

2013 IL App (1st) 113605-U

FOURTH DIVISION
October 24, 2013

No. 1-11-3605

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellee, |) | Cook County. |
| |) | |
| v. |) | No. 08 CR 21296 |
| |) | |
| MILTON WARDLAW, |) | Honorable |
| |) | Diane Gordon Cannon, |
| Defendant-Appellant. |) | Judge Presiding. |

JUSTICE EPSTEIN delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

ORDER

- ¶ 1 *Held:* Where record established that trial judge weighed probative value and prejudicial effect of previous gun-related conviction, the court's failure to enunciate its analysis did not constitute reversible error, and defendant also did not show that plain error occurred in court's questioning of potential jurors pursuant to Supreme Court Rule 431(b); the judgment of the trial court was affirmed.
- ¶ 2 Following a jury trial, defendant Milton Wardlaw was convicted of first degree murder and aggravated discharge of a firearm and was sentenced to consecutive terms of 55 years and 15 years in prison, respectively. On appeal, defendant contends the trial court erred in admitting into evidence his prior conviction for aggravated unlawful use of a weapon without expressly

articulating its balancing of the conviction's probative value against its prejudicial effect as required by *People v. Montgomery*, 47 Ill. 2d 510 (1971). Defendant further asserts his murder conviction should be reversed and this case remanded for a new trial because plain error occurred when the trial court failed to adequately question prospective jurors as to whether they understood and accepted the principles set out in Illinois Supreme Court Rule 431(b) (eff. May 1, 2007). We affirm.

¶ 3 Defendant was charged with first degree murder and aggravated discharge of a firearm for firing a handgun into a Chicago Transit Authority (CTA) bus on October 5, 2008, killing Kiyanna Salter. The parties stipulated to autopsy testimony that Salter died of a gunshot wound to the face.

¶ 4 Before trial, the defense filed a motion *in limine* to bar the State from introducing evidence of defendant's April 16, 2008, convictions for aggravated unlawful use of a weapon (AUUW) and possession of a controlled substance for impeachment purposes.¹ The defense argued in its motion that the earlier weapons conviction was particularly prejudicial in that the instant crime also involved the use of a firearm. The trial court ruled that the State could introduce evidence of the defendant's April 2008 convictions.

¶ 5 At trial, Steve Alexander, a video surveillance specialist with the CTA law and claims department, testified he retrieved and viewed a video recording from the bus on which the shooting occurred. The system records video but does not record sound. Alexander burned the portion of the video that depicted the shooting onto a compact disc that was entered into evidence by the State. Included on that recording was a three-minute portion of video depicting the shooting.

¹ Defendant was placed on two years of probation for those offenses.

¶ 6 Patricia Wilson, defendant's mother, testified that on October 6, 2008, she saw a video on the local news that showed her son in a shooting on a city bus. Wilson asked him to turn himself in to police, which defendant did two days later.

¶ 7 Barry Adams, a passenger on the bus, testified that two women, Salter and Jasmine Wilcox, boarded the bus at 71st and Merrill along with a man wearing a red hat and a black jacket. Adams said the man was talking to Salter and Wilcox and was holding a cell phone. That man sat across the aisle from the women near the back door of the bus, behind Adams. Defendant also was seated near the back door.

¶ 8 Adams testified that when defendant signaled for the bus to stop, the man in the red hat stood up and defendant asked him if he was getting off behind him. The man in the red hat replied no, and defendant asked him if he was "on that kind of shit," and the man responded no and said he was "checking out his surroundings." Adams said the man with the red hat was not speaking loudly and did not threaten defendant.

¶ 9 After defendant got off the bus, the man in the red hat continued to talk to the women with his back to the door of the bus. As the bus started to move, the man in the red hat turned around to face the door, and Adams looked through the bus window and saw defendant pull out a pistol and point it toward the bus door. Adams saw defendant "come up and grab it with two hands and fire one shot through the door." When defendant fired the shot, the man in the red hat was facing the door and holding onto a rail.

