2015 IL App (2d) 130771-U
No. 2-13-0771
Order filed March 4, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 07-CF-0829
FREDERICK HAMPTON	)	Honorable Patricia Piper Golden Susan Clancy Boles Judges, Presiding.
Defendant-Appellant.	)	

JUSTICE McLAREN delivered the judgment of the court.
Justices Jorgensen and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly found that delays in commencing trial were attributable to defendant; therefore, defendant's right to a speedy trial was not violated. The trial court properly determined that the complaining witness was unavailable for trial and, therefore, when her prior testimony was admitted, defendant was not denied his sixth amendment right to confront the witness pursuant to *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

¶ 2 Defendant, Frederick Hampton, appeals from his conviction for aggravated domestic battery (720 ILCS 5/12-3.3(a) (West 2006)), arguing that: (1) his right to a speedy trial was

violated; and (2) the admission of the victim's prior testimony and out-of-court statements violated his sixth amendment right to confrontation. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged on July 10, 2007, by indictment with aggravated domestic battery (720 ILCS 5/12-3.3(a) (West 2006)) in that he "kicked Deanna M. Simmons about the body, causing a lacerated liver" in violation of 720 ILCS 5/12-3.3(a) (2006). Defendant represented himself at his first trial in 2009. He was convicted by a jury and sentenced to 14 years' imprisonment. He appealed and, on June 29, 2012, this court reversed his conviction and remanded for a new trial because he had not validly waived his right to counsel (*People v. Hampton*, 2012 IL App (2d) 100856-U) (*Hampton I*). On retrial, defendant again represented himself. A jury convicted him of the same charge and he was again sentenced to 14 years' imprisonment. In *Hampton* I, we found that defendant's waiver of counsel was invalid because the trial court did not comply with the requirement of Illinois Supreme Court Rule 401(a)(2) (eff. July 1, 1984), that a defendant must be informed of the maximum and minimum penalties applicable in light of his criminal history. Defendant waived counsel after being told that he might receive probation or a prison term of three to seven years, but his criminal history made it necessary to sentence him as a Class X offender and he faced a mandatory prison term of 6 to 30 years. The deprivation of the right to counsel, in the absence of an effective waiver, is plain error (*People v. Vernón*, 396 Ill. App. 3d 145, 150 (2009)); therefore, on June 29, 2012, we reversed defendant's conviction and remanded for a new trial. This court's mandate issued on Friday, August 10, 2012.

¶ 5 This appeal, *Hampton II*, began on August 13 when the Kane County circuit clerk order stamped the mandate "received." On August 16, defendant appeared in court and informed the

trial judge that he wanted to proceed *pro se*. On August 20, the trial court accepted his waiver of counsel, and the State filed a motion to increase bond. Defendant filed a motion to strike, and, after hearing arguments on the motion to strike and the motion to increase bond, the trial court set defendant's bond at $100,000. After lengthy exchanges in court, during which defendant was removed for a time, the trial court concluded the hearing with the following: "I am at this time finding the court reporter could not possibly make a record, and Mr. Hampton on a number of occasions faced with his back to me and would not turn around; and although I was speaking, told me that I was not speaking."

¶ 6 On August 23, the trial court set the case for trial on October 22, 2012.

¶ 7 On October 18, the State filed a motion for continuance because it was unable to locate the doctor and nurse who had treated the victim, Deanna Simmons, in July 2007. The motion was allowed over defendant's objection. On October 23, the trial date was set for December 17. Defendant indicated he "could be ready by then." The prosecutor then asked defendant "if this is a by agreement date," and defendant responded "No."

¶ 8 On October 30, during a status hearing on the bill of particulars, defendant informed the trial court that he was unable to prepare for trial because he needed "seeing glasses" because "I can't see very well." Defendant stated that he was unable to prepare for trial because he was unable to see. He also stated that he had glasses with tinted lenses for photosensitivity; he had prescription glasses but had to "get up on stuff like this to see." He also stated that he had prescription glasses at his first trial but that they were broken. He represented that he needed a court order for the jail to arrange an eye examination and new glasses. The trial court instructed the prosecutor to investigate the jail's procedures regarding eye examinations for inmates.

