2017 IL App (2d) 151251-U
No. 2-15-1251
Order filed March 2, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. OTIS B. BOOSE, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Lake County. No. 11-CF-1657 Honorable George D. Strickland, Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Zenoff and Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly denied defendant's *pro se* claim of ineffective assistance of counsel, as its inquiry revealed that there was no colorable basis for his claim that counsel was ineffective for failing to strike a juror: although the juror made an isolated comment that suggested a bias against a defendant who refused to testify, he had earlier assured the court unequivocally that he would not hold such a refusal against defendant.

¶ 2 Following a jury trial, defendant, Otis B. Boose, was found guilty of two counts of unlawful violation of an order of protection (720 ILCS 5/12-30(a)(1) (West 2010)) and was sentenced to an extended term of four years' imprisonment. Defendant filed a *pro se* motion alleging that his trial counsel was ineffective. Following a preliminary inquiry into defendant's

claims, as required under *People v. Krankel*, 102 Ill. 2d 181 (1984), the trial court denied defendant's motion. Defendant timely appealed. Defendant argues that the matter should be remanded for the appointment of counsel and a full hearing under *Krankel*, because the evidence at the preliminary inquiry showed possible neglect in defense counsel's failure to seek removal of a juror. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged with two counts of unlawful violation of an order of protection (720 ILCS 5/12-30(a)(1) (West 2010)) after having been previously convicted of domestic battery (720 ILCS 5/12-3.2 (West 2010)). Both counts alleged that defendant had previously been served with an order of protection naming Dorian Davis as the protected party. Count I alleged that defendant violated the order of protection in that he came within 500 feet of Davis. Count II alleged that defendant violated the order of protection in that he had contact with Davis.

¶ 5 The jury was selected over a period of two days. On the first day, eight jurors were chosen. The second day began with questioning of a panel of four jurors, which included Juror No. 343. During questioning by the trial court, Juror No. 343 indicated that, in 1996, he had served on a jury for four months in California. He stated that he would be able to apply the law as instructed here. He further stated that his daughter had been robbed at gunpoint in Florida, that no one had been apprehended, and that the experience would not prevent him from being fair and impartial to either side. When questioned along with the other three panel members, Juror No. 343 indicated that he had never been arrested or charged with a crime, that there was nothing about the nature of the charges that would prevent him from being fair and impartial, and that he did not have any prejudice against a person charged with a crime. He further indicated that he would apply the law as instructed regardless of his personal feelings and that he would

not hesitate to return a not-guilty verdict if the State failed to prove defendant guilty beyond a reasonable doubt. He indicated that he understood that defendant was presumed innocent, that the State had the burden of proof, and that defendant did not have to offer evidence. He also indicated that he would not hold it against defendant if defendant did not testify on his own behalf.

¶ 6 When the State questioned Juror No. 343, it asked about his jury experience in California. He stated that "[i]t was too long, too much bickering, too many experts talking from both sides, couldn't even get a grasp what they were talking about." He stated that he did not like deliberating, "because [the jurors] totally brought their own feelings into that deliberation and weren't supposed to and they did. That's why I felt like the person didn't get justice." When asked how he handled it if other jurors did not agree with him, he stated, "Well, the way it worked, they only needed nine people out of the 12, so I was always the odd one out. So as long as they got the nine, they moved out [*sic*] when the other three didn't agree with it or not. I was mostly on the odd end of that all the time." He further explained: "Well, what I felt at the time, the evidence, we was instructed, if I felt firm on that decision, I stuck with it. I didn't let them sway me."

¶ 7 The State next asked Juror No. 343 about his personal life. He stated that he had been an aircraft mechanic for 22 years and that he was married. His wife attended school. He had three children: a 29-year-old son, who was in the Navy and stationed in California; a 29-year-old daughter, who did clerical work and lived in Texas; and a 22-year-old daughter, who lived in Texas with her sister and was studying to be a paramedic. Juror No. 343 stated that in his free time he bowled and worked on model railroads.

¶ 8 Finally, the State asked whether Juror No. 343 would find defendant not guilty if the State failed to meet its burden and whether he would find defendant guilty if the State met its burden. He answered in the affirmative.

¶ 9 When defense counsel questioned Juror No. 343, counsel began by asking where he liked to travel and where he had previously resided. Counsel asked him additional questions about his children. When counsel asked him about his previous experience as a juror, the following colloquy occurred:

"[DEFENSE COUNSEL]: And you said the one thing that you disliked that was a problem was the bickering.

JUROR NO. 343: Yes, a lot of bickering.

[DEFENSE COUNSEL]: Was that bickering amongst the jurors or was that bickering in the courtroom between attorneys and witnesses?

