2015 IL App (4th) 140147-U

NO. 4-14-0147

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
August 26, 2015
Carla Bender
4th District Appellate
Court, IL

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from |
| Plaintiff-Appellee, | ) | Circuit Court of |
| v. | ) | Edgar County |
| DANIEL L. ROBINSON, | ) | No. 12CF186 |
| Defendant-Appellant. | ) | |
| | ) | Honorable |
| | ) | Steven L. Garst, |
| | ) | Judge Presiding. |

JUSTICE STEIGMANN delivered the judgment of the court.
Justices Harris and Holder White concurred in the judgment.

**ORDER**

¶ 1 *Held*: The appellate court reversed defendant's conviction for aggravated battery (720 ILCS 5/12-3.05(d)(4) (West 2010)), concluding that the trial court erred by adjudicating defendant fit to stand trial based upon the parties' stipulation to that effect.

¶ 2 In October 2010, the State charged defendant, Daniel L. Robinson, with aggravated battery (720 ILCS 5/12-3.05(d)(4) (West 2012)), alleging that defendant grabbed the throat and punched the face of Andrew Hutson, a police officer engaged in his official duties. In April 2013, the trial court (1) found defendant unfit to stand trial and (2) committed him to the custody of the Illinois Department of Human Services (IDHS). However, in August 2013, after the State and defense counsel stipulated that defendant was fit based upon the conclusions of an IDHS psychiatrist, the court found defendant fit to stand trial. In December 2013, a jury convicted defendant of the charged offense. In January 2014, the court sentenced defendant to six years in prison.

¶ 3 Defendant appeals, arguing that (1) the trial court erred by relying on the parties' stipulation that defendant was fit to stand trial instead of making an independent judicial determination on that issue, and (2) the State's impeachment of defendant and two other defense witnesses with the mere fact of their prior felony convictions constituted plain error.

¶ 4 I. BACKGROUND

¶ 5 A. Pretrial Proceedings Related to Defendant's Fitness

¶ 6 In January 2013, several months after the State filed its charges in this case, defense counsel filed a motion under section 104-11 of the Code of Criminal Procedure of 1963 (Procedure Code) (725 ILCS 5/104-11 (West 2012)), requesting a determination as to defendant's fitness to stand trial. Later that month, the trial court granted the motion and appointed Dr. Marilyn Marks-Frey, a licensed clinical psychologist, to perform a fitness examination pursuant to section 104-13 of the Procedure Code (725 ILCS 5/104-13 (West 2012)).

¶ 7 On April 23, 2013, Marks-Frey filed a report pursuant to section 104-15 of the Procedure Code (725 ILCS 5/104-15 (West 2012)) in which she diagnosed defendant with (1) bipolar disorder (manic with psychotic features), (2) cyclothymic disorder, (3) intermittent explosive disorder, (4) psychotic disorder due to chronic substance abuse, (5) polysubstance dependence, and (6) antisocial personality disorder. Marks-Frey concluded in her report that defendant "suffers from multiple severe mental illnesses" and "there is very little likelihood that [defendant] will attain fitness within one year, regardless of treatment modality."

¶ 8 At an April 25, 2013, hearing, based upon the parties' agreement, the trial court (1) found defendant unfit to stand trial and (2) ordered defendant committed to IDHS custody on an inpatient basis for treatment and periodic evaluations regarding his fitness to stand trial. (We note that defendant's transfer from the Edgar County jail to IDHS custody did not occur until

June 18, 2013, after defense counsel filed a petition for rule to show cause against the secretary of IDHS.)

