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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Kane County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 11-CF-2531
)	
MARCELLUS THOMAS,)	Honorable
)	David R. Akemann,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Presiding Justice Burke and Justice Schostok concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's judgment was affirmed where the court's error in allowing the State to impeach defendant with a misdemeanor conviction of unlawful possession of a controlled substance was harmless, and where counsel's failure to impeach one of the State's witnesses with his prior conviction of theft did not prejudice defendant.

¶ 2 Defendant, Marcellus Thomas, appeals from his conviction of armed violence (720 ILCS 5/33A-2(a) (West 2010)) for the stabbing of Juan Carlos Prado on November 6, 2011, in Elgin, Illinois. Defendant argues in the alternative that either (1) the trial court erred in allowing the State to impeach him with his prior misdemeanor conviction of unlawful possession of a controlled

substance and in not allowing defense counsel to impeach Prado with his prior conviction of theft, or (2) counsel was ineffective for failing to object properly to the introduction of defendant's prior misdemeanor conviction and for failing to impeach Prado with his prior theft conviction. For the following reasons, we affirm.

¶ 3

BACKGROUND

¶ 4 On December 13, 2011, the grand jury returned a five-count indictment against defendant, charging him with attempted first-degree murder (count I), armed violence (count II), attempted armed robbery (count III), aggravated battery with a deadly weapon (count IV), and aggravated battery resulting in great bodily harm (count V). Originally, count II charged defendant with armed violence in that defendant, while armed with a knife, attempted to rob Juan Carlos Prado; however, the State subsequently amended count II to charge armed violence in that defendant, while armed with a knife, committed aggravated battery that resulted in great bodily harm to Prado. Prior to trial, the State nol-prossed count III of the indictment (attempted armed robbery).

¶ 5 Defendant filed a motion *in limine* to prohibit the State from impeaching him with his prior conviction in Tennessee of unlawful possession of a controlled substance. Defendant alleged upon information and belief that the conviction was a misdemeanor. At the hearing on defendant's motion, the State indicated that it had requested an authenticated copy of the conviction from Tennessee but had not yet received it. Both the court and the State agreed that, if the conviction were a misdemeanor, it would not be admissible for impeachment purposes. The court indicated that, if the conviction were a felony, it could be used for impeachment purposes, because the prejudicial effect of the conviction did not substantially outweigh its probative value.

¶ 6 The State filed a motion *in limine* to exclude from evidence Prado's prior conviction of resisting arrest. According to the State, defendant indicated in his answers to discovery that he planned to introduce the conviction pursuant to *People v. Lynch*, 104 Ill. 2d 194, 202 (1984), for the purpose of proving that Prado was the aggressor and that defendant stabbed him in self defense. During the hearing on the motion, the State noted that, in his answers to discovery, defendant had improperly listed the case number for Prado's resisting arrest conviction as 03-CM-7327. The State indicated that case No. 03-CM-7327 was "a theft conviction,"¹ while case No. 03-CM-7328 was a conviction not of resisting arrest, but of obstructing justice by providing a police officer with a false name. Because none of Prado's prior convictions involved violence or aggression, the court granted the State's motion.

¶ 7 Defendant's jury trial commenced on March 13, 2012. For purposes of this appeal, the testimony of the State's first eight witnesses is relevant to provide general background only, which we summarize as follows. Prado was stabbed at an apartment building 132 South State Street in Elgin, Illinois, during the early morning hours of November 6, 2011. A blood trail began in the hallway on the second floor outside of apartments seven and eight and proceeded down the interior stairway, through the first floor hallway, and onto the exterior concrete steps at the rear of the building. Paramedics, who had been summoned to the scene by a resident of the building, located Prado sitting on the rear concrete steps. He had lost copious amounts of blood. Prado had been

¹On appeal, the parties dispute whether this reference to Prado's prior theft conviction was sufficient to establish that he actually had a theft conviction. We note that no certified copy of Prado's theft conviction appears in the record.

stabbed in the area of his left clavicle, and, at the hospital, it was determined that the wound had pierced his subclavian artery.

