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defendant's posttrial motion for ineffective assistance of counsel; and (4) sentencing defendant under Class X sentencing guidelines. We affirm for the reasons set forth below.

¶ 3 BACKGROUND

¶ 4 On January 2, 2004, defendant was charged with the residential burglary of a home located on 138th Street in Crestwood, Illinois that occurred on July 24, 2003. The owner of the home testified that the defendant was not authorized to enter the home, and described the personal property that was missing from the home and its condition after the burglary. On the same day, within two blocks of the 138th Street property, a home on Sandra Lane was also burglarized. The owner of that home also described the personal property taken and the condition of the home after the burglary. The owners also testified that the defendant was not authorized to enter their premises. The point of entry on both houses were similar because the screens were damaged and the entry window broken. In addition, both burglaries occurred in close proximity in time, and fine jewelry was taken. At defendant's trial, fingerprint analysis linked defendant to the 138th Street burglary, but not the burglary on Sandra Lane. As a result, the jury found defendant not guilty of the residential burglary of the home on Sandra Lane.

¶ 5 On January 30, 2004, when the defendant was arraigned on the 138th Street burglary, he was represented by an Assistant Public Defender (APD). On February 25, 2004, a private attorney appeared for defendant, and the APD withdrew his appearance. On a March 25, 2004 status hearing, defendant disrupted the proceedings by indicating to the trial court that he desired to file a motion to quash and suppress evidence stating: "that [his] lawyer is not working with [his] best interest because he has failed to present this evidence to the court for this motion and

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the points are that the date and time of the crime, [he] was in downtown with [his] civil lawyer.”

At that point in time, defense counsel then indicated that he was not ready for the trial because of the information that defendant brought to the court’s attention. The trial court requested defense counsel to look into the matter. Thereafter, defense counsel requested a behavioral clinical examination (BCX) which the trial court granted.

¶ 6 On May 12, 2004, defense counsel was granted leave to withdraw, and a second private attorney filed an appearance and then moved to withdraw the request for the fitness evaluation on May 26, 2004. The trial court granted the request to withdraw on June 14, 2004. The second private attorney stated at that time:

“Your honor, the last court date I had requested a withdrawal of a previous request by defendant’s former attorney for a BCX. Based on my discussion with the attorney, with my client, and a review of the file, I don’t see anything there that leads me to believe that a BCX is in order. So I’d ask that it is withdrawn.”

¶ 7 On September 24, 2004, defendant informed the trial court that he had been falsely arrested, extradited and accused of manufactured cases made up by the police. At that point in time, the second private attorney withdrew and a third private attorney filed his appearance and also later withdrew.

¶ 8 On February 25, 2005, defendant’s fourth private attorney filed an appearance for defendant and withdrew on November 23, 2005, when defendant’s fifth private attorney filed an appearance and later withdrew on January 10, 2006. Defendant’s sixth private attorney then filed an appearance and withdrew on January 20, 2006. Defendant’s seventh private attorney then

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filed an appearance and withdrew on January 26, 2006. At that point in time, defendant informed the trial court that his constitutional rights had been violated, he was falsely arrested, was not properly extradited, that the fingerprints obtained by the police had been forged, that the warrant signed by the judge was a forgery, and that he wished to proceed pro se. The trial court then admonished defendant pursuant to Illinois Supreme Court Rule 401 as to his wishes to proceed pro se, and continued the case for two weeks to give defendant sufficient time to decide whether he really wanted to proceed pro se. On February 7, 2006, defendant was again admonished pursuant to Rule 401, and on February 14, 2006, defendant executed an attorney waiver form and the trial court accepted the waiver of his right to counsel.

¶ 9 On March 21, 2006, defendant presented an oral motion to dismiss his charges claiming that the prosecutors removed “RD” numbers from certain criminal cases and placed them on other case numbers that did not exist, that the police reports in his case and fingerprints were fabricated, that he was illegally extradited, falsely arrested, and illegally detained.

¶ 10 Afterwards, defendant mailed correspondence to the Presiding Judge of the Criminal Division of the Circuit Court and to the Clerk of the Circuit Court. Based upon the “nature and ramblings of these documents and various aspects of the case in terms of [defendant’s] presentation,” the trial court sua sponte, on May 5, 2006, ordered the case back earlier than scheduled, and again, ordered a behavioral clinical examination.

¶ 11 On May 18, 2006, defendant’s eighth private attorney filed his appearance for defendant for a second time. He was previously defendant’s third attorney. On June 2, 2006 when the eighth attorney was not present in court, the trial court noted on the record that the trial court had

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just received a report from a licensed clinical psychologist for forensic clinical services indicating that defendant was fit to stand trial and was legally sane at the time of the alleged offenses. In Dr. Susan Messina's letter to the court, dated June 1, 2006, she stated:

“Based on the results of my examination of the defendant it is my opinion to a reasonable degree of psychological and scientific certainty that he is currently FIT TO STAND TRIAL. The defendant is aware of the charges against him and the penalty he may face. He evidenced an adequate understanding for courtroom procedure and the roles of the court personnel and is capable of assisting counsel in his defense. The defendant is not prescribed psychotropic medication.

With respect to the issue of defendant's sanity I submit the following:
Based upon information from police reports, the defendant's own data from this examination it is my opinion to a reasonable degree of psychological and scientific certainty that the defendant was LEGALLY SANE at the time of the alleged offense. There is nothing from that which was reviewed to suggest that a prominent mental illness or defect precluded him from being able to appreciate the criminality of his behavior at the time of the alleged offense.”

