2014 IL App (3d) 120874-U

Order filed December 3, 2014
Modified order upon denial of rehearing filed February 9, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 14th Judicial Circuit, Whiteside County, Illinois.
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-12-0874 Circuit No. 11-CF-197
JAMES A. COX,	)	
Defendant-Appellant.	)	Honorable Stanley B. Steines, Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justice Lytton and Justice Holdridge concurred in the judgment.

ORDER

¶ 1 *Held*: Though the State presented evidence sufficient to convict defendant on both counts of threatening a public official, the trial court committed plain error when it failed to instruct the jury as to all elements of the offense. The trial court abused its discretion in denying defendant's motion to sever, but that error was harmless. Defense counsel did not render ineffective assistance by calling certain witnesses.

¶ 2 A Whiteside County jury found defendant, James Cox, guilty of being an armed habitual criminal, unlawful possession of a weapon by a felon, two counts of threatening a public official, and resisting or obstructing a peace officer.

¶ 3 Defendant appeals, claiming: (1) the State failed to prove him guilty of threatening public officials beyond a reasonable doubt; (2) he was denied a fair trial where the jury was not instructed as to all the elements of threatening public officials; (3) he was denied a fair trial where the trial court erroneously admitted charging instruments and other documents relating to his prior convictions; (4) the trial court erred in denying his motion to sever counts; (5) he received ineffective assistance of counsel based upon his attorney's decision to call a certain witness; (6) that, in the alternative, his case should be remanded for resentencing where the trial court sentenced defendant to extended terms for threatening public officials where that was not the most serious offense of which he was convicted; and (7) the court erroneously assessed several duplicate fees.

¶ 4 We affirm in part, reverse in part, and remand for further proceedings.

¶ 5 BACKGROUND

¶ 6 The State charged defendant with one count of being an armed habitual criminal (count I), two counts of unlawful possession of a firearm by a felon (counts II and III), two counts of threatening public officials (counts IV and V), and one count of resisting or obstructing a peace officer (count VI). The jury found defendant guilty on all counts. Counts II and III merged into count I; the court did not impose judgment on those counts. The trial court sentenced defendant to 18 years' incarceration on count I, 10 years' incarceration on both counts IV and V, and 364 days in the Whiteside County jail on count VI.

¶ 7 Prior to trial, defendant moved to sever counts I, II, and III from counts IV, V, and VI. The first three counts dealt with events occurring in and around a bar, the R&R Lounge, in Rock Falls. The latter three events, according to defendant, occurred after the incident at the bar and when defendant was at the police station. In his motion, defendant argued that his strategies for defending the two sets of counts would differ and that joinder of the counts would prejudice him.

¶ 8 Before hearing argument on defendant's motion to sever, the trial court granted the State's motion *in limine* to admit evidence of defendant's two prior burglary convictions as impeachment evidence in the event defendant chose to testify.

¶ 9 The trial court then denied defendant's motion to sever, finding that the events starting at the bar and proceeding through defendant's detention at the police station constituted "a continuing course of conduct." The court also found that the allegations in the threatening a public official counts were probative of defendant's state of mind as to the armed habitual criminal and unlawful possession of a weapon counts.

¶ 10 I. State's Evidence

¶ 11 In its case-in-chief, the State presented the testimony of William Bruns. Bruns, a patron at the R&R Lounge, testified that around 9:48 p.m. on the night in question, defendant approached him outside the bar and asked if he wanted to buy a Glock. Bruns stated on redirect that defendant offered to sell him a "nine and a Glock." Bruns observed defendant approach 15 to 20 other people standing outside the R&R Lounge, but he did not hear what defendant said to them. Bruns did not hear anyone accept defendant's offer.

¶ 12 Tom Wade, the manager of the R&R Lounge, testified that on the night of June 11, 2011, several patrons of the bar told him that someone was trying to sell a handgun. Wade approached defendant and defendant indicated he was trying to sell a gun. Defendant told Wade he had a

gun nearby and could get it right away. Wade asked defendant to leave the bar. Defendant did so. Wade then called the police.

¶ 13 Sergeant Herb Hall testified that on the night of June 11, 2011, he received a call on his radio that someone was attempting to sell a gun in the R&R Lounge. Hall arrived about 15 seconds later, at which point Bruns told him that the person who had tried to sell him a gun was in a van parked across the street.

¶ 14 Hall parked behind the van and activated his lights. Defendant and a younger individual, later identified as Justin Charleston, exited the vehicle. Defendant asked Hall what was wrong, while Charleston fled. Hall ordered defendant to get on the ground, but defendant refused. Hall began to draw his gun, and defendant subsequently knelt. Hall told defendant to lie on the ground, but defendant again failed to comply. Hall testified that he handcuffed defendant while he stood on the back of defendant's legs. Hall then walked defendant over to the curb where he pushed defendant down next to the van's occupants, Denise Svec and Lewis Vaughn.

