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ARKANSAS COURT OF APPEALS

DIVISION II
No. CACR10-1040

	Opinion Delivered APRIL 20, 2011
TROY LYNN SCOTT and KENNETH CRAIN, JR. APPELLANTS	APPEAL FROM THE LONOKE COUNTY CIRCUIT COURT [NO. CR-10-90-1, CR-10-90-2]
V.	HONORABLE PHILLIP T. WHITEAKER, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

CLIFF HOOFMAN, Judge

Following a joint jury trial, appellants Troy Scott and Kenneth Crain were found guilty of two counts each of aggravated robbery and theft of property, and their sentences were enhanced under Ark. Code Ann. § 16-90-120 (Supp. 2009) due to their use of a firearm in committing the aggravated robberies. On appeal, appellants argue (1) that the trial court abused its discretion by restricting their voir dire of jurors and (2) that the trial court erred by denying their motion to dismiss the firearm-enhancement charge because it violated their rights to be free from double jeopardy. We affirm on both points.

By an amended information filed on June 28, 2010, appellants were each charged with two counts of aggravated robbery, two counts of theft of property, and the commission of a felony by use of a firearm. On the day of the jury trial, June 29, 2010, appellants filed a

motion to dismiss the firearm-enhancement provision, alleging that subjecting them to both the aggravated-robbery charges and the enhancement provision would violate their constitutional rights to be free from double jeopardy. Appellants prayed that the trial court either dismiss the firearm-enhancement charge, or in the alternative, if appellants were convicted of both charges, that the trial court refrain from sentencing appellants on both charges. This motion to dismiss was denied by the trial court at a hearing held immediately prior to the trial. Because appellants do not challenge the sufficiency of the evidence supporting their convictions, a detailed recitation of the facts and evidence presented at trial is unnecessary.

Following the evidence, the jury convicted appellants of both counts of aggravated robbery and theft of property, and also found them guilty of employing a firearm during the commission of the aggravated robbery. Scott was sentenced to ten years' imprisonment on each count of aggravated robbery, to be served consecutively, in addition to one year of imprisonment on the firearm-enhancement charge, for a total of twenty-one years' imprisonment. He was also fined $2500 for each count of theft of property. Crain was sentenced to twenty years' imprisonment on the aggravated-robbery charges and to thirteen years' imprisonment on the firearm-enhancement charge, for a total of thirty-three years' imprisonment. In addition, Crain was fined $5000 for each theft-of-property charge.

Although each appellant has filed a separate brief on appeal, their arguments are virtually identical, and we will address them together. For their first point on appeal,

appellants argue that the trial court abused its discretion in restricting their voir dire of the jury. According to the record of the voir dire proceedings in this case, the trial court initially conducted voir dire of the entire jury panel, then seated twelve jurors and allowed the parties to conduct their own voir dire and to exercise any challenges.[1] After the third round of voir dire by the parties but prior to their exercise of strikes, the trial court asked counsel to approach, informing them that, "after you've exercised options this time, you may go through one more round and then at that point we'll pretty much be out of what we're doing," and asked that the parties take that into consideration with their current round of challenges. At this point, the parties exercised four more strikes, and after new jurors were called to replace them in the jury box, another round of voir dire commenced. This round was followed by three more strikes, and once these three new jurors were seated, the following exchange occurred:

> THE COURT: All right. As I previously indicated, at this point we're at the point where this is the jury, okay? So I'll allow counsels here on the record to make any objections that you might have that you didn't exercise any options or any strikes that you may have not done so, but at this point, I'm ready to finish the voir dire process and seat these 12. So any objections from the State?
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> PROSECUTING ATTORNEY: None.
>
> SCOTT'S ATTORNEY: Your honor, I would object**.** I think we're entitled to voir dire the jury in this regard. I thought I was out of strikes. I may only have seven but I thought I was out either way. I voir dire the jury regarding any kind of cause strikes to make sure they're appropriate to be seated, so I would object.
>
> THE COURT: Okay. Mr. Lane?

[1]The record does not reflect how each party exercised its challenges, whether peremptory or for cause.

> CRAIN'S ATTORNEY: I object as well, your Honor, for mister reasons – Mr. Golden's reasons. We're entitled to the pain but we've gotta go through the process that he's entitled to it.
>
> THE COURT: Objections are noted and overruled because the Court has already exhausted any efforts on cause strikes with the jury prior to the parties individually voir diring the jury. I went through all those cause issues previously and there were no answers to them so this will be the jury. You may return to your seats.
>
> SCOTT'S ATTORNEY: I understand your ruling, your Honor.

