No. 2—09—0995
Order filed May 13, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	No. 09—CF—74
and	)	
ANTHONY L. DAVIS,	)	Honorable Allen M. Anderson,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Zenoff and Birkett concurred in the judgment.

ORDER

Held: The defendant was not deprived of a fair trial due to the admission of other crimes evidence. The defendant's sentences for obstructing justice and resisting a peace officer must be vacated and remanded for re-sentencing because those sentences exceeded the maximum sentence allowed by statute.

Following a jury trial, the defendant, Anthony Davis, was convicted of aggravated battery (720 ILCS 5/12—4(b)(18) (West 2008)), resisting a peace officer (720 ILCS 5/31—1(a—7) (West 2008)), and obstructing justice (720 ILCS 5/31—4(a) (West 2008)) and was sentenced to seven years' imprisonment. On appeal, the defendant argues (1) he was denied a fair trial due to the

admission of other crimes evidence and (2) the sentences imposed for the offenses of resisting a peace officer and obstructing justice were unlawful. We affirm the defendant's convictions, vacate his sentences for resisting a peace officer and obstructing justice, and we remand for additional proceedings.

On April 27, 2009, the defendant was charged with two counts of aggravated battery (720 ILCS 5/12—4(b)(18) (West 2008)), two counts of resisting a peace officer (720 ILCS 5/31—1(a-7) (West 2008)), and two counts of obstruction of justice (720 ILCS 5/31—4(a) (West 2008)). The charges alleged that, on December 28, 2008, the defendant obstructed justice by furnishing false information regarding his true identity to Office Wagner[1] of the Aurora police department in order to prevent his prosecution. The charges further alleged that, on January 2, 2009, the defendant misrepresented his identity to Officers David Brian and Tom McNamara in order to avoid prosecution. Additionally, the defendant allegedly committed aggravated battery and resisting a peace officer by striking both Officers Brian and McNamara.

On July 16, 2009, the State filed a motion in limine seeking to admit the defendant's prior convictions in the event that he testified at trial. Following a hearing, the trial court determined that some of the defendant's prior convictions, such as one for aggravated battery, would be too prejudicial. The trial court ruled, however, that the State would be allowed to impeach the defendant with convictions for burglary, unlawful possession of a stolen motor vehicle, and theft.

On July 20 and 21, 2009, the trial court conducted a jury trial on the charges against the defendant. Officer Wagner testified that on December 28, 2008, around midnight, he was dispatched to 946 Oliver Avenue, apartment 11, in Aurora to investigate a noise complaint. Over defense

[1] Officer Wagner was identified only by his last name.

counsel's objection, Officer Wagner testified that one of the tenants had called to complain about the excessive noise coming from the apartment, and what she believed was the odor of cannabis. This was the second time that day that Officer Wagner had been dispatched to that apartment to investigate a noise complaint. When he arrived at the apartment around midnight, he heard what he believed was a physical altercation inside. He knocked on the door and spoke with the tenant and two other guests inside, one of whom was the defendant. Officer Wagner entered the apartment and requested that the defendant provide his name and his date of birth. The defendant stated that his name was "Fred Davis" and that his date of birth was June 12, 1966. Officer Wagner later learned that the defendant's real name was Anthony Davis, and that his date of birth was February 3, 1968. Additionally, Officer Wagner discovered that the defendant had outstanding warrants for his arrest at the time of the encounter.

Officer David Brian testified that, on January 2, 2009, he and Officer Tom McNamara were doing a routine patrol through the apartment complexes at 946 Oliver Avenue pursuant to a trespass agreement the police had with the management of the apartment building. Officer Brian testified that he heard loud voices coming from apartment No. 11 on the second floor. He recognized the men walking out of the apartment, and he knew that they did not live there. He spoke with them briefly to "find out what they were up to." The officers then approached the open door of the apartment, realized the tenant was not present, but saw the defendant and two other men sitting inside. Officer Brian requested that the defendant step outside to speak with the officers. The defendant complied. Officer Brian asked the defendant for his name and date of birth. The defendant responded that his name was "Fred Davis," paused a few seconds, and then stated that his date of birth was June 12, 1966.

