

remand his case so that he may be properly admonished by the trial court. We find that his plea was negotiated and dismiss his appeal.

¶3

BACKGROUND

¶4 Defendant was charged by information with: (1) home invasion (720 ILCS 5/12-11(a)(2) (West 2010)); (2) residential burglary (720 ILCS 5/19-3(a) (West 2010)); and (3) robbery (720 ILCS 5/18-1(a) (West 2010)). On March 25, 2013, defendant participated in a Rule 402 conference. See Ill. Sup. Ct. R. 402 (eff. July 1, 2012). On April 9, 2013, the State entered a *nolle prosequi* on the residential burglary and robbery charges and defendant pled guilty to the home invasion charge. At that time, the following exchange took place between defense counsel and the trial court:

“DEFENSE COUNSEL: On the last court date we did conduct a 402 conference and your Honor did make Mr. Hymond the offer of eight years on the home invasion.

DEFENSE COUNSEL: And I believe that Mr. Hymond wishes to accept the offer.

THE COURT: Motion state *nolle pros* counts two and three.

Defendant demands trial.

Plea of guilty on count one.”

¶5 Thereafter, the court advised defendant of the consequences of waiving his rights to a trial and inquired into the voluntariness of his plea. Of particular note, the trial court asked defendant:

“THE COURT: Other than the promise that your sentence would be eight years in the Illinois Department of Correction[s], have there been any other promises made to you to get you to plea[d] guilty other than that?

THE DEFENDANT: No.”

¶6 The parties then stipulated to the factual basis for defendant’s plea and the trial court accepted the plea. At the sentencing phase, the trial court offered the State and defendant the opportunity to present aggravating and mitigating evidence, but both parties rested on the Rule 402 conference. The trial court sentenced defendant to eight years in prison and gave defendant the following admonishments:

“THE COURT: You do have a right to appeal the sentenc[ing] order that I have just entered.

But before you can take an appeal you must file a written motion to vacate the judgment and for leave to withdraw the plea of guilty and the sentence.

When I use the word vacate, I mean erase or do away with.

That motion must be filed in this court within 30 days of today and it m[u]st be in writing and it must set out your reasons for asking me to allow you to withdraw your plea of guilty.

Any reason not put in that written motion cannot be used in any appeal that you take from the sentence and that in any appeal taken from the judgment on the plea of guilty, any issue or claim of error not raised in the motion to vacate the judgment and to withdraw the plea of guilty shall be deemed waived.

If you do not have the money to hire a lawyer and buy a transcript, a copy of this transcript will be given to you without cost and a lawyer will be appointed to help you prepare the motion to vacate your plea and sentence.

If your motion to withdraw your plea of guilty is allowed, then upon request of the State any other charges that were amended or dismissed as part of the plea agreement would be reinstated.

Lastly, if the motion to vacate the plea is allowed, then the guilty plea, the judgment of guilty, and the sentence will be vacated and a trial date would then be set on the charge to which you pled guilty. Do you understand?

THE DEFENDANT: Yes, Sir.”

¶7 Two weeks after pleading guilty, defendant filed a *pro se* notice of appeal. This appeal followed.

¶8 ANALYSIS

¶9 Defendant raises two points on appeal. First, he contends that he entered into an open plea rather than a negotiated plea. Accordingly, he claims that he should have been admonished

pursuant to Illinois Supreme Court Rule 605(b) (Ill. Sup. Ct. R. 605(b) (eff. Oct. 1, 2001)).

Second, defendant argues that, to avoid a possible Sixth Amendment violation, we should construe Illinois Supreme Court Rule 606(a) (Ill. Sup. Ct. R. 606(a) (eff. Feb. 6, 2013)) “as requiring the appointment of counsel to prepare the proper post-plea motion when an indigent defendant, convicted in a guilty plea, files a *pro se* notice of appeal” because “[p]erfecting an appeal, following a guilty plea, is a critical stage ***.” In response, the State argues that defendant was convicted pursuant to a negotiated guilty plea. With respect to defendant’s constitutional argument, the State replies that defendant’s argument is foreclosed by *People v. Merriweather*, 2013 IL App (1st) 113789, and that in any event defendant’s argument fails independently because the 30-day period following a guilty plea during which a defendant may move to vacate his or her plea is not a critical stage.

