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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 C4 41003
)	
DERRICK HARDIMON,)	
)	The Honorable
Defendant-Appellant.)	Carol A. Kipperman,
)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Howse and Justice Fitzgerald Smith concurred in the judgment.

ORDER

¶ 1 *Held*: The admission of defense witness Terry Christian's prior arrests, which did not result in convictions, was plain error in this case with closely balanced evidence. Specifically, a credibility contest existed between the testimony of the State's two officers and Christian making his credibility critical to the jury's ultimate determination. Reversed and remanded for a new trial.

¶ 2 After a jury trial, defendant Derrick Hardimon was convicted of one count of aggravated driving under the influence of alcohol (ADUI), one count of aggravated driving under the influence of alcohol when his alcohol concentration level was point .08 or more (.08 ADUI), and

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one felony count of driving with a revoked license when in actual physical control of a motor vehicle. The trial court subsequently sentenced defendant to 10 years' imprisonment on each count, to be served concurrently. On appeal, defendant contends that he was denied a fair trial by the prosecution's impeachment of defense witness Terry Christian. Specifically, the State improperly impeached Christian with (1) prior arrests that did not result in convictions; (2) the mere fact that he was incarcerated; and (3) the length of his sentence. Defendant also contends that he was denied a fair trial by a pervasive pattern of prosecutorial misconduct throughout closing arguments. In addition, defendant contends that two of his convictions must be vacated pursuant to the one-act, one-crime doctrine and contends that his sentence for Class 4 felony driving while his license was revoked is void. For the reasons discussed below, we reverse and remand for a new trial.

¶ 3

BACKGROUND

¶ 4 After a September 2010 incident, defendant was charged with four counts of ADUI, four counts of .08 ADUI and two felony counts of driving with a revoked license when in actual physical control of a motor vehicle. Before trial, the State indicated that it would proceed to trial on one count of ADUI, one count of .08 ADUI, and one felony count of driving with a revoked license when in actual physical control of a motor vehicle. The State nol prossed the remaining counts.

¶ 5 At trial, Master Sergeant Keith Chilson testified that on September 13, 2010, he arrived in the vicinity of the 100 block of Frederick in Bellwood at 3:00 a.m., and observed a white Dodge Avenger parked in the middle of the street. The vehicle was running, its rear lights were on, and

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the driver's side door was open. Sergeant Chilson turned on his overhead lights to signal the vehicle to move. When the vehicle remained stagnant, he got out of his unmarked car and approached the parked vehicle from the driver's side door. Defendant then stood up from the driver's seat with a set of keys in his hand. The passenger, Christian, remained in the passenger seat.

¶ 6 Sergeant Chilson observed that defendant swayed in place, had a strong odor of alcohol on his breath, had bloodshot eyes, and spoke profanities with slurred speech. Sergeant Chilson then asked defendant to sit back in the driver's seat. As defendant sat, Sergeant Chilson asked him for a driver's license and proof of insurance, but defendant only gave an ID card. Sergeant Chilson verified through the dispatch center that defendant had a revoked driver's license. Defendant then told Sergeant Chilson, "I don't have a driver's license, do what you got to do." Shortly thereafter, Officer Michael Underwood arrived on the scene, placed defendant in custody, and transported him to the station. Another officer escorted Christian home. Notwithstanding Sergeant Chilson's earlier testimony that defendant was holding the keys, Sergeant Chilson prepared the vehicle for a tow by taking the keys from the ignition and giving them to the tow truck driver. During the encounter, neither defendant nor Christian told Sergeant Chilson that someone was sick or had thrown up.

¶ 7 At the police station, defendant continuously yelled profanities at Sergeant Chilson, failed three field sobriety tests and submitted to a breathalyzer test revealing a breath alcohol concentration of .187. During an interview, defendant alleged he never drove the vehicle, but did not specifically identify Christian as the driver.

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¶ 8 On cross-examination, Sergeant Chilson admitted that he never actually saw anyone drive the vehicle. In addition, he failed to activate the video surveillance equipment because the department never instructed him on how to use it. Sergeant Chilson also admitted that the vehicle was still running when defendant initially exited the vehicle.

¶ 9 Officer Underwood substantially corroborated Sergeant Chilson's testimony regarding what occurred following Officer Underwood's arrival. In addition, he noted that Christian did not appear to be sick and there was no blood or vomit anywhere. Furthermore, Officer Underwood observed defendant in the driver's seat with the car running, but did not see him drive the vehicle or know how it arrived on the scene. Officer Underwood could not recall whether the keys were in the ignition.

¶ 10 Angela Jones, the mother of defendant's fiancé Callandria Mitchell, testified on defendant's behalf. Jones testified that on September 12, 2010, she rented a four-door white Dodge Avenger from Thrifty Car Rental. On the night of the incident, Jones lent her nephew Christian the vehicle to pick up defendant. Jones, unaware that Christian did not have a valid driver's license, made an agreement with him that only he would operate the vehicle. On Monday morning, Jones reclaimed the vehicle at the police station. She did not observe anything physically wrong with the vehicle or any sign of stains or vomit. When she returned the vehicle to the rental company, she did not disclose that her nephew had driven the vehicle.

