SECOND DIVISION
October 29, 2013

No. 1-11-1791

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. STEVEN CASTLEBERRY, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of Cook County. 09 CR 13411 Honorable Vincent M. Gaughan, Judge Presiding.

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Quinn and Justice Harris concurred in the judgment.

ORDER

¶ 1 *HELD*: Circuit court did not commit error in denying motion to dismiss juror for cause and defendant was not prejudiced where prospective juror hesitated and expressed concern during *voir dire* about the nature of the charges against defendant for aggravated criminal sexual assault because he was married and held women close to his heart, but was rehabilitated by the court and repeatedly reaffirmed that he could decide the case based only on the facts presented and would give both parties a fair trial. Following the holding in *People v. Blair*, 2013 IL 114122, the General Assembly revived the aggravated criminal sexual assault sentencing enhancement for commission of the offense armed with a firearm (720 ILCS 5/12-14(d)(1) (West 2010)) and circuit court did not err in imposing an additional 15 years' imprisonment pursuant to that provision, but did err in failing to impose the add-on for both of defendant's convictions for aggravated criminal sexual assault and sentence must be vacated as void and the matter remanded for

resentencing.

¶ 2 Following a jury trial, defendant Steven Castleberry was convicted on two counts of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(8) (West 2008)) based on oral and vaginal contact with the victim. Defendant was sentenced to consecutive sentences of 9 years for the convictions, with an additional 15 years' imprisonment under the statutory enhancement for the use of a firearm in committing aggravated criminal sexual assault. 720 ILCS 5/12-14(d)(1) (West 2008). Defendant filed a *pro se* motion for new trial alleging ineffective assistance of trial counsel. New counsel was appointed and following the filing of an amended motion and hearing, the motion was denied.

¶ 3 On appeal, defendant argues that he was denied a fair trial because the circuit court failed to strike two allegedly biased prospective jurors for cause, leaving defendant without a peremptory challenge to strike the last prospective juror who demonstrated bias but was empaneled over defendant's objection. Defendant also argues that the matter must be remanded for resentencing because the 15-year firearm enhancement was declared unconstitutional. The State argues that the enhancement was revived by the Legislature and asserts that remand for resentencing is required to apply the enhancement to defendant's second conviction. For the following reasons, we affirm the judgment of the circuit court, vacate defendant's sentence and remand the matter for resentencing to comply with the mandatory sentencing enhancement.

¶ 4 I. BACKGROUND

¶ 5 Defendant was charged with six counts of aggravated criminal sexual assault and one count of unlawful use of a weapon by a felon related to a June 22, 2009, incident involving the victim, C.A. The case proceeded to a jury trial on June 25, 2010, on two counts of aggravated

criminal sexual assault. During the jury selection process both parties made several motions to exclude certain prospective jurors both for cause and with their peremptory challenges. On appeal, defendant raises issues with three prospective jurors, Marcus Baker, Cozetta Coleman, and John Prihodka. Defendant moved to have all three prospective jurors excused for cause, but the court denied his motions. Defendant utilized his final two peremptory challenges on Baker and Coleman, and was unable to strike Prihodka who was empaneled on the jury.

¶ 6 Baker indicated that he was the dean of students at EPIC Academy High School in Chicago, Illinois, and had previously served as assistant principal. Baker reported that he was the victim of an unsolved armed robbery when he was in high school, but stated that would not prevent him from being fair and impartial. He also stated that his mother had been the victim of an unsolved robbery and assault when he was in high school. In response to the question of whether this would prevent him from being fair and impartial, Baker responded that, because of his mother's experience, when the judge was giving an introduction to the case, Baker "found myself being judgmental already, so I would say yes."

¶ 7 The court questioned Baker on his role as a disciplinarian at the high school and Baker agreed that he listened to both sides in a dispute and, despite seeing the same allegations and scenarios over and over, he was not unfair because each case was distinct. The *voir dire* examination of Baker concluded with the following exchange:

> "THE COURT: Right. Could you put that you - again like I said, these are just allegations against Mr. Castleberry, and you have to do this in your day-to-day work, especially as a dean. Could you listen to the evidence and only make your decision based on the evidence and only make your decision based on the

evidence that you hear in this courtroom, the instructions of law, and then deliberate with your brother and sister jurors?

PROSPECTIVE JUROR: I was just thinking when you read the situation or whatever I wasn't thinking as a dean. I was thinking as a human being and thinking about what was read off and how the same situation was similar, and I was thinking as a human being I would be impartial.