¶ 9 On August 14, 2013, Dr. Nageswararao Vallabhaneni, an IDHS psychiatrist, filed a progress report pursuant to section 104-18 of the Procedure Code (725 ILCS 5/104-18 (West 2012)). The four-page report noted that, since being in jail, defendant had (1) made an unprovoked attack on a fellow inmate and (2) threatened the lives of the two police officers who arrested him. Vallabhaneni also noted that defendant "was on suicide watch three weeks ago" and had previous suicide attempts. Defendant was hospitalized in 2007 for "a slit wrist, but he did not remember doing it." Defendant, who had used drugs and alcohol since his early teens, was placed in drug rehabilitation three times as an adolescent. Vallabhaneni found that defendant had "impaired insight, impulse control, and judgment," and his "memory, attention, concentration, and abstraction [were] unable to assess at the present time." Under a section of the report entitled, "Problem Identification & Treatment Interventions," Vallabhaneni wrote, "Patient presents well, but will need to evaluate. *** Patient refusing mood stabilizers/neuroleptics. May be necessary to Emergency Enforce and seek a court order to treat." Despite these findings, Vallabhaneni found defendant fit to stand trial, explaining as follows:

> "Initially, [defendant] was not able to acknowledge the charges and was argumentative. At present, he is willing to deal with his charges and return to court. He has a very clear cut understanding of the court proceedings and is going to assist his attorney. He is mentally stable behaviorally, appropriate, and rational in his thinking. He is fit to stand trial and can return to court."

¶ 10 On August 23, 2013, defense counsel, L. Kaye DeSelms Dent, filed an unopposed

motion to withdraw as counsel, citing her moving out of the jurisdiction as the reason she could no longer continue to represent defendant. At a hearing held that day, the trial court granted Dent's motion to withdraw and appointed Barry Schaefer as defendant's new counsel. The court then immediately addressed Vallabhaneni's progress report, as follows:

> "[THE COURT]: [Defendant] previously was found unfit to stand trial. He was sent to [IDHS] for a treatment plan, and I believe that they have now filed a report that [defendant] is fit to stand trial.
>
> Is there any dispute about that? Or would the parties so stipulate?
>
> [THE STATE]: Stipulate.
>
> [SCHAEFER]: Could I have a moment, Your Honor?
>
> THE COURT: Sure.
>
> (Discussion off the record.)
>
> [SCHAEFER]: With the brief opportunity I've had to talk with him, I believe we stipulate to that.
>
> THE COURT: Okay. So we'll show that that's stipulated."

(The above colloquy marked the final discussion of defendant's fitness in the trial court.)

¶ 11 B. Defendant's Trial

¶ 12 The parties presented the following evidence at defendant's December 2013 jury trial.

¶ 13 1. *The State's Evidence*

¶ 14 a. Sergeant Jeff Goodwin's Testimony

¶ 15 Sergeant Jeff Goodwin of the Paris City police department testified that on October 25, 2012, he went to a trailer home at 604 Kenton Street in Paris to arrest Dana Buntain, who was wanted on an outstanding arrest warrant. Officer Andrew Hutson volunteered to accompany Goodwin. Goodwin was wearing plain clothes and Hutson was wearing his full police uniform.

¶ 16 At the trailer, Goodwin knocked on the front door and defendant answered. Goodwin testified that he was familiar with defendant from previous police contacts. Goodwin asked defendant whether Buntain's father, Yondell DeWeese, was home. Defendant stared at Goodwin but did not respond. Yondell came to the door and, after Goodwin indicated that he was there to arrest Buntain on a warrant, Yondell invited Goodwin inside and directed him to the back bedroom where Buntain was staying. Goodwin entered the trailer and moved toward the back bedroom, at which time Hutson entered the trailer through a back door and followed Goodwin to the bedroom. Present inside the trailer at the time were Goodwin, Hutson, defendant, Buntain, Yondell, and Marsha DeWeese (Yondell's wife and Buntain's mother).

¶ 17 In the back bedroom, which Goodwin described as "very cramped" and "very, very tight," Goodwin found Buntain hiding under a blanket in the closet. He informed Buntain that he had a warrant for her arrest. Buntain "gave [Goodwin] some problems," such as refusing to come out of the closet and, after Goodwin pulled her out of the closet, resisting being handcuffed.

