

No. 1-09-1193

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

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	APPEAL FROM THE
Plaintiff-Appellee,)	CIRCUIT COURT OF
)	COOK COUNTY
)	
v.)	No. 06 CR 7498
)	
ASMIR DISDAREVIC,)	HONORABLE
Defendant-Appellant.)	KENNETH J. WADAS,
)	JUDGE PRESIDING.

JUSTICE STEELE delivered the judgment of the court.
Justices Neville and Murphy concurred in the judgment.

ORDER

HELD: On appeal from convictions for solicitation of murder and solicitation of murder for hire, defendant did not receive ineffective assistance of counsel, as he was not prejudiced by counsel's failure to object to the admission of two transcripts of recorded telephone calls. The trial judge's failure to fully question the jury pool during jury selection was not plain error, where defendant failed to show the jury selected was biased and the evidence was not closely balanced. However, defendant's conviction for solicitation of murder is vacated as violating the one-act, one-crime rule, because solicitation of murder is a lesser-included offense of solicitation of murder for hire.

¶ 1 Following a jury trial in the circuit court of Cook County, defendant, Asmir Disdarevic (Asmir) was found guilty of solicitation of murder and solicitation of murder for hire. The trial court sentenced Asmir to concurrent prison terms of 25 years for solicitation of murder and 30 years for solicitation of murder for hire. On appeal, Asmir contends: (1) he received ineffective assistance of trial counsel; (2) the trial judge violated Illinois Supreme Court Rule 431(b) (eff. May 1, 2007) during jury selection; and (3) his sentence violates the "one act, one crime" rule. We reject Asmir's first two claims, but agree with his third claim. Accordingly, for the following reasons, we affirm Asmir's conviction of solicitation of murder for hire, but vacate his solicitation of murder conviction, and correct the mittimus to reflect a conviction and 30-year sentence on count four of the indictment charging him with solicitation of murder for hire.

¶ 2 BACKGROUND

¶ 3 The record on appeal discloses the following facts. At trial, Ezekiel McDaniel testified that in January and February 2006, he and Asmir were cellmates in the Cook County Jail. Asmir told McDaniel he was in custody for violating restraining orders against his girlfriend, Daniela Keagle. According to McDaniel, Asmir said his incarceration was hurting his trucking business.

¶ 4 McDaniel testified Asmir stated it would be easier for him if Keagle was killed and asked whether McDaniel knew anyone who could kill her. McDaniel claimed he knew someone, but it would cost Asmir \$15,000, half of which would be a down payment. McDaniel stated Asmir responded, "No problem."

¶ 5 McDaniel also testified he saw Asmir telephone people for the money, but Asmir was unsuccessful. McDaniel lowered the down payment to \$2,500. McDaniel further testified that

he never planned to arrange a hit man for Asmir, but intended to keep the money and "rip off" Asmir.

¶ 6 Moreover, McDaniel testified that Asmir wanted the hit done before his next court date. However, Asmir did not raise the money before his next court date. McDaniel stated Asmir returned from his court date in a panic because Keagle was "going all the way" with the charges. McDaniel testified that Asmir wanted the hit done in a hurry because he could not afford to spend time in prison. According to McDaniel, Asmir said he was attempting to get money from Bosco Blagojevich, whom Asmir claimed was the then-Governor's brother.¹ Asmir gave McDaniel Blagojevich's business card. McDaniel stated he then had to re-think the situation, which was getting "way bigger" than him. McDaniel testified he then contacted a Sergeant Diaz at the Cook County Jail, with whom McDaniel had a prior relationship as a cooperating witness in another case.

¶ 7 Cook County Sheriff's Investigator Steven Zepeda testified he worked as part of the Jail Enforcement Team investigating criminal activity originating in the Cook County Jail. On February 24, 2006, Investigator Zepeda met with Sergeant Diaz and spoke to McDaniel about the claim that Asmir was trying to hire someone to kill Keagle. Investigator Zepeda testified that he corroborated information he received from McDaniel, *e.g.*, why Asmir was in jail, Asmir's court dates, the alleged victim in Asmir's case, and Bosco's telephone number. Investigator Zepeda

¹ The record shows that Bosco Blagojevich is unrelated to the then-Governor of Illinois.

then contacted Cook County Sheriff's Investigator Conley Dyer to act in an undercover role in the investigation.

