THIRD DIVISION
September 23, 2015

No. 1-13-2896

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 CR 9972
	)	
KITTRELL FREEMAN,	)	Honorable
	)	Frank G. Zelezinski,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE MASON delivered the judgment of the court.
Justices Lavin and Pucinski concurred in the judgment.

O R D E R

¶ 1 *Held*: The trial court did not abuse its discretion in admitting defendant's prior armed robbery conviction for impeachment purposes after it properly balanced the conviction's probative value against its prejudicial effect; although the court improperly instructed the jury with an instruction concerning the use of defendant's prior conviction for impeachment purposes, the error was harmless.

¶ 2 Defendant Kittrell Freeman was found guilty by a jury of resisting or obstructing a peace officer and sentenced to five years in prison. On appeal, he contends: (1) the trial court erred in admitting his prior armed robbery conviction for impeachment purposes where he committed the offense as a 16-year-old and the probative value of the offense was outweighed by its prejudicial

effect; and (2) he was denied his right to a fair trial when the trial court improperly instructed the jury on the use of his prior conviction for impeachment purposes. We find no abuse of discretion in the trial court's decision to allow use of Freeman's prior conviction for impeachment purposes and although the jury instruction on this evidence should not have been given over Freeman's objection, the error was harmless. Therefore, we affirm.

¶ 3 The State charged 23-year-old Freeman with three counts of aggravated battery to a peace officer and one count of resisting or obstructing a peace officer, proximately causing an injury to the peace officer. Prior to trial, the State moved *in limine* to use Freeman's prior armed robbery conviction for impeachment purposes if he testified at trial. Defense counsel objected, arguing that Freeman was only "a 15 year old child"[1] and "was clearly not the main perpetrator, as evidenced by the minimum sentence" of six years in prison he received. Additionally, defense counsel noted that both Freeman's prior conviction and current charges were "crime[s] of violence." Accordingly, defense counsel argued those factors would make the introduction of his conviction "extremely prejudicial." The State argued the prior crime was for armed robbery and was within 10 years from the instant offense. The court concluded the conviction was "probative" and granted the State's motion.

¶ 4 At trial, Officer Brown of the Sauk Village police department testified that at approximately 1:30 a.m. on March 7, 2010, he observed a vehicle whose rear registration plate light was "not illuminating the license plate." Brown activated his emergency lights, but the vehicle did not immediately pull over. After a brief chase, the driver of the vehicle pulled into a driveway, opened the door and began to run. Brown recognized the driver as Kittrell Williams,

[1] Freeman correctly notes on appeal that he was 16 at the time he committed the offense.

Freeman's father, based on Brown's previous contact with Williams. Brown was unable to apprehend Williams, so he returned to his police car in the driveway. There, he met with Sergeant Mieszczak, another Sauk Village officer, and learned that Williams' driver's license had been revoked. Mieszczak then called for a tow truck to impound the vehicle pursuant to Sauk Village police department procedures. On cross-examination, Brown admitted that he was the one who called for the tow truck, as evidenced by the case report he wrote.

¶ 5 Shortly after Brown called for the tow truck, Carolyn Freeman, Freeman's mother, exited the home. Carolyn was "irate" and "scream[ed]" at the officers. She also began to have health issues, so the officers called for an ambulance. Carolyn then went back inside her home. A short time later, Freeman came out of the home and was "angry [be]cause he knew that the vehicle was being towed." He told the officers "you're not taking this car," entered the vehicle from the passenger's side and then moved into the driver's seat. Brown attempted to enter the vehicle from the passenger's side, but Freeman locked the doors. Brown then proceeded to the driver's side where Mieszczak and Freeman "were struggling over the driver side door." Mieszczak was pulling the door frame from the outside with his right hand slightly on the inside of the frame, trying to keep the door open while Freeman was pulling the door handle from the inside, trying to close the door. Eventually, Freeman pulled the door shut on Mieszczak's hand.

¶ 6 Immediately after shutting the door, Freeman "jumped out of the passenger side" of the vehicle and fled through the yard of the home. Brown did not apprehend Freeman at that time. Brown returned to the vehicle and it was eventually towed. Freeman was later arrested on April 12, 2010.

