

No. 1-09-1143

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SIXTH DIVISION
MARCH 18, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 05 CR 20067
)	
DONALD McCORMICK,)	Honorable
)	John J. Fleming,
Defendant-Appellant.)	Judge Presiding

JUSTICE ROBERT E. GORDON delivered the judgment of the court.
PRESIDING JUSTICE GARCIA and JUSTICE CAHILL concurred in the judgment.

ORDER

HELD: Where defendant was represented by appointed counsel before requesting to proceed pro se, and where the court gave him repeated and detailed warnings of the consequences of self-representation, the court substantially complied with the requirement to admonish a defendant before a waiver of counsel and ensured that defendant's waiver was made knowingly.

Defendant, Donald McCormick, age 42, was convicted by a jury of aggravated criminal sexual assault, aggravated kidnapping, and robbery. He was sentenced to an aggregate of eighty years in the Illinois Department of Corrections, which included a forty year term for aggravated

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criminal sexual assault consecutive to concurrent terms of forty years for aggravated kidnapping and seven years for robbery. Defendant argues on appeal that he was denied counsel at trial and did not make an understanding waiver of the right to counsel because he was inadequately admonished regarding that right, and contends that we must vacate the conviction by the jury and remand the cause for a new trial. We affirm.

BACKGROUND

The public defender was appointed at defendant's arraignment in 2005 and represented him through the pre-trial proceedings. Fitness hearings following two behavioral clinical examinations (BCXs) found defendant sane and fit for trial.

On March 10, 2008, defendant requested in open court to proceed *pro se* so he could meet with the assistant State's Attorney (ASA) for plea bargaining. The court informed defendant of the charges against him and described the potential penalties. The court learned from defendant that he attended high school. When the court asked defendant if he knew the rules of evidence regarding such matters as foundation and relevancy, and defendant opined that he had "people that can assist me in my institution," the court noted that he would not have such assistance at trial. The court told defendant that he would be held to the same standards as an attorney, that the court could not tell him how to introduce evidence, that he would not have standby counsel or an investigator, and that his ability to subpoena witnesses would be limited by being in custody. The court told him that self-representation "is your right" but also that courts do not encourage it.

The court suggested that defendant meet with the ASA "with your lawyer present,"

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reminding him that he could incriminate himself in a direct discussion with the ASA and that the public defender is trained to handle cases with scientific evidence such as DNA so that defendant would be at a disadvantage if he represented himself. When the court recommended that defendant first inform his assistant public defender (APD) of what he wanted to tell the ASA before any direct meeting, defendant agreed "for now." Defendant complained that "it's hard to communicate with" the APD, and the APD told the court that she met with him several times, spoke with him by telephone, and corresponded by mail. The case was passed for defendant to meet with the APD, and upon recall defendant withdrew his request to proceed *pro se*.

On September 12, 2008, during discussions to set the trial date, the APD informed the court that defendant wanted another BCX. When the court told defendant that he could not have another, defendant demanded to proceed *pro se*. The court told defendant that the trial would not be delayed, but defendant repeated that he wanted to proceed *pro se*. When the court tried to read defendant the charges against him because "I have to put things on the record," defendant insisted that he knew the charges and repeatedly interrupted the court. The court listed the charges and told defendant that he could be imprisoned from six years to life. The court told defendant that there would be technical evidence regarding DNA and that the public defender was experienced with such evidence while defendant, without a college education, was not. The court told defendant that he would not have the assistance of counsel in cross-examining expert witnesses or explaining their testimony and that he would have to comply with the rules of evidence and maintain decorum at trial. After reminding defendant that he faced life imprisonment and invoking the adage that only a fool represents himself, the court asked

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defendant if he wanted to reconsider and retain counsel or still desired to proceed *pro se*.

Defendant replied that he was not "being evaluated properly," but the court noted that BCXs are conducted by medical professionals rather than attorneys and explained that "I can give you a whole new team of lawyers, and you're not getting another evaluation" before again suggesting that defendant "go to trial with [his] lawyers." Defendant repeatedly complained about his BCXs, and the court repeatedly told him that "[w]hoever your lawyer is is not getting you a new evaluation." Defendant again demanded to proceed *pro se*, and the court granted the motion, finding that he had been admonished.