¶ 8 Detective Brian Gorcowski testified that he worked in the major investigations division of the Elgin police department. On the morning of November 6, 2011, he received a call that a Hispanic male stabbing victim had been transported to St. Joseph Provena Hospital in Elgin. He proceeded to the hospital, where he found the victim intubated and unresponsive. A nurse gave the detective the victim's personal effects, which included a black smartphone-type cell phone. When Detective Gorcowski returned to the hospital on November 7, 2011, the victim was awake and gave his name as Juan Carlos Prado. The victim was able to give a description of the person who had stabbed him. After leaving the hospital, the detective was able to determine that defendant, who lived in apartment number seven at 132 South State Street, matched the description given by Prado. Prado subsequently identified defendant in a photo line-up as the man who had stabbed him. A warrant issued for defendant's arrest, and he was arrested on November 13, 2011.

¶ 9 Detective Gorcowski interviewed defendant shortly after midnight on November 14, 2011. The interview was not recorded. Initially, defendant said that he had seen some blood outside of his apartment but that he did not know anything about a stabbing. The detective explained to defendant that he already was facing five charges, including attempted murder, and that he needed to tell the truth. Defendant then told Detective Gorcowski that he had been near the JJ Peppers convenience store on State Street when a Mexican male had approached him wanting to know if he was interested in buying a cell phone for \$10. Defendant invited the male up to his apartment to "check out" the phone. Defendant said that, at some point after defendant purchased the phone, the man tried to take it back. Defendant grabbed onto the man and tried to get the phone. Defendant told the detective

that the man took an 8 to 10 inch knife from the kitchen counter and tried to leave with the phone. The man opened the door, and defendant went after him. Defendant grabbed onto the man's hands that were holding the knife. Defendant said that, during the struggle, the man either fell down or was lying on the stairs. The knife came down into the man while defendant was holding it. According to Detective Gorcowski, defendant motioned during the interview with both of his hands over his head how he brought the knife down into the area between the man's shoulder and neck. Defendant said that he went back into his apartment and that the knife was still in the victim. Defendant and his friend then left the apartment building. Defendant identified his friend as Rolando Romero.

¶ 10 Detective Gorcowski further testified that he located Romero at his father's house and interviewed him on November 14, 2011. Romero told the detective that he and defendant had met a Mexican male while walking home from JJ Peppers. Defendant wanted to buy a phone from the man and invited him up to his apartment so he could check it out. Romero said defendant paid \$40 for the phone. When defendant and the man later were struggling, the man was "holding the knife at defendant," and defendant somehow got the knife away from the man. Romero said that defendant then "poked" the man. According to Detective Gorcowski, Romero demonstrated how defendant had "poked" the man by making a horizontal motion toward the area between the neck and shoulder. Romero said that defendant brought the knife with him back into the apartment, placed it inside his jacket, then left the apartment with the knife in the jacket.

¶ 11 Detective Gorcowski returned to the police station and again interviewed defendant. He told defendant that he had spoken with Romero and asked why defendant had lied about the knife. Defendant said that he did take the knife with him when he left the apartment building and that he had thrown it while walking to Romero's brother's house. Defendant said he had given the knife

“a hard chuck.” Defendant disclosed the location where he had disposed of the knife, but three detectives were unable to locate the knife after searching for over an hour.

¶ 12 On cross-examination, Detective Gorcowski testified that one of Prado’s personal effects that he received from the nurse at the hospital on November 6, 2011, was a Mexican voter identification card with Prado’s photograph but with the name Augustin Bracho Ramirez. At the hospital, Prado had acknowledged that it was his photo on the card but had said it was not his name.

¶ 13 Rolando Romero testified that he and defendant encountered a Mexican male while walking back to defendant’s apartment from JJ Peppers, where they had purchased beer, sometime between 12 and 1 a.m. on November 6, 2011. He did not know the man, who spoke Spanish and little English. Defendant invited the man to his apartment because defendant wanted to buy a phone from him. Initially, Romero testified that he never saw defendant purchase the phone and did not know how much defendant paid for it. After being impeached with his prior inconsistent statement to Detective Gorcowski, Romero admitted that defendant had purchased the phone but said he may have given the man two \$5 bills rather than two \$20 bills. Romero further testified that defendant and the man never went into the bathroom together that night, but he was impeached with his statement to two assistant State’s Attorneys on February 28, 2012, that he had seen the two men enter the bathroom together. However, Romero went on to testify that, after follow-up questioning by the two assistant State’s Attorneys on February 28, he had told them that defendant and the man had not gone into the bathroom together. When asked about the inconsistency in his statements to the two assistant State’s Attorneys, Romero testified, “I thought they did, but they didn’t.”

