No. 122059

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	On Appeal from the Appellate Court of Illinois, First Judicial District No. 1-14-2548
Plaintiff-Appellant,	)	
v.	)	There on Appeal from the Circuit Court of Cook County, Illinois No. 10 CR 4270
THEOPHIL ENCALADO,	)	The Honorable Matthew E. Coghlan,
Defendant-Appellee.	)	Judge Presiding.

REPLY BRIEF OF PLAINTIFF-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

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POINTS AND AUTHORITIES

ARGUMENT

I. Only One Legal Standard Governs Whether an Issue-Specific Voir Dire Question Is Appropriate.

Contending that the People rely on an "improper standard," defendant proposes an intricate two-tiered standard under which proposed voir dire questions like his are subject to less exacting scrutiny from trial courts. Def. Br. 12-13.[1] Indeed, he acknowledges that the "intensely/extraordinarily controversial" standard identified by the People applies to proposed voir dire questions about legal theories and affirmative defenses, but suggests that a more lenient standard permits voir dire questions about subject matter of mere "considerable disfavor." *Id.* Defendant's position is not supported by the law.

The purpose of voir dire is to empanel a jury free from bias or prejudice, and courts have long recognized that fact-specific, issue-specific, and legal defense-specific voir dire questions tend to thwart that purpose. *People v. Rinehart*, 2012 IL 111719, ¶¶ 16-17; *People v. Terrell*, 185 Ill. 2d 467, 484-85 (1998); *People v. Bowel*, 111 Ill. 2d 58, 64-65 (1986). Such voir dire is therefore prohibited, unless the failure to ask a particular issue-specific question would undermine a defendant's right to an impartial jury and render his trial "fundamentally unfair." *Terrell*, 185 Ill. 2d at 484-85. Illinois cases have long considered the appropriateness of many types of

[1] "C__" denotes the common law record, and "R. __-__" denotes the report of proceedings. The People's opening brief is cited as "Peo. Br. __," and defendant's appellee's brief is cited as "Def. Br. __."

issue-specific voir dire questions. One can distill from these cases the rule that *ad hoc*, case-specific voir dire is consistently and unbendingly limited to matters of intense controversy — be they extraordinarily controversial legal requirements, or sources of extremely polarizing societal controversy risking that a juror could be so blinded by prejudice that he or she cannot perform his or her duties. *See* Peo. Br. 19-23. Only in those rare instances do courts find that the failure to ask a proposed voir dire question risks a fundamentally unfair trial.

Cases such as those permitting voir dire on the insanity defense and prohibiting voir dire on self-defense have asked explicitly whether the legal theory or defense is so extraordinarily controversial that a failure to vet prospective jurors on the subject would jeopardize the fundamental fairness of the trial. *People v. Stack*, 112 Ill. 2d 301, 312-13 (1986) (insanity defense subject of "intense controversy"); *People v. Kendricks*, 121 Ill. App. 3d 442, 449 (1st Dist. 1984) (self-defense not "extremely controversial in nature"). And the same rigid standard can be gleaned from cases considering whether a trial's highly controversial factual content (abortion, certain race issues, or the death penalty, to name a few) necessitated issue-specific voir dire in spite of the strong default rule against it. *See People v. Sanders*, 238 Ill. 2d 391, 408-09 (2010) (grouping together cases considering voir dire on both controversial legal defenses and controversial factual subject matter and citing one controlling standard); *People v. Boston*, 383 Ill. App. 3d 352, 354

(4th Dist. 2008) (same); *People v. Mapp*, 283 Ill. App. 3d 979, 987 (1st Dist. 1996) (same); *cf. People v. Washington*, 104 Ill. App. 3d 386, 391 (1st Dist. 1982) ("Compare the present case [regarding the accountability theory] with *People v. Murawski* . . . about attitudes towards abortion . . . and *People v. Moore* . . . about attitudes towards the insanity defense . . . ."). Whether words such as "intensely" or "extraordinarily" were specifically used by these courts, Def. Br. 12, only extremely controversial topics have warranted issue-specific voir dire, precisely to limit opportunities for voir dire that "even slightly indoctrinate[s] a juror." *People v. Cloutier*, 156 Ill. 2d 483, 496 (1993). And no case, other than *People v. Strain*, 194 Ill. 2d 467 (2000) — which did so in the specific context of gangs and based on unique policy considerations — has diluted this standard to allow voir dire on a factual matter of mere "considerable disfavor."