¶ 18 Hutson and defendant were also inside the small bedroom at the time Goodwin placed Buntain in handcuffs. Goodwin testified that defendant was being loud and obnoxious, and he was trying to intimidate the officers. Defendant was standing in the doorway of the small bedroom, blocking Goodwin and Hutson from leaving. Goodwin twice asked defendant to exit the doorway. Defendant raised his arms up, further blocking the doorway, and "started scream-

ing something about the Sons of Silence." Goodwin then informed defendant that he was under arrest. Goodwin grabbed defendant's hand and "attempted to put him in a control hold." Hutson stepped forward to help Goodwin place defendant in handcuffs. Goodwin testified that because of defendant's resistance and the tight quarters inside the bedroom, "the fight was on at that point."

¶ 19 Goodwin and Hutson struggled to place defendant into handcuffs. According to Goodwin, defendant showed signs of being under the influence of narcotics, such as mental disconnect and an increased pain tolerance. Goodwin pulled a Taser from Hutson's belt and administered it to defendant's body in "stun gun" mode. (A Taser does not fire projectile barbs in "stun gun" mode; instead, the end of the Taser delivers a shock by making direct contact with the target's body.) Goodwin's use of the Taser only made defendant more aggressive and angry. During the struggle, Buntain fled from the back bedroom. Goodwin left the bedroom to chase after Buntain, whom he found hiding in another closet in the trailer. By the time Goodwin returned to the back bedroom 30 or 45 seconds later, Hutson had successfully subdued defendant using pepper spray.

¶ 20 Goodwin never saw defendant punch or choke Hutson. He estimated that five to eight minutes elapsed between the time he received the call to go to 604 Kenton Street and the time defendant was placed in handcuffs.

¶ 21 b. Hutson's Testimony

¶ 22 Hutson testified that he was speaking with Marsha at the back door of the trailer when he saw Goodwin walking toward the back bedroom. Hutson entered the trailer and went to the back bedroom, where Goodwin was in the process of arresting Buntain. Defendant was also in the back bedroom, yelling and standing in an "aggressive position." After Goodwin decided

to arrest defendant, he set Buntain on the bed. When Goodwin and Hutson attempted to put defendant in handcuffs, defendant began "flailing" and jerking his hands away. Hutson testified that "immediately" after he and Goodwin attempted to put defendant's hands behind his back, defendant placed his hands "up and around" Hutson's throat. Hutson felt pain and a constriction of his airway. Hutson managed to maneuver defendant into a corner, at which point Goodwin used Hutson's Taser to stun defendant two times. The Taser intensified defendant's resistance to the officers. Hutson surmised that defendant was high on narcotics.

¶ 23 Hutson wrapped himself around defendant's body and brought defendant to the ground. With Hutson straddled on top of defendant's midsection, defendant struck the side of Hutson's face with his closed fist. After receiving that punch, Hutson sprayed defendant in the face with pepper spray. Defendant immediately stopped resisting. Hutson estimated 30 to 60 seconds elapsed between his first physical contact with defendant and his use of pepper spray. Later, at the sheriff's office, Hutson looked at a mirror and observed a fingernail mark on his neck. Hutson did not take photographs of his marks or seek medical attention.

¶ 24 2. *Defendant's Evidence*

¶ 25 a. Buntain's Testimony

¶ 26 Buntain testified that she was in the back bedroom with defendant when Hutson entered. Defendant asked what was going on, and Hutson told him to step aside. Goodwin entered and placed Buntain in handcuffs. At that point, Hutson was on top of defendant. After handcuffing Buntain, Goodwin also got on top of defendant. Hutson administered the Taser to defendant by firing the projectile barbs into defendant's body. Buntain ran out of the bedroom to a closet, where she stayed "for a good couple of minutes" while the officers struggled with defendant. Goodwin eventually retrieved Buntain from the closet and brought her outside to a

squad car. Defendant was being removed from the trailer at the same time. Buntain never witnessed defendant strike or choke either officer.

¶ 27 We note that the State initiated its cross-examination of Buntain with the following question:

"[THE STATE]: You are a convicted felon. Correct?

[BUNTAIN]: Yes."