¶ 7 Sergeant Mieszczak testified that shortly after he and Brown decided to call for a tow truck, Carolyn came out of the home and asked what was happening. When the officers told her, "[s]he became very belligerent" and told them they could not tow the vehicle. Freeman also came out of the home and acted "belligerent." When Carolyn began to have medical issues, Mieszczak called for an ambulance. Both Carolyn and Freeman went back inside the home. When the ambulance arrived, Carolyn refused to come out of the home. Later, Freeman emerged from the home, told the officers that they "weren't going to tow the vehicle" and entered the vehicle. Mieszczak and Freeman struggled with the door for "under a minute," and eventually, Freeman shut the door on Mieszczak's right hand. Later, Mieszczak went to the hospital where he was given a splint and pain medication, but suffered no major injuries.

¶ 8 Around 1:30 a.m. on March 7, 2010, Julia Gadzinski, a paramedic for Budz Ambulance Service, received a call about an ill female at a residence in Sauk Village. As she arrived on the scene, she saw two police officers. She then approached the residence, knocked on the door and a female answered, but refused to come outside. As Gadzinski returned to the ambulance, she saw Freeman exit the home. She heard an officer tell Freeman not to "get into the vehicle." But Freeman entered the vehicle and began to struggle with the officer over the vehicle's door. The officer had his hands on the top corner of the door, pulling the door to keep it from shutting while Freeman had his hands inside the door, pulling the door to shut it. After a short struggle, the officer's hand "got smashed" in the door. Freeman then exited the vehicle and fled. Gadzinski treated the officer, gave him an ice pack and advised him to go to the hospital. Later that day, she went to the Sauk Village police department, viewed a photo array and identified Freeman as the individual she saw shut the door on the officer's hand.

¶ 9 At the close of the State's case, Freeman moved for a directed finding, but the motion was denied.

¶ 10 In Freeman's case, Carolyn testified that she was in the vehicle with Williams, her husband, at approximately 1 a.m. on March 7, 2010, when they arrived at their home. According to Carolyn's direct testimony, the police were already at their home when they arrived. But on cross-examination, Carolyn admitted that the police followed her and Williams to their home, although she claimed they did not activate their emergency lights. Williams exited the vehicle, but then ran from the police. Carolyn exited the vehicle and left the passenger side door open, and walked toward the driver's side where the door was also open. When Carolyn began to have "chest pains from the excitement," Freeman came out of the home and asked her "what was wrong." After she explained the problem to Freeman, he entered the vehicle through the passenger's side and then moved to the driver's seat.

¶ 11 At some point, one of the officers told Carolyn that he was going to tow the vehicle but she was not exactly sure when that occurred. Then one of the officers "went for the door" but bumped into her. She then heard the officer say "[o]uch" and withdraw his hand from the vehicle's driver side door. After the police officer hurt his hand, she did not see what her son did, but knew "he was gone." Before Freeman disappeared, one of the officer's said "[t]ase him." Carolyn did not see her son the rest of the night.

¶ 12 Carolyn stated that although an ambulance arrived at her home, she refused medical help from paramedics because she "didn't like how the ambulance lady spoke to" her. On cross-examination, she stated she walked up to the paramedics and refused medical assistance.

Eventually, she received a ride to the hospital from Freeman's girlfriend who arrived at the home around the same time as the ambulance.

¶ 13 Freeman, who was 25 years old at the time of trial, testified. He admitted that he was arrested for armed robbery in 2003 and pled guilty to the charge. Early in the morning on March 7, 2010, he was asleep at his mother's home when he heard a "commotion" outside. He went outside, saw police officers in the driveway and also saw his mother holding her chest. Freeman testified that his mother suffered from anxiety attacks. Freeman then entered the vehicle in the driveway from the passenger's side rear door and closed the door. He then climbed over to the driver's seat and shut the front driver side door. He opened the rear driver side door and told his mother to "get in the car." When he closed the front driver side door, he heard an officer scream. The officer then told the other officer to "tase him."

¶ 14 On cross-examination, Freeman stated he was attempting to close the front driver's side door and open the rear driver side door simultaneously. His focus at that moment was on his mother and he did not pay much attention to the officer. He denied knowing that he closed the door on the officer's hand, but admitted to running away from the scene shortly after.

¶ 15 After both sides presented their evidence and before argument, the court held a jury instruction conference. In regard to State instruction 10, Illinois Pattern Jury Instruction, Criminal, No. 3.13 (4th ed. 2000), the following colloquy occurred:

> "MR. SMITH [Defense counsel]: Our objection, Judge, this is generally, the defense's instruction. I have never heard of this as a State's instruction before, but we are objecting to it because, all it does is remind[ ] the jury of a prior conviction and has no other purpose in terms of the case and it's unnecessary. They heard the testimony.