¶10 “[A] negotiated plea is one in which the prosecution has bound itself to recommend a specific sentence, or a specific range of sentence, or where the prosecution has made concessions relating to the sentence to be imposed and not merely to the charge or charges then pending.” Illinois Supreme Court Rule 605(c) (Ill. Sup. Ct. R. 605(c) (eff. Oct. 1, 2001)). By contrast, in an open plea, the defendant pleads guilty “without receiving any promises from the State in return.” *People v. Evans*, 174 Ill. 2d 320, 332 (1996). Thus, in an open plea, the parties may argue for any permissible sentence, and the trial court retains its full sentencing discretion. *People v. Gooch*, 2014 IL App (5th) 120161, ¶ 18. “When an agreement is silent as to defendant’s sentence, the sentence does not go hand in hand with the plea because the State has failed to include any aspect of sentencing as an element of the plea agreement.” *Id.* ¶ 21. Such a plea agreement is “equivalent to an open plea.” *Id.* ¶ 22.

¶11 A defendant wishing to appeal from a guilty plea must follow the procedure set forth in Illinois Supreme Court Rule 604(d) (Ill. Sup. Ct. R. 604(d) (eff. Feb. 6, 2013)). Rule 604(d) provides in relevant part:

“No appeal from a judgment entered upon a plea of guilty shall be taken unless the defendant, within 30 days of the date on which sentence is imposed, files in the trial court a motion to reconsider the sentence, if only the sentence is being challenged, or, if the plea is being challenged, a motion to withdraw the plea of guilty and vacate the judgment.”

When a defendant enters into an open plea, Rule 604(d)'s motion-to-reconsider clause applies. *People v. Diaz*, 192 Ill. 2d 211, 225 (2000) (“A plea bargain which is silent as to sentencing is analogous to an ‘open’ plea, and the motion-to-reconsider-sentence clause of Rule 604(d) applies.”). When a defendant enters into a negotiated plea, Rule 604(d)'s motion-to-withdraw clause applies, and the defendant must file a motion to withdraw the plea and vacate the judgment. *Evans*, 174 Ill. 2d at 332. A defendant who fails to comply with Rule 604(d) waives his or her right to appeal. *In re William M.*, 206 Ill. 2d 595, 600-601 (2003).

¶12 When a defendant has been found guilty of an offense, the trial court must provide the defendant with certain admonishments. See generally Illinois Supreme Court Rule 605 (Ill. Sup. Ct. R. 605 (eff. Oct. 1, 2001)). With respect to guilty pleas, the admonishments the trial court must give the defendant are contained in sections (b) and (c) of Rule 605. When a defendant enters an open guilty plea, the trial court should administer an admonishment under Rule 605(b). *People v. Dunn*, 342 Ill. App. 3d 872, 878 (2003). When a defendant enters a negotiated guilty plea, the trial court should administer an admonishment under Rule 605(c). *Id.* The operative

difference between the two rules is contained in their second and third paragraphs. *Id.* Under Rule 605(c), when a defendant enters a negotiated guilty plea, the trial court must provide the following admonishments:

“(1) that the defendant has a right to appeal;

(2) that prior to taking an appeal the defendant must file in the trial court, within 30 days of the date on which sentence is imposed, a written motion asking to have the judgment vacated and for leave to withdraw the plea of guilty, setting forth the grounds for the motion;

(3) that if the motion is allowed, the plea of guilty, sentence and judgment will be vacated and a trial date will be set on the charges to which the plea of guilty was made;

(4) that upon the request of the State any charges that may have been dismissed as a part of a plea agreement will be reinstated and will also be set for trial;

(5) that if the defendant is indigent, a copy of the transcript of the proceedings at the time of the defendant’s plea of guilty and sentence will be provided without cost to the defendant and counsel will be appointed to assist the defendant with the preparation of the motions; and

(6) that in any appeal taken from the judgment on the plea of guilty any issue or claim of error not raised in the motion to

vacate the judgment and to withdraw the plea of guilty shall be deemed waived.”