¶ 15 Hall testified that as other officers began to arrive on the scene, defendant "started coming towards [him] again," so he arrested defendant for obstructing. According to Hall, as he moved defendant to the squad car, defendant wrestled with him. Hall bent defendant over the hood of his squad car, double-locked defendant's cuffs to prevent them from tightening, and put defendant in the back of the car. Hall did not recall defendant complaining that his cuffs were too tight. Hall also did not recall defendant falling onto his cuffs. After securing defendant in the car, another officer told Hall that he had an abrasion and a cut on his arm. Hall did not know how he cut his arm, but testified it was not there before he put defendant in the car.

¶ 16 Officer Sara Hartz arrived after defendant was secured in the squad car. She searched defendant's van twice. During the second search, Hartz found a loaded .40-caliber Glock 27

pistol wrapped in a cloth that was "shoved up and underneath" the rear passenger's side seat. The gun's serial number matched that of a retired state trooper's handgun.

¶ 17 Hall drove defendant to the Rock Falls police station and locked him in an interview room. Hall said that defendant began screaming and swearing, banging on the door from the inside. Eventually, Hall and Officer Pilgrim moved defendant to a holding cell. Hall testified that defendant continued to yell and "walked haltingly" as they escorted him down the hall. Hall stated that defendant "said something to me about I will get your children." Pilgrim testified that, "[a]t one point he made a generic threat of I will get your children or I'm going to get your kids or something like that."

¶ 18 Hall and Pilgrim both testified that defendant refused to get into the holding cell. Pilgrim pointed his taser at defendant's chest. Hall told defendant to get into the cell or he would be tased. According to both officers, defendant told Hall that he would kill him, his wife, and his children, then repeated the same thing to Pilgrim. Defendant eventually backed into the holding cell, then yelled, "I will kill you all."

¶ 19 Neither Hall nor Pilgrim knew defendant before they arrested him that night. Hall said defendant would have no way of knowing whether Hall was married and had children. Hall did have a wife and children.

¶ 20 The State sought to prove elements of the armed habitual criminal and unlawful possession of a weapon by a felon counts with certified copies of defendant's prior burglary convictions. Defendant objected, arguing the State also sought to introduce extraneous information contained in minute entries, police reports, and charging instruments included with the statements of conviction. The trial court excluded the minute entries and police reports, but

permitted the State to introduce certified statements of conviction and the charging instruments, mittimuses and complaints for both cases.

¶ 21 The charging instruments set out the elements of the offense of burglary and identified the victims. In addition, the certified convictions and mittimuses contained notations that defendant was recommended for drug treatment and ordered to pay a Violent Crimes Victim Assistance Fund penalty.

¶ 22 II. Defendant's Evidence

¶ 23 Defendant chose to testify at trial and presented the following evidence. On June 11, 2011, he found that his mother's apartment had been burglarized. Whoever broke in took his mother's purse, cell phone, about $28 in quarters, and his dead father's 9-millmeter Glock handgun. He did not call the police about the break-in because he was on parole at the time, and the handgun was no longer registered after his father's death. His mother also could not call the police because she was on probation at the time.

¶ 24 Defendant suspected that Denise Svec had broken in because she had admired his mother's collection of quarters a few days before. Defendant confronted Svec at her apartment, but did not find his father's gun. Defendant, accompanied by Svec, then went to Lewis Vaughn's house. Vaughn, who was 13 years old at the time of trial, lived with his mother and a friend named Justin Charleston. Defendant asked Charleston whether he had taken his mother's cell phone, and Charleston replied that he had not. Defendant then called his mother's phone, and it rang in Charleston's pocket. Defendant slapped Charleston.

¶ 25 While at Vaughn's house, defendant learned that Svec sold his father's gun to someone outside a bar called the R&R Lounge two hours earlier. Defendant ordered Svec, Vaughn, and Charleston into his mother's van, telling them he would "fuck them all up" if he did not find the

gun. As defendant and his passengers drove by R&R Lounge, Svec pointed to a group of people standing outside and told defendant that she thought one of them was the person who bought the gun. Defendant ran across the street and started asking people if any of them had bought a 9-millimeter. After being in the bar for about a minute, the manager of the bar approached defendant and asked him to leave.

