2018 IL App (4th) 160001-U

NO. 4-16-0001

FILED
October 10, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macon County
JERRY D. TAYLOR,	)	No. 14CF326
Defendant-Appellant.	)	
	)	Honorable
	)	Robert C. Bollinger,
	)	Judge Presiding.

JUSTICE DeARMOND delivered the judgment of the court.
Justices Holder White and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, finding defendant failed to show any reversible error following his conviction for armed robbery and unlawful possession of a weapon by a felon.

¶ 2 In April 2015, a jury found defendant, Jerry D. Taylor, guilty of armed robbery and unlawful possession of a weapon by a felon. The trial court sentenced him to concurrent prison terms of 30 years and 14 years, respectively.

¶ 3 On appeal, defendant argues (1) the trial court failed to direct a verdict at the close of the State's case, (2) he was denied a fair trial, (3) prejudicial error occurred when the victim narrated a surveillance tape, (4) the introduction of text messages was error, (5) the court denied his right to counsel, (6) new counsel was required to determine defendant's *pro se* motion alleging ineffective assistance of counsel, and (7) prejudicial errors denied him a fair trial. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In March 2014, the State charged defendant by information with single counts of armed robbery (count I) (720 ILCS 5/18-2(a)(2) (West 2014)) and unlawful possession of a weapon by a felon (count II) (720 ILCS 5/24-1.1(a) (West 2014)). In count I, the State alleged defendant committed the offense of armed robbery in that, while carrying a dangerous weapon, a firearm, he knowingly took property from Terri Wallace by threatening the imminent use of force. In count II, the State alleged defendant committed the offense of unlawful possession of a weapon by a felon in that, having been convicted of the forcible felony of armed robbery, he knowingly possessed on or about his person a firearm. Defendant pleaded not guilty.

¶ 6 In April 2015, defendant's jury trial commenced. Wallace testified she was working as an overnight clerk at a Circle K gas station in Decatur on March 18, 2014. At approximately 2:25 a.m., a man wearing dark clothing, a hat, and a bandana came into the store. After getting two cups of soda, he approached Wallace and stated he "wanted all my money and showed me a weapon." Wallace stated the man wore a glove on the hand in which he carried the gun. Wallace opened the cash register, pulled out the money, and handed the cash, amounting to $87, to the man. The man told Wallace to open a second register and the safe, but Wallace stated the register had no money in it and the safe was time-locked. The man left, and Wallace called the police.

¶ 7 Wallace testified the store had a surveillance camera in operation, and defense counsel had no objection to her stepping down from the witness stand and discussing what was happening on the video as it played for the jury. Wallace stated she later picked the man who robbed the store out of a photo array. On cross-examination, Wallace testified defendant was not the man who entered the store.

¶ 8 Decatur police officer Scott Gilman testified he was on patrol at approximately 3:40 a.m. on March 18, 2014, when he observed a silver car with no lights on. Gilman and his fellow officer, Jason Danner, stopped the vehicle, which was driven by defendant. While speaking with passenger Colton Green, Gilman realized Green matched the description of an armed robbery suspect. Danner began completing the paperwork for the traffic stop and requested a canine officer. After the canine alerted on the vehicle, the car's occupants were ordered to exit the vehicle. In the rear seat on the floorboard directly behind the passenger seat, Gilman found a silver-colored handgun, which he eventually discovered was loaded. On cross-examination, Gilman stated he observed a rubber glove at Green's feet and a bandana in front of the gun.

¶ 9 Officer Danner testified he made contact with defendant. After defendant and Green were removed from the vehicle, Danner observed a yellow rubber glove, a handkerchief, and the gun. At the police station, Danner advised defendant of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). On cross-examination, Danner stated defendant provided a valid driver's license and proof of insurance. He was cooperative and did not make any movements that would alarm Danner.

¶ 10 Amanda Humke, a forensic scientist with the Illinois State Police, testified as an expert in deoxyribonucleic acid (DNA) analysis. She received swabs from the grip, the trigger, the hammer release, and other areas of the gun recovered from the vehicle. From the grip, Humke did not detect a DNA profile. She obtained DNA from the swab from the trigger and hammer release, but the results were unsuitable for comparison. Humke noted a person wearing gloves would impact whether DNA is present on a gun.