¶ 10 Salter fell to the floor after the first gunshot, and Adams heard a second shot. Adams identified defendant as the gunman in a police photo array two days after the shooting. On cross-examination, Adams said defendant boarded the bus at some point after he did. Adams could not see what the man in the red hat was doing with his hands when he approached the back door of the bus or when he spoke to defendant.

¶ 11 Wilcox testified that when she and Salter boarded the bus, the man in the red hat boarded behind them and he spoke to her before making a call on his phone. Wilcox said the man's demeanor was calm. At one point, the man handed Wilcox his phone so she could speak to someone, and Wilcox handed the phone back. When defendant stood up to exit the bus, he touched the man with the red hat and they "exchanged words" as defendant got off the bus. Wilcox saw a gun in the waistband of the man with the red hat; however, she said the man did not remove his weapon from his clothing or threaten defendant. The man turned away from defendant and was walking back to his seat when defendant fired. Wilcox identified defendant in a photo array and a police lineup.

¶ 12 Steven Darkins witnessed the shooting from a car stopped about 100 feet behind the bus. Darkins testified defendant was standing outside the bus holding onto the door and that he fired one shot into the bus after releasing the door. Defendant ran after the bus and fired three more shots.

¶ 13 After the State completed its case-in-chief, defendant testified in his own defense. He stated that on the night in question, he was riding a bus home after visiting his child. Defendant said he was carrying a handgun that night for protection because he had been attacked by a group of six people on October 2.

¶ 14 Defendant testified that when he stood up to exit the bus, he "came in contact" with the man in the red hat, who touched the pocket of defendant's hooded shirt twice. Defendant pushed the man's hand and asked why he touched him. Defendant testified that the man faced him and responded, "I'll shoot you in your mother f— face" and showed him a gun in the waist of his pants. During that encounter, defendant was getting off the bus but had turned to face the man. He asked the man not to shoot him, and the man glared at defendant. Defendant testified he was afraid the man would shoot him. He had not shown the man his own weapon.

¶ 15 Defendant said when he stepped off the bus, he pointed his gun and fired once because he was in fear and he "just reacted." Defendant said he did not intend to shoot at Salter or kill her; rather, he fired because he was afraid of the man in the red hat. On cross-examination, defendant admitted that after the shooting, he denied having a gun or shooting anyone. He said he could not see the man in the red hat when he fired his gun and did not know if the man was facing him.

¶ 16 In its rebuttal case, the State introduced certified copies of defendant's April 2008 convictions for AUUW and possession of a controlled substance. The jury received instructions, *inter alia*, on first degree murder and second degree murder based on an unreasonable belief in the need to use deadly force. After deliberating, the jury found defendant guilty of first degree murder and aggravated discharge of a firearm.

¶ 17 Defense counsel filed a motion for a new trial, asserting among other points that the trial court erred in denying his motion to exclude his prior convictions pursuant to *Montgomery*. After hearing argument, the trial court denied defendant's motion for a new trial. The court heard evidence in aggravation and mitigation and imposed a sentence of 55 years in prison for first degree murder, which included a 25-year sentence enhancement for having personally discharged a firearm that caused death. The court imposed a consecutive 15-year sentence for aggravated discharge of a firearm, for a total sentence of 70 years in prison. Defendant's motion to reconsider his sentence was denied.

¶ 18 On appeal, we initially note that defendant included in his brief an argument that he was denied a fair trial because the trial judge failed to question him as to whether he consented to his counsel's decision to tender a jury instruction on second-degree murder. In his reply brief, defendant withdrew that argument in light of the Illinois Supreme Court's February 2013 holding in *People v. Wilmington*, 2013 IL 112938, ¶ 52, that the trial court is not required to conduct such an inquiry. We thus proceed to defendant's additional contentions.

¶ 19 Defendant asserts the trial court abused its discretion in admitting evidence of his previous AUUW conviction. If a defendant decides to testify on his own behalf during a criminal proceeding, any prior convictions are admissible to discredit the defendant as a witness. *People v. Naylor*, 229 Ill. 2d 584, 594 (2008).

