

No. 1-10-1326

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IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of Cook County
Plaintiff-Appellee,)	
)	
v.)	No. 06 CR 1766
)	
ELLIOTT PETERSON,)	Honorable John Joseph Hynes,
)	Judge Presiding.
Defendant-Appellant.)	

JUSTICE REYES delivered the judgment of the court.
Justice Hall concurred in the judgment.
Justice Gordon specially concurred.

ORDER

¶ 1 *Held:* The judgment of the trial court is reversed and remanded for a new trial, as defendant was denied the right to represent himself.

¶ 2 Following a jury trial, defendant Elliott Peterson was convicted of the murder of Abimbola Ogunniyi with firearm enhancement, and was sentenced to a total of 70 years in

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prison. 720 ILCS 5/9-1(a)(3) (West 2010); 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2010).

Defendant appeals on several grounds, only three of which are necessary to consider.

Specifically, defendant contends: (1) he was improperly charged for armed robbery under a statute which was no longer in effect; (2) he was denied the right to represent himself; and (3) the jury instructions tendered regarding armed robbery were improper, because the instructions failed to state the statute excludes motor vehicle from the definition of property.

¶ 3 For the reasons which follow we reverse the trial court's judgment and remand this case for a new trial, holding: (1) the mistaken citation to the 1992 version of the armed robbery statute was not error; (2) defendant was denied the right to represent himself; and (3) the jury instructions did not amount to plain error.

¶ 4 BACKGROUND

¶ 5 In January 2006, defendant was charged with 35 criminal counts, including first degree murder, armed robbery, and vehicular hijacking. By the time the case went to the jury, all charges except first degree murder (720 ILCS 5/9-1(a)(3) (West 2010)) were *nolle prossed* by the State. The public defender was appointed to represent defendant in this case.

¶ 6 I. Pre-trial Proceedings

¶ 7 During a status hearing on September 2, 2009, defendant informed the court, "I want to fire my attorney. So I want to get my own attorney." The trial court informed defendant, "It would be very foolish for you to fire an attorney this far into this because there [is] no alternative. The only other alternative would be for you to represent yourself. And this is a mind-boggling experience for you to represent yourself on a complicated case like this." Defendant was

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encouraged to speak with his attorneys and if he still wanted to represent himself on a future date, the court would consider his request.

¶ 8 On January 14, 2010, defendant addressed the court stating, "I want another attorney."

The court gave defendant an opportunity to speak with his counsel, then recalled the case.

Defendant informed the court, "I still want a new attorney." The following exchange occurred:

"COURT: Well, you are going to have to make that affirmative request on your own here, too, because we are going in a trial stage here. And the problem is is [sic] that you are not entitled to another Public Defender, you know. You don't have another attorney in mind, do you?"

DEFENDANT: No.

COURT: And I'm assuming that you don't want to represent yourself on such a case like this, right?"

DEFENDANT: I don't want to but I will.

COURT: Well, this is a capital case, as you well know, and the State is seeking the ultimate punishment. And you need lawyers who are certified to do that. You have the attorneys here that can do that. Do you understand that?"

DEFENDANT: I understand.

COURT: Do you have any training in the law?"

DEFENDANT: No.

COURT: How far did you get in school?"

DEFENDANT: G.E.D.

COURT: Did you ever go to any college-type classes?"

DEFENDANT: No.

COURT: How far, how many years actually of high school did you have?"

DEFENDANT: Up to the tenth grade.

COURT: Up to the tenth grade. So, basically like a sophomore, somewhere in your sophomore year is where [sic] you dropped out?

DEFENDANT: Yes.

COURT: All right. Well, you know, you are trying to do this on your own, you are up against big odds. You understand that?

DEFENDANT: Yes, I do.

COURT: And you need to cooperate with your attorney as they need to cooperate with you. That's part of the whole - - the give and take here. Do you understand that?

DEFENDANT: (Nodding.)

COURT: Do you understand that?

DEFENDANT: I understand that.

COURT: Because we are now at a point in this matter where we are about three weeks from a trial, a little over three weeks from a trial date that I have set. This case has been pending in the system for well over three years. And it's an incident having occurred about, you know - - excuse me, over four years ago. We need to get this going ahead.

And you are going to need to sit down with Mr. Nolan, Mr. Ruffin, and Miss Calabrese, be it at this court room or at another location and talk about this. And we are going to give you that opportunity and if I have to bring you back here every day you will have that opportunity to speak with them.

But, you are not going to be able to change lawyers at this late stage. And I don't believe that you are qualified to represent yourself. Do you understand that?

DEFENDANT: I understand."

