FIFTH DIVISION
August 14, 2015

No. 1-13-2802

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 CR 20347
	)	
CHARLES HOLMES,	)	Honorable
	)	William J. Kunkle,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE PALMER delivered the judgment of the court.
Justices Gordon and Reyes concurred in the judgment.

O R D E R

¶ 1 *Held*: Where defense counsel moved *in limine* to exclude evidence of defendant's prior convictions to impeach his credibility should he testify but ultimately did not request a ruling on the motion, counsel is deemed to have abandoned the motion, and the court did not abuse its discretion in admitting the prior convictions.

¶ 2 Following a bench trial, defendant Charles Holmes was convicted of burglary and was sentenced as a Class X offender to eight years in prison. On appeal, defendant contends the trial court committed error in failing to rule on the admissibility of his prior convictions for impeachment until after he testified at trial. He also argues the fines and fees order should be

amended because it does not reflect credit for 293 days spent in pre-sentencing custody and because several charges were improperly assessed against him. We affirm defendant's conviction but order that the fines and fees order be corrected.

¶ 3 In October 2012, police discovered defendant on the second floor of a house that was undergoing renovation. Defendant was charged with burglary (720 ILCS 5/19-1(a) (West 2012)) for entering the building without authority and with the intent to commit a theft. At a pretrial hearing on February 4, 2013, the court set the case for a jury trial on April 16. Defense counsel informed the court he would file his "*Montgomery* motion" and "may argue it that day of the jury trial." The record includes defendant's motion *in limine* seeking to bar the State from using defendant's seven prior convictions to impeach his credibility. Defendant's motion was filed on February 4, 2013.

¶ 4 On April 8, the State filed a motion to admit proof of defendant's prior convictions as substantive evidence. The motion indicated defendant told police he had entered the building to lie down and urinate. The State asked to introduce evidence of three prior burglaries, one prior residential burglary and one prior attempted burglary to demonstrate defendant's intent upon entering the building in this case and to negate any claim by defendant that his presence was due to mistake or inadvertence. The State asked that the evidence be allowed to "show defendant's absence of an innocent frame of mind."

¶ 5 At the April 16 court date, the State was not able to answer ready due to a missing witness. The State asked if the court would consider its motion to admit defendant's prior convictions. Defense counsel responded that the State's motion should be stricken because the motion had been filed a week before the case was set for trial. The State indicated that if

defendant were to testify at trial, it would introduce evidence of defendant's prior bad acts for purposes other than impeachment. Defense counsel continued to demand a jury trial. The court granted the State's motion to admit as substantive evidence three of defendant's prior crimes: a 2003 burglary, a 2006 burglary and a 2008 attempted burglary. The State's motion was denied as to the remaining convictions.

¶ 6 On the next court date, defense counsel answered ready for trial and informed the court that defendant had elected to waive his right to a jury and proceed with a bench trial. At trial, Frederick Ragsdale Jr. testified he was in the business of rehabbing single-family homes and multi-unit residences. In 2010, Ragsdale purchased a single-family bungalow at 7650 South Evans in Chicago to complete a "total gut rehab," which began in March 2012.

¶ 7 On October 1, 2012, Ragsdale went inside the house, which had rough framing inside and new electrical wiring. The electrical fixtures in place at that time included the housing for recessed lights in the ceilings on the first and second floor. On October 4, while out of town, Ragsdale received a phone call from Chicago police, and upon returning home on October 8, Ragsdale visited the property and observed the light fixtures from the second-floor ceiling lying on the floor. He also testified the front door lock was pried open. Ragsdale identified photos of the property and testified he did not give defendant permission to enter the structure or remove items.

¶ 8 On cross-examination, Ragsdale said three carpenters and an electrician had access to the property and three light fixtures had been removed from the ceiling and were on the floor. The property was not equipped with a security system or video cameras.

¶ 9 Chicago police officer Andre Williams testified that at about 4:30 p.m. on October 3, 2012, he and Chicago police officer Fred Coffey were on routine patrol when he received a call to respond to 7650 South Evans. Williams testified that as he approached the house, he heard a sound "[l]ike items being dropped," specifically an item made of lightweight metal. The officers heard noises on the second floor, and upon going upstairs, discovered defendant "trying to cover himself." Defendant came out when ordered to do so.

