2018 IL App (1st) 150644-U

SIXTH DIVISION
DECEMBER 7, 2018

No. 1-15-0644

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 17250
	)	
PHINNEIUS BANKS,	)	Honorable
	)	Mary Margaret Brosnahan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Delort and Justice Connors concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's convictions for first degree murder and aggravated battery are affirmed. The trial court's admission of evidence of other crimes was erroneous, but constituted harmless error. The trial court's failure to make the inquiries of defense counsel and defendant described in *People v. Medina*, 221 Ill. 2d 394 (2006), was not plain error.

¶ 2 A jury found defendant-appellant guilty of the murder of one victim, Xiahong Song (Song) and aggravated battery with respect to a second victim, Qiwen Wang (Wang). Defendant argues that both convictions should be reversed due to the improper admission of evidence of his involvement in prior crimes. Alternatively, he seeks reversal of the aggravated battery

conviction, because the trial court instructed the jury on that charge as a "lesser included offense" without ascertaining that he personally agreed to defense counsel's request for that instruction. We affirm the judgment of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 The State indicted defendant on a number of charges relating to a July 3, 2010 attack on Wang and Song in Chicago's Chinatown neighborhood; the incident resulted in Song's death.

¶ 5 The State charged defendant with first degree murder for "intentionally or knowingly strangling and killing" Song (count 1) or "knowing that such act created a strong probability of death or great bodily harm" to Song (count 2). The State also charged multiple counts of felony murder predicated upon Song's death during the commission of several underlying felonies, namely, the robberies of Wang and Song (counts 3 and 4), the attempted murder of Wang (count 5), and the aggravated battery of Wang (count 6). Apart from the murder charges, the State also charged defendant with the attempted murder of Wang (count 7). The State did *not* charge defendant with aggravated battery of Wang.

¶ 6 Before trial, the State moved *in limine* for leave to introduce evidence of defendant's involvement in three other robberies, including incidents on July 3, 2010 (the same date as the attack on Wang and Song), March 15, 2010, and November 10, 2009. The State urged that such evidence was admissible "for the limited purpose of demonstrating the defendant's *modus operandi*, motive, intent, knowledge, absence of mistake or accident, to dispose of an alibi defense and to demonstrate that the crime charged was part of a common scheme, design, or plan." The trial court granted the motion only with respect to the incidents in July 2010 and March 2010, finding evidence of those incidents could be admitted "for motive, intent,

knowledge, and innocent frame of mind." The court denied the State's motion with respect to the November 2009 incident.

¶ 7 At trial, the State called Wang, who testified that he was 78 years old, born in China, and lived in Chicago's Chinatown neighborhood. Wang testified through an interpreter.

¶ 8 Wang testified that on the night of July 2, 2010, he went to a casino using a shuttle bus provided by the casino. Around midnight, he left the casino and returned to Chinatown, again using the shuttle bus. Song, a friend of his who also lived in Chinatown, had been at the casino and was on the same bus.

¶ 9 Wang recalled that, after the shuttle bus returned to Chinatown, Wang and Song were walking together on 23rd Street when they were "attacked from behind" by two people. Wang testified that "one guy was behind me putting his arm around my neck and [the] other guy was doing the same thing to [Song] from behind." Wang indicated that he was being choked and had difficulty breathing during the attack. Wang recalled that his assailant punched him on the side of the head and continued to choke him after he fell to the ground. Wang testified that $69 in cash and his cell phone were taken from him. He testified that the number of the stolen cell phone was (312) 823-6868. Wang identified defendant in court as the person who choked him.

¶ 10 Wang testified that Song was choked and punched in the face by a second attacker, after which Song "hit the tree that was on the sidewalk and then he fell on the ground immediately." Wang testified that Song's attacker was taller than defendant.

¶ 11 Detective John Murray testified that he arrived at the scene around 1:30 in the morning. He saw a deceased male (Song) laying face down, with his pockets turned inside out. He saw that the man had sustained "some sort of a head injury."

¶ 12 The State also called Tanasha Lovett, who testified that she knew defendant "through friends and through the neighborhood." She testified that on July 4, 2010, she was hanging out with friends and saw the defendant. They spoke and he asked for her phone number, which she gave to him. She testified that defendant subsequently called her three or four times, from the number (312) 823-6868.

¶ 13 Officer David Ryan, a forensic investigator for the Chicago Police Department, testified that he arrived at the scene around 2:30 a.m. on July 3, 2010. He observed that Song was face down on the sidewalk, with his head near a tree. He saw that Song's "pocket[s] on his pants were out like it had been pulled out, and near his body there was a small like casino card or rewards card *** and some change strewn about on the sidewalk." He observed that Song had an injury to the left side of his forehead and his left eye appeared to be swollen.