¶ 12 At no time thereafter did the defendant or any attorney representing him request a behavioral clinical examination by any other medical provider.

¶ 13 On August 4, 2005, the eighth attorney informed the trial court that defendant no longer wanted representation from him and requested leave to withdraw as counsel for defendant. The trial court denied defendant the withdrawal request. On October 23, 2006, defendant informed

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the trial court that he had filed a complaint with the Attorney Registration and Disciplinary Commission (ARDC) against his attorney, and that his attorney was fired, and that he would not participate in the trial with his attorney. After a heated discussion, defendant was physically removed from the courtroom. The trial court later changed its mind and informed defendant that the court would consider a motion to substitute counsel.

¶ 14 On the next court date of October 27, 2006, a ninth attorney filed an appearance on behalf of defendant, the eighth attorney agreed to act as co-counsel and both attorneys represented defendant at trial. However, on March 16, 2007, defendant informed the trial court that he wanted both of these attorneys to withdraw. The trial court denied that request. No actual hearing was ever held on defendant's fitness to stand trial. On State's motion, both burglary charges were joined for trial before one jury. On December 6, 2006, defendant's motion to sever charges was denied.

¶ 15 As noted, the jury found defendant guilty of the burglary of the 138th Street home and not guilty of the residential burglary of the home on Sandra Lane. Defendant filed a posttrial motion which the trial court denied, and defendant informed the trial court that he was firing private attorneys 8 and 9 because they had been ineffective.

¶ 16 The trial court then listened to defendant's reasons for firing his current attorneys and passed the case so that defendant could meet with a public defender. The defendant then advised the trial court that he desired to have the APD represent him for sentencing which the trial court granted. After hearing aggravation and mitigation, the trial court sentenced defendant to 18 years in the Illinois Department of Corrections.

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¶ 17 The parties then appeared for defendant's motion to reconsider sentencing which the court denied. This timely appeal was then filed.

¶ 18 ANALYSIS

¶ 19 Defendant raises four issues on appeal: (1) whether the trial court erred in failing to hold a fitness hearing; (2) whether the trial court erred in denying defendant's motion to sever the charges; (3) whether the trial court adequately inquired into defendant's claim of ineffective assistance of counsel; and (4) whether the trial court properly imposed a Class X sentence of 18 years imprisonment for defendant's residential burglary conviction.

¶ 20 Whether the trial court erred in failing to hold a fitness hearing

¶ 21 *Standard of Review*

¶ 22 Whether a *bona fide* doubt as to a defendant's fitness has arisen is generally a matter within the sound discretion of the trial court. *People v. Sandham*, 174 Ill. 2d 379, 382 (1996) (citing *People v. Murphy*, 72 Ill. 2d 421, 431 (1978)). The trier of fact's determination of a defendant's fitness to stand trial rests largely within its discretion and must be given great weight on review. *People v. Greene*, 102 Ill. App. 3d 639, 644 (1981). The trier of fact's determination will not be reversed absent a clear abuse of discretion. *People v. Baldwin*, 185 Ill. App. 3d 1079, 1086 (1989).

¶ 23 Defendant argues that the standard of review is *de novo* because there was no affirmative exercise of judicial discretion regarding his determination of fitness. In support of his claim, he cites *People v. Contorno*, 322 Ill. App. 3d 177, 180 (2001). However, in the case at bar, the trial court obtained a fitness evaluation (BCX) from a medical provider for forensic clinical services

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opining that defendant was fit to stand trial and was legally sane at the time of the alleged offense. Based on this report, we can infer the trial court made a determination that defendant was fit to stand trial and that there was no need for a fitness hearing. *Contorno*, 322 Ill. App. 3d at 181. Therefore, there was an affirmative exercise of judicial discretion regarding the trial court's determination of fitness and the proper standard of review is abuse of discretion.

¶ 24 Defendant concedes in his appellate brief that the fitness issue was not properly preserved. Defendant did not object when his attorney withdrew his request for a fitness evaluation (BCX), did not request a further evaluation by another medical provider, failed to object to the report of Dr. Susan Messina as to his fitness, and further failed to include the issue of fitness as part of his posttrial motion.

¶ 25 Defendant has waived for review the issue of his fitness. *People v. Piatkowski*, 225 Ill. 2d 551, 562-63 (2007). When a defendant has waived an issue for review, we may still review the issue under plain error. 134 Ill. 2d R. 615(a). A plain error occurs “when a clear and obvious error occurs and: (1) the evidence is closely balanced; or (2) the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process.” *People v. Bannister*, 232 Ill. 2d 52, 65 (2009), citing *Piatkowski*, 225 Ill. 2d at 556 (2007); *People v. Hall*, 194 Ill. 2d 305, 335 (2000). Our supreme court has held that “prosecuting a defendant where there is a *bona fide* doubt as to that defendant's fitness renders the proceeding fundamentally unfair.” *People v. Sandham*, 174 Ill. 2d 379, 382 (1996), citing 134 Ill. 2d R. 615(a). Thus, we review defendant's contentions concerning his fitness to stand trial under a plain error analysis. *Sandham*, 174 Ill. 2d at 382; *People v. McCullum*, 386 Ill. App. 3d 495, 515

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(2008), citing *People v. Meyers*, 367 Ill. App. 3d 402, 409 (2006); *People v. Lucas*, 140 Ill. App. 3d 1, 6 (1986). If the trial court committed error with regard to the determination of fitness, we must then determine, based on a review of the entire record, whether this error was harmless beyond a reasonable doubt. *People v. Contorno*, 322 Ill. App. 3d 177, 180 (2001), citing *People v. Arman*, 131 Ill. 2d 115, 127 (1989).