¶ 10 Williams testified that lighting materials and other electrical materials were on the floor. Upon leaving the house, he noted the front doorjamb had been damaged so the door could no longer be locked. On cross-examination, Williams stated he did not observe defendant touching a light canister.

¶ 11 Officer Coffey testified that as he and Williams walked toward the house, "we heard loud noises like somebody snatching stuff down." He said the first floor was under construction and when he went up the stairs, one of the stairs collapsed beneath him. After freeing himself, Coffey returned to the first floor and waited for Williams. They proceeded to the second floor together, where they found defendant in an enclosed area similar to a crawl space. Coffey acknowledged he did not know if the items in the house were awaiting installation or if they had been removed.

¶ 12 The State next presented substantive evidence as to defendant's other crimes, over defense counsel's renewed objection. Chicago police officer Perdue testified that on September 4, 2008, he responded to a call at 7542 South Dobson in Chicago and found defendant hiding under a basement stairway "behind a piece of drywall concealing himself." The officer stated drywall had been removed from a bathtub area and the bathtub had been moved to the first floor of the house. Defendant was arrested and charged with burglary.

¶ 13 Chicago police officer Craig Thompson testified that on January 1, 2006, he and a partner responded to a call to a newly renovated property near 7300 South University in Chicago. Officer Thompson observed defendant leaving the rear door of that property carrying a propane gas tank and an attached hose, as well as a pair of pliers. Upon seeing the officers, defendant dropped the items and ran. Defendant was apprehended and charged with burglary. The State rested.

¶ 14 Defendant testified he was homeless in October 2012 and was resting on the second floor of 7650 South Evans on the date in question. Defendant had been inside the property before and acknowledged he "had no right to be there" but stated he had been "up for three days and [] wanted a place to lie down." He covered himself with drywall "like a tent" to protect himself from the cold and was there for about an hour before the officers entered. Defendant testified the property had been abandoned and the doors were not locked. Defendant denied entering the house with the intent to commit a theft or removing light fixtures.

¶ 15 In rebuttal, the State called Chicago police officer Davis who spoke with defendant at the police station. Defendant told Davis he had been in the house for a couple of hours before the officers entered and that he had gotten up to urinate at the time they arrived.

¶ 16 Also in rebuttal, the State introduced certified copies of defendant's prior convictions for a 2004 burglary and also the 2006 burglary testified to in the State's case by Officer Thompson. Defense counsel objected those convictions were not relevant and were prejudicial. Defense counsel asked that the convictions be admitted for impeachment purposes only. The court asked the State if it sought to admit the convictions to impeach defendant, and the State responded affirmatively.

¶ 17 The following colloquy then took place:

"THE COURT: They are both admissible for the limited purpose of impeachment of the defendant, which I think, didn't we have a motion *in limine* on that as well or no?

MR. ELLIOTT [assistant public defender]: I had filed the motion, Judge, in anticipation of a jury trial but since this was a bench trial I –

THE COURT: All right."

¶ 18 The State then rested its case in rebuttal. In making its ruling, the trial court held the evidence of defendant's other crimes provided circumstantial evidence relevant to his intent. The court also noted the evidence that the house had been broken into and defendant was discovered on the second floor along with the lighting fixtures. The court remarked on the prior incidents "of very similar kinds of situations involving construction properties and the defendant." The court also noted the prior convictions weighed on the issue of defendant's credibility and "his attempt to explain the situation by being there solely for the purpose of taking a nap." The court subsequently found defendant guilty of burglary.

¶ 19 Defendant filed a motion for a new trial, arguing, *inter alia*, that the court erred in allowing evidence of the 2003 and 2006 burglaries for impeachment purposes. The trial court denied that motion, stating it had already ruled on that issue, and sentenced defendant as a Class X offender to eight years in prison.

¶ 20 On appeal, defendant contends the trial court erred in failing to rule on the admissibility of his prior convictions for impeachment purposes until after defendant had already testified. Defendant relies on the supreme court's ruling in *People v. Patrick*, 223 Ill. 2d 62, 73 (2009), which held that a trial court abused its discretion in not ruling on a defendant's motion *in limine*

as to prior convictions when it has sufficient information to make a ruling. The State responds that defense counsel in this case abandoned the motion and did not seek a ruling by the trial judge. We agree with the State.

