2019 IL App (1st) 172684-U

FIRST DIVISION
May 6, 2019

No. 1-17-2684

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re THE COMMITMENT OF PERRY HERNANDEZ	)	Appeal from the Circuit Court of Cook County.
(People of the State of Illinois, Plaintiff-Appellee, v. Perry Hernandez, Defendant-Appellant.)	)	No. 12 CR 8000201 Honorable Stephen G. Watkins, Judge Presiding.

JUSTICE GRIFFIN delivered the judgment of the court.
Presiding Justice Mikva and Justice Walker concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err when it denied respondent's motion to strike a prospective alternate juror for cause.

¶ 2 After a jury trial, respondent Perry Hernandez was adjudicated a sexual violent person and committed to the custody of the Illinois Department of Human Services ("DHS") pursuant to the Sexually Violent Persons Commitment Act (725 ILCS 207/1, *et seq*. (West 2012)) ("the Act"). Respondent appeals his adjudication, and argues that he is entitled to a new trial because

the trial court allowed a partial and unfair juror to be seated on the jury. We affirm.

¶ 3 BACKGROUND

¶ 4 On the night of September 2, 1989, respondent kidnapped and forcibly raped a six-year-old girl. Earlier that year, on April 31, 1989, respondent grabbed and attempted to disrobe a victim on the platform of a Metra train station. Respondent was arrested in connection with these events on September 25, 1989 and charged in two separate cases (89 CR 20909, 89 CR 20913) with a litany of sexual and other criminal offenses. In 1990, respondent pleaded guilty in both cases and was sentenced to serve concurrent prison terms of 45 and 8 years, respectively.

¶ 5 The sexual offenses of which respondent was convicted were "sexually violent offenses" (See 725 ILCS 207/5(e) (West 2012)) and made him eligible for commitment pursuant to section 40 of the Act (*Id*. § 207/40) ("section 40 of the Act"), which provides that a court shall commit a person to DHS for "control, care and treatment" if a judge or jury determines he or she is a "sexually violent person."

¶ 6 In 2012, the State filed a petition to adjudicate respondent a sexually violent person and commit him to the custody of DHS. The State amended the petition on July 25, 2017 and the matter proceeded to a jury trial. After a twelve-member jury was selected, the trial court swore in and questioned a venire of ten prospective alternate jurors. At issue in this case is prospective alternate juror Lucia Napatal.

¶ 7 The trial court first questioned Napatal as part of a smaller panel of prospective alternate jurors. Napatal answered the trial court's questions indicating that she understood and accepted she could not consider the State's petition as evidence or draw inferences therefrom, respondent was presumed not to be a sexually violent person, the presumption persisted through trial and the State had the burden of proof beyond a reasonable doubt. She told the trial court she accepted

and understood that respondent did not have to testify, had no burden of proof and his decision not to testify if he so chose could not be considered in any way. Napatal agreed to listen to the evidence, hear the arguments and the jury instructions before making up her mind and accepted that she must follow and apply the law as instructed by the trial court regardless of any personal disagreement.

¶ 8 When questioned individually by the trial court, Napatal stated neither she, nor her close relatives, had been a complainant or witness in a criminal or civil case, or the victim of any crime or sexual abuse. The trial court asked Napatal whether she could be fair and impartial if "the evidence shows that [respondent] has been convicted of a sexually violent offense against a minor." Napatal answered "I'm not sure."

¶ 9 The trial court inquired further and Napatal explained, "if [respondent] is convicted *** then he should be *** punished." The trial court clarified that respondent "was not on trial for a sex crime" and asked Napatal "if the evidence shows that in the past, he had been convicted — that's past tense" of a sexually violent offense against a minor if she could be fair in determining whether respondent was a sexually violent person. She answered, "Okay. I will do my best since the one is in the past." Later, the trial court asked Napatal if there was "anything I have not touched upon or that I have not asked you that would interfere with your ability to be fair and impartial juror and give both sides a fair trial." She answered, "No, no problem."