¶ 11 Colton Green testified he pleaded guilty to armed robbery in August 2014 and received a sentence of seven years in prison. He also had a previous conviction for aggravated battery and for violating an order of protection. On March 17 and 18, 2014, he was in contact with defendant via text messaging about "getting money, robbery." Green texted defendant about needing a "scratchy," which Green stated referred to a gun, and defendant indicated he could get one. After defendant returned to Decatur from Indianapolis, he picked up Green and they "got the firearm from someone like a block away" from Green's residence. Defendant took the gun, set it on his lap, and drove away. They then stopped at a house to "get some latex gloves." When the occupants of the house did not have any, defendant and Green "ended up getting a yellow kitchen glove." They left and "started on our mission to *** do some robberies for some money." After driving by a gas station and seeing it was empty, defendant parked the car. Defendant handed the gun to Green, and Green went in and robbed the store. Green stated he wore a glove on his gun hand and a bandana around his neck. After leaving the gas station, Green ran back to the car, and defendant drove away. Green gave defendant the money, and defendant took Green's hat, put the money in it, and placed the hat on the porch of a house. When defendant pulled over after being stopped by the police, he had the gun in his possession. Green stated defendant put the gun in the backseat.

¶ 12 On cross-examination, Green testified he had a global positioning system device on his ankle due to his aggravated battery conviction. He stated police officers were able to track his location to the gas station by his ankle bracelet.

¶ 13 Decatur police officer David Dailey testified he conducted an interview with defendant. During their conversation, defendant consented to a search of his cell phone. Dailey was then able to view text messages and calls from the phone. He found three calls between the

numbers associated with defendant's and Green's phones on March 17, 2014. Dailey also found text messages between defendant, Green, and others on March 17 and 18, 2014. Dailey stated text messages between defendant and others referenced a gun. At 7:29 p.m. on March 17, 2014, Green sent a text message asking defendant if he had an "extra scratchy" for him. Defendant responded that he had an "extra one." At 7:35 p.m., Green texted "make sure you grab extra scratchy" because he needed it. Defendant responded he was on the highway. Further text messages were exchanged. At 10:47 p.m., defendant sent a text to his brother asking to use "your burner tonight." Dailey stated a "burner" is a handgun. A text from defendant to Tyrell Cook at 12:20 a.m. on March 18, 2014, stated "I need a pistol." At 12:22 a.m., defendant texted his brother and said "I need that burner bad."

¶ 14 Decatur police detective Joe Patton testified he conducted an interview with defendant at the police station. Defendant made a statement indicating where he placed the money after the armed robbery. Patton went to the stated residence and found a ball cap containing $87 in cash.

¶ 15 The parties stipulated defendant had a prior felony conviction. At the close of the State's evidence, defense counsel made a motion for a directed finding, which the trial court denied. Defendant exercised his right not to testify. Following closing arguments, the jury found defendant guilty on both counts. Thereafter, the court asked defense counsel if he wished to have the jurors polled individually, and counsel responded in the negative.

¶ 16 In May 2015, defense counsel filed a motion for a directed verdict of acquittal or a new trial. In June 2015, defendant filed a *pro se* motion to dismiss his counsel and continue the sentencing hearing. In his motion, defendant claimed defense counsel did not represent him in his best interest and counsel's posttrial motion did not include a claim of ineffective assistance

of counsel. The court directed defendant to prepare a document outlining the specific bases for his claim of ineffective assistance of counsel. Defense counsel then filed a motion to withdraw.

¶ 17 In July 2015, the trial court conducted a hearing pursuant to *People v. Krankel*, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984), on defendant's *pro se* claims of ineffective assistance of counsel. The court considered defendant's claims that counsel (1) failed to file a motion to suppress evidence and his statement, (2) failed to allow him an opportunity to accept the State's plea offer, (3) failed to enter into evidence a notarized affidavit from a witness, (4) failed to impeach Green, (5) failed to ask for a mistrial in two instances, and (6) kept him from testifying. Following extensive discussion with defendant and defense counsel, the court found defendant's claims of ineffective assistance of counsel showed no signs of neglect. The court then allowed defense counsel to withdraw. The court admonished defendant he was facing a term of 21 to 45 years in prison on the Class X felony and 3 to 14 years in prison on the Class 2 felony. After further admonishment, defendant asked the court to appoint the public defender to represent him.

