

NOTICE  
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2012 IL App (4th) 110227-U

NO. 4-11-0227

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED  
November 30, 2012  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Sangamon County
JESSIE S. FISHBURN,	)	No. 07CF671
Defendant-Appellant.	)	
	)	Honorable
	)	Leslie J. Graves,
	)	Judge Presiding.

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JUSTICE POPE delivered the judgment of the court.  
Justices Cook and Knecht concurred in the judgment.

### ORDER

¶ 1 *Held:* (1) The trial court did not err in admitting evidence of defendant's prior possession-of-a-weapon-by-a-felon conviction where it was admitted for impeachment purposes.

(2) Trial court's *ex parte* communication with jury did not qualify for plain error review.

¶ 2 In December 2010, a jury convicted defendant, Jessie S. Fishburn, of aggravated battery of a child (720 ILCS 5/12-4.3(a) (West 2006)). In February 2011, the trial court sentenced defendant to 15 years' imprisonment.

¶ 3 Defendant appeals, arguing (1) the trial court erred in admitting evidence of defendant's prior possession-of-a-weapon-by-a-felon conviction and (2) he was deprived of a fair trial when the trial court engaged in *ex parte* communications with the jury. We affirm.

¶ 4 On July 5, 2007, the State charged defendant, by information, with aggravated

battery of a child (720 ILCS 5/12-4.3(a) (West 2006)).

¶ 5 On January 8, 2009, the State filed a notice of intent to impeach defendant with his prior convictions for (1) vehicular endangerment (Sangamon County case No. 04-CF-983), (2) possession of a stolen firearm (Sangamon County case No. 05-CF-835), and (3) possession of a weapon by a felon (Sangamon County case No. 05-CF-835). Defendant sought to exclude his prior convictions.

¶ 6 Following a hearing on November 29, 2010, the trial court stated that it considered the *Montgomery* factors (see *People v. Montgomery*, 47 Ill. 2d 510, 516, 268 N.E.2d 695, 698-99 (1971)) and found the State could use the two firearm convictions. However, the court ruled the vehicular-endangerment conviction was not admissible.

¶ 7 During defendant's trial, Sheena Cleeton testified in June 2007, defendant lived with her, her three-year-old son, Cameron, and the couple's one-year-old daughter, Kierra. On June 17, 2007, Sheena left the children with defendant while she worked. Sheena testified except for a skinned knee, Cameron was uninjured when she left home that morning and when she came home briefly on her lunch break.

¶ 8 At approximately 9 p.m., defendant telephoned Sheena at work. Defendant told Sheena that Cameron had broken his leg. When she asked how Cameron broke his leg, defendant initially said he did not know, then stated Cameron had fallen and hit a fan while jumping on his bed. Cameron slept in a toddler bed. Sheena testified the fan which defendant referred to was normally kept in the couple's bedroom, and when Sheena returned home later that night the fan was in its usual place and undamaged.

¶ 9 Sheena testified Cameron underwent surgery to realign a femur fracture and

remained in the hospital for approximately four days. He was placed in a body cast for three or four months.

¶ 10 Dr. Krishna Singh, the pediatric orthopedic surgeon who treated Cameron, testified Cameron had numerous fresh bruises on his buttocks and thighs; a small, fresh abrasion near his ear; and a transverse fracture of his left femur, meaning the bone had moved sideways during the break. When asked how he had been hurt, Cameron told doctors, "[D]addy spanked me." According to Dr. Singh, a transverse fracture is the most common type of femur break and its cause is difficult to diagnose. Dr. Singh testified such fractures typically are caused by a blow of some sort, and could have been caused by being thrown against the wall.

¶ 11 Dr. Singh testified she would not expect Cameron's type of injury from jumping on his toddler bed. Given the bruises on Cameron's body and his statement about his father spanking him, Dr. Singh believed the break had been the result of abuse.

¶ 12 Jason Hanson testified he was a deputy sheriff in Sangamon County. He was present while Sergeant Knowski interviewed defendant. Defendant "changed from at the beginning [] saying he threw [Cameron] on the bed to he threw him on the bed but [Cameron] could have hit the wall."