THE COURT: Right, but then - there is a lot of things that if we let ourselves go and don't use self-control could be detrimental to ourselves.

PROSPECTIVE JUROR: Absolutely.

THE COURT: The other thing is in your position too you have to discipline yourself, right?

PROSPECTIVE JUROR: Right.

THE COURT: Can you discipline yourself here today and give Mr. Castleberry a fair trial.

PROSPECTIVE JUROR: Without being impartial?

THE COURT: Well, here is the whole thing. Life experiences are going to effect us in certain ways, but we can say, listen, all right, I know this normally would have an effect on me but here I'm selected as one of the highest and most difficult jobs in my country is to judge another human being.

PROSPECTIVE JUROR: Absolutely.

THE COURT: So could you apply the discipline there and be fair?

PROSPECTIVE JUROR: I guess so.

THE COURT: When you say you guess so, that's not a reservation in judgment, is it?

PROSPECTIVE JUROR: I mean, I already said I was impartial.

THE COURT: Impartial means, you know, you're fair.

PROSPECTIVE JUROR: Right.

THE COURT: Okay, that's great. Thank you."

¶ 8 Coleman stated that she was the victim of an armed robbery in 1990, but nobody was apprehended. However, when she was later called for jury duty, her attacker was on trial for robbing and killing two people. When the assistant State's Attorney asked Coleman if this experience would prevent Coleman from being fair and impartial as a juror in the instant matter, Coleman responded "[n]ot in this case, but, you know, being robbed at gunpoint made to do, you know, something is really - it was very trying for me. It took me quite some time to reenter." Nonetheless, Coleman affirmed that she could follow the law as given by the court and enter a finding of guilty or not guilty depending on whether the State proved its case beyond a reasonable doubt.

¶ 9 The parties and the court discussed the first panels of prospective jurors in sidebar. Several prospective jurors were removed for cause and by the parties' use of peremptory challenges. Defendant moved to strike Baker and Coleman for cause, arguing that Baker indicated he was judgmental of defendant already and that Coleman would not be fair because she was robbed at gunpoint. The court denied the motions, stating that each prospective juror indicated they could be fair. The court advised defense counsel to hold her peremptory challenges until the State tendered the panel.

¶ 10 During the *voir dire* of Prihodka, he stated that he had been the victim of "childhood crimes, the usual walking home from school asking for change, being slapped in the face, punched, gloves stolen when you are out on the playground. Nothing that there were any police reports on." Prihodka responded that these events would not prevent him from being fair and impartial as a juror. He also stated that his wife and sister-in-law were both mugged, in separate incidents, while waiting at a bus station roughly 30 years ago and that nobody was prosecuted for those crimes, but that those experiences would not prevent him from being a fair and impartial juror in the instant case. However, under further questioning, the following colloquy occurred:

> "ASSISTANT STATE'S ATTORNEY: Anything about the nature of these charges that would prevent you from being fair and impartial? You're hesitating.
>
> PROSPECTIVE JUROR: It's an active crime against my wife and my, you know - I kind of hold women close and near to my heart.
>
> ASSISTANT STATE'S ATTORNEY: I see.
>
> THE COURT: But you would only make your decision on the evidence that you heard in this courtroom?
>
> PROSPECTIVE JUROR: Exactly.
>
> THE COURT: You can put those things aside?
>
> PROSPECTIVE JUROR: Yes.
>
> THE COURT: I would like you to take a look at Mr. Castleberry as he sits there right now. Can you give him a fair trial?

PROSPECTIVE JUROR: Yes.

THE COURT: And as you look at the State, can you give them a fair trial?

PROSPECTIVE JUROR: Yes.

THE COURT: Thank you."

¶ 11 During the second sidebar discussions on the prospective jurors, defense counsel stated "Judge, we're living on the edge. We're going to live on the edge. Baker we're striking him. That's number six, and Ms. Coleman, number seven. We're out of strikes." Counsel then moved to strike Prihodka for cause because he indicated that he was particularly sensitive to crimes against women. The court indicated that Prihodka was questioned and looked defendant in the eye and stated that he could give both sides, and defendant, a fair trial. The court also agreed that Prihodka's statement was general and not specifically applicable to the instant matter and denied the motion. Since defendant utilized all of his peremptory challenges, Prihodka was empaneled as a juror.