¶ 26 As defendant left the bar, he saw one of the patrons he had approached earlier talking to a police officer and pointing at him. Defendant got back into his mother's van and the officer pulled up behind it. Defendant exited the van and asked the officer what the problem was. The officer said, "Let me see your hands," then pointed his gun at defendant's chest and ordered defendant to "get on the floor." Defendant raised his hands and knelt. The officer put him in handcuffs and stood on his legs for 12 to 15 seconds. The officer then ordered him to sit on the curb, but he was unable to do so with his hands cuffed behind his back. According to defendant, the officer pushed him down by his shoulders. Defendant missed the curb, hitting the street instead. Defendant's cuffs struck the curb, tightening them and cutting off his circulation. Because of the pain, defendant stood up to show the officer the cuffs. The officer then led him over to his squad car and bent him over the hood. Defendant continued to move around due to the pain while the officer told him to stay still because the cuffs were apparently upside down. While the officer's hands were underneath the cuffs, defendant rolled off the squad car, scratching the officer's arm. Once defendant was on the ground, the officer loosened the cuffs, then placed defendant in the squad car.

¶ 27 Defendant did not know there was a gun in the van, nor did he own the gun that was in the van. The first time he learned of the gun was at the police station. While at the station,

defendant did not inform the officers about the burglary of his mother's apartment or his father's stolen Glock.

¶ 28 The defense then called Lewis Vaughn, who testified that Charleston showed him a gun in his room on June 11, 2011. Later that day, defendant and Svec came over to Vaughn's home. He left for Wal-Mart with defendant, Svec, and Charleston. Vaughn testified that while he was in the van, he knew that the gun Charleston had shown him was in Svec's bookbag. Vaughn stated that the police then pulled them over. The officer ordered him to sit on the curb, but Vaughn did not recall defendant sitting on the curb.

¶ 29 Vaughn went to the police station later that night, where he made five statements to the police. Vaughn testified that each of the statements was untrue because he was trying to "cover" for Charleston. The court admitted one of Vaughn's written statements for impeachment purposes. That statement said that defendant bought the gun from Charleston and that defendant stopped at bars to sell the handgun. Vaughn testified that he was "kind of" scared when he gave the statements at the station because he thought he would be in trouble for being with defendant, Svec and Charleston.

¶ 30 The defense then called Justin Charleston, who was 16 years old and in the custody of the Department of Juvenile Justice at the time of trial. Charleston testified that he stole a gun out of "a retired cop's" garage on June 11, 2011. Later that day, defendant and Svec picked up Charleston and Vaughn in defendant's mother's van. Svec had the gun in her pocket while they were in the van together. Police stopped the van when defendant returned from the R&R Lounge. Charleston got out of the van and ran away.

¶ 31 On direct examination, defendant's counsel asked Charleston what occurred at the Rock Falls police station. Charleston replied that police made him write a statement "describing how

[he] met [defendant], what transaction [he] made with [defendant], what time it happened." On cross, Charleston testified that he sold the gun to defendant. On redirect, Charleston stated he was not sure whether he physically handed the gun to defendant after he sold it to him.

¶ 32 Denise Svec testified that she was in the van with defendant, Vaughn, and Charleston on the night of the incident. Svec sat in the rear driver's side seat, Charleston was next to her, and Vaughn drove. Vaughn pulled over near a bar or two so that defendant could get a drink. She could not hear what defendant was saying while he was at the bar.

¶ 33 As defendant returned from the bar, an officer approached the van. Svec saw that Charleston was holding a gun. She did not know Charleston had a gun in the van; no one had spoken about a gun before then. Svec took a cloth out of her bag, wrapped the gun in it, and threw it under the backseat. She told the police that "the kids" had a gun in the van. At trial, Svec denied making a statement to police that defendant had bought the gun. When the State confronted Svec with her handwritten statement, she stated she could not read it, and could not understand what she had written because she was on medication when she wrote it. The trial court admitted Svec's written statement as impeachment evidence.

¶ 34 III. Closing Arguments

¶ 35 In its closing statement, the State cited Charleston's testimony, pointing out that defendant's own witness told the jury that defendant purchased the gun from Charleston.

¶ 36 Defense counsel called Charleston's credibility into question, noting that he could not remember any specifics about the sale of the gun. Counsel also attacked Charleston's credibility based on his admission that he had stolen the gun.

¶ 37 IV. Jury Instructions

¶ 38 The court defined the offense of threatening public officials for the jury as follows:

> "A person commits the offense of threatening public officials when he knowingly and willfully delivers or conveys, directly or indirectly, to a public official any threat to take the life of the public official or a member of the public official's immediate family, and the threat was conveyed because of the performance or nonperformance of some public duty."

¶ 39 The court then listed the elements of threatening public officials from the proposed jury instructions. Defense counsel did not object to either instruction on the record.