¶ 9 The following day, January 15, 2010, defendant again requested to be appointed new counsel or to proceed *pro se*. Defendant stated, "Do I still want another attorney? If you're not willing to provide another attorney; if that's not gonna happen, I would rather go *pro se* because I don't want them representing me. I don't want to go to court with them representing me no

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more." Defendant stated his counsel informed him there is a "90 percent or 99 percent chance of me being found guilty and I don't believe that people telling me that I'm gonna be found guilty before I even go to trial will represent me to the best of their ability if they already feel that I'm gonna be found guilty, so I just don't want them representing me at all. I would rather go *pro se*. I know this is a big thing. It's mind boggling like you told me back in September, but I would rather go *pro se* than sit here and have people telling me well, you're gonna get found guilty."

¶ 10 Defendant's counsel responded, stating he and the other two counsels visited defendant in prison at least ten different times, defendant refused to state his defense, whether he would testify, or if he had witnesses. Again defendant stated in response, "if you don't want to appoint me an appointed attorney, I would rather just represent myself."

¶ 11 The trial court again denied defendant's oral motion to have other counsel appointed or in the alternative represent himself stating:

"COURT: Well - - and that presents also an additional problem here because based on the complexity of the case, I don't believe that you are qualified to represent yourself. This is a capital case. As I said even for lawyers - - even though someone may have a law degree, they cannot participate in a capital case as what they call a first or second chair unless they have been certified by the Supreme Court as being a person who has the necessary experience to qualify and the attorneys that you have have [sic] that experience and that you, you know, with the limited education you have; the fact that you're dealing with just an - - it's a GED degree up to your tenth grade in high school, you don't have the requisite experience, knowledge to competently represent yourself. If you were to represent yourself in this case, you would not be able to do so competently and the Supreme Court has asked us as trial Judges to look at these things with a fine-tooth comb and though generally if this was a non-capital case, you may - - I may give you the right to represent yourself. Because it is a capital case, you're not competent to do that and so consequently, I am not going to allow you to represent yourself. ***

* * *

DEFENDANT: One question.

COURT: Go ahead.

DEFENDANT: So, basically what you're telling me - - I assumed it was my right if I didn't - - as far as me getting attorney; if it was possible to have one and if not, I could represent myself, so this is what I am assuming is my right. You're basically telling me you're denying it.

COURT: Well, what you're assuming it's not an absolute right. You know you do have the right to represent yourself, but as part of that kind as - - of one of the things that we have to take into account is you have the right to represent yourself, but you must represent yourself competently and although, you know, you seem to be a very articulate person, they're [sic] doesn't seem to be any problems as far as your understanding of the proceedings with me or anything that is going on. As I said in the area of death penalty cases, a capital litigation lawyer must have a certain expertise in this area and you certainly do not have the expertise as an attorney let alone the - - what I would say the more advanced expertise that you would need as a capital litigation attorney in this type of area and so what I am finding is that even though you in general have a right to have your - - to represent yourself, that you're not competent to represent yourself on this type of case because it is a complex case ***."

¶ 12 On January 28, 2010, the trial court informed defendant his counsel was filing a certificate of readiness, which indicated counsel reviewed the discovery with defendant.

Defendant stated his counsel did not go over the discovery with him and the following discussion took place:

"DEFENDANT: He said that they went over discovery. I have a copy of my statement, so I have a couple of pages out of a notebook, and that's about it. I never saw anything else. They say they went over and discussed it with me. I told you before they came and talked to me about a stack of paper maybe this high, and he wasn't there no longer than thirty minutes. I don't see how that is going over discovery with me after all these years. I don't have time to argue with these attorneys, so I told you what happened, and you told me what you was doing. You said I have a right for this right for that. I still feel the same way. I don't want to sign it with these people representing me. I don't want to argue in your court room. I already expressed my opinions about how I felt, and I still feel like if you won't give me an attorney, I'd rather represent myself rather than go into trial felling [sic] like I don't have an advantage. I already told you what they told me back there a couple of weeks ago."

The trial court then went through the pertinent discovery information with defendant. After

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asking questions regarding discovery, the trial court engaged in the following exchange:

"COURT: So you know it was there. You had the opportunity to discuss it with them and how that works in this, right?

DEFENDANT: I understand I had that opportunity. I mean the only thing is the only time I'm going to get a chance –

COURT: Well, they see you every day when you come in here.

DEFENDANT: I haven't talked to him today.

COURT: Well, you talked to him yesterday or two days ago when you were here, right?

DEFENDANT: I talked to him two days ago. Your Honor, I told you already what they told you, so this is the feeling that I have. They said, if and when I go to trial I will be found guilty. That's just what's being said, and that [sic] have me to believe that I'm not going to have a fair trial with him representing me.

COURT: Well, you know, the fact that they may tell you the likelihood of your likelihood [sic] of success on the case is very different than whether or not you talked over the case with them. That's the main thing I need to talk about. You have had opportunities to talk over the case with them."