Even accepting defendant's premise that a lower standard applies to proposed voir dire on certain case content, the intensely/extraordinarily controversial standard would still apply to defendant's proposed question because, as he acknowledges, it concerned his legal defense: consent (more specifically, consent from a purported prostitute). *See* Def. Br. 14-15; *see Stack*, 112 Ill. 2d at 312-13. Defendant has framed the question as one about a mere factual topic — prostitution — but the topic is inextricable from his asserted legal defense. And as the People's opening brief noted, the defense of consent is not among the legal defenses so intensely controversial that it

warrants an issue-specific voir dire question. *Boston*, 383 Ill. App. 3d at 355-56. The trial court therefore appropriately exercised its discretion in rejecting defendant's voir dire question relating to his consent defense.

II. *Strain* Created a Voir Dire Rule Limited to Gang Cases; It Did Not Expand the Traditional Rule Limiting Issue-Specific Voir Dire to Subjects of Intense Controversy.

Both defendant and the majority below are guided by an overreliance on, and a misunderstanding of, the gang-bias voir dire rule articulated in *People v. Strain*, 194 Ill. 2d 467 (2000). And neither addresses this Court's in-depth reflection on *Strain* in *People v. Sanders*, 238 Ill. 2d 391 (2010), much less the import of *Sanders*'s conclusion that *Strain*'s gang-bias voir dire rule was a new constitutional rule of criminal procedure, and not a change to or expansion of already-existing voir dire law. *Id.* at 411-13; *see generally* Def. Br. 10-25; *People v. Encalado*, 2017 IL App (1st) 142548, ¶¶ 27-46. Defendant's position that *Strain* broadly applies to all requested voir dire inquiries, even outside the gang context, is fundamentally inconsistent with *Sanders*'s holding that existing voir dire law had not been expanded or changed by *Strain*.

In *Sanders*, this Court considered *Strain* in the context of *Teague v. Lane*, 489 U.S. 288 (1989), and determined that the rule articulated in *Strain* was fundamentally new — a "clear break from precedent" that, although doctrinally consistent with existing law, was not merely an extension of it. *Sanders*, 238 Ill. 2d at 410-12 (noting that "[n]othing in the case law foretold

the holding in *Strain*" and emphasizing the "troubling precedent" if "future litigants [could] request[] *voir dire* on any potential bias merely by showing that the evidence on a particular subject will play a major role in the trial and that segments of our society view the subject with considerable disfavor"). For *Teague* purposes, the consequence was that *Strain*'s holding would not be applied retroactively. *Id.* at 413. Here, the conclusion that *Strain*'s gang-bias voir dire rule was a new constitutional rule of criminal procedure wholly undercuts defendant's contention that *Strain* simply expanded the existing doctrine governing issue-specific voir dire (including his proffered question). Def. Br. 12-13. If all *Strain* did was expand the existing legal standard, *Sanders* would have reached the opposite result. Thus, defendant's (and the appellate majority's) reading of *Strain* as having broadly expanded the existing standard for issue-specific voir dire to all cases involving factual content of "considerable disfavor" is incorrect.

III. If Anything, *Strain* Suggests that a Rule Prohibiting Voir Dire that Implicates a Sexual Assault Victim's Alleged Sexual History May Be Necessary to Further Effectuate the Protections of Illinois's Rape Shield Statute.

If guidance is to be drawn from *Strain*, it is not that the limitation on issue-specific voir dire has become more lenient. Instead, *Strain* suggests that, in certain instances, the policy rationale for an evidentiary limitation may also justify a rule furthering that policy rationale during jury selection. In *Strain*, this Court looked to an established evidentiary rule limiting the admissibility of evidence of a defendant's gang membership and gang-related

activities. It considered the policy rationale underlying that evidentiary rule — namely, the prejudicial effect that gang evidence has on criminal defendants at trial. And it determined that that same policy rationale compelled a rule ensuring that the concern would be adequately addressed during voir dire. *Strain*, 194 Ill. 2d at 477 (collecting cases).