¶ 14 At some point, Romero went to lie down on a bed in defendant’s son’s room. He then heard arguing. The first thing he heard was defendant saying, “ ‘No, give me my phone or give me my

money back.’ ” Romero got up and walked to the front of the apartment, where he saw the man take a knife from the kitchen counter and “go at” defendant. Romero clarified that the man “went to go stab” defendant. Defendant and the man started fighting over the knife and went out the open front door into the hallway. Romero went to get his shoes and jacket so he could get out of the apartment. Romero testified that “when I came back out, it was done, it was over with.” When asked if he saw what happened in the hallway, Romero testified, “Well, yes, *** I seen [defendant] poke the guy with the knife.” He further testified that, during the fight over the knife, defendant had obtained control of the knife. When defendant “poked” the man with the knife, both defendant and the man were standing up. Romero made a motion at shoulder height, parallel to the floor, showing how defendant “poked” the man with the knife. Romero saw defendant put the knife in his pocket, and Romero and defendant then left the apartment building.

¶ 15 The State then impeached Romero with his recorded statement to Detective Gorcowski on November 14, 2011, during which Romero had said defendant purchased the phone for \$40. He was also impeached with his statement to Detective Gorcowski that the apartment door had been closed and that the victim had opened it to walk out. Romero also testified that he had received calls from defendant on December 24, 2011, and January 28, 2012, while defendant was in jail. Romero knew that the conversations had been recorded. During the December 24, 2011, phone call, Romero had told defendant that he had been subpoenaed to testify at his trial and had asked defendant, “ ‘[N]ow we’re doing what we talked about, right?’ ” Romero testified that he had been talking about taking care of defendant’s son. During the January 28, 2012, phone conversation, defendant had said to Romero, “ ‘[W]hen you was telling them that he was trying to back out the door *** don’t say that shit again, tell them that.’ ” Romero did not know why defendant had told him to lie. Romero also

denied that there was any cocaine use in defendant's apartment on November 6, 2011. Romero admitted that he had been convicted of possession of a controlled substance in 2006 and of aggravated battery to a police officer in 2007.

¶ 16 On cross-examination, Romero testified that he had suffered a brain injury during an automobile accident in 1997. He had to relearn how to speak and walk. The injury still impacted his ability to recall things.

¶ 17 Juan Carlos Prado testified through an interpreter that, on November 5, 2011, around 8 or 8:30 p.m., he left his house with his mother's cell phone. He first went to the Milk Pail restaurant, where he used to work, to hang out. He was there for one to two hours and consumed six or more beers and some cocaine. Prado left the Milk Pail and traveled via taxi to the La Quebrada restaurant in downtown Elgin. He was there for 1 to 1 ½ hours and drank beer and wine.² Prado also consumed more cocaine while at La Quebrada.

¶ 18 Prado left La Quebrada and began walking in the direction of JJ Peppers on State Street. As he was walking up the hill just south of JJ Peppers, he encountered three men, two black males and a Hispanic male. The larger black male with gold teeth, whom he identified as defendant, said to him, "Hey, Carlos." Prado explained that he had met defendant once before at a party. Prado told defendant that he was "looking for something," meaning drugs, and defendant said, "Yes, maybe yes." Defendant told Prado to follow him to his house. At defendant's apartment, he offered Prado a beer, and the four men sat down in the dining area, talking and drinking. Prado kept asking if defendant could get him something, meaning drugs, and defendant asked Prado if he had any money. Prado said no but said he had a phone. Defendant looked over the phone. Prado still had some

²Prado later clarified that by "wine" he meant margaritas.

cocaine with him, and he, defendant, and the other black male went into the bathroom to use the cocaine. They did that twice, and Prado kept insisting that defendant get him more. At some point, defendant took the phone and gave Prado “a little rock” of cocaine. Prado testified that the men remained drinking in the apartment from approximately 12 or 1 a.m. to between 6 and 7 a.m.

¶ 19 At some point, the second black male left, and then the Hispanic male left. According to Prado, he told defendant he needed to call a taxi, and defendant handed him the cell phone. After trying to call for a taxi, Prado got up and said he was leaving, and defendant asked him for the phone. Prado told defendant that he could not return the phone to him because it belonged to his mother. As Prado was moving toward the front door of the apartment, defendant got up and locked it. Defendant then went into the kitchen, took out three knives, and asked Prado which one he wanted. Holding one of the knives in his hand, defendant walked toward Prado. Prado described the knife as “long” and held his hands apart to show the approximate length. Prado grabbed defendant’s hand that was holding the knife. The two men began struggling with each other. Prado did not remember how the door opened, but the struggle moved outside the apartment into the hallway. Defendant was walking forward, and Prado was walking backward. Prado testified, “I tripped on some stairs that were in the back and I went backwards, and he fell, like, on top of me, and that’s where he put the knife into me.” The stairs onto which Prado fell led up to the third floor of the apartment building. When defendant stabbed him with the knife, Prado no longer was holding onto it, because he had released his grip in order to brace himself as he fell. The blood was spurting out like “a hose with water.”