Officer Brian then, out of concern for his safety, asked the defendant to place his hands on the wall in order to pat him down. During the pat-down, Officer Brian stated that he did not believe that the defendant was being truthful about his identity. At that point, the defendant used his right arm to elbow Officer Brian in the face and cut his lip open. After Officer Brian was hit, both officers attempted to place handcuffs on the defendant. The defendant resisted the officers and began flailing his arms and fighting. Both officers managed to wrestle the defendant to the ground. Officer Brian then testified that the defendant "literally picked us up while we were on his back and started carrying us down the hallway as were fighting with him." The defendant carried them for approximately 25-30 feet until he reached a doorway to stairs that led to the ground floor.

When they reached the doorway, the defendant wrestled his arms free and began hitting Officer Brian in the head and grabbing at his gun. Eventually, the defendant broke free and began running down the stairs. Officer McNamara jumped on his back, and both he and the defendant fell to the ground. At this point, the officers managed to restrain the defendant and take him into custody. Afterwards, Officer Brian called an ambulance to the scene along with help from other law enforcement. During the altercation, both officers continually ordered the defendant to stop resisting with no success. The struggle lasted approximately three minutes.

After the altercation, Officer Brian learned that the defendant had given him false identification as his actual name was Anthony Davis and his real date of birth was February 3, 1968. Additionally, Officer Brian learned that the defendant had four outstanding warrants for his arrest. Officer Brian testified that, due to his altercation with the defendant, he had suffered injuries to the mouth and forehead.

Officer McNamara testified consistently with Officer Brian. Officer McNamara additionally testified that he had suffered injuries to his head and knee due to his altercation with the defendant.

Jeremy Malmborg and Sahak Charukian testified that they were at apartment No. 11 on January 2, 2009, when the defendant encountered the police. Charukian testified that he did not see the defendant strike the officers. On cross-examination, Charukian acknowledged that, following the altercation, he told Officer Christa Rees of the Aurora police department that he observed the defendant "start[] going crazy on the officers for no reason." On re-direct examination, he testified that he told the police that the defendant "started going crazy" because he was scared at that time.

Malmborg testified that he did not observe the defendant throw any punches; rather, he observed Office McNamara use a stun gun to subdue the defendant. On cross-examination, he acknowledged that he told Officer Rees on the night of the altercation that he saw the defendant "going crazy on the officers for no reason." On re-direct examination, he testified that he made that comment to Officer Rees because he was in shock.

The defendant testified that he lived in apartment No. 11, and he was there when the police arrived on January 2, 2009. He was visiting with Malmborg and Charukian. The defendant stood up when the police came to the door and motioned for Malmborg and Charukian to step out of the apartment. He then told the police, who wanted him to step out, that he was not going to. He told them that if they did not have a warrant for him, he would close the door. As he tried to close the door, an officer put his foot in and pushed the door open. The officer then motioned for him to come closer, and he did so. The officers then grabbed him.

As he held onto the door, the police hit him in the face a couple of times. They were able to throw him onto the floor, telling him he did not live there. The defendant hollered out for Robert,

the building manager, who could tell the police he lived there. He then felt something hot on his back and grasped for air. He told the police he had a bad heart. He said he was trying to get to Robert's apartment, at the other end of the hall by the stairs, but the police jumped on him and hit him. They also told him to stand up, and when he tried, he felt more burning. When he got to the stairs, he felt a knee in his back, and he fell down the stairs. He felt himself being dragged, and wound up at the bottom of the landing by the door to the building. The police kept hitting him in the back with the "hot thing." The door "flew open" and he was handcuffed.

