

No. 1-11-2167

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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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. 10 C4 41330
	)	
TYRUS CALDWELL,	)	Honorable
	)	Noreen V. Love,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE HALL delivered the judgment of the court.  
Presiding Justice ROCHFORD and Justice REYES concurred in the judgment.

**ORDER**

- ¶ 1 **Held:** Defendant failed to establish plain error resulting from the trial court's allegedly erroneous jury voir dire and alleged failure to apply *Montgomery* balancing test to the admission of defendant's prior convictions, where the evidence against defendant was not closely balanced and alleged errors were either not supported by the record or not so serious that they would affect the fairness of the trial regardless of the closeness of the evidence.
- ¶ 2 Following a jury trial, defendant Tyrus Caldwell was found guilty of possession of a controlled substance with intent to deliver. The trial court subsequently sentenced defendant to four years' imprisonment. On appeal, defendant contends that (1) the trial court failed to comply with Supreme Court Rule 431(b) (eff. July 1, 2012) when conducting *voir dire* of potential

jurors; and (2) the trial court failed to properly apply the balancing test of *People v. Montgomery*, 47 Ill. 2d 510 (1971) when responding to defendant's motion *in limine* to bar admission of his prior convictions for possession of a controlled substance. We affirm.

¶ 3 According to the State's theory of the case, defendant was stopped while driving because he failed to signal a right turn. A license check revealed that his license was suspended or revoked and he was placed under arrest. During a search incident to that arrest, the police recovered cocaine and cannabis. Defendant's theory of the case was that he did not fail to signal, was stopped without cause, and the police lied about discovering the drugs.

¶ 4 Prior to trial, defendant filed, *inter alia*, a motion to bar the use of prior convictions as impeachment. In the motion, defendant argued that the prejudicial effect of the prior convictions substantially outweighed their probative value. The motion cited *People v. Montgomery*, 47 Ill. 2d 510 (1971) in support of defendant's argument. The trial court addressed the motion as follows:

"[DEFENSE COUNSEL:] Judge, I also had a motion *in limine* –

THE COURT: I apologize. Yes?

[DEFENSE COUNSEL:] Motion to bar the use of prior convictions to impeach if [defendant] decides to testify.

THE COURT: And what are those prior –

[DEFENSE COUNSEL:] There's a prior PCS. Your Honor. I believe he's on your Honor's probation.

THE COURT: That certainly goes to credibility.

[DEFENSE COUNSEL:] There's actually two separate PCSes.

THE COURT: That absolutely goes to credibility. So I will allow the State to if he should take the stand, they can use a certified copy of his convictions to impeach him. So it's denied."

¶ 5 After denying defendant's motion *in limine*, the trial court began jury selection. Although the language used in the questioning of each panel of the venire and the individual jurors varied slightly, the questions posed to the first panel are representative of the questions posed to each panel and the jurors individually. The trial court questioned the first panel as follows:

"Okay. I'm going to begin as a group. I'm going to be asking you some questions. Please listen carefully.

A defendant is presumed to be innocent until the jury during deliberations determines from all the evidence that the defendant is guilty beyond a reasonable doubt. Is there anyone here who has a problem with that presumption? If you do, please raise your hand. Let the record reflect no hands were raised.

The State has the burden of proving the defendant guilty beyond a reasonable doubt in criminal cases. Does anyone disagree with requiring the State to meet that burden? If you do, please raise your hand. And let the record reflect that no hands were raised.

The defendant does not have to present any evidence at all in this case. The defendant may rely on the presumption of innocence. Does anyone here have difficulty with extending the defendant that presumption throughout the trial. If you do, please raise your hand. And let the record reflect that no hands were raised.

The defendant does not have to testify. Is there anyone here who would hold it against him if he chose not to testify? If you would hold it against him, please raise your hand. And let the record reflect that no hands were raised."

Defendant did not object to the *voir dire* procedures used by the trial court during jury selection.