¶ 9 On November 6, with defendant absent, the prosecutor reported to the trial court that the medical department at the jail informed her that defendant needed to request to see a doctor for an evaluation. Based on the evaluation, defendant would either be referred to another location or would see someone at the jail. The trial court then set the matter for November 13, for filing of motions and to bring defendant to court.

¶ 10 On November 13, defendant stated that no referral had been made in order for him to see a doctor. Defendant complained of his inability to see distance and also that bright lights gave him headaches. He represented to the court that he needed to have an eye exam in order to "get the glasses that I need and have them ready for trial." Defendant also filed a motion for a speedy trial.

¶ 11 On December 11, while both defendant and the State answered ready for trial, defendant did not have his witness list ready for the court and indicated he needed copies made of various documents. He had subpoenaed as witnesses both assistant state's attorneys assigned to prosecute the case. He also subpoenaed Judge Golden. The State filed a motion to quash the subpoenas as to the two prosecutors. A hearing was set for the next day as to the motion to quash. Defendant made no complaint about his vision.

¶ 12 On December 12, Judge Brawka, after hearing arguments, denied the State's motion to quash as to one of the prosecutors, but denied defendant's motion to subpoena Judge Golden and the other prosecutor under the "special witness" doctrine. Judge Brawka then set the matter for the next day in front of Judge Golden for final pretrial. Defendant did not complain about his vision.

¶ 13 On December 13, defendant appeared *pro se* before Judge Golden. After a short discussion about readiness for trial the following Monday, Judge Golden inquired about

defendant's lack of glasses. He informed the court that bifocal glasses had been delivered but that he returned them because he couldn't see with them and they were the "wrong prescription." He stated that the bifocals caused him to see "three on one side and four on the other." He was told that "it takes a few days." He continued: "I needed seeing glasses. I can't see far away. I can see close up just fine. I don't need glasses to read with or none of that stuff. I just put it up to my face and read." Defendant also stated that he needed tinted lenses because he got "super" migraine-like headaches "from the light." After further discussion, defendant answered ready for trial. The trial court responded that if defendant's glasses did not work and he could not see beyond four or five feet as represented, going to trial because he answered ready would mean he would automatically have an "ineffective assistance of counsel" claim due to his myopic self-representation. The trial court further observed that defendant had to hold papers very close which might have been the reason for a bifocals prescription. Defendant continued to insist on going to trial and demanded "speedy trial and a writ." The trial court then stated "I am finding that based on what he has represented cannot see and that I don't see that he can effectively represent himself at the trial" (defendant previously informed the trial court that he was unable to prepare for trial because he needed "seeing glasses"). **T**he trial court continued the matter to December 17 for status.

¶ 14 On December 17, the trial court iterated its concern regarding self-representation that defendant was unable to see beyond four feet and that in order to pick a jury and conduct a trial he would need to be able to observe faces. Defendant also seemed to be unable to read papers without holding them very close to his face. The trial court observed that defendant had not worn his new bifocals in order to get used to them. Defendant then stated that he didn't need bifocals or glasses in order to read, he only needed glasses for distance. The trial court instructed

defendant to attempt to wear the glasses in order to get used to them, telling him "I think you have a duty." On the court's own motion, the matter was continued to January 3, 2013, for status.

¶ 15 On January 3, 2013, defendant appeared without his glasses and in a wheelchair (no explanation of the necessity of a wheelchair was given). He informed the court that he was in segregation in the jail and there was "nobody to ask" about the glasses. On the court's own motion, the matter was continued to January 7 for status, on which date defendant appeared with his glasses, but he was not wearing them. Defendant was on crutches but not in a wheelchair. He informed the court that he could not see with the bifocal glasses. The trial court expressed concern that he would not be able to prepare his defense if he was unable to see. The matter was again continued to January 14 for status.

¶ 16 On January 14, defendant appeared with two pairs of glasses; he received one pair that was not bifocals immediately prior to appearing in court. He had worn them for "maybe about 30 seconds." The prescriptions for distance were the same. He stated that he was unable to see distance or details out of either pair. Judge Golden ordered that defendant "be brought to the optician to have his glasses evaluated." No demand for trial was made. The matter was continued to January 22 for status.

