

No. 1-11-0950

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 CR 17524
	)	
WILLIAM SLATER,	)	Honorable
	)	Arthur F. Hill, Jr.,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE LAVIN delivered the judgment of the court.  
Justices Epstein and Pucinski concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Where the trial court erroneously ruled that defendant's prior felony conviction was admissible at defendant's jury trial to impeach his trial testimony, defense counsel was ineffective for failing to correct the court's error; defendant was prejudiced where the issue of his credibility hung in the balance.
- ¶ 2 Following a jury trial, defendant William Slater was convicted of aggravated battery and sentenced to five years in prison. On appeal, defendant contends his trial counsel was ineffective for failing to preclude the State's use at trial of his prior burglary conviction that was too remote in time to be admissible to impeach his trial testimony. Defendant also contests the imposition of certain court fees. We reverse defendant's conviction and remand for new trial.

¶ 3 Prior to trial, defense counsel filed a motion *in limine* asking the court to bar, *inter alia*, the State's use for impeachment purposes of defendant's four prior felony convictions. The motion cited *People v. Montgomery*, 47 Ill. 2d 510 (1971), limiting the use of a prior criminal conviction to attack a witness's credibility at trial. At the hearing on the motion, the State conceded that three of defendant's felony convictions were beyond the 10-year limit of *Montgomery* but submitted that defendant's credibility could be impeached by a burglary conviction for which he was sentenced on January 15, 1998, to six years in prison. The court asked when defendant had been released from prison and defense counsel replied that defendant had served three years. The court asked whether the sentence was for a Class X or a Class 2 felony. The assistant State's Attorney replied that defendant was sentenced as a Class X offender, to which defense counsel stated, "That wouldn't be relevant." The trial court responded, "The reason I ask the question is[,] there's an argument, definition of confinement might include parole." The court noted the mandatory supervised release (MSR) term would be three years for a Class X felony instead of two years. Defense counsel replied, "If it extends within the time, sure, I understand, I withdraw the objection." The court ruled that it would allow the State to use the 1998 burglary conviction for impeachment, as defendant's confinement included the MSR term, which ended within the 10-year mandate of *Montgomery*.

¶ 4 At trial, Dannie Daniel testified that he had felony convictions resulting from his prior drug addiction. He walked with a stick because he had been shot in the leg several years previously. At twilight on August 30, 2008, Dannie, then 60 years old, arrived at his favorite hangout, the intersection of 47<sup>th</sup> and South Indiana in Chicago. About 20 or 25 other people were standing around in the area, including Dannie's girlfriend Marcella Berry. Defendant, whom Dannie knew by the nickname Buster, was there with his bike. Defendant sold cigarettes at that location to people who came by in cars or on foot. Keith Palmer also sold cigarettes in that area.

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Dannie saw defendant push his bike across the street. A metal rod about three feet long fell off defendant's bike. Dannie picked it up and handed it to defendant, and the two men had words. Defendant rode off on his bike with the metal rod. Dannie continued to talk with people at that location. Then he went home, using a chair leg as a walking stick. Marcella was there; she often stayed with Dannie.

¶ 5 After Dannie ate dinner, he went to 46<sup>th</sup> and Indiana to get a beer, still using the chair leg as a walking stick. About 20 minutes later defendant came to that location on his bike. A plastic grocery bag hung from the handlebar. Defendant parked his bike against a building. Dannie decided to go home. As he walked south on Indiana, he heard defendant say something. As Dannie turned, he was struck on the left side of his head with a hatchet or ax. It was a hard blow and made Dannie dizzy. As he went down to the ground, he saw defendant bringing the hatchet down on him again. Dannie was on his back. He tried to catch the hatchet. He raised his right arm to cover his face, and when he tried to block the blow, he was struck on the interior of his right arm in the area of his wrist. He did not have any cuts or injuries on the inside of his hands. He was struck again on the left side of his face, from the top of his left ear down to the left side of his mouth. He was struck on his right knee. He was able to catch the handle of the hatchet with his left hand and hold on to it. Before defendant attacked Dannie with the ax, Dannie had not threatened defendant nor hurt him in any way. Dannie denied striking defendant with his walking stick. Dannie heard Marcella say, "What you doing?" Marcella phoned an ambulance, which took him to the hospital where he had surgery on his face and head. He woke up four days later. He was in the hospital for about six days and returned subsequently for surgery on his arm. He showed his scars to the jury. He still needed surgery on his left eye, he could not move the left side of his face, and he had great difficulty chewing. He could not straighten out his arm or close his right hand and he had difficulty gripping things.