Appellants contend that this was an abuse of the trial court's discretion to not allow any further voir dire of the new jurors. Arkansas Rule of Criminal Procedure 32.2 (2010) sets forth the procedure for conducting voir dire:

> (a) Voir dire examination shall be conducted for the purpose of discovering bases for challenge for cause and for the purpose of gaining knowledge to enable the parties to intelligently exercise peremptory challenges. The judge shall initiate the voir dire examination by:
> (i) identifying the parties; and
> (ii) identifying the respective counsel; and
> (iii) revealing the names of those witnesses whose names have been made known to the court by the parties; and
> (iv) briefly outlining the nature of the case.
> (b) The judge shall then put to the prospective jurors any question which he thinks necessary touching their qualifications to serve as jurors in the cause on trial. The judge shall also permit such additional questions by the defendant or his attorney and the prosecuting attorney as the judge deems reasonable and proper.

The extent and scope of voir dire examination is within the sound discretion of the trial court, and the latitude of that discretion is wide. *Miller v. State*, 2010 Ark. 1, ___ S.W.3d ___. We do not reverse the trial court's restriction of voir dire unless that discretion is clearly abused. *Id.* An abuse of discretion occurs when the trial court acts arbitrarily or groundlessly. *Id.*

There was no abuse of discretion by the trial court here. As Rule 32.2 provides, it is the trial court, rather than counsel, that has the right to ask questions of the venire persons, and it is within the trial court's discretion whether to allow additional questions by counsel as the trial court deems reasonable and proper. *Id.* The trial court in this case initially conducted an extensive voir dire of the entire panel to establish any bases for potential cause challenges, by introducing the parties, counsel, and witnesses, as well as by outlining the nature of the case. In addition, the trial court explored areas of potential bias by the venire persons, such as any family connection to law enforcement that might sway their perception of witness testimony at trial. The trial court further instructed the entire panel to listen to the voir dire examination of those in the jury box, to make note of any questions to which they would have answered affirmatively, and to raise that issue if they were called to the jury box. The trial court then allowed four rounds of voir dire by counsel before declaring that the jury was set.

Appellants assert that the trial court's initial voir dire was insufficient to allow them to determine whether to exercise their challenges, whether peremptory or for cause, and that additional voir dire of the three new jurors should have been permitted. Appellants cite *Fauna v. State*, 265 Ark. 934, 582 S.W.2d 18 (1979), and *Griffin v. State*, 239 Ark. 431, 389 S.W.2d 900 (1965), as support for their argument. However, these cases are distinguishable from the present case in that both involved restrictions on voir dire as to specific defenses the defendants sought to raise at trial. In *Fauna*, the supreme court reversed the trial court's

limitation on voir dire as to the jurors' attitudes toward the insanity defense, finding that the trial court's preliminary voir dire was insufficient to elicit bases for challenges regarding this specific defense. Similarly, in *Griffin*, the defendant sought additional voir dire as to the jurors' attitudes toward self-defense, which he was claiming as an affirmative defense to murder charges.

In the present case, appellants did not identify to the trial court any specific area or defense they sought to explore with additional voir dire. Instead, appellants merely assert that further voir dire was essential because their case turned on witness credibility. In *Van Cleave v. State*, 268 Ark. 514, 598 S.W.2d 65 (1980), the supreme court upheld the trial court's curtailment of voir dire examination, noting that the defense was that of "not guilty" and finding that, had there been a specific defense such as insanity or self-defense presented, the latitude granted during the voir dire examination would have been greater.

In addition, there is also no evidence that appellants had any remaining peremptory challenges. To the contrary, Scott admitted to the trial court that he was assuming that he did not have any peremptory strikes left but that he was seeking additional voir dire to examine any bases for cause challenges. The record further shows that Crain did not ask any questions of the jurors during the last round of voir dire permitted by the trial court. As the trial court stated in its ruling, it had thoroughly conducted a voir dire examination of the entire panel and found no basis for excusing a potential juror for cause. Therefore, it was within the trial court's discretion to restrict additional voir dire of the jury in this case, and we find no abuse of that discretion here.

