2017 IL App (3d) 150572-U

Order filed October 26, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 14th Judicial Circuit,
	)	Rock Island County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-15-0572
v.	)	Circuit No. 15-CF-36
	)	
DOMINQUE LADELL CARTER,	)	Honorable
	)	F. Michael Meersman,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Presiding Justice Holdridge and Justice Wright concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Defendant failed to establish plain error based on the State's *voir dire* questioning; (2) the guilty verdicts are not legally inconsistent; (3) the trial court erred in ordering defendant to serve 85% of his sentence; and (4) the trial court failed to conduct a preliminary inquiry into defendant's *pro se* posttrial allegations of ineffective assistance of counsel.

¶ 2 Defendant, Dominque Ladell Carter, appeals his conviction and sentence. We affirm in part, vacate in part, and remand for further proceedings.

¶ 3 FACTS

¶ 4 The State charged defendant with armed robbery (720 ILCS 5/18-2(a)(2) (West 2014)) alleging defendant knowingly took money and other items from the victim, Damon Foulks, while threatening imminent force, when defendant was armed with a firearm. The State also charged defendant with aggravated robbery (720 ILCS 5/18-5(a) (West 2014)) alleging that, while indicating by his actions to the victim that he had a firearm, defendant took money and other items from the victim. The cause proceeded to a jury trial.

¶ 5 During *voir dire*, the trial court asked all potential jurors if they understood and accepted the principles pursuant to Illinois Supreme Court Rule 431(b) (eff. July 1, 2012). All potential jurors responded affirmatively. The State then asked several jurors (1) whether it was acceptable for the State to offer witnesses plea bargains in exchange for their testimony, and (2) whether the potential jurors were in favor of firearm ownership. The State also asked one potential juror whether he understood that, despite his views of firearm ownership, it is unlawful to brandish a firearm during a robbery. The defense did not object, and several of the venire members who were asked these questions sat on the jury.

¶ 6 During its opening statement, the State told the jury that it probably had some idea what the case was about based on the *voir dire* questioning. The State told the jurors that Foulks and Ontario Bester would testify that on January 18, 2015, defendant and another individual stole money and other items from Foulks while defendant was armed with a firearm. During its opening statement, defense counsel told the jury that defendant was at home with his girlfriend at the time of the robbery.

¶ 7 Foulks testified that he had a pending charge of possession of cannabis with intent to deliver. He agreed to testify truthfully in defendant's case in exchange for a sentence of two years in prison.

¶ 8 According to Foulks, on January 18, 2015, he and Bester were at Keesha Anderson's house in Rock Island. Foulks and Bester left the residence and were approached by defendant and another individual. Defendant said, "Where that shit at?" Foulks understood the question to mean that defendant was robbing him. The other individual with defendant pulled out a knife, and Foulks cut his hand and tore his jeans when he tried to grab the knife. Defendant then pulled out a firearm and hit Foulks in the face and hand with it. Foulks thought the firearm defendant hit him with was real. Defendant then took money and other items from Foulks. Defendant and the other individual ran from the scene. Foulks did not know what happened to the firearm or knife after the robbery.

¶ 9 Next, Bester testified that he had been charged in a pending case and had agreed to testify at defendant's trial in exchange for probation and jail time he had already served.

¶ 10 Like Foulks, Bester testified that on January 18, 2015, he and Foulks were at a female friend's house in Rock Island. As he and Foulks left the residence, they were robbed by defendant and another individual who took marijuana and other items from them. Defendant had a firearm, and the other individual had a knife. Bester did not know what happened to the firearm or knife after the robbery.

¶ 11 Jason Hackman, a Rock Island police officer, testified that he responded to the robbery. The cut on Foulks' hand and tear in his jeans was consistent with the story Foulks told Hackman at the scene. Hackman did not recover a firearm.