¶ 6 A video recording from a Chicago Police Department POD camera was played for the jury. The camera was mounted on a streetlight at 47<sup>th</sup> and Indiana and had automatically recorded the area at the time of the altercation. It swung around in a 360° circular motion, and a specific location came into view only when the camera swept past that location. While the camera video was played, Dannie testified about its contents, identifying the location on South Indiana and defendant. He also identified himself on the ground by a tree, with defendant standing over him. Later in the recording, Marcella was seen standing over Dannie, and Keith was also in the picture. Dannie also identified still photographs taken from the video. One still showed defendant pushing his bike across the street, another showed him standing by the wall with the bike. Other stills showed Dannie on the ground with defendant over him.

¶ 7 Marcella Berry testified that Dannie was her boyfriend. She also knew defendant from his selling cigarettes on 47<sup>th</sup> Street. She had struggled with heroin addiction in the past but no longer used drugs. She was convicted of retail theft in 2003. On August 30, 2008, she was staying with Dannie. At a little before 10:30 p.m., Dannie came home and was a little upset. He told Marcella that he and defendant "had a few words and got into an argument." Dannie walked with "a little slight limp" because he had been shot in his leg, and he would use a stick to help him to walk. Dannie ate something and then left. About 10 or 15 minutes later, she also left the apartment and walked down to 46<sup>th</sup> and Indiana. She saw Dannie talking with Keith, then she and Keith walked on together. Marcella heard a lady say that "somebody needs to call the police or stop that." Marcella and Keith looked down the street. Marcella saw a person on the ground and another person was over him. She thought the second man was hitting the man on the ground with his fist. When she got closer, she saw Dannie was on the ground helpless, and defendant was over him, hitting him with a silver object which she identified at trial as a hatchet. When Marcella got there, she saw defendant's hatchet make contact with Dannie's right wrist.

She asked Keith to give her his cell phone. When Keith handed her his phone, defendant looked at Keith and said, "you're next, nigger." As Marcella phoned for the police and an ambulance, defendant jumped on his bike and rode away.

¶ 8 Keith Palmer testified that on the date of the incident he had known Marcella and Dannie for five years. He normally hung out in the area of 47<sup>th</sup> and South Indiana. He and defendant were business rivals, as they would both sell cigarettes on the same street. If Keith would sell more cigarettes than defendant, defendant would get angry. Dannie did not help or protect Keith in the sale of cigarettes.

¶ 9 At about 9:30 on the evening of August 30, 2008, Keith saw defendant with his bike. On the back of the bike was a steel pole about two and one-half or three feet long. The pole fell off the bike onto the street. Dannie ran out into the street, picked up the pole, and played with it for about six seconds. Defendant told Dannie to bring the pole to him. When Dannie did so, defendant snatched it from Dannie's hand. The men argued briefly and then went their separate ways. Dannie was walking with a stick. About an hour later, Dannie came back to the area. Defendant also returned; he had his bike and a bag. He crossed the street and leaned his bike against the wall. Then he put the bike on the ground and Dannie walked over to where defendant was standing. Marcella was walking in the opposite direction. She came up to Keith and talked with him for about two minutes. Keith looked back and saw Dannie lying on the ground on his back with his hands raised, covering his face. Defendant was making a chopping motion with a hatchet in his hand. They were about 50 feet away from Keith. He saw defendant strike Dannie about four times: on the face, the forearm just above the wrist, below the knee and the shank. He did not see Dannie's stick anywhere near him. Keith and Marcella ran to defendant and Dannie. There was a lot of blood on the ground. Keith asked defendant what he was doing and said, "You going to kill the man." Defendant jumped up. He had blood on his shirt. Keith gave

his phone to Marcella to call the police and an ambulance. Defendant picked up his bag and pushed his bike past Keith to leave. As he passed by, he told Keith, "[Y]ou're next, nigger."