¶ 18 In October 2015, the trial court held a status hearing in which the public defender stated defendant wished to represent himself. The court admonished defendant he was facing a term of 21 to 45 years in prison on the Class X felony and 2 to 10 years on a Class 3 felony. Defendant indicated he understood. The court allowed defendant to proceed *pro se*.

¶ 19 Defendant filed a *pro se* motion for a new trial, which the trial court denied. Thereafter, the court sentenced defendant to 30 years on count I, which included a 15-year enhancement for possession of a firearm, and 14 years on count II. This appeal followed.

¶ 20 II. ANALYSIS

¶ 21 A. Motion for a Directed Verdict

¶ 22 Defendant argues the trial court erred in failing to direct a verdict at the close of the State's case. We disagree.

¶ 23 Section 115-4(k) of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-4(k) (West 2014)) provides as follows:

> "When, at the close of the State's evidence or at the close of all of the evidence, the evidence is insufficient to support a finding or verdict of guilty the court may and on motion of the defendant shall make a finding or direct the jury to return a verdict of not guilty, enter a judgment of acquittal and discharge the defendant."

¶ 24 A motion for a directed verdict at the close of the State's case asserts, as a matter of law, the evidence is insufficient to support a verdict of guilty. "In moving for a directed verdict, the defendant admits the truth of the facts stated in the State's evidence for purposes of the motion." *People v. Kelley*, 338 Ill. App. 3d 273, 277, 788 N.E.2d 775, 779 (2003). As a motion for a directed verdict presents a question of law, our review is *de novo*. *People v. Johnson*, 334 Ill. App. 3d 666, 676, 778 N.E.2d 772, 781 (2002). "In considering the denial of such a motion, we review the evidence presented by the State, in a light most favorable to the State, to determine whether a reasonable mind could fairly conclude defendant was guilty beyond a reasonable doubt." *People v. Tabb*, 374 Ill. App. 3d 680, 691, 870 N.E.2d 914, 925 (2007).

¶ 25 Armed robbery is the taking of property from the person or presence of another by the use of force or by threatening the imminent use of force, while the defendant is armed with a dangerous weapon or a firearm. 720 ILCS 5/18-2(a)(1), (a)(2) (West 2014). Thus, the essential elements of the offense of armed robbery are a "taking" of property, the use of force,

and the use of a dangerous weapon. *People v. Dennis*, 181 Ill. 2d 87, 101, 692 N.E.2d 325, 334 (1998).

¶ 26 Section 24-1.1(a) of the Criminal Code of 2012 (Criminal Code) (720 ILCS 5/24-1.1(a) (West 2014)) states "[i]t is unlawful for a person to knowingly possess on or about his person *** any firearm or any firearm ammunition if the person has been convicted of a felony under the laws of this State or any other jurisdiction." To prove the defendant committed the offense of unlawful possession of a weapon by a felon, the State must show "(1) defendant knowingly possessed a firearm or firearm ammunition, and (2) that defendant has been convicted of a felony." *People v. Rasmussen*, 233 Ill. App. 3d 352, 370, 598 N.E.2d 1368, 1380 (1992).

¶ 27 Pursuant to section 5-2(c) of the Criminal Code (720 ILCS 5/5-2(c) (West 2014)), a person is legally accountable for the conduct of another when "either before or during the commission of an offense, and with the intent to promote or facilitate that commission, he or she solicits, aids, abets, agrees, or attempts to aid that other person in the planning or commission of the offense." "[A]ctive participation has never been a requirement for imposing criminal liability under a theory of accountability; that is, one may aid and abet without actively participating in the overt act." *People v. Batchelor*, 171 Ill. 2d 367, 376, 665 N.E.2d 777, 780 (1996).

¶ 28 In this case, defendant was found in a car with Green, the gun, the bandana, and the yellow glove. Defendant told the officers where to find the money and the ball cap. Defendant consented to the search of his phone. The State introduced evidence of text messages between defendant and Green indicating the need to get a gun and their plan to commit the robbery, as well as texts by defendant to a third party repeatedly asking about the availability of a gun for his use. Defendant also stipulated he had a felony conviction.