After the police dragged him outside, the defendant felt like something was coming out of his chest. An ambulance arrived and he was taken to a hospital, where he stayed for six or seven days. The defendant denied stepping out of the apartment voluntarily and denied hitting an officer with his elbow or anything.

On cross-examination, the defendant stated that his birthday was February 3, 1968. He acknowledged that, on December 28, 2008, he told Officer Wagner that his name was Fred Davis and that his birth date was June 12, 1966. He denied giving any inaccurate information to Officer Brian regarding his name or birth date.

Following the defendant's testimony, the State then offered into evidence, for impeachment purposes, a certified copy of the defendant's conviction of theft from Kendall County in case No. 06—C—376. Along with the theft conviction, there were two misdemeanor battery convictions listed on the certified document that were read aloud by the prosecutor. Defense counsel objected, arguing that, because the trial court had already ruled that a certain aggravated battery conviction was too prejudicial on the motion in limine, the misdemeanors also should not be admitted into evidence. The prosecutor then explained that when she received the certified copy of the theft conviction, there

were accompanying misdemeanor convictions listed on the same page. The prosecutor further explained that she did not redact the misdemeanor offenses because it was a certified copy. The trial court then allowed the prosecutor to redact the misdemeanor battery charges. Defense counsel and the trial court then engaged in the following colloquy:

> "MR. MORELLI [Defense Counsel]: I am at kind of a loss as to whether to instruct the jury to disregard the domestic battery or not call further attention to it.
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> * * *
>
> THE COURT: All right. My expectation is that the [S]tate will go ahead and introduce these. You will object or not as the case may be and I will instruct them orally that this only for purposes of credibility and not for any other purpose, so not explain the redacted. I don't know what else to do.
>
> MR. MORELLI: Okay."

The State proceeded to introduce the redacted copy, and the trial court then instructed the jury that evidence of the defendant's previous convictions should only be considered as it might affect his credibility.

On rebuttal, Officer McNamara testified that he did not use a stun gun to subdue the defendant. He also did not believe that the Aurora police department was equipped with any stun guns.

At the close of the evidence, defense counsel filed a motion for mistrial based on Officer Wagner's testimony concerning cannabis, and the State's introduction of the defendant's misdemeanor battery convictions. The trial court denied the motion.

At the close of the trial, the jury convicted the defendant on all six counts. Following the denial of his posttrial motion, the trial court sentenced the defendant to a single term of seven years imprisonment on all the counts. The defendant thereafter filed a timely notice of appeal.

The defendant's first contention on appeal is that he was deprived of a fair trial due to the improper admission of other crimes evidence. Specifically, the defendant claims that he was prejudiced due to (1) the admission of evidence of suspected drug use and (2) prior battery convictions that were admitted in violation of an order in limine as well as Illinois case law.

Evidence showing that the defendant committed prior criminal offenses is improper where its purpose is to demonstrate the defendant's propensity to commit crime. People v. McKibbins, 96 Ill. 2d 176, 182 (1983). Further, evidence that is not relevant is improper. Relevant evidence is that which tends to prove or disprove a fact in controversy or renders a matter at issue more or less probable. People v. Pawlaczyk, 189 Ill. 2d 177, 193 (2000). Steps taken to investigate a crime are not relevant—and hence not admissible—unless they specifically connect the defendant to the offense in question. People v. Jackson, 232 Ill. 2d 246, 268-69 (2009). Evidentiary rulings are within the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion. People v. Dunmore, 389 Ill. App. 3d 1095, 1105 (2009).

In order to preserve an issue for appellate review, a defendant must both specifically object at trial and raise the specific issue again in a posttrial motion to preserve the error for appellate review. People v. Woods, 214 Ill. 2d 455, 470 (2005). For an objection to be available for consideration on review, the specific grounds must be stated in order to provide the trial court the chance to properly consider and rule on the objection; otherwise, it will be deemed forfeited. Gausselin v. Commonwealth Edison Co., 260 Ill. App. 3d 1068, 1079 (1994).