¶ 8 Investigator Zepeda also testified that on February 28, 2006, Investigator Dyer had an unrecorded predicate meeting with Asmir to corroborate information they had received in the investigation. On March 1, 2006, Investigator Zepeda obtained a consensual overhear order from a judge and recorded a conversation between Investigator Dyer and Asmir, who was arrested after the conversation.

¶ 9 Investigator Dyer testified that on February 24, 2006, he was assigned to work undercover in this case. Investigator Dyer met with McDaniel and worked out a cover story, in which Investigator Dyer would pose as a hitman known as "Big Ant." On February 26, 2006, Investigator Dyer received several calls on a telephone given to him in conducting the investigation. Two collect calls originating from Cook County jail did not go through, but Investigator Dyer heard McDaniel say, "It's fucked up," and "Dude don't want to do," which Investigator Dyer testified, over objection, he understood to mean Asmir had yet to receive money for the hit. Investigator Dyer accepted a third call, during which he and Asmir briefly discussed the hit and Asmir said Bosco was not accepting calls. Investigator Dyer further testified he told Asmir he would visit Asmir the next day at the jail.

¶ 10 Moreover, Investigator Dyer testified that on February 28, 2006, he met with Asmir at the jail. According to Investigator Dyer, when he introduced himself as "Big Ant," Asmir said, "I wanted that bitch killed. I got 15 days before my next court date. My next court date is March 15th." Investigator Dyer also testified he described the murder plan and the \$2,500 down

payment. Asmir replied he did not have the money and gave Bosco's business card to Dyer. Investigator Dyer further testified Asmir raised the possibility of murdering a second person. Investigator Dyer told Asmir that he would obtain an out-of state identification card to return to the jail for a second meeting with Asmir. Investigator Dyer explained that such identification would allow him to meet with Asmir when others were not in the visitors' cage.

¶ 11 After this meeting, Investigator Dyer obtained the court authorization for a confidential overhear. On March 1, 2006, Investigator Dyer met with Asmir again, wearing a wristwatch containing a recording device. The two men spoke for approximately 30 minutes. Investigator Dyer testified that Asmir provided information about Keagle's physical appearance, address, employment, daily routine, and automobile. According to Investigator Dyer, Asmir said the best time to kill Keagle would be late Saturday or early Sunday when she typically would have bags of money. Investigator Dyer also testified that Asmir suggested driving Keagle's car to the international terminal at O'Hare Airport, to create the appearance she left the country. Investigator Dyer stated he intended to cut Keagle's throat. Investigator Dyer asked Asmir if he was sure he wanted to go through with the killing and Asmir responded that he did.

¶ 12 Audio tapes of this conversation between Investigator Dyer and Asmir were played for the jury at trial. The jury also received a transcript of the recording.

¶ 13 Cook County Sheriff's Police Detective Joe Dugandzic testified about telephone calls made from the Cook County jail in February and March 2006. Detective Dugandzic testified that approximately 40 calls were placed from a pay phone in the jail to Bosco's phone number during the time period, 5 of which were recorded. Detective Dugandzic listened to these recordings and

1-09-1193

recognized Asmir and Bosco as the voices on the recordings. According to Detective Dugandzic, the conversations were in Bosnian or Serbian. Detective Dugandzic stated he was fluent in the dialects since he was a child, because his parents were from "the old country." Detective Dugandzic further testified that he reviewed the recordings and transcripts of conversations from February 22 and 25, 2006, and stated the transcripts were accurate, but the transcripts were less detailed on a couple of points than what he heard on the recordings.

