

**FIRST DIVISION
BARNES, P. J.,
MARKLE and HODGES, JJ.**

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August 19, 2026

In the Court of Appeals of Georgia

A26A1645. LINDER v. THE STATE.

MARKLE, Judge.

Following a jury trial, Harvey Linder was convicted of multiple counts of aggravated assault; a violation of the Georgia Street Gang Terrorism and Prevention Act; and possession of a firearm by a convicted felon. He now appeals from the denial of his motion for new trial, arguing that the trial court improperly questioned a juror during deliberations and, thereby, tainted the verdict. For the reasons that follow, we disagree and thus affirm.

Viewing the evidence in the light most favorable to the verdict, *Jackson v. Virginia*, 443 U. S. 307 (99 SCt 2781, 61 LE2d 560) (1979), the record shows that, late on evening in September 2019, Brandon Johnson and Linder fired into the home of

Keisha Hall while Hall and her two children were there. All three were frightened by the shooting, and Hall's teenage daughter was injured by a bullet. Police later determined that the shooting was in retaliation for a gang conflict between Hall's older son and Johnson.

Linder was then indicted for three counts of aggravated assault, a violation of the Georgia Street Gang Terrorism and Prevention Act, and possession of a firearm by a convicted felon. At trial, Linder's counsel admitted to the jury in opening statements that Linder was a member of a gang. Hall and her daughter testified to the events the night of the shooting. Hall's son, Kobe, testified that he was a former member of the Crips gang. He explained that he had been in an altercation at a club in August 2019, and he had previous conflicts with Johnson. After the incident at the club, Kobe went to Johnson's apartment and attempted to shoot him.

Johnson's girlfriend told police that Johnson was a member of the Blood gang. In his testimony, however, Johnson repeatedly denied being a member of a gang. Johnson explained that he was part of the altercation at the club in August, after which Kobe tried to shoot him. Johnson then met with Linder, another gang member, who

told Johnson that they should retaliate. Linder brought two guns and accompanied Johnson to Hall's house where they began shooting before driving away.

Although Johnson initially denied any involvement, he later confessed, implicated Linder, and agreed to testify as part of a plea deal.¹ Police also analyzed cell phone data from Johnson's and Linder's phones. Those records suggested that Johnson and Linder were in the area near Hall's home the night of the shooting. Images from Linder's phone also showed gang-related materials, including photos of guns and messages about gangs.

The State then presented the testimony from a gang expert with the Department of Corrections. The expert testified that street gangs used slogans and hand shakes, and wore similar colors to identify as gang members. He noted symbols, such as a five-pointed star, the capital letter "B", and the use of the swahili word for "blood" were consistent with membership in the Blood gang. The expert noted that Linder had several tattoos that identified him as a member of the Blood gang: a capital "B" tattooed on his face, and tattoos of a five-pointed star, the swahili word for "blood," and the words "Blood gang" on his torso. Linder also used the word

¹ Johnson's recorded interviews were admitted into evidence and played for the jury. The jury also heard jail phone calls between Johnson and Linder.

“brim” in his e-mail address, which marked him as a member of the Blood gang. The expert explained that respect was an important concept for gangs and physical violence was common, and he opined that the shooting at Hall’s home was consistent with a feud between rival gangs.

During jury deliberations, the jurors informed the trial court that they were deadlocked, and the court gave an *Allen*² charge and directed them to continue deliberations. Thereafter, one of the jurors wrote a note to the court that he would like to be replaced with an alternate juror. Linder requested that the court speak with the juror. The trial court questioned the juror and determined there was no basis to excuse him because the juror was able to “consider the evidence and deliberate with the other jurors,” but that he “just [had] a different view of the evidence than they [did].” The State then noted that it had reviewed the juror’s Facebook page and it appeared that he was friends with gang members, and the State questioned whether that was why the juror wanted to be replaced. Linder agreed to have the court speak to the juror again to determine if this was the reason. Thereafter, the following conversation occurred:

² *Allen v. United States*, 164 US 492, 501(9) (17 SCt 154, 41 LEd 528 (1896)).

Court: [O]ne other question that I would just simply pose to you. And that is ... course, this is, as you know, from being here two days and deliberating, this is a matter involving gangs and gangs in Washington County.

Juror: Yeah.