¶ 10 Respondent's counsel repeated the trial court's question and asked Napatal whether she could be fair, "knowing that respondent had been convicted of a sexual assault." Napatal replied, "I will try my best to be fair." When respondent's counsel asked if she was "sure," she answered, "I'm not sure." Counsel moved to strike Napatal for cause because she could not state, unequivocally, that she would be fair and impartial. The trial court denied counsel's request

noting that, upon further examination, Napatal indicated she would try her best. Napatal was seated as one of the prospective alternate jurors and when a juror failed to appear for the second day of trial, she was seated on the jury.

¶ 11 At trial, the State presented the testimony of two psychologists who were qualified as experts in the fields of clinical psychology and sex offender diagnosis and risk analysis. On July 26, 2017, the jury found respondent to be a sexually violent person and the trial court, on September 12, 2017, entered an order committing him to the care of DHS.

¶ 12 Respondent appeals, and argues that the trial court erred when it allowed Napatal to be seated on the jury and he is entitled to a new trial.

¶ 13 ANALYSIS

¶ 14 The issue on appeal is whether the trial court erred when it denied respondent's motion to strike Napatal for cause.

¶ 15 The determination of whether a prospective juror possesses the state of mind which will enable him or her to give to an accused a fair and impartial trial rests in the sound discretion of the trial judge. *People v. Kuntu*, 196 Ill. 2d 105, 127 (2001). Such a determination will not be set aside unless it is against the manifest weight of the evidence. *People v. Smith*, 341 Ill. App. 3d 729, 738 (2003).

¶ 16 A criminal defendant is guaranteed the right to a trial by an impartial jury by both the United States and Illinois Constitutions. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. *Voir dire* allows for the selection of impartial jurors who are free from prejudice or bias, and insures that the attorneys have an informed and intelligent basis on which to exercise their peremptory challenges. *People v. Clark*, 278 Ill. App. 3d 996, 1003 (1996).

¶ 17 Respondent admits that he failed to challenge the trial court's denial of his motion to

strike Napatal for cause in a posttrial motion. *People v. McCarty*, 223 Ill. 2d 109, 122 (2006) (failure to raise an issue in a posttrial motion results in the forfeiture of that issue on appeal). The State argues that, forfeiture aside, the trial court's decision is not reversible because respondent failed to exhaust his peremptory challenges before challenging Napatal for cause. See *People v. Pendleton*, 279 Ill. App. 3d 669, 675 (1996) (a trial court's failure to remove a juror for cause is grounds for reversal only if the defense has exercised all of its peremptory challenges and an objectionable juror was allowed to sit on the jury). We address the State's argument first.

¶ 18 Proceedings under the Act are civil in nature. 725 ILCS 207/20 (West 2012) ("proceedings under this Act shall be civil in nature"). Therefore, jury selection in this case was governed in pertinent part by section 2-1106 of the Illinois Rules of Civil Procedure (735 ILCS 5/2-1106 (West 2012)) ("section 2-1106 of the Code"), which allows each side to five peremptory challenges and one additional peremptory challenge for use against alternate jurors.

¶ 19 Our review of the record shows that when respondent moved to strike Napatal for cause he had exercised *more* peremptory challenges than he was entitled to exercise under section 2-1106 of the Code. Respondent's counsel exercised a total of eight peremptory challenges before he moved to strike Napatal for cause. The State exercised seven peremptory challenges. No objection regarding the number of peremptory challenges was raised in the trial court and except for the State's argument that respondent's counsel failed to exhaust his peremptory challenges before moving to strike Napatal for cause, the parties do not challenge the jury selection process on appeal. Accordingly, we reject the State's argument and turn to address the issue of forfeiture.