JUROR NO. 343: Everything. Between the attorneys, the experts[,] and the jurors.

[DEFENSE COUNSEL]: In regards to any bickering in the courtroom, what kind of sense of the judicial system did that leave you with?

JUROR NO. 343: A lot of suspicion.

[DEFENSE COUNSEL]: Can you expound on that a little bit?

JUROR NO. 343: Well, for example, the individual that was operating the train, it was determined he tested positive. That's the first thing that happened. When the incident happens, the policemen, the BART policemen, they take them into custody and they take a sample. Two samples are taken and they test Sample 1. Sample 1 comes back positive supposedly. And then they're supposed to retest the other to make the

verify. Well, that sample vaporized. It just disappeared, and then these tapes the BART uses to keep track of the trains, they keep three tapes. On that one day, that one particular incident, all three tapes disappeared, and they never lost a tape before that and after that, and the individual that was operating the train, he never testified. So that left a lot of suspicion with me. So that's what I mean there was bickering back and forth."

[DEFENSE COUNSEL]: I'm going to cling onto something you just said. You said the person driving the train, the person running the train did not testify, and that left you with some suspicion; is that what you said?

JUROR NO. 343: Yes.

[DEFENSE COUNSEL]: Now, if [defendant] decided not to testify, would that leave you with some suspicion as to why he wasn't testifying?

JUROR NO. 343: I would think about it.

[DEFENSE COUNSEL]: What do you mean you would think about it?

JUROR NO. 343: Somebody is in court for something, and if you're facing a long jail time or a long time behind bars and you're not going to say nothing, you're just going to bet on somebody else going to get you out of it, if that was me, I'm facing a long-term whether I did it or not, I'm going to say something because if I'm a hundred percent sure that I didn't do it, I'm going to talk. I'm going to talk. But I'm not a hundred percent sure, I'm not going to talk.

[DEFENSE COUNSEL]: All right. Thank you very much."

¶ 10 The final panel of four jurors, which included Juror No. 343, was ultimately selected and the trial commenced.

¶ 11 At trial, Davis testified that defendant was her ex-husband. They had been married for 17 years prior to their divorce on May 10, 2011, and they had two children. Davis obtained the order of protection against defendant in April 2010. On May 24, 2011, defendant telephoned Davis on her cell phone and asked if he could come over to see their children. Davis told him that he could not come over. Davis admitted that her cell phone showed that a call had been subsequently placed from her phone to defendant's phone. According to Davis, it was an accidental call. Davis thought that one of her grandchildren touched the screen and dialed defendant back.

¶ 12 Davis testified that defendant came to her house at 8:20 p.m. that evening and entered through an unlocked door. He told her that he wanted to talk to her and to find out if the children needed anything to eat. She said no and asked him to leave. He refused to leave, despite being asked to leave several times, and stood less than two feet away from her. Davis could smell beer on defendant's breath. She looked for her cell phone, but she could not find it, so she left the house and drove to her niece's house to call the police. After calling the police and telling them that defendant was at her house, she returned home and saw that defendant was still there. She told defendant that she had called the police and that he needed to leave. Defendant cursed at Davis and began to exit her home. At that point, the police arrived and arrested him.

¶ 13 Davis further testified that, as a part of the order of protection, defendant was to give child support payments to his sister, Marilyn Boose, and then Marilyn was to give the payments to Davis. Defendant was not allowed to give money directly to Davis.

¶ 14 North Chicago police officer Carl Sturt testified that, when he arrived at Davis's home, he saw defendant standing at the bottom of the stairs that led up to the home. Defendant told Sturt that he was there to pay child support and that Davis had called him and asked him to come

over. Davis showed Sturt court documents that indicated that defendant was to give the child support payments to Marilyn. Sturt looked at defendant's phone and confirmed that defendant had placed a call to Davis, which had lasted approximately one minute. He also saw that there had been a phone call from Davis to defendant, which had lasted approximately five seconds. Sturt asked Davis about the call placed to defendant, and Davis explained that it had been a misdial.

¶ 15 Following closing arguments, the jury found defendant guilty of both counts of unlawful violation of an order of protection.

¶ 16 Prior to sentencing, defendant filed a *pro se* "Motion to Reduce Sentence," wherein he claimed, *inter alia*, that defense counsel did not represent him adequately. Thereafter, defense counsel filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. The trial court heard and denied the motion filed by defense counsel without addressing defendant's *pro se* challenge to the adequacy of counsel's representation and sentenced defendant to four years in prison. Defendant appealed, arguing that the trial court erred in failing to inquire into his *pro se* allegations of ineffectiveness. *People v. Boose*, 2013 IL App (2d) 111276-U (summary order). The State confessed error, and we remanded. *Id.* ¶ 3.

