No. 1-09-2130

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FIRST DIVISION
February 7, 2011

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. 08 CR 12123
	)	
OSCAR MARMOLEJO,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.

JUSTICES Hoffman and Rochford concurred in the judgment.

O R D E R

HELD: (1) Where defendant did not object to the trial court's Rule 431(b) questioning of the venire during trial or in a posttrial motion, and the trial court complied with Rule 431(b), the issue was forfeited; and (2) where the trial court conducted an adequate inquiry into defendant's *pro se* ineffective assistance of counsel motion, its refusal to appoint independent counsel was not manifestly erroneous.

After a jury trial, defendant Oscar Marmolejo was convicted of residential burglary and sentenced to nine years in prison. On appeal, defendant contends that the trial court violated Illinois Supreme Court Rule 431(b) (eff. May 1, 2007) or, in the alternative, that the trial court should have appointed independent counsel to assist defendant with his *pro se* claim of ineffective assistance of counsel. We affirm.

In June 2009, the trial court began jury selection by addressing the entire venire. The court first explained "[t]hat a criminal trial begins with the person accused of a crime presumed to be innocent." After expanding upon this statement, the court asked that anyone who had "a problem with that" raise their hand. No hands were raised. The trial court then said, "the only way someone can be guilty of a crime is if the government who brought the charge against the accused is able to prove the accused guilty beyond a reasonable doubt." The court explained this principle in more detail, then again asked if "anybody has a problem with that", and if so, to raise their hands. No hands were raised. Then, the trial court introduced "[t]he last proposition" that "[i]n a criminal trial, the burden of proof is on the government. They have to prove guilt beyond a reasonable doubt, and the accused does not have to prove anything at all." The court went on to say that "[t]he accused does not have to testify *** [or] call witnesses on their own behalf."

The trial court asked that anybody "who would hold it against the accused if they did not testify *** or did not call witnesses" to raise their hand. No hands were raised.

The trial court then proceeded to question each of the prospective jurors individually, during which time he again covered the same principles as above, asking, for example, "If the government does prove Mr. Marmolejo guilty beyond a reasonable doubt, you will sign a guilty verdict?" and "If they cannot or do not for any reason at all, you won't hesitate to sign a not guilty verdict?" and "You'll agree to keep your mind open till all the evidence is in; correct?" and "You won't hold it against him if he does not testify?"

After the jury was empaneled, the trial evidence showed that around 1:53 p.m. on June 13, 2008, a police officer observed defendant enter the apartment of Jose Lopez at 3800 South Wolcott, and leave a short time later carrying certain electronics that belonged to Lopez. Defendant was with codefendant Anthony Sanchez, who is not party to this appeal, when he crawled in the window of a first floor apartment at 3800 South Wolcott. Sanchez disappeared around the corner of the building, into the "gangway area." Approximately 20-30 minutes after he entered, an officer saw defendant come around from the gangway carrying something when he had been carrying nothing earlier, followed shortly after by Sanchez carrying a backpack

that he had not been wearing earlier. Both defendant and Sanchez were soon arrested. In the gangway area, the officers observed a large LCD TV lying against the wall next to a white plastic bag containing several electronic items. Inside the apartment everything was in disarray and there was a backing on the wall where the TV used to hang. Detective Michael Conway, who arrested defendant just as defendant was about to get into his car, observed that the items defendant had been carrying included two remote controls, a VCR, a cell phone and a Play Station video game system.

Detective Conway testified that he advised defendant of his *Miranda* rights using the Fraternal Order of Police Handbook. As he read defendant each right, defendant said he understood and agreed to talk to the officers. Defendant said that he and Sanchez were looking to "do a job, do a burglary." Sanchez was looking for unlocked windows and found one at 3800 South Wolcott. Defendant climbed in the open window into the apartment living room, then let Sanchez in through the back door. Once inside, both men started disconnecting the electronics, and Sanchez looked through the jewelry. Defendant took the TV and some gaming systems and placed them in the gangway. He then walked back to his car so he could drive to the apartment and load up the car with the items in the gangway. Defendant said they were going to sell the stolen items because he had a $65 a day heroin

habit. Defendant's statement was not reduced to writing, and no written *Miranda* waiver was taken.

In closing argument, defendant's trial counsel argued that defendant never gave a statement. He noted that there was no written corroboration of the statement, and suggested that the police were attempting to convict defendant of an unsolved burglary that, left unsolved, would make the police look bad.

After the jury found defendant guilty of residential burglary, defendant's trial counsel filed a motion for a new trial, arguing generally that defendant was denied due process of law, did not receive a fair and impartial trial, and that the State failed to prove him guilty beyond a reasonable doubt. The trial court denied the motion.

