2018 IL App (1st) 153161-U
No. 1-15-3161
Order filed March 6, 2018

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 15 CR 2650
	)	
GARY STOKES,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE HYMAN delivered the judgment of the court.
Presiding Justice Neville and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: We reverse defendant's conviction for being an armed habitual criminal and remand for a new trial because the record does not indicate the trial court applied the balancing test required under *People v. Montgomery*, 47 Ill. 2d 510 (1971) in exercise of its discretion to admit defendant's prior convictions to impeach.

¶ 2 Defendant Gary Stokes argues that the trial court failed to exercise its discretion when it admitted, for the purposes of impeachment, his prior convictions without first performing the balancing test required by *People v. Montgomery*, 47 Ill. 2d 510 (1971). We agree. Accordingly, we reverse Stokes's conviction and remand for a new trial.

¶ 3 Background

¶ 4 Stokes was arrested on February 3, 2015, following a foot chase with police officers. He was charged with one count of being an armed habitual criminal, two counts of unlawful use or possession of a weapon by a felon, and four counts of aggravated unlawful use of a weapon. Stokes waived his right to a jury trial and the case proceeded to a bench trial. Because Stokes does not challenge the sufficiency of the evidence to sustain his conviction, we recount the facts only to the extent necessary to resolve the issue on appeal.

¶ 5 At trial, Chicago police officer Carreno testified that, on February 3, 2015, he and his partner, Officer Garcia, were working in plain clothes. Carreno was wearing his vest, his star, and his duty belt, which indicated that he was a Chicago police officer. While travelling southbound in the 6200 block of South May Street, Carreno saw Stokes walking northbound in the street. Stokes was looking at his cellular phone and, as the officer's approached, he looked up. Carreno made eye contact with Stokes, who looked alarmed and grabbed his front waistband. When Carreno opened the passenger door, Stokes started running southbound on May Street. Carreno announced his office and told Stokes to stop. Stokes continued running and Carreno pursued. When Carreno arrived at an alley, he saw Stokes remove a gun from his waistband and toss it. Carreno described the gun as a two-tone, semi-automatic handgun. Carreno estimated that he was 20 to 25 feet away from Stokes, with nothing obstructing his view. Carreno described the area between the garage and fence where Stokes threw the weapon as having about one foot of snow. Stokes was apprehended.

¶ 6 Stokes was transported to the 5th District police station. There, he was read his *Miranda* rights and agreed to speak with the officers. Stokes stated that he had the gun for protection

because "his peoples were into it with the Gangster Disciples of the 7000 block of South Morgan Street."

¶ 7 On cross-examination, Carreno testified that he did not know what Stokes did with his cellular phone, nor could he recall if it was recovered. Carreno acknowledged that he and his partner were driving in an unmarked police car.

¶ 8 On redirect-examination, Carreno testified that the inventory list showed that a cellular phone belonging to Stokes was recovered.

¶ 9 Chicago police officer Kennedy testified that, on February 3, 2015, he and his partner were in an unmarked vehicle when they responded to a call about a foot pursuit. Kennedy and his partner were wearing plain clothes. The officers arrived in the area, which Kennedy described as a busy street with "many" vacant lots. Kennedy estimated that there was "[w]ell over a foot" of snow, as well as ice, on the ground. As they arrived, Kennedy saw Stokes running southbound in an alley between Racine and May Street. Kennedy saw Officer Carreno running 50 to 60 feet behind Stokes. Kennedy pursued Stokes and saw Stokes throw a "dark object" over a chain-link fence, a fact which Kennedy relayed over his radio. After throwing the object, Stokes briefly ran southbound before continuing west and running "right up" to Kennedy, who then detained him.

¶ 10 Kennedy, along with two other officers, returned to the area where Stokes threw the object over the fence and saw that the snow was undisturbed, with the exception of one indentation that corresponded to where Kennedy saw the object land. Officer Garcia, who was one of the officers with Kennedy, climbed the fence and recovered a handgun in the snow. At this point, Stokes was arrested and transported to the 5th District police station. At the station, Stokes told Kennedy and three other officers that he had the weapon on him for protection because "his people" were feuding with a rival gang.

