

No. 1-10-2983

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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. 10 C6 60078
)	
GARY ALLGOOD,)	Honorable
)	Frank G. Zelezinski,
Defendant-Appellant.)	Judge Presiding.

JUSTICE GARCIA delivered the judgment of the court.
Justice Palmer concurred in the judgment.
Presiding Justice Gordon dissented.

ORDER

¶ 1 *Held:* Defendant's claim of ineffective assistance of trial counsel rejected where he was not prejudiced by counsel's failure to present a closing argument at his bench trial; the Class X sentence of 12 years found not to be excessive.

¶ 2 Following a bench trial, defendant Gary Allgood was found guilty of burglary and sentenced as a Class X offender to 12 years in prison. Defendant contends that he was deprived of his right to the effective assistance when defense counsel failed to make a closing argument and that his sentence is excessive.

¶ 3 Defendant was charged by information with one count of burglary to a car, which was parked in the lot of Ultra Foods grocery store in Lansing, Illinois. Early in the proceedings, defendant informed the court that he wanted to represent himself because his public defender had not filed any pre-trial motions on his behalf. The trial court told him that his attorney would be subject to sanctions if he filed frivolous pleadings. Defense counsel stated that he had discussed the case and his opinion that there were no substantive motions to file with defendant. Defendant proceeded to trial with his appointed counsel.

¶ 4 At the start of the bench trial, both the State and defense waived opening statements. The State opened its case by calling the driver of the car, Matthew Denny. Denny testified that at approximately 9:50 p.m. on December 18, 2009, he was grocery shopping with his 76-year-old mother at Ultra Foods in Lansing. He parked in a handicapped space near the store exit, because he has multiple sclerosis and walks with a cane. He also chose that parking space because an officer is usually parked nearby.

¶ 5 Denny testified that when he and his mother exited the store, it was snowing and sleeting heavily. He unlocked the passenger side door for his mother. She placed her purse in the front passenger side of the car and opened the rear door to load groceries into the back seat. Denny unlocked the trunk and was standing beside the rear door of the car when he noticed a man standing outside of, and leaning his body into, the front passenger side of the car. When the man came out of the car, he was holding Denny's mother's purse. Denny yelled at the man, who looked at him, smiled, and said "It's Christmas." The man then threw the purse back into the car and started backing away from the car. The man may have been wearing a hooded sweatshirt, but Denny could not be sure because of the heavy snowfall.

¶ 6 Denny testified that when he confronted the man after he removed the purse from the car, he was face-to-face with the man for "[m]aybe 15 seconds." After the man backed away

from the car, Denny "never took [his] eyes off of him." The police eventually tackled and arrested the man in the parking lot. Denny walked up to the police where the man was on the ground "getting ready to be handcuffed." Denny told the police what had happened. Denny testified that the person that was arrested was the same person that took his "mom's person from her car." He had "[n]o doubt at all" as to this.

¶ 7 Joan Denny, the owner of the purse, testified to the same sequence of events as her son. She added that when she heard her son yell, she turned and saw a man "leaning back out" of her car with her purse in his hands. She did not know this man and had not given him permission to take her purse. She saw the man running through the parking lot, until the police tackled him about 50 feet away. She stated that the person tackled by the police was the same person she had seen backing out of her car with her purse.

¶ 8 Lansing Police Officer Todd Yonker testified that he was off-duty, working security patrol for Ultra Foods on December 18, 2009. About 9:50 that evening, Denny called out to him that a black male with a backpack had taken his mother's purse. Denny pointed out the man to him, and Officer Yonker followed the man in his squad car. There were no other black males with backpacks running through the parking lot at that time. Officer Yonker briefly lost sight of the man, but others in the parking lot pointed him out. Officer Yonker radioed for assistance. He then saw other officers tackle the man and take him into custody. He identified defendant in court as the man Denny pointed out to him that night.

¶ 9 Lansing Police Officer Joshua Evans testified that his first contact with defendant was at the scene of the arrest on December 18, 2009. About 2 p.m. the following day, he spoke with defendant at the police department in the presence of a detective and a tactical officer. After reading defendant his *Miranda* rights, defendant signed a waiver form indicating that he understood his rights and was willing to speak with the officers. Defendant told the officers that

he was walking past a car in the Ultra Foods parking lot the previous evening when he saw a purse inside of it. He needed money, so he grabbed the purse from the car and had it in his hands when a man yelled at him. Defendant threw the purse back in the car, said "Merry Christmas," and ran away. Defendant declined to memorialize his statement. Prior to the interview, defendant had been given something to eat. Officer Evans noticed that defendant had scrapes on his face, but could not tell if he was under the influence of alcohol at the time of the interview. No other witnesses were called.