The trial court asked defense counsel to respond to these remarks. Defense counsel when through the number of meetings he had with defendant regarding the discovery. Defense counsel indicated defendant knew "everything he needs to know here to proceed to trial." The trial court made its ruling:

"COURT: I have had an opportunity to once again going back throughout my course of being on this trial more than a year on this case, I have seen the attorneys, their diligence in this matter. I have seen them file motions. I'm aware they did call civilian witnesses on Mr. Peterson's behalf. I have seen the interplay here. I know that they have gone back and talked to Mr. Peterson on numerous occasions because I have seen that, and I have been here while they have talked to him for quite a period of time. They have been in the back there for, you know, for a period of time that I was on the bench here. I have seen that happen. I have listened to Mr. Nolan's recitation of the facts here. I've also listened to Mr. Peterson, and it appears that he understands the evidence against him,

and the parameters of this trial, and it's clear to me that he is an intelligent person. He knows his rights, and that, in fact, this is done on the eve of trial as a dilatory tactic, and that's what I find that this is done as a dilatory tactic in order to prevent this case from going to trial, and as I noted before, the murder in this matter occurred on or about December 22 of 2005. This case has been pending in the Circuit Court of Cook County, the Defendant having been arrested several days after that, it's been pending at least in this courtroom since February 1st of 2006.

We are scheduled to go to trial on February 16th of 2010, that being more than four years after this case has arrived on the Court's docket. You know, enough is enough.

I have not heard anything that would indicate to me there's any stone unturned from the defense that they haven't looked at, anything that the Defendant hasn't told them that they haven't investigated. They have an excessive mitigation list of witnesses. As I said, they also called civilian witnesses on Mr. Peterson's behalf at the motion. Consequently, I find this to be a dilatory tactic. The State's Certificate of Readiness, I feel that that stands. They are ready to proceed to trial."

¶ 13

II. Trial

¶ 14 Defendant's case then proceeded to trial on February 16, 2010, with defendant represented by counsel. The following evidence was presented.

¶ 15 In the late afternoon of December 22, 2005, Abimbola Ogunniyi (Ogunniyi) was working as a freelance cab driver. While driving his 1994 teal blue Mitsubishi Montero SUV, Ogunniyi received a dispatch at 3:52 p.m. from Denise La-Hori to pick up a fare at 8024 S. Wood, Chicago. He went to the address, but it did not exist. He corresponded in code to his dispatcher "1015," which indicated to the dispatcher the address was not a good one. But La-Hori received another call at 4:06 p.m. for the same address, and that time Ogunniyi was able to locate his fare.

¶ 16 His passengers included two women, Jimille Brown (Brown) and Joyce McGee (McGee), and one man, defendant Elliott Peterson. Unbeknownst to Ogunniyi, defendant was executing a plan to rob an armored vehicle. But first, defendant needed to obtain an automobile in order to travel to the bank where the armored vehicle was located. Defendant called South Side Livery

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with McGee's cell phone, and when the cab did not arrive the first time, he instructed McGee to call again, since defendant was on a time schedule to intercept the armored vehicle by 5:00 p.m. When the cab arrived at 8024 S. Wood, defendant, accompanied by Brown and McGee, directed Ogunniyi to drive to 97th and Pulaski. Before Ogunniyi reached the destination he was instructed to drive into an alley.

¶ 17 The cab parked in the alley. Defendant ordered Ogunniyi to exit the cab and take his clothes off, an instruction rendered by defendant in hopes it would stall Ogunniyi's progress in obtaining assistance after they departed the alley. Meanwhile, defendant exited the cab with his sawed-off shotgun already cocked and pointed it at Ogunniyi. According to defendant's statement to police, a fight over the weapon ensued with defendant holding the handle of the shotgun and Ogunniyi holding the barrel.

¶ 18 Forensic scientist Melissa Nally testified at trial that four and a half to five pounds of force is required to discharge a shell from a shotgun. Dr. Ponni Arunkumar of the Cook County Medical Examiner's Office testified Ogunniyi died from a shotgun wound to his left leg and that the shotgun pellets entered the front of Ogunniyi's left thigh at a perfectly straight angle injuring the femoral vein and artery. Further, she stated Ogunniyi's leg contained no gun powder residue, therefore the shotgun was discharged between twenty inches and three feet away.

