2017 IL App (5th) 140464-U

NO. 5-14-0464

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Effingham County.
	)	
v.	)	No. 14-CF-24
	)	
JAY C. MILLER,	)	Honorable
	)	Kimberly G. Koester,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Barberis and Overstreet concurred in the judgment.

ORDER

¶ 1 *Held*: The court affirmed the defendant's drug-induced homicide conviction, rejecting his argument that he was denied his right to a fair trial by an impartial jury where the trial court refused to dismiss a juror for cause even though the juror stated that he would give greater weight to a police officer's testimony because the defendant failed to show he was prejudiced where he did not use an available peremptory challenge to strike the juror.

¶ 2 After a jury trial, the defendant, Jay C. Miller, was found guilty of drug-induced homicide and sentenced to 17 years' imprisonment followed by 3 years of mandatory supervised release. He appeals, arguing that he was denied his right to a fair trial by an impartial jury where the court refused to dismiss a juror for cause even though the juror

stated that he would give greater weight to a police officer's testimony. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 The defendant was charged in Effingham County with possession of a controlled substance (720 ILCS 570/402(c) (West 2012)) (count I), delivery of a controlled substance (720 ILCS 570/401(d)(i) (West 2012)) (count II), and drug-induced homicide (720 ILCS 5/9-3.3 (West 2012)) (count III). After his motion to sever count I from counts II and III was granted, he entered a negotiated guilty plea to possession of a controlled substance (count I) but demanded a jury trial on counts II and III. Count II charged that, on February 4, 2014, the defendant committed the offense of delivery of a controlled substance in that he knowingly and unlawfully delivered a substance containing heroin to Jessica M. James. Count III charged that, on that same day, he also committed the offense of drug-induced homicide in that he knowingly delivered a substance containing heroin to James, and she thereafter injected a portion of that heroin into her body, which caused her death.

¶ 5 During *voir dire*, defense counsel asked prospective jurors the following question: "Would you necessarily give more weight to the testimony of a police officer just because that's his or her job?" Four prospective jurors, Susan Cisna, Sarah Mellendorf, Vera Sapp, and Charles Smith, answered affirmatively. This was the last question they were asked before they were sent back to the jury room. The court granted challenges for cause on Cisna and Mellendorf for reasons unrelated to their responses about a police officer's testimony. The court, however, denied the defendant's challenges for cause on

Sapp and Smith even though he argued that they would give more weight to a police officer's testimony. He used a peremptory challenge to strike Sapp but did not use a peremptory challenge to strike Smith even though he had peremptory challenges remaining, 8 of the 12 jurors had already been selected, and he had not challenged any of the other remaining prospective jurors for cause. Smith was selected to serve on the jury.

¶ 6 At trial, Aaron Heaton testified as follows. He worked at John Boos and lived in a house in Effingham. He met James in March 2013 when she started working at John Boos. They started dating in July 2013, and she moved in with him in August 2013. He had a 13-year-old son, who also lived with him part of the time.

¶ 7 In August 2013, James told Heaton she was having substance abuse issues. In November 2013, she agreed to enter rehab, which she began shortly before Thanksgiving 2013. She told Heaton that she had been using heroin for less than six months and that this was her first trip to rehab. She completed 30 days in rehab and went into a halfway house for a while before returning to live with Heaton.

¶ 8 On February 4, 2014, Heaton left for work at about 6:40 a.m. He told James that his truck would not start, which was a lie; drove her car to work; and took his truck keys with him. He explained that she had recently lost her job, that he was worried that she would relapse, and that he did not want her to be able to go out and obtain heroin.

¶ 9 James woke up shortly after 9 a.m., and she and Heaton messaged back and forth most of the morning. Heaton received her last message at 3:18 p.m.

¶ 10 Heaton left work at 4:30 p.m., picked up his son, went grocery shopping, and got home between 5:10 and 5:15 p.m. As he was unpacking the groceries, his son came into

the kitchen and said that James was asleep on the bedroom floor. He told his son to call 911 and went into the bedroom, where he found James. She was not breathing, and he began CPR.

¶ 11 Heaton had a computer in his home with key logger software, which records the key strokes on the computer. During the investigation, he gave John Maguire, a detective with the Effingham Police Department, his password to allow access to the computer.