¶ 14 Before the State presented testimony relating to prior crimes, the court instructed the jury:

> "Evidence will be received that the defendant has been involved in an offense other than that charged in the indictment. The evidence is being received on the issues of the defendant's intent, motive, knowledge, and absence of innocent frame of mind, and may be considered by you only for that limited purpose. It is for you to determine whether the defendant was involved in that offense, and if so, what weight should be given to this evidence on the issues of intent, motive, knowledge, and absence of innocent frame of mind."

¶ 15 The State then called Zhao Cai Ruan (Zhao), who testified through an interpreter. On the evening of March 15, 2010, Zhao and his wife were walking on a sidewalk in Chinatown when a

man approached them from behind. The man punched Zhao repeatedly, and he fell to the ground. His wife "tr[ied] to protect me" and briefly fought with the man, before the man left. Zhao testified that the man took money from him before he left. Zhao acknowledged that he could not identify the attacker when he later viewed a police lineup, but he testified that his wife later identified the man who robbed him.

¶ 16 The State called Mei Ling He, Zhao's wife, to testify about the March 15, 2010 incident. She recalled that "a guy came from nowhere [and] started hitting my husband from behind." She saw her husband "getting beat up on the ground" so she "started hitting the bad guy," who then hit her in the face. After she called for help, "the guy got scared and ran." In March 2011, she viewed a lineup at the police station and identified defendant as the man who attacked her and her husband. She also identified defendant in court.

¶ 17 The State subsequently called Guo Mei (Mei), who testified about an incident at about 1 a.m. on July 3, 2010, when he was walking alone in Chinatown. Mei was walking down Princeton Avenue toward Archer Avenue when he realized that someone was walking very close behind him. He turned and made eye contact with the person, whom he subsequently identified as defendant. Defendant walked ahead of him, before he turned and approached Mei. Mei recalled that: "Suddenly he choke[d] me and then I feel he touch[ed] my pocket and then he heavily hit me on the head and my face and then I lost consciousness and then fell down on the ground."

¶ 18 Mei testified that he was "passed out" for a few minutes. When he woke up, he realized that his wallet and his car key were gone. He later reported the incident to police. On September 1, 2010, Mei viewed a police lineup, and identified defendant as the person who attacked him. Mei also identified defendant in court.

¶ 19 On cross-examination, Mei admitted that when he viewed the police lineup, he told police that he was only "60 percent" sure of his identification. He acknowledged that he previously viewed a photograph array in July 2010, and at that time he "told police I need to see the real person to get more percentage to identify who is the person who attacked." Mei further acknowledged that on September 13, 2010, about two weeks after he viewed the lineup, he called police after he recognized defendant in a newspaper article reporting defendant's arrest for a crime in Chinatown. Mei stated that, after seeing the newspaper, he was one hundred percent sure that defendant was his attacker.

¶ 20 The State called Detective Daniel Stanek of the Chicago Police Department, who investigated Song's homicide. Detective Stanek stated that he obtained the phone records for the cell phone that was taken from Wang. Based on those records, he contacted Tanasha Lovett and spoke with her on August 28, 2010.

¶ 21 On September 1, 2010, Detective Stanek took defendant into custody. He contacted Wang and Mei to view lineups that included defendant. Detective Stanek testified that Wang identified defendant in a lineup. Detective Stanek recalled that when Mei viewed the lineup, he "wasn't 100 percent sure" that defendant was the attacker; Detective Stanek testified that Mei "gave me a percentage, like, maybe 60 percent sure at that point."

¶ 22 Detective Stanek further testified that on September 2, 2010, he and a partner conducted a videotaped interview of defendant, after providing defendant *Miranda* warnings.

¶ 23 A portion of the interview was published to the jury. In the interview, defendant told police that on the night of July 2, 2010, he and other man, Fred Clark, had lost all their money in a dice game. They left the game and talked about "where we can get our bread back." They saw two men leaving a casino bus and Clark said "we can get our bread right there." Defendant and

Clark approached the men. Defendant stated that he punched one of the men, took $600 from him, and ran. Defendant saw Clark choking the other man. After the robbery, defendant and Clark met up. Defendant indicated that Clark took a phone during the robbery. Defendant stated that on July 4, 2010, he used a phone taken in the robbery to call a woman.

¶ 24 The State also called Dr. Hilary McElligot, who formerly worked at the Cook County Medical Examiner's Office, and who performed an autopsy on Song. She testified that Song had head injuries consistent with blunt force trauma and neck injuries consistent with strangulation. She opined that the manner of Song's death was homicide by strangulation.

¶ 25 The defense elected not to present any evidence.