¶ 28 b. Marsha's Testimony

¶ 29 Marsha testified that she was speaking with an officer at the back door when a struggle ensued in the back bedroom of her trailer. The officer entered the trailer and went to the back bedroom. Marsha followed and saw defendant, who was handcuffed behind his back, struggling with two officers. As the struggle continued, the bedroom door became shut. Marsha next observed the officers escorting Buntain and defendant out of the trailer through the back door.

¶ 30 c. Yondell's Testimony

¶ 31 Yondell testified that he was sleeping on the couch during the entirety of the incident. When he woke up, he saw the police driving away from the trailer. He denied giving anyone permission to enter the trailer.

¶ 32 We note that the State began its cross-examination of Yondell, as follows:

"[THE STATE]: Mr. DeWeese, you're a convicted felon.

Correct?

[YONDELL]: Yeah."

On cross-examination, Yondell could not recall whether he talked with Goodwin at his front door on the day of the incident.

¶ 33 d. Defendant's Testimony

¶ 34 Defendant testified that he did not remember everything that occurred during the incident because he drank a few beers and a quarter of a pint of tequila the night before. He remembered sitting on the floor of the back bedroom when two police officers entered. The first officer, Hutson, walked directly up to defendant and administered a Taser to his neck. About five seconds later, the other officer—whom defendant referred to as "Officer Ealy"—sprayed pepper spray in defendant's eyes. On direct examination, defendant denied making any physical contact with Hutson.

¶ 35 The State began its cross-examination of defendant, as follows:

> "[THE STATE]: [Defendant], you're a convicted felon. Is that correct?
>
> [DEFENDANT]: Yes."

On cross-examination, defendant testified that he could not recall, among other things, whether (1) the incident occurred in the morning or the evening, (2) Buntain was in the room during the incident, or (3) he engaged in a physical struggle with anyone.

¶ 36 3. *The State's Rebuttal Evidence*

¶ 37 In rebuttal, the State called Goodwin, who testified that (1) Yondell was awake during the incident and not sleeping on the couch, (2) defendant initially answered the front door, and (3) Officer Ealy was not present or even working on the day of the incident.

¶ 38 4. *Closing Argument*

¶ 39 Pertinent to the issues raised in this appeal, the State made the following comments in its closing argument:

> "Let's talk about credibility of the witnesses. Solely your

choice to believe or not believe what you hear from the stand. *** Two guys in uniform doing their jobs. What's their motivation to lie? We have a convicted felon, probably doesn't want another conviction. Does he have any motivation to misremember, to be foggy on some details except for some other details?

* * *

Mr. DeWeese, another convicted felon, says he just slept through the whole thing.

* * *

Then we have Dana Buntain. Guess what? Another convicted felon who's going to testify.

* * *

We have three convicted felons all telling kind of different stories or different portions of what they recall.

* * *

So you have to decide from that information what the fact pattern is, according to a reasonable doubt. And I think, without question, when you start going through the witnesses and trying to match them up and see what information they have, taking into account who's a felon, who's not, that I think the State has proven beyond a reasonable doubt the defendant knowingly caused bodily harm to [Hutson]; that he knew [Hutson] to be a peace officer; and he knew [Hutson] was engaged in the performance of his official

duties."

¶ 40 We note that the trial court did not give the jury a limiting instruction regarding the permissible use of evidence of the witnesses' or defendant's prior convictions. See Illinois Pattern Jury Instructions, Criminal, No. 3.12 (4th ed. Supp. 2009) (hereinafter, IPI Criminal 4th No. 3.12 (Supp. 2009)); Illinois Pattern Jury Instructions, Criminal, No. 3.13 (4th ed. Supp. 2009) (hereinafter, IPI Criminal 4th No. 3.13 (Supp. 2009)).

¶ 41 As stated, the jury found defendant guilty of aggravated battery. In January 2014, the trial court sentenced defendant to six years in prison.

¶ 42 This appeal followed.