¶ 40 The court instructed the jury that defendant's prior convictions for burglary could be used to establish the predicate felony elements of the armed habitual criminal and unlawful possession of a weapon by a felon charges. The court further instructed the jury that for the offenses of threatening a public official and resisting or obstructing a peace officer, "evidence of a defendant's previous conviction of an offense may be considered by you only as it may affect his believability as a witness and must not be considered by you as evidence of his guilt of the offense with which he is charged." Neither party objected to these instructions when they were proposed on the record.

¶ 41 During its deliberations, the trial court granted the jury's request for the transcripts of William Bruns and Tom Wade. Ultimately, the jury returned guilty verdicts on all counts.

¶ 42 V. Motion for a New Trial

¶ 43 In his amended motion for a new trial, defendant asserted, *inter alia*, that the jury was provided an incorrect instruction as to the threatening a public official counts and that the trial court erred in denying defendant's motion to sever. The court denied the motion.

¶ 44 The trial court sentenced defendant. The court found defendant extended-term eligible for threatening public officials "given the nature of the offense itself." The court also ordered defendant to pay "court costs and the VCV fund fine" as to each count.

¶ 45 Defendant filed a motion to reconsider sentence. On September 19, 2012, the court denied the motion. Defendant appeals.

¶ 46 ANALYSIS

¶ 47 I. Jury Instructions and Sufficiency of the Evidence

¶ 48 Defendant argues that the trial court erred in giving a jury instruction that allowed the jury to convict him of threatening a public official without making a finding on all the necessary elements of the offense. We agree.

¶ 49 The State contends that defendant failed to preserve this issue in the trial court, thus has forfeited his argument on appeal. The record reflects that defense counsel did not object to the improper jury instruction at trial, but did object, at least as to one of the elements, in a posttrial motion. Defendant concedes that the issue is forfeited, but asks this court to review it under the plain-error doctrine.

¶ 50 The plain-error doctrine permits a reviewing court to consider an unpreserved error 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. Sargent*, 239 Ill. 2d 166, 189 (2010).

¶ 51 We typically undertake plain-error analysis by first determining whether any error occurred at all. *Id*. If error is found, the court then proceeds to consider whether either of the two prongs of the plain-error doctrine has been satisfied. Under both prongs, the burden of persuasion rests with the defendant. *People v. Naylor*, 229 Ill. 2d 584, 593 (2008).

¶ 52 "The purpose of jury instructions is to provide the jury with the correct legal principles applicable to the evidence, so that the jury may reach a correct conclusion according to the law and the evidence." *People v. Bannister*, 232 Ill. 2d 52, 81 (2008). Generally, the decision to give certain jury instructions rests with the trial court, and that decision will not be reversed absent an abuse of that discretion. *People v. Lovejoy*, 235 Ill. 2d 97, 150 (2009). However, "the issue of whether the jury instructions accurately conveyed to the jury the applicable law is reviewed *de novo*." *People v. Parker*, 223 Ill. 2d 494, 501 (2006).

¶ 53 Here, the proffered jury instructions stated:

> "To sustain the charge of threatening public officials, the State must prove the following propositions:
>
> *First Proposition*: That the defendant knowingly and willfully delivered or conveyed, directly or indirectly, to Dave Pilgrim a threat to take the life of Dave Pilgrim or a member of Dave Pilgrim's immediate family; and
>
> *Second Proposition*: That Dave Pilgrim was a public official at the time of the threat; and

Third Proposition: That the threat was conveyed because of the performance or nonperformance of some public duty; and

Fourth Proposition: That when the defendant conveyed the threat, he knew Dave Pilgrim was then a public official."

¶ 54 The second instruction was identical, save for the officer's name. The offense of threatening a public official is set out in section 12–9 of the Criminal Code of 1961 (720 ILCS 5/12–9 (West 2010), which provides:

"(a) A person commits threatening a public official when:

(1) that person knowingly delivers or conveys, directly or indirectly, to a public official by any means a communication:

(i) containing a threat that would place the public official or a member of his or her immediate family in reasonable apprehension of immediate or future bodily harm, sexual assault, confinement, or restraint; ***

* * *

(a-5) For purposes of a threat to a sworn law enforcement officer, the threat must contain specific facts indicative of a unique threat to the person, family or property of the officer and not a generalized threat of harm." 720 ILCS 5/12-9 (West 2010).

¶ 55 It is clear that the trial court should have instructed the jury that defendant's threat would place either the officers or members of their immediate families in reasonable apprehension of

immediate or future bodily harm *and* that the threat must contain specific facts indicative of a unique threat to the person, family, or property of the officer and not a generalized threat of harm. The instructions tendered to the jury are conspicuously devoid of either element.