¶ 20 Prado testified that, at the time of trial, he was in the custody of Immigration and Customs Enforcement because he was in the country illegally. Prado further testified that he used false names

because of his immigration status. Prado acknowledged that, when he first spoke with detectives about the stabbing, he did not tell them about the drug deal or cocaine use.

¶ 21 On cross-examination, Prado testified that, when he left home on November 5, 2011, he had \$60. After spending \$10 to \$12 on a taxi ride to the Milk Pail, \$25 to \$30 on a small baggie of cocaine while at the Milk Pail, \$10 to \$12 on a taxi ride to La Quebrada, and the rest on several drinks, Prado had no money left. Prado used about half of the cocaine he purchased at the Milk Pail while he was there and used some of it at La Quebrada. Initially, he testified that he used the rest of the cocaine at La Quebrada, but he later clarified that he still had some cocaine left when he left the restaurant. Prado was impeached with his statement to police that he had not used cocaine while at La Quebrada. Prado acknowledged that, on the date of the stabbing, he had an identification card in his wallet with his photo and the name Augustin Ramirez. Prado further testified that he falsely told the detective in the hospital that he used the card to get into clubs. In fact, he used the card because of his immigration problems.

¶ 22 Prado further testified on cross-examination that there was no talk of drugs between him and defendant until they were inside the apartment. Defendant simply invited Prado to come to his apartment. Once inside, defendant offered him a beer, and Prado indicated that he wanted to trade the cell phone for cocaine. By the time he got up to leave defendant's apartment, he had consumed the entire ¼-inch to ½-inch "rock of cocaine" that defendant had given him in exchange for the phone. When Prado and defendant were struggling, Prado fell backwards, and defendant fell onto him. It was then that the "wound was created in his shoulder." Once Prado and defendant realized that Prado had been stabbed, all arguing over the phone and all struggling stopped. Defendant

looked surprised when he saw how much Prado was bleeding. Prado admitted that he had been convicted of the federal felony of illegal reentry into the country.

¶ 23 After the State rested, outside of the jury's hearing, defense counsel again raised the issue of defendant's prior conviction. Defense counsel stated, "[W]hen the defendant takes the stand, he does have a prior felony; and we would ask that it be referred to as a prior felony rather than a prior unlawful possession of a controlled substance." The trial court denied defense counsel's request.

¶ 24 Defendant testified that, on the date of the offense, he was unemployed and lived with his girlfriend and three children at 132 South State Street in apartment number seven. He and Romero had walked to JJ Peppers to buy beer before the store closed at 1 a.m. On the way back, they ran into an older Mexican male whom defendant had never met before. The man had a phone in his hand and was asking if he or Romero wanted to buy it. Defendant told the man to follow him to his apartment so he could take a better look at it.

¶ 25 Once in the apartment, defendant gave beers to Romero and the man. While they were sitting in the dining area of the apartment, defendant asked the man how much he wanted for the phone. He told defendant \$40, and defendant said he would pay only \$10. The man accepted his offer. The three men sat there drinking and talking. Defendant had four or five beers. At some point, Romero went to lie down, and the Mexican man left. Defendant then went to lie down, but he had trouble falling asleep. About 25 or 30 minutes later, he heard a knock on the door, and it was the Mexican man again, asking to use the phone to call for a ride. Defendant gave the man the phone and heard him call a woman who "cussed him out" on the phone. The man was aggravated and got up and started walking out with the phone. Defendant told him to give the phone back, and the man said no because it was his mother's phone. The man put the phone in his left pocket and, with his right

hand, took a knife from the kitchen counter. The front door had remained open the entire time. The man swung the knife at defendant and then “came up with the knife.” Defendant had no choice but to “run into him” and grab his hand. Defendant was fighting with the man, trying to get him out of the house. Defendant feared that the man would kill him and then kill his kids. Defendant had his hands on “just a piece of the knife.” Defendant then testified:

“So we fighting for the knife (indicating), and like somehow we get in the hallway, and I’m pushing him back because I’m trying to get him out the door, and that’s when he trips over the stair and he falls and I fall; and when he fall, he, like, took—that’s when I got control of the knife, and he, like, caught his self; and with my left hand I caught myself because I ain’t fall directly on him, and I guess that’s when the knife stuck him, I don’t know, but that’s what I’m thinking, when I fell on top of him, the knife stuck him and I didn’t know it.”