¶ 11 On cross-examination, Kennedy acknowledged that he did not record or memorialize Stokes's statement. He testified that he saw Carreno pursuing Stokes at one point, but he did not see Carreno in the alley behind Stokes.

¶ 12 The State introduced into evidence: a certified record from the Illinois State Police showing that Stokes did not possess a Firearm Owner's Identification (FOID) card; a certified record from the county clerk's office of vital records for Stokes; a certified copy of Stokes's conviction for residential burglary under case number 11 CR 03719-01; and a certified copy of Stokes's conviction for burglary under case number 13 CR 14359-01. The State rested.

¶ 13 Defense counsel informed the court that Stokes wished to testify and the following exchange transpired:

> "THE STATE: Judge, the State makes a motion pursuant to *Montgomery*.
>
> THE COURT: Are you making a motion pursuant to *Montgomery*?
>
> DEFENSE COUNSEL: Yes, your Honor. There are two qualifying predicate offenses alleged in the indictment; and Mr. Stokes, of course, wants the Court to only receive those as—
>
> THE COURT: Okay. Well, does he have other proffers?
>
> THE STATE: Yes, Judge.
>
> THE COURT: What else does he have?
>
> THE PROSECUTOR: He has a 2008 theft from person.
>
> THE COURT: Okay
>
> THE STATE: That, as well as the two that are predicate crimes of dishonesty within 10 years.

THE COURT: All right. She's got a point, that theft from a person particularly, is a crime that impacts honesty. I think it's fair game. If he wants to testify, of course, he can, to impeach his credibility. It's baggage that he created for himself. So, the two burglaries, the predicate offenses I know about; and the theft conviction will be admissible as may impeach his credibility. Anything else?

DEFENSE COUNSEL: No, your Honor."

¶ 14 Stokes testified that, on February 3, 2015, he was walking to meet a friend near 62nd Street and May Street. His head was down because he was texting with someone on his phone. As he started to look up from his phone, he heard a door slamming and he started running. According to Stokes, there had been "a lot of robberies and stuff" and his first thought was to run. Stokes started running toward the police station on Racine Avenue. As he ran through a vacant lot, he fell once, but was able to get back on his feet and continue running. He crossed an alley into another vacant lot but did not run down it. He did not hear anyone yelling "police" or for him to stop. While he ran, Stokes kept his cellular phone in his right hand and used his left hand to grab his waistband several times to keep his pants from falling down. Before Stokes could reach the police station he was running toward, he saw "a lot of police," and he ran toward them instead. He described one of the officers as being in uniform. Stokes stated that he did not possess a gun, nor did he throw a gun that day. When arrested, Stokes had his cellular phone in his right hand. Stokes also denied giving any statement to the police.

¶ 15 On cross-examination, Stokes said he had never seen plain clothed police officers wearing vests over civilian clothes. In his experience, plain clothed officers wore hooded sweatshirts. Stokes acknowledged that there was "a lot" of snow on the ground because there had been a blizzard a few days before. He did not look behind him to check if he was being chased,

but he continued to run toward the police officers in front of him. The officers in front of him included Kennedy and other uniformed police officers. Stokes did not tell the officers he encountered that he was running out of fear because when he reached the officers, they grabbed him "like [he had done] something wrong."

¶ 16 In rebuttal, the State introduced Stokes's prior conviction for theft, under case number 08 CR 21664-01, as well as the two prior convictions that constituted the predicate offenses for his armed habitual criminal charge, and asked the court to consider the offenses as impeachment of Stokes's credibility.

¶ 17 The court found Stokes guilty of being an armed habitual criminal. In announcing its decision, the court stated that "this is a matter of credibility." After summarizing the testimony of the officers, the trial court concluded that it found "their credibility [to be] compelling, beyond a reasonable doubt." The court characterized Stokes' testimony as "not compelling" and found him guilty on all counts. The court denied Stokes's posttrial motion, and, after merging all counts into the armed habitual criminal count, sentenced Stokes to seven years' imprisonment.