¶ 17 On January 22, the case was reassigned to Judge Boles due to the retirement of Judge Golden. The next day, defendant appeared before Judge Boles. He stated that he was given the wrong prescriptions and that, in the prior week or two, he was taken to the optometrist to recheck the prescription, but his eyes were not rechecked at that time. The cause was set for trial on February 4.

¶ 18 On February 4, Judge Boles presiding, defendant appeared *pro se* in a wheelchair. Defendant did not have his glasses and stated that he could not see with his glasses. Defendant answered ready and demanded trial. The trial court tested defendant's vision by having the bailiff hold up fingers while sitting in both the witness chair and in the jury box. Defendant, seated at the defense table, was unable to see the bailiff's hand gestures. The court found defendant unfit to proceed due to his continued vision problems and ordered a new vision examination from a different specialist. The trial court continued the matter to March 6, over defendant's objection.

¶ 19 On March 6, defendant appeared with new glasses and indicated he was able to see. The trial court, Judge Boles presiding, set a trial date of March 25.

¶ 20 On March 12, 2013, the trial court held a fitness hearing at which the parties stipulated to the findings of the eye doctor. The trial court further tested defendant's eyes, although defendant argued "Let's not do this. Let's just skip over that." The trial court stated "No, we're not going to skip over that." The trial court then instructed the bailiff to sit in the far chair in the jury box and also on the witness stand while defendant remained at the defense counsel's table. Defendant correctly identified the number of fingers the bailiff held up. The court found defendant physically fit to stand trial and set the trial for March 18.

¶ 21 On March 18, Simmons failed to appear even though she had been subpoenaed to testify. Judge Boles issued a warrant, and put the case over until the next day.

¶ 22 The following day, the State informed the court that it was unable to find Simmons, and moved for a continuance. Defendant objected and filed *pro se* a motion to dismiss charges pursuant to statute (725 ILCS 5/114.1 (West 2013)), arguing that the speedy trial term had elapsed. After hearing arguments, the trial court denied his motion, finding that the 53-day delay

between December 13 and February 4 was attributable to defendant. The trial court then granted the State a continuance until March 27 for status on the availability of Simmons. The cause was set for trial on April 1.

¶ 23 On March 27, the State moved to introduce Simmons' prior testimony at defendant's first trial because she had become unavailable. The State indicated Simmons had left a message saying she was unable to attend the trial to testify; the State had served her with a subpoena and a warrant issued for her failure to appear. The State indicated it had been unable to locate her or reach her by telephone. Defendant objected, arguing that her testimony at trial and at his sentencing hearing was inconsistent and amounted to perjury. The trial court declared Simmons unavailable "at this time" and granted the State's motion, with the caveat that if Simmons could be located before the trial date, the State would not be allowed to use the transcript of her testimony from defendant's first trial.

¶ 24 On April 1, the State was still unable to locate Simmons. Defendant moved the trial court to reconsider its prior ruling, arguing that the State had not established that she was unavailable, her prior testimony was untrustworthy, and that he was denied an opportunity to confront the witness. The trial court denied the motion to reconsider.

¶ 25 Defendant also re-argued his motion to discharge, which the trial court then denied. Defendant then indicated that he was unable to stand without crutches, and that he had been brought to the courtroom in a wheelchair. The State indicated that the jail kept the crutches because a doctor had determined that defendant no longer needed them.[1] Additionally, defendant was not wearing his glasses, and informed the trial court that the jail had taken his

[1] The jail provided the trial court with a written opinion from the doctor at the jail that indicated defendant was able to put full weight on both his legs and no longer needed crutches.

glasses and his tinted lenses because the State "talked to the commander and the commander sent word for them to come in and shake [his] cell down." Defendant stated that he could not see. The trial court then ordered that his crutches, glasses, and tinted lenses be brought to the courtroom.

¶ 26 The trial commenced before a jury.