¶ 12 Kirk Miller, a paramedic for Effingham City/County Ambulance, gave the following testimony. On February 4, 2014, he was dispatched to James' house for a possible drug overdose. When he arrived, James was not breathing and had no pulse. Paramedics performed CPR and respirations, put her on a cardiac monitor, gave her Narcan to counteract the possible heroin that had been found in the house, and took her to the hospital. She had a pulse when care was transferred to the emergency room doctor.

¶ 13 Paramedics got a call the next morning to take James to a hospital in Springfield. While en route, she went into ventricular tachycardia. Paramedics performed CPR and defibrillated her, and she regained a pulse. They then turned around and headed back to Effingham because she was extremely unstable at that time.

¶ 14 Duane Guffey, the county coroner, testified that James was pronounced dead at about 10:20 a.m. on February 5, 2014. Her death certificate was entered into evidence.

¶ 15 Dr. James Michael Jacobi, a forensic pathologist, gave the following testimony. On February 6, 2014, he performed an autopsy on James. He observed needle marks on both of her feet and her right forearm. Her urine specimen taken at the emergency room detected the metabolite of heroin, which showed that she had used heroin. He opined to a

reasonable degree of medical certainty that her death was a result of delayed heroin toxicity. He testified that no other substances or conditions contributed to her death and that she had last used heroin between two and four hours before she was found.

¶ 16 Betty Fulford, James' grandmother, testified as follows. James went into rehab in late November and got out shortly before Christmas. After 30 days in rehab, she went into a halfway house for three weeks before returning to Effingham. She went back to work for about six weeks but lost her job two weeks before she died and was very upset about it. Fulford was very concerned about her because she knew she had used drugs since losing her job. Fulford called her at about 3:30 p.m. on February 4, 2014, but got no answer. James called back a few minutes later and sounded "groggy." Fulford knew James was taking pain medication for her back and asked her if she had taken too much. She responded that she was fine. This was the last time that Fulford talked to her.

¶ 17 Tomeka Price testified that, as of February 4, 2014, she and the defendant had been dating for about a week and a half. She stated that he did not have a job and that he lived in an apartment in Effingham with Albert Church. She testified that he had a heroin problem and that she did not like it that he used heroin. She stated that he would sweat profusely and sometimes vomit right after using heroin.

¶ 18 Price testified that the defendant often used her cell phone because he did not have a phone. Price stated that she accidentally sent James a text message asking her to have the defendant call her when she saw him. Price testified that she meant to send that message to a different Jessica, who was staying at the defendant's apartment. She stated that she did not know that Jessica's last name. She denied making any calls to James.

¶ 19 Price testified that Chris Miller was a friend of the defendant's and that she had sometimes texted and called him in an effort to reach the defendant. She stated that, although she had made plans on one occasion to drive Chris Miller and the defendant to Decatur, she had never actually gone to Decatur with either of them.

¶ 20 Price testified that she took food to the defendant's apartment between 12 and 1 p.m. on February 4, 2014. She stated that, while she was there, the defendant asked her to give James a ride to the bank. She testified that she and the defendant then drove to James' house, picked her up, took her to the bank, waited in the car while she went inside the bank to get money, and drove her back home. She stated that she then got a text message from Church, asking for a ride to work; that she left to take Church to work; and that the defendant and James went inside James' house.

¶ 21 Price testified that, after taking Church to work, she returned to James' house to pick up the defendant. She stated that she went to the door, knocked, and yelled in for him; that he came out; and that they left. She testified that he was sweating profusely when they got back in the car. She stated that she then took him to his apartment and went home because she was running late for work, which started at 3:45 p.m.

¶ 22 Angie Swingler, a teller at an Effingham bank, testified that James came into the bank shortly after 2 p.m. on February 4, 2014, and withdrew $50.

¶ 23 Chris Miller testified that he was a heroin addict and that, in exchange for a tenth of a gram of heroin, he drove the defendant to Decatur on February 4, 2014, to purchase heroin. He acknowledged that he was cooperating with the prosecution in this case; that he had a pending petition to revoke probation for delivery of heroin; that he had other

prior drug convictions; and that, by testifying for the prosecution in this case, he was hoping for a favorable outcome on his petition to revoke probation.

¶ 24 Andy Warner, an officer with the Effingham Police Department, testified as follows. At 5:11 p.m. on February 4, 2014, he responded to a 911 call to James' house for a possible overdose. When he entered the house, paramedics were in the bedroom with James. He went around the bedroom and spoke with Heaton.