¶ 20 In *Montgomery*, the supreme court held that evidence of a witness' prior conviction is admissible to attack his credibility 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. *Montgomery*, 47 Ill. 2d at 516. In the case at bar, defendant was convicted of AUUW within six months of the instant crime. See 720 ILCS 5/24-1.6(a)(1) (West 2008). A first AUUW offense is a Class 4 felony, which is punishable by a prison sentence of not less than one year and not more than three years in prison. 730 ILCS 5/5-8-1(a)(7) (West 2008). Therefore, the first two prongs of *Montgomery* were satisfied.

¶ 21 Defendant argues the court failed to conduct the balancing test required by *Montgomery* and weigh the probative value of the prior conviction against the unfair prejudice that could result from its introduction. Defendant contends the court erred by allowing his prior conviction into evidence after issuing only a "conclusory pronouncement" that it had performed the balancing test. He argues any probative value of his prior AUUW conviction was substantially outweighed by the risk of unfair prejudice from the similarity between that offense and the instant crime, and the court did not conduct a meaningful balancing analysis as required by *Montgomery*.

¶ 22 The following colloquy took place when the court considered the defense's pretrial motion to bar the use of defendant's prior convictions to impeach his credibility. After defense counsel described defendant's previous convictions, defense counsel addressed the court:

"MS. MCBETH: Judge, we think that the probative value of having the jurors learn that he is a felon is substantially outweighed by the prejudicial effect here while he is on trial, the question of whether he was a defendant himself when he discharged the firearm in the direction of the bus and in the direction of the man with whom he had an argument, and I think both of them are significantly more prejudicial, but especially the count of an unlawful use of a weapon by a felon [*sic*] because it sounds to people on the jury as if Mr. Wardlaw has been convicted for unlawfully using a weapon and that's going to be the question in [this] case[,] was he unlawfully discharging the weapon in this case, or was he defending himself so at the very least, we are asking if Your Honor is inclined to impeach with the felony conviction, use the drug conviction and not the unlawful use of a weapon, but we're asking that you bar both of them.

MR. WEINER [assistant State's attorney]: Judge, we don't believe that is overly prejudicial in this matter. It's a recent conviction from 2008. This happened just a few months after that. He was convicted of both possession of a controlled substance and unlawful use of a weapon. We believe that they are relevant, and they do fit within the parameters of *Montgomery*, and we're asking you to deny that motion.

THE COURT: The Court has weighed the probative versus the prejudicial value. [Addressing defendant] The State will be allowed to use them should you choose to testify, sir."

¶ 23 The court later addressed that ruling in denying defendant's motion for a new trial:

"[T]he defense argued orally today, the *Montgomery* motion with regard to defendant's previous conviction. I point out now as I did prior to trial, in weighing the factors set out in *Montgomery* [] that case is not as complicated today. He was found guilty. He pled guilty. He pled guilty within six months of this murder to having a firearm and drugs on him.

It is not a protracted case. It is off an arraignment. He pled guilty. Yes, I had a gun. Yes, I had drugs. Again, within six months this murder occurs.

I did weigh, as I again weigh the probative versus the prejudicial value of that conviction. And I stand by my rulings that it was admissible."

¶ 24 The intent of *Montgomery* is to allow into evidence those crimes which bear on the individual's truthfulness as a witness. *People v. Williams*, 161 Ill. 2d 1, 39 (1994). The supreme court in *Williams* noted the trial court's important discretionary role in weighing the admission of evidence of previous crimes that do not bear on the honesty or veracity of the witness and also, where the witness is the defendant, in considering if the prior conviction "is for the same or substantially the same conduct for which the accused is on trial." *Williams*, 161 Ill. 2d at 38, quoting *Gordon v. United States*, 383 F.2d 936, 940 (D.C. Cir. 1967). However, the supreme court also has reiterated the tenet that the mere similarity of the prior crime and the instant offense "does not mandate exclusion of the prior conviction." *People v. Atkinson*, 186 Ill. 2d 450, 463 (1999).