¶ 27 Dana Demeter, R.N., testified that on February 22, 2007, she worked in the intensive care unit at Provena Mercy Medical Center and cared for Simmons. Demeter identified photographs of Simmons' injuries, which were then admitted into evidence. Demeter testified that Simmons received several phone calls from her boyfriend that upset her. Demeter told the caller to stop calling because Simmons needed to rest.

¶ 28 Dr. Kaleem Khan testified that in February 2007 he treated Simmons at Provena. She had a lacerated liver that caused internal bleeding. Defendant cross-examined Dr. Khan at length. During the cross-examination, defendant moved for a mistrial because Dr. Khan testified to "third-party information hearsay, not direct knowledge of anything." The trial court denied the motion.

¶ 29 Aurora police officer Jason Sheldon testified that, on February 23, he interviewed Simmons. Simmons told him that defendant had beaten her in a stairwell, then forced her to walk five blocks to an apartment they shared. She told Sheldon that she was in pain at that point, so she went to a laundromat to find a person named Waymon James who sometimes helped her. James took her to the hospital. Simmons appeared scared and nervous while talking to Sheldon, and told him that she was afraid defendant would "come after her." On cross-examination, Sheldon testified that he was aware that Simmons had an outstanding warrant for her arrest.

¶ 30 Detective Roger Bara testified that he investigated the incident and interviewed Simmons at the Kane County jail on March 20, 2007. He stated that Simmons identified defendant as her assailant. An audiotape of the interview was admitted into evidence and played for the jury in open court.

¶ 31 The trial court, having declared Simmons unavailable, allowed her testimony from defendant's first trial to be read into the record. Her testimony at the first trial recited the details of the attack and subsequent injuries. Simmons claimed not to know who inflicted her injuries, but admitted that she had told a police officer in a recorded statement that defendant attacked her. She testified that she had lied to the police.

¶ 32 Lieutenant Dean Holste, Kane County Sheriff's Department, testified that he was an administrative lieutenant for the jail and was responsible for the inmate telephone system and visiting system. Holste testified that calls made by inmates and conversations between inmates and visitors were recorded. Pursuant to subpoena, Holste pulled a recording of a 30-minute visit on March 15, 2007, between defendant and Simmons. A three-minute segment of the recording was admitted into evidence and played for the jury.

¶ 33 After the State rested, defendant testified on his own behalf. Due to the late hour, court adjourned for the day before cross-examination. The next morning, April 3, the State informed the court that Simmons had been arrested on a warrant the night before and had agreed to testify. A discussion ensued during which defendant indicated he did not know whether he would call Simmons during his case in chief. When Judge Boles indicated trial would recommence before the jury and defendant would be cross-examined, defendant complained that he was not finished with his own direct testimony, and he asked for leave to file a motion for a substitution of judge, which was denied. The only comment regarding Simmons's present availability occurred when

the trial court asked him twice whether he intended to call Simmons as a witness; his first answer was non-responsive, and his second answer was "I don't know." The trial reconvened. Although Simmons was available, she was not called to testify by either the State or defendant.

¶ 34 The State began to cross-examine defendant, but he refused to answer any questions. He was admonished that he was required to answer questions on cross examination. The following colloquy occurred in the presence of the jury:

THE COURT: All right. At this point, Mr. Hampton, do you have any additional witnesses you wish to call?

MR. HAPMTON: Um—I guess not, at this point. I am looking for—hang on.

THE COURT: All right. The defendant has indicated not at this time, so the defense rests; is that right, Sir?

MR. HAMPTON: Um—I would like to know why is the State looking up the radio. [sic].

THE COURT: Mr. Hampton, that doesn't concern you. My question to you—

MR. HAMPTON: It does if they intend on playing it.

THE COURT: Does the defense rest?

(Long pause.)

THE COURT: All right. Mr. Hampton is refusing to answer. He has indicated that he doesn't have any additional witnesses at this time. The Court is taking this yes, the defense is resting.

¶ 35 The trial court then granted the State's motion to strike his direct testimony in its entirety. Defendant indicated he would call no other witnesses and rested his case. After arguments, the

jury retired. The trial court held defendant in direct criminal contempt and sentenced him to four months in jail, commencing immediately.