¶ 20 Respondent forfeited the issue he raises on appeal, but asks this court to review the trial court's decision for plain error. *In re Commitment of Gavin*, 2014 IL App (1st) 122918, ¶ 55, 14 N.E.3d 1163, 1180 (criminal plain error rule should apply to appeals in proceedings under the

Act); *People v. Ware*, 2014 IL App (1st) 120485, ¶ 14 (plain-error doctrine allows a reviewing court to reach a forfeited error which affects substantial rights where: (1) the evidence is so closely balanced, the jury's guilty verdict might have resulted from the error and not the evidence; or (2) as argued here, the error is so serious the defendant was denied a substantial right and, thus, a fair trial). We decline to review the trial court's decision for plain error because we find it committed no error at all. *Id*. (where there is no error, there can be no plain error).

¶ 21 A review of the entire *vior dire* examination of Napatal shows that trial court did not err when it denied respondent's motion to strike her for cause. *People v. Buss*, 187 Ill. 2d 144, 187 (1999) (a juror's *voir dire* examination must be considered in its entirety). Respondent points to the words "I'm not sure" as conclusively establishing partiality and unfairness on the part of Napatal, but a review of the record as a whole places the statement in context and demonstrates that the trial court's determination was not against the manifest weight of the evidence.

¶ 22 In response to the trial court's questioning, Napatal indicated she understood and accepted the presumption of innocence and the State's burden of proof beyond a reasonable doubt. She agreed to listen to all of the evidence before arriving at a conclusion of whether respondent was a sexually violent person, affirmed she had no relatives that were victims of crime or sexual abuse and told the trial court she would follow the law.

¶ 23 When asked by the trial court whether she could be fair given respondent's prior conviction of a sex crime, she stated "I'm not sure," but this uncertainty stemmed from her misunderstanding of the trial court's question. Once the trial court clarified that respondent was not on trial for the sex crime, but had in fact been convicted in the past, Napatal indicated that she would "try her best to be fair." She gave the same response when questioned by respondent's counsel, indicating she was not "sure" she could be fair, but would "try [her] best to be fair."

¶ 24 Such a statement, standing alone, does not warrant a reversal of the trial court's decision. *People v. Bowman*, 325 Ill. App. 3d 411, 424, 758 N.E.2d 408, 419 (2001) (a single equivocal answer does not require the trial court to accept a challenge for cause); *People v. Tipton*, 222 Ill. App. 3d 657, 665 (1991) (finding no error when the trial court refused to dismiss a prospective juror indicated that she "might" have some difficulty being impartial, but would "do her best" to abide by her oath as a juror); *People v. Hobley*, 159 Ill. 2d 272, 296-297 (1994) (finding no error in refusing to dismiss a juror for cause when one juror first stated she would "try to" follow applicable law and another juror first "guessed" she could follow applicable law). Given the totality of Napatal's responses and applicable case law, we decline to reverse the trial court's decision.

¶ 25 Respondent relies on two cases in his opening brief (*People v. Johnson*, 215 Ill. App. 3d 713 (1991) and *People v. Stone*, 61 Ill. App. 3d 654 (1978)) that do not support his position. In *Johnson*, the trial court's determination that three prospective jurors should not be removed for cause was reversed because they "all equivocated when they were asked by the trial court whether they could be fair and impartial, and they testified that they had been victims of crimes, that their family members had been victims of crimes, or that their friends had been victims of crimes, some of which were violent crimes." 215 Ill. App. 3d at 724. In *Stone*, the court reversed a decision not to remove three prospective jurors for cause because the record was "replete with expressions of self-doubt concerning their ability to be impartial" and the prospective jurors "displayed marked signs of prejudice." 61 Ill. App. at 667. These cases bear no factual resemblance to the case at hand.

¶ 26 We hold that the trial court did not err when it denied respondent's motion to strike Napatal for cause. Respondent is not entitled to a new trial.

¶ 27 CONCLUSION

¶ 28 Accordingly, we affirm.

¶ 29 Affirmed.