¶ 19 Ogunniyi yelled, "you shot me" while McGee and Brown disposed of Ogunniyi's personal items left in the cab, his day planner and mail, by throwing those items into a nearby dumpster. Brown drove the cab away from the alley with McGee in the passenger seat and defendant in the backseat. McGee then discovered Ogunniyi's wallet in the glove compartment. Defendant

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removed the money from the wallet, later using the currency to purchase a present for Brown and a pair of jeans. Brown parked the cab near 95th Street and Cicero, blocking a driveway and leaving the parking lights of the vehicle illuminated.¹

¶ 20 The three decided to travel home on a bus, however, they did not have any money. Using a twenty dollar bill from Ogunniyi's wallet, McGee and Brown purchased a Butterfinger candy bar from a nearby Walgreen's to break the twenty dollar bill. Defendant threw Ogunniyi's wallet and keys into a nearby trash can and the three rode the bus back to defendant's apartment.

¶ 21 Following closing arguments and jury instructions, the jury deliberated and found defendant guilty of first degree murder. The jury also found the State proved defendant personally discharged a firearm that proximately caused Ogunniyi's death. The trial court declined to impose the death penalty and instead sentenced defendant to 40 years for first degree murder with a mandatory sentence of 30 years for firearm enhancement.

¶ 22 Defendant filed three posttrial motions: a motion to reconsider sentence; a motion for a new trial; and a motion in arrest of judgment. All three motions were denied by the trial court.

¶ 23 This appeal timely followed.

¶ 24 ANALYSIS

¶ 25 I. Armed Robbery

¶ 26 Defendant argues his first degree murder conviction should be overturned because he was charged with armed robbery under a statute which was no longer in effect. Consequently,

¹ Defendant did not pursue his plan to rob the armored vehicle because he would arrive late for the armored vehicle delivery.

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defendant maintains the jury was improperly instructed on the elements of armed robbery.

¶ 27 We first note defendant's motion to dismiss the indictment did not address the error in the citation to the statute under which defendant was charged. Defendant did, however, challenge the sufficiency of the indictment in a motion in arrest of judgment which was denied by the trial court. No objections were raised at trial or in a posttrial motion regarding the content of the jury instructions. Therefore, defendant is requesting this court review these issues under the plain-error doctrine.

¶ 28 To preserve an issue for review, defendant must object both at trial and include the alleged error in a written posttrial motion. *People v. Leach*, 2012 IL 111534, ¶ 60. Failure to do so operates as a forfeiture as to that issue on appeal. *People v. Ward*, 154 Ill. 2d 272, 293 (1992). Illinois Supreme Court Rule 615(a) (eff. July 1, 2002), however, carves out an exception to forfeiture known as the “plain-error” doctrine which permits review of issues otherwise procedurally defaulted. *People v. Lewis*, 234 Ill. 2d 32, 42 (2009).

¶ 29 Under the plain-error doctrine, this court will review forfeited challenges when: (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant; or (2) a clear or obvious error occurred, and the error is so serious that it affected the fairness of the defendant's trial and the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). The defendant bears the burden of persuasion under each prong of the doctrine. *People v. Naylor*, 229 Ill. 2d 584, 593 (2008). Where a defendant is unable to establish plain error, it is incumbent upon us to honor the procedural default. *People v. Keene*,

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169 Ill. 2d 1, 17 (1995). In undertaking this review, it is appropriate to first determine whether error occurred at all. *People v. Williams*, 193 Ill. 2d 1, 27 (2000).

¶ 30 Defendant argues he was charged under a statute which was no longer in effect, as the indictment for armed robbery states he "knowingly took property from the person or presence of Abimbola Ogunniyi by the use of force or by threatening the imminent use of force while armed with a dangerous weapon, to wit: a firearm, in violation of Chapter 720, Act 5, Section 18-2 of the Illinois Compiled Statutes 1992, as amended."

¶ 31 The State responds defendant was not convicted of armed robbery, as the charge was *nolle prossed* prior to the commencement of trial.

¶ 32 Defendant maintains the statute under which he was charged was amended in 2000 prior to the offense. Defendant claims the amendment divided the armed robbery statute into essentially two different sections; one requiring the robbery occur with the use of a "dangerous weapon;" the other to occur with the use of a "firearm." 720 ILCS 5/18-2(a)(1), (2) (West 2000).² Defendant concludes, when the indictment stated "armed with a dangerous weapon, to wit: a firearm" it confounded two different subsections of the statute resulting in an improper jury instruction.

² The armed robbery statute in fact divided the prior statute into four sections, the first two are as stated, however the third and fourth reference whether the defendant personally discharged the firearm during the crime or discharged a firearm that proximately caused great bodily harm, permanent disability, permanent disfigurement, or death to another person, respectively. 720 ILCS 5/18-2(a)(3), (4) (West 2000).

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¶ 33 The State responds that it is not required to prove up the elements of armed robbery in order to obtain a conviction for first degree murder, as the underlying felony is not an element of the offense of first degree murder.