¶ 21 Although a defendant's prior convictions or bad acts are not admissible merely to show the defendant's propensity to commit crimes, such evidence may be admitted under two different Illinois Supreme Court rules. A defendant's other crimes, wrongs or acts are admissible if relevant for any other purpose than to show his propensity to commit crime and can be admitted to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ill. S. Ct. R. 404(b) (eff. Jan. 1, 2011); *People v. Illgen*, 145 Ill. 2d 353, 365-66 (1991). In addition, if a defendant chooses to testify, his credibility can be impeached with evidence of crimes committed within the last 10 years if the crime was punishable by death or imprisonment in excess of one year, or involved dishonesty or false statement regardless of the punishment, unless the trial court determines that the probative value of the evidence of any of those crimes is substantially outweighed by the danger of unfair prejudice. Ill. S. Ct. R. 609(a), (b) (eff. Jan. 1, 2011); *People v. Montgomery*, 47 Ill. 2d 510, 517 (1971).

¶ 22 When a defendant, in consultation with counsel, makes the decision to testify at trial, he or she faces serious risks of impeachment. *Patrick*, 223 Ill. 2d at 69. Accordingly, a ruling by the trial court as to the admissibility of the defendant's prior convictions allows defense counsel to make several tactical decisions, including whether the defendant should testify, whether the jury should be informed of the defendant's intent to testify, and whether the defendant should be portrayed in a light consistent with prior convictions being admitted or not being admitted. *Id*. at 70.

¶ 23 Defendant contends the trial court erred in refusing to rule on his motion to bar the admission of his prior convictions before his testimony. However, as the State points out, it is the responsibility of the party filing a motion to request a ruling from the trial judge, and when no ruling has been made on a motion, the motion is presumed to have been abandoned absent circumstances indicating otherwise. *Rodriguez v. Illinois Prisoner Review Board*, 376 Ill. App. 3d 429, 433 (2007); see also *People v. Johnson*, 159 Ill. 2d 97, 123 (1994). Furthermore, abandonment of the motion creates a procedural default of any issue related to that motion for purposes of appeal. *Rodriguez*, 376 Ill. App. 3d at 433.

¶ 24 Here, we can not only presume that the motion was abandoned; indeed, the record expressly indicates that defense counsel abandoned the motion *in limine* after it was decided that defendant would forego a jury trial. Before trial, defense counsel filed a motion *in limine* seeking to bar the State from introducing his prior convictions to impeach his credibility. The case was set for a jury trial, and defense counsel told the court he "may argue it that day of the jury trial." The State filed a motion to admit proof of defendant's convictions, and the trial court ruled that defendant's prior burglary and burglary-related convictions could be admitted as substantive evidence to show that defendant had gained entry to buildings in the past and was not present in the building at 7650 South Evans due to mistake or inadvertence.

¶ 25 Until the trial court's ruling on the State's motion, defense counsel had demanded a jury trial; however, on the trial date, counsel told the court defendant waived his right to a jury trial and wished to proceed with a bench trial. At trial, defendant testified, and following the State's case in rebuttal, when the trial court referred to the defense's motion *in limine*, defense counsel told the court he had filed that motion "in anticipation of a jury trial." In the State's rebuttal case,

when the State sought to admit the convictions, defense counsel asked that they be allowed only for purposes of impeaching defendant. The State indicated it was admitting the convictions for that purpose. Thus, the colloquy reveals that defense counsel intended to challenge the admission of defendant's prior convictions should a jury decide the case but abandoned the motion in light of the bench trial.

¶ 26 The case law on which defendant relies does not support his arguments on appeal. Defendant contends his case is comparable to *Patrick* and also relies on *People v. Mullins*, 242 Ill. 2d 1, 13 (2011), in which the State conceded error based on *Patrick*. In *Patrick*, when the defense filed a motion *in limine* seeking to bar the State from introducing his prior convictions in the jury trial for purposes of impeachment, the trial judge refused to rule on the motion, referring to such a ruling as an advisory opinion and stating that his custom was not to make such rulings until after the defendant's testimony. *Patrick*, 233 Ill. 2d at 66. The supreme court held that ruling constituted an abuse of the trial court's discretion because the court could determine at an early stage of the trial whether the balancing test in *Montgomery*, including the weighing of probative value of the conviction against unfair prejudice to the defendant, favored the admission of the defendant's prior conviction. *Id*. at 73.