¶ 13 Eric Knowski testified he was a detective sergeant with the Sangamon County Sheriff's office. He interviewed defendant at the sheriff's office. Defendant told Knowski "he had spanked Cameron a couple times and threw him onto the bed, but he used too much force and Cameron had sailed—his words—sailed over the bed and struck the wall."

¶ 14 Defendant testified Cameron took food out of the refrigerator and smeared it on the floor. Frustrated, defendant took both children to their bedroom, placed Kierra on the bed, and

made Cameron stand in the corner. Defendant testified after he returned to the living room, three-year-old Cameron kept opening the bedroom door and peeking out. Frustrated and angry, defendant returned to the children's bedroom and spanked Cameron twice and "put him on his bed."

¶ 15 Defendant testified he returned to the bedroom a short time later to find Cameron on the floor unable to get up. Defendant testified he had gone back to the children's bedroom because he heard a thud, and because he "felt bad" for what he had done and was going to let Cameron come out.

¶ 16 After defendant's testimony, the defense called three witnesses who testified as to defendant's reputation for nonviolence in the community.

¶ 17 In rebuttal, the State called Jeff Smith. He testified he was a deputy sheriff with the Sangamon County Sheriff's office. Smith was present during the interview of defendant by Sergeant Knowski. According to Smith, defendant "[s]aid he had gotten angry with [Cameron] and threw him on the bed but missed the bed and the child hit the wall."

¶ 18 Over defense counsel's objection, defendant was impeached with prior convictions for possession of a stolen firearm and unlawful possession of a weapon by a felon.

¶ 19 On December 2, 2010, the jury found defendant guilty of aggravated battery of a child.

¶ 20 On December 13, 2010, defendant filed a posttrial motion, which the trial court denied.

¶ 21 On February 15, 2011, the trial court sentenced defendant to 15 years' imprisonment.

¶ 22 On February 18, 2011, defendant filed a motion to reconsider sentence, which the trial court denied.

¶ 23 This appeal followed.

¶ 24 On appeal, defendant argues the trial court erred in admitting evidence of defendant's prior possession of a weapon by a felon conviction for impeachment purposes. We disagree.

¶ 25 On September 2, 2009, defendant filed a motion *in limine* to exclude his prior convictions. The State sought their admission for impeachment purposes.

¶ 26 Generally, evidence of other crimes is inadmissible to demonstrate a defendant's propensity to engage in criminal activity. *People v. Donoho*, 204 Ill. 2d 159, 170, 788 N.E.2d 707, 714 (2003). However, a defendant who testifies may be impeached by proof of a prior conviction. *People v. Tribett*, 98 Ill. App. 3d 663, 675, 424 N.E.2d 688, 697 (1981). The supreme court in *Montgomery*, 47 Ill. 2d at 516, 268 N.E.2d at 698-99, held evidence of a witness's prior conviction is admissible to attack his credibility where (1) the prior crime was punishable by death or imprisonment in excess of one year, or involved dishonesty or false statement regardless of the punishment; (2) less than 10 years has elapsed since the date of conviction of the prior crime or release of the witness from confinement, whichever is later; and (3) the probative value of admitting the prior conviction outweighs the danger of unfair prejudice.

¶ 27 The third *Montgomery* factor requires the trial court to conduct a balancing test, in which it weighs the prior conviction's probative value against its potential prejudice. See *People v. Robinson*, 299 Ill. App. 3d 426, 441, 701 N.E.2d 231, 243 (1998). If, after balancing, the court

finds the prejudice substantially outweighs the probative value of admitting the prior conviction, then the evidence of the prior conviction must be excluded. *Montgomery*, 47 Ill. 2d at 517-18, 268 N.E.2d at 699. A trial court's decision to admit evidence of prior convictions for impeachment purposes is reviewed under an abuse of discretion standard. *Montgomery*, 47 Ill. 2d at 517-18, 268 N.E.2d at 699.

¶ 28 Defendant's convictions in this case included (1) vehicular endangerment (Sangamon County case No. 04-CF-983), (2) possession of a stolen firearm (Sangamon County case No. 05-CF-835), and (3) possession of a weapon by a felon (Sangamon County case No. 05-CF-835).