¶ 26 *Determination of Fitness*

¶ 27 When there exists a *bona fide* doubt as to a defendant's fitness to stand trial, the trial court has a duty to hold a fitness hearing before proceeding to trial. 725 ILCS 5/104-1(e) (West 2004); *People v. Murphy*, 72 Ill. 2d 421, 439 (1978). Defendant argues that the trial court erred because it failed to hold a fitness hearing when there was a *bona fide* doubt as to defendant's mental fitness.

¶ 28 The test of whether a defendant is fit to stand trial includes whether he can assist in his defense, and whether the defendant understands the nature and purpose of the proceedings against him. *Murphy*, 72 Ill. 2d at 432. Further factors in determining whether a *bona fide* doubt of defendant's fitness exists include the defendant's irrational behavior, the defendant's demeanor at trial, and any prior medical opinion on the defendant's competence to stand trial. *People v. Harris*, 206 Ill. 2d 293, 304 (2002).

¶ 29 The first factor in the test to determine whether a defendant is fit to stand trial is the question of whether the defendant can assist in his defense. The case at bar in many ways mirrors *People v. Tapscott*, 386 Ill. App. 3d 1064 (2008), where defendant wrote to the trial court indicating he wanted to withdraw his guilty plea, and he also filed a pro se motion to withdraw

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his guilty plea alleging his attorney provided him with ineffective assistance of counsel.

Tapscott, 386 Ill. App. 3d at 1077. At the hearing on the motion to withdraw, defendant testified that he wanted his attorney to file for a substitution of judge because he felt the judge was prejudiced against him from previous encounters between the judge, defendant and his family.

Tapscott, 386 Ill. App. 3d at 1078. Defendant testified that his attorney failed to investigate the case to his satisfaction because he failed to interview witnesses whose names defendant had given to the attorney. The Illinois Appellate Court stated that these actions demonstrated defendant's grasp of the legal process. *Tapscott*, 386 Ill. App. 3d at 1077.

¶ 30 This court has made a full and complete analysis of the record in this case. In the case at bar, the defendant demonstrated his involvement in his defense by hiring and firing 10 different attorneys in order to ensure that he was being properly defended. According to trial testimony, defendant repeatedly informed the court that he had been falsely arrested and accused of burglary. He also claimed that his fingerprints had been forged and the warrant for his arrest, signed by the trial judge, had been forged. At one point, defendant informed the court that he wanted to proceed *pro se*. Here, defendant was actively assisting in his defense by hiring and firing the large number of attorneys, by proceeding *pro se*, and making claims in his defense. Whenever this defendant observed his attorneys not working in what he believed was his best interest, he fired them. Like *Tapscott*, defendant here took actions that demonstrated his grasp of the legal process and displayed an active participation in his defense.

¶ 31 Defendant argues that because he and his attorneys had some disagreements, he was unable to participate in his defense and thus, was unfit for trial. However the fact that defendant

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was uncooperative and made decisions that were against his attorney's advice does not make him unfit to stand trial. *People v. Shum*, 207 Ill. 2d 47, 59 (2003).

¶ 32 Defendant argues in his petition for rehearing that all the claims that he made in his defense, were all based on his unreasonable and irrational belief that his fingerprints had been forged and the arrest warrant, signed by the trial judge, had been forged, not his understanding of the legal process. Collazo fired each of his ten attorneys because they would not file motions arguing that the judge's signature on the search warrant had been forged and that the prosecutors took "RD" numbers from certain case numbers and placed them on different case numbers, which did not exist. When defendant was unable to find an attorney who would make these arguments, he decided to represent himself. Defendant persisted in these irrational claims despite the trial judge informing him that his signature, which appeared on the arrest warrant, was not forged. However, defendant failed to provide medical evidence to counteract the medical report of the clinical psychologist who found that defendant was able to assist in his defense and was fit to stand trial.

¶ 33 Another factor in the test to determine whether a defendant is fit to stand trial is the question of whether the defendant understands the nature and purpose of the proceedings against him. In the case at bar, the defendant demonstrated his understanding of the nature and purpose of the proceedings against him throughout the process. Early on in the prosecution, at a status hearing, defendant disrupted the proceedings by indicating to the trial court that he desired to file a motion to quash and suppress evidence stating:

“that [his] lawyer is not working with [his] best interest because he has failed to

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present evidence to the court for this motion and the points are that the date and time of the crime, [he] was in Downtown with [his] civil lawyer.”

¶ 34 One that does not understand the nature and the purpose of the proceeding against him would be hard pressed to seek a motion to quash and suppress evidence. Furthermore, in a court requested behavior clinical examination (BCX), Dr. Susan Messina, a licensed clinical psychologist, wrote a letter to the court indicating that “defendant is aware of the charges against him and the penalty he may face. He evidenced an adequate understanding of courtroom procedure and the roles of court personnel and is capable of assisting counsel in his defense.”