Appellants next argue, as they did to the trial court, that the firearm-enhancement charge under Ark. Code Ann. § 16-90-120 should have been dismissed as a violation of Ark. Code Ann. § 5-1-110 (Supp. 2009) and of their state and federal constitutional rights to be free from double jeopardy because it imposed cumulative punishments for the same conduct. Section 16-90-120(a) provides that any person convicted of any offense classified as a felony, who employs a firearm as a means of committing or escaping from the felony, may be subjected to an additional period of confinement not to exceed fifteen years. This additional period of confinement "shall be in addition to any fine or penalty provided by law as punishment for the felony itself" and "shall run consecutively and not concurrently with any period of confinement imposed for conviction of the felony itself." Ark. Code Ann. § 16-90-120(b). The relevant provisions of section 5-1-110 provide that

> (a) When the same conduct of a defendant may establish the commission of more than one (1) offense, the defendant may be prosecuted for each such offense. However, the defendant may not be convicted of more than one (1) offense if:
> (1) One (1) offense is included in the other offense, as defined in subsection (b) of this section;
>
> . . . .
>
> (4) The offenses differ only in that one (1) offense is defined to prohibit a designated kind of conduct generally and the other offense to prohibit a specific instance of that conduct;
>
> . . . .
>
> (b) A defendant may not be convicted of one (1) offense included in another offense with which he is charged. An offense is included in an offense charged if the offense:
> (1) Is established by proof of the same or less than all of the elements required to establish the commission of the offense charged;
>
> . . . .

Appellants contend that because the aggravated robbery and the felony-firearm-enhancement statutes require exactly the same proof, they may not be convicted under both

provisions, according to section 5-1-110(b)(1); that the two offenses differ only in that one is designed to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct, so that convictions for both violate section 5-1-110(a)(4); and that the predicate offense of aggravated robbery is not mentioned in the specific exceptions noted in section 5-1-110(d)(1). The State asserts that appellants' double-jeopardy argument is not preserved for appeal because it was raised prematurely, before appellants were convicted of both the aggravated-robbery and the firearm-enhancement charges.

In *Brown v. State*, 347 Ark. 308, 317, 65 S.W.3d 394, 400 (2001), our supreme court held that a defendant "cannot object to a double jeopardy violation until he has actually been convicted of the multiple offenses, because it is not a violation of double jeopardy under § 5-1-110(a)(1) for the State to charge and prosecute on multiple and overlapping charges." Because the defendant in *Brown* moved for relief during his directed-verdict motion before he was actually convicted of any offense, and failed to object after he was convicted of both charges by the jury, the court held that he waived his double-jeopardy argument for purposes of appeal. *Id.*; *see also Hollins v. State*, 80 Ark. App. 342, 96 S.W.3d 755 (2003) (barring double-jeopardy claim not made following defendant's conviction on the disputed counts); *cf. Lee v. State*, 2010 Ark. App. 224 (distinguishing *Brown* and *Hollins* and finding that double-jeopardy argument was preserved where it was made during jury deliberations and before conviction, but this was only upon trial court's request).

In this case, appellants made their double-jeopardy argument in a motion to dismiss prior to the trial and again prior to the jury receiving its instructions. Appellants did not,

however, make this argument after they were convicted of both aggravated robbery and the firearm enhancement. Appellants did make an alternative argument in their motion to dismiss that, if they were convicted of both charges, the trial court should refrain from sentencing them on both. However, under the holdings in *Brown* and *Hollins*, because appellants did not make this argument after they were actually convicted of both charges, they have waived their double-jeopardy argument on appeal.

In any event, there is no merit to appellants' argument on this point. In *Davis v. State*, 93 Ark. App. 443, 220 S.W.3d 248 (2005), this court addressed this same issue and held that the defendant's double-jeopardy rights were not offended by application of both the firearm-enhancement and the aggravated-assault statutes. *See also Williams v. State*, 364 Ark. 203, 217 S.W.3d 817 (2005) (holding that § 16-90-120 is only a sentence enhancement added to the initial sentence). Contrary to appellants' argument, the firearm enhancement under section 16-90-120 is not a substantive criminal offense; rather, it is a sentencing enhancement specifically intended to provide additional punishment for the use of a firearm during the commission of the underlying felony itself. Thus, the enhancement provision does not violate section 5-1-110(a)'s proscription against being convicted of more than one "offense" under the circumstances set out in the statute, and appellants' double-jeopardy rights were not violated. We affirm.

Affirmed.

VAUGHT, C.J., and GLADWIN, J., agree.