Here, defendant attempted to invoke his victims' alleged sexual histories, via a voir dire question on prostitution. Under the reasoning of *Strain*, this Court should promote the purposes Illinois's rape shield statute by prohibiting such questioning during voir dire (to the extent the statute itself does not already cover voir dire, *see* Peo. Br. 27-29; 725 ILCS 5/115-7; *see also* Def. Br. 20-21). The rape shield statute has long served to severely constrain any discussion of a victim's (or corroborating witness's) prior sexual activity on the grounds that such prior sexual activity has no bearing on a person's consent in a particular instance, and that sexual assault victims should be protected from the harassment of having their unrelated sexual histories litigated in court. *People v. Summers*, 353 Ill. App. 3d 367, 373 (4th Dist. 2004); *People v. Ivory*, 139 Ill. App. 3d 448, 453-54 (1st Dist. 1985) (collecting cases); *People v. Hughes*, 121 Ill. App. 3d 992, 999-1000 (1st Dist. 1984); *People v. Tennin*, 162 Ill. App. 3d 520, 525-26 (2d Dist. 1987); *see also* 725 ILCS 5/115-7. The teaching of *Strain* is that this Court may consider the policy underpinnings of the rape shield statute and adopt a voir dire rule that furthers those goals, instead of subverting them. *See Strain*, 194 Ill. 2d at

477. This approach is also consistent with this Court's policy interest in protecting sexual assault victims in voir dire from potential jurors' "preconceptions about sexual assault cases," as evinced by its holding in *Rinehart*, 2012 IL 111719, ¶ 21 (allowing voir dire question targeted at uncovering bias against sexual assault victims who had delayed reporting).

Defendant's proposed voir dire, on the other hand, undermines these same interests. Under his proposed result, all sexual assault survivors — prostitutes and non-prostitutes alike — would become subject to voir dire questions invoking their unrelated and irrelevant prior sexual activities (true or not), despite the rigid evidentiary limitations that the rape shield statute imposes on trial proceedings. A rule that applies Illinois's demonstrated policy interest in protecting sexual assault victims to jury selection is therefore the only approach truly consistent with *Strain*.

IV. The Societal Biases Against Prostitutes and Patrons Are So Disparate that Even a "Neutrally-Phrased" Question on Prostitution Could Not Be Neutral in Impact.

Defendant's request for a voir dire question on prostitution is based on a concern that admitting to seeking the services of prostitutes "painted him[]" as "sleazy" and "in an extremely unflattering light." Def. Br. 17. But such reputational worries do not strike at the fundamental fairness of trial or the need to remove "minds . . . so closed by bias and prejudice that they cannot apply the law as instructed in accordance with their oath." *Cloutier*, 156 Ill. 2d at 495-96; *Rinehart*, 2012 IL 111719, ¶¶ 16-17; *Terrell*, 185 Ill. 2d at 484-

85. The purported "bias" that defendant meant to avoid was, as he acknowledges in his brief, a superficial concern that some jurors might find him unsympathetic. Def. Br. 17. This is precisely why the question was inappropriate for voir dire and defendant had no sufficient basis for a voir dire question that would preview his defense and indoctrinate the venire to be more receptive to it. *Bowel*, 111 Ill. 2d at 64-65; *Mapp*, 283 Ill. App. 3d at 986.

Even more troubling is defendant's equating his own reputational harm from admitting at trial to sometimes paying for sex (an admission which, if anything, portrayed him as someone who, though "sleazy," was at least willing to pay for sex rather than force it) with the irreparable damage to an alleged victim's sexual assault claims caused by a loaded voir dire question signaling to the jury that it may presume the victim to be a prostitute. *See, e.g.*, Def. Br. 16 ("[E]vidence about frequenting prostitutes . . . is just as likely to be held against the defendant as it is to be held against the sex worker."). Whereas the risk to a patron is embarrassment or shame, *see* Def. Br. 16-18 (collecting citations), the risks to a victim are (1) implanting a presumption in jurors from the outset of trial that she was, in fact, a prostitute — the crux of what defendant here sought to prove as his defense — and (2) reinforcing some jurors' troubling preconceived notions about prostitutes as rape victims: that a prostitute's rape allegations are less believable or legitimate, that a prostitute is incapable of being raped, or that