¶ 34 Our supreme court has stated, "the felony in felony murder is essential in the sense that if there were no felony the defendant could not do anything in the course of it, but the felony is only a precondition, not an element of independent significance." *People v. Holt*, 91 Ill. 2d 480, 485 (1982); see *People v. Wilson*, 348 Ill. App. 3d 360, 364 (2004) (noting the "[d]efendant's contention that 'the underlying felony is an element of the offense' of felony murder has been expressly rejected by the Illinois Appellate Court."); see also *People v. Edwards*, 343 Ill. App. 3d 1168, 1179 (2003) (stating in felony murder cases, "proof that the underlying felony occurred is not used to establish that felony *per se*; but is used to establish the requisite substitute for criminal intent for felony murder.").

¶ 35 The statute under which defendant was convicted states:

"A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death: he is attempting or committing a forcible felony other than second degree murder." 720 ILCS 5/9-1(a)(3) (West 1992)³.

Armed robbery is not an element of first degree murder. Rather, in this instance, the armed

³ Defendant does not challenge on appeal the statute under which he was charged for first degree murder, which was also the 1992 statute. This is likely because the 1992 statute was not amended in 2000 and the language of the statute has remained unchanged to this day.

robbery is used to form the *mens rea* required for the first degree murder conviction. *Edwards*, 343 Ill. App. 3d at 1179. Based on the evidence presented at trial, the jury could determine whether defendant had this requisite intent. The State did not proceed on the armed robbery charge. Defendant was found guilty by a jury of first degree murder. Thus, defendant was only convicted of first degree murder and not armed robbery. Accordingly, we find no error occurred.

¶ 36 II. Defendant's Request for Self-Representation

¶ 37 Defendant next contends he was denied the right to represent himself after making numerous requests in the trial court and being told he could not represent himself because he lacked the advanced expertise of a capital litigation attorney. The State responds, the trial court did not err because defendant did not make a clear and unequivocal request to proceed *pro se*.

¶ 38 A defendant has a constitutional right to represent himself. *Faretta v. California*, 422 U.S. 806, 835 (1975); *People v. Burton*, 184 Ill. 2d 1, 21 (1998). A defendant's waiver of counsel, however, must be clear, unequivocal, and free from ambiguity. *People v. Baez*, 241 Ill. 2d 44, 115-16 (2011). The purpose of requiring a criminal defendant make an unequivocal request to waive counsel is to: “(1) prevent the defendant from appealing the denial of his right to self-representation or the denial of his right to counsel; and (2) prevent the defendant from manipulating or abusing the system by going back and forth between his request for counsel and his wish to proceed *pro se*.” *Id.* at 116 (citing *People v. Mayo*, 198 Ill. 2d 530, 538 (2002)).

¶ 39 The trial court must confirm the defendant can make a knowing and intelligent waiver of his right to counsel. *People v. Woodson*, 2011 IL App (4th) 100223, ¶ 23. Whether a defendant has made an intelligent waiver of the right to counsel depends, in each case, “upon the particular

facts and circumstances of that case, including the background, experience, and conduct of the accused.” *Baez*, 241 Ill. 2d at 116. To represent himself, a defendant “need only have a full awareness of the nature and consequences of his decision to proceed without counsel.”

Woodson, 2011 IL App (4th) 100223, ¶ 23. A defendant should be informed of the dangers and disadvantages of self-representation so the record will reflect that he or she has made his decision “with eyes open.” *Faretta*, 422 U.S. at 835 (quoting *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 279 (1942)). A trial court cannot reject a defendant's request for self-representation based upon the court's perception the defendant lacks legal knowledge or the ability to defend himself. *People v. Fisher*, 407 Ill. App. 3d 585, 589-90 (2011).

¶ 40 A court must “indulge in every reasonable presumption” against a defendant's waiver of his right to counsel. *Brewer v. Williams*, 430 U.S. 387, 404 (1977). A reviewing court will not reverse the trial court's determination as to whether a defendant waived his right to counsel absent an abuse of discretion. *Burton*, 184 Ill. 2d at 25. An abuse of discretion occurs when the court's ruling is arbitrary and without a logical basis. *Fisher*, 407 Ill. App. 3d at 589; but see *People v. Bowman*, 40 Ill. 2d 116, 123 (1968) (“It has been found to be reversible error to refuse a criminal defendant's timely request for self-representation.”).