¶ 29 Together with this evidence, Green testified about defendant picking him up, obtaining a gun, and engaging in their "mission to *** do some robberies for some money." After Green robbed the store with the gun, he gave the money to defendant. The testimony of an accomplice witness has inherent weaknesses, and the trier of fact should accept it "only with caution and suspicion." *People v. Tenney*, 205 Ill. 2d 411, 429, 793 N.E.2d 571, 583 (2002). "Nevertheless, the testimony of an accomplice witness, whether corroborated or uncorroborated, is sufficient to sustain a criminal conviction if it convinces the jury of the defendant's guilt beyond a reasonable doubt." *Tenney*, 205 Ill. 2d at 429, 793 N.E.2d at 583. Here, along with Green's accomplice testimony, the jury was well aware of his prior convictions, his guilty plea to the armed robbery, and his seven-year prison sentence, as well as defense counsel's claims Green was not a credible witness. It undoubtedly considered this evidence along with defendant's own statements to police directing them to the location of the money, along with the contents of his phone and the items found in the car he was driving when stopped by the police. Viewing the evidence in the light most favorable to the State, we conclude a rational trier of fact could have found defendant guilty of the charged offenses.

¶ 30 B. Evidentiary Matters

¶ 31 Defendant argues the failure to contest the traffic stop delay and the failure to object to his videotaped statement denied him a fair trial and due process of law. We find this issue forfeited.

¶ 32 Initially, we note the State argues defendant did not properly preserve the issues pertaining to the traffic stop and his videotaped statement because defense counsel did not raise the issues at trial or raise them in a posttrial motion. Thus, the issue is forfeited on appeal. See *People v. Hestand*, 362 Ill. App. 3d 272, 279, 838 N.E.2d 318, 324 (2005) (a defendant must

object at trial and raise the issue in a posttrial motion to preserve the issue for review). Defendant, however, argues the issues should be addressed as a matter of plain error.

¶ 33 The plain-error doctrine allows a court to disregard a defendant's forfeiture and consider unpreserved error in two instances:

> "(1) where 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, regardless of the seriousness of the error and (2) where a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process ***." *People v. Belknap*, 2014 IL 117094, ¶ 48, 23 N.E.3d 325.

¶ 34 Under both prongs of the plain-error analysis, the burden of persuasion remains with the defendant. *People v. Wilmington*, 2013 IL 112938, ¶ 43, 983 N.E.2d 1015. As the first step in the analysis, we must determine "whether there was a clear or obvious error at trial." *People v. Sebby*, 2017 IL 119445, ¶ 49, 89 N.E.3d 675; *People v. Eppinger*, 2013 IL 114121, ¶ 19, 984 N.E.2d 475. "If error did occur, we then consider whether either prong of the plain-error doctrine has been satisfied." *People v. Sykes*, 2012 IL App (4th) 111110, ¶ 31, 972 N.E.2d 1272. "[T]he plain error rule is not a general savings clause for any alleged error, but instead is designed to address *serious injustices*." (Emphasis in original.) *People v. Williams*, 299 Ill. App. 3d 791, 796, 701 N.E.2d 1186, 1189 (1998).

¶ 35 1. *Traffic Stop*

¶ 36 Defendant contends police officers had no right to detain him based on the initial stop and the delay in the arrival of the canine rendered the search of the vehicle illegal. "When a

police officer observes a driver commit a traffic violation, the officer is justified in briefly detaining the driver to investigate the violation." *People v. Ramsey*, 362 Ill. App. 3d 610, 614, 839 N.E.2d 1093, 1097 (2005). Here, Officer Gilman stated he initiated a traffic stop after observing defendant's car traveling at night with no lights on. Section 12-201(b) of the Illinois Vehicle Code (625 ILCS 5/12-201(b) (West 2014)) requires two operable headlights from sunset to sunrise. Thus, Gilman had probable cause to initiate a valid traffic stop.

¶ 37 In *People v. Harris*, 228 Ill. 2d 222, 886 N.E.2d 947 (2008), our supreme court analyzed the conduct of police officers during lawful traffic stops by looking at the United States Supreme Court's decision in *Illinois v. Caballes*, 543 U.S. 405 (2005). See *People v. McQuown*, 407 Ill. App. 1138, 1144, 943 N.E.2d 1242, 1247 (2011).

> "First, a seizure that is lawful at its inception can become unlawful 'if it is prolonged beyond the time reasonably required' to complete the purpose of the stop. [Citation.] Second, so long as the traffic stop is 'otherwise executed in a reasonable manner,' police conduct does 'not change the character' of the stop unless the conduct itself infringes upon the seized individual's 'constitutionally protected interest in privacy.' " *Harris*, 228 Ill. 2d at 239, 886 N.E.2d at 958-59 (quoting *Caballes*, 543 U.S. at 407-08).