¶ 35 Defendant argues that by ordering a BCX, a *bona fide* doubt as to defendant’s fitness was implied. However, this argument is not persuasive. Neither case law nor Section 104-11 of the Code of Criminal Procedure required the court to hold a fitness hearing just because it ordered the defendant to undergo a BCX. In addition, defendant argues that the court may not merely rely upon the expert’s ultimate opinion and cites *In re T.D.W.*, 109 Ill. App. 3d 852, 855 (1982) in support of its argument. *In re T.D.W.* is a fourth district case that concerns the narrow issue of whether a trial court that has ordered a fitness hearing for a juvenile may proceed to an adjudication hearing without first ruling on the juvenile’s fitness to stand trial. The *T.D.W.* case does not warrant analysis because there was no fitness hearing scheduled in the case at bar and *People v. Gentry*, 351 Ill. App. 3d 872, 878 (2004), expressly overruled *T.D.W.* finding that to hold a fitness hearing, the trial court must first have evidence raising a *bona fide* doubt of the defendant’s fitness. *Gentry*, 351 Ill. App. 3d at 878 (citing *People v. Eddmonds*, 143 Ill. 2d 501 (1991)).

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¶ 36 The factor of determining irrational behavior of a defendant was analyzed in *People v. Tursios*, 349 Ill. App. 3d 126 (2004). In *Tursios*, the appellate court stated that defendant exhibited rational behavior when defendant himself brought up the difference between first and second degree murder and the possible sentences involved. *Tursios*, 349 Ill. App. 3d at 131. In the case at bar, like *Tursios*, defendant exhibited rational behavior when defendant made an oral motion to dismiss the case based on a violation of due process. Further, in *Tursios*, the court found defendant possessed rational behavior because defendant was “alert and oriented to time, place, and person.” The same can be said for defendant in the case at bar. The defense argues that the fact that defendant hired and fired many attorneys is evidence of a *bona fide* doubt of fitness to stand trial. Here, the defense is confusing irrational behavior with a poor decision-making process.

¶ 37 The factor of considering the defendant’s demeanor at trial when determining whether a *bona fide* doubt of defendant’s fitness exists can be ascertained by defendant’s response to the trial judge. *People v. Hill*, 345 Ill. App. 3d 620, 628 (2003). “Defendant’s demeanor at trial demonstrated that he understood the nature of the proceedings and was able to assist in his own defense. *Hill*, 345 Ill. App. 3d at 628. During the trial proceedings in *Hill*, defendant responded appropriately to the court’s questions and indicated deference to the court’s authority. *Hill*, 345 Ill. App. 3d at 628. In the case at bar, there were times that defendant responded appropriately to the court’s questions and displayed deference to the court’s authority. There was a time where the defendant made inappropriate outbursts and was physically removed from the courtroom. Yet, defendant’s outbursts were an effort to defend himself from the charges at hand. Defendant

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independently made a decision to present his defense in a vigorous manner that included hiring and firing many attorneys and occasional outbursts during trial. Although defendant's outbursts may have appeared to be delusional, the defendant may have been using those outbursts as part of his trial strategy. Defendant's case was able to convince the jury that he did not burglarize the home on Sanders Lane.

¶ 38 The final factor used to determine whether defendant is fit to stand trial is any prior medical opinion on the defendant's competence to stand trial. In Dr. Susan Messina's letter to the court, she stated in part that defendant "is currently fit to stand trial. The defendant is aware of the charges against him and the penalty he may face. He evidenced an adequate understanding for courtroom procedure and the roles of the court personnel and was capable of assisting counsel in his defense. The defendant is not prescribed psychotropic medication." The defendant has never provided to the trial court any medical evidence or reports from medical providers that he was unfit to stand trial.

¶ 39 As a result, we cannot say that the trial abused its discretion in failing to hold a fitness hearing, or that the failure to conduct a fitness hearing rose to the level of plain error.

¶ 40 Whether the trial court erred in denying defendant's motion to sever the charges

¶ 41 The decision to grant or deny a severance rests solely within the sound discretion of the trial court and will not be reversed absent abuse of discretion. *People v. Byron*, 116 Ill. 2d 81, 92 (1987). The court may consider various factors when determining whether or not to sever charges, including: (1) the proximity in time and location of the offenses; (2) the identity of the evidence needed to demonstrate a link between the offenses; (3) whether there was a common

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method in the offenses; and (4) whether the same or similar evidence would establish the elements of the offenses. *People v. Gapski*, 283 Ill. App. 3d 937, 942 (1996).

¶ 42 The analysis here starts with the proximity in time and location of the offenses factor, the most useful factor to determine joinder. *People v. Walston*, 386 Ill. App. 3d 598, 603 (2008).

¶ 43 *People v. Harmon*, 194 Ill. App. 3d 135, 141 (1990), is instructive as an illustration of this factor. In that case, that defendant argued that charges of battery and mob action should not have been joined with the murder charge against him. *Harmon*, 194 Ill. App. 3d at 139. The charges resulted from a fight at a party between rival gang members. *Harmon*, 194 Ill. App. 3d at 137. The defendant, along with a small group, went to a nearby bar after leaving a party and attacked two members of a rival gang who were sitting outside the bar. *Harmon*, 194 Ill. App. 3d at 137. From the bar, the group then went to sit on the porch of a house “a few blocks away.” *Harmon*, 194 Ill. App. 3d at 140. From the porch, they observed a vehicle with two rival gang members inside and attacked the passengers inside the automobile. *Harmon*, 194 Ill. App. 3d at 137. One of the rival gang members was killed in the ensuing brawl. *Harmon*, 194 Ill. App. 3d at 137-38. We held that joinder was proper, because the murder took place “only a few blocks away” from the other crimes, and that all the crimes took place within a short period of time, and all the crimes “sprang from [the] common motive to attack members of a rival gang.” *Harmon*, 194 Ill. App. 3d at 140.