Here, defense counsel objected to Officer Wagner's testimony that he was dispatched to the apartment at issue in part, due to a smell of cannabis, on the grounds of hearsay and not prejudice. As the reason defense counsel gave at trial for objecting to Officer Wagner is different than the reason the defendant raises on appeal, the defendant's argument is forfeited. See id. Nonetheless, the defendant asks that we consider his contention on the basis of plain error. Plain errors or defects affecting substantial rights may be noticed by an appellate court although they were not brought to the attention of the trial court. People v. Howell, 358 Ill. App. 3d 512, 519-20 (2005); Supreme Court Rule 615(a) (eff. January 1, 1967). This court will find plain error only where (1) the evidence was closely balanced or (2) the error so prejudiced the defendant's case that it resulted in an unfair trial. People v. Johnson, 208 Ill. 2d 53, 64 (2003). The defendant bears the burden of persuasion in establishing plain error. People v. Pratkowski, 225 Ill. 2d 551, 565 (2007).

Further, this court will not apply a plain error analysis if the alleged error was not a material factor in the defendant's conviction. See People v. Basden, 264 Ill. App. 3d 530, 551 (1994); see also People v. Cortes, 181 Ill. 2d 249, 285 (1998) (to warrant reversal, the improper evidence must be so prejudicial as to deny the defendant a fair trial, i.e., it must have been a material factor in his conviction such that without the evidence the verdict likely would have been different); People v. Ingram, 389 Ill. App. 3d 897, 902 (2009) (if the evidence is unlikely to have influenced the jury, its admission will not warrant reversal).

Here, we believe that it was improper for Officer Wagner to testify that he was dispatched to the apartment where the defendant was because, in part, there was a reported smell of cannabis coming from that apartment. Whether or not there was a smell of cannabis coming from the defendant's apartment was not relevant to the charges against the defendant. Nonetheless, we do not

believe that such evidence was material to the defendant's convictions. Officer Wagner only testified as to the charge against the defendant arising from the December 28, 2008 incident, that being the defendant obstructed justice by providing false information to him. The defendant acknowledged at trial that he had provided false information to Officer Wagner. In light of the defendant's admission to providing false information, the fact there may have been a smell of cannabis coming from the apartment where he was at was not material to his conviction for obstruction of justice.

We also do not believe that Officer Wagner's testimony regarding a report from December 28, 2008, was material to the defendant's convictions arising from his conduct on January 2, 2009. The central issue as to those convictions was whether the defendant gave false information to a police officer and then subsequently fought with two police officers. The defendant's use, or non-use, of cannabis was simply not material to those charges.

In so ruling, we find the defendant's reliance on People v. Agee, 307 Ill. App. 3d 902, 904 (1999), People v. Mikyska, 179 Ill. App. 3d 795, 804 (1989), and People v. Harbold, 124 Ill. App. 3d 363, 384 (1984), to be misplaced. In Agee, the defendant was charged with unlawful use of weapon. The arresting officer testified that the defendant was arrested in a "high narcotic activity area." He also testified that he observed the defendant perform a "hand to hand transaction" with another individual. Agee, 307 Ill. App. 3d at 903. The reviewing court determined that the admission of the above testimony was improper and that it constituted reversible error because it created the inference that the defendant was involved in drug trafficking. Id. at 904.

We believe that the Agee court determined that it was improper to suggest that the defendant was involved in drug trafficking because there is a well-recognized correlation between weapon

possession and drug trafficking. See People v. Reatherford, 345 Ill. App. 3d 327, 343 (2003) (drug dealers typically carry large amounts of drugs, currency and weapons). There is no similar correlation between cannabis use and aggravated battery, resisting a peace officer, and obstructing justice. Even if there was, the evidence is in this case as to the defendant's possible cannabis use was too minimal to have prejudiced him. Office Wagner never testified that he smelled cannabis when he went to the defendant's apartment. Rather, he testified that he saw two other people at the apartment. Thus, if in fact there was a cannabis smell coming from the defendant's apartment, the jury could not infer that the defendant was the one producing that smell.