¶ 41 We first consider the State's assertion defendant did not make an unequivocal request to proceed *pro se*. The State argues this case is analogous to *People v. Rasho*, 398 Ill. App. 3d 1035, 1037 (2010). *Rasho*, however, is distinguishable from the case at bar. In *Rasho*, the defendant filed “a motion to withdraw counsel and go *pro se*.” *Id.* at 1038. The trial court, however, did not receive the motion and on the day of trial the defendant made an oral request to

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proceed *pro se*. *Id.* The trial court denied the defendant's motion finding it was a dilatory tactic. *Id.* at 1039. The defendant appealed, arguing he made an unequivocal assertion to proceed *pro se*. *Id.* at 1041. We determined the language the defendant used in the body of his motion did not contain an unequivocal request to proceed *pro se*. *Id.* at 1042. Additionally, we concluded "defendant's request to proceed *pro se* on the day of trial was not timely and was accompanied by an implicit motion for a continuance. A request made before trial commences is generally viewed as timely if it is not accompanied by a request for additional time to prepare." *Id.*

¶ 42 The present case, however, is distinguishable from the facts in *Rasho*. In *Rasho*, the defendant made only one request to proceed *pro se*, which was made on the day of trial, and sought a continuance. Here, defendant made multiple requests over the course of a month to proceed *pro se*, the last request occurred three weeks before trial was scheduled to commence, and did not make any requests for a continuance. Our supreme court in *Burton* stated, "a defendant's request is untimely where it is first made just before the commencement of trial, after trial begins, or after meaningful proceedings have begun. [Citations.]" *Burton*, 184 Ill. 2d at 24. In the case at bar, defendant made his first request to proceed *pro se* a month before the commencement of trial. The last request was made three weeks before trial was scheduled to commence. Three weeks is hardly "just before the commencement of trial" that our supreme court contemplated would allow a trial court the discretion to deny a motion for self-representation. *Id.*, see *People v. Ward*, 208 Ill. App. 3d 1073, 1084. Accordingly, *Rasho* is not applicable to the case at bar as defendant repeatedly and unequivocally stated he desired to represent himself and made no request for a continuance when making his request to proceed *pro*

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se. See *Woodson*, 2011 IL App (4th) 100223, ¶ 24 (citing 2 W. LaFave & J. Israel, Criminal Procedure § 11.5(d), at 47-48 (1984)) (a request to proceed *pro se* made before trial commences is generally viewed as timely if it is not accompanied by a request for additional time to prepare).

¶ 43 Defendant further contends the trial court improperly based its decision for denying defendant's request to proceed *pro se* on his legal knowledge and ability to represent himself. Defendant maintains this case is similar to *Woodson* where the trial court erroneously denied the defendant's request for self representation based on the fact the defendant lacked sufficient legal knowledge and expertise to represent himself. *Woodson*, 2011 IL App (4th) 100223, ¶ 25.

¶ 44 We agree this case is similar to *Woodson*. In the present case, the trial court denied defendant's request to proceed *pro se* stating he was "not qualified" and with his "limited education" could not "competently represent" himself. This rationale for denying a defendant his right to self-representation has been repeatedly rejected. See *id.* at ¶ 23; *People v. Lego*, 168 Ill. 2d 561, 563-64 (1995); *Fisher*, 407 Ill. App. 3d at 590. Moreover, the trial court stated it would not accept defendant's waiver of his right to counsel on the basis this was a capital case. This is an improper basis on which to deny defendant's his constitutional right. See *People v. Coleman*, 168 Ill. 2d 509, 544-46 (1995).

¶ 45 For the reasons stated above, we conclude the trial court did not properly consider defendant's request to proceed *pro se* and based its decision on an improper legal standard. Although a trial court may voice its opinion that a defendant's decision to proceed *pro se* is unwise, it cannot refuse the defendant his right to self representation on that basis. See *Fisher*, 407 Ill. App. 3d at 591. As it is reversible error to refuse a criminal defendant's timely request

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for self-representation, this matter is reversed and remanded for a new trial. See *Bowman*, 40 Ill. 2d at 123.

¶ 46

III. Jury Instructions

¶ 47 "Because the defendant must be tried again, it is appropriate to consider here those questions raised by the parties that are likely to recur on retrial." *People v. Bryant*, 113 Ill. 2d 497, 507 (1986); see *People v. Sanders*, 238 Ill. 2d 391, 405 (2010). Therefore, we need not address defendant's other contentions on appeal, with the exception of whether the trial court issued proper jury instructions. Thus, we turn to consider defendant's contention that the instruction tendered to the jury regarding armed robbery was in error because the instruction failed to inform the jury that the robbery statute explicitly excludes the taking of a motor vehicle from the definition of property. Defendant asserts the error was further compounded by the State focusing its case on defendant's plan to steal Ogunniyi's cab. Defendant maintains the State improperly stated in their closing argument that the property taken in this case was "the victim's car and everything in it."

¶ 48 The State responds that defendant waived this issue, as defendant did not object to the instruction at trial. In reply, defendant cites Illinois Supreme Court Rule 451(c) (eff. July 1, 2010) which states, "substantial defects [in jury instructions in criminal cases] are not waived by failure to make timely objections thereto if the interests of justice require." Rule 451(c)'s exception to the waiver rule for substantial defects applies when there is a grave error or when the case is so factually close that fundamental fairness requires that the jury be properly instructed. *People v. Thurman*, 104 Ill. 2d 326, 329-30 (1984).