¶ 44 Like *Harmon*, the burglaries in the instant case occurred near the same time and just a few blocks away. The owner of the house on 138th Street testified that her house was broken into on July 24, 2003, between 8:45 a.m. and 1 p.m. The owner of the house on Sandra Lane

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testified that her house was burglarized between the hours of 11 a.m. and noon on July 24, 2003. Thus, according to the victims' testimony, both burglaries occurred on the morning of July 24, 2003. The residence on 138th Street in Crestwood, Illinois, is located less than two blocks away from the residence on Sandra Lane. Therefore, the burglaries occurred close in time and location just like *Harmon* where the defendant engaged in criminal acts at a party, then to a nearby bar then to a nearby automobile. Where, in *Harmon*, the common motive was to attack rival gang members, the common motive here was to burglarize homes.

¶ 45 Next, the trial court considered the identity of the evidence needed to demonstrate a link between the offenses. This factor “asks not whether evidence of the two crimes is similar or identical but rather, whether the court can identify evidence linking the crimes.” *People v. Duncan*, 115 Ill. 2d 429, 442 (1987). While defendant claims no evidence linking the two burglaries was presented at trial. On the contrary, the evidence presented at trial linking the two cases together consist of the items taken. In both burglaries, the victims reported that their fine jewelry was taken. Both burglaries occurred by breaking the frame of the screens on the window, and then breaking the window for entry into the premises.

¶ 46 The issue of whether there was a common method in the offenses is satisfied by the fine jewelry stolen and the type of entry used to gain access to both homes. Both victims testified that when they left their homes on the morning of July 24, 2003, their windows were closed with the screens pulled down. The crime scene investigator for both burglaries determined that a screen window on the lower-level of the back of both residences had been “bent and disturbed.” The evidence showed that defendant used a common method by maneuvering the screens of the

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window to gain access to both residences in order to commit the burglaries. In *People v. Stevens*, 188 Ill. App. 3d 865 (1989), the trial court considered the fact that windowpanes were broken in two different residences to gain access; the front door window at one residence and a basement window at a second residence, and determined that the broken windows were adequate evidence of a common method. *Stevens*, 188 Ill. App. 3d at 885.

¶ 47 Defendant argues that the result of the test from *People v. Bricker*, 23 Ill. App. 3d 394 (1974), proves that the trial court erred in joining the two burglaries in one trial. *Bricker*, however, is a 1974 case and only considers the question of whether the two crimes are a result of the same comprehensive transaction. However, we have used additional factors outlined more recently in *Gapski* to determine whether joinder was proper. Another major difference between *Bricker* and the case at bar is the fact that the robberies in *Bricker* occurred several miles apart while the two burglaries here occurred just blocks away from one another.

¶ 48 In addition, defendant argues that the burglary on 138th Street actually occurred on July 23, 2003, and is additional evidence that severance should have been granted. We find this argument unpersuasive because defendant is unable to show us any evidence that the 138th Street burglary occurred on July 23, 2003.

¶ 49 Therefore, the trial court properly denied severance because it considered the factors outlined in *Gapski* and determined that the burglaries occurred in close proximity in time and location, and that an evidentiary link was demonstrated by the removal of fine jewelry from both homes, and a common method was established by the entry through the windows of both homes.

¶ 50 Whether the trial court adequately inquired
into defendant's claim of ineffective assistance of counsel

¶ 51 To succeed on a claim of ineffective assistance of counsel, the defendant must establish both that counsel's representation was deficient and that the defendant was substantially prejudiced by the deficient performance. *People v. Williams*, 391 Ill. App. 3d 257, 264 (2009) (citing *Strickland v. Washington*, 466 U.S. 668, 690, 104 S.Ct. 2052, 2066-68, 80 L.Ed.2d 674, 698 (1984)). Falling short on either showing is fatal to the claim. *Williams*, 391 Ill. App. 3d at 264 (citing *People v. Coleman*, 183 Ill. 2d 366, 397-98). To prove prejudice, the defendant must show that but for counsel's deficient performance, there was a reasonable probability that the trial result would have been different. *People v. Alexander*, 391 Ill. App. 3d 419, 428 (2009).

¶ 52 Courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689; *People v. Edwards*, 195 Ill. 2d 142, 163 (2001). Mistakes in strategy or tactics alone do not normally amount to ineffective assistance of counsel; nor does the fact that another attorney may have handled things differently. *Ward*, 371 Ill. App. 3d at 434 (citing *People v. Palmer*, 162 Ill. 2d 465, 476 (1994)). It is defendant's burden to affirmatively prove both of the *Strickland* elements. *Strickland*, 466 U.S. at 693, 80 L.Ed. 2d at 697, 104 S.Ct. at 2007.

¶ 53 Defendant claims that his attorneys withheld evidence that the 138th Street burglary occurred on July 23, 2003. Defendant claimed that he told his attorney that he had an alibi because he was with his civil attorney on a non-related civil legal matter preparing for a deposition on July 23, 2003, at the time of the 138th Street burglary, and was actually giving his

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deposition on July 24, 2003, at the time of the burglary on Sandra Lane. Defendant further claims that when the trial court allowed him to fire his private attorneys and appointed the public defender to represent him for sentencing, the trial court failed to address defendant's claims that his attorneys were ineffective, failed to question his lawyers about his claim of ineffective assistance, and failed to appoint new counsel to argue his claims of ineffective assistance.

Defendant claims the law requires a trial court to conduct an initial inquiry into the factual basis of an accused's posttrial claim of ineffective assistance of counsel, and no such inquiry occurred in this case. Defendant cites *People v. Krankel*, 102 Ill. 2d 181 (1984) in support of his position.