¶ 26 Outside the presence of the jury, the court discussed jury instructions. With respect to the charged offense of attempted murder of Wang, defense counsel requested jury instructions permitting the jury to convict on the "lesser included offense" of aggravated battery. That is, defense counsel requested that the jury be instructed that, as an alternative to finding him guilty of attempted murder of Wang, defendant could be found guilty of aggravated battery of Wang.

¶ 27 The State objected, in the following exchange:

> THE COURT: "The next instruction on deck is 2.01, which in its current form indicates the defendant is charged with the offense of first degree murder and attempt first degree murder. Defense, at this time you tendered to the court two separate instructions, both for different theories of aggravated battery under IPI 11.15, indicating 'a person commits the offense of aggravated battery.' You have the language of the person over 60 and also aggravated battery, bodily harm on a public way.

> State, what is your position with respect to the defense request?
>
> [State's Attorney]: The attempt first degree murder, 'perform a substantial step toward the killing of an individual with an intent to kill.' Those would be the elements. I don't know if it would be [a] lesser included offense. The mental state is different. So I don't want the instruction to go back. But if you do give the instruction, Judge, it is up to you. I would only have to change [instruction] 26.01. I would not have to change what he is charged with."

¶ 28 The court then inquired: "Did anybody pull a case that it dictates whether this is a lesser included of attempt first degree murder? There is obviously an element of bodily harm [in] an aggravated battery that is not present in an attempt first degree murder." Defense counsel responded:

> "Judge, I did not pull a case; however, I believe the testimony that came from the witness stand was sufficient to meet that. The testimony of *** Wang indicated he was choked; he did not pass out. *** I believe that that supports the jury receive an instruction as to aggravated battery."

After discussion off the record, the court ruled: "Over the State's objection I believe there is sufficient evidence in the record to support the giving of 11.15 as a lesser included offense."

¶ 29 The jury was thus instructed regarding aggravated battery, an uncharged offense, as if it was a lesser included offense of the attempted murder of Wang. Instructions No. 18 and 19

instructed the jury regarding the elements of aggravated battery.[1] Instruction No. 20 informed the jury that it had the option to convict of aggravated battery, instead of attempted murder:

> "The defendant is charged with the offense of attempt first degree murder. Under the law, a person charged with attempt first degree murder may be found (1) not guilty of attempt first degree murder and not guilty of aggravated battery; or (2) guilty of attempt first degree murder; or (3) guilty of aggravated battery.
>
> Accordingly, you will be provided with three verdict forms pertaining to the charge of attempt first degree murder: 'not guilty of attempt first degree murder and not guilty of aggravated battery,' 'guilty of attempt first degree murder,' and 'guilty of aggravated battery.' "

¶ 30 The parties made closing arguments following the jury instruction conference. In closing argument, the prosecutor argued that testimony describing the prior robberies was evidence of defendant's "intent, motive, knowledge, and absence of an innocent frame of mind."

¶ 31 Defense counsel's closing argument conceded that defendant "committed an aggravated robbery against Qiwen Wang" but argued that Clark was solely responsible for killing Song. Defense counsel urged that Wang's robbery and Song's death stemmed from "Two separate people, two separate acts" and that defendant should not be held accountable for Clark's actions.

[1] Instruction No. 18 stated that "A person commits the offense of aggravated battery when he knowingly and by any means causes bodily harm to another person and in doing so, he is on or about a public way or the other person is an individual 60 years of age or older." Instruction No. 19 similarly stated: "To sustain the charge of aggravated battery, the State must prove the following propositions: First: That the defendant knowingly caused bodily harm to Qiwen Wang; and Second: That the defendant did so while on or about a public way; or [t]hat Qiwen Wang was an individual 60 years of age or older."

Defense counsel urged that there were "two separate robberies" committed against Song and Wang, rather than a "shared event," and thus the evidence was insufficient to hold defendant legally responsible for Song's death. Defense counsel conceded that defendant robbed Wang, but argued that defendant did not attempt to murder him.

¶ 32 The jury returned verdicts finding defendant guilty of first degree murder of Song and guilty of the aggravated battery of Wang.

¶ 33 Defendant filed a motion for new trial, which argued, among other claims, that the trial court should not have permitted testimony regarding the robberies of Zhao and Mei. The motion was denied.

¶ 34 The trial court sentenced defendant to a term of 57 years' imprisonment for first degree murder, as well as a concurrent term of 10 years' imprisonment for aggravated battery. On February 4, 2015, defendant's motion to reconsider sentence was denied. On the same date, defendant filed a notice of appeal. Accordingly, we have jurisdiction. Ill. S. Ct. R. 606(b) (eff. Dec. 11, 2014).