¶ 36 The jury convicted defendant of aggravated domestic battery. Defendant timely appealed.

¶ 37 II. ANALYSIS

¶ 38 A. Speedy Trial

¶ 39 In Illinois, a defendant has both a constitutional and a statutory right to a speedy trial. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8; 725 ILCS 5/103-5 (West 2010). The Illinois speedy-trial statute contained in the Code of Criminal Procedure of 1963 (Code) implements the constitutional right to a speedy trial. *People v. Cordell*, 223 Ill.2d 380, 385-86, (2006). The speedy-trial provisions of the Code are to be liberally construed in favor of a defendant because they were enacted to avoid infringements of the defendant's constitutional speedy-trial right. *People v. Bauman*, 2012 IL App (2d) 110544, ¶ 16 (citing *People v. Kohler*, 2012 IL App (2d) 100513, ¶ 23). Defendant asserts that his statutory right to a speedy trial was violated because he was not brought to trial within the 120-day speedy trial term. 725 ILCS 5/103-5 (West 2012). We disagree.

¶ 40 The pertinent statutes are as follows. An incarcerated defendant must be brought to trial within 120 days of his demand for trial. 725 ILCS 5/103-5 (West 2010). However, section 103-5(f) provides that delay caused by the defendant temporarily suspends the running of the speedy-trial period until the expiration of the delay, at which point the statute shall recommence to run. 725 ILCS 5/103-5(f) (West 2012); see *People v. McDonald*, 168 Ill.2d 420, 438-39 (1995); *People v. Bowman*, 138 Ill.2d 131, 149, 149 (1990). Section 114-1(a)(1) of the Code (725 ILCS 5/114-1(a)(1) (West 2010)) provides that, upon motion of the defendant prior to trial, the court

may dismiss an indictment on the grounds that a defendant has not been placed on trial in compliance with Section 103-5.

¶ 41 Section 114-4(i) of the Code, in turn, states:

> "(i) Physical incapacity of a defendant may be grounds for a continuance at any time. If, upon written motion of the defendant or the State or upon the court's own motion, and after presentation of affidavits or evidence, the court determines that the defendant is physically unable to appear in court or to *assist in his defense*, or that such appearance would endanger his health or result in substantial prejudice, a continuance shall be granted. *** *Such continuance shall suspend the provisions of Section 103-5 of this Act, which periods of time limitation shall commence anew* when the court, after presentation of additional affidavits or evidence, has determined that such physical incapacity has been substantially removed." (Emphases added.) 725 ILCS 5/114-4(i) (West 2008).

Additionally, section 103-5(c) pertains to the State's request and provides:

> "If the court determines that the State has exercised without success due diligence to obtain evidence material to the case and that there are reasonable grounds to believe that such evidence may be obtained at a later day the court may continue the cause on application of the State for not more than an additional 60 days. 725 ILCS 5/103-5(c) (West 2012).

¶ 42 A delay is "occasioned by the defendant" when the defendant's acts caused or contributed to a delay resulting in the postponement of trial. *People v. Hall*, 194 Ill. 2d 305, 326 (2000). The defendant bears the burden of affirmatively establishing a speedy-trial violation,

and in making his proof, the defendant must show that the delay was not attributable to his own conduct. See *People v. Jones*, 104 Ill. 2d 268, 280 (1984). A trial court's determination that a delay is attributable to a defendant is entitled to much deference and should be sustained absent a clear showing that the trial court abused its discretion. *People v. Hall*, 194 Ill. 2d 305, 327 (2000). The question before us is whether there was sufficient delay attributable to defendant to preclude a claim of a speedy trial violation. The trial court found that the statutory time period was suspended during the time that defendant remained in custody throughout the period of time in question. The speedy trial term began to run on August 13, 2013, when the Kane County circuit court clerk entered the final order for a new trial that was ordered in *Hampton I*. The time computation between August 13 and December 13 is not disputed; the parties agree that this time period accounted for 55 days of the 120 day term.