¶ 12 Sean Roman, a Rock Island police sergeant, testified that he interviewed defendant after the robbery. Defendant denied any involvement in the robbery, and told Roman that he was with his cousin and two friends at the time of the robbery. During the interview, defendant referred to

facts that Roman had not yet mentioned to defendant. Those facts were that the robbery occurred at Anderson's residence and that a firearm was involved.

¶ 13 During defense counsel's case-in-chief, Sinae Tate testified that she was living with defendant at the time of the robbery. Tate and defendant were together at her house at the time of the robbery. Defendant did not leave her house that evening.

¶ 14 During its closing argument, the State told the jury that even though Foulks and Bester were criminals, they identified defendant as the perpetrator before making exchanges for their testimony. The State noted that Foulks' and Bester's testimony was consistent. The State reminded the jury that while many of them had said they were firearm owners it was unlawful to brandish firearms in order to intimidate others. The State acknowledged that no firearm was recovered, but told the jury that if it did not believe defendant used a real firearm, it should convict defendant of aggravated robbery because the item defendant brandished was something that looked like a firearm.

¶ 15 The defense argued that neither Foulks nor Bester told the truth because they received plea deals in exchange for their testimony. The defense also emphasized the fact that no firearm was ever recovered.

¶ 16 Ultimately, the jury found defendant guilty of armed robbery and aggravated robbery. The trial court told the parties that it was surprised the jury found defendant guilty of both crimes and asked the parties to research the issue and inform the court of any action it should take.

¶ 17 The defense filed a motion for new trial arguing, in relevant part, that the guilty verdicts for armed robbery and aggravated robbery were inconsistent because defendant could not be convicted of both actually being armed with a firearm and merely indicating he was armed with a firearm.

¶ 18 Prior to the court's ruling on defense counsel's motion for new trial, defendant filed several *pro se* motions alleging ineffective assistance of counsel.

¶ 19 On July 30, 2015, the trial court denied defendant's *pro se* motions without questioning defendant regarding the basis of his allegations of ineffective assistance. The court also did not question defense counsel regarding defendant's allegations. As to defense counsel's motion for new trial, the court found that the jury had convicted defendant of armed robbery and aggravated robbery based on the fact that defendant was armed with a firearm and the court merged the convictions so that defendant was only convicted of armed robbery. The court sentenced defendant to 21 years' imprisonment and ordered defendant to serve 85% of his sentence.

¶ 20 ANALYSIS

¶ 21 On appeal, defendant argues that he is entitled to a new trial because the State improperly indoctrinated the jury during *voir dire*, and the verdicts returned by the jury are legally inconsistent. Alternatively, defendant argues the trial court erred in ordering him to serve 85% of his sentence, and failing to conduct a preliminary inquiry into his *pro se* posttrial allegations of ineffective assistance of counsel. We discuss each argument in turn.

¶ 22 I. *Voir dire*

¶ 23 First, defendant contends the State improperly indoctrinated the jury with its theory of the case in its questioning during *voir dire*. Defendant concedes that he forfeited this argument by failing to raise it in the trial court, but he contends that this court should review his claim under the second prong of the plain error doctrine. This prong allows relief from a forfeited error where the error was so fundamental and of such magnitude that it affected the fairness of the trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). We first consider whether error occurred.

¶ 24 "The constitutional right to a jury trial encompasses the right to an impartial jury." *People v. Rinehart*, 2012 IL 111719, ¶ 16. "The purpose of *voir dire* is to ascertain sufficient information about prospective jurors' beliefs and opinions so as to allow removal of those members of the venire whose minds are so closed by bias and prejudice that they cannot apply the law as instructed in accordance with their oath." *People v. Cloutier*, 156 Ill. 2d 483, 495-96 (1993). Consequently, *voir dire* questions must not be " 'a means of indoctrinating a jury, or impaneling a jury with a particular predisposition.' " *Rinehart*, 2012 IL 111719, ¶ 17 (quoting *People v. Bowel*, 111 Ill. 2d 58, 64 (1986)). This is not a bright-line rule but rather a continuum. *Id*. Broad questions are generally permissible, but specific questions tailored to the facts of the case and intended to serve as preliminary final argument are generally impermissible. *Id*.