Defendant was shocked when he saw the blood, and he and Romero left the apartment building. As they were walking out, they saw the victim talking to another man who was calling an ambulance.

¶ 26 On cross-examination, defendant testified that Prado lied when he said defendant gave him drugs in exchange for the phone. Defendant testified that he was not a drug dealer but that he would sell marijuana “here and there.” Defendant explained: “I smoke weed; so if somebody could come up to me and ask me, do I have a blunt or two, if it’s somebody I know, I sell it to them.” Defendant testified that he told Detective Gorcowski that he sold marijuana but that the detective did not put everything in his police report that defendant told him. Defendant denied telling Romero on the phone from the jail what to say about the door and the knife. Defendant testified that, when he fell on Prado, “just a little bit” of the knife was in defendant’s right hand. Defendant demonstrated with his hand the angle of his arm as he fell and the knife stuck Prado. Defendant had the knife in his

hand because Prado let go of it when he fell. According to defendant, the knife came out of Prado after Prado pushed defendant off of him.

¶ 27 After the defense rested, the State in its rebuttal case moved to admit an authenticated copy of defendant's Tennessee conviction. The State indicated that defendant had pleaded guilty to the felony of unlawful possession of a controlled substance on January 26, 2006. The court admitted the authenticated copy of the conviction over defendant's objection. The State then called Detective Gorcowski as a rebuttal witness. Detective Gorcowski testified that, when he interviewed defendant on November 14, 2011, defendant never told him that he sold drugs or marijuana. Also, defendant never told him that Prado slashed at him or did anything toward him with the knife. Defendant did not tell the detective that he fell on top of Prado with the knife or that he fell at all. Nor did defendant tell the detective that the knife came out of Prado after Prado pushed defendant off of him. Defendant had declined to give a recorded or written statement.

¶ 28 The jury found defendant not guilty of attempted first-degree murder (count I) and guilty of armed violence (count II), aggravated battery with a deadly weapon (count IV), and aggravated battery resulting in great bodily harm (count V). The two aggravated battery convictions merged into the armed violence conviction, and the trial court sentenced defendant to 11 years' imprisonment. Defendant filed a posttrial motion in which he alleged that the court had erred in barring defendant from admitting Prado's conviction for obstructing justice and in allowing defendant to be impeached with his Tennessee conviction. Regarding the Tennessee conviction, defendant's only argument was that the prejudicial effect of the conviction substantially outweighed its probative value. The court denied defendant's posttrial motion, and defendant timely appealed.

¶ 29

ANALYSIS

¶ 30 On appeal, defendant argues that he was denied a fair trial in that the trial court allowed the State to impeach him with his prior Tennessee conviction, which was in fact a misdemeanor, and in that the court did not allow him to impeach Prado with his prior theft conviction, which was a crime involving dishonesty. In the alternative, defendant argues that defense counsel was ineffective for failing to object properly to the introduction of defendant's prior misdemeanor conviction and for failing to attempt to impeach Prado with his prior theft conviction.

¶ 31 Illinois Rule of Evidence 609 (eff. Jan. 1, 2011) governs the impeachment of witnesses with their prior criminal convictions. The rule provides, in pertinent part:

“(a) General Rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime, except on a plea of nolo contendere, is admissible but only if the crime, (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, or (2) involved dishonesty or false statement regardless of the punishment unless (3), in either case, the court determines that the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice.” Ill. R. Evid. 609(a) (eff. Jan. 1, 2011).

A conviction is inadmissible if a period of more than 10 years has passed since the date of the conviction or since the release of the witness from confinement, whichever is later. Ill. R. Evid. 609(b) (eff. Jan. 1, 2011). Rule 609 represents a codification of proposed Federal Rule of Evidence 609, as adopted by the Illinois Supreme Court in *People v. Montgomery*, 48 Ill. 2d 510 (1971). Ill. R. Evid. 609, Committee Comments (adopted Sept. 27, 2010).