¶ 11 Mitchell testified that her cousin Christian arrived in a white Dodge Avenger outside of the apartment she shared with defendant. Defendant got into the passenger side and Christian drove away, but Mitchell did not know where they went or what they did after they left. When

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she went with Jones to return the vehicle, she did not notice anything unusual, such as vomit.

¶ 12 Christian testified that on the night of the incident, defendant got into the passenger side of a white Dodge Avenger Christian had borrowed from Jones and the two men stopped at two friends' houses, where they played cards and drank. They then ate at a restaurant and departed for defendant's mother's house in Bellwood. When they arrived in Bellwood, Christian's stomach became upset. He then pulled down a side street and stopped the vehicle in the middle of the street. Christian opened the driver's side door, got out of the vehicle, and vomited outside near the back door. As a result, defendant exited the vehicle and went to the driver's side to assist Christian.

¶ 13 Shortly thereafter, a police vehicle pulled up flashing its lights. The officer got out of his vehicle, saw Christian holding his stomach, and inquired about his health. Christian stated that he was sick, and the officer asked both Christian and defendant to present identification. The officer determined that neither had a valid driver's license. Christian told the officer that he was driving the vehicle on his way to drop off defendant at his mother's house. When the officer began asking defendant questions, he became difficult. The officer then placed defendant in handcuffs in the back of the officer's vehicle. Eventually another officer escorted defendant to the station and a tow company removed the rental vehicle. Christian testified that defendant never drove the vehicle at anytime. Christian further testified that he was incarcerated and was then serving a sentence at Dixon Boot Camp for an unrelated matter.

¶ 14 On cross-examination, Christian testified that he was currently serving a four-year sentence on two felony counts. He had never had a valid driver's license, but had been arrested

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on several occasions for driving without a license and having a fictitious license. He admitted to driving without a license on the night in question, while consuming alcohol. In addition, there was vomit behind the back driver's side tire. Christian reiterated that defendant never drove the vehicle and neither were ever physically inside the vehicle during the entire encounter with the officers. Christian neither heard defendant tell the officer, "I don't have a driver's license, do what you got to do," nor did he hear the officer instruct defendant to get back inside the vehicle. Christian believed that defendant was the unlucky one for getting arrested for disorderly conduct. Throughout the incident, the vehicle was running with the keys in the ignition.

¶ 15 In rebuttal, Sergeant Chilson testified that Christian did not tell him that he was in Bellwood to drop defendant off at his mother's house or that Christian drove the vehicle. Sergeant Chilson also testified that when he arrived at the scene he did not see anyone who was sick or see vomit near the car. Furthermore, he never told Christian that defendant was arrested for disorderly conduct. The State also presented two certified copies of conviction, indicating that Christian had been convicted of the manufacture/delivery of cannabis and the manufacture/delivery of cocaine, as well as a six-page driving abstract listing the "Date of Arrest" for 32 traffic violations between 2005 and 2009.

¶ 16 After closing arguments, the jury found defendant guilty of ADUI, .08 ADUI, and felony driving with a revoked license when in actual physical control of a motor vehicle. Based on defendant's criminal background, the trial court subsequently sentenced him to 10 years' imprisonment on each count, to be served concurrently.

¶ 17

ANALYSIS

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¶ 18 Defendant first contends that he was denied a fair trial when the prosecution impeached Christian with prior arrests. The State argues that by failing to object, defendant forfeited the argument. See *People v. Allen*, 222 Ill. 2d 340, 350 (2006). Defendant admits he failed to object either during trial or in a posttrial motion to the impeachment evidence he now challenges.

Defendant contends, however, that we may proceed in our review of the matter under the plain error doctrine. See *People v. Herron*, 215 Ill. 2d 167, 175 (2005).

¶ 19 We may consider unpreserved error pursuant to the plain error doctrine where the evidence was so closely balanced that the error alone threatened to tip the scales of justice against the defendant; or (2) the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *People v. Walker*, 232 Ill. 2d 113, 124 (2009). The defendant has the burden of persuasion under both prongs of the plain error doctrine, and if he fails to meet the burden of persuasion, then the court must honor the forfeiture. *People v. Naylor*, 229 Ill. 2d 584, 593 (2008). Before applying either prong of the plain error doctrine, we must first determine whether a clear and obvious error occurred. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010); *Cf. People v. White*, 2011 IL 109689, ¶ 144 (the supreme court found it inappropriate to consider pursuant to the plain error doctrine whether a constitutional error had occurred where resolving the constitutional error was not essential to the disposition of the appeal).