" 'Thus, police conduct occurring during an otherwise lawful seizure does not render the seizure unlawful unless it either unreasonably prolongs the duration of the detention or independently triggers the fourth amendment.' " *McQuown*, 407 Ill. App. 3d at 1144, 943 N.E.2d at 1248 (quoting *People v. Baldwin*, 388 Ill. App. 3d 1028, 1033, 904 N.E.2d 1193, 1198 (2009)).

¶ 38 Subsequent to the United States Supreme Court's opinion in *Rodriguez v. United States*, 575 U.S. __, 135 S. Ct. 1609 (2015), our supreme court, upon reconsideration in *People v. Cummings*, 2016 IL 115769, ¶ 13, 46 N.E.3d 248, held a traffic stop is analogous to a *Terry* stop. As such, its permissible duration is determined by the officer's "mission" at the time. *Cummings*, 2016 IL 115769, ¶ 13, 46 N.E.3d 248. The court found a regular traffic stop, such as the one in this case for driving at night with no headlights, permits " ' "ordinary inquiries incident to [the traffic] stop," which typically " 'involve checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance.' " *Cummings*, 2016 IL 115769, ¶ 13, 46 N.E.3d 248 (quoting *Rodriguez*, 135 S. Ct. at 1615 (quoting *Caballes*, 543 U.S. at 408)). In *Rodriguez*, 135 S. Ct. at 1616, the Supreme Court discussed the inherent risks involved in traffic stops, pointing out how drivers and even passengers may be required to exit the vehicle during the ordinary inquiries endemic to such stops. Once the officer observed the traffic violation, he had a basis to stop the vehicle defendant was driving.

¶ 39 Here, defendant has offered nothing to show police officers engaged in an unreasonable delay between the time of the traffic stop and the arrival of the canine. Nothing in the record indicates the exact amount of time that expired between the stop and the canine's arrival. Without providing factual support for his argument, defendant has not demonstrated error occurred.

¶ 40 2. *Videotaped Statement*

¶ 41 Defendant contends the trial court erred in denying his motion *in limine*, which complained the video of his interview erroneously contained statements by Green that

constituted inadmissible hearsay and statements made by police officers were conclusory and opinions on defendant's truthfulness.

¶ 42 We note appellate counsel has not supplied this court with the alleged offending statements from defendant's videotaped statement and offers little more than conclusions to support his claims.

> " 'A reviewing court is entitled to have issues clearly defined with pertinent authority cited and cohesive arguments presented [citation], and it is not a repository into which an appellant may foist the burden of argument and research [citation]; it is neither the function nor the obligation of this court to act as an advocate or search the record for error.' " *People v. Williams*, 385 Ill. App. 3d 359, 368, 895 N.E.2d 961, 968 (2008) (quoting *Obert v. Saville*, 253 Ill. App. 3d 677, 682, 624 N.E.2d 928, 931 (1993)).

As it is not this court's duty to scour the record to develop defendant's argument, we find the issued forfeited. See Ill. S. Ct. R. 341(h)(7) (eff. Nov. 1, 2017) (stating an appellant's brief must include "[a]rgument, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relief on").

¶ 43 However, we note defendant's claim of error regarding the admissibility of the investigator's questions or comments to him during his interview would have failed even if properly raised. This court recently addressed the same issue in *People v. Whitfield*, 2018 IL App (4th) 150948, 103 N.E.3d 1096. There, the defendant argued he was denied a fair trial as a result of the trial court allowing portions of his interrogation video to be played to the jury. He contended the video contained inadmissible hearsay, improper opinions, and commentary of the

investigating officers as part of the interrogation which were unduly prejudicial. *Whitfield*, 2018 IL App (4th) 150948, ¶ 43, 103 N.E.3d 1096. We found the statements were not hearsay since they were not offered for the truth of their assertions but for their effect on the listener, *i.e.*, the defendant.

> " '[A]n out-of-court statement offered to prove its effect on a listener's mind or to show why the listener subsequently acted as he did is not hearsay and is admissible.' [Citation.]" *Whitfield*, 2018 IL App (4th) 150948, ¶ 47, 103 N.E.3d 1096.