¶ 29 Following a November 29, 2010, hearing, the trial court stated it considered the *Montgomery* factors and found the State could use the two firearm convictions. However, the court ruled the vehicular-endangerment conviction was not admissible. Defendant concedes admitting defendant's conviction for possession of a stolen firearm did not constitute an abuse of discretion. Defendant argues only that the trial court erred in admitting evidence of defendant's prior possession-of-a-weapon-by-a-felon conviction.

¶ 30 It is uncontested defendant was released from confinement within the past 10 years and the offenses for which he was imprisoned were punishable by more than a year in prison. See *Stokes v. City of Chicago*, 333 Ill. App. 3d 272, 278, 775 N.E.2d 72, 77 (2002) ("Any timely felony conviction will satisfy the first *Montgomery* factor"). As a result, the only remaining issue is whether the probative value of the evidence outweighs its prejudicial nature. *Robinson*, 299 Ill. App. 3d at 441, 701 N.E.2d at 243. Factors trial courts can consider in making this determination include the following: (1) whether the prior conviction is veracity

related; (2) the recency of the prior conviction; (3) the witness's age and other circumstances surrounding the prior conviction; (4) the length of the witness's criminal record and his conduct subsequent to the prior conviction; (5) the similarity of the prior offense to the instant offense, thus increasing the danger of prejudice; (6) the need for the witness's testimony and the likelihood he would forego his opportunity to testify; and (7) the importance of the witness's credibility in determining the truth. *Robinson*, 299 Ill. App. 3d at 441, 701 N.E.2d at 243-44.

¶ 31 Citing *People v. Williams (Williams I)*, 161 Ill. 2d 1, 641 N.E.2d 296 (1994), defendant argues against the mechanical application of the balancing test. In *Williams I*, the supreme court expressed concern over trial courts taking a more mechanical approach to the *Montgomery* balancing test thereby allowing more prior-conviction evidence. *Williams I*, 161 Ill. 2d at 39, 641 N.E.2d at 312. The court "emphasized the importance of conducting the balancing test of probative value versus unfair prejudice before admitting prior convictions for impeachment purposes." *People v. Williams (Williams II)*, 173 Ill. 2d 48, 81-82, 670 N.E.2d 638, 654-55 (1996). While it admonished trial courts not to admit prior-conviction evidence as probative of guilt, *Williams I* did not modify *Montgomery*. *People v. Cox*, 195 Ill. 2d 378, 384, 748 N.E.2d 166, 170 (2001) (citing *Williams II*, 173 Ill. 2d at 82, 670 N.E.2d at 655 ("We hold that [*Williams I*] does not alter the three-prong[ed] rule set forth in *Montgomery*. Rather, this court in [*Williams I*] was expressing concern about the indiscriminate admission of all prior felony convictions for impeachment purposes absent application of the critical balancing test mandated by *Montgomery*.")).

¶ 32 Moreover, the facts of *Williams I* are distinguishable from the facts in the instant case. In *Williams I*, the defendant sought to prevent the State from using his prior voluntary-

manslaughter conviction as impeachment evidence. *Williams I*, 161 Ill. 2d at 40, 641 N.E.2d at 312. The supreme court found the defendant's conviction was clearly offered and admitted as relevant to the question of the defendant's guilt of murder, and not for impeachment, which was directly contrary to *Montgomery*. *Williams I*, 161 Ill. 2d at 41, 641 N.E.2d at 313.

¶ 33 In this case, the possession-of-a-weapon-by-a-felon conviction was clearly offered and admitted for impeachment purposes. See *People v. Guthrie*, 60 Ill. App. 3d 293, 298, 376 N.E.2d 425, 428 (1978) ("evidence of convictions and felonies not directly related to dishonesty are not completely lacking in probative value for impeachment"). Further, the trial court stated it considered each *Montgomery* factor and used the balancing test to determine whether the conviction should be permitted. While the trial court did not articulate the specific factors it weighed, its failure to do so is not error. See *People v. Atkinson*, 186 Ill. 2d 450, 463, 713 N.E.2d 532, 538 (1999) (finding although the trial court did not articulate the factors it considered in applying the *Montgomery* balancing test, no error occurred because the trial court's comments showed it was aware of the test); *Williams II*, 173 Ill. 2d at 83, 670 N.E.2d at 655 (finding the trial court did not disregard the *Montgomery* standard even though it did not expressly articulate it was applying it).