¶ 35 ANALYSIS

¶ 36 On appeal, defendant raises two separate lines of argument. First, he argues that the trial court abused its discretion when it permitted the State to present evidence concerning the robberies of Mei and Zhao. He claims that the evidence had only minimal probative value regarding the issues of "intent, motive, knowledge, and absence of innocent frame of mind" and that the jury likely used such evidence as proof of defendant's propensity to commit robberies. Specifically, he urges that evidence of the prior incidents was not necessary to establish intent or motive, as it was already obvious that Song and Wang's attackers acted with intent: "The State presented evidence that two people beat up [Wang and Song] without provocation and took

property from them. Obviously, these acts constituted robbery; they are not the sort of actions that could plausibly be undertaken by an ordinary human being without knowledge of what one was doing." Thus, he urges that the evidence of prior crimes had "only nominal probative value."

¶ 37 Defendant further argues that any probative value of the prior incidents was "substantially outweighed by the serious possibility that a jury could conclude that [defendant] was in fact one of the robbers because the evidence suggested that he had a propensity to rob people." He argues that "the evidence could have led the jury to infer that [defendant] had committed the charged crimes because he had a propensity to commit robberies, the very inference forbidden by Rule 404(b)" of the Illinois Rules of Evidence. He notes that the prosecutor's discussion of the prior crimes in closing argument increased the risk that the jury considered the evidence for this improper purpose. Defendant further argues that the error in the admission of evidence of prior robberies "cannot be found harmless beyond a reasonable doubt."

¶ 38 Under the rules of evidence, "[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith ***. Such evidence may also be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ill. R. Evid. 404(b).

¶ 39 "Generally, evidence that the defendant in a criminal case has engaged in other bad acts on a different occasion is not admissible to show that the defendant had a propensity to commit crime." *People v. Clark*, 2015 IL App (1st) 131678, ¶ 26. "[W]here the prior bad act involved *** the same offense for which defendant was standing trial, the law recognizes that it is a natural human reaction to think that, if defendant committed a previous [robbery], it is more likely that he committed *this* [robbery]. It is precisely because that inference is so enticing that

the law disallows it, because it can overshadow the jury's consideration of other evidence. [Citation.]" (Emphasis in original.) *Id.* ¶ 27.

¶ 40 "Nevertheless, evidence of prior bad acts may be admitted to prove any matter other than propensity that is relevant to the case, including 'motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.'" *Id.* ¶ 28 (quoting Ill. R. Evid. 404(b)). "If the trial court *** determines that the probative quality of the evidence outweighs any prejudice to the defendant, the evidence may be admitted. [Citation.] The admission of other-crime evidence rests within the trial court's discretion and will not be overturned absent an abuse of that discretion. [Citations.]" *Id.*

¶ 41 "The erroneous admission of evidence of other crimes carries a high risk of prejudice and ordinarily calls for reversal. [Citation.] However, where the error is harmless beyond a reasonable doubt, reversal is not required. [Citation.] In deciding whether the admission of other-crime evidence is harmless beyond a reasonable doubt, we must ask whether the other-crime evidence was 'a material factor in [defendant's] conviction such that without the evidence the verdict likely would have been different.' [Citation.] 'If the error is unlikely to have influenced the jury, admission will not warrant reversal.' *Id.* ¶ 65.

¶ 42 We find that *Clark* is instructive. In that case, during defendant's trial for a 2012 bicycle theft, the trial court permitted the State to introduce evidence describing defendant's theft of a bicycle in 2008. *Id.* ¶ 1. The trial court instructed the jury that the evidence could only be considered "on the issue[s] of the defendant's identity and intent." *Id.* ¶ 16. We found that the admission of the evidence was erroneous, as it "did not prove his intent to commit theft or his identity *** in a permissible way" but "relied on an inference that defendant possessed a propensity to commit theft, which is prohibited under the rules of evidence." *Id.* ¶ 3.

¶ 43 We first concluded that the prior theft was not properly admitted to show the issue of intent in the 2012 theft, because the 2012 theft was obviously intentional: "[defendant's] intent in this case was not at issue. The evidence undoubtedly showed that the individual who took [victim's] bicycle cut its lock, rode it away, removed its wheel, put it in a car, and drove away. The only conclusion to be drawn from this evidence was that the perpetrator intended to steal [the] bicycle." *Id.* ¶ 34. We additionally concluded that evidence of the prior theft was not properly admitted to prove identity, as "[t]he 2008 theft did not share any piece of evidence with the 2012 theft that would link defendant to both offenses, and the offenses were not so distinctive and similar to one another to establish a *modus operandi*." *Id.* ¶ 62. Thus, we concluded that the trial court abused its discretion in admitting evidence of the 2008 theft. *Id.*

¶ 44 Importantly, however, our decision in *Clark* went on to conclude that "the trial court's erroneous admission of the 2008 theft was harmless beyond a reasonable doubt" given the evidence of defendant's guilt in the 2012 theft, including that the bicycle owner "saw defendant three separate times in broad daylight" and recorded defendant's license plate number, which permitted the police to obtain defendant's name. *Id.* We concluded that, "in light of the overwhelming evidence against defendant *** we cannot say that the jury's verdict would have been any different had the State not relied upon the improper other-crime evidence. *Id.* ¶ 66.