¶ 6 At trial, Maywood police detective Diaz testified that on December 1, 2010 at approximately 6:46 p.m. he was on a tactical patrol with officers Pratt and Cobos. They were wearing plain clothes with bullet proof vests and badges and driving in an unmarked car. Diaz testified that while on tactical patrol he was still charged with enforcing general laws such as traffic offenses and that he was not allowed to ignore offenses, even a minor traffic violation. While on patrol near the intersection of School Street and First Avenue, Diaz observed a red vehicle turn right onto School Street without signaling. The headlights on the car and Diaz's vehicle were both on and Diaz could not see the driver and could not tell whether there were any passengers in the car. Diaz did not recognize the car. Diaz turned to follow the car and activated his emergency lights.

¶ 7 The car pulled over, Diaz approached, and he saw defendant sitting in the driver's seat. There were no other occupants. Diaz asked defendant for his driver's license and insurance, and defendant provided Diaz with a state identification card. Diaz used that information to contact his dispatcher and learned that defendant's driving privileges were suspended or revoked. Diaz then placed defendant under arrest. Diaz conducted a custodial search and recovered a clear plastic bag from defendant's waistband. The bag contained suspect rock cocaine and suspect cannabis. The rock cocaine was packaged in three "eight balls," three chunks approximately one-eighth of an ounce or 3.5 grams each. Diaz testified that this amount is typically held for sale and that for personal use each eight ball would be broken down into 18 smaller chunks of cocaine. The street value of the cocaine was approximately \$180 per bag.

¶ 8 Diaz further testified that he spoke to defendant about the narcotics. Defendant said "I brought the work here for Doughboy. I was going to sell him two balls. I'm not working and I need money."

¶ 9 On cross-examination, Diaz admitted that the arrest was not his first encounter with defendant that evening. Approximately two hours earlier, defendant was questioned and searched by Diaz's partner. Diaz did not prepare a report memorializing the encounter because no contraband was recovered and no arrest was made. Diaz testified that it was his duty to arrest anyone violating the law, but admitted that he could not recall how many traffic tickets he wrote on the night he arrested defendant.

¶ 10 On redirect examination, Diaz testified that, during the first encounter, he investigated the car in which defendant was a passenger because it was parked outside a currency exchange that had been involved in armed robberies and the drug trade. Diaz further testified that he did not recognize the car the second time he encountered defendant.

¶ 11 Maywood police officer Justin Pratt testified in a manner largely consistent with Diaz's testimony. On cross-examination, he likewise admitted that he could not recall how many traffic tickets he wrote the evening of defendant's arrest.

¶ 12 Cristine Dillow Benak, a forensic scientist with the Illinois State Police, testified that the substances recovered from defendant during the search tested positive for cocaine and cannabis.

¶ 13 Defendant testified that on December 1, 2010, he was at a currency exchange with his girlfriend and her cousin after his shift at a local restaurant ended. Defendant's girlfriend went into the currency exchange to get change for the restaurant. Officers Diaz, Cobos and Pratt pulled into the parking lot. Defendant got out of the car, and Diaz grabbed defendant's identification from his pocket. Eventually he was searched by the officers. Defendant testified

that he had encountered Diaz before and that he had been arrested and convicted "for drugs."

After searching him and checking for warrants, the officers released defendant.

¶ 14 Defendant testified that he encountered Diaz and the other officers a second time approximately 30 minutes later. The officers were "trailing" him and then put their emergency lights on. The officers ran to defendant's car and told him that there was a warrant out for his arrest. The officers searched defendant and his car, but recovered nothing. The officers placed defendant under arrest and told him that they would release him after writing some tickets. Defendant denied being given the *Miranda* warnings and denied making a statement to the police.

¶ 15 On cross-examination, defendant testified that he never received traffic tickets. He admitted that People's exhibits 4 and 5 were traffic tickets but testified that he had never seen them prior to a pretrial motion. Diaz and Cobos took defendant to the police station and Pratt stayed with defendant's car. Defendant spent approximately one hour in the "bull pen" until Diaz called him out and told him that "they got me." Diaz told defendant that they had searched the car and recovered drugs.

¶ 16 The State called Officer Cobos in rebuttal. Cobos testified consistently with Diaz and Pratt. The State also presented certified copies of defendant's convictions for possession of a controlled substance in 2003 and 2010.

¶ 17 Following closing argument, the trial court instructed the jury. The jury found defendant guilty of possession of a controlled substance with intent to deliver. Defendant's posttrial motion was denied following a sentencing hearing, the trial court entered judgment on the jury's verdict and sentenced defendant to four years' imprisonment. Defendant timely appeals.