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¶ 49 Rule 451(c) and Rule 615(a) are construed identically. *People v. Durr*, 215 Ill. 2d 283, 296 (2005). "Even if no chance of excusing the bar could exist under the language of Rule 451(c), plain error would remain an avenue for relief pursuant to Rule 615(a): jury instructions are recognized as implicating substantial rights." *Id.* at 296-7 (quoting *People v. Keene*, 169 Ill. 2d 1, 32 (1995)). This exception to the waiver rule is limited and is "applicable only to serious errors which severely threaten the fundamental fairness of the defendant's trial." *People v. Roberts*, 75 Ill. 2d 1, 15 (1979). "[A]n omitted jury instruction constitutes plain error only when the omission creates a serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law, so as to severely threaten the fairness of the trial." *People v. Hopp*, 209 Ill. 2d 1, 12 (2004).

¶ 50 Defendant argues the grave error here was that the jury was not informed of the essential characteristics of the crime of armed robbery, namely that the stealing of a motor vehicle is explicitly excluded from the statute. Accordingly, defendant must show there was a serious risk the jury convicted him of first degree murder because it did not understand the definition of property in relation to the armed robbery statute excluded a motor vehicle. *Id.* Defendant cannot establish that there was a serious risk the jury did not understand the definition, as defendant was not convicted of armed robbery and the jury was presented with evidence defendant stole other personal items from the victim.

¶ 51 The instruction given to the jury stated: "A person commits the offense of armed robbery when he, while carrying on or about his person, or while otherwise armed with a dangerous weapon, intentionally takes property from the person or presence of another by the use of force or

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by threatening the imminent use of force." Defendant was indicted and charged with armed robbery, but he was neither prosecuted nor convicted under this statute. Armed robbery is merely the underlying felony upon which the jury relied to convict defendant for first degree murder. As stated above, the crime of armed robbery in this context merely provides the requisite intent for first degree murder. See *Holt*, 91 Ill. 2d at 485.

¶ 52 Defendant further argues the jury convicted him of first degree murder solely based on the taking of Ogunniyi's cab. The State, however, presented evidence at trial that defendant confiscated other personal property belonging to Ogunniyi. This included his money, wallet, keys, cell phone, and clothes. These personal items were referenced by the State in their closing. A reasonable juror could and very likely would infer due to the many different items taken from Ogunniyi armed robbery was committed. As there was evidence presented at trial indicating defendant took items of property other than a motor vehicle from Ogunniyi, this jury instruction did not create a serious risk of an incorrect conviction. *Hopp*, 209 Ill. 2d at 12. Defendant's argument amounts to mere speculation, which is insufficient to find plain error. See *id.* at 17. Accordingly, we find the jury instruction was proper and no error occurred.

¶ 53 CONCLUSION

¶ 54 For the reasons stated, the judgment of the trial court is reversed and remanded for a new trial.

¶ 55 Reversed and remanded.

¶ 56 JUSTICE GORDON, specially concurring:

¶ 57 I concur, but I must write separately to address a few additional arguments made by the

State in support of its claim that the trial court did not err when it denied defendant's request for self-representation, and to clarify the correct legal standard.

¶ 58

I. Requests in the Alternative

¶ 59 On appeal, the State argues that defendant's request for self-representation was not clear and unequivocal because he *also* asked the trial court to appoint new counsel.

¶ 60 For months, defendant had consistently requested the trial court to adopt one of two options: (1) to appoint new counsel; and, (2) if new counsel was not appointed, to represent himself. When the trial court denied the first option, that left only the second option available – self-representation. *People v. Gray*, 2013 IL App (1st) 101064, ¶ 24 ("While the request was arguably contingent upon the preclusion of defendant's preferred course *** that does not render the request ambiguous.>").

¶ 61 Although defendant's request was phrased in the alternative, it was still clear, as well as consistent and repeated. A full month before the trial, after being denied new counsel, defendant stated, clearly and unequivocally, three different times in open court, "I'd rather go *pro se*," and a fourth time, he stated, "I would just rather represent myself." After the trial court denied his request, defendant stated that he thought self-representation was "my right."

¶ 62 To the extent that the trial court found defendant's "I'd rather" statements confusing, defendant's subsequent comment about "my right" left no doubt that he was exercising his constitutional "right" to represent himself.

¶ 63

II. No Evidence of Delay

¶ 64 On appeal, the State also argues that the trial court reasonably denied defendant's request

because it was made for purposes of delay. However, not only did defendant make his request a full month before trial, but he also did not make any request for a continuance or a postponement.

