No. 1-09-2131

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FIRST DIVISION
FILED: May 23, 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 14695
	)	
GREGORY CARR,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Justices Lampkin and Rochford concurred in the judgment.

O R D E R

HELD: The trial court did not abuse its discretion in rejecting defense counsel's supplemental question for a prospective juror where the trial court's *voir dire* examination sufficiently inquired of the juror about possible bias. Aggravated robbery conviction affirmed.

Following a jury trial, defendant Gregory Carr was convicted of aggravated robbery and sentenced to 10 years in prison. On appeal, defendant asserts the trial court erred in refusing defense counsel's proposed question to a potential juror, who

stated he aspired to be a police officer, whether he would accord greater weight to the testimony of police officers. We affirm.

During jury selection, one of the prospective jurors was Jeffrey Cysz, a university student studying criminology and sociology. The trial court questioned Cysz as follows:

"Q. What do you want to do with that degree?

A. I want to be a police officer.

Q. You want to be a police officer, all right. Can Mr. Carr get a fair trial from you?

A. Yes.

Q. You're on the jury, the jury hears the evidence, they feel the right verdict is a not guilty verdict. That causes you no difficulty with your aspirations to go into law enforcement?

A. No.

Q. You will be a fair man?

A. Yes.

Q. If the government does prove beyond a reasonable doubt that Mr. Carr is guilty as charged, you will sign a guilty verdict?

A. Yes.

Q. If they cannot do so for any reason, you won't hesitate to sign a not guilty verdict?

A. No, I won't.

Q. You will agree to keep your mind open until all the evidence is in before you reach a verdict?

A. Yes.

Q. You will not hold it against him should he not testify?

A. No.

Q. Thank you."

In a sidebar discussion, one of defendant's attorneys noted that police officers were going to testify at trial and reminded the court that at a previous sidebar, she had asked the court to inquire of Cysz "whether he would give them any more credence just for being a police officer," but the court had denied that request. The trial court again declined to put the question to Cysz because the court believed all potential jurors had been questioned adequately and stated, "I'm not doing further voir dire. Objection noted."

The next potential juror to be questioned after Cysz was Arnetha Johnson. During the trial court's questioning, Ms. Johnson responded, "In 2001, my baby brother was murdered. And at age 18 I was raped and robbed." No one had been arrested in either of those incidents. With 11 jurors chosen and only 2 jurors left in the panel, Jeffrey Cysz and Arnetha Johnson, defendant had only one remaining peremptory challenge to use in selection of the 12th juror. The defense chose to use its final

peremptory challenge to eliminate Cysz from the jury and, perforce, Ms. Johnson became the 12th juror.

At trial, the following testimony was presented. On July 10, 2008, at about 4 a.m., Donald Mason and a lady were walking east on Pershing Road when defendant and another man approached and demanded money. When Mason said he had no money, the second man moved his right hand toward his waist and told Mason to give up the money or he would kill Mason. While the second man went through Mason's pockets and took some loose change, defendant took the red and silver cell phone clipped to Mason's waist. The second man ordered Mason to leave the scene before he "popped" (shot) Mason.

Mason left and two blocks away he flagged a police car. He gave the officers, Fagan and Monte, descriptions of the two robbers and Monte sent a flash message relaying the descriptions. Officer Hooper in a second police car drove Mason around the area. About 20 minutes after the robbery, Hooper and Mason arrived at an apartment complex at 40th and Prairie. Mason saw defendant and the second man approaching an outside staircase, and Mason told Hooper they were the two robbers. Officers Fagan and Monte had arrived at the scene, and Hooper notified them by radio that the two men, who began climbing the stairs, were the robbers. Fagan and Monte mounted the stairs after the offenders, detained them, and brought them back down the stairs to Hooper's car where Mason identified them as the robbers. Hooper notified

Fagan and Monte that he had seen one of the men (defendant) place an object above a light fixture on the third floor of the staircase. Mason gave the police his cell phone number and Hooper dialed the number. They could hear the phone ringing. Monte went back up the stairs and retrieved Mason's cell phone from above the light fixture where Hooper had seen defendant place an object. Mason identified the cell phone as his.

Defendant did not present evidence in his defense. The jury returned a verdict finding defendant guilty of aggravated robbery. Defendant later filed a motion for a new trial, which included the claim that the trial court "erred in refusing to question the venire as requested by counsel and by insisting that all sidebars be off the record, over defense objection." Defense counsel rested on the motion without argument. The court sentenced defendant to 10 years in prison.

On appeal, defendant contends the court erred in failing to ask prospective juror Jeffrey Cysz, who aspired to be a police officer, whether he would give any officers who testified more credence merely because they were police officers.

Voir dire is governed in criminal cases by Supreme Court Rule 431 (eff. May 1, 2007), which provides that the trial court shall put to the prospective jurors questions the court thinks appropriate, touching upon their qualifications to serve as jurors. In addition, "[t]he court may permit the parties to submit additional questions to it for further inquiry if it

thinks they are appropriate ***." Ill. S. Ct. R. 431(a) (eff. May 1, 2007). The trial court is given the primary responsibility of conducting the *voir dire* examination, and the scope and extent of the examination rests within that court's discretion. *People v. Terrell*, 185 Ill. 2d 467, 484 (1998). The trial court's discretion must be exercised in a manner consistent with the purpose of *voir dire*, which is to acquire sufficient information about the opinions and beliefs of prospective jurors so as to allow removal of those whose minds are closed by bias and prejudice, preventing them from applying the law as instructed. See *People v. Strain*, 194 Ill. 2d 467, 476 (2001), and cases cited therein. Where *voir dire* questions are offered by defense counsel but not put to the venire by the court, prejudicial error will not be inferred unless the jury finally selected was actually biased or unfair in any manner. *People v. Taylor*, 235 Ill. App. 3d 763, 764 (1992). The burden is on the defendant to show that he was actually prejudiced. *Taylor*, 235 Ill. App. 3d at 764.