On November 5, 2008, defendant again requested in open court to meet with the ASA. The court again reminded defendant that he could incriminate himself in such a meeting as he would be speaking both as counsel trying to negotiate a plea and a party capable of making party admissions. The court told him that the ASA would have an investigator present who would take notes of the meeting but defendant has "all your rights. You still have your right to remain silent. You had a lawyer, you didn't want one." When defendant replied that "it really wasn't an issue that I didn't want an attorney," the court told him that "[y]ou don't get to pick and choose your lawyers. That was the lawyer that was appointed to you. *** It's your choice, but you're not getting a different lawyer."

At the next court date, on November 13, 2008, the court admonished defendant that:

"It's natural life. You don't have to represent yourself. You did have an attorney. You know what you're facing. *** You don't have a law degree, and I can't treat you any differently than any

other lawyer. You have to follow the rules of evidence. You have to follow the same procedures as everyone else. I've gone through this with you on several occasions. You've always indicated you want to represent yourself, correct?"

Defendant replied "Yes." The court again reminded defendant that he could incriminate himself if he discussed the facts of the case with the ASA and suggested that he not delve into the facts. The case was passed for the meeting, and upon recall the ASA told the court that the case would proceed to a jury trial. Defendant unsuccessfully requested another BCX and then answered that he was ready for a jury trial.

On January 12, 2009, the case was called for jury trial and the ASA answered that the State was ready. Defendant asked the court if it could appoint a new APD, a "different one." The court denied the request, noting that defendant had not claimed a conflict that would merit a different APD, but the court also told defendant that he could have his previous APD and a brief continuance before trial. Defendant replied that he wanted his prior APD, and the court stated that it would pass the case for defendant to meet with her, warning that if he accepted her, he would not be allowed to again change his mind before trial as that would again delay trial. Defendant replied that he would accept the prior APD, and the court and the APD discussed scheduling the trial.

Defendant interrupted that discussion to note that the State was ready for trial. The court replied that the APD could not be ready for trial on such short notice and recalled the court's earlier advice that it was in defendant's best interest to have counsel at trial. "You can fire your

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lawyer, you can keep your lawyer, but this will be like the third time we have been through it, and I think that is probably enough for the Appellate Court to let you make your decision."

Defendant replied that he was going to represent himself and again complained that the APD had not met with him often enough. The court stated that "[y]ou are represented by a lawyer" and explained that the case would be continued to set a trial date but "if you fire the lawyer, then I am not going through this dance again. Then you will be on your own because you have been admonished at that point probably six times as to what the consequences are." After defendant answered that he does not understand the law, the court replied that it "told you that from the beginning. I always tell people they should have a lawyer. The Constitution says you can represent yourself if you want." Defendant answered that he wanted the APD to meet with him, and the APD told the court that she and her investigators met defendant several times. Defendant accused the APD of lying and insisted that he wanted to represent himself.

The court passed the case, and upon recall trial commenced with the court addressing the venire. At the lunch recess, before jury selection began, the court asked defendant if he was ready to go to trial "by yourself on your own." Defendant responded that "[i]t's like I have no choice." The court replied that he had a choice: "You can have a lawyer. I will give you that opportunity to have the public defender, okay? You disagreed about how many times she came to see you. *** She will prepare. *** They have a DNA lawyer ready to help to do the trial. I have told you all along [that] you are always better off to have a lawyer." The court asked defendant if he had a witness list or had filed notice of any affirmative defenses, and noted that he was in a prison uniform rather than regular clothes. When the court asked if defendant

wanted to proceed with the APD or *pro se*, he responded that he would represent himself and was ready for trial. However, when defendant said that he was "just going to let them do what they had to do because I don't know..." the court reminded him that "you can have a lawyer, okay?" After noting that the State's case includes DNA evidence and that the defense had not filed a notice of affirmative defense, the court told defendant that "[y]ou have a right to a lawyer. I appointed a lawyer; you don't want the lawyer." After asking defendant if he had any questions, which he did not, the case proceeded to motions *in limine* with defendant representing himself. A jury was then selected.