¶ 25 Our consideration of the trial court's analysis of the *Montgomery* factors is informed by *Atkinson* and also by the supreme court's recent opinion in *People v. Mullins*, 242 Ill. 2d 1 (2011). In *Atkinson*, the defendant contended that the trial court erred by failing to conduct a proper *Montgomery* balancing test. *Atkinson*, 186 Ill. 2d at 462. In rejecting that argument, the supreme court noted the trial court's comments made clear the judge "was aware of the *Montgomery* balancing test" and "did not err in failing to articulate the factors he considered in his application" of that test. *Id.* at 462-63. The *Atkinson* court cited *People v. Williams*, 173 Ill. 2d 48, 83 (1996), in which the supreme court held the trial judge did not disregard the balancing test when the parties referred to the test in their arguments and the transcript revealed the judge was aware of the standard, even though the trial court did not explicitly state for the record that it was balancing the opposing interests. *Id.* at 462.

¶ 26 Similarly, in *Mullins*, the supreme court discussed the trial court's application of the *Montgomery* test in that case and rejected the defendant's assertion that the court failed to perform the test. Noting the concepts of prejudicial effect and probative value had been "argued and applied" throughout the proceedings, the supreme court stated that even though the trial judge "never specifically stated that it was balancing the factors pursuant to *Montgomery*," the court had "declined to find error under similar circumstances when the transcript makes it clear that the court was applying the *Montgomery* standard, even though it was not expressly articulated." *Mullins*, 242 Ill. 2d at 18, citing *Williams*, 173 Ill. 2d at 83, and *People v. Redd*, 135 Ill. 2d 252, 325-26 (1990) (record indicated court understood and properly exercised its discretion under *Montgomery* even though court did not specifically articulate the test).

¶ 27 Applying those supreme court holdings to the instant case, we conclude the trial court understood and correctly applied the *Montgomery* balancing test. The record establishes that when the court considered defendant's motion to bar the use of his previous convictions, defense

counsel argued to the court that the convictions' probative value was substantially outweighed by the prejudicial effect of introducing those crimes, particularly the AUUW charge, while defendant was charged with a shooting in the instant case. The prosecutor argued that the convictions were recent and relevant and "fit within the parameters of *Montgomery*." The trial court stated that it "has weighed the probative versus the prejudicial value." Later, in considering defendant's motion for a new trial, the court referred to its earlier weighing of the factors set out in *Montgomery*. As the supreme court has consistently held, the fact that the trial court did not expressly articulate the reasoning behind that decision does not support a finding that the court failed to consider the appropriate factors or weigh them correctly. See *Mullins*, 242 Ill. 2d at 18; *Atkinson*, 186 Ill. 2d at 462-63; *Williams*, 173 Ill. 2d at 83. We also note that the jury was instructed as to the limited use of the prior conviction as pertaining to defendant's credibility and not to his guilt of the instant offense.

¶ 28 Still, defendant argues the court could have displayed its understanding of the balancing test by expressly discussing his AUUW conviction separately from his conviction for possession of a controlled substance. He contends the admission of the drug conviction would have sufficed to attack his credibility without carrying the same prejudicial effect of the weapons conviction.

¶ 29 Impeachment with a prior conviction assists the trier of fact with determining defendant's credibility in comparison with the credibility of conflicting witnesses. *Naylor*, 229 Ill. 2d at 599-600. We review the trial court's decision to admit evidence of a defendant's prior conviction for an abuse of discretion. *People v. McKibbins*, 96 Ill. 2d 176, 187 (1983). An abuse of discretion occurs where the trial court's decision is arbitrary, fanciful or unreasonable or where no reasonable person would take the view adopted by the trial court. *People v. Becker*, 239 Ill. 2d 215, 234 (2010).