¶ 43 II. ANALYSIS

¶ 44 Defendant argues that (1) the trial court erred by relying on the parties' stipulation that defendant was fit to stand trial instead of making an independent judicial determination on that issue, and (2) the State's impeachment of defendant and two other defense witnesses with the mere fact of their prior felony convictions constituted plain error. We address these contentions in turn.

¶ 45 A. Defendant's Fitness To Stand Trial

¶ 46 Defendant contends that the trial court erred by accepting the parties' stipulation that he was fit to stand trial. We agree.

¶ 47 "The due process clause of the fourteenth amendment bars prosecution of a defendant unfit to stand trial." *People v. Holt*, 2014 IL 116989, ¶ 51, 21 N.E.3d 695. A defendant is unfit to stand trial if a mental or physical condition prevents him from understanding the nature and purpose of the proceedings against him or assisting in his defense. 725 ILCS 5/104-10 (West 2012). "[W]here a defendant was previously adjudicated to be unfit to stand trial, a pre-

sumption exists that the condition of unfitness remains until the defendant has been adjudicated to be fit at a valid subsequent hearing." *People v. Gipson*, 2015 IL App (1st) 122451, ¶ 29, 34 N.E.3d 560 (citing *People v. Greene*, 102 Ill. App. 3d 639, 641-42, 430 N.E.2d 219, 221 (1981)).

¶ 48 "Normally, a trial court's decision that a defendant is fit to stand trial will not be reversed absent an abuse of discretion." *People v. Contorno*, 322 Ill. App. 3d 177, 179, 750 N.E.2d 290, 292 (2001) (citing *People v. Newell*, 196 Ill. App. 3d 373, 377, 553 N.E.2d 722, 725 (1990)). However, because the issue of fitness is constitutional in dimension, the record must affirmatively show that the court's fitness determination was the product of judicial discretion and judgment. *Gipson*, 2015 IL App (1st) 122451, ¶ 29, 34 N.E.3d 560; *People v. Cook*, 2014 IL App (2d) 130545, ¶ 13, 25 N.E.3d 717; *Contorno*, 322 Ill. App. 3d at 179, 750 N.E.2d at 292; *Greene*, 102 Ill. App. 3d at 642, 430 N.E.2d at 221. In other words, the court may not simply "rubber stamp" an expert's ultimate conclusion that a defendant has been restored to fitness. *Contorno*, 322 Ill. App. 3d at 179, 750 N.E.2d at 292 ("The ultimate decision as to a defendant's fitness must be made by the trial court, not the experts." (citing *People v. Bilyew*, 73 Ill. 2d 294, 302, 383 N.E.2d 212, 215 (1978))); see also *Gipson*, 2015 IL App (1st) 122451, ¶ 29, 34 N.E.3d 560 ("[T]he court should be active, not passive, in assessing a defendant's fitness.").

¶ 49 More than 60 years ago, the supreme court stated that "[i]f a defendant is insane and unable to answer for himself, he certainly is in no position to authorize his counsel to stipulate, nor is counsel warranted in stipulating, to his restoration [to fitness]." *People v. Reeves*, 412 Ill. 555, 560, 107 N.E.2d 861, 864 (1952). This is not to say, however, that a trial court may never base its fitness determination upon a stipulation. As the First District recently noted, "[t]he distinction between proper and improper stipulations *** is a fine one." *Gipson*, 2015 IL App (1st) 122451, ¶ 30, 34 N.E.3d 560.

¶ 50 In the seminal case of *People v. Lewis*, 103 Ill. 2d 111, 468 N.E.2d 1222 (1984), the supreme court examined the distinction between proper and improper stipulations. That case was a consolidated appeal in which the supreme court reviewed two separate Cook County proceedings involving different defendants—Lewis and McKinley—who were found unfit, then later adjudicated as having been restored to fitness based upon stipulations.