even if a prostitute is capable of being raped, she may have been "asking for it" or may not have suffered the same trauma resulting from it. Such disconcerting preconceptions are well-studied and widely acknowledged. *See Hughes*, 121 Ill. App. 3d at 999-1000; *Tennin*, 162 Ill. App. 3d at 525; Amanda Shapiro, *Buyer Beware: Why Johns Should Be Charged with Statutory Rape for Buying Sex from a Child*, 23 J.L. & Pol'y 449, 477-79 (2014) ("Once the victim's status as a prostituted person is admissible, juries believe that it is impossible to rape a prostitute."); David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. Crim. L. & Criminology 1194, 1351-65 (Summer 1997) ("Promiscuity is perhaps the most effective charge that a rape defendant can level against his accuser . . . [a]s there is copious evidence of jury prejudice against sexually adventurous women."); *id.* at 1355 (describing English study showing conviction rate of ninety-four percent where alleged victim was either virgin or victim's sexual past was not referenced at trial, versus conviction rate of forty-eight percent where alleged victim's sexual reputation, such as allegation of being a prostitute, was invoked during trial); Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 Geo. Wash. L. Rev. 51, 117-18 (Feb. 2002) ("Studies confirm that subjects tend to rate prostitutes as more responsible for having been raped . . . [and i]n a 1995 study, researchers interviewed prostitutes about their experiences of violence and rape in prostitution and found that several distinct themes emerged, including the

societal beliefs that prostitutes could not be raped, that prostitutes were not harmed even if they were raped, and even that prostitutes deserved to be raped."); *see also Commonwealth v. Harris*, 825 N.E.2d 58, 75-76 (Mass. 2005) (Marshall, C.J., concurring in part and dissenting in part, joined by Greaney, J.) ("[S]ocietal beliefs persist that prostitutes cannot be raped, or that they are not harmed by rape, or that they somehow deserve to be raped. . . . Courts have long recognized the difficulty in persuading juries that prostitutes are the victims of rape."); *Wood v. Alaska*, 957 F.2d 1544, 1552-53 (9th Cir. 1992).

So although there may be some social stigma attached to both prostitutes and their patrons, the bias associated with the former is far more consequential than any bias that attaches to the latter. Hence, defendant's proposed voir dire question was anything but neutral, despite his protestation that it was "neutrally-phrased" in that it asked about fairness "to either side." Def. Br. 18, 19. At best, it is sorely naïve to suggest that a voir dire question on prostitution, with all of its subtext as to an alleged victim's unrelated sexual history — a sexual history that, in this case, defendant had completely fabricated as to both Y.C. and C.C. — would have somehow benefitted both sides equally. Def. Br. 15-16, 17-18. To the contrary, the question would have undermined the victim's (or corroborating witness's) well-founded allegations before the trial ever began.

Whatever the supposed benefit to "revealing jurors who held negative biases against women who engage in 'commercial affection,'" Def. Br. 17, the

problem of juror prejudice based on a woman's irrelevant sexual history can be avoided entirely by prohibiting the very voir dire question that raises an innuendo about that woman's irrelevant sexual history in the first place.

V. Any Error Was Harmless.

But for a conclusory statement that "no harmless error analysis is necessary," defendant does not meaningfully engage with the People's argument that harmless error analysis is appropriate in this case. *See* Def. Br. 21; Peo. Br. 29-30. That said, this Court's decision in *People v. Glasper*, 234 Ill. 2d 173 (2009), is instructive on this point. *Glasper* explains that voir dire questions required to be asked only upon the request of the defendant are a right available by rule of this Court, despite being broadly founded in a constitutional right to a fair and impartial jury. *Id.* at 189-94, 196-98, 199-200. The failure to ask such a "permissive" voir dire question is therefore "amenable to harmless error review"; it is neither structural error nor *per se* reversible. *Id.* at 199-200. Furthermore, *Glasper* expressly clarified that *Strain*, which defendant relies upon, Def. Br. 21, does *not* stand for the proposition that a trial court's error in rejecting a requested voir dire question requires automatic reversal; "[h]armless error was simply not at issue" in *Strain* because it had not been raised. *Glasper*, 234 Ill. 2d at 191.

Accordingly, to the extent that it determines that any error occurred in refusing to ask defendant's proposed voir dire question on prostitution, this Court should, for the reasons discussed in the People's opening brief, find the

evidence against defendant to be overwhelming and deem any error to be harmless. *See* Peo. Br. 29-34.

CONCLUSION

For all of these reasons, as well as those set forth in the People's opening brief, this Court should reverse the portion of the First District's judgment addressing the voir dire issue and affirm defendant's conviction.

December 19, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342, is twelve pages.

/s/ *Evan B. Elsner*
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PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. The undersigned deposes and states that on December 19, 2017, the foregoing **Reply Brief of Plaintiff-Appellant People of the State of Illinois** was (1) filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and (2) served by transmitting a copy from my e-mail address to the e-mail addresses listed below:

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Additionally, upon the brief's acceptance by the Court's electronic filing system, the undersigned will mail thirteen copies of the brief to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois 62701.

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