¶ 12 At trial, C.A. testified that she met defendant in June 2009 at the barbershop where he worked at East 79th Street and South Michigan Avenue. The two exchanged phone numbers and arranged a meeting on June 21, 2009. C.A. testified that it was Father's Day and she went to pick up defendant at his home in the evening. She drove defendant to a liquor store and waited in the car while defendant went in and purchased some vodka. Defendant then suggested that they go to a place where he knew people were playing dice. C.A. drove to this location and defendant gambled for approximately an hour and a half. Defendant then suggested they go to the barbershop where he worked so they could hang out.

¶ 13 C.A. first drove to a house where defendant retrieved keys to the barbershop and then to the barbershop. The shop was closed and no one was there. Defendant unlocked the door and then locked it from the inside after they entered the shop. C.A. testified that she and defendant hung out and talked. Defendant drank his vodka and C.A. smoked cigarettes, but did not drink. At around 11:40 p.m., C.A. said it was time for her to go home and she gathered her things. However, defendant pointed a gun at her and told her that she was going to perform oral sex on him.

¶ 14 C.A. testified that defendant held the gun to her head and took her to a sofa and ordered her to take her clothes off. C.A. complied because she was scared and began to perform oral sex after defendant removed his clothing and sat down on the couch. After a period of time, defendant ordered C.A. to stand up and put her hands on the couch and defendant got up and behind C.A. and penetrated her vagina with his penis. Defendant continued to hold the gun and then told C.A. he wanted her to perform oral sex again.

¶ 15 C.A. testified that defendant walked across the barbershop, emptied the bullets from the gun and placed the gun down. He then returned to the couch and demanded C.A. perform oral sex on him again. C.A. again complied and performed oral sex on defendant. Defendant did not ejaculate at any time during the night.

¶ 16 C.A. testified that she was crying throughout this time and told defendant that she needed tissues. She was heading to the bathroom when defendant informed her of a roll of tissue in the room. C.A. informed defendant that she needed to use the restroom, hoping she could escape from a window. Defendant refused to allow her to use the restroom and told C.A. to urinate on the floor. C.A. urinated on the floor next to the couch and gathered more tissue.

¶ 17 C.A. testified that defendant fell asleep on the couch. When she called his name and he did not answer, C.A. got dressed, picked up the gun with a towel and hid it in the back of the barbershop. C.A. retrieved defendant's keys but was unable to unlock the door. When she tried to call the police on her cell phone she realized that the battery was dead. However, she was able to call 9-1-1 on defendant's cell phone and then the barbershop's land line when the police could not determine her location.

¶ 18 A police car soon arrived, but defendant woke up. Defendant grabbed C.A. and attempted to force her into the restroom. C.A. testified that she yelled and fought defendant and tried to be as loud as she could so the police would hear her. After defendant forced C.A. into the bathroom, he asked her why she called the police. C.A. responded that she called the police because defendant had raped her. Defendant told C.A. to go to the door and tell the police it was a mistake, but when she was outside of the restroom, defendant grabbed C.A. to stop her. At this time, the police officers gained entrance by breaking through a window in the front of the barbershop. C.A. testified that she pulled away and ran and exited through the broken window.

¶ 19 C.A. met up with a police officer and was placed in a squad car. She told the police what had happened and where she hid the gun that defendant used. C.A. was taken to the hospital and a rape kit examination was conducted, but there was insufficient male DNA for analysis. Officer Andrew Scudella of the Chicago police department testified that he responded to the scene and recovered the handgun, wrapped in at towel, from a plastic bin in the barbershop as C.A. told the officers. He testified that the gun was unloaded and he was unable to find any ammunition.

¶ 20 The State also presented other crimes evidence through the testimony of M.S. M.S. testified that she met defendant in February 2009 and went out with defendant on June 15, 2009.

Defendant picked her up from work that night and they went to McDonald's and a park and then to the barbershop where defendant worked. The barbershop was closed at the time and the two watched television and M.S. smoked marijuana. M.S. testified that defendant left for approximately 20 minutes and when he returned, M.S. told defendant she was ready to leave.

¶ 21 M.S. testified that defendant agreed and began turning lights off and preparing to leave. However, when he returned from the back of the barbershop, defendant was holding a gun and told M.S. that they were not leaving and to take her clothes off. Defendant forced M.S. to perform oral and vaginal sex on him. Defendant then fell asleep, but M.S. testified that her cell phone battery died and she did not look for a phone or try to get out. Defendant drove M.S. home the next morning. After talking with friends about the incident, one of M.S.'s friends called the police and the police interviewed M.S. and took her to the hospital. On July 27, 2009, M.S. went to the police station and identified defendant in a lineup as the man who sexually assaulted her.