¶ 51 In Lewis's case, the parties stipulated "that Dr. Gilbert Bogan of the Psychiatric Institute of the circuit court of Cook County had examined defendant and if Dr. Bogan were called as a witness, he would testify that he had examined defendant and, based upon his examination, defendant was now mentally fit for trial, able to understand the nature of the charges pending against him, and able to cooperate with counsel in his own defense." *Id*. at 113, 468 N.E.2d at 1223. In McKinley's case, the parties stipulated as follows:

> " 'That if we were to proceed to hearing, Judge, we would prove the following facts by way of testimony by one Gilbert Bogan, a licensed physician in the State of Illinois, licensed to practice medicine, Dr. Bogan being a member of the Psychiatric Institute of the Circuit Court of Cook County, would testify that on May 31, 1979, he had occasion to examine the defendant before the Court, Jessie McKinley, and at that time making observations and after interviewing Mr. Jessie McKinley came to the opinion, and so stated it is his opinion that the defendant is mentally fit to stand trial and that he understands the nature of the charges pending against him, the purpose of the proceedings, and that he is able to cooperate with counsel in his own defense.' " *Id*. at 114, 468

N.E.2d at 1224.

In both Lewis and McKinley's cases, the trial court adjudicated the defendants fit to stand trial based upon the parties' stipulations.

¶ 52 The supreme court affirmed the trial court's fitness determination in both cases, rejecting the defendants' arguments that *Greene* and *Reeves* dictated a different result. The *Lewis* court noted that in *Reeves,* "the parties stipulated to the conclusion that the defendant had 'recovered from said insanity to the degree that he can now co-operate with his counsel and can enter a plea.' " *Id.* at 115-16, 468 N.E.2d at 1225 (quoting *Reeves*, 412 Ill. at 557, 107 N.E.2d at 863). In *Greene*, "defense counsel stipulated to 'the findings of the two psychiatrists as contained in the reports and *** to the fact that the defendant is fit for trial.' " *Id.* at 116, 468 N.E.2d at 1225 (quoting *Greene*, 102 Ill. App. 3d at 641, 430 N.E.2d at 221). The *Lewis* court distinguished *Reeves* and *Greene*, as follows:

> "We find the stipulations in *Reeves* and *Greene* and those entered into here clearly distinguishable. *** Here, *** it was stipulated that, if called to testify, qualified psychiatrists who had examined defendants would testify that in their opinions the defendant was mentally fit to stand trial.
>
> The stipulations were not to the fact of fitness, but to the opinion testimony which would have been given by the psychiatrists. Upon considering these stipulations and personally observing defendants, the circuit court could find defendants fit, seek more information, or find the evidence insufficient to support a finding of restoration to fitness. The circuit court recognized that,

> as stated in [*Bilyew*, 73 Ill. 2d at 302, 383 N.E.2d at 215] '[t]he ultimate issue was for the trial court, not the experts, to decide.' We find, therefore, that the circuit courts did not err in considering the stipulations regarding the psychiatrists' opinions as to defendants' fitness." *Id*. at 115-16, 468 N.E.2d at 1225.

¶ 53 More recently, in *Cook*, 2014 IL App (2d) 130545, ¶ 15, 25 N.E.3d 717, the Second District attempted to explain the distinction discussed in *Lewis* and its progeny, as follows:

> "Where a trial court fails to conduct an independent inquiry into a defendant's fitness but, instead, relies exclusively on the parties' stipulation to a psychological report finding the defendant fit, the defendant's due process rights are violated. [Citations.] However, where a trial court's finding of fitness is based not only on stipulations but also on its observations of the defendant and a review of a psychological report, the defendant's due process rights are not offended. [Citations.]"

¶ 54 In this case, the record makes clear that the trial court improperly based its fitness determination upon the parties' simple stipulation that defendant *was fit*. The parties did not even discuss the substance of Vallabhaneni's report, much less stipulate as to what Vallabhaneni would say if called to testify as a witness. Accordingly, the stipulation in this case was more like the improper stipulations in *Reeves* and *Greene* than the proper stipulations discussed in *Lewis*. Indeed, the colloquy at the August 23, 2013, hearing seemed to suggest that neither the court nor defense counsel even read Vallabhaneni's report, which provided the only conceivable basis for the court to conclude that defendant was fit.