Court: And the question will be that if you ... do you have friends who are gang members? And if so, is that friendship or relationship any part of your reason that you want to be removed from this jury?

Juror: No, sir. After the juror confirmed that the gang situation was not the basis for his request to be removed, the court instructed the juror to return to deliberations. The jury foreman later sent the trial court a note that the same juror did not have lunch with the others, and he told the jurors that he had "seen too many railroaded by false testimony." Linder then agreed that the trial court should question the juror again "to clear that up." When asked, the juror admitted that he had made the comment.

Court: Alright, well do you feel like you ... that you are, then, therefore basing part of your position in this case on other cases in other matters outside the evidence in this case?

Juror: Yeah ... pretty much based it on ... like, what I've experienced. You know, I mean, knowing that, you know, and that

people that I know ... did time from ... for, you know, stuff that really they haven't done. Yeah, yeah.

...

Court: [A]nd you're not able to put that aside in making your decision in this case?

Juror: No, not, not really, no. No, sir.

Court: Okay Because would it be fair to say, then, based on those prior experiences of yours and prior concerns, that, that you cannot be a fair and impartial juror in a criminal case where ... the State is seeking to convict somebody?

Juror: I'm not saying I can't be fair. It just, it just like I mean, I just, I just can't, can't seem to come up with, come up with a ... you know, a verdict, really.

Court: I understand. But I ... but the question is, are you putting ... and you've admitted to me that you are putting these personal feelings based on other experiences outside of the courtroom and outside of the evidence in this case, that that's a part of your consideration?

Juror: Yes, sir.

Court: But you still say, ... you still think .. say you think you could be fair, even though you're considering those other friends of yours, or acquaintances of yours?

Juror: I mean, I ... I'm —

Court: That the ... that's not part of the evidence in this case?

Juror: Yeah, I'm, I'm, I'm being as fair as I can with this case.

...

Court: Alright, well, what's stopping you from being able to be totally fair ---

...

Juror: I ... as far ... fair as I can is pretty much being totally fair, in my opinion.

...

Court: But you admit that part of your consideration is things you have seen in other cases, friends of yours who you feel like were wrongly convicted and went to prison for things that they indicate they didn't do. And you believe they didn't do. That that's a part of your consideration, is that what you're saying?

Juror: Yes.

The court instructed the juror to return to the jury room, and Linder's counsel argued that every juror brings some personal experience to their deliberations and there was no reason to excuse this juror. After the parties discussed the options with the trial court, Linder's counsel suggested the court question the juror again about whether he would set aside any bias. The court then engaged in another discussion with the juror:

Court: Alright, one, one last time, and I'm not going to keep bringing you back-and-forth, back in, and forth, back in, and forth. But the instructions that I gave the jury say that you're supposed to consider this case only on the evidence produced here in the courtroom and the law that I gave you in the Charge.

Juror: Yes, sir.

Court: You have indicated that a part of your process is based on what you have seen happen to others, and that you have a reluctance to convict somebody because of what you have seen happen to other people that you know.

Juror: No, I'm not saying because of what I've seen. I'm just saying, like, I mean, it's kind of ... I just can't figure out, figure out everything. You know what I'm saying, out of all the evidence? I just can't put ... everything together. Before I, before I even come up with, you know, a, a, a final verdict or whatever, I just can't put everything together.

Court: Well, the other jurors hadn't been talking with you to say ... to help you put everything together?

Juror: Yeah, I mean, they've been trying. But, I still ... I mean, they got they own opinions, just like I do.

Court: No, I understand.

Juror: Yeah, we're kind of, kind of like at a roadblock right now.

Court: But can you put your ---

Juror: Yeah, I'm not using anything that I've seen happen in there, is ... if that what you about to ask.

Court: Well, that is kind of what you told me --- a few minutes ago, is that, yeah, that was a part of your, your mindset is that what you had seen and, and heard from others about ---

Juror: Yeah. Yes, yes, sir. I, I mean, I did mention that. But, I mean, I'm not, I'm not saying that really. I'm not, not just saying that it's stopping me from — --- from this case.

Following this discussion, the juror returned to deliberations.

Thereafter, the jury convicted Linder of three counts of aggravated assault and the street gang act violation. The State then presented evidence of Linder's prior convictions, and the jury convicted him of possession of a firearm by a convicted felon.