¶ 22 Defendant presented the testimony of Detective Nanette Ansley of the Chicago police department. Ansley testified that she interviewed C.A. on June 22, 2009. C.A. indicated that she had been having phone conversations with defendant in the weeks prior and that she picked up defendant from the barbershop, not his home. Defendant rested.

¶ 23 Following closing arguments, the jury found defendant guilty of both counts of aggravated criminal sexual assault. Defendant filed a *pro se* motion for a new trial, alleging that he suffered ineffective assistance of trial counsel. Following testimony by defendant, defense counsel and two others, the circuit court denied the motion.

¶ 24 At sentencing, the parties presented evidence in aggravation and mitigation. The State

sought a sentence beyond the minimum, which it argued was 6 years' imprisonment, plus 15 years' for the firearm enhancement for each conviction, for a total minimum sentence of 42 years' imprisonment. The court opined that case law only allowed application of the enhancement to one count and defendant was sentenced to consecutive sentences of 9 and 24 years' imprisonment for the aggravated criminal sexual assault convictions, including the single 15-year enhancement for use of a firearm in the commission of the crime. This appeal followed.

¶ 25 II. ANALYSIS

¶ 26 A. Jury Selection

¶ 27 Defendant argues that the court erred in refusing to strike three prospective jurors, Marcus Baker, Cozetta Coleman, and John Prihodka, for cause. Defendant argues that this required that he use his two final peremptory challenges on the first two prospective jurors, leaving him with no remaining challenges and empaneling Prihodka. Defendant asserts that he was denied a fair trial because Prihodka was empaneled despite being admittedly biased. Defendant concedes that while counsel objected to the prospective jurors, the issue was not raised in the motion for a new trial and asserts it should be addressed under the plain-error doctrine.

¶ 28 The plain-error doctrine allows a reviewing court to review an unpreserved error when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005). Under the first prong, the defendant must show that the evidence at trial was so closely balanced that the error alone "threatened to tip the scales of justice against him." *Herron*, 215 Ill. 2d at 187. For the second prong, the defendant must prove that the error was so serious that

it affected the fairness of the trial and questions the integrity of the judicial process. *Herron*, 215 Ill. 2d at 187. The first step in conducting plain-error review is to determine whether error occurred at all. *People v. Walker*, 232 Ill. 2d 113, 124 (2009)

¶ 29 A litigant is entitled to an impartial panel of jurors who are free from bias or prejudice. *People v. Szudy*, 262 Ill. App. 3d 695, 707 (1994). The circuit court has substantial discretion in determining whether to excuse a prospective juror for cause and its decision regarding whether to do so will not be disturbed absent an abuse of that discretion. *Id.* at 708. A court's failure to remove a potential juror for cause is grounds for reversal only if the aggrieved party has exercised all its peremptory challenges and an objectionable juror was allowed to sit on the jury. *People v. Pendleton*, 279 Ill. App. 3d 669, 675 (1996). This court has defined the term "objectionable juror" as a juror who should have been dismissed for cause and who would prejudice the case. *People v. Reid*, 272 Ill. App. 3d 301, 309 (1995).

¶ 30 We agree with the State that the circuit court did not abuse its discretion in determining that Prihodka was qualified to serve as a juror and refusing to grant defendant's motion to strike Prihodka was not an error. Prihodka stated that he was a victim of "some smaller crimes" as a child, but not the kind "that there were any police reports on." Prihodka responded that these events would not prevent him from being fair and impartial as a juror. Prihodka also stated that his wife and sister-in-law were both mugged in separate incidents roughly 30 years ago, but again responded that those experiences would not prevent him from being a fair and impartial juror in the instant case.

¶ 31 When questioned about the specific charges in the instant matter, Prihodka expressed concern because "[i]t's an active crime against my wife and my, you know - I kind of hold

women close and near to my heart." However, Prihodka answered in the affirmative when the court immediately questioned him, asking "But you would only make your decision on the evidence that you heard in this courtroom?" In subsequent questioning, Prihodka consistently stated that he would render his decision solely on the facts presented at trial and that he could give both defendant and the State a fair trial.