¶ 17 On remand, a preliminary *Krankel* hearing was held before a different judge. Defendant presented his allegations that defense counsel was ineffective. Defendant argued, *inter alia*, that defense counsel failed to challenge certain potential jurors during jury selection. The trial court asked defense counsel to address defendant's claim, and she did so. The court then inquired of the State, and the State provided its input on the issue. Thereafter, the trial court denied defendant's claims, stating:

> "All the points were addressed. I did not find a scintilla of evidence that would support your claim of ineffective assistance on behalf of [defense counsel], who was a very seasoned defense attorney, gave you good representation; and frankly, [defendant], I can't believe anything you are saying. They disproved you. The record disproves you. Nice try. That is all I can tell you."

¶ 18 Defendant appealed, arguing that he was deprived of a fair preliminary inquiry into his *pro se* claims of ineffective assistance of trial counsel, where the State's participation in the hearing rendered the hearing adversarial. *People v. Boose*, 2014 IL App (2d) 130810. We agreed, and we remanded for a new preliminary hearing before a different judge. *Id.* ¶ 37.

¶ 19 On remand, a preliminary *Krankel* hearing was held before a different judge. At the hearing, defendant outlined his various claims of ineffective assistance of counsel. With respect to Juror No. 343, he stated: "[T]here was Juror No. 343, who stated if [defendant] do [*sic*] not take the stand, I will find him one hundred percent guilty, which my attorney, *** had me sign a statement saying I would not take the stand." When defense counsel was questioned on the issue by the trial court, she stated:

> "Throughout the entire jury selection, [defendant] was very involved. I still have all of the notes he was giving to me. Each juror was thoroughly questioned by me. I do know he had a struggle with one juror, and I can't remember if we left him on or not, but I do know that he stated Juror No. 344 [*sic*] was on the final panel. I don't have that number, so I don't know which juror he is precisely referring to.
>
> I don't recall nor would I keep a juror that said he doesn't take the stand, I am finding him, you know, I would vote for guilty; but I cannot recall if that was specifically said or not.

I do know that jury selection was very thorough. I have very copious notes on it for myself and [defendant]."

¶ 20 The trial court denied defendant's motion, ruling as follows on the issue of Juror No. 343:

"Regarding the jury selection, no juror was seated who did not agree to follow the law. There was—there are many, many jurors when initially are asked would you consider it against the Defendant that they did not testify, many jurors do initially say, well, I would want them to testify or the such; but no juror was accepted in this case who said they would convict [defendant] just if he didn't testify.

By the time all 12 jurors who were on the jury were selected, all of them agreed to follow the law; and it is absolutely contrary to the law to consider the Defendant's not testifying; and the Court finds that that, in fact, did not happen."

¶ 21 Following the denial of his motion for reconsideration, defendant timely appealed.

¶ 22 II. ANALYSIS

¶ 23 Defendant argued below that defense counsel was ineffective for allowing Juror No. 343 to be on the jury where the juror stated: "[I]f [defendant] do [*sic*] not take the stand, I will find him one hundred percent guilty." Defendant concedes that his recollection of what the juror said was not entirely accurate, but he nevertheless argues that what the juror did say was enough to raise a red flag about his impartiality, such that the trial court erred in failing to appoint new counsel to represent him on this claim of ineffective assistance of counsel.

¶ 24 In response, the State argues that defendant is estopped from raising this claim, because he acquiesced in the selection of Juror No. 343. In the alternative, the State argues that the trial court's denial of the motion was not against the manifest weight of the evidence, where the entirety of the *voir dire* showed that Juror No. 343 would be fair and impartial.

¶ 25 Claims of ineffectiveness of counsel are judged under the familiar standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). A defendant must show that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 687-88.

¶ 26 When a defendant alleges a posttrial claim that he or she was denied effective assistance of appointed counsel, the trial court must adequately inquire into the claim and, if appropriate, appoint new counsel to argue the claim. *Krankel*, 102 Ill. 2d at 187-89. But defendant's mere presentation of a claim does not automatically require new counsel. *People v. Moore*, 207 Ill. 2d 68, 77 (2003). The trial court first must examine the claim's factual basis. *Id.* at 77-78. New counsel need not be appointed and the *pro se* motion may be denied when the claim lacks merit or pertains only to matters of trial strategy. *Id.* at 78. But should the examination reveal possible neglect, then new counsel should be appointed to represent the defendant at a hearing on the defendant's claim. *Id.* We will not reverse a trial court's decision to decline to appoint new counsel unless it is manifestly erroneous. See *People v. McCarter*, 385 Ill. App. 3d 919, 941 (2008) ("The trial court's decision to decline to appoint new counsel for a defendant based on a judgment that the ineffective assistance claim is spurious shall not be overturned on appeal unless the decision is manifestly erroneous.").

