

FIRST DIVISION
September 30, 2011

No. 1-08-2955

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(3)(1).

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.)	06 CR 22884
)	
DONZELL THOMAS,)	Honorable
)	Joseph G. Kazmierski,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

HELD: The State may prove a defendant committed armed robbery by showing that the defendant used a firearm, even if the State does not prove that the firearm is a dangerous weapon. The trial court's error concerning admonitions to the venire did not rise to the level of plain error. The defendant did not show that any of the trial judge's comments improperly prejudiced him. The

trial court did not abuse its discretion when it refused to instruct the jury on the lesser included offense of robbery, because no evidence supported an inference that the defendant used anything other than a firearm to rob the victims. The defendant did not preserve a sufficient record to show that the trial court erred when it denied his motion for new trial without asking defendant why he believed he did not receive effective assistance of counsel.

¶ 1 A jury found the defendant, Donzell Thomas, guilty of armed robbery. On appeal, defendant argues: (1) the State did not prove him guilty because it did not show he used a dangerous weapon; (2) the trial judge violated Supreme Court Rule 431(b) (Ill. S. Ct. R. 431(b) (eff. May 1, 2007)) by giving the venire members inadequate admonitions; (3) the judge's hostile comments to defense counsel require a retrial; (4) the court should have instructed the jury on the lesser included offense of robbery; and (5) the court should have inquired further into the defendant's allegations of ineffective assistance of counsel.

¶ 2 We hold: (1) the State satisfied the amended armed robbery statute by showing that defendant used a firearm; (2) the violation of Rule 431(b) does not amount to plain error; (3) defendant has not shown that the judge's comments would likely have swayed the jury; (4) the court did not abuse its discretion when it refused to instruct the jury on robbery; and (5) the record on appeal does not show that the court failed to inquire adequately into the defendant's allegations of ineffective assistance. Therefore, we affirm the judgment of the trial court.

¶ 3 **BACKGROUND**

¶ 4 On September 3, 2006, around 1 a.m., Yvette Felton drove Trenette Jackson and Shondale Harris to a nightclub on 66th Street. When they stopped to get out of the van, they saw a man standing on the sidewalk next to a woman. The man walked up and

asked for a light. Jackson, who sat in the front passenger seat smoking a cigarette, offered him a light. The man pulled the door open, pushed his way into the van, stuck something against Jackson's head, and demanded money, jewelry and cell phones. The three women gave him what they had. The man took the loot and ran down an alley. Felton, Jackson and Harris drove to the police station where they reported the crime. They described the robber, and all three said he held a gun to Jackson's head.

¶ 5 The next day Harris called the phone company to report the robbery of her cell phone. The company told her that someone made calls from her phone after 1 a.m. on September 3. The company gave her the numbers called and she reported the numbers to police. The phone numbers led police to suspect that the defendant, who lived near the nightclub, might have committed the crime. Police prepared a photo array which the women viewed at the police station. Each picked out defendant's photograph as a picture of the robber. After police arrested defendant, the women all identified him in a lineup as the robber. Prosecutors charged defendant with three counts of armed robbery, with one count for each of the three victims.

¶ 6 Before trial, defendant moved to prevent the State from using, for impeachment, evidence of defendant's two prior convictions for armed robbery. The trial court deferred its ruling on the motion until defendant completed his testimony. Defendant chose not to testify.

¶ 7 The trial court admonished all prospective jurors that they must presume defendant innocent, the State bore the burden of proving him guilty, and the defendant

had no duty to present any evidence on his own behalf. The judge asked the venire members collectively if they understood and had any problem with those principles. No one responded. The judge did not tell the venire members or ask them about the principle that they must not hold against the defendant his decision not to testify.

¶ 8 At trial, Felton, Jackson and Harris all identified defendant as the man who held a gun to Jackson's head and robbed all three of them. All said they saw defendant clearly in the streetlight as he approached the van. Jackson testified that she came to a preliminary hearing in this case on September 28, 2006. In court she saw the woman who stood on the street by the nightclub on the night of the robbery. That woman left the courtroom after the hearing in the case against defendant. Jackson also testified that when she first described the robber to police, she thought the robber had a birthmark on his face, but she realized that she saw pock marks.

¶ 9 Defense counsel presented as a witness an officer who said the victims initially reported seeing a birthmark on the robber's face, but when the officer questioned them further, the victims said the robber had pock marks. In the photo array and the lineup at the police station, police presented no one with a birthmark on his face.

¶ 10 During Harris's cross-examination, defense counsel asked for details about the jewelry stolen from her. The record shows the following testimony and comments:

"Q Do you remember in what order you took [the jewelry]
off?