¶ 27 Here, however, unlike in *Patrick*, the trial court did not announce a "blanket policy." Moreover, the trial court in this case did not refuse to rule on the defense's motion *in limine*. The record establishes that defense counsel said he would argue the motion on the day of a potential jury trial, and then indicated just before the State closed its rebuttal case that his motion had been filed in case a jury trial was held. Defense counsel did not request a ruling on the motion; rather, counsel indicated to the court that the motion was no longer active, and counsel ultimately

agreed to the admission of the prior convictions for impeachment purposes. Accordingly, defendant abandoned the motion and cannot show any reason for relief on appeal.

¶ 28 Defendant's remaining contentions on appeal involve the assessment of $359 in fines and fees. Defendant first argues that although the trial judge stated after imposing his sentence that he would receive credit for 293 days of time served, that credit is not reflected in the fines and fees order. A defendant is entitled to a $5-per-day credit against his fines for time served prior to sentencing. 725 ILCS 5/110-14(a) (West 2012). The State agrees that defendant was incarcerated for 293 days before sentencing. Because defendant has accumulated 293 days of presentencing incarceration credit, he has $1,465 of credit to be applied against his fines. *Id.*; see also *People v. Jones*, 397 Ill. App. 3d 651, 663 (2009) (presentencing credit applies only to fines and not to those charges that are considered fees).

¶ 29 Defendant next contends three of the charges assessed against him are fines and should be offset by that presentencing incarceration credit. First, defendant argues, and the State correctly concedes, that the $15 State Police Operations fee (705 ILCS 105/27.3a-1.5 (West 2012)) is a fine subject to such an offset. See *People v. Millsap*, 2012 IL App (4th) 10668, ¶ 31 (holding the State Police Operations charge is a fine because it does not reimburse the State for costs incurred in the defendant's prosecution).

¶ 30 Defendant also contends the $2 Public Defender records automation fee (55 ILCS 5/3-4012 (West 2012)) and the $2 State's Attorney records automation fee (55 ILCS 5/4-2002.1(c)(West 2012)) are, in fact, fines. However, this court has held the latter charge is a fee because it "is intended to reimburse the State's Attorneys for their expenses related to automated record-keeping systems." *People v. Rogers*, 2014 IL App (4th) 121088, ¶ 30; see also *People v.*

Mister, 2015 IL App (4th) 130180, ¶ 111 (and cases cited therein). Using the same reasoning employed in *Rogers*, we find that the Public Defender records automation charge is a fee because the language creating that fee is identical to that of the counterpart statute establishing the State's Attorney records automation charge. Compare 55 ILCS 5/3-4012 and 55 ILCS 5/4-2002.1(c). Therefore, each of those $2 charges will stand and because they are fees, they are not offset by defendant's presentencing incarceration credit. See *Jones*, 397 Ill. App. 3d at 663.

¶ 31 In conclusion on this point, the State asserts, and we agree, that the $15 State Police Operations fine and several other charges not disputed by defendant equal a total of $65 in fines that should be offset. In addition to the State Police Operations charge, the State acknowledges that defendant is entitled to presentence incarceration credit toward the $10 Mental Health Court charge (55 ILCS 5/5-1101(d-5) (West 2012)), the $5 Youth Diversion/Peer Court charge (55 ILCS 5/5-1101(e) (West 2012)), the $30 Children's Advocacy Center charge (55 ILCS 5/5-1101(f-5) (West 2012)) and the $5 Drug Court charge (55 ILCS 5/5-1101(f) (West 2012)), because all of those charges are fines. See *People v. Graves*, 235 Ill. 2d 244, 251 (2009) (Mental Health Court and Youth Diversion/Peer Court charges are fines); *People v. Butler*, 2013 IL App (1st) 110282, ¶ 4 (Children's Advocacy Center charge is a fine); *People v. Cameron*, 2012 IL App (3d) 110020, ¶ 42 (Drug Court charge is a fine). Applying the offset, the amount of fines and fees owed by defendant should be reduced by $65 from the originally stated amount of $359 to $294.

¶ 32 Accordingly, pursuant to Illinois Supreme Court Rule 615(b)(2) (eff. Aug. 27, 1999), we direct the circuit court to correct defendant's fines and fees order to reflect a total amount due of $294. The judgment of the trial court is affirmed in all other respects.

¶ 33 Affirmed; order corrected.