¶ 10 Kristin McCluskey, a Chicago Fire Department paramedic, testified that shortly after 10:30 p.m. on August 30, 2008, she and her partner responded to a call of a battery victim in the area of 46<sup>th</sup> and Indiana. She observed Dannie Daniel sitting on the sidewalk under a tree. He was conscious and bleeding from the left side of the face and from his arm. There was great blood loss with arterial blood spurting from the left side of his face. His left ear was hanging off and she could see his ear canal. From the cut on his cheek, she could see inside his mouth. The paramedics placed Dannie in an ambulance. En route to the hospital, Dannie's condition began to deteriorate. McCluskey could not get a blood pressure and his pulse rate had dropped significantly, indicating he had gone into shock from the loss of blood.

¶ 11 Officer Kenneth Young, Jr., testified that he and his partners responded to a radio message of a person stabbed at 47<sup>th</sup> and Indiana. At that location, an unknown civilian gave clothing and physical descriptions of the offender and told them that the man's nickname was Buster, he sold loose cigarettes at 47<sup>th</sup> and Indiana, and he had proceeded north on Indiana on a bike. Young recalled that about two weeks earlier, he had had contact with defendant who fitted that description. At about 11 p.m. Young and his partners went to defendant's address where they encountered him. Defendant had blood on his shirt and his pants, and he was placed under arrest. Young also saw a bike in the building's common area and found a hatchet next to the bike. Young did not notice any injuries on defendant. Among the photographic exhibits Young identified at trial were the frontal and side mug shots taken of defendant at the police station.

¶ 12 The parties stipulated that defendant's jeans and his hatchet contained blood stains and that forensic analysis showed the blood belonged to Dannie Daniel.

¶ 13 Defendant testified in his own behalf and admitted he had struck Dannie with the hatchet but only in self-defense. On the evening of August 30, 2008, defendant was on the west side of Indiana at 47<sup>th</sup> Street. He supported himself by selling cigarettes at that intersection but was not a licensed cigarette vendor because he had a felony conviction. Keith Palmer was defendant's competitor in selling cigarettes at that corner. Defendant said Keith "worked with Dannie. Dannie was the enforcer" who acted as security for Keith. At about sundown, Dannie approached defendant and asked him what he was doing on the corner. Defendant told him to mind his own business and walked across to the east side of the street. Defendant had a hatchet in his pocket but did not draw the hatchet at that moment. Dannie was not carrying a wooden chair leg but was holding an iron pipe three feet long. The pipe had not fallen off defendant's bike. The two men argued. Defendant grabbed the pipe, pinned it to Dannie's chest, and took it from him. Defendant was afraid Dannie was going to kill him with the pipe. Defendant told Dannie, "Man, go on, stop messing with me. Find yourself something else to do." Dannie went home, and defendant went to his own house to get more cigarettes to sell.

¶ 14 At about 10:30 that evening, defendant returned to 47<sup>th</sup> and Indiana to sell more cigarettes. A car pulled up and defendant was negotiating with the occupants about the price of a carton of cigarettes when a lady in the car told him somebody was coming up behind him with a weapon. Defendant turned around and saw Dannie, who was carrying the chair leg in his hand. Defendant told him, "What's up, man, that's over with, man. Let's do something else." Defendant turned back to the car. Then he was hit across the back of the head with Dannie's chair leg. Defendant turned around. Dannie was holding the chair leg with two hands and coming down with it to strike a second blow. Defendant caught the chair leg with his right hand and pulled Dannie toward him. Defendant transferred the chair leg to his left hand, pulled the hatchet from his back pocket, and struck Dannie with it. Dannie no longer had the chair leg in