¶ 32 We review a trial court's decision whether to admit evidence of a prior conviction for impeachment purposes for an abuse of discretion. *People v. Meyers*, 367 Ill. App. 3d 402, 415

(2006). A trial court abuses its discretion where its ruling is arbitrary or fanciful, or where no reasonable person would agree with the trial court. *People v. Patrick*, 233 Ill. 2d 62, 68 (2009).

¶ 33 Defendant's Tennessee Conviction

¶ 34 Defendant is correct that the authenticated copy of his Tennessee conviction indicates that, although he was indicted for unlawful possession of a controlled substance with intent to deliver, which was a felony (see Tenn Code Ann. § 39-17-417 (West 2012)), he pleaded guilty to and was convicted of unlawful possession of a controlled substance, which was a Class A misdemeanor (Tenn. Code Ann. § 39-17-418 (West 2012)). Under Tennessee law, a Class A misdemeanor is punishable by up to 11 months and 29 days in prison. Tenn. Code Ann. § 40-35-111 (West 2012). Consistent with the statute, according to the authenticated copy of his conviction, defendant was sentenced to one day in the workhouse and fined \$750. Because defendant's conviction was a misdemeanor, and because it was not a crime involving dishonesty or false statement, it was not admissible for impeachment purposes. See Ill. R. Evid. 609(a) (eff. Jan. 1, 2011); *Montgomery*, 48 Ill. 2d at 516, 519. Therefore, the court abused its discretion in allowing the State to admit the conviction in its rebuttal case to impeach defendant.³

³Although defendant did not make the same argument that he makes on appeal in his posttrial motion, which is required to preserve for appeal an objection to an evidentiary ruling (*People v. Enoch*, 122 Ill. 2d 176, 186 (1988)), the State has not raised defendant's failure to do so and, thus, has forfeited the issue of forfeiture (*People v. Flores*, 406 Ill. App. 3d 566, 571 n.1 (2010)). Similarly, the State has not argued that defendant invited the error when defense counsel told the trial court that defendant had been convicted of a felony, so we also decline to address invited error. Even if we were to conclude that defense counsel invited the error, we could address the issue of the

¶ 35 The State’s reliance on *People v. Harris*, 231 Ill. 2d 582 (2008), is misplaced. Citing *Harris*, the State argues that defendant opened the door to admission of his prior drug conviction by attempting to mislead the jury as to his criminal background. In *Harris*, the court held that the trial court did not abuse its discretion in permitting a defendant to be impeached with two prior juvenile adjudications where the defendant testified, “ ‘I don’t commit crimes.’ ” *Harris*, 231 Ill. 2d at 585, 591. The court relied on the rule that a defendant can open the door to the admission of evidence that, under ordinary circumstances, would be inadmissible. *Harris*, 231 Ill. 2d at 588. Here, far from misleading the jury as to his participation in criminal activity, defendant disclosed that he smoked marijuana and would even sell it “here and there.” Accordingly, he did not open the door to admission of his prior conviction. Moreover, even if defendant had opened the door, it would have been to the admission of his misdemeanor (not felony) conviction.

¶ 36 The State also argues that, even if it were error to admit defendant’s prior conviction for impeachment purposes, the error was harmless. An “evidentiary error is harmless ‘where there is no *reasonable probability* that the jury would have acquitted the defendant absent the error.’ ” (Emphasis in original.) *In re E.H.*, 224 Ill. 2d 172, 180 (2006) (quoting *People v. Nevitt*, 135 Ill. 2d 423, 447 (1990)). Put another way, “[t]o warrant reversal, the improper evidence must be so prejudicial as to deny the defendant a fair trial, *i.e.*, it must have been a material factor in his conviction such that without the evidence the verdict likely would have been different.” *People v. Ingram*, 389 Ill. App. 3d 897, 902 (2009). “If the evidence is unlikely to have influenced the jury, its admission will not warrant reversal.” *Ingram*, 389 Ill. App. 3d at 902.

improper impeachment under defendant’s alternative ineffective-assistance-of-counsel argument. We would reach the same result under that analysis.