¶ 10 Defense counsel's motion for a directed finding was denied. After a recess, defense counsel informed the court that defendant was electing to testify against his advice.

¶ 11 Defendant testified that on December 18, 2009, he was drunk and walking past Ultra Foods around 9:30 or 10 p.m., when he saw a man and woman "parked in the handicapped, right in front of the store." He also saw a black bag "on the front passenger, on the ground." He picked the bag off the ground, put it on the seat of the car, and was going to help the couple with their groceries. The man asked defendant what he was doing, to which defendant replied he was picking the bag off the ground, wished him a Merry Christmas, and walked away. According to defendant, the man misunderstood the situation when he told the police that defendant was trying to steal the purse. Defendant testified that he had worked at that grocery store for two years where he was always helping people, that he was trying to do that by putting the purse in the car, and that he was not trying to steal anything from the car.

¶ 12 Defendant testified that because he was drunk, he never made a statement to the police and he never told them that he took the purse. He stated he was taken to the hospital on the night of his arrest because of injuries he sustained in the course of the arrest. According to defendant, the police questioned him at the hospital that night, not the following day. He did not

run from police, but was "moving out the way" because he had two outstanding warrants for "domestic."

¶ 13 After defendant rested, the State introduced a certified copy of defendant's 1992 conviction for aggravated criminal sexual assault. Neither the State nor defense counsel presented a closing argument.

¶ 14 Prior to announcing its decision, the trial court summarized the evidence, including defendant's testimony, explaining away the events. The court stated the defendant's claim was it was all a misunderstanding because he was drunk at the time, he did not intend to steal the purse, and he was trying to help by giving the purse to the people who dropped it. The court also noted that defendant denied making a statement to the police and the testimony conflicted as to when defendant was questioned. The court stated that although the Dennys never made an in-court identification of defendant, they observed his person at the time of the occurrence and Denny testified that he never lost sight of defendant. The court concluded:

"And the court has reviewed all matters here, and I have to make a decision based on credibility of the defendant's testimony versus these other people. The defendant's credibility is somewhat shadowed further by a certified copy of conviction that the State presented as well. And in reviewing all matters, I do resolve the credibility in favor of the prosecution and state, very frankly, this one isn't even close."

The trial court found defendant guilty of burglary. The matter was continued for posttrial proceedings.

¶ 15 Prior to sentencing, defense counsel's motion for a new trial was denied. In aggravation, the State introduced evidence of defendant's criminal history, including a 1989

burglary conviction; a 1989 robbery conviction; a 1992 conviction for aggravated criminal sexual assault, for which he was sentenced to 30 years in prison; and a 2007 conviction for domestic battery, for which he was sentenced to 120 days in jail. Based on his background, defendant faced a Class X sentence. The State requested a sentence of no less than 10 years, arguing that defendant had a history of violence and disregard for the law.

¶ 16 In mitigation, defense counsel noted that defendant had graduated from high school, had attended college, and was gainfully employed at CSX Railroad. Counsel emphasized defendant's request for drug treatment. In the pre-sentencing report, defendant acknowledged alcohol and drug problems, which included use of marijuana and cocaine on a daily basis since separating from his wife in 2007. Counsel asked the court to consider the minimum sentence.

¶ 17 Defendant spoke at length in allocution. He described his struggles with alcohol and drugs and their connection to the burglary charge. "I know I got myself in a pretty bad situation, and it was because of the alcohol and drugs, because that stuff is serious." He denied being violent and noted the absence of violence in the case. He stated that he should not have touched the purse, but denied intending to steal it. He also denied attempting to flee from the police. He explained, "But I wasn't trying to run because of the crime that I was committing, I put myself in a bad position, that's why I walked away." Defendant asked the trial court to place him in a drug treatment program. He asked that he be sentenced according his actions in the case and not on his background.