¶ 14 Detective Dugandzic then testified that in the February 22, 2006, conversation, which lasted approximately nine minutes, Asmir gave Bosco a telephone number belonging to McDaniel's brother and told Bosco the jail could only record conversations in English and Spanish. Moreover, Detective Dugandzic testified that in the February 25, 2006, conversation, which lasted over 12 minutes, Asmir gave Bosco a telephone number for "Big Ant" and told Bosco to contact "Big Ant" and show him where Keagle worked.

¶ 15 Asmir rested his case without presenting evidence on his behalf.

¶ 16 Following closing arguments and jury instructions, the jury deliberated and found Asmir not guilty of soliciting McDaniel to commit murder, but found him guilty of soliciting Investigator Dyer to commit murder and guilty of soliciting Investigator Dyer to commit murder for hire. Asmir filed a posttrial motion for a new trial, which the trial court denied before sentencing Asmir to concurrent prison terms of 25 years for solicitation of murder and 30 years for solicitation of murder for hire. Asmir now appeals after filing a timely notice of appeal to this court.

¶ 17

DISCUSSION

¶ 18 On appeal, Asmir contends: (1) he received ineffective assistance of trial counsel; (2) the trial judge violated Illinois Supreme Court Rule 431(b) (eff. May 1, 2007) during jury selection; and (3) his sentence violates the "one act, one crime" rule. We address Asmir's arguments in turn.

¶ 19

I. Ineffective Assistance of Counsel

¶ 20 First, Asmir claims that he received ineffective assistance of counsel because his trial counsel failed to object to the introduction of the transcripts of the February 22 and 25, 2006, telephone conversations on foundational grounds. Generally, in order to show ineffective assistance of counsel, a defendant must establish: (1) counsel's representation fell below an objective standard of reasonableness; and (2) counsel's alleged deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We must show great deference to the attorney's decisions as there is a strong presumption that an attorney has acted adequately. *Strickland*, 466 U.S. at 689. A defendant must overcome the strong presumption the challenged action or inaction "might have been the product of sound trial strategy." *E.g., People v. Evans*, 186 Ill. 2d 83, 93 (1999) (and cases cited therein). Every effort must "be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. Because effective assistance refers to competent and not perfect representation, mistakes in trial strategy or judgment will not, of themselves, render the representation incompetent. *People v. Calhoun*, 404 Ill. App. 3d 362, 383 (2010) (and cases

cited therein). To satisfy the prejudice prong of the *Strickland* test, a defendant must demonstrate a reasonable probability that the outcome of the trial would have been different or that the result of the proceeding was unreliable or fundamentally unfair. *Strickland*, 466 U.S. at 687; *People v. Evans*, 209 Ill. 2d 194, 220 (2004). Such a reasonable probability "is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. If a reviewing court finds that the defendant did not suffer prejudice, it need not decide whether counsel's performance was constitutionally deficient. *People v. Buss*, 187 Ill. 2d 144, 213 (1999).

¶ 21 In this case, Asmir cannot show that he suffered prejudice. Assuming *arguendo* defense counsel successfully objected to the introduction of the transcripts for the February 22 and 25, 2006, recorded conversations, the evidence against Asmir would have included: (1) McDaniel's testimony; (2) Investigator Dyer's testimony; and (3) the audio tapes and transcripts of the March 1, 2006, conversation between Investigator Dyer and Asmir. Any doubt a jury might have entertained about McDaniel's testimony is completely overwhelmed by the testimonial and recorded evidence of the March 1, 2006, conversation, in which Asmir, among other things: (1) gave Investigator Dyer information about Keagle's physical appearance, address, employment, daily routine and automobile; (2) advised Investigator Dyer of the best time to kill Keagle; (3) suggested Investigator Dyer drive Keagle's car to the international terminal at O'Hare Airport to create the appearance she left the country; and (4) reaffirmed he wanted Investigator Dyer to kill Keagle. Asmir describes this conversation as taking a "passive role." We disagree. Given the record on appeal, there is no reasonable probability that the outcome of the trial would have been

different or that the result of the proceeding was unreliable or fundamentally unfair.