¶ 56 The State concedes that the jury instructions did not explicitly state these two elements, but argues that evidence of the defendant's guilt was so overwhelming on both counts that defendant failed to meet his burden under the first prong of the plain-error test.

¶ 57 The recent case of *People v. Hale*, 2012 IL App (4th) 100949, is directly on point. The Fourth District held that the failure to instruct the jury as to all of the elements of threatening public officials required a new trial. *Id*. ¶ 25. In *Hale*, the instruction failed to include the element that when a charge of threatening public officials involves a threat made to a sworn law enforcement officer, " 'the threat must contain specific facts indicative of a unique threat to the person, family or property of the officer and not a generalized threat of harm.' " *Id*. ¶ 21 (quoting 720 ILCS 5/12-9(a-5) (West 2008)).

¶ 58 The *Hale* court also considered whether the omitted jury instruction constituted plain error. The court stated:

> " '[A]n omitted jury instruction constitutes plain error only when the omission creates a serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law, so as to severely threaten the fairness of the trial. This rule does not require that defendant prove beyond doubt that her trial was unfair because the omitted instruction misled the jury to convict her. It does require that she show that the error caused a *severe* threat to the

fairness of her trial.' " (Emphasis in original.) *Hale*, 2012 IL App (4th) 100949, ¶ 22 (quoting *People v. Hopp*, 209 Ill. 2d 1, 12 (2004)).

¶ 59 We, too, find that defendant satisfied his burden of proving that the plain-error exception applied to the general forfeiture rule. The instructions given in this case deprived the jury of the guidance necessary to decide whether defendant's threats contained specific facts indicative of unique threat to Officers Hall and Pilgrim. Moreover, and beyond the error recognized in *Hale*, the instructions also failed to apprise the jury that the State had to prove that the threat would place Officers Hall and Pilgrim or their immediate family members in reasonable apprehension of immediate or future bodily harm. A clear and obvious error occurred here, and it was one that affected the fairness of defendant's trial. See *Hale*, 2012 IL App (4th) 100949, ¶ 24. Accordingly, we reverse defendant's convictions for threatening a public official. We remand for a new trial before a properly instructed jury.

¶ 60 We reject defendant's sufficiency of the evidence claim. Based on the evidence presented by the State, we find that a reasonable trier of fact could find defendant guilty of the offenses beyond a reasonable doubt. "Thus, no double-jeopardy violation will occur in the event of a new trial." *Id.* ¶ 26 (citing *In re R.A.B.*, 197 Ill. 2d 358, 369 (2001)).

¶ 61 II. Defendant's Motion to Sever

¶ 62 Defendant argues that the trial court erred in denying his motion to sever his armed habitual criminal and unlawful possession of a weapon by a felon counts from his threatening public officials and resisting or obstructing a peace officer counts, where the former required proof of defendant's prior burglary convictions and joinder of the counts denied defendant of his right against self-incrimination.

¶ 63 The court may order two or more charges to be tried together if the offenses and the defendants could have been joined in a single charge. 725 ILCS 5/114-7 (West 2010). On the other hand, "[i]f it appears that a defendant or the State is prejudiced by a joinder of related prosecutions or defendants in a single charge or by joinder of separate charges or defendants for trial the court may order separate trials, grant a severance of defendants, or provide any other relief as justice may require." 725 ILCS 5/114-8(a) (West 2010). Generally, the joinder of two or more charges is appropriate if the offenses are of a similar nature or are part of a single transaction or common scheme. *People v. Boand*, 362 Ill. App. 3d 106, 116 (2005). While there is no precise criterion for determining whether separate offenses are part of the same comprehensive transaction, some important factors to consider in connection with a motion to sever include: "(1) the proximity in time and location of the offenses; (2) the identity of evidence needed to demonstrate a link between offenses; (3) whether there was a common method in the offenses; and (4) whether the same or similar evidence would establish the elements of the offenses." (Internal quotation marks omitted.) *People v. Walston*, 386 Ill. App. 3d 598, 601 (2008) (quoting *People v. Gapski*, 283 Ill. App. 3d 937, 942 (1996)). We must also bear in mind that "[a] defendant suffers severe prejudice where a jury learns of the defendant's prior convictions through an indictment on an enhanced weapons count while adjudicating his guilt on other unrelated charges." *People v. Bracey*, 52 Ill. App. 3d 266, 273 (1977) (citing *People v. Edwards*, 63 Ill. 2d 134 (1976)). The denial of a motion for severance is reviewed for an abuse of discretion. *Walston*, 386 Ill. App. 3d at 600-01.