¶ 25 In this case, defendant asserts that the State indoctrinated the jury with its theory of the case by asking the jurors whether: (1) it was acceptable for the State to offer witnesses plea bargains in exchange for their testimony, (2) they were in favor of firearm ownership, and (3) they understood that, despite their views of firearm ownership, it was unlawful to brandish a firearm during a robbery. In considering defendant's argument, we separate the questions cited by defendant into two categories.

¶ 26 The first category includes two broad questions which tested the jurors' preconceived notions about firearm ownership in general and the State offering plea deals in exchange for testimony. Specifically, whether the jurors were in favor of firearm ownership and whether it was acceptable to the State to offer plea bargains in exchange for their testimony. Although the instant case involved the use of a firearm and included witness testimony given in exchange for plea deals, these inquiries were broad questions and did not contain any facts specific to the case. Further, neither question served as an improper preliminary argument. Both questions were

general and did not suggest that it was wrongful to own a firearm or that a witness is credible even if his or her testimony is given in exchange for a plea deal. Consequently, these questions did not serve to indoctrinate the jury. Since these questions did not constitute error, they cannot constitute plain error. *Id.* ¶ 21.

¶ 27 The second category includes one question, which tested the jurors' preconceived notions on the use of a firearm during a robbery. Specifically, whether the potential jurors understood that, despite their views on firearm ownership, it was unlawful to brandish a firearm during a robbery. This question is tied to the specific facts of this case and served as an attempt to preargue the case. Therefore, it was improper for the State to ask this question. See *Bowel*, 111 Ill. 2d at 64 (whether asked by the court or by the parties with sanction of the court, *voir dire* questions must not be a means of indoctrinating a jury). We now turn to the question of whether this error constitutes second-prong plain error.

¶ 28 It is well established that where a defendant asserts the trial court's conduct thwarted the purpose of *voir dire* or otherwise "tainted the jury pool," to establish plain error under the second prong, the defendant must show the selected jury was biased. *People v. Morales*, 2012 IL App (1st) 101911, ¶ 53; see also *People v. Trzeciak*, 2014 IL App (1st) 100259-B, ¶¶ 82-85; *People v. Ingram*, 409 Ill. App. 3d 1, 13-18 (2011). Here, nothing supports defendant's claim that the State's question "significantly compromised the jury's impartiality and effectively destroyed [d]efendant's presumption of innocence." First, we note that all the selected jurors stated that they understood and accepted the principles of Rule 431(b). See, generally *People v. Zehr*, 103 Ill. 2d 472 (1984). Second, the question at issue was only asked to a single juror—even though the second panel of jurors was present for the question. Third, all selected jurors were questioned and approved by defense counsel and all agreed that they would find defendant not guilty if the

State failed to meet its burden of proof. "Most telling is the fact that defense counsel did not object to the swearing of the jury, which indicates to us counsel believed the jury as impaneled could be fair and impartial." *Trzeciak*, 2014 IL App (1st) 100259-B, ¶ 84. Based on our review of the record, and the nature of the question, we conclude that the jury remained fair and impartial. Because nothing in the record supports defendant's claim that he did not receive a fair trial by a fair and unbiased jury, there is no basis to find plain error. *Morales*, 2012 IL App (1st) 101911, ¶ 60.

¶ 29 II. Guilty Verdicts

¶ 30 Second, defendant argues that the jury verdicts are legally inconsistent. He also asserts that the merging of the convictions did not cure this error. Instead, defendant believes he is entitled to a new trial on this ground. Specifically, defendant argues the verdicts are legally inconsistent because armed robbery requires defendant to actually be armed with a firearm, but aggravated robbery requires that defendant merely indicate that he is armed with a firearm.