¶ 45 Under the facts of this case, we reach a similar conclusion. We agree with defendant that admission of evidence of the prior robberies was erroneous, as it had minimal probative value. Although the trial court admitted that evidence to show intent, there was no dispute at trial that Wang and Song were victims of an intentional attack. Wang's testimony (which was not contradicted or disputed) described an unprovoked attack in which two men approached from behind, punched and choked Wang and Song, and took property from them. Similar to the

actions of the bicycle thief in *Clark*, the actions of attacking and robbing the victims in this case were undoubtedly intentional. Further, defendant in this case never raised any suggestion that the perpetrators lacked intent to attack the victims or take property. Thus, the evidence of prior robberies had little, if any, probative value on the issue of intent. Further, we agree with defendant that any probative value was significantly outweighed by the risk that the jury would consider the prior robberies for an improper purpose—that is, to infer that defendant had a propensity to commit robbery and so was more likely the perpetrator in this particular case. Thus, we agree that the trial court abused its discretion in admitting such evidence. However, the evidence in this case was not close.

¶ 46 Therefore, such error was harmless, in light of the other overwhelming evidence of defendant's guilt. Improper introduction of other-crimes evidence is harmless error when a defendant is neither prejudiced nor denied a fair trial based upon its admission. *People v. Johnson*, 406 Ill. App. 3d 805, 813 (2010). In deciding if there was harmless error, we ask "whether the other-crime evidence was 'a material factor in [defendant's] conviction such that with[out] the evidence the verdict likely would have been different. [Citation.] If the error is unlikely to have influenced the jury, admission will not warrant reversal." *Clark*, 2015 IL App (1st) 1316798, ¶ 65.

¶ 47 Given the ample additional evidence of guilt, we cannot say that the other crimes evidence had a material impact on the jury's decision to convict defendant. Apart from the evidence of prior robberies, the State presented Wang's testimony describing the attack and identifying defendant. Wang's testimony was corroborated by Lovett's testimony that defendant repeatedly called Lovett using Wang's stolen cell phone. Perhaps most importantly, the jury also viewed defendant's videotaped interview in which he explained that he and Clark attacked and

robbed two men, in order to obtain money after gambling losses. Defendant's appellate briefing now argues that defendant's confession was unreliable because the police "fed [defendant] most of the details of the robbery during their interrogation *** and implied that admitting his involvement would result in better treatment ***, which could have led [defendant] to falsely confess in hopes of leniency." Defendant also argues that Wang's testimony conflicted with defendant's videotaped statement, in that Wang testified that defendant took $69 and a cell phone from him, whereas defendant told police that he took $600 but did not take a phone. He now argues that "Given the risk that [defendant] falsely confessed, there is a significant possibility that the jury would not have credit[ed] Qiwen Wang's identification" of defendant, had the jury not also heard evidence of his involvement in prior crimes.

¶ 48 We find these arguments unavailing. First, we note that this appears to be the first time that defendant has suggested that his confession was "false." Indeed, his counsel's closing argument to the jury did not dispute his confession. Rather, defense counsel's argument conceded that defendant committed an aggravated battery of Wang, but argued that it was Clark who killed Song and that Clark's killing of Song was a "separate" event, so that defendant was not responsible for Song's death. Moreover, despite any inconsistency between Wang's trial testimony and defendant's videotaped statements, the jury could easily conclude (even without the evidence of prior robberies), that defendant and Clark engaged in a coordinated attack on Wang and Song, such that defendant was legally responsible for Song's death.

¶ 49 In sum, there was ample evidence of defendant's guilt, even absent the evidence of defendant's prior crimes. Given the strength of the State's case, we do not discern any significant probability that he would have been acquitted, had the jury never heard the disputed evidence.

As such, we conclude that admission of such evidence was harmless error. We thus reject defendant's request for reversal on the basis of that evidence.

¶ 50 We now turn to defendant's alternative argument on appeal, which challenges his conviction for aggravated battery, on the basis that the trial court failed to comply with our supreme court's holding in *People v. Medina*, 221 Ill. 2d 394 (2006). He claims that the court violated *Medina* when it instructed the jury on aggravated battery as a lesser-included offense of attempted murder, without ascertaining defendant's "personal consent" to that instruction. He claims that under *Medina*, when defense counsel requested an instruction on that offense, "the court had the clear duty to both advise [defendant] of the penalties associated with aggravated battery and ask him whether he agreed with seeking the instruction on the offense." He claims that the trial court failed to make the inquiries required by *Medina* and erred in allowing the instruction over the State's objection "without learning [defendant's] wishes."

