

**NOTICE**  
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2015 IL App (4th) 140036-U

NO. 4-14-0036

IN THE APPELLATE COURT  
OF ILLINOIS

FOURTH DISTRICT

**FILED**  
December 29, 2015  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
MICHAEL B. JACKSON,	)	No. 13CF181
Defendant-Appellant.	)	
	)	Honorable
	)	Scott Daniel Drazewski,
	)	Judge Presiding.

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JUSTICE APPLETON delivered the judgment of the court.  
Justices Steigmann and Pope concurred in the judgment.

**ORDER**

¶ 1 *Held:* The appellate court affirmed, concluding the trial court substantially complied with Illinois Supreme Court Rule 401 (eff. July 1, 1984) in admonishing defendant regarding his waiver of counsel.

¶ 2 After an October 2013 jury trial, the jury found defendant, Michael B. Jackson, guilty of unlawful possession of a controlled substance and unlawful possession of a controlled substance with intent to deliver. After merging the offenses, the trial court sentenced defendant to 10 years in prison on the latter offense. In this direct appeal, defendant contends his waiver of counsel was ineffective because the court accepted defendant's waiver before it admonished defendant in accordance with Illinois Supreme Court Rule 401(a) (eff. July 1, 1984). We affirm.

¶ 3 **I. BACKGROUND**

¶ 4 In February 2013, the State charged defendant by indictment with four drug offenses: (1) unlawful possession of a controlled substance with intent to deliver more than 15

grams but less than 100 grams of cocaine, a Class X felony (720 ILCS 570/401(a)(2)(A) (West 2012)) (count I); (2) unlawful possession of a controlled substance with intent to deliver more than 1 gram but less than 15 grams of cocaine, a Class 1 felony (720 ILCS 570/401(c)(2) (West 2012)) (count II); (3) unlawful possession of more than 15 grams but less than 100 grams of cocaine, a controlled substance, a Class 1 felony (720 ILCS 570/402(a)(2)(A) (West 2012)) (count III); and (4) unlawful possession of less than 15 grams of cocaine, a controlled substance, a Class 4 felony (720 ILCS 570/402(c) (West 2012)) (count IV). The trial court appointed the public defender to represent defendant.

¶ 5 On the day of trial, the parties appeared before the trial court and announced they were ready to proceed. However, defendant's attorney informed the court defendant wished to proceed *pro se*. First, the prosecutor informed the court the State was proceeding only on counts II and IV, and that defendant, due to his criminal history, was extended-term eligible. Next, the court addressed defendant's request to represent himself. The court explained that count IV was a lesser-included offense of count II, meaning, if the jury found defendant guilty of both counts, a guilty verdict and sentence would be entered on count II only.

¶ 6 The trial court questioned defendant about his education and experience. Defendant said he had vocational training and had completed the tenth grade. He said he had never before acted as his own counsel. The court explained (1) the difficulty of acting as his own counsel against an experienced prosecutor, (2) defendant would not receive special consideration, (3) he would not receive additional time to prepare for trial, (4) he would not be able to change his mind during the trial, and (5) it was within the court's discretion to not appoint standby counsel. Defendant confirmed his desire to proceed *pro se*. The court found defendant

made "such a knowing and intelligent waiver based upon the admonishments which the court has provided to him." Defendant's attorney remained in the courtroom.

¶ 7 The trial court and the prosecutor discussed defendant's prior convictions, to be used for impeachment purposes should defendant choose to testify. Defendant questioned whether his 2002 conviction could be used to enhance his sentence if it was too old to be used for impeachment purposes. The following colloquy occurred:

"THE COURT: All right. So two delivery charges of a controlled substance. The '02 case that was a Class 2 felony. And then the '07 case which is a Class 2 felony. And so if you are convicted of count II in this case, that's also a Class 2 felony, that would trigger the mandatory Class X sentencing, minimum 6, maximum 30, with no possibility of parole or conditional discharge. And I should add that if you were sentenced to the Illinois Department of Corrections for a Class X sentence, that there is a three-year period of mandatory supervised release, formerly known as parole, that is also applicable and you would be subject to upon the date of your release from the penitentiary.

THE DEFENDANT: Okay. So what about the Class 4?

THE COURT: What about it? I don't understand your question.

THE DEFENDANT: The Class 4, it says eligible for extended term.

THE COURT: It is. Here's—that's okay, meaning this is an important consideration. You've got two counts apparently that the State is going to be proceeding upon, Counts II and IV. They both allege the same occurrence, the same occurrence on the same date, time, and place. Right?

THE DEFENDANT: Yes.

THE COURT: All right. And so really the jury is going to be provided with two verdict forms, that being—well, four verdict form but on two charges, that being whether or not you possessed a controlled substance or whether or not you possessed a controlled substance with the intent to deliver.

THE DEFENDANT: Yes, sir.