¶ 18 Defendant first contends that the trial court erred when it failed to inquire whether potential jurors "understood" the principles identified in Rule 431(b). Defendant concedes that

he failed to preserve the issue because he failed to object or raise the issue in a posttrial motion. However, defendant argues that we may consider his claim under the plain-error doctrine despite his procedural default because the evidence was closely balanced.

¶ 19 The plain-error doctrine is used to bypass normal forfeiture principles and to allow a reviewing court to consider unpreserved claims of error in specific circumstances. *People v. Averett*, 237 Ill. 2d 1, 18 (2010). We will apply the plain-error doctrine when:

"(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

The first step in the plain-error analysis is determining whether any error occurred. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

¶ 20 At issue in this case is compliance with Rule 431(b). We review compliance with supreme court rules and determine the consequences, if any, that flow from noncompliance *de novo*. See *People v. Wilmington*, 2013 IL 112938, ¶ 26. The version of Rule 431(b) in effect when defendant was tried provided:

"(b) The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that the defendant's failure to testify cannot be held

against him or her; however, no inquiry of a prospective juror shall be made into the defendant's failure to testify when the defendant objects.

The court's method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section." Ill. S.Ct. R. 431(b) (eff. May 1, 2007).<sup>1</sup>

In the case before us, the trial court asked the jurors about each of the four principles identified in Rule 431(b) but variously phrased the questions in terms of "[having] a problem with," "disagree[ing] with," "hav[ing] difficulty with" or "hold[ing] it against" defendant. At no point did the trial court ask the potential jurors whether they understood these principles.

¶ 21 The State cites a series of cases from this district which have held that such questioning was proper. See, e.g., *People v. Digby*, 405 Ill. App. 3d 544, 548 (2010); see also *People v. Ingram*, 409 Ill. App. 3d 1, 12-13 (2011); *People v. Smith*, 2012 IL App (1st) 102354, ¶ 105. For example, in *Digby*, this court held:

"We find no substantive difference [from cases holding that Rule 431(b) does not dictate a particular methodology] in this case, where the venire members were asked if they 'had a problem' with the presumption that defendant is innocent, if they 'disagreed' with the State's burden of proving defendant guilty, and if they would hold defendant's failure to testify 'against' him. Although the court did not use the precise language of Rule 431(b), the words it did use were appropriate and clearly indicated to the prospective jurors that the court was asking them whether they understood and accepted the principles enumerated in the rule." *Digby*, 405 Ill. App. 3d at 548.

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<sup>1</sup>An April 26, 2012, amendment effective July 1, 2012, made minor changes to the language of the rule regarding the fourth principle that are not relevant to the issues before this court.

However, we find the State's reliance on these cases unpersuasive, because our supreme court has recently condemned the very practice approved in *Digby* and the other cases. See *People v. Wilmington*, 2013 IL 112938. The court stated:

"As this court stated in *Thompson*, Rule 431(b) requires that the trial court ask potential jurors whether they understand and accept the enumerated principles, mandating 'a specific question and response process.' *Thompson*, 238 Ill.2d at 607. While it may be arguable that the court's asking for disagreement, and getting none, is equivalent to juror acceptance of the principles, the trial court's failure to ask jurors if they understood the four Rule 431(b) principles is error in and of itself. Moreover, the trial court did not even inquire regarding the jury's understanding and acceptance of the principle that defendant's failure to testify could not be held against him. Thus, error clearly occurred." *Wilmington*, 2013 IL 112938, ¶ 32.

Accordingly, we must likewise find that clear error resulted from the trial court's failure to ask potential juror's whether they "understood" the four principles contained in Rule 431(b). The next question before us then is whether this clear error rises to the level of plain error such that defendant is entitled to reversal and remand for a new trial. *Id.* at ¶ 33.

¶ 22 Initially, we note that our supreme court has held that Rule 431(b) *voir dire* errors do not rise to the level of plain error under the second prong of the plain-error analysis. *Thompson*, 238 Ill. 2d at 614 (holding that in the absence of a showing of a biased jury, such error does not rise to the level of plain error under the second prong). Defendant does not argue that *Thompson* was wrongly decided, attempt to distinguish it, or argue for some limitation of its rule. Rather, defendant argues that the error in this case rises to the level of plain error under the first prong,

*i.e.*, the evidence was so closely balanced that the error threatened to tip the scales of justice. We disagree.