¶ 18 The trial court stated it considered all matters in aggravation and mitigation, including defendant's drug problem, and noted that the aggravation in this case was "substantial." The court pointed out that although defendant claimed not to be violent, he had committed violent crimes. The court stated that after serving a substantial time in prison for the violent offenses, and relatively soon after his release, defendant was sentenced to 120 days in jail for

domestic battery and then committed the crime in this case. The court noted that defendant's victims were a 76-year-old lady and her handicapped son, who walks with a cane, which the court characterized as aggravating factors, as defendant was "picking on the weak and innocent." The court found that defendant's track record indicated he would commit further crimes "if let out here." Taking into account all the factors in aggravation and mitigation, the trial court sentenced defendant to 12 years in prison.

¶ 19 At the hearing on defense counsel's motion to reconsider sentence, the trial court stated it imposed the 12-year sentence based on defendant's background, and "all other factors in aggravation and mitigation." The court stated that the crime, committed against "a handicap[ped] man as well as an elderly lady," did not merit a lesser sentence and denied the motion. Upon defense counsel's request, the trial court amended the mittimus to reflect a referral to a drug facility. This timely appeal followed.

¶ 20 Defendant first contends trial counsel rendered ineffective assistance of counsel in failing to present a closing argument. While defendant notes other alleged omissions by defense counsel in his opening brief, he affirmatively states in his reply brief that his claim of ineffectiveness is not based on the other alleged deficiencies. Accordingly, we limit our discussion to the contention that not presenting a closing argument in this case rendered trial counsel's assistance ineffective.

¶ 21 To prevail on a claim of ineffective assistance of counsel, defendant must satisfy both prongs of the claim: (1) counsel's performance was deficient and (2) defendant was prejudiced by the alleged deficient performance. *People v. Petrenko*, 237 Ill. 2d 490, 496 (2010) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). A failure to satisfy either prong is fatal to the claim. *People v. Givens*, 237 Ill. 2d 311, 331 (2010). A reviewing court may deny relief when no prejudice is shown without examining trial counsel's performance. *Id.*

¶ 22 Defendant contends that by not presenting a closing argument, defense counsel squandered the last clear chance to persuade the trier of fact that there may be reasonable doubt of his guilt, thereby prejudicing him. He points to five contentions defense counsel should have addressed in a closing argument in an effort to persuade the trier of fact that reasonable doubt remained: (1) questions surrounding the unmemorialized statement and defendant's possible intoxication during the interrogation; (2) defendant's trip to the hospital following his arrest; (3) the impact of the inclement weather on the victims' ability to see; (4) that neither victim identified defendant in court as the perpetrator; and (5) doubt whether defendant would commit a crime at a store where he used to work and would likely be recognized. In support of this contention, he cites *Herring v. New York*, 422 U.S. 853, 862 (1975), and *People v. Wilson*, 392 Ill. App. 3d 189 (2009).

¶ 23 We find each case cited to offer little guidance on the precise issue before us. *Herring* addressed only the constitutionality of a New York law that "confers upon every judge in a nonjury criminal trial the power to deny counsel any opportunity to make a summation of the evidence before the rendition of judgment." *Herring*, 422 U.S. at 853. *Wilson* involved a jury trial, where defense counsel failed to make a closing argument and failed to object to certain evidence, which added support to defendant's contention of deficient performance. *Wilson*, 392 Ill. App. 3d at 200. The circumstances of this case differ substantially from *Wilson*.

¶ 24 To show prejudice, defendant must demonstrate that there is a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *People v. Albanese*, 104 Ill. 2d 504, 525 (1984). In the context of a bench trial, where the only contention that counsel's assistance was constitutionally deficient is his failure to argue in closing, to establish prejudice defendant must demonstrate that there is a reasonable probability that the verdict would have been not guilty, but for counsel's omission. See *People v. McCarter*,

385 Ill. App. 3d 919, 935 (2008). In other words, before a defendant can be found to have been prejudiced by defense counsel's alleged deficient performance in not presenting a closing argument, defendant must demonstrate that based on the trial evidence, "a verdict of not guilty would be reasonable." *Id.* at 935.

¶ 25 In this case, based on the defendant's own testimony, we cannot say that a verdict of not guilty would be reasonable. Defendant claimed to be walking past the victim's car when he noticed something. "There was a black bag on the front - - on the front passenger, on the ground. *** I pick up the purse up or bag off - - off the counter - - off the ground, and I put it on the seat of the car. *** I was actually trying to be helpful, which is why he seen me putting the purse - - He said, he saw me coming out, but I was actually putting the purse in the car on the - - on the seat." Defendant testified "against [his] attorney's advice." Defense counsel's concern over defendant's testimony was warranted.

