

No. 1-12-3384

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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. 11 CR 19402
)	
ANTHONY DISMUKE,)	Honorable
)	Jorge Luis Alonso,
Defendant-Appellant.)	Judge Presiding.

JUSTICE EPSTEIN delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Ellis concurred in the judgment.

O R D E R

¶ 1 *Held:* No plain error where trial court conducted proper *Montgomery* balancing test before admitting prior conviction for impeachment; defendant's procedural forfeiture honored; judgment affirmed.

¶ 2 Following a bench trial, defendant Anthony Dismuke was found guilty of burglary, and sentenced to nine years in prison. On appeal, defendant contends that the trial court abused its discretion by admitting evidence of a prior conviction as impeachment without performing the balancing test mandated by *People v. Montgomery*, 47 Ill. 2d 510 (1978). He thus requests that this court reverse his conviction, and remand his cause for a new trial.

¶ 3 The record shows that on November 5, 2011, defendant was arrested on the south side of Chicago in connection with a burglary involving copper pipes and wiring taken from the building located at 6730 South Racine Avenue. At trial, Kim Jackson testified that he was a deacon at Christ Chapel Missionary Baptist Church, located at 6734 South Racine Avenue, where he also performed weekly cleaning and maintenance. On the morning of November 5, 2011, he was parking his car near the church when he noticed that a door on the ground level, and a window on the second floor of the neighboring and usually boarded up building at 6730 South Racine Avenue, were open. Jackson then observed two arms, clothed in a black leather jacket, extend out of the open window and drop some copper items to the ground below near a shopping cart. After parking his car in the alley, Jackson went inside the church and called police. When he came back out, he saw a bearded black man wearing a black leather jacket standing between the doorway of 6730 South Racine and the nearby shopping cart. That man, later identified as defendant, was loading the cart with the copper items that had been dropped to the ground.

¶ 4 Jackson further testified that he was in front of the church when police arrived, and, shortly thereafter, he saw defendant being detained in the back of the building. Jackson testified that defendant was the same man he had seen loading up the cart with copper items, that the arm sleeves he saw in the window were the same as those worn by defendant, and that the copper in the grocery cart was the same as the copper he saw being dropped in the alley.

¶ 5 Chicago police officer Graves testified that he responded to the scene about 8:47 a.m. and drove his police car down the alley behind 6730 South Racine Avenue. There, he saw defendant, dressed in a long, black leather jacket, pushing a shopping cart that was overflowing with metal southbound in the alley. Officer Graves detained and then arrested defendant after speaking with Jackson.

¶ 6 Gabriel Brown testified that she owned the building in question and was rehabilitating it. At the time of the incident, the plumbing and the electrical work, which included copper piping and wiring, were finished, and the building was normally boarded up. Her workmen entered by removing the board on the front door and using a key. Brown testified that she visited the building the evening before the incident, and saw that the doors and windows were boarded up, and there was no other damage to the property.

¶ 7 On the morning of November 5, 2011, the police called Brown to the property, and upon arriving, she noticed that boards had been removed from four windows and two doors of the building, and some of the windows had been broken. Inside the building, she observed that copper piping and wiring had been removed from the basement and first and second floors. She also saw a black shirt and a hammer that had not been in the building the day before, and she identified the piping and gutters in defendant's cart as coming from inside her building. She testified that she did not know defendant, and did not give him permission to enter her property or remove items from within.

¶ 8 After the court denied defendant's motion for a directed finding, defense counsel informed the court that defendant intended to testify. Counsel then made an oral *Montgomery* motion, seeking to prevent the admission of defendant's 2002 conviction for burglary. The State noted that defendant was sentenced to eight years in prison on the prior conviction, which fell within the 10-year period, and asked that it be permitted for "*Montgomery* purposes." Defense counsel did not dispute that time period, but argued that the conviction was of the same nature as the current charge, and that it did not bear on testimonial credibility.

¶ 9 The trial court denied the defense motion, noting:

"The State will be allowed to get into it if they choose to get into [sic]. It is

exactly the sort of charge--even though it's the same offense here, it's exactly the sort of charge that does bear on credibility. Most importantly, I'll point out that even though it is the same charge, because there is no jury, there's absolutely no reason to believe that the conviction will be used inappropriately or in some way other than it's supposed to be used, which is just bearing on credibility."

¶ 10 Defendant testified that he was innocent of the instant offense, and that he picked up scrap metal for extra money. On the morning of the incident, he was walking around looking for scrap metal when he entered the alley near 6730 South Racine Avenue, wearing a black leather jacket and pushing a shopping cart containing several items. As he walked behind the building, defendant noticed some pieces of copper and a plastic bag on the ground, and he placed those items in his cart. He denied going inside the building, breaking any windows, or opening any doors or windows. He also testified that a board had been removed from a side door when he arrived, and that he was arrested as he pushed his cart down the alley. On cross-examination, defendant acknowledged that the police found a broken screwdriver and a pair of scissors during a search of his person. He also stated that copper is not often found in the streets. The State then submitted a certified copy of defendant's 2002 burglary conviction, for which he was sentenced to a term of eight years' imprisonment.