¶ 18 Analysis

¶ 19 Stokes argues that the trial court erred by admitting his prior convictions for impeachment purposes without conducting the *Montgomery* balancing test. Stokes does not argue that the trial court abused its discretion in admitting the conviction. Rather, the trial court failed to exercise its discretion at all, effectively abdicating its role to balance the probative value of his prior convictions against the danger of unfair prejudice.

¶ 20 Initially, the State maintains that Stokes failed to preserve this claim, having not made a specific objection during trial or including it in his posttrial motion. Alleged errors not objected to at trial and specifically raised in a posttrial motion are deemed forfeited on appeal. *People v.*

Enoch, 122 Ill. 2d 176, 186 (1988). Stokes responds that he objected to the admission of the prior convictions at trial, which satisfied his obligation. He further argues that, because this error touches on a constitutional issue, it falls within an exception to the requirement that the issue be included in a posttrial motion. And even if the issue is forfeited, we should still review under the plain-error doctrine. The State counters that the admission of prior convictions presents an evidentiary issue and, therefore, does not fall into any exception. We need not decide whether this issue is constitutional or evidentiary in nature as we conclude Stokes has met his burden even under the more onerous plain-error doctrine.

¶ 21 Under the plain-error doctrine, a reviewing court may consider 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 the 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." See Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967); *People v. Sargent*, 239 Ill. 2d 166, 189 (2010). Before considering whether the plain-error exception to the rule of forfeiture applies, we must determine whether an error occurred, "without reversible error, there can be no plain-error." *People v. McGee*, 398 Ill. App. 3d 789, 794 (2010). We find that the court erred by failing to properly conduct the *Montgomery* balancing test.

¶ 22 Evidence of a prior conviction becomes admissible for impeachment purposes where (i) the crime was punishable by death or imprisonment for more than one year, or the crime involved dishonesty or false statement regardless of the punishment; (ii) the conviction or release from confinement, whichever is later, occurred less than 10 years from the date of trial; and (iii) the danger of unfair prejudice does not substantially outweigh the probative value of the

conviction. *Montgomery,* 47 Ill. 2d at 516. This final factor involves a balancing test: probative value versus prejudicial effect. *People v. Cox*, 195 Ill. 2d 378, 383 (2001). The trial court has discretion in the balancing test and in determining whether to admit a prior conviction. *Id.* Nevertheless, the trial court should not mechanically apply the balancing test (*Stokes v. City of Chicago,* 333 Ill. App. 3d 272, 279 (2002)), and, although the court does not need to expressly state it is applying the balancing test, the record must indicate that the trial court did apply that standard (*People v. Mullins*, 242 Ill. 2d 1, 18 (2011)). If the record reveals that the trial court did not exercise its discretion, the deferential abuse of discretion standard is inappropriate, and this court will instead review the issue *de novo*. *People v. Newborn*, 379 Ill. App. 3d 240, 248 (2008) (citing *People v. Whirl*, 351 Ill. App. 3d 464, 467 (2004)).

¶ 23 Neither the trial court nor counsel explicitly referenced the balancing test required under *Montgomery* with respect to Stokes's prior convictions. Counsel did not argue the probative or prejudicial nature of his convictions before their admission, and the record does not indicate that the trial court was aware of the need to conduct a balancing test. Rather, the trial court made one reference to a *Montgomery* motion, before admitting Stokes's prior convictions. The trial court stated that the prior convictions were crimes impacting honesty and "baggage that he created for himself." Without evidence to show that the court exercised its discretion, we cannot defer to the trial court and assume that the probity of the admitted convictions outweighed their prejudice to Stokes. See *Whirl*, 351 Ill. App. 3d at 467 ("In the absence of an exercise of discretion, we cannot defer to the trial court and assume that the probity of the admitted convictions * * * outweighed their prejudice to defendant.").