¶ 27 First, we reject the State's claim that defendant is estopped from raising the issue because he acquiesced in the selection of Juror No. 343. In support of its claim, the State relies on statements made by defense counsel during the first preliminary *Krankel* hearing, which this court found to be an improper adversarial hearing where defendant was unrepresented and not permitted to give his side. *Boose*, 2014 IL App (2d) 130810, ¶ 36. The State cites no authority

to support the proposition that we can rely on testimony from that improper hearing to affirm the court's ruling at a subsequent hearing.

¶ 28 We now consider whether the trial court's ruling declining to appoint counsel to argue defendant's ineffective-assistance claim was manifestly erroneous. We find *People v. Manning*, 241 Ill. 2d 319 (2011), instructive. In *Manning*, the defendant, a registered sex offender, was on trial for drug-related offenses. *Id.* at 321-26. During *voir dire*, defense counsel questioned the jurors about what impact, if any, the defendant's sex-offender status would have on their ability to be fair and impartial. *Id.* at 322. Juror A.C. stated that he believed that sex offenders should be " 'locked up for life.' " *Id.* He then agreed that he could render a judgment separate and distinct from the sex-offender case. *Id*. at 322-23. He said that he did not think that the sex-offender background would influence his decision in the case. *Id.* at 323. But then, when defense counsel pressed the issue, he stated, "I cannot be fair with the case." *Id.* He repeated that statement two more times. *Id.* Defense counsel did not move to strike A.C. for cause or otherwise remove him from the case. *Id.* The defendant was found guilty and appealed.

¶ 29 On appeal, the defendant argued that his counsel was ineffective for failing to challenge A.C., arguing that A.C. was unequivocally biased against him. *Id.* at 334. The court rejected this argument. The court stated:

> "[D]efendant focuses only on the last few answers A.C. gave in response to trial counsel's questions. This selective focus on those answers given by A.C. that suit defendant's argument skews the analysis of whether trial counsel was deficient. The entire *voir dire* of A.C. should be considered in evaluating whether and to what extent A.C. exhibited bias against defendant." *Id.*

The court noted that, even after saying that he believed that sex-offenders should be locked up for life, A.C. stated that, notwithstanding that belief, he would be able to listen to the evidence and render a decision apart from the sex-offender issue. *Id.* The court noted that A.C. also stated that he did not think that a sex-offender background would influence his decision on the case. *Id.* The court further noted that it was not until defense counsel pressed A.C. to state unequivocally that such a background would not influence his decision that he stated that he could not be fair with the case. *Id.* The court found that, considering the entire *voir dire* of A.C. in context, it was possible that defense counsel decided that A.C. was not unequivocally biased. *Id.* at 335. The court also noted other factors that counsel may have taken into consideration, such as the fact that A.C. was not a native of this country and that he had encounters with law enforcement officers in connection with two speeding tickets. *Id.*

¶ 30 Here, as in *Manning*, defendant focuses on an isolated statement by Juror No. 343. Juror No. 343 did say that he would "think about it" if defendant did not testify, because, if he himself is innocent of a charge, he is "going to talk." Previously, however, he made clear that he would apply the law as instructed regardless of his personal feelings, that there was nothing about the nature of the charges that would prevent him from being fair and impartial, that he did not have any prejudice against a person charged with a crime, that he would not hesitate to return a not-guilty verdict if the State failed to prove defendant guilty beyond a reasonable doubt, that he understood that defendant was presumed innocent, that he understood that the State had the burden of proof, and that he understood that defendant did not have to offer evidence. He also indicated to the court that he would not hold it against defendant if defendant did not testify on his own behalf.

¶ 31 Moreover, Juror No. 343 specifically indicated that, while deliberating on the California jury, other jurors improperly "brought their own feelings into that deliberation." He also stated, "Well, what I felt at the time, the evidence, we was instructed, if I felt firm on that decision, I stuck with it. I didn't let them sway me." These comments tend to show that Juror No. 343 was well aware of the need to follow the jury instructions, consider the evidence, and leave his personal feelings out of the deliberation.

¶ 32 Based on the foregoing, we find that a review of the entire *voir dire* shows that defense counsel's failure to use a preemptory challenge to excuse Juror No. 343 did not amount to possible neglect. Thus, the trial court properly denied defendant's motion without appointing new counsel.

¶ 33 III. CONCLUSION

¶ 34 Based on the foregoing, we affirm the judgment of the circuit court of Lake County. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 35 Affirmed.