¶13 By contrast, the second and third paragraphs of Rule 605(b) require that the trial court admonish a defendant making an open plea that:

“(2) that prior to taking an appeal the defendant must file in the trial court, within 30 days of the date on which sentence is imposed, a written motion asking to have the trial court reconsider the sentence or to have the judgment vacated and for leave to withdraw the plea of guilty, setting forth the grounds for the motion;

(3) that if the motion is allowed, the sentence will be modified or the plea of guilty, sentence and judgment will be vacated and a trial date will be set on the charges to which the plea of guilty was made[.]”

¶14 We first consider whether defendant entered into an open or negotiated plea. In analyzing this issue, we find *People v. Gougisha*, 347 Ill. App. 3d 158 (2004), and *People v. Dunn*, 342 Ill. App. 3d 872 (2003), instructive. In *Gougisha*, the defendant was charged with attempted murder, aggravated battery of a child, and two counts of aggravated battery. *Gougisha*, 347 Ill. App. 3d at 159. The parties conducted a Rule 402 conference, and at the following status hearing defense counsel stated “I believe as a result of the 402 conference on the last Court date, the defendant will be entering a plea of guilty to count 2 *** in exchange for your Honor’s offer of 12 years Illinois Department of Corrections.” *Id.* at 160. The defendant did not file a motion to withdraw her plea, but instead filed a late notice of appeal. *Id.* On

appeal, the defendant contended that she entered into an open plea and therefore a remand was necessary so she could be admonished pursuant to Rule 605(b). *Id.*

¶15 The court found that defendant had entered into a negotiated plea. The court specifically noted that defense counsel’s statement that defendant would accept “your Honor’s offer *** illustrate[d] that the parties agreed to the 12-year prison term in exchange for defendant’s guilty plea, and the court concurred with the terms of the agreement.” *Id.* at 161.

¶16 In *Dunn*, the defendant pled guilty to one count of residential burglary and was sentenced to 20 years in prison. *Dunn*, 342 Ill. App. 3d at 874. In addressing the defendant, the trial court stated “I did say on a prior occasion if you plead guilty, I would sentence you to 20 years ***.” *Id.* at 875. On appeal, the defendant argued that he merely entered into an agreement with the trial court. The court rejected defendant’s argument and found that he had entered a negotiated plea. The court found that the trial court’s statement regarding defendant’s sentence did not indicate an agreement between the judge and defendant, but rather merely “illustrates the trial court satisfied the requirements of [Illinois Supreme Court Rule] 402(b),” which requires the court confirm in open court the terms of any plea agreement. *Id.* at 880; see also Ill. Sup. Ct. R. 402(b) (eff. July 1, 2012). As additional evidence that defendant entered a negotiated plea, the court noted that defendant’s 20-year sentence was “closer to the minimum available under the extended-term sentencing range and demonstrates that, pursuant to the agreement reached during the Rule 402 conference, the State was foreclosed from arguing for a sentence from the full range of penalties available under the law.” *Dunn*, 342 Ill. App. 3d at 880.

¶17 Here, there are two key facts demonstrating that defendant entered into a negotiated plea. First, before accepting defendant’s plea, the trial court referred to “the promise that your sentence would be eight years” without any objection or correction on the part of the State or

trial counsel. The statements of the trial court are strong evidence that the parties agreed to an eight year sentence in exchange for defendant's guilty plea. See *Gougisha*, 347 Ill. App. 3d at 161. This leads us to conclude that the State was prevented from "seeking a sentence from the full range of available penalties" and that defendant therefore entered into a negotiated plea. *People v. Smith*, 406 Ill. App. 3d 879, 889 (2010); see also *Gougisha*, 347 Ill. App. 3d at 161; *Dunn*, 342 Ill. App. 3d at 880.