¶ 43 At issue here is the trial court's finding that the 53-day period between December 13, 2012, through February 4, 2013, was attributable to defendant. Defendant argues that he demanded trial and that certain continuances during this time should not have been attributed to him. Specifically, defendant argues that the speedy trial was not tolled when, on December 13, he objected to his prescription glasses, telling the trial court that the prescription was wrong and that he did not need bifocals. He stated that he could not see distances but could read as long as the papers were close to his face. He refused to wear the bifocals that had been issued him. The trial court continued the matter to December 17.

¶ 44 On that date, the trial court noted that defendant's ability to represent himself might be impeded by his vision problems. She opined that defendant needed to wear the glasses prescribed for him in order to get used to them, and up until that time he had not done so.

¶ 45 Between December 17 and February 4, defendant continued to appear in court, and repeatedly demanded trial and answered ready. At each court appearance, Judge Golden addressed defendant's multiple complaints about his eyesight and headaches, but despite all efforts to accommodate his professed needs, he continued to express problems. On October 30, during a status hearing on the bill of particulars, defendant informed the trial court that he was unable to prepare for trial because he was unable to see, with or without glasses. At the same time, he refused to wear the prescription glasses that had been issued to him after an eye examination. Paradoxically, defendant continued to demand speedy trial.

¶ 46 Moreover, on January 14, he appeared in court with two pairs of glasses, one bifocal and one for distance only. On that date, he did not demand trial and he insisted that he could not see distance out of either pair. Until that date, his complaint had been that the bifocals distorted his vision and he insisted that he could read without glasses, despite having to hold paperwork very close to his face.

¶ 47 We note that the first time defendant complained about vision problems was on October 30 when, during a status hearing on the bill of particulars, he informed the trial court that he was unable to prepare for trial because he needed "seeing glasses" because "I can't see very well." His description was that he had "to get up on stuff" in order to see. While this description of his vision problem is somewhat unclear, on other occasions Judge Golden observed that while in court defendant had to hold paperwork very close to his face. On December 17, defendant stated that he only needed glasses for distance but did not need bifocals or glasses in order to read. This became a recurrent refrain throughout the pretrial proceedings, but at the same time, defendant continued to insist that he was ready to go to trial and now complains that his right to a speedy trial was violated because, by his accounting, 122 days attributable to the State elapsed

before his trial commenced. Considering the continuing representations made by the defendant regarding his need for "seeing glasses," the trial court's attribution of delay to the defendant was manifestly reasonable and supported by the manifest weight of the evidence.

¶ 48 B. Confrontation Clause

¶ 49 1. Forfeiture

¶ 50 As a preliminary matter, the State asserts that defendant forfeited his sixth amendment right to confront the witness argument because he did not include it in his posttrial motion for a new trial. In his reply, defendant responds that:

> "At page 4 of his post-trial motion, the defendant asserted: 7) That the trial court error [*sic*] in allowing perjuried [sic] trial and sentencing transcript be read into the records over the defendant's objections deny him a fare [*sic*] trial."

Defendant further asserts that, "when viewed in the context of the discussions that were held before and during the trial concerning the State's successful efforts to prosecute the defendant using Simmons' prior testimony," this allegation of error must be construed as defendant's effort to renew his complaint that his sixth amendment right to confront the witness against him had been violated. We agree, and we will address the merits of defendant's argument regarding his right to confront the witness as a perfected issue.

¶ 51 2. Admission of prior testimony

¶ 52 We review a trial court's ruling on the admission of former testimony is reviewed for an abuse of discretion. *People v. Torres*, 2012 IL 111302, ¶ 46 (addressing the issue of adequate cross-examination under the confrontation clause). However, a defendant's sixth amendment constitutional right to confront a witness is a question of law that we review *de novo*. *People v. Williams*, 238 Ill.2d 125, 141 (2010).