Linder moved for a new trial, raising the issue he now raises on appeal. Following a hearing, the trial court denied the motion. Linder now appeals.

In related enumerations of error, Linder argues that the trial court committed plain error by expressing an opinion that the case involved gang activity when initially questioning the juror, in violation of OCGA § 17-8-57. He further contends that the questioning essentially bullied the juror into convicting him and showed the trial court's bias. He asserts that the court questioned the juror four times based solely on his inability to vote to convict. We are not persuaded.

Under OCGA § 17-8-57(a)(1), "[i]t is error for any judge, during any phase of any criminal case, to express or intimate to the jury the judge's opinion as to whether a fact at issue has or has not been proved or as to the guilt of the accused." See also *Smart v. State*, 299 Ga. 414, 42 (788 SE2d 442) (2016). Where the trial court has expressed an opinion on the facts of the case, a defendant must make a contemporaneous objection to preserve review; otherwise, we review for plain error. OCGA § 17-8-57(a)(2), (b).

As Linder concedes, he did not raise any objection to the questions in the trial court, and thus we review for plain error.³ *Rease v. State*, – Ga. __ (7)(4)(b) (__ SE2d __ (7)(4)(b)), 2026 WL 1729013, at *7(4)(b) (2026). See also OCGA § 17-8-57(b) (providing for plain error review where there has been no objection at trial). "To establish plain error, an appellant must identify an error that was not affirmatively waived, was clear and not open to reasonable dispute, likely affected the outcome of the proceeding, and seriously affected the fairness, integrity, or public reputation of judicial proceedings. Satisfying all four prongs of this standard is difficult, as it should be." *Tucker v. State*, 362 Ga. App. 489, 493-94(1) (869 SE2d 142) (2022) (citation modified).

³ Our review here is for plain error because Linder does not contend that court expressed an opinion as to his guilt. OCGA § 17-8-57(b), (c). See also *State v. Cleveland*, 321 Ga. 375, 383(2) (914 SE2d 811) (2025).

To begin, we note that the trial court questioned the juror here repeatedly, often at the express request of Linder's counsel.⁴ Compare *Suggs v. State*, 310 Ga. 762, 767-68(6) (854 SE2d 674) (2021) (finding no error where the court received communication from the jury, marked it as an exhibit in the presence of counsel, and discussed its response with counsel before bringing in the entire jury). But, pretermitted whether counsel's conduct has waived the alleged error, we conclude that Linder has not shown that the trial court's conduct violated OCGA § 17-8-57(a)(1).

Although Linder cherry picks certain phrases from those discussions to show the trial court made impermissible comments, when we read the entirety of the discussion in context, we conclude that nothing in the judge's comments suggested its opinion about the case or any *disputed* fact. Importantly, Linder *admitted* in opening statements that he was a member of a gang.⁵ And none of the court's comments

⁴ The trial court is authorized to question a juror during deliberations to determine if the juror is unable to perform his duty. See *Moon v. State*, 312 Ga. 31, 36(2), 45-46(2)(b) (860 SE2d 519) (2021) (finding the trial court erred by replacing a holdout juror on grounds of bias without sufficient inquiry). See also *Semega v. State*, 302 Ga. App. 879, 879-82(1) (691 SE2d 923) (2010) (where jury was deadlocked, the trial court should conduct inquiry into holdout juror's conduct before replacing the juror). The court's discretion to remove a juror, however, "narrows once deliberations have begun, and even more so when removing a dissenting juror from a jury that appears to be divided. Because removing a dissenting juror when the jury is deadlocked risks violating a defendant's right to a unanimous verdict, a trial judge must exercise the utmost care in determining that good cause exists before removing the juror." *Brown v. State*, 372 Ga. App. 497, 500(1) (904 SE2d 684) (2024) (citation modified).

⁵ Linder does not challenge the sufficiency of the evidence as to any of the charges; thus, he has not contested that the evidence was sufficient to establish the existence of gangs; that Linder was a member of the gang; that Linder committed the shooting; and that the shooting was in furtherance of the gang's interest. OCGA §§ 16-5-4; 16-5-21(a)(2). See also *Boyd v. State*, 306 Ga. 204, 209(1)(b) (830 SE2d 160) (2019).

expressed any opinion on the evidence in the case or whether the State established all the disputed elements of the charged offenses. Instead, the trial court attempted to determine — often at Linder’s request — whether the juror held any bias that prevented him from being able to return a verdict. Such conduct was within the court’s authority. See *Weaver v. State*, 336 Ga. App. 206, 211(4) (784 SE2d 61) (2016) (physical precedent only) (court’s inquiry into juror’s premature comment regarding the defendant’s guilt in her notes was permissible as it sought to clarify the juror’s statement and did not comment on guilt), disapproved of on other grounds by *Quiller v. State*, 338 Ga. App. 206, 209, n.3 (789 SE2d 391) (2016).