¶ 51 Defendant acknowledges that he did not preserve this claim of error in the trial court. Despite his forfeiture, he urges that we review this claim as plain error as it "involves a fundamental right." That is, he contends that the trial court's error in failing to comply with *Medina* was "so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." He urges that, due to the *Medina* error, his conviction for aggravated battery cannot stand. Further, since the jury already acquitted him of attempted murder, he asserts that he cannot be retried on that offense as a matter of double jeopardy. Thus, he requests outright reversal of his aggravated battery conviction, rather than a new trial.

¶ 52 The State's response is two-fold. First, it suggests that defendant has not met his burden to show that the trial court failed to comply with *Medina*. The State emphasizes that the trial court transcript indicates that there were "off the record" discussions regarding jury instructions.

The State suggests that the *Medina* inquiries may have occurred off the record. Thus, the State urges that defendant cannot show that any *Medina* error occurred. Second, the State argues that, even assuming that the trial court did not make the inquiries required by *Medina*, this is not the sort of "structural" error that qualifies for review under the second prong of the plain-error doctrine.

¶ 53 In *Medina*, our supreme court considered whether "the record must disclose that [defendant], personally, made the ultimate decision" as to whether to tender a lesser-included offense instruction." *Id.* at 402. *Medina* described certain inquiries that a trial court "should" make to help ensure that a defendant understands and agrees to the decision to seek such a jury instruction:

> "Where a lesser-included offense instruction is tendered, a defendant is exposing himself to potential criminal liability, which he otherwise might avoid, and is in essence stipulating that the evidence is such that a jury could rationally convict him of the lesser-included offense. Consequently, when a lesser-included offense instruction is tendered, we believe the trial court should conduct an inquiry of defense counsel, in defendant's presence, to determine whether counsel has advised defendant of the potential penalties associated with the lesser-included offense, and the court should thereafter ask defendant whether he agrees with the tender." *Id.* at 409.

¶ 54 In this case, the parties acknowledge that defendant did not preserve his claimed violation of *Medina* at trial. See *People v. Thompson*, 238 Ill. 2d 598, 611 (2010) ("To preserve a claim for

review, a defendant must both object at trial and include the alleged error in a written posttrial motion."). In turn, we consider whether his claim is reviewable as plain error. In criminal cases, "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." Ill. S. Ct. R. 615(a). Our supreme court has explained:

> "[T]he plain-error doctrine bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence. In the first instance, the defendant must prove 'prejudicial error.' *** In the second instance, the defendant must prove there was plain error and that the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. [Citation.] Prejudice to the defendant is presumed because of the importance of the right involved, '*regardless* of the strength of the evidence.' (Emphasis in original.) [Citation.] In both instances, the burden of persuasion remains with the defendant." [Citation.]" *People v. Piatkowski*, 225 Ill. 2d at 564-65 (2007).

¶ 55 "The first-step of plain error review is determining whether any error occurred. [Citation.]" *Thompson*, 238 Ill. 2d at 613. In this case, we find there was error. There is nothing in the record showing that the trial court complied with *Medina* by "conduct[ing] an inquiry of defense counsel, in defendant's presence" to determine if counsel had advised defendant of the potential penalties associated with aggravated battery; similarly there is no instance in the record

where the trial court "ask[ed] defendant whether he agree[d] with the tender" of that instruction. *Medina*, 221 Ill. 2d at 409.

¶ 56 We note the State's argument that defendant cannot show any error, due to the possibility that the trial court may have conducted the *Medina* inquiries during off-the-record discussions. We find the State's argument unpersuasive, as it would impose upon defendant a virtually impossible burden of proving a negative proposition—that at no point, on or off the record, did the trial court make the *Medina* inquiries. Imposing such a burden does not comport with our reading of *Medina*; notably, the defendant in *Medina* argued for reversal "*because the record fails to disclose* that he, personally, made the ultimate decision not to tender a lesser-included offense instruction." *Id*. at 397. (Emphasis added.) Thus, we read *Medina* to require the trial court to make the relevant inquiries on the record. See *People v. Burton*, 2015 IL App (1st) 131600, ¶ 28 (finding error where "the trial transcript reveals that the court did not make the required inquiry" under *Medina*). Thus, on the record before us, we find that there was error under *Medina.*

¶ 57 We next consider whether the trial court's failure to comply with *Medina* constituted plain error. Defendant relies on the second prong of the plain-error doctrine, which applies where 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. [Citation.]" *Thompson*, 238 Ill. 2d at 613. Defendant asserts: "The seriousness of the error here is obvious from its effect: without [defendant's] consent, the jury convicted him of an offense on which it otherwise would not have even been instructed."