¶ 64 In this case, before hearing arguments on defendant's motion to sever, the trial court granted the State's request to admit evidence of two of defendant's prior burglary convictions as impeachment evidence in the event defendant chose to testify. The court then denied

defendant's motion to sever, finding the allegations in the threatening a public official counts were probative of defendant's state of mind as to the armed habitual criminal and unlawful possession of weapons counts.

¶ 65 Having previously determined that the threatening a public official counts must be reversed and remanded, we find no need to address the prejudicial effect of the armed habitual criminal charge on those counts. Yet, defendant also argues that the prejudice worked both ways, *i.e.*, the threatening a public official counts also prejudiced the armed habitual criminal and unlawful possession by a felon counts, and should not have been presented in the same trial. Therefore, says defendant, he is entitled to a new trial on all counts. This argument is unpersuasive.

¶ 66 "A defendant is not prejudiced by the improper joinder of charges if, had separate trials been given, defendant still would have been convicted." *People v. Gonzalez*, 339 Ill. App. 3d 914, 922 (2003). The record presents an abundance of facts upon which defendant's conviction properly rests. There were the certified records of conviction on defendant's prior burglaries, which were clearly admissible, and indeed necessary for the State to prove the requisite elements on the armed habitual criminal charge. In addition, both William Bruns and Tom Ward testified that defendant offered to sell them a gun. Ward further stated that defendant told him "he had a gun nearby and could get it right away." The State impeached Svec's trial testimony, where she denied making a statement to police that defendant had bought the gun, with her handwritten statement. Charleston testified that he sold defendant the gun. Finally, Officer Hartz found the gun in defendant's mother's van. All of this evidence bolsters the State's argument that defendant possessed the gun. While the facts surrounding defendant's threats to Officers Hall and Pilgrim undoubtedly did nothing to endear defendant to the jury, we cannot say that the

threatening a public official counts prejudiced the armed habitual criminal count or the unlawful possession of a weapon by a felon counts. In light of the other evidence, no reasonable jury would have voted to acquit.

¶ 67 As for the resisting or obstructing a peace officer count, only the proximity in time and location of the offense cut in favor of finding that the counts were part of the same comprehensive transaction. *Walston*, 386 Ill. App. 3d at 601. However, we cannot say that the trial court's failure to sever the resisting charge from the armed habitual criminal and unlawful possession charges constitutes reversible error under the circumstances of this case.

¶ 68 Defendant's motion to sever requested only that the trial court sever counts I, II and III from IV, V, and VI. He notably did not request that the resisting charge (count IV) be severed and tried separately from the threatening a public official charge. Thus, even if the trial court granted the motion for severance, the resisting charge would have been tried with the threatening a public official counts.

¶ 69 That then raises the question: when it comes to the resisting arrest charge, how much more prejudicial were defendant's prior convictions than the evidence the State presented with regard to defendant's alleged threats to the officers? Would the jury be more likely to convict defendant on the resisting charge knowing that he had two prior burglary convictions, or knowing that he threatened to kill two officers and their families? We do not know—but the argument is really a metaphysical one. Defendant is not depicted as a pillar of the community in either scenario.

¶ 70 Moreover, we fail to see how defendant could evade conviction on the resisting charge without testifying on his own behalf. The defense presented no witnesses to contradict Hall's or Pilgrim's testimony. Without defendant's version of events, the trier of fact would have only

considered the particularly damning evidence that: (1) defendant refused to lie on the ground and continued to come at Officer Hall; (2) and wrestled with Hall. If, in an attempt to refute those facts, defendant did testify at his properly severed trials, his prior convictions would come in for impeachment purposes. This was a lose-lose situation for defendant, no matter how the trial court ruled.

¶ 71 Even assuming an abuse of discretion, when faced with those options, we find no prejudicial error in the trial court's failure to sever. Accordingly, we find that any error in the trial court's denial of defendant's motion to sever was harmless. We affirm defendant's armed habitual criminal and resisting convictions.

¶ 72 III. The Trial Court's Admission of Charging Instruments, Complaints and Mittimuses Relating to Defendant's Prior Convictions

¶ 73 Defendant argues that the trial court erroneously allowed the State to present superfluous documentation relating to his prior convictions that both prejudiced him and denied him his right to a fair trial. Specifically, that the trial court erred in permitting the State to present documentation—beyond that of just his convictions—that contained information on the length of defendant's sentences, that he had been recommended for drug treatment, and that his bond had been revoked.

¶ 74 The State correctly points out that defendant failed to include the issue in his posttrial motion, noting that "[i]t is well settled that a defendant must make a timely objection *and* address the alleged error in a written post trial motion to preserve the issue for review." (Emphasis added). *People v. Enoch*, 122 Ill. 2d 176, 190 (1988).