¶ 25 As he walked around the house, Officer Warner saw certain items that could have been used for illicit drug use, including an uncapped syringe with a small amount of blood in it, a spoon with two pieces of cotton stuck to it, and a small piece of foil. Upon opening the foil, he saw two small chunky pieces of an off-white, grayish-colored substance, which later tested positive for the presence of heroin.

¶ 26 Officer Warner explained that heroin is often injected by heating a spoon so the substance, which is in a solid form, will turn into a liquid. The cotton pieces act as a filter when the substance is heated up on the spoon and then drawn into the needle.

¶ 27 After Officer Warner discovered these items, Heaton picked up James' purse and began going through it. As Heaton did so, Officer Warner saw other items that may have been consistent with drug use, including Q-tips, small pieces of cotton, tweezers, and short sections of red straw that might be snorting tubes. He explained that heroin, pills, and cocaine are sometimes crushed and snorted and that it is common for heroin addicts to use narcotic pills when they cannot get heroin.

¶ 28 Aaron Lange, a detective with the Effingham Police Department, gave the following testimony. He was called to James' house shortly after 5 p.m. on February 4,

2014, for a possible drug overdose. When he arrived, Officer Warner advised him that James might have overdosed on heroin, that her condition was critical, and that she had been taken to the hospital.

¶ 29 During his investigation, Detective Lange questioned the defendant at the Effingham County Jail. He read the defendant his *Miranda* rights, and the defendant indicated that he understood those rights and signed a waiver. Detective Lange asked the defendant if he had provided any heroin to James, and the defendant responded that he had not. He said that he was a heroin user, not a heroin seller.

¶ 30 John Maguire, an investigator with the Effingham Police Department who specializes in high-technology crimes and digital investigations, testified as follows. During his investigation, he reviewed the call logs and text messages from James' cell phone, Church's cell phone, Price's cell phone, and Heaton's hard drive. Price's number was saved in the contacts database on James' cell phone as "Jay."

¶ 31 Investigator Maguire created a chronological real time transcript of communications between the various devices, which was admitted into evidence. The transcript shows that beginning on the evening of February 1, 2014, James began communicating with Church, desperately trying to find someone who would sell her heroin. Church indicated that he had a "buddy" who went to Decatur frequently and might be able to help. The communications between James and Church continued throughout the next day and evening. Finally, on the afternoon of February 3, 2014, Church sent James messages, giving her a phone number and telling her to talk to "Jay."

¶ 32 At 6:39 a.m. on February 4, 2014, Chris Miller sent a text message to Price's phone, stating: "Wakey wakey lol its gunna start snowing at noon so we need to get goin asap he said wenever we ready is good[.]"

¶ 33 Between 9:10 a.m. and 2:08 p.m. that day, there were numerous phone calls between James' phone and Church's phone. At 2:05 p.m., James sent a failed message to Church's phone asking, "U on way[?]" At 2:08 p.m., "Jay" called James.

¶ 34 At 2:44 p.m., Price sent a message to an unknown number stating: "We are at some girls house…we will be back soon[.]" At 4:53 p.m., Price sent a message to James asking: "Hey when you see Jay can you have him call me either on my cell or at work[?]"

¶ 35 Julie Jamerson testified that on the evening of February 7, 2014, the defendant, who was related to her, came to her house to rest and shower. While there, he told her that he was using heroin and that he was selling enough heroin to support his habit.

¶ 36 Jeremy Davis, a deputy with the Effingham County Sheriff's Department, gave the following testimony. During a search incident to arrest on February 7, 2014, he seized from the defendant a hypodermic needle; a medication bottle with a green leafy substance in it; a metal spoon; a metal pipe; and a blue Q-tip container containing a small baggie with a white powdery substance inside, which field tested positive for heroin.

¶ 37 After the State rested, the defendant moved for a directed verdict, which was denied. The defendant did not testify, nor did he present any evidence. The jury found him guilty of both delivery of a controlled substance and drug-induced homicide.

¶ 38 The defendant subsequently filed a motion for acquittal or, in the alternative, for a new trial, arguing, *inter alia*, that the court erred in denying his challenges for cause as to

certain prospective jurors. He later filed an amended motion, specifically setting out the prospective jurors who should have been stricken for cause. The motion was denied.