A No.

Q But you remember at some point?

A No, I don't.

Q Ma'am, if you don't mind just take your hand off.

A I'm just nervous, I'm sorry.

Q Do you remember in what order you took everything off?

[Prosecutor]: Objection.

THE COURT: She said she doesn't remember.

[Defense Counsel]: Q But at some point all your jewelry is
off?

A Yes.

Q And what did you do with your jewelry after you took it off?

A As I was taking it off I was handing it to him.

Q And so is it fair to say that you would take one piece off
hand it to him –

THE COURT: She just said she took it off and handed it to
him. Are you listening to what she is saying? You don't have to
repeat it, she just said it."

¶ 11 Defense counsel asked Felton three times about whether the men in the lineup had
long hair. The first two times, the court sustained objections to the questions, but the
third time, the court said, "Didn't you hear my last ruling?" Counsel then questioned
Felton about details of the lineup, including who saw the lineup first, whether an officer

escorted that person back to the waiting area, and so forth. Counsel remarked, "Just to make this clear because I'm getting confused." The court interjected, "Well, I don't care if you are confused, so just make sure the jury is not confused." Several other times the judge commented that witnesses had already answered questions defense counsel re-asked with slightly different words.

¶ 12 Defense counsel requested an instruction on robbery as a lesser included offense, arguing that the victims could have mistaken a cell phone or other dark metallic object for a gun. The trial court denied the request. The court instructed the jurors that in their deliberations they must not consider the fact that defendant did not testify.

¶ 13 The jury found defendant guilty on all three counts of armed robbery. Defendant mailed to the court a *pro se* motion for a new trial. The motion did not mention ineffective assistance of counsel. Defendant apparently later sent an amended *pro se* motion for a new trial to the court, with allegations of ineffective assistance, but the record on appeal does not include that motion. Defendant's attorney presented a motion for a new trial that included most of defendant's arguments, and added some further claims, but the motion did not mention ineffective assistance of counsel.

¶ 14 At the hearing on the motion, defense counsel specifically sought a ruling on the motions defendant filed *pro se*. The judge said:

" I did make a determination that there's no further inquiry with regard to his motions that were filed. I did not believe an appointment of another attorney was warranted based on what he

said."

Defendant then directly addressed the court, and he said, "I filed my amended motion because I had put in there for ineffective assistance of counsel." He added, "my case ha[s]n't been done the right way." The trial judge did not ask defendant to elaborate about why he thought he did not receive effective assistance. The trial court denied the motions for a new trial.

¶ 15 The court sentenced defendant to natural life in prison, without possibility of parole, on one count of armed robbery. The court imposed no sentence on the other counts. Defendant now appeals.

¶ 16 ANALYSIS

¶ 17 Sufficiency of the Evidence

¶ 18 On appeal defendant argues first that the evidence does not prove that he committed armed robbery because the State did not prove that he used a dangerous weapon. We will not reverse a conviction for insufficient evidence if any rational trier of fact could find that the State proved all the elements of the crime beyond a reasonable doubt. *People v. Davison*, 233 Ill. 2d 30, 43 (2009).

¶ 19 The defendant in *People v. Toy*, 407 Ill. App. 3d 272 (2011), raised a similar argument. Defendant, like the defendant in *Toy*, relies primarily on *People v. Ross*, 229 Ill. 2d 255 (2008). In *Ross*, the victim testified that the defendant pointed a gun at him and demanded his money. The trial court found the defendant guilty of armed robbery. On appeal, our supreme court found that no evidence showed that the gun was loaded or that the defendant could have used the gun as a bludgeon. The court held that the State

had not proved that the defendant used a "dangerous weapon" within the meaning of the armed robbery statute in effect at the time of the crime. *Ross*, 229 Ill. 2d at 277; see 720 ILCS 5/18-2 (West 1998).

¶ 20 A new version of the armed robbery statute came into effect on January 1, 2000, and the new version applies here. See *Toy*, 407 Ill. App. 3d at 291. Under the statute as amended, a person commits armed robbery if he commits a robbery while he is "armed with a dangerous weapon other than a firearm; or *** [he is] armed with a firearm." 720 ILCS 5/18-2(a) (West 2006). Thus, the amendment "deleted the requirement of proof of a 'dangerous weapon' when the defendant is armed with a firearm." *Toy*, 407 Ill. App. 3d at 291-92. The testimony from Felton, Jackson and Harris sufficiently proved that the defendant used a firearm to rob them. See *Toy*, 407 Ill. App. 3d at 293; *People v. Hill*, 346 Ill. App. 3d 545, 548 (2004). Thus, the evidence sufficiently supports the conviction for armed robbery.

