

¶ 5

I. BACKGROUND

¶ 6 On September 18, 2009, the State filed an information against defendant alleging he committed the offense of aggravated battery of an insulting or provoking nature by throwing a liquid substance on Dion Sullivan, knowing him to be a state correctional officer engaged in the performance of his duties in violation of section 12-3 of the Criminal Code of 1961 (720 ILCS 5/12-3 (West 2008)).

¶ 7 On October 21, 2009, the trial court appointed counsel to represent defendant and scheduled a preliminary hearing for November 9, 2009. At that hearing, defendant was represented by appointed counsel. The only evidence was the testimony of an investigator for the Pontiac Correctional Center. He testified as to the events which occurred on July 9, 2009. The trial court found probable cause. Defense counsel conducted a limited cross-examination of the witness. Defendant told the court he was being deprived of his rights to question witnesses and object to the testimony because he believed it did not show probable cause. Defendant then stated he wanted to represent himself. The court told defendant he should talk to his counsel prior to the pretrial hearing set for December 14, 2009, and if he still wanted to represent himself, it would be addressed at that time.

¶ 8 On December 14, 2009, a pretrial hearing was held. The trial court noted defendant filed several motions *pro se*, including a motion to represent himself. The court discussed defendant's desire to proceed *pro se*. The court told defendant representing himself was "not a smart decision." The court further explained to defendant he had been appointed a competent attorney, and if he gave up the public defender, he would not be offered another. The court went on to explain to defendant he would be at a disadvantage if he proceeded *pro se*. The

court asked defendant whether he was on any type of medications, how far he had gone in school, whether he could read or write, and whether he had any mental health diagnoses. Defendant stated he could read and write and finished ninth grade. As for his mental health, defendant stated he was not currently on any medications and his mental health diagnoses were deferred at that time.

¶ 9 The trial court advised defendant a person "unfamiliar with legal procedures" may give the prosecution an advantage by failing to make objections to inadmissible evidence, may not make effective use of *voir dire* of jurors and may make tactical decisions producing unintended consequences. The court told defendant if he represented himself, he would not be able to raise the issue of his representation on direct appeal and his defense might be diminished by his dual role as attorney and client. He was told he would not receive any special consideration from the court and would not get extra time to prepare or any greater library time in prison. Defendant stated he understood and had no questions. The court then granted defendant's request to represent himself. Defendant was not given the admonitions required by Supreme Court Rule 401(a): the nature of the charge, the minimum and maximum sentences prescribed by law, and that he has the right to counsel and free, appointed counsel if he is indigent.

¶ 10 Defendant proceeded to represent himself, including presenting several pretrial motions regarding his attempt to present an insanity defense. Defendant requested discovery of his complete health records, especially those pertaining to his mental health, and also requested the appointment of a psychiatrist or psychologist to be an expert witness on his behalf in support of his claim of insanity. Included with his request for more mental health records were some mental health records dating back seven or eight years indicating he was evaluated by the

Department of Corrections, found to have engaged in self-harming behavior, and placed on suicide watch. He had been diagnosed with antisocial personality disorder and with paranoia. There was a question as to whether he had a history of severe childhood head injuries. The trial court denied defendant's motion for discovery as the information in regard to possible mental health issues was dated and deemed not relevant to the time period in which the charged aggravated battery occurred. The court did not specifically rule on the motion for appointment of a psychiatrist or psychologist. As defendant did not have mental health records or expert witnesses to state he was mentally ill, the court informed him he could not raise a defense of insanity.

¶ 11 Despite the trial court's ruling on defendant's insanity defense, he attempted to raise it at every pretrial hearing and again at the start of his jury trial on October 20, 2010. At the beginning of the jury trial, defendant stated in front of the jury he did not believe in jury trials and did not participate in *voir dire* of the jurors. He engaged in limited cross-examination of the State's witnesses due to his desire to present an insanity defense and was cut off by the court when he attempted to raise the issue of his insanity.