¶ 54 In *Krankel*, the defendant filed a *pro se* posttrial motion alleging ineffective assistance of counsel based on defense counsel's failure to contact alibi witnesses and to present an alibi defense. *Krankel*, 102 Ill. 2d at 187. The trial court refused to appoint a new attorney to represent the defendant on his ineffective assistance claim, but allowed the defendant to personally argue his motion. *Krankel*, 102 Ill. 2d at 188. The parties *agreed* that the defendant should have had counsel other than his trial counsel to represent defendant at the posttrial hearing on his claim of ineffective assistance. *Krankel*, 102 Ill. 2d at 189. The Illinois Supreme Court remanded the matter for the appointment of new counsel and a hearing on the defendant's motion. *Krankel*, 102 Ill. 2d at 189.

¶ 55 Subsequent case law interpreting *Krankel* clarified that new counsel is not automatically required every time a defendant presents a *pro se* motion for new trial alleging ineffective assistance of counsel. *People v. Nitz*, 143 Ill. 2d 82, 134 (1991); *People v. Moore*, 207 Ill. 2d 68, 77 (2003). Rather, when a defendant presents a *pro se* claim of ineffective assistance of counsel,

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the trial court should first examine the factual matters underlying the defendant's claim. *Moore*, 207 Ill. 2d at 77-78; *People v. Washington*, 184 Ill. App. 3d 703, 711 (1989). If the trial court determines that the defendant's claims of incompetence show possible neglect of the case, the trial court should appoint new counsel to argue defendant's claim of ineffective assistance. *Nitz*, 143 Ill. 2d at 134-35; *People v. Munson*, 171 Ill. 2d 158, 199-200 (1996).

¶ 56 The trial court must conduct an adequate inquiry into the defendant's *pro se* allegation of ineffective assistance of counsel. *People v. Johnson*, 159 Ill. 2d 97, 125 (1994). During this inquiry some interchange between the trial court and defense counsel regarding the facts and circumstances surrounding the defendant's claim of ineffective assistance of counsel should occur. *People v. Parsons*, 222 Ill. App. 3d 823, 830 (1991) ("there should be some interchange between the trial court and the defendant's trial counsel to explain complained-of possible neglect"); *People v. Jackson*, 131 Ill. App. 3d 128, 139 (1985) ("[i]t seems elementary that during the evaluation of defendant's claim, some interchange between the court and the defendant's attorney must take place"). Although a brief discussion between the trial court and the defendant may be sufficient, it is error for the court to fail to consider a defendant's motion. See, e.g., *People v. Chapman*, 194 Ill. 2d 186, 228-31 (2000); *Munson*, 171 Ill. 2d at 200-02; *People v. Milton*, 354 Ill. App. 3d 283, 292-93 (2004).

¶ 57 In the case at bar, the record demonstrates that defendant's claims of ineffective assistance were made without affidavit and involved matters outside the record. Immediately after the trial court denied defendant's posttrial motion, the following colloquy was had:

"DEFENDANT: I am firing these attorneys. They are no longer my

attorneys.

THE COURT: [Defendant], once again, please don't continue to talk over the Court. [Defendant], I am going to ask you one further time for the record, don't interrupt during the course of my colloqu[y] with counsel.

DEFENDANT: They are no longer my attorneys.

THE COURT: Please refrain at this point from saying anything further.

DEFENDANT: They have been ineffective, I am firing them.

THE COURT: I am going to ask you for about the fifth or sixth time to please not disrupt the orderly administration of justice in this courtroom and refrain from further comment until I give you the opportunity to speak and I will do that at some point in the future.

THE COURT: [Defense counsel] did you make some representations yesterday concerning a potential posttrial motion that you were in the process of investigating, the underlying basis. Would you spread of record the extent of your investigation and why you have determined that there is not a basis to file such motion.

DEFENSE COUNSEL: Your honor, we did conduct an investigation. We specifically conducted an interview with Edward Collazo (defendant's brother). I also conducted an interview with Mr. Frank Collazo (defendant's brother), as a matter of fact during the time that we were in court yesterday. I

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indicated to Mr. Frank Collozo and Mr. Edward Collazo that an affidavit would be necessary to go forth with these particular motions. They did not want to submit the affidavits, your Honor, so at that point I felt that we didn't have a basis to file the motion.

THE COURT: Okay.

DEFENSE COUNSEL: I have also attempted to discuss the matter with [defendant] but he basically refused to speak with me, in the course indicating in his opinion I was fired.

THE COURT: Okay. So, you have investigated the matter in its entirety, talked to both of the brothers of the defendant that were identified on the record yesterday. After talking to them they have not furnished you with affidavits to support the contention that was represented in the court yesterday and that's your posture today; is that right?

DEFENSE COUNSEL: That is correct, your Honor.

THE COURT: All right.

DEFENDANT: May I address the Court?

THE COURT: I will let you know when it's time to speak, [defendant]. Is there anything further that needs to be done with respect to your investigation on that issue or are you satisfied after discussing this matter with both of those brothers of the defendant that there is no good faith basis to file such a motion."

¶ 58 At this point in the proceedings, defendant was given the opportunity to speak to the

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court. Defendant claimed that he:

“[I]nformed the court that his attorney withheld evidence that the McCool burglary actually occurred on July 23, 2003, as opposed to July 24, the day of the Scheide burglary, which would have been pertinent to the severance issue, and that his attorneys failed to investigate his alibi which would have shown that he was in preparations for a deposition in an unrelated matter on July 23, 2003, and actually giving the deposition at that time of the burglary on July 24, 2003.”