¶ 32 Unlike the prospective jurors in the cases that defendant principally relies upon, Prihodka was not equivocal in his responses. *People v. Johnson*, 215 Ill. App. 3d 713, 723-25 (1991) (court erred in failing to deny challenge to three prospective jurors when all answered equivocally and with self-doubt when asked if they could be impartial and fair because they and their relatives had been harmed by criminal acts); *People v. Harris*, 196 Ill. App. 3d 663, 676-677 (1990) (abuse of discretion in failing to dismiss prospective juror who expressed difficulty not being judgmental during preliminary *voir dire* and continued to express doubt that he could be fair and impartial because his father was murdered). In this case, the record only shows that Prihodka hesitated when asked about the specific crimes alleged against defendant and answered that he was sensitive regarding crimes against women, particularly because he was protective of his wife. However, he never intimated that he would not be impartial or unable to come to a decision on anything other than the facts presented at trial. He further specifically stated and reaffirmed his willingness and ability to be impartial and give the parties a fair trial. The court did not commit error in empaneling Prihodka as the final juror over defendant's objection.

¶ 33 B. Sentencing Enhancement

¶ 34 Defendant also argues that the circuit court erred in entering his sentence with the 15-year firearm add-on to the crime of aggravated criminal sexual assault because that add-on was

held unconstitutional by this court in *People v. Hampton*, 406 Ill. App. 3d 925 (2010). In *Hampton*, the parties were in agreement that our supreme court's decision in *People v. Hauschild*, 226 Ill. 2d 63 (2007), rendered the 15-year add-on for sentences for aggravated criminal sexual assault with a firearm unconstitutional. *Hampton*, 406 Ill. App. 3d at 942. The *Hauschild* court held that the defendant's sentence for armed robbery while armed with a firearm (720 ILCS 5/18-1(a), 18-2(a)(2) (West 2000)) violated the proportional penalties clause because it was more severe than the sentence for the offense of armed violence predicated on robbery while carrying a firearm (720 ILCS 5/33A-1(c)(1) (West 2000) which consisted of identical elements. *Hampton*, 406 Ill. App. 3d at 942. Because the armed violence statute contained the same provisions for the crime of aggravated criminal sexual assault with a firearm, this court reversed the defendant's sentences because the application of the add-on was unconstitutional. *Id.*

¶ 35 However, we agree with the State that our supreme court recently resolved this issue in *People v. Blair*, 2013 IL 114122. The *Blair* court considered the effect of Public Act 95-688, which was enacted by the legislature to " 'correct' " the effect of the *Hauschild* opinion. *Id.* at ¶ 38, quoting 95th Gen. Assem., Senate Proceedings, July 26, 2007, at 8 (statements of Senator Cullerton). The court found that the amendment eliminated robbery as a predicate offense for a charge of armed violence. *Id.* at ¶ 21, citing P.A. 95-688 (eff. Oct. 23, 2007), amending 720 ILCS 5/33A-3 (West 2008). The legislature thereby eliminated the proportionate penalties problem and revived the offense of armed robbery while armed with a firearm and the enhanced statutory sentencing range for the offense. *Id.* at ¶ 27-38.

¶ 36 The legislature also eliminated the proportionate penalties issue for aggravated criminal sexual assault as a predicate offense for armed violence by similarly removing that offense from the statute. PA. 95-688 (eff. Oct. 23, 2007), amending 720 ILCS 5/33A-3 (West 2008). Accordingly, under *Blair*, P.A. 95-688 effectively revived the sentencing add-on for aggravated criminal sexual assault with a weapon. 720 ILCS 5/12-14(d)(1) (West 2008). Therefore, the circuit court did not err in applying the 15-year add-on to one of defendant's convictions.

¶ 37 However, our analysis does not end there as we also agree with the State that the circuit court did err in failing to impose the enhancement to both sentences as required by the plain language of the statute. The language of the enhancement is mandatory as "[a] violation of subsection (a)(8) is a Class X felony for which 15 years shall be added to the term of imprisonment imposed by the court." 720 ILCS 5/12-14(d)(1) (West 2008). There is no discretion in applying the add-on and the circuit court is responsible for enforcing the requirements of statutes as written and imposing the appropriate sentence. *People v. White*, 2011 IL 109616, ¶ 21.

¶ 38 The circuit court was required to fashion a sentence including the mandatory enhancement for each sentence imposed for each violation. *Id.* at ¶ 26. Because the sentence did not conform to the statutory requirements, it is void. *Id.* at ¶ 21. The proper remedy in this situation is to remand the matter to the trial court for a new sentencing hearing. *Hauschild*, 226 Ill. 2d at 81. Accordingly, we hold that defendant's sentences must be vacated and the matter remanded to the circuit court for resentencing consistent with this order.

¶ 39 III. CONCLUSION

¶ 40 For the foregoing reasons, the judgment of the trial court is affirmed, defendant's sentence is vacated and the cause remanded for resentencing.

¶ 41 Affirmed in part and vacated in part; cause remanded.