Defendant then asked to file a *pro se* motion arguing that his trial counsel was ineffective. The trial court expressly granted "a *Krankel* hearing instanter". Defendant argued that his trial counsel had failed to file a pretrial motion to suppress his statement even though he told his counsel the statement was coerced. Defendant alleged that the police threatened to charge him with other burglaries in the area if he did not confess to the burglary at 3800 South Wolcott. Defendant also claimed that he told the police he wanted an attorney, but was told he did not need one.

Defendant's trial counsel told the trial court that defendant had not provided any proof or substantiation of his claims, and pointed out that the evidence against defendant at trial was overwhelming.

After more discussion with defendant's trial counsel and defendant, the trial court found:

> "I was present and presided over all matters related to this case since the time of arraignment up until trial.
>
> I will note that there was a trial by jury. That the defense *** did come in with a cogent theory of defense.
>
> Somehow to look at this case now, it's an extremely strong case because the police basically watched Mr. Marmolejo commit the crime. They had him in their sights and were following him and watching him as he did what he did coming out of a building with property.
>
> ***
>
> Somehow to suggest that a lawyer doing some things differently with this package might have had a different

> result and that this was derelict and below the Strickland standard, I cannot find."

The court denied defendant's *pro se* motion and sentenced him as a Class X offender to a nine-year prison term.

On appeal, defendant first contends that the trial court violated Illinois Supreme Court Rule 431(b) because the trial court failed to specifically question whether the jurors understood each principle, and combined two of the four principles so the jurors did not have an opportunity to respond to them individually. Defendant seeks an automatic reversal and remand for a new trial.

As a threshold matter, the State contends and defendant acknowledges that he forfeited review of this issue by failing to both enter a contemporaneous objection and raise it in a posttrial motion. *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). Defendant's argument that forfeiture should be relaxed where a Rule 431(b) issue is raised has been rejected by the supreme court in *People v. Thompson*, 238 Ill. 2d 598, 611-12 (2010). Thus, defendant has forfeited review of this issue.

To bypass forfeiture, defendant asserts that the issue should be considered under the second prong of the plain error doctrine, which allows review of an unpreserved error where the alleged error is so serious that it affected the fairness of the

trial and challenged the integrity of the judicial process. *E.g.*, *Thompson*, 238 Ill. 2d at 613. A Rule 431(b) issue is reviewable under this prong of the plain error doctrine and defendant bears the burden of persuasion in such review. *Id.*

The initial inquiry in review for plain error is whether any error occurred. *Id.* In the present case, we find that the trial court did not commit error in its questioning of the venire under Rule 431(b).

Rule 431(b) requires that the trial court ask each juror, either individually or in a group, whether they understand and accept the four following principles: (1) a defendant is presumed innocent; (2) a defendant must be proved guilty beyond a reasonable doubt; (3) a defendant is not required to present evidence on his own behalf; and (4) if a defendant chooses not to testify, that cannot be held against him. In addition, 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).

Here, defendant first complains that the court failed to comply with Rule 431(b) when it did not question whether each juror understood the principles, relying primarily on the second district's opinion in *People v. Rogers*, 403 Ill. App. 3d 584, 588-589 (2010). The *Rogers* decision, however, was subsequently

disavowed because during the pendency of this appeal and after the supreme court's decision in *Thompson*, the second district expressly departed from *Rogers* in *People v. Blankenship*, No. 2-08-1012, slip op. at 5, n.1 (Ill. App. Nov. 15, 2010). In *Blankenship*, the second district reasoned that "acceptance implies understanding" and, therefore, the text of Rule 431(b) does not require separate inquiries. See also *People v. Digby*, No. 1-09-0902, slip op. at 7-8 (Ill. App. Nov. 24, 2010) (finding no error where the trial court did not ask whether the venire "understood" the principles separately from whether they "had a problem" with or "disagreed" with the principles); *People v. Davis*, No. 1-08-2895, slip op. at 4 (Ill. App. Nov. 12, 2010) (the trial court asking whether anyone had "a problem" with a principle was sufficiently broad to incorporate understanding and acceptance); *contra*, *People v. White*, No. 1-08-3090, slip op. at 8-9 (Ill. App. Jan. 7, 2011) (the trial court did not comply with Rule 431(b) when it did not specifically ask whether jurors understood the fourth principle).

In his final complaint about Rule 431(b), defendant faults the court for melding rather than separating the last two principles. As to these principles, the court stated:

> "[I]n a criminal trial, the person accused of a crime does not have to prove their innocence *** the burden of

> proof is on the government. They have to prove guilt beyond a reasonable doubt, and the accused does not have to prove anything at all.
>
> The accused does not have to testify. The [*sic*] don't have to call witnesses on their own behalf."

