Candelario had their weapons drawn and to their sides. Officer Prieto searched him and recovered nothing. Officer Candelario went to search the alley. Defendant testified that Officer Candelario's coat was zipped up when he went into the alley and unzipped when he was walking out of the alley after finding a gun. Defendant testified that there was no one else around the alley during this time.

¶ 38 Given the opposing version of events and the fact that there was no extrinsic evidence presented to corroborate either version, we must agree with defendant that the evidence in this case is closely balanced. See *Naylor*, 229 Ill. 2d at 594. In so deciding, we have certainly taken into consideration the fact that the jury heard evidence from Officer Candelario that defendant was on probation for aggravated battery with a firearm and that the jury was erroneously instructed to consider that prior conviction as substantive evidence of his guilt in this case. Therefore, we find that defendant has satisfied the first prong of plain error and a new trial is warranted.

¶ 39 Although we conclude that the evidence is closely balanced, we nevertheless find, after carefully reviewing the record, that the evidence was sufficient to prove defendant guilty beyond

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a reasonable doubt. Accordingly, we find that there is no double jeopardy impediment to a new trial. In doing so, we reach no conclusion as to defendant's guilt that would be binding on retrial. *Piatkowski*, 225 Ill. 2d at 566-67 (2000). Given our disposition in this case, we need not consider defendant's remaining claims.

¶ 40

CONCLUSION

¶ 41 For the foregoing reasons, we reverse and remand for a new trial.

¶ 42 Reversed and remanded for a new trial.

¶ 43