¶ 30 The colloquy reflects that defense counsel argued to the court that, in the event the court determined defendant should be impeached with any prior conviction, the court should allow into evidence the drug conviction and not the weapons-related offense. A trial court does not abuse its discretion by admitting into evidence a prior conviction that is similar to the instant crime with which the defendant is charged. See *People v. Melton*, 2013 IL App (1st) 060039, ¶ 18; *People v. Blankenship*, 353 Ill. App. 3d 322, 326 (2004) (where the defendant was charged with AUUW, trial court was not required to exclude his two prior convictions for AUUW, especially when the jury was instructed the prior conviction could only be considered for the purposes of assessing the defendant's credibility). For all of those reasons, the trial court did not abuse its discretion in allowing both of defendant's recent prior convictions into evidence.

¶ 31 Defendant's remaining contention on appeal is that the trial court committed plain error in failing to ask prospective jurors if they understood and accepted the four principles set forth in Supreme Court Rule 431(b). That rule imposes a *sua sponte* duty on the trial court to question prospective jurors, individually or in a group, if they understood and accepted the principles outlined in *People v. Zehr*, 103 Ill. 2d 472, 477 (1984). The court must ask venire members if they understand and accept that: (1) a defendant is presumed innocent; (2) the defendant is not required to offer any evidence in his own behalf; (3) the defendant must be proved guilty beyond a reasonable doubt, and (4) the defendant's failure to testify in his own behalf cannot be held against him. *Id.*; see also *People v. Johnson*, 2013 IL App (1st) 111317, ¶ 55. The rule states the court's "method of inquiry shall provide each juror an opportunity to respond to specific questions" regarding those principles. Ill. S.Ct. R. 431(b) (eff. May 1, 2007).

¶ 32 Defendant contends the following inquiries by the trial judge failed to meet that standard:

"Ladies and gentlemen, I'm going to be asking you some

questions again touching [on] your qualifications. Once again truthful answers to the questions put forth to you.

Ladies and gentlemen in the jury box, as I indicated earlier defendant is presumed innocent of the charges, and the State has the burden of proving him guilty beyond a reasonable doubt. Is there anybody that has any qualms or disagreement with that proposition of law? No response. Defendant is not required to prove his innocence. He is not required to call witnesses. Does anybody have any problems with that proposition of law? No response. The defendant has a right to testify. He has a right not to testify. If he exercises his right not to testify, is there anybody seated in the jury box who would hold that against him? No response.

Should the State meet their burden of proof beyond a reasonable doubt, is there anybody seated in the jury box who could not or would not for any reason go back into the jury room with your fellow jurors and sign a verdict form of guilty? Anybody who could not or would not do that? No response.

Should the State meet [*sic*] their burden of proof beyond a reasonable doubt, is there anybody seated in the jury box who could not or would not go into the jury room with your fellow jurors, the law that governs this case and sign a verdict form of not guilty? No response."

¶ 33 Defendant contends those admonitions were inadequate because the trial court did not question the potential jurors, either individually or as a group, as to whether they understood or accepted the described principles of law. Defendant notes that, as to the first two principles of the presumption of innocence and the State's burden of proving defendant's guilt beyond a reasonable doubt, the court asked whether anyone had any "qualms or disagreement" with those tenets. As to the third principle, that defendant need not present any evidence, the court asked the venire if they had "any problems" with that concept, and as to the fourth tenet, defendant's potential choice not to testify, the court asked if any of the venire members "would hold that against" defendant.

¶ 34 Defendant acknowledges he did not raise this objection during jury selection and include this argument in his motion for a new trial, which generally results in forfeiture of the issue. See *People v. Lovejoy*, 235 Ill. 2d 97, 148 (2009), citing *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Defendant contends this issue should be reviewed under the plain error doctrine, which allows a reviewing court to reach an unpreserved error in two instances: (1) where a clear and obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, or (2) where a clear and obvious error occurred and that error constituted a structural error 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. Piatkowski*, 225 Ill. 2d 551, 565 (2007). The burden of persuasion rests with the defendant in both instances. *People v. McLaurin*, 235 Ill. 2d 478, 495 (2009). This court generally considers whether error occurred at all before proceeding to consider whether either prong of the doctrine has been satisfied. *People v. Sargent*, 239 Ill. 2d 166, 189-90 (2010).