¶ 58 The State responds that our court has already determined, in *People v. Burton*, 2015 IL App (1st) 131600, that a failure to comply with *Medina* does not qualify as second-prong plain

error. Thus, we review that decision. The defendant in *Burton* was convicted of burglary for stealing a car from a factory parking lot. *Id.* ¶ 1. At trial, defense counsel requested a jury instruction on the lesser-included offense of criminal trespass to a vehicle, and the trial court gave that instruction over the State's objection. *Id.* ¶ 11.

¶ 59 On appeal, the defendant claimed that the trial court erred in granting his counsel's request for the instruction, without asking defendant if he agreed with the instruction and understood its consequences. *Id.* ¶1. The *Burton* defendant (like the defendant in this case) conceded that he did not preserve the issue at trial, and sought review under the second prong of the plain error doctrine. *Id.* ¶ 29. The *Burton* defendant "assert[ed] that automatic reversal *** is warranted because he was unable to exercise a fundamental right." *Id.*

¶ 60 Our court found that there was no plain error, reasoning that:

> "[E]ven an error of this magnitude does not always mandate reversal under the second prong of plain error review. Our supreme court has held that automatic reversal is only required where an error is deemed 'structural,' *i.e.* a systemic error which serves to erode the integrity of the judicial process and undermine the fairness of the defendant's trial. [Internal quotation marks omitted.] We do not find Burton established that the circuit court's failure to make the necessary inquiry amounted to structural error." *Id.* ¶ 30.

¶ 61 The *Burton* decision further recognized: "We have held that a trial court's failure to ask whether a defendant agreed with the decision to tender a lesser-included offense jury instruction does not, in fact, mean that the defendant disagreed with the tender. [Citation.] Burton does not

claim that he actually did not take part in the decision to tender the criminal trespass to vehicle instruction or that he disagreed with the tender." *Id.* ¶ 31.

¶ 62 Finally, the *Burton* decision noted:

> "Moreover, this court has found that a circuit court's failure to comply with *Medina*'s directive and inquire whether the defendant consented to the tender of a lesser-included offense instruction does not amount to a violation of that defendant's right to a fair trial, where, as here, the defendant ultimately was not convicted of the lesser offense. See *People v. Calderon*, 393 Ill. App. 3d 1, 12 (2009) ('We fail to perceive any error under *Medina* where he was not convicted of the lesser-included offense. The danger *Medina* seeks to avoid—a defendant convicted of an uncharged offense to which he unknowingly concedes liability by way of a jury instruction he has not tacitly or expressly approved—while it may have been present here, did not harm the defendant.')." *Id*. ¶ 32.

Our court proceeded to conclude that the *Burton* defendant "failed to meet his burden of showing that the error affected the fairness of his trial and constituted plain error under the second prong of plain-error review." *Id.*

¶ 63 The State argues that *Burton* is controlling in this case, such that there is no plain error. Defendant responds that *Burton* is "plainly distinguishable, as the defendant in that case was not convicted of the lesser-included offense, and hence not prejudiced by the instructions." In contrast, defendant in this case argues that he suffered the "danger *Medina* seeks to avoid," as he

was "convicted of an uncharged offense *** by way of a jury instruction he has not tacitly or expressly approved."

¶ 64 For the following reasons, we find that defendant's argument is unavailing. We acknowledge that, in *Burton*, we observed that since defendant was not convicted of the lesser offense, he could not have actually been prejudiced by his counsel's request for an instruction on that offense. See *id*. ¶ 32. However, this does not mean that, whenever a defendant is convicted of a lesser offense, we are required to *assume* that defendant suffered prejudice from the trial court's failure to comply with *Medina*. We reiterate that, for the error to meet the threshold of second-prong plain error, we would need to find that the failure to comply with *Medina* deprived defendant of a fair trial, or undermined the integrity of the judicial process.

¶ 65 In our view, *Medina* does not suggest that the inquiries are so crucial, that their absence from the record necessarily gives rise to a presumption of an unfair trial or prejudice to defendant. Indeed, as recognized in *Burton*, the mere failure to conduct the *Medina* inquiry does not necessarily mean that a defendant, in fact, disagreed with the decision to request an instruction on a lesser-included offense. See *id*. ¶ 31. In other words, prejudice cannot be presumed from a failure to comply with *Medina.*

¶ 66 In this respect, we find guidance in our supreme court's plain-error analysis in *People v. Thompson*, 238 Ill. 2d 598 (2010). In that case, the trial court failed to comply with Supreme Court Rule 431(b), which "required the trial court to ask each potential juror whether he understood and accepted that defendant was presumed innocent of the charge, the State had the burden of proving him guilty beyond a reasonable doubt, defendant was not required to present any evidence, and his decision against testifying could not be held against him [Citation.]" *Id.* at 601-02. That error was not preserved at trial, but our appellate court applied plain-error review

and "concluded that the trial court committed reversible error by failing to comply with Rule 431(b)." *Id.* at 605.