¶ 23 Three police officers consistently testified about the arrest and custodial search of defendant which revealed the controlled substances. Each testified that defendant was pulled over for turning without signaling, arrested for driving on a suspended/revoked license, and found in possession of narcotics. Defendant, on the other hand, testified to being harassed by the police officers who subsequently conspired to plant narcotics in his car. Defendant argues that the police officers' testimony that they did not recognize his car was incredible and that the traffic stop was merely a pretext for searching him. However, pretextual stops are not, by themselves, unlawful. See *People v. Juarbe*, 318 Ill. App. 3d 1040, 1051 (2001). Moreover, defendant's pretext theory is speculation. The officers' testified, that because of the early dusk during the wintertime stop and the glare from the cars' headlights, they were unable to recognize either the car or the driver prior to effectuating the stop. Defendant's testimony, on the other hand, was impeached by his prior convictions for possession of a controlled substance. Therefore, we conclude that the evidence in this case was not so closely balanced that the trial court's failure to use the word "understand" when questioning the potential jurors was enough to threaten to tip the scales of justice against defendant.

¶ 24 Defendant next contends that the trial court failed to properly weigh the potential for prejudice against the probative value when determining whether to admit evidence of his prior convictions. Defendant concedes that he failed to preserve this error with a timely objection and failed to include it in his posttrial motion. However, defendant urges us to consider this issue under the plain-error doctrine.

¶ 25 As noted above, the first step in the plain-error analysis is to determine whether any error occurred at all. See *People v. Brown*, 2013 IL App (3d) 110669, ¶ 46. Defendant has the burden

of persuading this court that an error occurred. *Id.* at ¶ 51. Although defendant makes a *pro forma* argument that the trial court abused its discretion in admitting evidence of the prior convictions, the main thrust of his argument is procedural, not substantive, *i.e.*, he argues that the trial court failed to articulate that it was applying the *People v. Montgomery*, 47 Ill. 2d 510 (1971) balancing test and failed to articulate why defendant's prior convictions were material and relevant to his truthfulness as a witness.

Under *Montgomery*, a witness' prior convictions are admissible as impeachment 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."

*People v. Mullins*, 242 Ill. 2d 1, 14 (2011), citing *Montgomery*, 47 Ill. 2d at 516.

The trial court, however, is not required to explicitly state that it is conducting the *Montgomery* balancing test. *Brown*, 2013 IL App 110669, ¶ 50, citing *Mullins*, 242 Ill. 2d at 16-19 and *People v. Atkinson*, 186 Ill. 2d 450, 463 (1999). "A trial judge is presumed to have understood the law and properly applied it." *Id.*, citing *People v. Howery*, 178 Ill. 2d 1, 32 (1997).

¶ 26 Here, defendant has quite simply failed to meet his burden of persuading this court that an error occurred. The record is, at worst, simply silent regarding the issue of whether the trial court properly applied the *Montgomery* balancing test. Viewed more liberally, the trial court's comments concerning credibility strongly suggest that it was engaged in a *Montgomery* balancing test. We will not infer from the trial court's silence a failure to apply what has become the familiar test for the admission of prior convictions.

¶ 27 Defendant's reliance on *People v. McGee*, 286 Ill. App. 3d 786 (1997) is unpersuasive. There, the trial court made comments which strongly suggested it was admitting the defendant's prior convictions without weighing the potential for unfair prejudice. *McGee*, 286 Ill. App. 3d at 793 (quoting the trial court as admitting evidence of a witness' background "be it good, bad or indifferent"). Here, the trial court did not affirmatively misstate the *Montgomery* standard, rather it was merely silent. Accordingly, we find that defendant has failed to meet his burden of persuading us that an error occurred, and we need not proceed to examine whether the alleged error was plain.

¶ 28 For the foregoing reasons, we find that defendant has failed to meet his burden of persuading this court that the alleged unpreserved errors rose to the level of plain error. Accordingly, we will not excuse defendant's forfeiture, and we affirm the judgment of the circuit court of Cook County.

¶ 29 Affirmed.