Moreover, nothing in the court’s comments suggested to the juror what his verdict should be. A review of the discussions shows that the juror was ambivalent about his ability to put aside his personal feelings and his ability to limit his consideration to the evidence presented in court.⁶ The trial court’s repeated questions sought to clarify that ambiguity. See *Weaver*, 336 Ga. App. at 211(4). The record reflects that the trial court never addressed disputed factual issues. See *Tedder v. State*, 320 Ga. 29, 37-38(3)(a) (907 SE2d 623) (2024) (no plain error where court’s comments did not address disputed issue of fact or guilt of the accused); *Moore v. State*, 315 Ga. 263, 273-74(4) (882 SE2d 227) (2022) (court’s comments about evidentiary issues, even if word choice “suggested” court was siding with State, did not violate statute because it did not reference a fact at issue or guilt). Cf. *Washington v. State*, 320 Ga. 839, 846-48(3) (912 SE2d 600) (2025) (trial court’s questions to witness to “make sure that this is the truth” and that witness was not relying on what other people said did not violate statute). Moreover, in its instructions, the trial court reminded the jury that none of the court’s comments were intended to express any opinion about the case. Thus, the trial court’s inquiry did not violate OCGA § 17-8-57.

Nevertheless, recognizing that plain error is a high bar to meet, Linder argues that the trial court’s repeated questioning, especially considering its tone and

⁶ “[M]ost jurors in most cases bring some previous knowledge to jury deliberations that helps the other jurors understand and evaluate the evidence and arguments presented by the parties at trial, and we find this to be part of the very nature of the constitutionally mandated trial by jury.” *Brown*, 372 Ga. App. at 501(1) (citation modified).

duration, all demonstrate that the court coerced the juror into voting to convict, and that the court's conduct affected the outcome of his case. We disagree.

When we consider the entire discussion in context, we conclude it was not coercive because it did not "cause [the] juror to abandon an honest conviction for reasons other than those based upon the trial or the arguments of other jurors." *Cannon v. State*, 223 Ga. App. 248, 249(3) (477 SE2d 381) (1996). See also *Smith v. State*, 302 Ga. 717, 718(2) (808 SE2d 661) (2017) (considering the totality of the circumstances to determine if verdict was result of coercion); *Brown v. State*, 372 Ga. App. 497, 500(1) (904 SE2d 684) (2024) (once deliberations begin, the court exercises "the utmost care in determining that good cause exists" to remove a juror). We are mindful that the trial court repeatedly questioned the juror primarily at Linder's express request.⁷ In those discussions, the juror was ambivalent, leading the court to ask additional questions. Ultimately, the juror confirmed that he had his own opinions but could be fair and impartial, and he was trying to piece together the evidence. These inquiries did not amount to coercion, as nothing the trial court said urged the juror to abandon his position, and the trial court is tasked with determining whether there is good cause to remove a juror. See *Jones v. State*, 314 Ga. 214, 222-23(2)(b) (875 SE2d 737) (2022); *Nelson v. State*, 370 Ga. App. 231, 232-33(2) (896 SE2d 139) (2023) (trial court should conduct inquiry before removing juror during deliberations); *Cannon*, 223 Ga. App. at 249(3) (trial court's instruction to juror to continue deliberating despite juror's reluctance was not coercive).

Accordingly, for the reasons discussed above, Linder failed to show plain error in the trial court's discussion with the juror. We therefore affirm the denial of the motion for new trial.

Judgment affirmed. Barnes, P. J., and Hodges, J., concur.

⁷ Notably, at the time the court made the inquiry, the juror seemed beneficial to Linder, and it would have been reversible error to remove him in the absence of good cause. See *Cannon v. State*, 223 Ga. App. 248, 249(3) (477 SE2d 381) (1996).