Where an ineffective assistance of counsel claim is without merit, an evidentiary hearing is not required. *People v. Byron*, 164 Ill. 2d 279, 305 (1995); *People v. Miles*, 176 Ill. App. 3d 758 (1988) (court noted that the trial court was not required to interrogate defendant’s trial counsel regarding defendant’s pro se allegations of incompetence); *People v. Walton*, 240 Ill. App. 3d 49 (1992) (court noted that the trial court had no duty to interrogate counsel where the trial court could assess a defendant’s claim from its observations at trial).

¶ 59 In the instant case, defendant’s claims on appeal lack merit. First, defendant claims that his attorneys “withheld evidence that the burglary occurred on July 23, 2003, as opposed to July 24.” However, at trial, the owner of the burglarized home testified that her home was burglarized on July 24, 2003, and even clarified during the State’s redirect questioning that the burglary occurred on July 24, 2003, and not on July 23, 2003.

¶ 60 Defendant hired and fired ten different attorneys throughout the proceedings. The record on this case reveals that defendant provided his alibi claim to his lawyers. Defendant’s last attorney, James Tyson, investigated defendant’s alibi and subpoenaed the civil attorney, who

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defendant claims he was with on the day of the burglaries. However, defense counsel learned that the firm defendant alleges to have attended for a deposition on July 24, 2003, “no longer possess any records, documents or [sign-in] logs of visitors” for the date in question. Most telling is that all ten of defendant’s attorneys strategically decided not to pursue defendant’s alibi with the court. Defendant’s claims in no way prove that defense counsel was ineffective. On the contrary, the record clearly shows that defense counsels adequately represented defendant throughout all stages of the proceedings.

¶ 61 Not only was the defendant’s attorneys unable to obtain any affidavits from his civil attorney that would be helpful, there is no evidence in the record of this case that could pinpoint the actual time of the burglaries to make an affidavit effective.

¶ 62 We cannot say that the trial court abused its discretion where it inquired into defendant’s allegations of ineffective assistance of counsel and determined his claims were meritless, and thus, properly proceeded to a sentencing hearing.

¶ 63 Sentencing Defendant Under Class X Sentencing Guidelines

¶ 64 Defendant contends that pursuant to United States Supreme Court decisions of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000) and *Shepard v. United States*, 544 U.S. 13, 125 S. Ct. 1254 (2005), his eighteen year sentence for residential burglary is unconstitutional and asks that the matter be remanded for imposition of a Class 1 sentence. Specifically, defendant maintains that the mandatory Class X offender sentencing provision found in section 5-5-3(c)(8) of the Unified Code of Corrections (730 ILCS 5/5-5-3(c)(8)) is unconstitutional because it requires a trial court to impose a sentence within the range for Class X offenses (6-30 years)

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whenever a 21 year old or older defendant has been convicted of a Class 2 or greater offense and has been previously convicted of at least two prior Class 2 or greater offenses (provided the convictions were sequential and not simultaneous). He asserts that under *Apprendi* and *Shepard*, such a procedure is improper because it is based upon the trial court's factual findings.

¶ 65 In response, the State first maintains that defendant should not be permitted to raise this issue as he failed to make a similar claim in the trial court. Illinois law is clear that a defendant who wishes to challenge his sentence or any irregularities in the sentencing process must first file a timely post-sentencing motion in the trial court or the issue will be deemed waived. See 730 ILCS 5-8-1(c)(1994); *People v. Reed*, 177 Ill. 2d 389 (1997).

¶ 66 Moreover, since defendant never claimed that the presentence report was inaccurate or incomplete, he cannot now contend on appeal that it was an insufficient source for the trial court's decision to impose the mandatory Class X sentence. *People v. Williams*, 149 Ill. 2d 467, 495 (1992) (rejecting the defendants' contention that the PSI report was "deficient for the purpose of imposing a Class X sentence because the commission dates of their prior felonies were not listed in the report," because they never raised the alleged deficiency or inaccuracy in the trial court). Accordingly, the State maintains that defendant's challenge to his sentence is waived and should be summarily rejected.

¶ 67 However, even if waiver was not applicable, *Apprendi* does not apply to recidivist provisions such as section 5-5-3(c)(8). In *Apprendi*, the United States Supreme Court held that the United States Constitution requires that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to

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a jury and proved beyond a reasonable doubt. *Apprendi*, 120 S. Ct. 2348 at 2362-63 (emphasis added). In excepting recidivist statutes from this rule, the *Apprendi* majority noted that recidivism is a “traditional, if not the most traditional basis for a sentencing court’s increasing an offender’s sentence” and that recidivism “does not relate to the commission of the offense.” *Apprendi*, 120 S. Ct. 2348 at 2361-62 (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 243-44, 118 S.Ct. 1219, 1230-31 (1998)). While it is true that the *Apprendi* majority stated that “it is arguable that *Almendarez-Torres* was incorrectly decided,” the Supreme Court was clear that it was not overruling its prior decision, *Apprendi*, 120 S.Ct. at 2362.

¶ 68 Moreover, *Shepard* specifically recognized that the prior conviction exception to the *Apprendi* rule is still applicable, noting that judges are free to rely upon the “conclusive significance of a prior judicial record” when imposing an enhanced sentence based upon recidivism without implicating *Apprendi*. *Shepard*, 125 S.Ct. at 1262. The only limitation on this rule is that courts may not go behind the fact of the prior conviction in an attempt to determine what the parties “must have understood as the factual basis of the prior plea.” *Shepard*, 125 S.Ct. at 1262.