¶ 21 Rule 431(b)

¶ 22 Next, defendant argues that we should remand for a new trial because the court failed to admonish the venire members that if defendant decided not to testify, they must not consider that against him. *People v. Thompson*, 238 Ill. 2d 598 (2010), which our supreme court decided after the parties briefed this appeal, controls our consideration of the issue. Because defendant failed to object to the improper admonitions, we review the issue only for plain error. We will reverse a judgment based on a plain error when "(1) a clear or obvious error occurs 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 occurs 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 closeness of the evidence.” *People v. Sargent*, 239 Ill. 2d 166, 189 (2010).

¶ 23 Three eyewitnesses who had excellent opportunities to view the robber all readily identified defendant as the robber. Defendant lived near the scene of the robbery and other evidence showed that the woman who stood by the robber on the night of the crime came to court for a preliminary hearing in the case against defendant. We do not consider the evidence against defendant closely balanced. Therefore, the first prong of plain error review provides no grounds for reversal.

¶ 24 The decision in *Thompson* effectively disposes of the claim here for reversal under the second prong of plain error review. The *Thompson* court held that a similar violation of Rule 431(b) did not amount to a structural error, and the error did not implicate a fundamental right. *Thompson*, 238 Ill. 2d at 614-15. Defendant, like the defendant in *Thompson*, has not shown that the court empaneled a biased jury, so he has not shown that the error affected the integrity of the judicial process. See *Thompson*, 238 Ill. 2d at 615. Accordingly, we find no plain error, and therefore we find that the failure to admonish the venire properly does not warrant reversal of the conviction.

¶ 25 Prior Convictions

¶ 26 The trial court refused to rule on defendant's motion to preclude the use of his

prior convictions for impeachment if he chose to testify. Defendant decided not to testify. Defendant seeks to challenge the trial court's refusal to rule on the motion. However, our supreme court held, in *People v. Averett*, 237 Ill. 2d 1, 19 (2010), that this court cannot review the trial court's failure to rule on the admissibility of impeachment evidence when the defendant chooses not to testify.

¶ 27 Hostility to Defense Counsel

¶ 28 Defendant claims that the court's display of hostility to defense counsel deprived him of a fair trial. "Every defendant, regardless of the nature of the proof against him or her, is entitled to a trial that is free from improper and prejudicial comments on the part of the trial judge." *People v. Stokes*, 293 Ill. App. 3d 643, 648 (1997). Remarks belittling defense counsel or demonstrating hostility to defense counsel may prevent the defendant from receiving a fair trial. *People v. Harris*, 123 Ill. 2d 113, 137 (1988). "[I]n order for a trial judge's comments to constitute reversible error, a defendant must demonstrate that the comments constituted a material factor in the conviction or were such that an effect on the jury's verdict was the probable result." *Harris*, 123 Ill. 2d at 137. We review *de novo* the legal issue of whether the trial judge's conduct requires reversal of the judgment. *People v. McLaurin*, 235 Ill. 2d 478, 485 (2009).

¶ 29 During the course of the trial, the trial judge pointed out several times that defense counsel essentially repeated questions, sometimes after the witness had answered, and sometimes after the judge had sustained objections to the questions. The judge once asked, "Didn't you hear my last ruling?" The judge also asked, "Are you listening to what

she's saying?" The judge also responded to one of counsel's remarks, as the judge said he did not care whether counsel felt confused, as long as the jury did not get confused. We find that the judge appropriately restricted repetitive questions. See *People v. Leak*, 398 Ill. App. 3d 798, 822 (2010). We also find that defendant has not shown that any improper remarks had prejudicial effect. Accordingly, we hold that the conduct of the trial judge towards defense counsel does not warrant reversal of the conviction.

¶ 30 Jury Instruction

¶ 31 Next, defendant argues that the trial judge should have instructed the jury on the lesser included offense of robbery. We will reverse the trial court for erroneous instructions only if the trial court abused its discretion. *People v. Jones*, 219 Ill. 2d 1, 31 (2006). But if the evidence supports an instruction on a lesser included offense, the failure to grant the defendant's request for such an instruction constitutes an abuse of discretion. *Jones*, 219 Ill. 2d at 31.