¶ 24 We are unpersuaded by the State's cases contending that, although the trial court did not explicitly say it was undertaking the *Montgomery* balancing test, we must presume the trial court

did so. Although the trial court need not explicitly state on the record that it was applying the *Montgomery* balancing test, our supreme court insists that the record indicate the trial court's awareness of its obligation to balance the prejudice to the witness against the probative nature of the evidence. *Mullins*, 242 Ill .2d at 18-19 (record "clearly [showed] that [court] was exercising its discretion and attempted to minimize the potential prejudice to defendant" where the court barred two of defendant's convictions); *People v. Atkinson*, 186 Ill. 2d 450, 463 (1999) (trial court did not err by failing to articulate factors it considered when defense counsel specifically referenced balancing test); *People v. Williams*, 173 Ill. 2d 48, 83 (1996) (while trial court did not explicitly reference the balancing test, "[a] review of the transcripts shows that the judge was fully aware of the *Montgomery* standard and the balancing test it requires" where the parties specifically referenced the balancing test when they argued whether the defendant could be impeached with an earlier conviction).

¶ 25 A careful review of the record divulges nothing to show that the trial court conducted the required balancing test. As mentioned, unlike in *Atkinson* and *Williams*, neither the court nor the parties referenced the *Montgomery* balancing test during their brief exchange. Rather, after the State informed the court that Stokes's prior convictions were "crimes of dishonesty within 10 years," the court noted that "[the State]'s got a point" and admitted the prior convictions because they impacted his honesty and were "baggage that he created for himself." This reasoning is at odds with *Montgomery*'s requirement that the trial court inquire whether the danger of undue prejudice from allowing evidence of a prior conviction substantially outweighs the probative value of the evidence on the issue of the defendant's testimonial credibility. *Whirl*, 351 Ill. App. 3d at 466 (finding presumption trial court conducted *Montgomery* balancing test rebutted where record showed that court referred to defendant's prior convictions as "one of the things people

bring to the stand"). Given the record, we cannot presume that the trial court applied the *Montgomery* balancing test as it required.

¶ 26 Despite this error, Stokes is not entitled to relief unless he can establish plain-error. Stokes argues that the admission of his prior convictions amounts to plain-error because the evidence at trial was closely balanced and came down to a "pure case of credibility." We agree.

¶ 27 "[A] reviewing court must undertake a commonsense analysis of all the evidence in context when reviewing a claim under the first prong of the plain-error doctrine." *People v. Belknap*, 2014 IL 117094, ¶ 50. This inquiry involves an assessment of the evidence on the elements of the charged offense or offenses, along with any evidence regarding the witnesses' credibility. *People v. Sebby*, 2017 IL 119445, ¶ 53.

¶ 28 Stokes was charged with being an armed habitual criminal. The statute required the State to prove that Stokes possessed a gun after having been twice-convicted of certain qualifying felonies. See 720 ILCS 5/24-1.7(a) (West 2014). Thus, the relevant evidence at Stokes's trial involved two elements: whether Stokes had two qualifying felony convictions and whether he possessed a gun.

¶ 29 On the first element, the State introduced into evidence certified copies of two qualifying felonies for which Stokes had been convicted. Specifically, the State introduced a certified copy of Stokes's conviction for residential burglary under case number 11 CR 03719-01 and a certified copy of Stokes's conviction for burglary under case number 13 CR 14359-01.

¶ 30 On the second element, whether Stokes possessed the gun, the State presented the testimony of two police officers who said they pursued Stokes, and saw him throw an object over the fence. Carreno testified that Stokes was walking in the street toward his unmarked police car with his head down, possibly looking at his cellular phone. According to Carreno, Stokes looked

up, made eye contact with him, became alarmed, grabbed at his waistband, and started to run. Carreno opened his car door and proceeded to chase Stokes. Carreno stated that he announced his office and told Stokes to stop running. Stokes ran through an alley where Carreno saw him throw a two-toned handgun over a fence. Carreno said he never lost sight of Stokes. Kennedy also testified that he saw Stokes throw a "dark shape[d]" object over the fence in the alley. Kennedy further testified that he did not see Carreno behind Stokes in the alley. According to Kennedy, after Stokes tossed the weapon, he then ran "right up" to him and was arrested. Both officers stated that they saw Garcia recover the weapon from an indent in the snow where they saw it land. Both officers also testified that Stokes admitted to them that he possessed the weapon because he wanted protection from a rival gang.