We find that the court's presentation complied with Rule 431(b) even though it combined two principles. *E.g.*, *People v. Davis*, No. 1-08-2895, slip op. at 4-5 (Ill. App. Nov. 12, 2010), relying on *People v. McCovins*, 399 Ill. App. 3d 323, 327 (2010) (the trial court was not required to question the jurors about each individual principle); *cf.*, *People v. Johnson*, No. 1-09-0879, slip op. at 21-22 (Ill. App. Nov. 24, 2010) (the trial court erred where, among other things, it collapsed the first three principles).

Even if the trial court had committed error in its questioning about the rule's principles, the error would not have risen to the level of plain error. The court in *Thompson* held that the only way a Rule 431(b) error could satisfy the second prong of the plain error doctrine is by a showing that defendant was tried by a biased jury which directly affected his right to a fair trial. *Thompson*, 238 Ill. 2d at 613-14. "We cannot presume the jury was biased simply because the trial court erred in

conducting the Rule 431(b) questioning." *Thompson*, 238 Ill. 2d at 614. Here, as in *Thompson*, defendant has not presented any evidence that demonstrates jury bias so defendant has failed to meet his burden and therefore, has forfeited this issue.

Defendant next asserts that the trial court should have appointed independent counsel to assist him in his *pro se* claim of ineffective assistance of trial counsel. Specifically, defendant argues that he made the preliminary showing that his trial counsel neglected his case by failing to file a motion to suppress his statement and therefore the court erred in denying his motion.

The appointment of new counsel is not required automatically every time a defendant brings a *pro se* motion for ineffective assistance of counsel. *People v. Taylor*, 237 Ill. 2d 68, 75 (2010). The trial court must first examine the factual basis of defendant's claims, commonly referred to as the "*Krankel* inquiry", and if the claims lack merit or pertain to matters of trial strategy, the trial court may deny the motion. *Taylor*, 237 Ill. 2d at 75; *People v. Krankel*, 102 Ill. 2d 181 (1984). New counsel should only be appointed to assist with the motion if defendant's claims show possible neglect of the case. *Taylor*, 237 Ill. 2d at 75. The question for the reviewing court is whether the trial court conducted an adequate inquiry into defendant's *pro se* motion. *People v. Banks*, 237 Ill. 2d 154, 214

(2010). Here, as the trial court made a determination on the merits, and it is this determination that defendant is challenging, the decision will be overturned only if it is manifestly erroneous. *People v. Walker*, 403 Ill. App. 3d 68, 79 (2010).

In its evaluation, the trial court may have an exchange with defense counsel about the facts and circumstances surrounding defendant's claims of ineffective assistance. *People v. Moore*, 207 Ill. 2d 68, 78 (2003). However, a brief discussion between the trial court and the defendant may be sufficient. *Moore*, 207 Ill. 2d at 78. A court may also rely on " 'its knowledge of counsel's performance at trial and the insufficiency of the defendant's allegations on their face.' " *Vargas*, 396 Ill. App. 3d at 478, quoting *Moore*, 207 Ill. 2d at 78.

In this case, we find that the trial court conducted an adequate inquiry into the basis of defendant's *pro se* ineffective assistance of counsel motion. The trial court considered defendant's argument and had a discussion with defendant's trial counsel. In denying the motion, the trial court noted that it presided over the entire trial, that defendant's trial counsel came in with a "cogent theory of defense", and that the evidence against defendant was overwhelming. Additionally, the decision not to file a motion to suppress defendant's statement is presumptively a matter of trial strategy. *People v. Johnson*, 372

Ill. App. 3d 772, 777 (2007). In making his *pro se* arguments, defendant did not present the court with any reason to suppose the motion might have succeeded. *People v. Little*, 322 Ill. App. 3d 607, 611 (2001). Defendant only told the trial court that his statement was coerced and taken after he requested counsel. However, the trial court heard Detective Conway, who took defendant's statement, testify that he gave defendant his *Miranda* warnings, that defendant said he understood them and then agreed to talk to him. Finally, the trial court's consideration of the weight of the evidence against defendant was not premature, as it is the trial court's duty to determine whether defendant's claim has merit. Here, it was unlikely that the outcome of the trial would have differed if a motion to suppress his statement had been filed and granted as three police officers testified to seeing defendant enter Lopez's apartment and then leave holding electronics that belonged to Lopez. Based on these circumstances, we are unable to find that the trial court's denial was manifestly erroneous.

For the foregoing reasons, we affirm the judgment of the trial court.

Affirmed.