¶ 35 A lack of compliance with Rule 431(b) is not a structural error requiring reversal under the second prong of the plain error doctrine. *People v. Thompson*, 238 Ill. 2d 598, 607 (2010).

Thus, defendant contends his case requires reversal under the first plain error alternative because the evidence in this case was closely balanced.

¶ 36 As defendant points out, during the pendency of this appeal, the supreme court addressed the required scope of the trial court's inquiries in *Wilmington*, 2013 IL 112938, ¶ 30-32. The *Wilmington* court concluded that error occurred when the trial judge asked if anyone in the pool of potential jurors "disagreed" with each of the four *Zehr* principles. The court noted its recent holding in *Thompson* that Rule 431(b) "mandates a specific question and response process" and "requires an opportunity for a response from each prospective juror on their understanding and acceptance of those principles." *Wilmington*, 2013 IL 112938, ¶ 32, citing *Thompson*, 238 Ill. 2d at 607.

¶ 37 Under that standard, the supreme court in *Wilmington* found the trial judge's inquiries in that case constituted error, stating: "While it may be arguable that the court's asking for disagreement, and getting none, is equivalent to juror *acceptance* of the principles, the trial court's failure to ask jurors if they *understood* the four Rule 431(b) principles is error in and of itself." *Wilmington*, 2013 IL 112938, ¶ 32 (emphasis in original). However, the supreme court went on to affirm the defendant's conviction, holding the evidence was not closely balanced so as to satisfy the first prong of plain error. *Id.* at 42.

¶ 38 In the case at bar, our analysis of the evidence in this case warrants a similar conclusion. Under the holding in *Wilmington*, the court's questioning of the venire in the instant case did not ensure the potential jurors understood the four concepts described in Rule 431(b). Even though defendant in this case did testify, thus mitigating any harm if the potential jurors did not understand that he had the right not to testify, the court did not ascertain the group's understanding of the remaining three principles.

¶ 39 Defendant contends the evidence presented to the jury was closely balanced. Defendant points to his own account that immediately before he fired the shot that killed Salter, the man in the red hat lifted his shirt to show a gun tucked in his waistband, and he claims the testimony of Wilcox, the victim's friend, corroborated his account.

¶ 40 A "closely balanced" case is defined as one where the outcome of the case would have to be different had the impropriety not occurred. *People v. Pierce*, 262 Ill. App. 3d 859, 865 (1992). We do not find the evidence here was closely balanced as to whether defendant had an unreasonable belief in the need for self-defense. Although Wilcox stated that defendant and the man in the red hat "exchanged words," she said the man did not remove his weapon or threaten defendant. Adams, a passenger on the bus, also testified the man did not threaten defendant. Wilcox testified that when defendant fired, the man had turned his back on defendant and was walking to his seat. Adams and Darkins, who was in a car stopped behind the bus, testified defendant fired multiple shots, in contrast to defendant's testimony that he only fired once in fear for his life.

¶ 41 In addition to the testimony of the State's witnesses set out above, which contradicts defendant's account, defendant further testified that when he fired his gun, he could not see the man in the red hat and did not know if the man was facing him, which contradicts defendant's account that he fired because he feared the man was going to shoot him. In conclusion on this point, defendant cannot show the evidence was so closely balanced that his conviction resulted from the trial court's failure to ask if the jurors understood the *Zehr* principles.

¶ 42 In summary, the trial court's *Montgomery* analysis did not constitute error. Moreover, defendant cannot establish that reversal is required under the first prong of plain error because the evidence was not closely balanced such that the verdict could have resulted from the incomplete admonitions.

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¶ 43 Accordingly, the judgment of the trial court is affirmed.

¶ 44 Affirmed.