THE COURT: State.

MR. BOGDAN [assistant State's Attorney]: Judge, the Jury is aware of the Defendant's background and because he chose[ ] to testify, and counsel confronted his armed robbery conviction. This is the instruction given in circumstances like these, so the jury does not take that into account, and considering the facts of this case *** this is a proper instruction to be given to the Jury.

THE COURT: Over the Defense's objection, I will allow it. It does put the fact that the Defendant previously had been convicted of an offense explained to the jurors, to be considered only for a limited purpose of considering it regarding his believability and nothing more than that. I think that is necessary to be presented by either side."

¶ 16 During rebuttal closing argument, the assistant State's Attorney reminded the jury of Freeman's previous conviction and told them that the previous conviction could only be considered by them "as it may affect his believability as a witness" and not "as evidence of his guilt" for the charged offenses.

¶ 17 On October 15, 2012, the jury found Freeman guilty of resisting or obstructing a peace officer, proximately causing an injury to the peace officer. However, the jury acquitted defendant on the three counts of aggravated battery of a peace officer. When the court asked defense counsel what day he wanted to return for posttrial motions, he asked for November 15, 2012, which was 31 days later. The State did not object to this date.

¶ 18 On November 15, 2012, Freeman filed what he labeled a "partial" motion for judgment notwithstanding the verdict and in the alterative, a new trial. Defense counsel advised the court that he had not received a transcript of the proceedings because the court reporter had a death in

the family and that the transcript would be available "before the next court date." The court responded, saying "[i]f you will file partial motion, you can supplement it within the time period so that tolls it." The State did not object.

¶ 19 At the next court date on December 3, 2012, defense counsel informed the court that he had been provided the transcript that day and requested a short continuance. The State did not object. On December 11, 2012, Freeman filed a supplemental motion for a new trial, arguing, *inter alia*, that the trial court erred in allowing his prior conviction to be used against him for impeachment purposes and that IPI Criminal 4th No. 3.13 should not have been given to the jury. After counsel for both parties argued the merits of Freeman's motion, the trial court denied it and later sentenced Freeman to an extended-term sentence of five years in prison. This appeal followed.

¶ 20 As a threshold matter, we reject the State's contention that Freeman has forfeited the issues he raises on appeal and, therefore, must proceed under the plain error doctrine because he filed his initial posttrial motion one day late. Here, the jury rendered its verdict on October 15, 2012, and Freeman filed his initial posttrial motion 31 days later on November 15, 2012. See 5 ILCS 70/1.11 (West 2010) (time is computed by excluding the first day and including the last day unless the last day is a weekend day or a holiday). Accordingly, Freeman failed to timely file his posttrial motion. See 725 ILCS 5/116-1 (West 2010). Although untimely filing is a ground for denial of a posttrial motion (*People v. Gauwitz*, 80 Ill. App. 3d 362, 367 (1980)), the State never objected to the filing as untimely and instead proceeded on the merits of the issues raised. Accordingly, the State forfeited its contention regarding Freeman's late filing. See *People v. Raibley*, 338 Ill. App. 3d 692, 698 (2003) (stating "waiver is a 'two-way street' [and] [i]f the State

never alerted the trial court to the untimeliness of the posttrial motion but instead attacked the substantive merits of the motion, the State necessarily recognized the trial court's jurisdiction and waived the issue of untimeliness") citing *Gauwitz*, 80 Ill. App. 3d at 367 (same). Therefore, Freeman has not forfeited the issues on appeal.

¶ 21 Freeman first contends that the trial court abused its discretion when it allowed his prior conviction for armed robbery to be admitted for impeachment purposes. In particular, Freeman observes that he was 16 years old when the armed robbery was committed, he pled guilty and was sentenced based on accountability, and that his current case involved a credibility contest between himself and the police.

¶ 22 A prior conviction may be admitted for impeachment purposes if: (1) the prior conviction was a crime "punishable by death or imprisonment in excess of one year" or "the crime involved dishonesty or false statement regardless of the punishment;" (2) less than 10 years has passed since the date of conviction of the prior crime or the witness' release from confinement, whichever was later; and (3) the probative value of the crime is substantially outweighed by the danger of unfair prejudice. *People v. Montgomery*, 47 Ill. 2d 510, 516 (1971); see also *People v. Atkinson*, 186 Ill. 2d 450, 456 (1999), now codified at Ill. R. Evid. 609 (eff. Jan. 1, 2011). There is no dispute that the first two criteria are satisfied here because Freeman pled guilty to armed robbery in 2005, for which he received a sentence of six years in prison, and his current offense occurred less than 10 years later. Thus, the only issue concerns the trial court's application of the balancing test articulated in third requirement.