¶ 75 Defendant counters with two separate arguments. First, that the admission of other-crimes evidence is a constitutional issue that he raised at trial thus, his failure to include it in a posttrial motion does not forfeit review. *Id.*; *People v. Exson*, 384 Ill. App. 3d 794, 798-99

(2008). Second, and in response to the State's argument that he forfeited the issue, defendant argues in his reply brief that the issue is reviewable under the closely balanced prong of plain-error review. We find both of defendant's contentions without merit.

¶ 76 In regard to the first, the *Enoch* court held that when a defendant fails to file a posttrial motion, review is limited to constitutional issues that have been properly raised at trial and can be raised later in a postconviction hearing petition, sufficiency of the evidence and plain error. *Enoch*, 122 Ill. 2d at 190. The court's rationale is premised upon judicial economy; that the trial counsel still has an obligation to see that the statute requiring a posttrial motion is in compliance so that review by our supreme court will be limited to issues of some significance. *Id*.

¶ 77 Arguably, any error, evidentiary or otherwise, can be classified as constitutional or significant in the context of a criminal case, where a defendant's liberty is always at issue. However, the evidentiary issue raised here does not fall within the ambit of constitutional issues contemplated by *Enoch*, which was notably a capital case. The defendant in *Enoch* argued that the trial court's admission into evidence of statements he made to the police after he requested an attorney violated his fifth amendment privilege against self-incrimination. The alleged violation of Enoch's fifth amendment rights is categorically different from the purely evidentiary error alleged here (see *People v. Stull*, 2014 IL App (4th) 120704, ¶ 104 (noting that a claim the trial court improperly admitted a prior consistent statement does not raise a constitutional issue)), thus, defendant's failure to raise it in his posttrial motion would normally constitute forfeiture of the issue.

¶ 78 Yet, as noted above, defendant also contends in his reply brief that we should review and reverse this issue under the closely balanced prong of the plain-error doctrine. See *People v. Ramsey*, 239 Ill. 2d 342, 412 (2010) (raising plain error in a reply brief is sufficient to allow this

court to review an issue for plain error). Defendant argues that because the verdict turned on the jury's views of the credibility of the witnesses, the evidence was closely balanced. See *People v. Naylor*, 229 Ill. 2d 584, 608 (2008) (evidence was closely balanced where the "evidence boiled down to the testimony of two police officers against that of defendant" and "no additional evidence was introduced to contradict or corroborate either version of events. *** [C]redibility was the only basis upon which defendant's innocence or guilt could be decided."); *People v. Vesey*, 2011 IL App (3d) 090570, ¶ 17 (finding "the evidence was closely balanced *** because defendant's verdict was decided by who the jury found more credible.").

¶ 79 Again, we undertake plain-error analysis by first determining whether error occurred at all. If error is found, the court then proceeds to consider whether either of the two prongs of the plain-error doctrine has been satisfied. Under both prongs, the burden of persuasion rests with the defendant. *Naylor*, 229 Ill. 2d at 593.

¶ 80 We find error in the trial court's admission of the charging instruments and extraneous documentation relating to defendant's prior convictions. This finding is in line with *People v. Dudley*, 217 Ill. App. 3d 230, 232 (1991), holding a new trial was warranted where, in an attempt to impeach the defendant with his prior felony convictions, the State introduced docket sheets that included details of the nature of defendant's aggravated battery charge. Specifically, that defendant and three other codefendants stabbed the victim in the back. The court held that "[t]hese portions of the records of conviction were surplusage, irrelevant, and prejudicial and should therefore not have been admitted." *Id.* See also *People v. Spenard*, 46 Ill. App. 3d 892, 897-98 (1977) (admission into evidence by the State of authenticated copies of the entire record of the defendant's two prior convictions, rather than just the judgment orders, was improper).

¶ 81 Having found error, we must now turn to plain-error analysis under the closely balanced prong. However, we digress for a moment to highlight the standard of review for evidentiary errors. "Although the erroneous admission of other-crimes evidence carries a high risk of prejudice, the evidence must be so prejudicial that the defendant is denied a fair trial." *People v. Pelo*, 404 Ill. App. 3d 839, 865 (2010) (citing *People v. Lopez*, 371 Ill. App. 3d 920, 937 (2007)); see also *People v. Cortes*, 181 Ill. 2d 249, 285 (1998) (noting that such an error "must have been a material factor in [the defendant's] conviction such that without the evidence the verdict likely would have been different."). In short, "[i]f the error is unlikely to have influenced the jury, admission will not warrant reversal." *Cortes*, 181 Ill. 2d at 285.