¶ 26 Defendant's testimony eliminated any issue as to his identification by Matthew or Joan Denny. His testimony also rendered moot defendant's contention that he would not commit a crime at a store where he says he used to work. The record evidence simply does not permit the conclusion that "but for" defense counsel's failure to argue in closing, "a verdict of not guilty would be reasonable." *Id.* The trial judge, as trier of fact, in his review of the evidence and in assessing the credibility of the State's witnesses and the testimony of defendant, stated as much when he noted, "this one isn't even close. There's a finding of guilty." Defendant is mistaken as to his burden before this court that he need only point to arguments defense counsel could have made to demonstrate that defense counsel was ineffective.

¶ 27 In light of all the evidence before the trial court, defendant cannot demonstrate that the outcome of his bench trial would have been different had defense counsel argued the points raised in his main brief. The trial court clearly found the facts to be contrary to those

asserted by defendant's testimony. *People v. Campbell*, 146 Ill. 2d 363, 375 (1992). No argument by defense counsel during closing argument could have changed those facts, which foreclose defendant's claim that he was prejudiced. *People v. Talasch*, 20 Ill. App. 3d 794, 801 (1974); see also *People v. Coleman*, 212 Ill. App. 3d 997, 1004 (1991).

¶ 28 Defendant also presents various challenges to his sentence. He first contends the record does not reveal that he was aware of the senior age of Joan Denny or that Matthew Denny had multiple sclerosis and used a cane. Although the State argues this contention has been forfeited for failure to explicitly list it in the motion to reconsider sentence, we elect to address the claim directly.

¶ 29 A fair inference can be drawn from defendant's testimony on cross-examination that defendant was in fact aware, from the point he first observed the Dennys, of the senior age of Joan Denny and that Matthew Denny was disabled. Defendant testified, "These people are parked in the handicapped [space], right in front of the store." Defendant nevertheless insists that the record supports his contention in his reply brief that "the judge *** [believed] Mr. Allgood committed the crime *because* of the victims' vulnerabilities, and nothing in the record supports that belief."

¶ 30 We do not share defendant's reading of the record as establishing a direct link between the "victims' vulnerabilities" and defendant's commission of the burglary. It may well be that the crime was one of opportunity; the fact remains that the crime was committed against a senior citizen. See 730 ILCS 5/5-5-3.2(b)(3)(ii)(iii) (West 2009). We are aware of no bar that precludes a sentencing judge from commenting on the age of the victim when deciding where in the permissible range defendant's sentence should fall. In any event, defendant fails to present us with any authority that the trial court here abused its discretion by commenting on the characteristics of the victim and her son that are clearly borne out by the record.

¶ 31 Defendant also contends his sentence of 12 years is excessive, though he concedes it falls well within the Class X sentencing range of 6 to 30 years. He argues he was convicted of the "minimum conduct" necessary to constitute burglary and his prior felony convictions occurred over 20 years ago.

¶ 32 Where, as here, the sentence imposed by the court falls within the statutory range for the offense of which defendant is convicted, it will not be disturbed unless it constitutes an abuse of discretion. *People v. Gutierrez*, 402 Ill. App. 3d 866, 900 (2010). Such a sentence will be found excessive only if it is manifestly disproportionate to the nature of the offense or is at great variance with the spirit and purpose of the law. *People v. McGee*, 398 Ill. App. 3d 789, 795 (2010). Defendant has not demonstrated that his sentence of 12 years was excessive under any standard of review.

¶ 33 The trial court expressly considered the factors in mitigation and aggravation, as well as defendant's statements in allocution, in imposing sentence. The trial court noted that the aggravation in this case was "substantial." The trial court pointed out that the victims in this case were a 76-year old woman and her son, who walks with a cane due to his disability, facts which were established at trial. The court also rejected defendant's blanket claim of being non-violent, with his prior convictions proving the opposite. The court noted that a relatively short time following his release from prison, he was sentenced to jail for domestic battery and then charged in the case at bar. Based on this background, the trial court found that defendant would commit further crimes "if let out here," thereby indicating that defendant's rehabilitative potential was minimal, a proper sentencing consideration (see *People v. Shumate*, 94 Ill. App. 3d 478, 485 (1981)). Nor has defendant supported his contention that his conviction for burglary, based on his claim of "minimum conduct" to establish the commission of burglary, should compel a lesser sentence than 12 years, in light of his background. That defendant's last felony conviction was

over 20 years ago in 1992 describes nothing more than his lengthy incarceration to complete a sentence of 30 years for his aggravated criminal sexual assault conviction.