Accordingly, Asmir's argument fails. See *Buss*, 187 Ill. 2d at 213.

¶ 22 II. Questioning Prospective Jurors Under Illinois Supreme Court Rule 431(b)

¶ 23 Next, Asmir claims the trial court violated Supreme Court Rule 431(b) (eff. May 1, 2007) by failing to establish that each prospective juror understood and agreed with the four principles enunciated by our supreme court in *People v. Zehr*, 103 Ill. 2d 472 (1984). The rule currently provides:

"(b) The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that the defendant's failure to testify cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's failure to testify when the defendant objects.

The court's method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section."

Ill. S. Ct. R. 431(b) (eff. May 1, 2007).

Asmir concedes he forfeited this issue by failing to make a contemporaneous objection at trial and raising it in his posttrial motion. *E.g.*, *People v. Johnson*, 238 Ill. 2d 478, 484 (2010) (citing *People v. Enoch*, 122 Ill. 2d 176, 186 (1988)). Asmir contends, however, that application of the

forfeiture rule should be relaxed because the issue raised on appeal concerns the conduct of the judge. See *People v. Barrow*, 133 Ill. 2d 226, 260 (1989) ("[T]his court has held that a less rigid application of the waiver rule prevails where misconduct of the trial judge is involved.").

However, in *People v. Thompson*, 238 Ill. 2d 598, 612 (2010), our supreme court rejected this position. The *Thompson* court explained that, when the conduct of the trial court is at issue, the forfeiture rule may be relaxed only in extraordinary circumstances such as when the court ignores an objection to Rule 431(b) questioning or oversteps its authority in the presence of the jury. *Id.* Here, as in *Thompson*, there is no indication that the trial court would have ignored an objection to Rule 431(b) questioning had defendant raised one. Further, Asmir does not argue, let alone show, that the trial court overstepped its authority in the jury's presence. Accordingly, we find no compelling reason to relax the forfeiture rule in this case.

¶ 24 Alternatively, Asmir asks us to review this issue pursuant to Illinois Supreme Court Rule 615(a) (eff. Jan. 1, 1967). Rule 615(a) creates an exception to the forfeiture rule by allowing courts of review to note "[p]lain errors or defects affecting substantial rights." Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). Under Illinois' plain error doctrine, a reviewing court may consider a forfeited claim when:

" (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that 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 strength of the evidence.' " *Johnson*, 238 Ill. 2d at 484 (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)).

The plain-error doctrine is intended to ensure that a defendant receives a fair trial, but it does not guarantee every defendant a perfect trial. *Johnson*, 238 Ill. 2d at 484. Rather than operating as a general savings clause, it is construed as a narrow and limited exception to the typical forfeiture rule applicable to unpreserved claims. *Id.* The burden of persuasion rests with the defendant under both prongs of the plain-error analysis. *People v. Sargent*, 239 Ill. 2d 166, 190 (2010).

The ultimate question of whether a forfeited claim is reviewable as plain error is a question of law that is reviewed *de novo*. *Johnson*, 238 Ill. 2d at 485.

¶ 25 Illinois courts typically undertake plain-error analysis by first determining whether error occurred at all before proceeding to consider whether either prong of the doctrine has been satisfied. *Sargent*, 239 Ill. 2d at 189-90. In this case, the State concedes the trial judge did not fully comply with the rule. Thus, we turn to determine whether the error qualifies as one justifying plain-error review.

¶ 26 In his initial brief, Asmir argues plain error exists under the second prong of our case law. Under that prong, "[p]rejudice to the defendant is presumed because of the importance of the right involved." *People v. Herron*, 215 Ill. 2d 167, 187 (2005). The question then is whether the error committed here threatened the integrity of the judicial process. *People v. Blue*, 189 Ill. 2d 99, 139 (2000).