¶ 12 The State's witnesses testified defendant claimed one of the Department of Correction's guards gave his meal tray to another inmate and then he threw a milk carton containing urine and feces at the guard. The guard's stained uniform was presented as evidence. Defendant and another inmate testified the guard had given defendant's mail to another inmate and this was a recurring problem which precipitated defendant's ire at the guard. The other inmate did not see the incident, however, and could not say whether defendant threw anything at the guard. Defendant testified was he was angry over his mail delivery and threw a milk carton

at the guard but it never made it out of his cell and did not break. Therefore, it could not have spilled its contents onto the guard.

¶ 13 The jury returned a verdict of guilty. Defendant filed a posttrial motion, again raising the issue of an insanity defense. At the sentencing hearing on January 22, 2011, the trial court found the issue was already ruled on and denied the motion. The court then sentenced defendant to a five-year term of imprisonment to be served consecutively to the term of natural life he was already serving. This appeal followed.

¶ 14 II. ANALYSIS

¶ 15 Defendant argues the trial court failed to comply with Supreme Court Rule 401(a) when it allowed him to waive his right to be represented by counsel. Rule 401(a) provides in part:

"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." Ill. S. Ct. R. 401(a) (eff. July 1, 1984).

¶ 16 The trial court must give these admonitions to the defendant at the time it accepts

the defendant's waiver of counsel. *People v. Jiles*, 364 Ill. App. 3d 320, 329, 845 N.E.2d 944, 952 (2006). By failing to tell defendant, on December 14, 2009, "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," the court failed to comply with Rule 401(a) and defendant's waiver of counsel on that date was invalid. Ill. S. Ct. R. 401(a)(2) (eff. July 1, 1984). The remedy is to remand the case for a new trial with directions to comply fully with Rule 401(a). *People v. Langley*, 226 Ill. App. 3d 742, 753, 589 N.E.2d 824, 832 (1992).

¶ 17 The State argues, however, defendant has forfeited this issue by failing to raise it in the trial court either at the time of trial or in a posttrial motion. Defendant acknowledges the issue was not raised in the trial court but contends it was plain error and is not forfeited. We agree. See *People v. Herring*, 327 Ill. App. 3d 259, 261-62, 762 N.E.2d 1186, 1188 (2002) (right to counsel so fundamental, claim of no effective waiver of counsel will be reviewed as plain error).

¶ 18 The State contends if the issue is not forfeited, the trial court substantially complied with Rule 401(a) and defendant's waiver of counsel was knowingly and voluntarily made. The State points out defendant was told the nature of the charge and the minimum and maximum sentences prescribed by law on November 9, 2009, at his preliminary hearing. He was not told the sentence would be consecutive to the sentence he was already serving and was not admonished of that fact until after his waiver of counsel was accepted. The admonishments given to defendant were done in a piecemeal fashion and were given prior to his waiver of counsel. Prior admonishments, given to a defendant several months earlier, when the defendant

was not requesting to waive counsel, do not satisfy Rule 401(a) and do not constitute substantial compliance. *People v. Stoops*, 313 Ill. App. 3d 269, 275, 728 N.E.2d 1241, 1245 (2000); *Langley*, 226 Ill. App. 3d at 749-50, 589 N.E.2d at 830.

¶ 19 The fact there is no effective waiver of counsel without proper admonitions is complicated by the issue of defendant's mental health and his fitness to represent himself or even be tried. Although the mental health records before the court were several years old, there is no question on this record his current mental health status was undetermined as it had been "deferred," and defendant's statements and behavior were possibly indicative of mental health issues. By the time a presentence investigation report was prepared, it included findings defendant had demonstrated "psychotic symptoms" and "agitated depression" in 2009, the year in which this incident occurred. Significant questions were raised as to the status of defendant's mental health, which makes compliance with Rule 401(a) all the more important.

¶ 20 III. CONCLUSION

¶ 21 For the foregoing reasons, we vacate the judgment of the trial court and remand this case with directions to give defendant a new trial, either with the assistance of counsel or, after fully complying with Rule 401(a), without the assistance of counsel.

¶ 22 Vacated and remanded with directions.