¶ 23 Some of the factors the trial court should consider in balancing a conviction's probative value versus its prejudicial effect include: the age of the defendant when he committed the prior

crime, the nature of the prior conviction, the circumstances surrounding the prior conviction, how long ago the prior conviction occurred, how similar the prior conviction is to the current charged offense, the defendant's criminal record and the importance of the defendant's credibility for adjudication of the charged offense. See *Atkinson*, 186 Ill. 2d at 456; *Montgomery*, 47 Ill. 2d at 518; *People v. Barner*, 374 Ill. App. 3d 963, 969-70 (2007). We review a trial court's admission of prior convictions for an abuse of discretion. *Atkinson*, 186 Ill. 2d at 463.

¶ 24 The record reflects that the trial court properly applied the *Montgomery* balancing test. In opposition to the State's motion *in limine* to allow use of defendant's prior conviction for armed robbery, defense counsel argued about Freeman's age and that he "was clearly not the main perpetrator." Additionally, defense counsel reminded the court of the requisite balancing test, pitting the conviction's probative value versus its prejudicial effect. The trial court, in granting the State's motion, acknowledged the supreme court's decision in *Montgomery*, and ultimately determined the prior conviction was "probative." The court was keenly aware it had to balance various factors even if it did not expressly weigh the factors on the record. See *People v. Mullins*, 242 Ill. 2d 1, 18 (2011) (stating the trial court does not need to expressly articulate the factors to demonstrate it was following the *Montgomery* balancing test). Accordingly, we cannot say the trial court abused its discretion in admitting Freeman's prior armed robbery conviction.

¶ 25 Nevertheless, Freeman relies on *Miller v. Alabama*, 567 U.S. ——, 132 S. Ct. 2455 (2012), to support his argument that the trial court abused its discretion in admitting his prior conviction given his age and guilt premised upon accountability. In *Miller*, the United States Supreme Court held that mandatory life imprisonment without parole for individuals under 18 violated the eighth amendment's prohibition on cruel and unusual punishments. *Id.* at ——,

2457-58. Our supreme court has thus far refused to apply *Miller* outside the sentencing context, *People v. Patterson*, 2014 IL 115102, ¶¶ 100-101, and we do not believe *Miller*'s rationale is relevant in this contect. While we do not dispute the overall notion that the younger an individual is, the less mature he is, we do not find that *Miller* impacts the way courts should apply the *Montgomery* balancing test. In fact, the age of the defendant when he committed the prior crime and the circumstances surrounding it are already integral parts of the balancing test. See *Montgomery*, 47 Ill. 2d at 518 ("In exercising discretion in this respect, a number of factors might be relevant, such as *** the age and circumstances of the defendant.") (Internal quotation marks omitted.) Accordingly, we are not persuaded that *Miller* warrants a finding that the trial court abused its discretion in admitting Freeman's prior conviction.

¶ 26 We also reject Freeman's additional argument that the trial court abused its discretion because credibility was essential in adjudicating his guilt, and the "jury did not need to know that [Freeman] had a prior armed robbery conviction *** to decide whose account of the incident to believe." While we understand that every defendant who exercises his right to testify would prefer that a jury not be advised of his prior criminal convictions, the fact that a defendant has asked the jury to assess his credibility weighs in favor of admitting prior convictions. See *Barner*, 374 Ill. App. 3d at 971 (stating where "a defendant's credibility is a central issue in a trial where the defendant chooses to testify, the State has the right and obligation to use impeaching evidence to destroy the defendant's credibility").

¶ 27 Freeman next contends that the trial court committed reversible error because it erroneously instructed the jury, over his objection, concerning the use of his prior conviction for

impeachment purposes. The State counters that we should reject Freeman's contention because the jury was given accurate instructions and the evidence of defendant's guilt was overwhelming.

¶ 28 We agree with Freeman that the trial court improperly gave IPI Criminal 4th No. 3.13, which provides:

> "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." Illinois Pattern Jury Instruction, Criminal, No. 3.13 (4th ed. 2000).