¶ 11 The trial court found defendant guilty of burglary and sentenced him as a Class X offender, to a term of nine years in prison. In this appeal from that judgment, defendant solely contends that the trial court abused its discretion by denying his motion to bar admission of his prior burglary conviction for impeachment without conducting a proper *Montgomery* balancing test.

¶ 12 As a preliminary matter, defendant concedes that he procedurally forfeited his claim on appeal by failing to raise it in a post-trial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). However, he contends that we may review the alleged error under the first prong of the plain-error doctrine, which permits a reviewing court to excuse forfeiture when 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. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). The first step in a plain-error analysis is to determine whether error occurred at all (*Id.*), for if there was no error, there can be no plain error (*People v. Bannister*, 232 Ill. 2d 52, 65 (2008)). This requires "a substantive look" at the issue. *People v. Naylor*, 229 Ill. 2d 584, 593 (2008).

¶ 13 *Montgomery* provides that, for the purpose of attacking a witness' credibility, evidence of a prior conviction is admissible where: (1) the prior crime was punishable by death or imprisonment in excess of one year, or involved dishonesty or false statement regardless of the punishment, (2) less than 10 years has elapsed since the date of conviction of the prior crime or release of the witness from confinement, whichever is later, and (3) the probative value of admitting the prior conviction outweighs the danger of unfair prejudice. *People v. Atkinson*, 186 Ill. 2d 450, 456 (1999); *Montgomery*, 47 Ill. 2d at 516. The trial court is vested with discretionary authority as to whether or not to allow evidence of a prior conviction to impeach a witness, and its decision to admit evidence of a prior conviction is reviewed for an abuse of discretion. *People v. McKibbins*, 96 Ill. 2d 176, 187 (1983).

¶ 14 Defendant concedes that his prior burglary conviction carried a penalty in excess of one year of imprisonment, and occurred within the last 10 years, but he maintains that the trial court failed to weigh the probative value of admitting the prior conviction against the danger of unfair

prejudice. He claims that the "perfunctory test" performed by the court did not fulfill the *Montgomery* balancing test requirements. We disagree.

¶ 15 In conducting the balancing test, the trial court may consider, *inter alia*, the recency of the prior conviction and its similarity to the present charge, the length of defendant's criminal record and his conduct subsequent to the prior conviction, and the importance of the witness' credibility in determining the truth. *People v. Robinson*, 299 Ill. App. 3d 426, 441 (1998).

Defendant asserts that the court omitted an analysis of various factors listed in *Robinson*, which may have militated in his favor. We note, however, that these factors are merely "helpful" in determining whether judicial balancing occurred, but are not required to be stated on the record. *Robinson*, 299 Ill. App. 3d at 441. In fact, the supreme court has consistently found no error where the trial court failed to specifically articulate the factors it considered in performing the *Montgomery* balancing test, provided that the record reflects that the trial court was aware of the test and applied the standard. *Atkinson*, 186 Ill. 2d at 463; *People v. Williams*, 173 Ill. 2d 48, 83 (1996).

¶ 16 Accordingly, we find that defendant's reliance on *Naylor* as support for his argument that reversal is required because the trial court did not conduct a "comprehensive" *Montgomery* analysis on the record is misplaced. In *Naylor*, the record failed to show that either the court or counsel considered the *Montgomery* balancing test. See *Naylor*, 229 Ill. 2d at 605 n.3 ("Nowhere in the above-quoted colloquy, in either the court's words or in counsel's arguments, is it shown that *Montgomery*'s balancing test was considered."). By contrast, here, defendant's motion as to whether he could be impeached with the earlier conviction which was for the same offense with which he was charged, was made and argued in reference to the *Montgomery* balancing test.

¶ 17 We observe that a court is not barred from admitting, as it did here, the same or similar prior convictions for impeachment purposes (*People v. Barner*, 374 Ill. App. 3d 963, 971 (2007)), and in issuing its ruling, the court observed here that defendant's prior burglary was "exactly the sort of charge that does bear on credibility." Given the opposing versions of events presented by Jackson and defendant, and the fact that no extrinsic evidence was presented to corroborate or contradict either version, the trial court's finding necessarily involved its assessment of the credibility of the witnesses (*Naylor*, 229 Ill. 2d at 606-07), and defendant's prior conviction was of probative value.

¶ 18 The court also noted that this was a bench trial, without a jury, so there was "no reason to believe that the conviction [would] be used inappropriately or in some way other than [it was] supposed to be used, which is just bearing on credibility." Although the trial court did not explicitly state that it was balancing the opposing interests, or recite the main factors considered, the record clearly shows that the court was aware of its discretion in the matter and understood the *Montgomery* standard in determining that the prior burglary conviction would bear on defendant's credibility and not be misused to reflect propensity. *People v. White*, 407 Ill. App. 3d 224, 233-234 (2011).

¶ 19 Under these circumstances, we find no abuse of discretion by the trial court in admitting the conviction as impeachment. *Williams*, 173 Ill. 2d at 83. Since there was no error, there can be no plain error (*Bannister*, 232 Ill. 2d at 79), and we thus honor defendant's procedural default of this issue (*Naylor*, 229 Ill. 2d at 593), and affirm the judgment of the circuit court of Cook County.

¶ 20 Affirmed.