THE COURT: All right. So there are all kinds of options as you can see that the jury will have. I mean, look at the permutations. They could go ahead and find you guilty of both, they could find you guilty of one but not the other, they could find you not guilty of both. Right?

THE DEFENDANT: Yes, sir.

THE COURT: So depending upon what the jury's verdicts would be would determine then what sentences would be available to the court at the time of a sentencing hearing. So clearly if you're found not guilty of both of the charges, then there is no sentence to be imposed. If you're found guilty of only one of the charges, then

the court will have the ability to go ahead and impose a sentence that is available as it relates to that charge.

And so, for example, on the Class 2—I keep saying Class 2—on the Class 1 felony, that being unlawful possession of a controlled substance with the intent to deliver that is subject to Class X sentencing, you would know that if the jury finds you guilty of that charge, that the sentence must be not less than 6 nor more than 30 years with a three-year period of mandatory supervised release.

If you're found guilty of the offense of unlawful possession of a controlled substance, that's a Class 4, and so the sentencing range would be from a minimum of one year in the Department of Corrections up to a maximum of six years in the Department of Corrections, but you're actually not even required to be sentenced to the Department of Corrections for that particular felony. You could be placed upon a term of probation or conditional discharge for a term that could not exceed 30 months in duration, a condition of which could be that you serve up to six months in the county jail. That is the sentencing range in the event that you were found guilty only on count IV.

The last item to go ahead and make sure that you understand is if the jury were to come back with guilty verdicts on

both counts II and IV, then count IV we wouldn't even bother with, okay, because it would merge; it would become—

THE DEFENDANT: Yes, sir, I understand.

THE COURT: Okay. You've got that. And so we would just be sentencing you on the Class X. Okay?

THE DEFENDANT: Yes, sir.

THE COURT: All right. So now do you understand?

THE DEFENDANT: You said basically if you're guilty for the Class 4 that you don't even do DOC time. Isn't that what you said?

THE COURT: No. That's what you heard. If you're only found guilty of the Class 4, there is a wide range of sentencings. I didn't tell you what the sentence would be because unlike with the finding of guilt that may occur with regard to the Class 1 but sentencing as a Class X, the legislature has told the courts in that situation that we don't have the discretion to go ahead and even consider a probationary or community-based sentence.

THE DEFENDANT: All right. I understand.

THE COURT: So on the Class 1 felony, it's got to be not less than 6, not more than 30. Go back to your question on the Class 4. If that is the only charge on which you are found guilty, count IV, Class 4 felony, then the maximum sentence that can be imposed would be a six-year term in the Illinois Department of

Corrections. You would also have a one-year period of mandatory supervised release. That's at the end of the spectrum. At the other end of the spectrum would be placing you upon a term of let's say conditional discharge and giving you credit for the amount of time that you have served, but my guess—how many days has he served, [defense attorney]?

MR. LEWIS [(Defense attorney)]: I'm sure he—he's beyond the six months.

THE COURT: Okay. Yeah, you would be able to be released basically at the time of your sentencing hearing because you would have served the maximum amount of time that you could be required to serve on a period of probation or conditional discharge, which is 180 days. And then since day-for-day credit would apply, it would actually only be 90 days that you would have to serve. So what we're looking at is what the maximum and the minimum sentence would be on that particular charge, along with any court costs and/or mandatory fines that would need to be imposed, but those are monetary obligations.

So I just want to clarify for you that I didn't say that you would receive probation or conditional discharge—

THE DEFENDANT: No. I understand.

THE COURT: Okay. But that's a possibility.

THE DEFENDANT: Right. I just wanted to be sure.

THE COURT: Okay. Anything else?

THE DEFENDANT: No, sir."

¶ 8 After a break, the trial court reconvened, noting defense counsel was still present. Upon the court's inquiry, counsel explained he had made contact with a subpoenaed witness to arrange for his availability, gathered discovery for defendant, and tendered the juror questionnaires to the clerk. Counsel asked to be excused from the proceedings. The court offered defendant an opportunity to ask anything further of counsel.

¶ 9 Defendant questioned which counts had been dismissed and which remained pending. The trial court again advised counts II and IV remained pending. Defendant questioned whether he could mention the other dismissed charges. The court explained the dismissed charges were irrelevant to the pending charges. Defendant said he understood. The court again offered defendant an opportunity to ask anything further of counsel. Defendant declined the offer, the court excused counsel, and counsel left the courtroom.

¶ 10 The jury trial commenced. After considering the evidence, the jury found defendant guilty of both charges: possession of a controlled substance with intent to deliver (count II) and possession of a controlled substance (count IV). The trial court sentenced defendant to 10 years in prison on count II, merging count IV.

¶ 11 This appeal followed.