In the case at bar, defendant claims the trial court's alleged error, refusing to question Cysz about whether he would give added weight to the testimony of police officers, forced the defense to exercise its last peremptory challenge to eliminate Cysz as a juror and prevented the defense from being able to challenge the remaining prospective juror, Arnetha Johnson. We find the trial court did not abuse its discretion in rejecting

the proffered questioning of Cysz. In its initial questioning, the court had already addressed the intent of Cysz to become a police officer with respect to whether Cysz could be a fair and unbiased juror. Defense counsel's proffered question sought the identical purpose: to determine whether the potential juror might be biased in favor of State witnesses. The trial court possesses great latitude in deciding what questions to pose during *voir dire*. *Terrell*, 185 Ill. 2d at 484. Defendant's attempt to distinguish the court's questioning of the potential juror from his own counsel's proffered question is a distinction without a difference. We do not find an abuse of discretion in the court's favoring of one form over the other.

Moreover, the testimony of the two police officers, Fagan and Hooper, was not critical to the State's case. The crucial testimony came from Donald Mason, the victim, who first observed defendant when he robbed Mason of his cell phone and who, minutes later, gave descriptions of the offenders to police officers. Mason rode in a police car with an officer as they searched the vicinity, saw defendant and the second robber within 20 minutes of the robbery, announced they were the perpetrators, and positively identified the two men after they were brought down from the stairs. Mason gave the police his cell phone number, heard the phone ringing from the stairwell after the police dialed the number, saw an officer go up the stairs and retrieve an object, and identified the object as his cell phone. Mason

again positively identified defendant at trial. The fact that the testimony of police officers was not an integral part of defendant's trial reinforces our conclusion that the court did not abuse its discretion by refusing to expand its questioning of Cysz, who had already stated under oath that his aspiration to go into law enforcement would not prevent him from returning a not guilty verdict where appropriate.

Additionally, Cysz did not sit on the jury that found defendant guilty. Notwithstanding this fact, defendant complains that he had only one peremptory challenge left when his defense counsel was required to excuse either Jeffrey Cysz or Arnetha Johnson. That decision was forced on the defense, however, by the fact defendant had already used all but one of his peremptory challenges. We find no basis for inferring prejudicial error without any indication in the record that the jury ultimately chosen was actually biased or unfair. Defendant has failed to sustain his burden of establishing actual prejudice.

Defendant raised two other issues in his opening brief, but in his reply brief concedes that those claims are undermined by recent decisions of our supreme court.

First, defendant initially contended that the trial court erred in failing to consider his pretrial claims of ineffective counsel, citing *People v. Krankel*, 102 Ill. 2d 181 (1984). *Krankel* announced a new rule requiring what has become known as a *Krankel* hearing whereby a case is remanded for a posttrial

hearing on a *pro se* ineffective-assistance-of-counsel claim. *Krankel*, 102 Ill. 2d at 189. The State's brief and defendant's reply brief correctly note that, while this case was pending, our supreme court decided in *People v. Jocko*, 239 Ill. 2d 87, 93 (2010), that a circuit court is not obligated to conduct an inquiry, *before trial*, into a *pro se* defendant's claims of ineffective assistance of counsel. Defendant's reply brief concedes the *Jocko* decision precludes relief on this issue.

Second, defendant initially contended that the trial court did not fully comply with Supreme Court Rule 431(b) (effective May 1, 2007) in questioning the venire. Defendant observed that the court advised the potential jurors of the four principles set forth in Rule 431(b), but merely inquired whether any of the jurors had "a problem with" the first two principles (presumption of a defendant's innocence and the State's burden of proof beyond a reasonable doubt) or whether any of them would "hold it against" defendant if he did not testify or present witnesses in his defense. Defendant contended this questioning was insufficient to determine whether each prospective juror both understood and accepted all four principles. Defendant further asserted that his failure to object at trial or preserve his claim of error in a posttrial motion should not result in forfeiture where the error arose from the trial judge's conduct, that trial courts should be held responsible for Rule 431(b)

compliance, and that the error should be reviewed under the second prong of the plain error rule.

Since defendant filed his opening brief, our supreme court has issued its opinion in *People v. Thompson*, 238 Ill. 2d 598 (2010), which held that a trial court's violation of amended Supreme Court Rule 431(b) was not a structural error requiring automatic reversal. *Thompson*, 238 Ill. 2d at 610-11. The court held that the defendant in that case had failed to meet his burden under the second prong of plain-error review of showing the trial court's error had affected the fairness of his trial or had challenged the integrity of the judicial process. *Thompson*, 238 Ill. 2d at 614. The court also refused to adopt a bright-line rule of reversal for any violation of Rule 431(b). *Thompson*, 238 Ill. 2d at 616. Defendant's reply brief concedes that *Thompson* is applicable in the instant case. Our examination of the record convinces us that, even assuming there had been a violation of Rule 431(b), defendant has not established that the violation resulted in a biased jury. Here, as in *Thompson*, the second prong of plain-error review does not provide a basis for excusing defendant's procedural default.

For all the above-stated reasons, we affirm the judgment of the trial court.

Affirmed.