¶ 39 At sentencing, the defendant's delivery of a controlled substance conviction merged with his drug-induced homicide conviction, and he was sentenced to 17 years' imprisonment followed by 3 years of mandatory supervised release. He filed a motion to reconsider sentence, which was denied. He appeals.

¶ 40 ANALYSIS

¶ 41 The defendant argues that he was denied his right to an impartial jury where the court denied his challenge to juror Smith for cause even though Smith stated that he would give greater weight to a police officer's testimony. The State responds that the defendant waived this issue on appeal because, after the court denied his challenge to Smith for cause, he did not use a peremptory challenge to strike Smith even though he had peremptory challenges remaining. He responds that he had a special need to preserve his peremptory challenges because the potential for bias or impartiality was significant.

¶ 42 "[T]he well-settled rule in Illinois is that a court's failure to remove a juror for cause is grounds for reversal only if prejudice can be shown; that is, only if the party challenging the juror has exercised all of his peremptory challenges and an objectionable juror was allowed to sit on the jury." *In re Commitment of Trulock*, 2012 IL App (3d) 110550, ¶ 45 (citing *Spies v. People*, 122 Ill. 1, 257-58 (1887) ("We think it must be made to appear that an objectionable juror was put upon the defendants after they had exhausted their peremptory challenges. *** We can not reverse this judgment for errors committed in the lower court in overruling challenges for cause to jurors, even though

defendants exhausted their peremptory challenges[,] unless it is further shown that an objectionable juror was forced upon them and sat upon the case after they had exhausted their peremptory challenges.")). See also *People v. Ford*, 19 Ill. 2d 466, 475 (1960) ("We have frequently stated that a defendant, having failed to use his peremptory challenges, is in no position to complain concerning jury selections."); *Collins v. People*, 103 Ill. 21, 24 (1882) ("Without stopping to inquire whether the juror was incompetent on the ground suggested, *** it does not appear that the accused had exhausted his peremptory challenges, or that he subsequently had occasion to use all his peremptory challenges, and such being the case, under the authority of *St. Louis & Southeastern R.R. Co. v. Lux*, 63 Ill. 525, the objection is not well taken."); *St. Louis & Southeastern R.R. Co. v. Lux*, 63 Ill. 523, 525 (1872) ("It is urged that Hill should not have been accepted as a juror, as he was on the regular panel, and was called to serve on this trial without drawing his name by lot. Admitting this was an irregularity, it is not a reason in this case for granting a new trial. The appellant might have challenged him peremptorily. If it had occasion to use its peremptory challenges before the panel was complete, in order to exclude other jurors, we might take a different view of the question. It did not, however, *** and as it might have excluded this juror *** without prejudice to itself, we do not consider the refusal of the court to do so a ground for a new trial.").

¶ 43 In arguing that this well-settled rule should not be applied here, the defendant relies on *People v. Hines*, 165 Ill. App. 3d 289 (1988). *Hines*, which involved the mysterious disappearance and brutal slaying of a young, innocent girl, garnered immediate, intense, and protracted media coverage. *Id.* at 295-96. Three local men were

accused of using a police light to stop and abduct the victim. *Id.* at 295. The sister of two of the men told the police of their part in the crime, and the news media reported about the resultant family dissension. *Id.* Although most of the news articles dealt with the factual circumstances surrounding the crimes and the subsequent trials, some of the articles relayed emotionally-packed stories of the victim and her family. *Id.* at 295-96.

¶ 44 To gauge community sentiment over his client's case, defense counsel requested and received approval for a public opinion poll to be conducted. *Id.* at 296. The poll showed that 81% of the 287 people surveyed knew of the case by name. *Id.* More importantly, of those persons who knew of the case, 73% thought the right people had been arrested, and 64% believed that those who had been arrested were guilty. *Id.* Over 50% of those polled had heard of the case at least 25 times and could name the defendants. *Id.*

¶ 45 During *voir dire*, 135 prospective jurors were questioned during a 14-day selection process. *Id.* Most of them had heard of the case, and 25% of them were excused for cause because they held a preconceived opinion about the defendant's guilt. *Id.*

¶ 46 On appeal, the defendant argued that the trial court abused its discretion in denying several of his challenges for cause. *Id.* at 297. The State argued that the defendant had waived any objections he might have had regarding jury selection, as he had failed to exhaust all of his peremptory challenges. *Id.* The court ruled as follows:

> "Case law certainly suggests that failure to use all allotted peremptory challenges precludes any complaint on appeal. [Citations.] Also, such failure by defense counsel to exercise those challenges 'tends to belie a claim of unfair prejudice.'