The following testimony was adduced at defendant's trial:

R.D., age 52, went to cash a check at a currency exchange at 1:00 p.m. on the south side of Chicago. She parked her automobile in a Walgreens' parking lot and walked to the currency exchange. When she returned to her vehicle she encountered defendant, who reached out and grabbed her arm, stating he had a gun and he "didn't mind killing [her]." Defendant pushed R.D. into her vehicle on the passenger's side and took her car keys. Defendant drove R.D.'s vehicle a short distance, parking it in a vacant lot between two buildings. Defendant took all of R.D.'s money and later took her ring. He ordered R.D. to remove her clothes and go into the backseat of her vehicle. Defendant then repeatedly raped R.D. until 6:00 p.m., took some items from R.D.'s trunk, and returned to the vehicle and told R.D. to put on her clothes. Defendant instructed her to drive and drop him off at a bus stop. R.D. called the police and identified defendant from a photo array. Later, a DNA match was made from semen left by defendant.

E.S. was sexually assaulted in her Oak Forest apartment when defendant broke in and

forced her into her bedroom. The assault ended when E.S. ran out of the apartment, clothed only in a t-shirt, and cried out for help. The DNA profile obtained from the semen was a match to defendant's DNA.

Defendant testified on his own behalf contending that both incidents were consensual and involved no use of force. He further testified that both women had previously paid him for sex.

At sentencing, the State argued that defendant could receive up to 120 years' imprisonment and that society needed to be protected from him. Defendant briefly addressed the court, denying that he was a criminal and that he sexually assaulted anyone. The court sentenced defendant to consecutive prison terms of 40 years each for aggravated criminal sexual assault and aggravated kidnaping and 7 years for robbery. This timely appeal followed.

ANALYSIS

On appeal, defendant argues that we must reverse the conviction of the jury and remand the cause for a new trial. First, defendant argues that the trial court erred in failing to admonish him regarding his right to counsel and that if he were indigent, his right to appointed counsel. Second, even if the admonishments were sufficient, the trial court erred in its judicial determination that defendant knowingly and intelligently waived his right to counsel because defendant was confused about the manner in which he could solve certain problems.

Defendant claims that the question of waiver of counsel is a legal issue and should be reviewed *de novo*. While defendant properly asserts that the waiver of counsel is an issue not to be taken lightly and all presumptions must be made against that waiver, it has been well established that we review the waiver of counsel issue under an abuse of discretion standard.

People v. Phillips, 392 Ill.App.3d 243, 260 (2009); People v. Hughes, 315 Ill.App.3d 86, 91 (2000); People v. Jackson, 228 Ill.App.3d 868, 874 (1992).

First, we must note that defendant failed to object to these issues in the trial court and failed to file a posttrial motion raising these issues. Generally, both a trial objection and a written posttrial motion are required for raising any issues of alleged errors that could have been raised during trial. People v. Enoch, 122 Ill.2d 176, 186 (1988). The requirement for a written posttrial motion is statutory, and the statute requires that a written motion for a new trial shall be filed by the defendant, and that the motion shall specify the grounds for a new trial. Id. at 187. The failure to specify the grounds for a new trial in a posttrial motion constitutes forfeiture of the issue in the absence of plain error. Id.

Additionally, defendant failed to raise the plain error doctrine in his appellate brief, and therefore, the issues were forfeited. The plain error doctrine allows a reviewing court to consider unpreserved error when either (1) the evidence is close, regardless of the seriousness of the error; or (2) the error is serious, regardless of the closeness of the evidence – so serious that it affected the fairness of the defendant’s trial and challenged the integrity of the judicial process. People v. Piatkowski, 225 Ill.2d 551, 559 (2007) citing People v. Herron, 215 Ill.2d 167, 186-87 (2005). The burden of persuasion remains with the defendant. Herron, 215 Ill.2d at 186-87. In order to determine whether plain-error is applicable, we must first determine whether any error occurred. Piatkowski, 225 Ill.2d at 559.

Defendant claims that a violation of his right to counsel is a fundamental constitutional error affecting a substantial right, and as such no forfeiture can occur. However, even if the

issue was not forfeited, the trial court in the case at bar made no error.

The sixth amendment to the United States constitution guarantees an accused in a criminal proceeding the right to assistance of counsel. U.S. Const., amend. VI. Along with this right, an accused also has the right to self-representation. Faretta v. California, 422 U.S. 806, 819 (1975). However, any waiver of the right to counsel must be made voluntarily, knowingly and intelligently. People v. Jiles, 364 Ill.App.3d 320, 328 (2006).