¶ 32 Our supreme court recited the relevant principles in *People v. Novak*, 163 Ill. 2d 93, 108 (1994), *abrogated on other grounds by People v. Kolton*, 219 Ill.2d 353, 364 (2006):

"A defendant is entitled to a lesser included offense instruction only if the evidence would permit a jury rationally to find the defendant guilty of the lesser included offense and acquit him or her of the greater offense. [Citation.] A lesser included offense instruction is not proper where, on the evidence presented

at trial, the factual issues to be resolved by the jury are the same as to both the lesser and greater offenses. A lesser included offense instruction is proper only where the charged greater offense requires the jury to find a disputed factual element that is not required for conviction of the lesser included offense. [Citations.]

This evidentiary requirement is usually satisfied by the presentation of conflicting testimony on the element that distinguishes the greater offense from the lesser offense. However, where the testimony is not conflicting, this requirement may be satisfied if the conclusion as to the lesser offense may fairly be inferred from the evidence presented. [Citation.] The amount of evidence necessary to meet this factual requirement, *i.e.*, that tends to prove the lesser offense rather than the greater, has been described as any, some, 'slight,' or 'very slight.' " *Novak*, 163 Ill. 2d at 108, quoting *People v. Upton*, 230 Ill. App. 3d 365, 374 (1992) and *People v. Willis*, 50 Ill. App. 3d 487, 490-91 (1977).

¶ 33 Here, all three victims swore they saw a gun in the defendant's hand, held against Jackson's head. No evidence supports an inference that they saw an object other than a gun. Therefore, we cannot find even slight evidence to support a verdict of guilty of robbery but not guilty of armed robbery. The trial court did not abuse its discretion when it refused to instruct the jury on the lesser included offense of robbery.

¶ 34 Investigating Allegations of Ineffective Assistance of Counsel

¶ 35 At the hearing on his motion for a new trial, defendant said that he received ineffective assistance of counsel, because his case was not "done the right way." Nothing in the record further explains the basis for his claim of ineffective assistance. The trial judge reviewed defendant's *pro se* motions and held that the allegations of ineffective assistance required no further inquiry. Defendant argues that we must remand for a hearing at which he could explain why he felt he received ineffective assistance of counsel.

¶ 36 The decision in *People v. Walker*, 2011 IL App (1st) 072889B, provides useful guidance on this issue. The court there held:

"A trial court is not required to appoint new counsel every time a defendant files a *pro se* motion claiming ineffective assistance of counsel. [Citation.] Rather, the trial court should first examine the factual basis underlying the defendant's claim. [Citation.] This can be accomplished in several ways. [Citation.] The court could simply ask trial counsel about the circumstances surrounding the claim or ask defendant questions about his claim. [Citation.] In the alternative, the court can base its determination on its personal knowledge of defense counsel's performance at trial or on the facial insufficiency of defendant's allegations. [Citation.] If a defendant's claim lacks merit or relates only to matters of trial

strategy, the trial court may deny the motion without appointing new counsel." *Walker*, 2011 IL App (1st) 72889B, ¶32.

¶ 37 Here, we do not know exactly what defendant alleged as the basis for his claim of ineffective assistance of counsel, because the record on appeal does not include the *pro se* motion for a new trial in which he alleged ineffective assistance. If defendant, in that motion, made only conclusory allegations of ineffective assistance, or allegations that related only to matters of trial strategy, the trial judge's review of that motion with his knowledge of the conduct of the trial would completely justify the decision to deny the motion for a new trial without further inquiry into the allegations of ineffective assistance of counsel. See *Walker*, 2011 IL App (1st) 72889B, ¶32. Where the defendant has failed to present a sufficient record to show that the trial court erred, we will not reverse the judgment. *People v. Fair*, 193 Ill. 2d 256, 264 (2000). Defendant has not presented a record that shows that the judge needed to do any more than read his *pro se* motion to investigate sufficiently his allegations of ineffective assistance of counsel. Therefore, we will not remand for further inquiry into the basis for defendant's claim that he received ineffective assistance of counsel.

¶ 38 CONCLUSION

¶ 39 Defendant did not show that the trial court's violation of Supreme Court Rule 431(b) amounted to plain error. The trial court's comments in response to defense counsel's examinations of some witnesses do not require reversal. Because no evidence supports an inference that the robber used anything other than a gun to rob the victims,

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the trial court did not abuse its discretion when it refused to instruct the jury on the lesser included offense of robbery. Because the evidence sufficiently shows that defendant used a firearm to rob the victims, it adequately supports the conviction for armed robbery.

Finally, defendant has not preserved a record to show what facts he alleged as a basis for his claim that his counsel provided ineffective assistance, and therefore we cannot say that the trial judge needed to inquire any further into the basis for defendant's claim.

Accordingly, we affirm the judgment of the trial court.

¶ 40 Affirmed.