¶ 53 In *Crawford v. Washington*, 541 U.S. 36, 68 (2004), the United States Supreme Court held that where testimonial evidence is at issue, the Sixth Amendment demands unavailability and a prior opportunity for cross-examination. *Id*. at 68. Thus, in order to admit the prior testimony of a witness in a criminal proceeding, the State must satisfy the first requirement of unavailability. The State must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant. See *People v. Bowen*, 183 Ill.2d 103, 118 (1998). The prosecution is obliged to make a "good faith" effort to produce the witness, if there is even a remote possibility that "affirmative measures" will succeed. *People v. Torres*, 2012 IL 111302, ¶ ¶ 53-54. The lengths to which the prosecution must go to produce a witness is a question of reasonableness; the ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness. *Id*. As with other evidentiary proponents, the prosecution bears the burden of establishing this predicate. *Id*.

¶ 54 Here, the State subpoenaed Simmons to testify at trial. However, she became unavailable on the eve of trial. The State informed the trial court of the measures it was taking to find her, which included repeatedly telephoning, leaving messages, visiting her last known addresses, and ultimately issuing a warrant for her arrest for failure to appear on the morning of the trial. After two days of trial had concluded, the Aurora police located and arrested her, after her testimony from the first trial was admitted into evidence and the transcript read to the jury. We believe the State adequately demonstrated a good faith and reasonable effort to produce the witness. The trial court did not abuse its discretion in determining the witness was unavailable at the time the prior trial testimony was admitted into evidence. Later, when the witness became available, the defendant procedurally defaulted any error regarding the admissibility of the testimony of the now available witness.

¶ 55 3. Opportunity to Cross-examine

¶ 56 "The confrontation clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *People v. Hampton*, 387 Ill. App. 3d 206, 214 (2008). What matters is that defense counsel (in this case defendant himself) had a "fair opportunity" to inquire into a witness's observation, interest, bias, prejudice, and motive. *Torres*, 2012 IL 111302, ¶ 66.

¶ 57 Defendant complains that Simmons was "not previously cross examined." While it is true that in the first trial she was not cross-examined by defendant, the opportunity to cross-examine was afforded defendant when she testified during the State's case in chief. Defendant decided to forgo cross examination at that stage. Defendant then called Simmons as a defense witness and she answered his questions at that time. We agree with the State that because Simmons appeared at the first trial, testified under oath, and answered questions proffered by both the prosecution and the defense, she was available for cross-examination at the first trial for the purposes of the confrontation clause.

¶ 58 Defendant did not request an opportunity to cross-examine the now available witness (a second time). Additionally, defendant could have called Simmons on the morning of the third day of trial during his case in chief. The only comment regarding Simmons's present availability occurred when the trial court asked him twice whether he intended to call Simmons as a witness; his first answer was non-responsive, and his second answer was "I don't know." Instead, he chose to rest without calling any additional witnesses.

¶ 59 "The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." *Faretta v. California*, 422 U.S. 806, 819 (1975). We recognize that there are "difficulties inherent in *pro se*

representation." *People v. Allen*, 401 Ill. App. 3d 840, 852 (2010). However, a defendant proceeding *pro se* may not later complain that he received ineffective assistance of counsel, *People v. Simpson*, 204 Ill. 2d 536, 565 (2001). See also *People v. O'Neal*, 62 Ill. App. 3d 146, 150 (1978) (noting that once a defendant has waived his right to counsel, he cannot now be heard to complain that his *pro se* representation prevented him from receiving effective representation of counsel or a fair trial).

¶ 60 As we pointed out in *Hampton I*, it is well settled that a defendant may proceed *pro se* only if he "voluntarily, knowingly, and intelligently waives his right to counsel." *People v Black*, 2011 IL App (5th 080089, ¶ 11. We also noted that even though "defendant appears to have labored under a misunderstanding about certain critical legal concepts," he had more than a passing familiarity with the judicial process and demonstrated some knowledge of criminal procedure. This observation is even more valid since the proceedings after remand spanned many months, with defendant filing numerous motions and arguing in court on his own behalf.

¶ 61 In this case we do not find that defendant's waiver of counsel was invalid, as he intimates in his brief. Defendant adamantly insisted that he was waiving his right to counsel and he was repeatedly admonished throughout the proceedings as to the rights he was waiving and the duties involved in self-representation.