¶ 34 We note further, contrary to defendant's argument addressing the mere-fact approach method of impeachment, the record here establishes the jury was advised defendant had felony convictions for possession of a stolen firearm and unlawful possession of a weapon by a felon.

¶ 35 Moreover, defendant's trial testimony was in effect his entire defense. Defendant's credibility was therefore a central issue, and the prior possession-of-a-weapon-by-a-felon

conviction was crucial in measuring defendant's credibility. The trial court thus did not abuse its discretion in finding that the probative value of admitting the prior possession-of-a-weapon-by-a-felon conviction was not outweighed by the danger of unfair prejudice to the defendant.

¶ 36 Additionally, the trial court strictly limited the use of the prior possession-of-a-weapon-by-a-felon conviction by providing the jury with an instruction limiting its evidentiary use to impeachment. Specifically, the trial court instructed the jury to consider defendant's prior convictions only for the purpose of assessing defendant's credibility as a witness, and not as evidence of his guilt of the offense charged. Accordingly, the trial court did not abuse its discretion in admitting defendant's prior possession-of-a-weapon-by-a-felon conviction for impeachment purposes.

¶ 37 Defendant next argues he was deprived of a fair trial when the trial court engaged in *ex parte* communications with the jury by tendering photographs to the jury without argument from counsel. Following the testimony of Dr. Singh, the trial court admitted photographs depicting Cameron's injuries and they were published to the jury. Defense counsel did not object. After the case was submitted to the jury, the jury sent out a note requesting "defendant's statement, officer statement, and all photos." The trial court held a discussion about the note, advising the parties it had already given the jury the photographs. Defense counsel did not object when he learned the photographs were sent to the jury.

¶ 38 Defendant concedes he failed to preserve the issue but maintains the issue may be addressed by this court under the plain-error doctrine. The plain-error doctrine allows a reviewing court to consider an unpreserved and otherwise forfeited error when "(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." *People v. Herron*, 215 Ill. 2d 167, 186-87, 830 N.E.2d 467, 479 (2005). A defendant seeking plain-error review has the burden of persuasion to show the underlying forfeiture should be excused. *Herron*, 215 Ill. 2d at 187, 830 N.E.2d at 480. Our review is *de novo*. *People v. Johnson*, 238 Ill. 2d 478, 485, 939 N.E.2d 475, 480 (2010).

¶ 39 In this case, it would have been better practice for the trial court to have consulted the parties before sending the pictures to the jury. However, since defendant cannot satisfy either prong of plain-error review, we need not decide if the court erred in sending the photographs to the jury. *People v. White*, 2011 IL 109689, ¶ 134, 956 N.E.2d 379, 408.

¶ 40 We reject defendant's characterization of the evidence as closely balanced. Dr. Singh testified in her expert opinion the injury was the result of abuse. Three law enforcement officers testified defendant admitted causing the injury by throwing Cameron against a wall. Defendant offered inconsistent explanations as to how the injury occurred. Accordingly, defendant's forfeiture may not be excused under the first prong of the plain-error test.

¶ 41 We next consider the second prong of plain-error analysis, requiring defendant to show the error was serious, regardless of the closeness of the evidence. *Herron*, 215 Ill. 2d at 186-87, 830 N.E.2d at 479. Defendant urges us to find "the particular type of *ex parte* communication which occurred in this case carried with it a high degree of prejudice."

¶ 42 "It is well established that the matter of whether exhibits should be taken to the jury room is within the sound discretion of the trial judge and his ruling will not be disturbed unless there was an abuse of such discretion to the prejudice of defendant." *People v. Allen*, 17 Ill. 2d 55, 62-63, 160 N.E.2d 818, 823 (1959). Defendant cites no cases where admissible photographs were not allowed to go to the jury room. Here the photographs were both admitted

and published to the jury during trial. It is difficult to conceive how sending the photographs to the jury room prejudiced defendant where the jury had already seen the photos in the courtroom. Thus, the trial court's action did not deprive defendant of a fair trial under the second prong of the test for plain error.

¶ 43 Having determined that defendant's forfeited claim does not qualify for plain-error review under either prong, we find no basis to excuse its forfeiture.

¶ 44 For the foregoing reasons, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2010).

¶ 45 Affirmed.