his hand. The men began to wrestle. Dannie grabbed defendant's neck with his left hand and grabbed the hatchet with his right hand. The men tussled. Dannie still had defendant by the neck and was coming toward him. The look on Dannie's face indicated he was going to kill defendant, and defendant struck him in the head a second time with the hatchet. Dannie fell to the ground. Defendant did not strike him again. Defendant got on his bike and went home because Dannie and Keith were "running buddies" and defendant knew that if he stayed, he would have to fight Keith. After he got home, defendant did not have time to call the police before they came to arrest him. Defendant never saw Dannie lying on the ground; he was sitting up. Defendant struck him only twice, on the top of the head and the left side of the face. He did not strike Dannie on the arm or wrist or on his leg, and did not strike him when he was defending himself with his palms out. When defendant was arrested, he told Officer Young to get the POD camera and see everything that went down. He also told Young that Dannie had struck him in the head. He asked to be taken to the hospital, but the police did not comply. Defendant had "a little crack" on the back of his head that caused bleeding and left a scar, and a few scratches on his neck from Dannie choking him. He also had bruises on his head and his neck. Defendant testified he did not intend to kill or cause great bodily harm or permanent disfigurement to Dannie. He struck Dannie only to try to stop Dannie from killing him.

¶ 15 In rebuttal, the State offered in evidence a certified copy of defendant's burglary conviction with no objection by the defense. The prior conviction was received in evidence on January 18, 2011, the same day defendant testified.

¶ 16 Following deliberations, the jury returned verdicts of not guilty of attempted first degree murder but guilty of aggravated battery. The presentence investigation report revealed that defendant was released from prison on February 25, 2000, on his 1998 burglary conviction.

Defense counsel filed a post-trial motion which did not raise the issue of the introduction of defendant's prior conviction. The court sentenced defendant to a prison term of five years.

¶ 17 On appeal, defendant contends he received ineffective assistance of counsel because his trial counsel allowed the court to rule erroneously that defendant could be impeached with an 11-year-old prior felony conviction. Defendant asserts he was prejudiced when the jury learned of his prior conviction because this case came down to a battle of credibility between himself and complainant Dannie Daniel.

¶ 18 Claims of ineffective assistance of counsel are examined under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), which requires a showing of: (1) deficient performance by counsel; and (2) prejudice to the defendant from the deficient performance. *People v. Hodges*, 234 Ill. 2d 1, 17 (2009). To prevail on his claim of ineffective assistance, defendant must satisfy both prongs of *Strickland*. *People v. Salas*, 2011 IL App (1<sup>st</sup>) 091880, ¶ 91. If we can dispose of defendant's claim on the basis that he suffered no prejudice, we need not address whether his counsel's performance was objectively unreasonable. *Id.*

¶ 19 In *People v. Montgomery*, 47 Ill. 2d 510, 516 (1971), our supreme court ruled that evidence of a prior criminal conviction is admissible to impeach the credibility of a witness if: (1) the prior conviction involved a crime punishable by death or imprisonment of more than one year, or involved dishonesty or false statement; (2) a period of not more than 10 years has passed since the date of the prior conviction or the 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. The *Montgomery* rule is now codified in the new Illinois Rules of Evidence. Ill. R. Evid. 609, Committee Comment (eff. Jan. 1, 2011).

¶ 20 We agree with defendant that the court's ruling on the admissibility of the 1998 burglary conviction was error. Defendant was released from prison in that case in February of 2000; he

testified at his trial in the instant case in January 2011, more than 10 years after his release. At the time defendant's motion *in limine* was ruled on, the law in effect was that the time requirement for the admissibility of a prior conviction for impeachment was based on " 'the date of conviction or of the release of the witness from *confinement*[' (emphasis added)." *People v. Sanchez*, 404 Ill. App. 3d 15, 18 (2010), quoting *Montgomery*, 47 Ill. 2d at 516. From the date of confinement, the 10-year time limit is calculated in relation to the date of the defendant's trial. *People v. Naylor*, 229 Ill. 2d 584, 602 (2008).