¶ 69 Furthermore, it is well established that “only [the Supreme Court] may overrule one of its precedents” and that “[u]ntil that occurs [*Almendarez-Torres*] is the law.” *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 103 S.Ct. 1343, 1344, 75 L. Ed. 2d 260 (1983). As the Supreme Court has recognized, “unless we wish anarchy to prevail within the federal judicial system, a precedent of this [C]ourt must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.” *Hutto v. Davis*, 454 U.S. 370, 70 L. Ed

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2d 556, 120 S.Ct. 703, 706 (1982). Thus, since *Almendarez-Torres* was expressly not overruled by the Supreme Court in *Apprendi* or *Shepard*, it is clear that section 5-5-3(c)(8) does not violate the federal Constitution.

¶ 70 Moreover, in *People v. Lathon*, 317 Ill. App. 3d 573 (2000), this court rejected similar arguments under *Apprendi* and expressly held that section 5-5-3(c)(8) is constitutional. In *Lathon* we stated:

“[A] defendant's recidivism is a narrow exception to the general rule articulated in *Apprendi* that the federal Constitution requires that any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be alleged in the charging document, submitted to a jury, and proved beyond a reasonable doubt. The reasons recognized by *Apprendi* for applying the recidivism exception exist in this case and mitigate constitutional concerns regarding defendant's due process rights and jury trial guarantees. Here, procedural safeguards enhanced the validity of the defendant's prior convictions. Moreover, the defendant's prior convictions were not an essential element of the underlying offense and were not related to the commission of the underlying offense. Consequently, we hold that the mandatory Class X sentencing provision of section 5-5-3(c)(8), which provides for sentencing enhancement based on prior convictions, is constitutional and does not violate defendant's due process rights or jury trial guarantees. 730 ILCS 5/5-5-3(c)(8) (West 1998). Under this mandatory Class X sentencing provision, a defendant's sentence is properly increased when the trial judge

concludes at the sentencing hearing that evidence of the prior two convictions is accurate, reliable and satisfies the section 5-5-3(c)(8) statutory factors. When a defendant's punishment is increased based on prior convictions, the prior convictions need not be alleged in the charging document, submitted to the jury or proven beyond a reasonable doubt because the prior convictions were obtained as the result of proceedings which provided procedural safeguards, the prior convictions were not an essential element of the underlying offense and the prior convictions were unrelated to the commission of the offense.” *Lathon*, 317 Ill. App. 3d at 587 (citations omitted). See also *People v. Ramos*, 318 Ill. App. 3d 181, 193 (2000) (holding that section 5-5-3(c)(8) is constitutional because “*Apprendi* clearly exempts recidivist statutes”) and *People v. Roberts*, 318 Ill. App. 3d 719, 729 (2000) (“Because *Almendarez-Torres* is good law, we reject defendant’s assertion that *Apprendi* renders [section 5-5-3(c)(8)] unconstitutional”).

Thus, any assertion that *Almendarez-Torres* is no longer good law or that *Apprendi* applies to recidivist provisions is not persuasive.

¶ 71 In regard to defendant’s claim that section 5-5-3(c)(8) is not simply a recidivist provision since it also requires a particular sequence of the convictions and applies only to those defendants who are at least 21 years old, this court has repeatedly rejected such an argument because those factors are “sufficiently intertwined with recidivism and distinct from the elements of the underlying offense to fall under the recidivism exception recognized in *Apprendi*.” *People*

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v. *Smith*, 338 Ill. App. 3d 555, 561-62 (2003) (citing *People v. Jones*, 322 Ill. App. 3d 236, 243 (2001); *People v. Dunn*, 326 Ill. App. 3d 281, 289 (2001)).

¶ 72 In *People v. Riviera*, 362 Ill. App. 3d 815 (2005), this court relied upon these same pre-*Shepard*, *Apprendi* cases and held that *Shepard* did not render Illinois Class X sentencing provision unconstitutional or otherwise require that the sequence of the defendant's prior convictions or the dates of commission of those offenses be proven beyond a reasonable doubt to the jury. We explained in *Riviera*, that unlike *Shepard*, which addressed the question of "how" the prior offense was committed, section 5-5-53(c)(8) concerns the "if and when" the defendant committed the prior felonies which led to his convictions. *Riviera*, 362 Ill. App. 3d at 820. Accordingly, we found in *Riviera*, that it was permissible for the trial court to find the "ancillary elements" such as the minimum age and proper sequence without implicating the defendant's constitutional rights. *Riviera*, 362 Ill. App. 3d at 820-21 (citing *People v. Smith*, 338 Ill App. 3d 555, 561 (2003), *People v. Jones*, 322 Ill App. 3d 236, 243 (2001) and *People v. Dunn*, 326 Ill. App. 3d 281, 289 (2001)). See also *People v. Matthews*, 362 Ill. App. 3d 953, 965 (2005) (citing *Smith*, *Jones*, and *Dunn* and holding that section 5-5-3(c)(8) is constitutional). Because *Riviera* and *Matthews* conclusively reject defendant's arguments and because there is nothing in either *Shepard* or *Apprendi* to support defendant's claims, it is clear that defendant's argument is wholly without merit.

¶ 73 CONCLUSION

¶ 74 Therefore, for all the foregoing reasons, we affirm defendant's conviction and sentence.

¶ 75 Affirmed.

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