The Committee Note to IPI Criminal 4th No. 3.13 directs that "[t]his instruction should be given *only* at the request of the defendant when there has been impeachment of the defendant by proof of a prior conviction." (Emphasis added.) *Id.*

¶ 29 Here, the trial court gave the instruction at the request of the State and over defendant's objection. Accordingly, the trial court erred in giving the jury the instruction. See *People v. Fultz*, 2012 IL App (2d) 101101, ¶ 69; *People v. Brandon*, 283 Ill. App. 3d 358, 364 (1996); *People v. Cook*, 262 Ill. App. 3d 1005, 1019 (1994).

¶ 30 Errors in jury instructions are reviewed under a harmless-error analysis. *People v. Dennis*, 181 Ill. 2d 87, 95 (1998). The test for determining if an error is harmless is whether the outcome of defendant's trial would have been different had the trial court properly instructed the jury. *Id.* If there is "clear and convincing" evidence of the defendant's guilt, we may deem the instructional error harmless. *Id.* We inquire whether "evidence of defendant's guilt was so clear and convincing as to render the error harmless beyond a reasonable doubt." *Id.* at 96.

¶ 31 In the present case, we find the trial court's error was harmless. Three witnesses for the State testified regarding Freeman's struggle with Sergeant Mieszczak over the driver's side door: Mieszczak himself, Officer Brown and paramedic Gadzinski. Mieszczak testified that Freeman came out of his home, acted "belligerent" and said the police "weren't going to tow the vehicle." Brown testified that Freeman said "you're not taking this car." And Gadzinski testified that one of the officers told Freeman not to "get into the vehicle" and then began to struggle with him over the door. While Freeman and his mother gave a contrary version of events, Carolyn's testimony was replete with "I don't knows" and various equivocations and Freeman readily admitting to running away from the scene, which implicitly weighed against his credibility. See *People v. Velez*, 2012 IL App (1st) 101325, ¶ 36 (stating a trier of fact may infer "consciousness of guilt" from a defendant's flight). Further, the jury's acquittal of Freeman on three counts of aggravated battery of a police officer supports the conclusion that they were not unduly influenced by the reference in the instructions to Freeman's prior conviction. Finally, although the State alluded to the instruction during rebuttal closing argument, the State was permitted to argue the effect of Freeman's prior conviction whether or not the instruction was given. See *Fultz*, 2012 IL App (2d) 101101, ¶ 75. Under the circumstances here, we find the evidence of Freeman's guilt was overwhelming, and therefore, the trial court's error in giving the jury IPI Criminal 4th No. 3.13 was harmless.

¶ 32 Freeman points to *Fultz* and *Cook*, arguing that there is "strong language" in those cases warranting a finding that the trial court's error was reversible. We disagree.

¶ 33 In *Fultz*, defendant was charged with aggravated battery against a police officer and obstructing a police officer. *Id.* ¶ 5. His prior conviction for possession of a controlled substance

was admitted against him for impeachment purposes at trial, and the court instructed the jury with IPI Criminal 4th No. 3.13 over his objection. *Id.* ¶¶ 31, 33. In posttrial proceedings, the trial court conceded giving the instruction was error and on appeal, the State conceded the same. *Id.* ¶ 69. The Second District determined that the question was "whether the error was harmless." *Id.* The *Fultz* court found that in addition to the erroneous jury instruction, the trial court also erred in limiting the scope of the defendant's cross-examination concerning the potential bias of the central witness and, thus, precluded the defendant's challenge to the that witness's credibility. *Id.* ¶¶ 59-61. Because the defendant's trial ultimately became a credibility contest between that witness and the defendant, "[t]he erroneous rulings went to the heart of that issue." *Id.* ¶ 76. Accordingly, the cumulative effect of the trial court's errors warranted reversal. *Id.*

¶ 34 The State in *Cook* admitted on appeal that giving IPI Criminal 4th No. 3.13 at its request was error, and the *Cook* court found the error was not harmless because the evidence was not overwhelming. *Cook*, 262 Ill. App. 3d at 1019. Ultimately, the *Cook* court reversed the defendant's conviction for second degree murder based on the cumulative effect of the errors of the *defendant's counsel*, not this instructional error alone. *Id.* at 1019-20.

¶ 34 Unlike *Fultz*, this case has no cumulative-error effect, and the trial was not just a credibility contest between one witness and Freeman. Instead, three witnesses detailed Freeman's actions, including a paramedic on the scene. Further, unlike *Cook*, the evidence here was not close. Thus, neither case lends support to Freeman's position.

¶ 35 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 36 Affirmed.