¶18 Second, defendant pled guilty to a Class X felony. See 720 ILCS 5/12-11(c) (West 2010) ("Home invasion in violation of subsection (a)(1), (a)(2), or (a)(6) is a Class X felony."). Class X felonies carry a sentencing range of six to thirty years. 730 ILCS 5/5-4.5-25 (West 2012). Yet, defendant received an eight year sentence, which falls at the extreme low end of the permissible range of sentences defendant could have received. The fact that defendant received such a mild sentence is strong evidence that the State was precluded from seeking the full range of penalties against defendant. See *Gougisha*, 347 Ill. App. 3d at 161-62; *Dunn*; 342 Ill. App. 3d at 880. Accordingly, we find that defendant entered into a negotiated plea.

¶19 Defendant nonetheless contends that the eight year offer was "made by the judge" and therefore defendant entered into an open plea. We have reviewed the record and can find no evidence suggesting that defendant's agreement was with the trial court rather than the State. To the extent that defendant relies on trial counsel's statement "your Honor did make Mr. Hymond the offer of eight years on the home invasion," that language simply indicates that the parties entered into an agreement and the trial court concurred. *Gougisha*, 347 Ill. App. 3d at 161. Finally, we find, contrary to defendant's assertion, that the agreement was stated in open court. See Ill. Sup. Ct. R. 402(b). During the proceedings on April 9, 2013, the trial court noted that the State was going to *nolle prosequi* counts two and three and that defendant was "promised" an

eight year sentence. Based on the foregoing, we reject defendant's arguments to the contrary and find that defendant entered into a negotiated plea.

¶20 Next, we must determine whether defendant was properly admonished by the trial court. We consider questions of compliance with a supreme court rule *de novo*. *People v. Hall*, 198 Ill. 2d 173, 177 (2001). Because we find that defendant entered into an open plea, the trial court was required to admonish defendant pursuant to Rule 605(c). *Dunn*, 342 Ill. App. 3d at 878. We have reviewed the record and find that the trial court's admonitions were consistent with Rule 605(c).

¶21 The fact that defendant (1) did not comply with Rule 604(d)'s written motion requirement and (2) received proper admonishments from the trial court requires that we dismiss defendant's appeal. "Rule 604(d) establishes a condition precedent for an appeal from a defendant's plea of guilty." *People v. Wilk*, 124 Ill. 2d 93, 104 (1988). Although courts have carved out a narrow exception to Rule 604(d)'s written motion requirement in instances where the defendant received inadequate admonishments, (*People v. Foster*, 171 Ill. 2d 469, 473 (1996); *People v. Lloyd*, 338 Ill. App. 3d 379, 384 (2003)), that rule does not apply in this case because defendant did receive proper admonishments. Accordingly, we must dismiss defendant's appeal.

¶22 That requires us to consider defendant's constitutional argument. Defendant's argument proceeds in two steps. First, citing *Mempa v. Rhay*, 389 U.S. 128 (1967), he asserts that the 30-day period following entry of a guilty plea is a critical stage of criminal proceedings. Second, citing *Roe v. Flores-Ortega*, 528 U.S. 470 (2000) and *Evitts v. Lucey*, 469 U.S. 387 (1985), defendant contends that Rule 606(a), unless construed as requiring the appointment of counsel,

violates the Sixth Amendment because it invites criminal defendants to perfect appeals by filing a notice of appeal “regardless of whether that defendant would be waiving his appeal rights ***.”

¶23 This division rejected those arguments in *People v. Merriweather*, 2013 IL App (1st) 113789. We find no reason to depart from the analysis and result obtained in that case.

¶24 Appeal dismissed.