¶ 31 "Legally inconsistent verdicts occur when the essential element of each crime must, by the very nature of the verdicts, have been found to exist and to not exist even though the offenses arise out of the same set of facts." *People v. Frieberg*, 147 Ill. 2d 326, 343 (1992). Whether two verdicts are legally inconsistent presents a question of law and, therefore, our review is *de novo*. *Redmond v. Socha*, 216 Ill. 2d 622, 642 (2005).

¶ 32 Count I of the indictment charged defendant with armed robbery. One commits armed robbery when they knowingly take property from another by use of force or by threatening the use of imminent force while armed with a firearm. 720 ILCS 5/18-2(a)(2) (West 2014). Count II of the indictment charged defendant with aggravated robbery. One commits aggravated robbery when they knowingly take property of another by use of force or by threatening use of imminent

force while indicating verbally or by his actions to the victim that he or she was armed with a firearm. 720 ILCS 5/18-5(a) (West 2014). Unlike armed robbery, one can commit aggravated robbery even if it is later determined that he or she did not possess a firearm when committing the robbery. *Id.*

¶ 33 In this case, defendant's argument is based on his assertion that in finding him guilty of aggravated robbery, the jurors must have found that the firearm he possessed was not real, but a replica. Thus, defendant argues that the verdicts are legally inconsistent because armed robbery requires the use of a real firearm. Since the jury found defendant guilty of both crimes, defendant asserts that the jury found that the firearm he possessed was both real and a replica. Thus, defendant contends the verdicts are legally inconsistent.

¶ 34 It is true that in order to convict defendant of armed robbery the jury was required to find that he used a real firearm during the robbery. The flaw in defendant's argument, however, is that in order to convict him of aggravated robbery the jury was not required to find that he used a replica firearm. Instead, the jury only needed to find defendant *indicated* that he was armed with a firearm. In other words, defendant could have been convicted of aggravated robbery regardless of the functionality of the weapon. Here, the State established defendant both indicated he was armed with a firearm and used a real firearm during the robbery. Specifically, Foulks and Bester testified that defendant showed them a firearm during the robbery. As a result, the jury could have legally found that defendant committed both crimes while armed based on this testimony. See *People v. Gray*, 346 Ill. App. 3d 989, 994 (2004) (nothing that a defendant commits aggravated robbery while indicating that he or she has a firearm, whether he or she is actually armed or not). The verdicts are legally consistent.

¶ 35 In reaching this conclusion, we reject defendant's argument that the jury necessarily found that defendant was both armed with a real firearm and a replica firearm based on the State's closing argument. To support his position, defendant cites to the State's statement that if the jurors believed the firearm defendant possessed was a replica, it should find defendant guilty of aggravated robbery. Defendant argues that this statement presented the jury with a binary choice: if it found the firearm was real it should find defendant guilty of armed robbery or if it found the firearm was a replica it should find defendant guilty of aggravated robbery.

¶ 36 We do not view the State's statement to suggest that the jury's choice was binary. Stated differently, the statement did not mean that the jury could *only* convict defendant of aggravated robbery if it believed the firearm was a replica. Instead, we view this statement as an argument to the jury that it should find defendant guilty of both crimes if the jury believed the firearm was real. Or, alternatively, the jury could find defendant guilty of only aggravated robbery if it believed the firearm was a replica. This interpretation is supported by the fact that the indictment did not specifically allege that the firearm used by defendant was a replica. It is also supported by the jury instructions which informed the jury that it could find defendant guilty of aggravated robbery even if it is later determined that he did not possess a firearm during the robbery.