¶ 34 We find no abuse of discretion in the sentence imposed by the trial court, which means there is no basis to interfere with its decision. *People v. Owens*, 46 Ill. App. 3d 978, 992 (1977) ("In the instant case, in view of defendant's criminal record, and considering the nature and circumstances of the offense, we cannot say that the trial court abused its discretion in its determination of sentence.").

¶ 35 The judgment of the circuit court of Cook County is affirmed.

¶ 36 Affirmed.

¶ 37 Justice Gordon, dissenting.

¶ 38 Defendant appeals his burglary conviction claiming that (1) his trial counsel was ineffective for failing to make a closing argument, and that (2) his 12-year sentence is excessive. Defendant received 12 years in the Illinois Department of Corrections, for lifting a purse off the front seat of an open vehicle, saying “Merry Christmas” to two people standing next to the vehicle, and then putting the purse back.

¶ 39 Although I find defendant’s sentence to be overly harsh, I would reverse and grant a new trial on the claim that defendant’s trial counsel was ineffective for failing to make a closing argument. Defendant’s counsel in this case did less than the bare minimum in his defense of defendant. Prior to trial, defendant told the judge that he wanted to proceed *pro se*, citing, among other things, his public defender’s failure to file any pretrial motions. The trial judge questioned the attorney, who claimed that there was nothing to file.

¶ 40 Defense counsel did not file any pretrial motions, despite the fact that the State planned to introduce an unmemorialized oral statement that defendant denied making. Defense counsel waived opening statement, as did the State; and failed to make appropriate objections. In addition, defense counsel failed to move for a *Montgomery* hearing on the admission of defendant’s prior convictions. Defense counsel filed only a boilerplate posttrial motion for a new trial and then waived his right to argue the motion, and also waived his right to argue defendant's motion to reduce the sentence. Most importantly, defense counsel failed to make a closing argument.¹

¶ 41 There are questions about the unmemorialized oral statement, defendant’s claimed intoxication at the time of the interrogation, defendant’s trip to the hospital following his arrest, and the fact that neither victim identified defendant as the perpetrator. In addition, it was snowing

¹ The State also waived closing arguments.

and sleeting so heavily that Mr. Denny, one of the victims, could not observe the perpetrator clearly. The fact that defendant had previously worked at the grocery store casts doubt that he had intended to take the purse or otherwise deprive the owner of the purse in a place where he would be likely to be recognized and in full view of the security guards' customary position. Defense counsel, however, squandered his opportunity to highlight these facts for the trial judge by failing to argue them or anything else in a closing argument.

¶ 42 Both the federal and Illinois constitutions guarantee criminal defendants the right to effective assistance of counsel. U.S. Const., art. VI, XIV; Ill. Const. (1970) art. I § 8; *Strickland*, 466 U.S. at 687-689; *Albanese*, 104 Ill. 2d at 526. Defense counsel provides ineffective assistance when his representation falls below an objective standard of reasonableness, and when the deficiencies in his performance undermine confidence in the outcome of the proceedings or deprive defendant of a fair trial. *Strickland*, 466 U.S. at 687-689. To meet the prejudice prong of *Strickland*, defendant need not show that he would have been acquitted, as “prejudice may be found even when the chance that minimally competent counsel would have won an acquittal is significantly less than 50 percent.” *People v. McCarter*, 385 Ill. App. 3d 919, 935 (2008).

¶ 43 The United States Supreme Court has stressed the role of closing arguments in bench trials. *Herring*, 422 U.S. at 861-862. In *Herring*, the trial court barred both the defense and the prosecution from making closing arguments. *Herring*, 422 U.S. at 855. The Court, in the context of a bench trial, discussed the essential role of closing arguments. *Herring*, 422 U.S. at 861-862. The Court stated:

“The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. In a criminal trial,

which is in the end basically a factfinding process, no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment.” *Herring*, 422 U.S. at 862.

¶ 44 Here, defense counsel wasted the essential opportunity to give a closing argument and point out to the trial court all of defendant's defenses to the burglary charge, thereby prejudicing defendant. There were multiple issues that defense counsel should have highlighted for the trial judge. For example, there were many questions raised by the unmemorialized oral statement introduced by Officer Evans, which defendant denied making. Officer Evans said that he interrogated defendant the day after the arrest and that defendant made an inculpatory statement. The officer presented a Miranda waiver, initialed by defendant. By contrast, defendant testified that the police attempted to interrogate him while he was extremely intoxicated, when he was at the hospital for injuries he suffered during the arrest. Defendant denied making any statement at all. Also, Officer Evans claimed that defendant declined to memorialize his oral statement, despite the fact that he was willing to initial the Miranda form.