In Mikyska, the defendant was charged with reckless homicide for driving at an unreasonable speed and reckless homicide for driving under the influence of drugs. Mikyska, 179 Ill. App. 3d at 797. The trial court allowed the State to introduce evidence regarding the defendant's prior illegal drug use. Id. at 797-798. On appeal, this court determined that the defendant was deprived of a fair trial because his past use of drugs was not relevant to the question of whether the defendant was under the influence of drugs at the time of the accident. Id. at 804. Therefore, unlike the instant case, there was a distinct connection between the crime the defendant was charged with (reckless homicide for driving under the influence of drugs) and the improper evidence that was admitted (prior drug usage).

In Harbold, a murder case, the reviewing court found that the defendant was deprived of a fair trial, in part due to the improper admission of testimony regarding weapons found in the defendant's home. Harbold, 124 Ill. App. 3d at 384. The reviewing court explained:

> "Under different facts, even intentional misconduct such as this might be considered harmless. In this case, however, the prosecution's consistent tactic of bolstering its case with irrelevancy militates against a finding of harmless error." Id.

Here, the State did not seek to consistently bolster its case with the admission of irrelevant evidence. Rather, although Officer Wagner's testimony regarding a smell of cannabis coming from the apartment where the defendant was at was irrelevant, that evidence was also minimal and not material to the charges against the defendant. Thus, Harbold is distinguishable from the case at bar.

We next turn to the defendant's argument that he was deprived of a fair trial due to the State's improper impeachment of his testimony. Specifically, the defendant contends that his rights were violated when the State informed the jury that he had prior misdemeanor convictions for both battery and domestic battery. The defendant insists that information was prejudicial because it violated a prior motion in limine. Further, relying on People v. Montgomery, 47 Ill. 2d 510 (1971), the defendant argues that evidence regarding his prior misdemeanor convictions was not admissible for attacking his credibility.

Evidence that a witness has been convicted of a crime is admissible, for the purpose of attacking that witness's credibility, but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted; or (2) involved dishonesty or false statement regardless of the punishment and (3) in either case, the judge further determines that the probative value of the evidence of the crime substantially outweighs the danger of unfair prejudice. Id. Here, as the defendant's misdemeanor battery convictions were not punishable by more than a year in prison nor did they involve dishonesty or false statements, they were not admissible. See id.

As the State improperly referred to those misdemeanor offenses, we next consider whether the trial court's actions sufficiently remedied that error. If a timely objection is made at trial, the trial court can correct the error by sustaining the objection or instructing the jury to disregard the remarks. People v. Hall, 194 Ill. 2d 305, 342 (2000). Further, a defendant cannot complain of the failure of the court to instruct on a certain aspect of the case where he has not requested the proper instruction. People v. Wendt, 183 Ill. App. 3d 389, 398 (1989); see also People v. Clark, 165 Ill. App. 3d 210, 214 (1988) (where the defendant requested that an instruction not be given, the court had no obligation to instruct sua sponte and did not deprive the jury of essential guidance in evaluating the evidence).

Here, the trial court did not specifically admonish the jury that it should not consider the defendant's prior misdemeanor battery convictions. Such an instruction would have cured the error. See Hall, 194 Ill. 2d at 342. However, the trial court did not give such an instruction because defense counsel indicated that he did not want to bring further attention to the jury that the defendant had prior misdemeanor battery convictions. Moreover, when the trial court indicated that it was not going to give such an instruction, defense counsel indicated his approval of that decision. Accordingly, based on defense counsel's strategic decision, the trial court's failure to instruct the jury to disregard the misdemeanor convictions did not deprive the defendant of a fair trial. See Wendt, 183 Ill. App. 3d at 398; Clark, 165 Ill. App. 3d at 214.