In Illinois, the trial court must give the defendant certain admonishments when the defendant seeks to proceed *pro se*. This procedure is governed by Supreme Court Rule 401(a), which provides:

“Any waiver of counsel shall be in open court. The court shall not permit a waiver of counsel by a person accused of an offense punishable by imprisonment without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:

(1) the nature of the charge;

(2) the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences; and

(3) that he has a right to counsel, and, if he is indigent, to have counsel appointed for him by the court.” 134 Ill.2d R. 401(a).

While strict compliance is required for an effective waiver of counsel, substantial compliance is sufficient if the defendant knowingly, intelligently, and voluntarily waived the right, and the admonishments that defendant did not receive did not prejudice his rights. People v. Cleveland, 393 Ill.App.3d 700, 719 (2009); People v. Phillips, 392 Ill.App.3d 243, 262 (2009).

Defendant argues that People v. Campbell and its predecessors stand for the proposition that there can be no effective waiver of counsel without the admonishments provided by Supreme Court Rule 401(a). Citing to Campbell, defendant states that where the required admonitions are not given, there can be no effective waiver of counsel. However, in Campbell, the Supreme Court stated that substantial compliance, not strict compliance, was required for an effective waiver of counsel. People v. Campbell, 224 Ill.2d 80, 84 (2006). Furthermore, the trial court in Campbell failed to give any of the admonishments required by Rule 401(a).

We find that the trial court substantially complied with Supreme Court Rule 401(a).

In response to defendant's first request to proceed *pro se*, the trial court admonished defendant concerning the charges against him as well as the minimum and maximum sentences associated with those charges. The trial court then discussed the implications of the DNA evidence involved with the case and informed defendant that the Public Defender's office had the resources to determine the validity of such evidence. Defendant, however, withdrew his request to proceed *pro se*, and therefore, did not waive his right to counsel at this point in time.

Again when defendant requested to proceed *pro se*, the trial court admonished defendant concerning the charges entered against him as well as the possible resulting sentences. Once more the trial court told defendant that he would be held to the same standards as that of an

attorney. The trial court then asked defendant if he desired to retain counsel to guide him through the trial process. By asking this question, the trial court was admonishing defendant of his right to counsel as well as his right to appointed counsel. People v. Cleveland, 393 Ill.App.3d 700, 723 (2009). Moreover, up until this point, defendant had been represented by appointed counsel, which illustrated defendant's knowledge of his right to counsel as well as appointed counsel. Phillips, 392 Ill.App.3d at 264; People v. Adams, 225 Ill.App.3d 95, 98 (1993). Thus, while the trial court had explicitly admonished defendant regarding the charges entered against him and the minimum and maximum sentences for those charges, the trial court also substantially admonished him regarding his right to counsel.

On January 12, 2009, defendant expressed his desire for counsel. In People v. Cleveland, we found that when a defendant makes a valid waiver of counsel, this waiver remains in place throughout the remainder of the proceeding, including posttrial stages. Cleveland, 393 Ill.App.3d at 719. There are two exceptions to this rule: (1) the defendant later requests counsel or (2) other circumstances suggest that he waiver is limited to a particular stage of the proceedings. Id. Here, defendant requested counsel. At first, defendant accepted the trial court's re-appointment of the previous assistant public defender. We note that defendant's choice to reaccept his assistant public defender for trial as well as the trial court's effort to inform defendant that it would re-appoint the assistant public defender illustrates defendant's awareness of his right to counsel. Adams, 225 Ill.App.3d at 98. However, defendant again requested to proceed *pro se*.

The trial court then re-admonished defendant just before trial started. First, the trial court

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emphasized that defendant had a choice to have a lawyer. Second, the trial court again explained the serious nature of the possible sentences associated with the charges against defendant. Finally, the trial court stated that defendant had the right to a lawyer. Thus, the record makes clear that the defendant had been repeatedly admonished according to Rule 401(a) and was completely aware of his right to counsel as well as his right to appointed counsel.

In the alternative, defendant asserts that even if he were sufficiently admonished, he did not knowingly and intelligently waive his right to counsel. We find defendant's argument unpersuasive.

In order to determine whether a waiver has been made knowingly and intelligently, courts have looked at the defendant's age, level of education, mental capacity, and prior experience with legal proceedings. Jackson, 228 Ill.App.3d at 875 citing People v. Kavinsky, 91 Ill.App.3d 784 (1980).