¶ 31 Stokes testified that, as Carreno stated, he was looking down at his cell phone while walking in the street when he heard a car door open in front of him. Stokes did not see who was in the car or what kind of car it was, but took off running because he was aware that recently there had been robberies in the area. Stokes stated that he did not hear anyone say "police" or ask him to stop running. He described running through a vacant lot filled with snow and falling once, which was consistent with the officers' testimony. He explained that he ran with his cellular phone in one hand and that he used his other hand to grab his waistband so that his pants would not fall down as he ran. Initially, he stated that he was running in the direction of the police station on Racine Avenue, but he soon saw "a lot of police" in front of him and ran toward them instead. This is consistent with Kennedy's testimony that Stokes ran "right up" to him. Stokes explained that, because the police grabbed him "like [he had done] something wrong," he was unable to tell them that he was running because he was scared. Stokes denied that he threw a weapon over a fence. He also denied making a statement to the police.

¶ 32 A commonsense assessment of the evidence supports that it was closely balanced. The trial court was confronted with two versions of events that were plausible and neither version was supported by corroborating evidence. Because both versions are plausible, we conclude that the evidence is closely balanced. See *Sebby*, 2017 IL 119445, ¶ 63 (finding evidence closely balanced where outcome turned on how trier of fact resolved "contest of credibility" in which defense witnesses' account of events "no less plausible" than State's witnesses' version, and neither version supported by corroborating evidence); *People v. Naylor*, 229 Ill. 2d 584, 606-07 (2008) (finding evidence closely balanced where case a "contest of credibility").

¶ 33 The State insists that the evidence was not closely balanced because the trial court, in announcing its decision, stated that it found the officers' testimony to be "compelling beyond a reasonable doubt," whereas the court described Stokes's testimony as "not compelling." We note, however, that the issue before us does not involve the sufficiency of close evidence, but rather the closeness of sufficient evidence. See *People v. Piatkowski*, 225 Ill. 2d 551, 566 (2007) ("Whether the evidence is closely balanced is, of course, a separate question from whether the evidence is sufficient to sustain a conviction on review against a reasonable doubt challenge."). The trial court acknowledged that this case came down to a "matter of credibility." In assessing the credibility of Stokes's testimony, we must assume that the court considered Stokes's erroneously admitted prior convictions for impeachment purposes. See *Naylor*, 229 Ill. 2d at 605 ("We must conclude that the trial court improperly considered this incompetent evidence and, consequently, committed reversible error."). Thus, we follow our supreme court's guidance in *Naylor* and "opt to err on the side of fairness." *Id.* at 608 (internal quotation marks omitted).

¶ 34 Stokes's final requirement for relief under first-prong plain-error involves showing prejudice. *Sebby*, 2017 IL 119445, ¶ 68. As our supreme court has explained, "[w]hat makes an

error prejudicial is the fact that it occurred in a close case where its impact on the result was potentially dispositive." *Id.* So "[t]he only question in a first-prong case, once clear error has been established, is whether the evidence is closely balanced. *Id.* at ¶ 69. Because Stokes has shown clear error where the evidence was closely balanced, he has shown prejudice.

¶ 35 Although we conclude that the evidence is closely balanced, we find the evidence sufficient to prove Stokes guilty beyond a reasonable doubt. We therefore find that there is no double jeopardy impediment to a new trial. See *Piatkowski*, 225 Ill. 2d at 567 ("[W]e find that the evidence was sufficient to convict for reasonable doubt purposes, thereby precluding any double jeopardy claim on remand should we determine that a new trial is warranted.").

¶ 36 Reversed; cause remanded.