¶ 20 Here, a clear and obvious error occurred when the defendant's prior arrests were admitted into evidence. In general, convictions, not mere arrests or indictments, may be used to impeach the credibility of a witness. *People v. Evans*, 373 Ill. App. 3d 948, 956 (2007); *People v.*

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Hughes, 168 Ill. App. 3d 758, 761 (1988). Evidence showing bias, interest, or motive to testify is a proper mode of impeachment, but proof of arrests, indictments and charges are not admissible when attacking a witness's character. *Evans*, 373 Ill. App. 3d at 957. Even when the State attempts to admit a defendant's prior conviction, it may be admitted only where (1) the conviction was punishable by a sentence of more than one year or involved dishonesty or false statements; (2) the trial court determined that its probative value outweighed its potential for causing unfair prejudice; and (3) the conviction occurred less than 10 years prior to the testimony. *People v. Valentine*, 299 Ill. App. 3d 1, 4 (1998), see also *People v. Montgomery*, 47 Ill. 2d 510 (1971).

¶ 21 Here, the trial court erred when it allowed the State to impeach Christian with his prior arrests during cross-examination and rebuttal. Although the State contends it brought in Christian's prior arrests for the sole purpose of rebutting the fact that he was the actual driver, the State fails to cite any authority for the proposition that this provided an independent basis for admitting such evidence. *Cf. People v. Williams*, 317 Ill. App. 3d 945, 949 (2000) (finding that no improper impeachment occurred when the evidence was not offered by the State to impeach the defendant, but by the defense to explain why the defendant lied to the police); *People v. Hester*, 271 Ill. App. 3d 954, 959 (1995) (finding that no improper impeachment occurred when the State brought in the defendant's prior conviction because it was an element of the crime he was charged with). While the State may have offered Christian's prior arrests to show defendant was the driver, the State's means of proving this was nonetheless to impeach Christian's credibility. See 625 ILCS 5/6-303(a) (West 2012) (a person commits driving with a revoked

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driver's license when he drives or is in actual physical control of a motor vehicle on any highway of this State at a time when his driver's license is revoked).

¶ 22 The State contends, however, that defense counsel initially “dirtied up” Christian by eliciting facts about his prior criminal history. See *People v. DeHoyos*, 64 Ill. 2d 128, 355 (1976) (when defense counsel opens the door to the defendant’s prior arrests, the prosecutor may cross-examine the defendant regarding his prior arrests). Although defense counsel may have been strategically mitigating Christian's incarceration and unrelated criminal history by bringing it into evidence on direct examination, the record does not indicate that defendant introduced facts specifically pertaining to Christian’s prior *arrests*. Thus, the State was without authority to specifically cross-examine defendant about his prior arrests for driving without a license and having a fictitious license.

¶ 23 Moreover, we agree with defendant's contention that the evidence was closely balanced. In *Naylor*, the State presented the testimony of two police officers, who testified that the defendant sold them heroin. *Naylor*, 229 Ill. 2d at 607. In turn, the defendant testified that he had left his apartment to pick up his son and was swept up in a drug raid. The supreme court determined that the trial court erred when it admitted defendant's prior conviction for impeachment because it was more than 10 years old. The supreme court then reasoned that the first prong of the plain error doctrine had been satisfied because the two officers and defendant relayed their “respective versions of the same underlying incident- a drug raid in a residential housing complex.” *Id.* The court reasoned that there were two opposing yet credible versions of the same event, and there was not any extrinsic evidence presented to corroborate or contradict

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either version making the case a credibility contest.

¶ 24 Similarly, here, a credibility contest existed between the testimony of the State's two officers and Christian. Both officers testified that they never saw defendant or Christian drive the vehicle. In addition, the officers testified that Christian did not appear to be ill and the officers saw no indication of vomit. Sergeant Chilson testified that arriving on the scene he observed the vehicle in the middle of the street with defendant sitting in the driver's seat and Christian in the passenger seat. Officer Underwood, however, arrived later and did not see how the initial encounter began. Sergeant Chilson inconsistently testified both that the vehicle was running during the incident, and that defendant exited the vehicle with keys in hand. Furthermore, Sergeant Chilson testified that despite being a veteran officer, he did not know how to use his vehicle's surveillance camera.

¶ 25 In support of defendant's theory that he was not the driver, Christian testified that no one was sitting in the vehicle when the officers arrived. Christian pulled the vehicle over in the middle of the street, exited the driver's seat, and vomited outside near the back door. Defendant came over to the driver's side to assist Christian, who admitted to being the driver. Moreover, there is no extrinsic evidence in the record to corroborate or contradict either version of events. Thus, Christian's credibility was critical to which version of events the jury found most believable.

¶ 26 Furthermore, Christian's arrests were highly prejudicial because they directly related to the matter at hand. Here, unlike Christian's drug convictions properly introduced into evidence, his arrests for traffic violations were factually related to the jury's key determination: namely,

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who was the driver of the vehicle. As a whole, the record reflects that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against defendant. See *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Thus, we find plain error in the trial court's admittance of defendant's prior arrests into evidence. In light of our finding of plain error, we need not address the other contentions raised in this appeal.

¶ 27

CONCLUSION

¶ 28 Based on the foregoing reasons, we reverse and remand to the circuit court for a new trial.

¶ 29 Reversed and remanded for a new trial.