¶ 65 There is no dispute that defendant had a constitutional right to represent himself, and that a request for self-representation should be granted if it is clear, unequivocal and not made solely for purposes of delay. *People v. Rohlfis*, 368 Ill. App. 3d 540, 544-45 (2006). In the case at bar, I find that defendant's request was clear and unequivocal, and that the record does not contain any evidence to support the State's argument that it was made for purposes of delay. Thus, I concur in the majority's conclusion that the trial court erred by denying defendant's request for self-representation.

¶ 66 III. The Wrong Legal Standard

¶ 67 The majority concludes that the trial court applied the wrong legal standard, and I concur in that conclusion, but I write separately to clarify the correct standard.

¶ 68 The trial court believed that it was not a smart choice for defendant to forego representation in a capital murder case and so denied his request for self-representation. The trial court's error concerning the correct legal standard may be due to our oft-repeated phrase that a waiver must be "voluntary, knowing and *intelligent*." (Emphasis added.) *Phillips*, 392 Ill. App. 3d at 260 (citing *People v. Jiles*, 364 Ill. App. 3d 320, 328 (2006) (citing *People v. Haynes*, 174 Ill. 2d 204, 235 (1996))). In this context, what we mean by the word "intelligent" is that defendant has the capacity, considering his age and other factors in his background, to make a meaningful choice. *Woodson*, 2011 IL App (4th) 100223, ¶ 23 ("a defendant need only have a full awareness of the nature and consequences of his decision"); *People v. Gray*, 2013 IL App

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(1st) 101064, ¶ 23 (in determining whether defendant's waiver was "intelligent," we consider his "background," as well as his "conduct"). By using the word "intelligent," we are not restricting defendant to making the smartest choice. *Woodson*, 2011 IL App (4th) 100223, ¶ 25. In the case at bar, the trial court found that defendant was "intelligent," when it stated that he was "articulate," and that "there doesn't seem to be any problems as far as your understanding of the proceedings with me or anything that is going on."

¶ 69 In the case at bar, the trial court denied defendant's request to represent himself solely because it believed that defendant lacked the legal expertise to defend a capital murder trial.

People v. Woodson, 2011 IL App (4th) 100223, ¶ 21 ("[a] court abuses its discretion *** when it applies the improper legal standard"). After defendant asked the trial court how it could deny his "right" to self-representation, the trial court explained its ruling, as follows:

"THE COURT: Well, what you're assuming[,] it's not an absolute right. You know you do have the right to represent yourself, but as part of that kind as – of one of the things that we have to take into account is you have the right to represent yourself, but you must represent yourself competently and although, you know, you seem to be a very articulate person, there doesn't seem to be any problems as far as your understanding of the proceedings with me or anything that is going on. As I said in the area of death penalty cases, a capital litigation lawyer must have a certain expertise in this area and you certainly do not have the expertise as an attorney[,] let alone the – what I would say the more advance expertise that you would need as a capital litigation attorney in this type of area and so what I am finding is that[,] even though you[,] in general[,] have a right to your – to represent yourself, that you're not competent to represent yourself on this type of case because it is a complex case ***. [T]here are many intricacies to this case that you are not competent to represent yourself with, so that's my ruling."

¶ 70 Although it may be true that defendant lacked the legal expertise to competently defend a capital murder case, the constitution does not prohibit foolish choices. It requires waivers of counsel to be knowing and voluntary; but it does not require them to be smart. *People v. Phillips*,

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392 Ill. App. 3d 243, 260 (2009). In the case at bar, there is no question that the waiver was knowing and informed; the trial court had explained the consequences to defendant for months. There is no claim that defendant's choice was coerced, so there is no issue of voluntariness. After hearing defendant's repeated and clear request for self-representation and after determining that it was knowing and voluntary, the trial court abused its discretion by denying it on the ground that, in the court's opinion, this was an unwise choice. *Woodson*, 2011 IL App (4th) 100223, ¶¶ 23, 25-26 (the trial court abused its discretion when it denied defendant's request for self-representation on the ground that defendant lacked the legal knowledge and ability to represent himself); *People v. Baez*, 241 Ill. 2d 44, 116 (2011) ("Although a court may consider a defendant's decision to represent himself unwise, if his decision is freely, knowingly and intelligently made, it must be accepted.").

¶ 71 In sum, I find that the trial court abused its discretion, because: (1) the record demonstrates that, although defendant's request was made in the alternative, it was still clear, unequivocal and repeated, as well as knowing, voluntary and intelligent; (2) the record does not contain any evidence to support the State's argument that it was made for purposes of delay; and (3) the trial court's explanation of its ruling shows that the trial court applied the wrong legal standard.