In so ruling, we find the defendant's reliance on People v. Dudley, 217 Ill. App. 3d 230 (1991) to be misplaced. In that case, over the defendant's objection, the State was allowed to introduce documents that included details regarding the defendant's prior felony convictions. On appeal, the reviewing court reversed the defendant's conviction, explaining that because the trial

court improperly overruled the defendant's objection, the defendant was "given no opportunity to 'nullify' the documents' prejudicial effects." Id. at 233. Here, in contrast, the trial court did not give a jury instruction that would have "nullified" the prejudicial effects of the misdemeanor other crimes evidence based on defense counsel's strategic decision that such an instruction should not be given.

The defendant further argues that based on the cumulative errors in this case, he was deprived of a fair trial. In instances where individual errors committed by a trial court do not merit reversal alone, the cumulative effect of the errors may deprive a defendant a fair trial. People v. Simmons, 342 Ill. App. 3d 185, 191 (2003). In such cases, due process and fundamental fairness require that the defendant's conviction be reversed and the cause remanded for a new trial. People v. Batson, 225 Ill. App. 3d 157, 169 (1992).

The errors in this case, considered cumulatively, did not deprive the defendant of a fair trial. As explained above, Officer Wagner's testimony as to a smell of cannabis coming from an apartment was minimal in scope and did not relate to a material part of the charges against the defendant. Because the admission of that testimony was ultimately a minor error, that testimony in conjunction with the State's improper reading of the defendant's prior misdemeanor offenses did not deprive the defendant of a fair trial. Our conclusion is bolstered by the fact that the evidence against the defendant was quite strong. The defendant acknowledged that he gave a false name and birth date to a police officer on December 28, 2008, and that he thereby obstructed justice. The evidence also showed that five days later, he gave the same false name and birth date to another police officer. Two police officers testified that the defendant struck them while the defendant was being patted down. Although two people whom the defendant was with on the night in question testified that they did not see the defendant throw any punches, both of them acknowledged that they informed another

police officer after the incident that the defendant had "gone crazy" on the officers for no reason at all.

The defendant' second contention on appeal is that the trial court erred in sentencing him. The defendant points out that his convictions for resisting a police officer and obstructing justice were Class 4 felonies which have a maximum sentence of 3 years' imprisonment, or 6 years' imprisonment for an extended term sentence. As the trial court sentenced him to seven years' imprisonment on those counts, the defendant argues that his sentences on those convictions must be vacated and reduced to terms within the statutory limits.

Although the defendant did not challenge his sentence below, a sentence that does not conform to a statutory requirement is void and can be challenged at any time. People v. Arna, 168 Ill. 2d. 107, 113 (1995). A claim that a sentence exceeds the statutory limit is a question of law, which we review de novo. People v. Dowding, 388 Ill. App. 3d 936, 946 (2009).

The maximum nonextended prison sentence that may be imposed for a class 4 felony conviction is three years. 730 ILCS 5/5—8—1(a) (7) (West 2008). The maximum extended sentence that may be imposed for a class 4 felony is six years. 730 ILCS 5/5—8—2(a)(6) (West 2008); 730 ILCS 5/5—5—5—3.2(a)(1)(b) (West 2008).

Here, the trial court sentenced the defendant to seven years' imprisonment on all the charges he was convicted, including the four class 4 felonies. As this sentence exceeded the statutory maximum for a class 4 felony, we must vacate the trial court's sentence as to those convictions. See Arna, 168 Ill. 2d at 113. We therefore remand for the trial court to impose a sentence that is within the statutory range.

For the foregoing reasons, we affirm the defendant's conviction, we vacate the defendant's sentence as to the class 4 felonies, and we remand for re-sentencing on those convictions.

Affirmed in part, vacated in part, and remanded.