¶ 55 However, even assuming that the court and both parties read Vallabhaneni's report, the stipulation was still insufficient because the court simply invited the parties to stipulate to the *ultimate fact* of defendant's fitness, as follows:

> "[Defendant] previously was found unfit to stand trial. He was sent to [IDHS] for a treatment plan, and I believe that they have now filed a report that [defendant] is fit to stand trial.
>
> Is there any dispute about that? Or would the parties so stipulate?"

The State immediately responded by stating, "Stipulate." Defense counsel, who had been representing defendant for about a minute or less, had a brief discussion with defendant off the record before stating, "I believe we stipulate to that." The court then simply stated, "Okay. So we'll show that that's stipulated."

¶ 56 The record in this case provides no basis to conclude that the trial court's fitness determination was based upon anything more than the parties' stipulation that defendant was fit. Further, the parties' stipulation—as far as the record reveals—was based upon nothing more than Vallabhaneni's ultimate conclusion that defendant was fit. Neither the court nor either party asked any questions of defendant during the fitness hearing, and no discussion took place regarding Vallabhaneni's findings. This "was in effect no fitness hearing at all." *Greene*, 102 Ill. App. 3d at 643, 430 N.E.2d at 222. The court erred by adjudicating defendant fit to stand trial based upon the parties' stipulation to that effect.

¶ 57 Having concluded that the trial court's fitness determination was invalid, we must now determine whether the proper remedy requires reversal of defendant's conviction and remand for a new trial, or simply remand for a retrospective fitness hearing. The supreme court

has noted that "retrospective fitness determinations will normally be inadequate to protect a defendant's due process rights when more than a year has passed since the original trial and sentencing." *People v. Neal*, 179 Ill. 2d 541, 554, 689 N.E.2d 1040, 1046 (1997). The *Neal* court went on to say that "[i]n exceptional cases, however, circumstances may be such that the issue of defendant's fitness or lack of fitness at the time of trial may be fairly and accurately determined long after the fact." *Id.* In *Neal*, the court concluded that a retrospective fitness hearing—instead of reversal of the defendant's conviction—was appropriate because the issue of the defendant's fitness at the time of trial hinged upon the dosage of psychotropic medication defendant was taking. Because the dosage could be readily ascertained from the record long after the original proceeding, the court held that the passage of time was "of no consequence given the nature of the proof." *Id.* Specifically, the court explained that "[i]f the chemical properties of medication are such that their effects could accurately be assessed in light of a defendant's known medical history, as was the case here, it would not matter whether the evaluation followed the original trial and sentencing by 15 days or 15 years. The result would be the same." *Id.*

¶ 58 In this case, we have no confidence that remand for a retrospective fitness hearing could yield a reliable determination as to whether defendant was fit to stand trial in December 2013. In April 2013, Marks-Frey concluded that defendant "suffers from multiple severe mental illnesses" and "there is very little likelihood that [defendant] will attain fitness within one year, regardless of treatment modality." Just four months later, in August 2013, Vallabhaneni concluded that defendant was fit to stand trial, despite a slew of troubling conditions and behaviors. Following Vallabhaneni's report, defendant was removed from treatment at IDHS and placed in jail, where he remained until his December 2013 trial. Even taking everything in Vallabhaneni's report as true, it is clear that defendant's mental competence was prone to sudden change, which

calls into question whether defendant remained fit nearly four months after Vallabhaneni filed his report. It is simply impossible to determine with any modicum of certainty whether defendant remained fit by the time of trial.

¶ 59 Additionally, as defendant points out on appeal, Vallabhaneni's report was of questionable reliability because it included contradictory statements regarding the medication defendant was taking at the time. On one page of the report, Vallabhaneni wrote that defendant was "currently taking" 1 milligram of Xanax (an anxiety medication) twice per day and 200 milligrams of Trazodone (an antidepressant) before sleep. On the next page, however, Vallabhaneni wrote that defendant was "compliant with recommended treatment including" 10 milligrams of Olanzapine (used to treat schizophrenia and bipolar disorder) twice per day and 2 milligrams of Lorazepam (used to treat anxiety and depression) as needed. Further, despite defendant's need for these medications and the fact that defendant was on "suicide watch" three weeks earlier, Vallabhaneni wrote that defendant was "not psychotic, depressed, or anxious." Vallabhaneni did mention, however, that a "court order" to "emergency enforce" treatment upon defendant may be necessary because defendant was refusing to take mood stabilizers and neuroleptics (antipsychotic drugs).