¶ 37 We agree with the State that the error was harmless. The admission of defendant's prior Tennessee conviction was not a material factor in his armed violence conviction. The State made no mention of defendant's prior conviction during its closing argument. The only reference to the conviction at trial was when it was admitted during the State's rebuttal case. At no point did the State urge the jury to disbelieve defendant's testimony because he (purportedly) was a convicted felon. This factor distinguishes this case from cases in which the admission of prior convictions prejudiced a defendant because the State made repeated references to the convictions during argument to the jury. Compare *People v. Melton*, 2013 IL App (1st) 060039, ¶ 53 (finding harmless error where the State did not mention defendant's prior conviction while addressing the jury), with *People v. Patrick*, 233 Ill. 2d 62, 75-76 (2009) (holding that error was not harmless where the State made "focused and repeated argument urging the jury not to believe a three-time convicted felon"). Additionally, the jury was properly instructed that a witness's prior conviction could be considered only as it may affect the believability of the witness. See Illinois Pattern Jury Instructions, Criminal, No. 3.12 (4th ed. 2000); see also *People v. Allen*, 335 Ill. App. 3d 773, 782 (2002) (noting that limiting jury instruction "did reduce the likelihood the jury considered the other-crimes evidence as propensity to commit crimes").

¶ 38 Although defendant contends that admission of his prior conviction prejudiced him by casting him as a drug dealer before the jury, his prior conviction of *possession* arguably did less to cast him in that light than his own testimony. Defendant testified that he was not a drug dealer but that he would sell marijuana "here and there." Defendant explained that he "smoke[d] weed" and that if someone he knew asked him if he had "a blunt or two," then he would sell it to them. Defendant's admitted drug selling (he contends it was not "drug dealing") arguably had a greater

tendency to prejudice the jury's view of him than did his prior conviction of possession of a controlled substance.

¶ 39 Furthermore, the jury could have found that defendant's testimony lacked credibility for other reasons. The State presented evidence at trial that, during phone conversations from jail, defendant had instructed Romero not to say that " ' he [Prado] was trying to back out the door, ' " which is what Romero had told Detective Gorcowski. During another conversation, defendant had responded affirmatively when Romero asked defendant, " '[N]ow we're doing what we talked about, right?' " This evidence tended to undermine defendant's credibility at trial and to show his consciousness of guilt. Additionally, on appeal, the State points to a number of inconsistencies between defendant's testimony and the story he told Detective Gorcowski shortly after the stabbing. When the detective first interviewed him, defendant initially denied knowing anything at all about the stabbing. Although he quickly admitted that he had stabbed Prado, he did not say anything to Detective Gorcowski during the November 14, 2011, interview about falling on top of Prado. This conflicted with defendant's testimony at trial that he unknowingly stabbed Prado when defendant fell on top of him on the stairs. Nor had defendant told the detective during the interview that Prado had slashed at him with the knife. Similarly, defendant testified at trial that the knife came out of Prado after Prado pushed defendant off of him. Detective Gorcowski testified that defendant initially told him that he had left the knife in Prado. Even after defendant changed that part of his story, he never told the detective that the knife came out of Prado after Prado pushed him away. In light of defendant's jail phone conversations with Romero and the inconsistencies between the story he told Detective Gorcowski and his testimony at trial, the impeaching value of his prior conviction was marginal at best.

¶ 40 Finally for purposes of our harmless error analysis, the evidence against defendant was not closely balanced. Although defendant urges this court to conclude that the case came down to the credibility of his testimony versus Prado's testimony, defendant ignores significant pieces of evidence against him. Arguably, the most damaging testimony was not Prado's but Romero's. Romero testified that he witnessed defendant "poke" Prado with the knife. At no point did Romero suggest that the "poke" had been accidental or the result of a fall. According to Romero, when defendant "poked" Prado, both defendant and Prado were standing. Romero made a motion at shoulder height, parallel to the floor, showing how defendant "poked" Prado with the knife. This aspect of Romero's testimony was consistent with his account of the stabbing during his recorded interview with Detective Gorcowski on November 14, 2011. Further evidence of defendant's guilt was his conduct following the stabbing. Defendant left the apartment building quickly, walked past Prado, who was bleeding profusely, and disposed of the knife by giving it "a hard chuck." See *People v. Price*, 158 Ill. App. 3d 921, 927 (1987) (noting that the defendant's flight from the scene and disposal of weapon was evidence of consciousness of guilt). Moreover, the evidence of defendant's motive to stab Prado was undisputed. Both defendant and Prado testified that Prado attempted to leave the apartment with his mother's cell phone and that the struggle began following defendant's demanding that Prado return the phone.

¶ 41 In sum, there is not a reasonable probability that the jury would have acquitted defendant absent the trial court's erroneous admission of his prior conviction of possession of a controlled substance. Therefore, the error was harmless.