¶ 21 The State resists the holding in *Sanchez* on the basis that it was based on defense counsel's failure to investigate the specific date of the defendant's release from prison, not on the interpretation of the term "confinement." However, in *Sanchez* we specifically held that the time requirements for admissibility of the prior conviction are calculated based on the release of the defendant from prison, not the date of release from the custody of the Department of Corrections upon completion of MSR. *Sanchez*, 404 Ill. App. 3d at 18. Our holding in *Sanchez* clearly interpreted the term "confinement" to mean prison, not parole or MSR, and adheres to the rule that Illinois courts have followed for decades. In *People v. Yost*, 78 Ill. 2d 292, 294-97(1980), our supreme court ruled that the 10-year time limit was to be calculated on actual confinement and that the expiration of the witness' parole term was not a consideration. Similarly, in *People v. Warmack*, 83 Ill. 2d 112, 124 (1980), the court ruled that the 10-year limit was to be based on actual confinement and not a period of probation. In *People v. Reddick*, 123 Ill. 2d 184, 202-03 (1988), the court observed that the defendant's trial was held within 10 years of the witness's release from prison. Consequently, *Montgomery's* 10-year time limit rendered defendant's 1998 burglary conviction incompetent to impeach his testimony where he was released from prison in 2000 and testified at his trial in 2011.

¶ 22 The error was not negated nor forfeited by the fact that defendant himself mentioned the conviction in his direct testimony, as it is common practice to diffuse the State's use of a prior conviction for impeachment and limit the effect it will have on the jury by first raising the conviction in the defendant's own testimony. *People v. Bond*, 405 Ill. App. 3d 499, 505-06 (2010), citing *People v. Spates*, 77 Ill. 2d 193, 199-200 (1979).

¶ 23 Defendant contends he was prejudiced by the erroneous introduction of his prior conviction, and defense counsel's failure to achieve its exclusion under *Montgomery's* 10-year rule. Defendant argues that while the evidence showed he inflicted severe injuries to Dannie, the contested issue was whether he did so in response to an attack by Dannie. The State counters that defendant has failed to show prejudice under the second prong of *Strickland* because ample evidence other than the victim's testimony was presented from which the jury reasonably could infer that defendant was the aggressor and did not act in self-defense. Marcella and Keith testified that they saw Dannie lying helpless on the ground and defendant over him, striking Dannie repeatedly with the hatchet, and the POD camera showed Dannie on the ground in a defenseless position with defendant standing over him.

¶ 24 Marcella and Keith witnessed only the end of the altercation, not its beginning. Only defendant and Dannie could testify to whether defendant initiated the attack on Dannie or whether he reacted in self-defense to an attack by Dannie. We agree with defendant that because the trial was a credibility contest between himself and the victim as to whether defendant acted in self-defense, informing the jury about his prior conviction may have tipped the balance against him unfairly. Consequently, defendant was prejudiced by his counsel's deficient performance and his conviction must be reversed and remanded to the trial court for a new trial.

¶ 25 Defendant and the State agree that the imposition of certain fees was error, and we address the issue to preclude the re-imposition of those fees upon remand. The imposition of a

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\$200 DNA analysis fee pursuant to section 5-4-3(j) of the Unified Code of Corrections (730 ILCS 5/5-4-3(j) (West 2010)) was error where the record confirms defendant was sentenced on his previous burglary conviction on January 15, 1998, after the DNA requirement became effective on January 1, 1998. We may presume that at that time defendant was required to submit a DNA sample and pay an analysis fee of \$200 (*People v. Leach*, 2011 IL App (1<sup>st</sup>) 090339, ¶ 37), and he was not required to submit another sample or pay another fee (*People v. Marshall*, 242 Ill. 2d 285, 303 (2011)). The \$35 traffic court supervision fee was also erroneously imposed because defendant was not convicted of any offense under the Illinois Vehicle Code or a similar county or municipal ordinance. 625 ILCS 5/16-104c (West 2010); *People v. Williams*, 2011 IL App (1<sup>st</sup>) 091667-B, ¶ 17.

¶ 26 For the reasons set forth, we reverse defendant's conviction of aggravated battery and remand for a new trial.

¶ 27 Reversed and remanded.