¶ 60 Based upon the state of the record and the evidence available at the time of the August 2013 fitness hearing, we decline to remand this cause for a retrospective fitness determination. Instead, we reverse defendant's conviction and sentence, and we remand for a new fitness hearing, to be followed (if necessary) by a new trial.

¶ 61 B. The State's Mere-Fact Impeachment

¶ 62 Defendant also contends that the State's impeachment of defendant and two other defense witnesses with the mere fact of their prior felony convictions constituted plain error. Ini-

tially, we note that we need not address this claim under the plain-error doctrine because we have already concluded that defendant is entitled to a new trial due to the trial court's invalid fitness determination. However, because this issue may arise again upon retrial, we deem it appropriate to briefly address the State's improper use of mere-fact impeachment.

¶ 63 "Under the mere-fact method of impeachment, the jury is informed of the fact that the witness committed a past crime, not the precise offense." *People v. Harvey*, 211 Ill. 2d 368, 383, 813 N.E.2d 181, 190 (2004). The supreme court has "expressly rejected the mere-fact method of impeachment." *Id.* Instead, the supreme court has held that impeachment of a witness through prior convictions should be governed by the rule adopted in *People v. Montgomery*, 47 Ill. 2d 510, 519, 268 N.E.2d 695, 700 (1971). The supreme court succinctly summarized that rule, as follows:

> "Under the *Montgomery* rule, evidence of a witness' prior conviction is admissible to attack the witness' 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." *People v. Atkinson*, 186 Ill. 2d 450, 456, 713 N.E.2d 532, 535 (1999).

See also Illinois Rule of Evidence 609 (Ill. R. Evid. 609 (eff. Jan. 1, 2011)), which essentially adopts the holding in *Montgomery*.

¶ 64 In this case, the record contains no indication that the State even attempted to comply with *Montgomery* before revealing to the jury that Buntain, Yondell, and defendant were convicted felons. The State never requested a *Montgomery* hearing at which the trial court could consider the nature, time, or probative value of the past crimes at issue.

¶ 65 The most serious error committed by the State regarding the impeachment of defendant with his prior conviction is that the State elicited the existence of the prior conviction when cross-examining defendant. As the supreme court wrote in *People v. Naylor*, 229 Ill. 2d 584, 594, 893 N.E.2d 653, 660 (2008), "[w]hen the defendant testifies in a criminal case, the State may not impeach the defendant's testimony by cross-examination as to his or her prior conviction, but rather only by introducing the record of the prior conviction." We note that this rule is hardly new, having been articulated by the supreme court almost 60 years ago in *People v. Moses*, 11 Ill. 2d 84, 88, 142 N.E.2d 1, 3 (1957). This error, coupled with the trial court's failure to give IPI Criminal 4th No. 3.13 (Supp. 2009), explaining to the jury how it should consider evidence of defendant's prior conviction only for the limited purpose of assessing his credibility, might have given us pause affirming defendant's conviction if we were not otherwise reversing it. (We acknowledge that the Committee Comments to IPI Criminal 4th No. 3.13 (Supp. 2009) state that it should be given only at the request of the defendant. Nonetheless, given the potential for prejudice if the jury misuses evidence of a defendant's prior conviction, if defense counsel does not address this subject, the better practice is for the trial court to do so *sua sponte*.)

¶ 66 III. CONCLUSION

¶ 67 For the reasons stated, we reverse defendant's conviction and sentence, and we remand for a new fitness hearing, and, if necessary, a new trial.

¶ 68 Reversed; cause remanded with directions.