¶ 12 II. ANALYSIS

¶ 13 Defendant claims his pretrial waiver of counsel was invalid because the trial court did not provide him with the admonishments required by Rule 401(a) before accepting his waiver of counsel. Defendant claims the court merely warned him of the ramifications of representing himself, without addressing the specific admonishments required by the rule, before



accepting defendant's waiver of counsel. The State disagrees with defendant and claims the record demonstrates the court substantially complied with Rule 401(a) and defendant's waiver was made knowingly and voluntarily. We agree with the State and affirm.

¶ 14 Initially, we note defendant failed to object to the lack of Rule 401(a) admonishments at trial or in a posttrial motion. Therefore, he has forfeited the issue and the same cannot be considered on appeal unless it satisfies the plain-error doctrine. See Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). The plain-error doctrine bypasses forfeiture principles and allows a reviewing court to consider unpreserved error when: (1) the evidence is close, regardless of the seriousness of the error; or (2) the error is serious, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005). This claim is reviewable as plain error. See *People v. Langley*, 226 Ill. App. 3d 742, 749 (1992); *People v. Stoops*, 313 Ill. App. 3d 269, 273 (2000). We therefore address the merits of defendant's claim.

¶ 15 The United States and Illinois Constitutions guarantee a criminal defendant the right to counsel at every critical stage of the proceedings. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. A defendant may waive this right and proceed *pro se*, but only if the trial court finds he voluntarily and intelligently elects to do so. *People v. Campbell*, 224 Ill. 2d 80, 84 (2006).

¶ 16 Illinois Supreme Court Rule 401(a) (eff. July 1, 1984) provides as follows:  
"Any waiver of counsel shall be in open court. The court shall not permit a waiver of counsel by a person accused of an offense punishable by imprisonment without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:

(1) the nature of the charge;

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

(3) that he has a right to counsel and, if he is indigent, to have counsel appointed for him by the court."

¶ 17 Our supreme court has held, "The language of Rule 401(a) could not be clearer: a trial court 'shall not permit a waiver of counsel by a person accused of an offense punishable by imprisonment without first \*\*\* informing him of and determining that he understands \*\*\* that he has a right to counsel and, if he is indigent, to have counsel appointed for him by the court.' [Citation.]" *Campbell*, 224 Ill. 2d at 84. Further, "substantial compliance with Rule 401(a) is required for an effective waiver of counsel." *Campbell*, 224 Ill. 2d at 84. "Rule 401(a) admonishments must be provided at the time the court learns that a defendant chooses to waive counsel, so that the defendant can consider the ramifications of such a decision." *People v. Jiles*, 364 Ill. App. 3d 320, 329 (2006). "There can be no effective waiver of counsel without proper admonitions." *Langley*, 226 Ill. App. 3d at 749.

¶ 18 In this case, there was substantial compliance with Rule 401(a). On the day of trial, defense counsel informed the trial court defendant desired to proceed without counsel. From there, the court spent a great amount of time admonishing defendant about the consequences of proceeding *pro se*. The court, the prosecutor, and defendant discussed the offenses and the potential punishment should defendant be convicted. Defendant's counsel remained at the hearing until the court was assured defendant was knowingly and voluntarily

waiving his right to counsel. The court relayed to defendant the nature of the charges, the minimum and maximum sentences defendant faced, and his right to appointed counsel.

¶ 19 However, defendant contends, because the trial court accepted defendant's waiver as knowing and voluntary *before* it admonished him, his waiver was ineffective. He claims he decided to proceed *pro se* and the court accepted his decision, warning him his decision was final, without the benefit of the admonishments required by Rule 401(a).

¶ 20 We agree with defendant the court stated it was accepting defendant's waiver as knowing and voluntary *before* it engaged in its lengthy admonishments. However, we find because (1) the admonishments occurred within minutes after defendant's formal waiver, (2) defendant's counsel remained in the courtroom during the entire discussion, and (3) defendant was not prejudiced by any delay in the admonishment, the court substantially complied with Rule 401(a) and defendant's waiver of counsel was valid. The fact the court announced its decision to allow defendant to proceed *pro se before* it began its in-depth and comprehensive colloquy with defendant regarding the nature of the charges and the potential punishment he faced had no effect on either the validity of defendant's waiver or the sufficiency of the court's compliance with Rule 401(a).

¶ 21 Based upon the particular circumstances of this case, it is clear to this court defendant had ample opportunity to consider the ramifications of his decision. See *Jiles*, 364 Ill. App. 3d at 329. Cf. *People v. Seal*, 2015 IL App (4th) 130775, ¶ 30 (the record demonstrated no compliance, substantial or otherwise, with Rule 401(a)). Because the record demonstrates substantial compliance with Rule 401(a), and because defendant knowingly and voluntarily waived his right to counsel after being admonished, we affirm defendant's conviction.

¶ 22

### III. CONCLUSION

¶ 23 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 24 Affirmed.