¶ 82 We point this out simply to draw attention to one of the worrisome practical problems with plain-error review. Had defendant included his objection to the charging instruments in his posttrial motion, we would, instead, engage in the above analysis—essentially harmless error. Under that standard, we would conclude that absent the inclusion of extraneous information regarding defendant's sentences, drug treatment recommendation and bond revocation, the verdict would likely not have been any different. In other words, while it was error, it did not rise to the level of reversible error. Yet, defendant's failure to include this issue allows him to argue plain error under the closely balanced prong, which, pursuant to *People v. Belknap*, 2013 IL App (3d) 110833, ¶ 92, means that if the evidence is found to be closely balanced, reversal is warranted regardless of whether the error was actually prejudicial or a material factor in the conviction. Though our supreme court recently reversed *Belknap*, 2013 IL App (3d) 110833 in *People v. Belknap*, 2014 IL 117094, its decision did little to unmuddy the waters surrounding plain-error review. It held that the evidence was not closely balanced, thereby dodging the issue

of whether, even when the evidence is closely balanced, reversal is not required unless the error likely tipped the scales of justice against defendant. *Id*. at ¶ 56.

¶ 83 Even if the state of the law regarding that point of plain-error review is somewhat in flux, it is of little consequence here. Though we find error in the admission of extraneous information in defendant's prior convictions, the evidence in this case is not closely balanced as defendant suggests. This case did not simply "boil down" to a credibility contest between defendant and police officers. As we made clear in ¶¶ 66-70, *supra*, the jury also had the testimony of Bruns, Ward, Svec and Charleston, in addition to that of officers Hall and Hartz and the discovery of the gun in defendant's mother's van.

¶ 84 We, accordingly, find that where the evidence was not closely balanced, the trial court's admission of charging instruments, complaints, and mittimuses relating to defendant's prior convictions did not constitute plain error.

¶ 85 IV. Ineffective Assistance of Counsel

¶ 86 Defendant argues he received ineffective assistance of counsel when his trial counsel called Justin Charleston to the stand. According to defendant, Charleston's testimony added nothing to the case, instead providing the State with its best evidence that Cox possessed the gun. We disagree.

¶ 87 To succeed on a claim of ineffective assistance, a defendant must show: (1) that counsel's performance was deficient; and (2) that the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668 (1984); *People v. Albanese*, 104 Ill. 2d 504, 526 (1984). It is unnecessary to address whether defense counsel's performance was deficient if it is easier to dispose of the ineffectiveness claim on the grounds of lack of sufficient prejudice. *Albanese*, 104 Ill. 2d at 527. Under the second prong, the defendant must prove that his counsel's deficient

performance substantially prejudiced his defense. To satisfy this burden, defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. at 525.

¶ 88 Here, we find that defense counsel's decision to call Charleston to the stand was a reasonable trial strategy, where it is clear from her line of direct examination that she was attempting to call into doubt defendant's possession of the weapon. Even assuming, *arguendo*, counsel's deficiency, defendant has failed to show prejudice. Even without Charleston's testimony, a trier of fact could find defendant guilty of all necessary elements of armed habitual criminal and unlawful possession of a weapon beyond a reasonable doubt. As mentioned above, the State presented the testimony of Bruns and Wade, both of whom testified that Cox was attempting to sell a gun, stating that he could get it right away. The credibility of Svec's testimony was called into doubt when the State introduced her handwritten statement that defendant bought the gun. Add to that evidence the fact that Officer Hartz found the gun in defendant's mother's van, which happened to be across the street from the saloon where witnesses say he was attempting to sell it.

¶ 89 Defendant has failed to show a reasonable probability that the result of the proceeding would have been different had counsel not called Charleston. Defendant did not receive ineffective assistance of counsel.

¶ 90 V. Extended-Term Sentencing

¶ 91 Defendant argues, and the State concedes, that his sentences for the threatening a public official counts should be vacated and remanded for resentencing where those sentences were not the most serious offense of which he was convicted. See *People v. Jordan*, 103 Ill. 2d 192, 206

(1984). In light of our reversal and subsequent remand of those counts, the sentencing issue is moot.

¶ 92 VI. Duplicative Fees

¶ 93 Finally, defendant argues he was erroneously charged with duplicative fees. The State also concedes error in the fees imposed, but is unclear as to what fees defendant has actually been assessed. The trial court is directed to calculate defendant's fees and vacate any duplicative fees on remand.

¶ 94 CONCLUSION

¶ 95 For the foregoing reasons, the judgment of the circuit court of Whiteside County is affirmed in part, reversed in part, and remanded for proceedings consistent with this order.

¶ 96 Affirmed in part and reversed in part; cause remanded.