¶ 45 Not only did defense counsel fail to make a motion to suppress the claimed statement, he failed to use a closing argument to question the veracity of the statement. Defense counsel could have pointed out the lack of specificity of the claimed statement. Further, defense counsel did not take the opportunity to question before the court why defendant would agree to initial the Miranda waiver, but then decline to memorialize his statement in any way.

¶ 46 Defense counsel also could have drawn the trial court's attention to the fact that neither Mr. nor Mrs. Denny identified defendant as the perpetrator. Mr. Denny did say that he observed defendant running through the parking lot, but he did *not* make an in-court identification.

Moreover, Mr. Denny often referred to the perpetrator as “somebody” or “someone”, “the guy,” “the person,” or “the individual.” Mr. Denny also could not say whether the person was wearing a hood or not because it was dark and snowing. Mrs. Denny did not identify defendant at all, and she never referred to the perpetrator as defendant. Defense counsel could have used Mr. and Mrs. Denny’s testimony to suggest that defendant was not the person who touched the purse, or to suggest that they did not actually observe defendant reach into their vehicle. Their testimonies could have been used to corroborate defendant’s testimony that the purse was on the ground, and that he picked it up and tossed it into the vehicle as a good Samaritan to help the Dennys.

¶ 47 Furthermore, defense counsel also failed to highlight the fact that defendant had worked at the Ultra Foods store where the incident occurred. This evidence could have been used to suggest that defendant would be unlikely to commit a crime at the store due to the probability that he would be recognized.

¶ 48 Defense counsel waived every opportunity to present defendant's theory of the case. The attorney provided no assistance at all. He did not file a motion to suppress the unmemorialized oral statement defendant denied making, which would have exposed the trial court to his version of the events. Following the bench trial, defense counsel filed only a boilerplate posttrial motion for a new trial and then declined to argue the motion. After defendant was sentenced to twice the minimum for reaching into the vehicle, counsel failed to argue the motion to reconsider the sentence.

¶ 49 Not only did defense counsel fail to articulate defendant's theory of the case, he also failed to make any appropriate objections to inadmissible evidence. For example, Mrs. Denny never identified defendant as the person who reached into the vehicle. Nevertheless, the prosecutor, in questioning Mrs. Denny, referred to the perpetrator as “the defendant.” Defense

counsel did not object to the lack of foundation for the prosecutor's assertion that defendant was the person who reached into the vehicle.

¶ 50 Furthermore, defense counsel failed to request a *Montgomery* hearing, even though defendant planned to testify and had prior convictions. In *Montgomery*, the Illinois Supreme Court adopted an early version of Fed. R. Evid. 609 and held that the use of a 21-year-old conviction to impeach a defendant's credibility was reversible error. *People v. Montgomery*, 47 Ill. 2d 510, 516-517 (1971). The supreme court held that prior convictions may be used to impeach only if they are not more than 10 years old and involved a crime punishable by imprisonment in excess of one year or a crime involving dishonesty or false statement. *Montgomery*, 47 Ill. 2d at 516. If the conviction qualifies, the trial judge must conduct a balancing test, weighing probative value against prejudicial impact, and must determine that the conviction's probative value is not "substantially outweighed by the danger of unfair prejudice," before allowing the use of prior convictions to impeach a witness's credibility. *Montgomery*, 47 Ill. 2d at 516-518; See also *People v. Naylor*, 229 Ill. 2d 584, 593 (2008) (discussing the common law rule which disqualified witnesses with prior convictions, the history of impeachment by prior convictions in Illinois, and *Montgomery*). Here, following defendant's testimony the State introduced a certified statement of a prior conviction, and counsel failed to object. All of these prior failures make the failure to present a closing even worse.

¶ 51 This was not a simple case, and there were numerous problems with the State's evidence that defense counsel could have highlighted. Furthermore, defense counsel waived every possible opportunity to present defendant's theory of the case to the trial court. Defense counsel's waiver of a closing argument together with all of the other failures together provided constitutionally ineffective assistance of counsel and denied defendant a fair trial, and therefore, I would reverse and grant a new trial.

No. 1-10-2983

¶ 52 Accordingly, I must respectfully dissent.