¶ 37 III. Sentencing

¶ 38 Third, defendant argues that the trial court erred in ordering him to serve 85% of his sentence. Defendant argues that the trial court should have order him to serve only 50% of his sentence under the truth-in-sentencing provisions. The State concedes error. After consideration of the argument and a careful review of the record, we accept the State's concession. See 730 ILCS 5/3-6-3(a)(2)(iii) (West 2014); *People v. Cunningham*, 365 Ill. App. 3d 991, 997 (2006) (where no great bodily injury was suffered by the victim of the crime, the trial court errs in

requiring defendant to serve at least 85% of his sentence). Accordingly, we vacate the portion of the sentencing order requiring defendant to serve 85% of his sentence, and remand the matter for the trial court to amend the sentencing order to reflect that defendant is eligible for day-for-day good-conduct credit. *Cunningham*, 365 Ill. App. 3d at 997.

¶ 39 VI. *Pro se* Claims of Ineffective Assistance of Counsel

¶ 40 Last, defendant argues that the trial court erred in denying his *pro se* posttrial motions alleging ineffective assistance of counsel without first inquiring into his allegations pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984). The State argues that defendant's *pro se* allegations were insufficient to trigger the trial court's duty to conduct a *Krankel* inquiry. Alternatively, the State argues that the trial court made a sufficient inquiry into defendant's *pro se* allegations.

¶ 41 The need to conduct a *Krankel* inquiry is triggered when a defendant raises a *pro se* posttrial claim of ineffective assistance of trial counsel. *People v. Ayres*, 2017 IL 120071, ¶ 11. A *pro se* defendant is not required to do anything more than bring his or her ineffective assistance of counsel claim to the trial court's attention. *Id*. (a *pro se* defendant is not required to file a written motion but may raise the ineffective assistance claim orally or through a letter or a note to the trial court). "[W]hen a defendant brings a clear claim asserting ineffective assistance of counsel, either orally or in writing, this is sufficient to trigger the trial court's duty to conduct a *Krankel* inquiry." *Id*. ¶ 18. For example, a defendant need only use the words "ineffective assistance of counsel," in his *pro se* motion to trigger the trial court's duty to make a preliminary inquiry into defendant's claim. *Id.* (finding defendant's bare allegation of "ineffective assistance of counsel" sufficient to trigger a preliminary *Krankel* inquiry)

¶ 42 Here, defendant made allegations that "Counsel's performance was deficient and prejudiced defendant," "Counsel was ineffective in assistance of ongoing case," "Counsel's

failure for objections as well timely motions to disqualify witnesses allowed prosecution the benefit of inflaming the jury," "Counsel did not follow my wishes," and "Counsel's serious errors deprived defendant of [a] fair trial." Although defendant's claims of ineffective assistance are general and conclusory, his allegations were sufficient to trigger the court's duty to conduct a preliminary *Krankel* inquiry. *Id*. Therefore, we now consider whether the trial court conducted an adequate preliminary inquiry before it denied defendant's *pro se* motions. *Id.*

¶ 43 Although it is true that in rejecting defendant's ineffective assistance claims, the trial court briefly explained that counsel had not done anything wrong, the court never questioned defendant or defense counsel regarding defendant's assertion that counsel was ineffective. Defendant's allegations prompted at least *some* questioning by the trial court. "In making the inquiry, ' "some interchange between the trial court and trial counsel regarding the facts and circumstances surrounding the allegedly ineffective representation is permissible and usually necessary in assessing what further action, if any, is warranted on a defendant's claim.' ' " *Id.* ¶ 12 (quoting *People v. Jolly*, 2014 IL 117142, ¶ 30, quoting *People v. Moore*, 207 Ill. 2d 68, 78 (2003)). Consequently, on remand we also order the trial court to conduct a preliminary inquiry into defendant's *pro se* claims of ineffective assistance of counsel.

¶ 44 CONCLUSION

¶ 45 The judgment of the trial court of Rock Island County is affirmed in part, vacated in part, and remanded with directions. On remand, the trial court is instructed to amend the sentencing order to reflect that defendant is eligible for day-for-day good-conduct credit and to conduct a preliminary inquiry into defendant's *pro se* allegations of ineffective assistance of counsel.

¶ 46 Affirmed in part, vacated in part, and remanded with directions.