¶ 67 Our supreme court, however, determined that non-compliance with Rule 431(b) did not constitute second-prong plain error, because the trial court's failure to comply with that rule did not establish that defendant was, in fact, deprived of a fair trial. Our supreme court reasoned:

> "A finding that defendant was tried by a biased jury would certainly satisfy the second prong of-plain-error review because it would affect his right to a fair trial and challenge the integrity of the judicial process. Critically, however, defendant has not presented any evidence that the jury was biased in this case. Defendant has the burden of persuasion on this issue. *We cannot presume the jury was biased simply because the trial court erred in conducting the Rule 431(b) questioning."* (Emphasis added.) *Id.* at 614.

¶ 68 Our supreme court recognized that, prior to an amendment effective in 2007, Rule 431(b) contained "permissive language" that "requir[ed] questioning only upon the defendant's request," whereas the amended rule "imposes a duty on trial courts to perform the questioning in every criminal case tried by a jury." *Id*. Nevertheless, the *Thompson* court reasoned that:

> "Our amendment to Rule 431(b) does not indicate that compliance with the rule is now indispensable to a fair trial. As we have explained, the failure to conduct Rule 431(b) questioning does not necessarily result in a biased jury ***. Although the amendment to the rule serves to promote the selection of an impartial jury by

> making questioning mandatory, Rule 431(b) questioning is only one method of helping to ensure the selection of an impartial jury. *** A violation of Rule 431(b) does not implicate a fundamental right or constitutional protection, but only involves a violation of this court's rules. [Citation.] Despite our amendment to the rule, we cannot conclude that Rule 431(b) questioning is indispensable to the selection of an impartial jury." *Id.* at 614-15.

¶ 69 The supreme court concluded that since the "Defendant has not established that the trial court's violation of Rule 431(b) resulted in a biased jury" he "failed to meet his burden of showing the error affected the fairness of his trial and challenged the integrity of the judicial process." *Id.* at 615. Thus, the *Thompson* court found that "the second prong of plain-error review does not provide a basis for excusing defendant's procedural default." *Id.* at 615.

¶ 70 In this case, the trial court's error in failing to conduct the *Medina* inquiry is analogous to the trial court's failure to comply with Rule 431(b) in *Thompson*. Just as *Thompson* held that the trial court's failure to comply with Rule 431(b) does not permit a presumption that the jury was biased; a trial court's failure to make the inquiries required by *Medina* does not necessarily lead to the presumption that defendant did not understand or agree to jury instructions on a lesser offense.

¶ 71 We conclude that defendant cannot meet his burden, under the second prong of the plain-error doctrine, to show that the *Medina* error affected the fairness of his trial and challenged the integrity of the judicial process. Accordingly, the second prong of plain-error review does not apply. Thus, his challenge to the aggravated battery conviction, based on the trial court's failure to comply with *Medina*, fails.

¶ 72 Separately, we note that we find defendant's argument remarkable, if not disingenuous, since it appears, in all likelihood, that he *benefited* from the strategic decision to seek the jury instruction on aggravated battery. As the State points out, he very well could have been convicted of attempted murder, had his trial counsel not sought the aggravated battery instruction. In effect, his appellate argument challenges a strategy that his counsel selected and that, most likely, benefited him. This scenario resembles invited error, under which "an accused may not request to proceed in one manner and then later contend on appeal that the course of action was in error." *People v. Carter*, 208 Ill. 2d 309, 319 (2003). Notably, we have applied that doctrine to preclude a defendant from challenging jury instructions that he affirmatively requested at trial. *People v. Patrick*, 233 Ill. 2d 62, 77 (2009) ("We decline to address Patrick's plain-error claim because Patrick invited any error by submitting the [allegedly erroneous] jury instruction"); *People v. Parker*, 223 Ill. 2d 494 (2006) ("Even if we were to conclude that any error occurred in instructing the jury in this case *** because defense counsel submitted the instruction, defendant cannot directly attack the instruction").

¶ 73 We do not find that these facts fall within the scope of invited error, since the nature of the asserted error in this case is not the trial court's decision to give the jury instruction requested by defense counsel, but rather the trial court's failure to confirm defendant's agreement to that instruction on the record, pursuant to *Medina*. Defendant is trying to use *Medina* to invalidate his "lesser included offense" conviction, when it appears that he benefited from the instruction on that lesser offense. Surely, our supreme court did not intend that *Medina* would be used in this manner. Thus, we caution defense counsel in this and other cases to be careful in deciding whether an argument based on *Medina* is appropriate.

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

¶ 75 Affirmed.