¶ 62 4. Ineffective Assistance of Counsel

¶ 63 In this appeal, defendant avers that in his first trial he was not provided with an opportunity to confront Simmons "within the meaning of the Sixth Amendment, because he did so without counsel and without having knowingly waived his right to counsel." This approach has some superficial appeal, but ignores that defendant received a new trial because the trial court did not comply with the requirement of Illinois Supreme Court Rule 401(a)(2) (eff. July 1,

1984) that a defendant be informed of the maximum and minimum penalties applicable in light of his criminal history. Defendant waived counsel after being told that he might receive probation or a prison term of three to seven years, whereas in fact he faced a mandatory prison term of 6 to 30 years because defendant's criminal history made it necessary to sentence him as a Class X offender. The law requires substantial compliance with the rule that a defendant be fully apprised of the full range of sentencing possibilities. *People v Vasquez*, 2011 IL App (2d) 091155, ¶ 14. In *Hampton I*, we found that the trial court had not advised defendant of the possible penalties, and, therefore, substantial compliance had not occurred.

¶ 64 We believe that defendant seeks to avoid the consequences of his decision to represent himself. The record shows that the defendant performed all of the duties of an attorney, including making an opening statement and closing argument, cross-examining witnesses, entering exhibits into evidence, objecting to witnesses' testimony, and submitting jury instructions. Defendant actively filed and argued motions on his behalf and participated in excusing jurors during *voir dire*. In other words, defendant was able to carry out the basic tasks needed to present his own defense without the help of counsel. At his retrial, defendant persisted in his wish to proceed *pro se*.

¶ 65 As we have stated, the right to defend oneself is personal and basic to our adversary system of criminal justice. *Faretta*, 422 U.S. 806, 818, 834. Defendant cannot now allege his counsel was ineffective because he himself made the decision to proceed *pro se*. Defendant could have requested counsel, could have requested to cross-examine the witness, or could have requested to call her in his case in chief. Defendant is asking for a fourth strike before being called "out."

¶ 66 C. Prior Inconsistent Statements

¶ 67 Defendant's final contention is that Detective Bara and Officer Sheldon's testimony regarding Simmons's statements to them identifying defendant as her attacker should have been barred. Defendant asserts that the statutory exception to hearsay that allows a prior inconsistent statement to be admitted as substantive evidence under certain circumstances (725 ILCS 5/115-10.1 (West 2012)) does not apply in this case. Section 115-10.1 of the Code provides as an exception to the hearsay rule that a prior statement by a witness may be admissible as substantive evidence as long as it is inconsistent with his trial testimony, the witness is subject to cross-examination concerning the statement, and the statement was made under oath at a trial, hearing, or other proceeding. *People v. Martinez*, 348 Ill.App.3d 521, 532 (2004). The State avers that the trial court did not abuse its discretion by admitting Simmons's prior statements as prior inconsistent statements. Detective Bara's testimony at the retrial and Simmons's recorded statement related to the same statements to which victim testified and acknowledged at the first trial. Defendant had an opportunity at that time to question Simmons about her statements to Bara. Therefore, the same reasoning regarding the opportunity to question Simmons about her prior inconsistent statement applies here. We note that the jury was instructed as to how it could consider hearsay testimony. The jury was instructed as follows:

> "The believability of a witness may be challenged by evidence that on some former occasion, he made a statement that was not consistent with his testimony in this case. Evidence of this kind ordinarily may be considered by you only for the limited purpose of deciding the weight to be given the testimony you heard from the witness in this courtroom. However, you may consider a witness' earlier inconsistent statement without this limitation when the statement narrates, describes or explains an event or condition the witness has personal knowledge of and the statement was written or signed

> by the witness or the witness acknowledged under oath that he made the statement. It is for you to determine whether the witness made the earlier statement, and if so, what weight should be given to that statement.
>
> In determining the weight to be given to an earlier statement, you should consider all of the circumstances under which it was made."

As such, we cannot determine if the jury improperly considered the testimony. We do determine that assuming, *arguendo*, that there was error, it was harmless.

¶ 68 III. CONCLUSION

¶ 69 For the reasons stated, we affirm.

¶ 70 Affirmed.