Here, defendant had been found mentally fit to stand for trial. Furthermore, defendant had been previously convicted for home invasion, aggravated criminal sexual assault, and murder. Thus, it appears defendant was familiar with the criminal justice system.

However, defendant claims that he was confused regarding his reasons to proceed *pro se*. Defendant cites to People v. Vanderwerff. First, defendant argues that like the court in Vanderwerff, the trial court's sole motivation for allowing the defendant to proceed *pro se* was to expedite the proceedings. Vanderwerff, 57 Ill.App.3d 44, 50 (1978). Second, defendant argues that the trial court made no effort to discern whether defendant was making an impetuous decision regarding the waiver of counsel. Id. at 51.

Defendant does not show any evidence that the trial court had a motivation to expedite the trial. The record shows that the trial court was willing to continue the trial, so that defendant's counsel would be prepared. In Vanderwerff, the defendant was not represented by counsel before trial. Id. at 47-48. After admonishing defendant of his right to counsel, the trial court told defendant that he would have to make a decision regarding whether or not he would hire counsel at that moment. Id. Furthermore, when defendant asked how long the trial would last, the trial court indicated that it wanted to conclude trial that same afternoon. Id. at 48. In the case before us, defendant's case had been on the docket since 2005. Furthermore, the trial court entertained three requests by defendant to proceed *pro se* and also re-appointed counsel before trial began. Additionally, as previously discussed, the trial court sufficiently admonished defendant according to Supreme Court Rule 401(a).

Next, defendant argues that the trial court acted hastily and allowed defendant to make an impetuous decision regarding his waiver of counsel. However, the record points to the contrary.

First, defendant claims that he believed he had to proceed *pro se* in order to obtain a meeting with the assistant state's attorney for plea bargaining. However, the record is clear that during this appearance, defendant explicitly stated he felt compelled to proceed *pro se* due to the conduct of his appointed assistant public defenders, not the opportunity to plea bargain with the assistant state's attorney. Even so, the trial court took efforts to discourage defendant from proceeding *pro se* by explaining the intricacies of the DNA evidence involved in the case as well as the trial process as a whole. Second, defendant also claims that he believed he had to proceed *pro se* in order to cure his perceived inefficiencies of the doctors conducting his fitness

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evaluation. Again, the record is clear that the trial court explicitly informed defendant that the doctors' evaluation for fitness had no bearing on his lawyers' efforts and conduct. The court went further to tell defendant that even if it gave defendant a "whole new team of lawyers," defendant would not be granted another fitness evaluation. Despite this information, defendant still decided to proceed *pro se* because he was unhappy with the efforts of his appointed assistant public defender.

Most importantly, defendant did not suffer any prejudice as a result of the trial court's conduct. See Phillips, 392 Ill.App.3d at 262-63 (finding substantial compliance with Rule 401(a) where defendant failed to claim that he suffered any prejudice as a result of the error); See also, People v. Johnson, 119 Ill.2d 119, 132-34 (1988) (finding substantial compliance where record indicated waiver was made knowingly and intelligently *and* sole admonishment defendant did not receive in no sense prejudiced defendant's rights). Defendant was fully apprised of charges against him as well as the minimum and maximum sentences. Furthermore, as previously discussed, defendant was fully aware of his right to counsel and appointed counsel. Defendant does not claim that he would have acted any differently if he were explicitly informed of his right to counsel.

We cannot say that defendant did not knowingly and intelligently waive his right to counsel, and we cannot say that the trial court abused its discretion.

We conclude that the court properly apprised defendant of his right to counsel and ascertained that he understood that right.

We also reject categorically defendant's contention that "the record reflects no real effort

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was made by [the trial court] to make the determination that [defendant] made a knowing and intelligent waiver of his right to counsel." By repeatedly informing defendant in detail of the consequences of proceeding *pro se*, the court made herculean efforts to ensure that defendant was knowingly waiving his right to counsel. Accordingly, the judgment of the trial court is affirmed.

CONCLUSION

Defendant's claims are forfeited for failure to object and failure to raise his claims of errors in a posttrial motion. Plain error is not applicable because there was no claimed error in defendant's brief. However, even if plain error was applicable, the trial court committed no error in the handling of defendant's case.

Affirmed.