¶ 42 Prado's Theft Conviction

¶ 43 Defendant next contends that either the trial court erred in not allowing defendant to impeach Prado with his prior theft conviction or defense counsel was ineffective for failing to do so. The State responds that defendant did not raise this issue before the trial court and cannot raise it for the first time on appeal. The State is correct in part. Although defendant did not raise the issue of Prado's prior theft conviction before the trial court, and therefore cannot raise it for the first time on appeal, this does not restrict his ability to raise an ineffective-assistance-of-counsel argument on appeal, because the same attorney who represented defendant at trial also drafted his posttrial motion. See *People v. Reed*, 298 Ill. App. 3d 285, 296 (1998) (“[A] defendant does not waive his ineffective assistance of counsel claim by failing to raise it in a posttrial motion where *** the posttrial motion was prepared and presented by the same attorney who represented defendant at trial.”); see also *People v. Ramos*, 339 Ill. App. 3d 891, 900 (2003) (applying the waiver rule to an ineffective-assistance-of-counsel claim where the attorney who represented the defendant at trial did not also draft the posttrial motion).

¶ 44 To succeed on an ineffective-assistance-of-counsel claim, a defendant must show both (1) that counsel's performance fell below an objective standard of reasonableness and (2) that the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984). Both prongs must be met, and the failure to satisfy either prong will preclude a finding of ineffective assistance of counsel. *People v. Theis*, 2011 IL App (2d) 091080, ¶ 13 (citing *People v. Patterson*, 192 Ill. 2d 93, 107 (2000)).

¶ 45 Here, even assuming *arguendo* that defense counsel's performance fell below an objective standard of reasonableness, defendant has failed to establish that he was prejudiced by the error.⁴

⁴Because we resolve defendant's argument on *Strickland*'s prejudice prong, we also do not

See *People v. Harris*, 206 Ill. 2d 293, 304 (2002) (“If this court concludes that defendant did not suffer prejudice, the court need not decide whether counsel’s performance was constitutionally deficient.”). To establish prejudice, a defendant must show that, but for trial counsel’s ineffective assistance, there is a reasonable probability that the result of the proceeding would have been different. *People v. Colon*, 225 Ill. 2d 125, 135 (2007) (citing *Strickland*, 466 U.S. at 694). “A reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome of the proceeding.” *Colon*, 225 Ill. 2d at 135 (citing *Strickland*, 466 U.S. at 694).

¶ 46 As we discussed above, defendant incorrectly views the outcome of his case as tied to the competing credibility of his testimony versus Prado’s testimony. Defendant’s view of the evidence leaves out Romero’s testimony, which strongly supported the jury’s guilty verdict. Also supporting the jury’s verdict was the undisputed motive evidence and defendant’s flight from the scene and disposal of the knife. Defendant’s phone calls to Romero from jail, in which defendant and Romero seemed to be arranging Romero’s trial testimony, were further evidence of defendant’s consciousness of guilt. Again, the evidence in this case was not closely balanced.

¶ 47 Moreover, there were a number of reasons for the jury to discount Prado’s testimony at trial. Prado’s testimony on direct examination was inconsistent with his testimony on cross examination in a number of respects. Prado testified on direct that he still had cocaine when he left La Quebrada

need to address the State’s argument that the record is insufficient to establish that Prado actually had a prior theft conviction. We note, however, that a conviction of theft does qualify as a crime involving dishonesty that generally is admissible under *Montgomery* and Illinois Rule of Evidence 609. *People v. Spates*, 77 Ill. 2d 193, 203-04 (1979).

restaurant. On cross, he initially testified that he had used all of the cocaine by the time he left La Quebrada, then, later, he testified that he still had some cocaine when he left the restaurant. Prado also testified on direct that he inquired about trading the phone for cocaine while on the street near JJ Peppers. On cross, Prado testified that no conversation about drugs took place until after he had entered defendant's apartment. In addition, Prado admitted to using false names and to lying to police because of his immigration status. Finally, he was impeached with his prior felony of illegal reentry into the country. In light of these considerations, the impeachment value of Prado's prior conviction of theft would have been marginal at best.

¶ 48 In sum, because the evidence was not closely balanced, and because the outcome of the case did not rest entirely on Prado's credibility, defendant has not satisfied *Strickland's* prejudice prong. See *People v. Sundling*, 2012 IL App (2d) 070455-B, ¶ 90 ("Because we find that the evidence was not closely balanced, defendant cannot prove the requisite prejudice prong of ineffective assistance of counsel.").

¶ 49

CONCLUSION

¶ 50 For the reasons stated, we affirm the judgment of the circuit court of Kane County.

¶ 51 Affirmed.