[Citation.] However, because of the amount of publicity in this case and the number of veniremen apparently influenced by it, defendant had special need to preserve his peremptory challenges. We conclude we should not hold defendant to have waived error in the denial of his challenges for cause for failing to exercise all of his peremptory challenges." *Id.*

¶ 47 Relying on *Hines*, the defendant here argues as follows:

"[O]f those venire members that were asked if they had heard about the circumstances of this case, at least twenty responded that they had in some form, whether it be radio, newspaper articles, or workplace gossip. [Citations.] Many of the venire members knew the witnesses. [Citations.] Several of the venire members had a relationship with law enforcement. [Citations.] Various venire members expressed reservations about their ability to be proper jurors based on what they had heard or their own experiences with drugs. [Citations.] Other venire members indicated that they could not presume the defendant to be innocent, questioned why an innocent individual would not testify, or conveyed doubts about their own partiality. [Citations.] While the majority of these prospective jurors were rehabilitated by the court, the potential for bias was severe in this case. Comparable to *Hines*, the bias apparent in the questioned panels of prospective jurors suggested that the unquestioned prospective jurors would express similar biases. [Citation.] Accordingly, [the defendant] had a special need to preserve peremptory challenges when faced with such acute bias from such a large number of the venire."

¶ 48 We disagree with the defendant's characterization of the extent of potential bias in this case. Although most of the 28 prospective jurors questioned in this case during the two-day selection process had read about, or heard about, the case, they testified almost without exception that they could put aside what they had heard or read and decide the case based solely on the evidence presented. Similarly, although many of them knew one or more of the witnesses, almost all of them testified that this would not affect their ability to decide this case fairly and impartially. Only 5 of the 28 prospective jurors were stricken for cause. Based on the record before us, we find no merit to the defendant's argument that he had a special need to preserve peremptory challenges in this case.

¶ 49 When the defendant was faced with the decision of whether to use peremptory challenges to strike jurors in juror Smith's panel, 8 of the 12 jurors had already been selected, he had three peremptory challenges remaining, and the State had six. Three prospective jurors, Victoria Draves, Sapp, and Smith, were left over from prior panels. The defendant's challenges for cause as to Sapp and Smith had been denied. Twelve additional prospective jurors had been questioned, and one of them, the county sheriff, had been removed for cause. Neither the defendant nor the State had challenged any of the other 11 additional prospective jurors for cause.

¶ 50 Smith's panel, which was initially tendered to the State, included the three prospective jurors left over from prior panels, Draves, Sapp, and Smith, as well as Sharon Wolfert. The State used its second peremptory challenge to strike Draves.

¶ 51 The State then tendered the panel of Sapp, Smith, Wolfert, and Nyla Key to the defendant. The defendant used his fifth peremptory challenge to strike Sapp but did not

use a peremptory challenge to strike Smith, even though he had two remaining peremptory challenges, he had unsuccessfully challenged Smith for cause, and he had not challenged any of the other remaining prospective jurors for cause.

¶ 52 Instead, the defendant tendered the panel of Smith, Wolfert, Key, and Michael Tappendorf to the State. The State used its third peremptory challenge to strike Wolfert.

¶ 53 The State then tendered the panel of Smith, Key, Tappendorf, and Phillip Hartke to the defendant. Again, the defendant did not use a peremptory challenge to strike Smith even though he had two peremptory challenges remaining. Instead, he affirmatively accepted the panel, and Smith was selected to serve on the jury.

¶ 54 Even though the trial court erred in denying the defendant's challenge of juror Smith for cause, the court's ruling was not reversible error because the defendant failed to show that he suffered any prejudice from the court's ruling because he did not use a peremptory challenge to strike Smith even though he had peremptory challenges remaining. Because he cannot show prejudice, his argument must be rejected. See *Ford*, 19 Ill. 2d at 475; *Spies*, 122 Ill. at 258; *Collins*, 103 Ill. at 24; *Lux*, 63 Ill. 525; *In re Commitment of Trulock*, 2012 IL App (3d) 110550, ¶ 46.

¶ 55 CONCLUSION

¶ 56 For the foregoing reasons, the judgment of the circuit court of Effingham County is affirmed.

¶ 57 Affirmed.