¶ 27 In *Thompson*, our supreme court held that a trial court's failure to comply with Rule 431(b) does not necessarily render a trial fundamentally unfair or unreliable and does not require

automatic reversal. *Thompson*, 238 Ill. 2d at 614–15. Only upon the defendant's presentation of evidence that the jury was biased would his fundamental right to a fair trial be questioned.

Thompson, 238 Ill. 2d at 614. The *Thompson* court stated: "We cannot presume the jury was biased simply because the trial court erred in conducting the Rule 431(b) questioning." *Id.* Thus, in analyzing the issue under a second-prong, plain-error analysis, the critical question is whether the defendant has shown that the trial court's Rule 431(b) error resulted in impaneling a biased jury. See *Id.*

¶ 28 In this case, Asmir has offered no evidence of bias. He claims only that the jury may have been biased. However, pursuant to *Thompson*, such speculation is neither sufficient nor determinative. See *Thompson*, 238 Ill. 2d at 614. A defendant must present at least some evidence that the court's error was so serious that it deprived him of a fair trial. *Id.* Asmir fails to do so here. Absent such evidence, Asmir cannot carry his burden of persuading this court the error affected the fairness of his trial and challenged the integrity of the judicial process. *Id.* at 615.

¶ 29 In his reply brief, which was filed after the *Thompson* decision, Asmir alternatively argues that the error is reversible under the first prong of the plain-error doctrine because the evidence was closely balanced. *Thompson* did not reach this issue because the defendant in that case asserted only second-prong error. Therefore, the first prong is possibly still available for finding Rule 431(b) errors. See *Thompson*, 238 Ill. 2d at 613.

¶ 30 Even so, Asmir still bears the burden of persuading this court the evidence was so closely balanced that the error alone threatened to tip the scales of justice against him. As noted earlier,

the record in this case shows that Asmir was recorded not merely soliciting Investigator Dyer to murder Keagle, but also providing personal information about Keagle and the best time to murder her, as well as suggesting how the murder might be covered up. Based on these facts, we conclude Asmir has failed to meet his burden of persuasion that the evidence against him was closely balanced. As a result, the trial court's Rule 431(b) error is not reversible under the first prong of the plain-error doctrine.

¶ 31 III. The "One Act, One Crime" Rule

¶ 32 Lastly, Asmir argues, the State concedes, and we agree that Asmir's conviction for solicitation of murder violates the one-act, one-crime rule because solicitation of murder is a lesser-included offense of solicitation of murder for hire. See *People v. Csaszar*, 375 Ill. App. 3d 929, 946 (2007). Accordingly, we affirm Asmir's conviction of solicitation of murder for hire, vacate his solicitation of murder conviction, and correct the mittimus to reflect a conviction and 30-year sentence on count four of the indictment charging solicitation of murder for hire. See *id.*; see also *People v. Douglas*, 381 Ill. App. 3d 1067, 1069 (2008) (citing Ill. S. Ct. R. 615(b)(1) (eff. Jan. 1, 1967) (appellate court may correct trial court orders as necessary)); *People v. Mitchell*, 234 Ill. App. 3d 912, 921 (1992) (appellate court may correct mittimus and sentencing orders without remanding the cause to the trial court).

¶ 33 CONCLUSION

¶ 34 In sum, Asmir failed to show he received ineffective assistance of counsel where counsel failed to object to the introduction of the transcripts of the February 22 and 25, 2006, telephone conversations on foundational grounds, because there is no reasonable probability that the

1-09-1193

outcome of the trial would have been different or that the result of the proceeding was unreliable or fundamentally unfair had any objection been made and sustained. Additionally, Asmir failed to show the trial judge's violation of Rule 431(b) was plain error, because he offered no evidence the jury was biased and the evidence was not closely balanced. Finally, we affirm Asmir's conviction of solicitation of murder for hire, but vacate his solicitation of murder conviction, and correct the mittimus to reflect a conviction and 30-year sentence on count four of the indictment charging him with solicitation of murder for hire.

¶ 35 Affirmed in part, vacated in part; mittimus corrected.