Both the Second and Third Districts have concluded statements of investigating officers during police interviews are admissible when they are "necessary" to show the effect of the statement on the defendant or to explain his subsequent actions. *People v. Theis*, 2011 IL App (2d) 091080, ¶ 33, 963 N.E.2d 378; *People v. Hardimon*, 2017 IL App (3d) 120772, ¶ 35, 77 N.E.3d 1184. We found in *Whitfield*, however, such statements may also be admissible to aid a jury in providing context for what transpired during a police interrogation and why. *Whitfield*, 2018 IL App (4th) 150948, ¶ 49, 103 N.E.3d 1096.

> "We find that questions and statements by police officers during a defendant's interrogation may still possess probativeness where they are simply 'helpful,' although perhaps not essential or 'necessary,' to a jury's understanding of the defendant's responses or silence." *Whitfield*, 2018 IL App (4th) 150948, ¶ 48, 103 N.E.3d 1096.

For these reasons, although defendant has failed to properly preserve this issue for appeal, based on the record, we find the trial court properly denied defendant's motion *in limine* paragraphs

seven and eight and allowed the statements and comments of the investigating officers during defendant's interrogation.

¶ 44 C. Surveillance Tape

¶ 45 Defendant argues prejudicial error occurred when Wallace, the gas station clerk, narrated the surveillance tape. We find defendant acquiesced in any alleged error.

¶ 46 Initially, we note defendant failed to preserve this issue for review by not objecting at trial and including it in a posttrial motion. Thus, the issue is forfeited. See *People v. Bush*, 214 Ill. 2d 318, 332, 827 N.E.2d 455, 463 (2005). Moreover, " '[u]nder the invited-error doctrine, a party cannot acquiesce to the manner in which the trial court proceeds and later claim on appeal that the trial court's actions constituted error.' " *People v. Cox*, 2017 IL App (1st) 151536, ¶ 73, 89 N.E.3d 898 (quoting *People v. Manning*, 2017 IL App (2d) 140930, ¶ 16, 78 N.E.3d 1007)). "This is because, by acquiescing in rather than objecting to the admission of allegedly improper evidence, a defendant deprives the State of the opportunity to cure the alleged defect." *Bush*, 214 Ill. 2d at 332, 827 N.E.2d at 463-64. "Simply stated, a party cannot complain of error which that party induced the court to make or to which that party consented." *In re Detention of Swope*, 213 Ill. 2d 210, 217, 821 N.E.2d 283, 287 (2004).

¶ 47 In the case *sub judice*, the State asked the trial court to permit Wallace to step down from the witness stand to discuss what was happening in the video. The court asked defense counsel if he had any objection, and he responded "[t]hat is fine." The court allowed Wallace to testify as the State requested, and defense counsel did not object throughout her narration. By failing to object, and instead allowing the State to proceed as it requested, defense counsel prevented the State from having the opportunity to cure any alleged error. Thus, defendant cannot now be heard on this issue.

¶ 48 Again, however, had defendant objected and preserved the issue for appeal, we addressed this matter in *People v. Mister*, 2016 IL App (4th) 130180-B, ¶ 77, 58 N.E.3d 1242, where we found it was not error to allow a witness who was present during the events seen on a surveillance video to essentially narrate the events observed and identify the persons portrayed. Since defendant was not the individual identified on the video, nor was he present, he was not prejudiced thereby. In addition, the witness was present in court and subject to cross-examination. For these reasons, defendant cannot show error occurred.

¶ 49 D. Text Messages

¶ 50 Defendant argues the introduction of his text messages from his cellular telephone was error. We find this issue forfeited.

¶ 51 Detective Dailey testified he received defendant's consent to search his cell phone. Dailey then searched the phone and obtained the text messages. At trial, he testified regarding the back-and-forth exchanges between defendant and Green. Defense counsel did not object to Dailey's testimony, and defendant did not raise the issue in a posttrial motion. Thus, the issue is forfeited. In his brief, defendant offers only seven sentences to support his claim of error on this issue, and he does not cite to the record where the offending text messages can be found. Instead, defendant argues the text messages were exculpatory and claims neither the defense nor the prosecution can introduce exculpatory text messages. He then simply concludes "this was prejudicial error raised by plain error which requires reversal and a new trial." As noted by the State, the text messages referenced at trial were not exculpatory in nature but inculpatory. We find defendant has not shown the introduction of the text messages constituted error.

¶ 52 E. Waiver of Counsel

¶ 53 Defendant argues the trial court denied him his right to counsel at a critical stage of the proceedings where he did not make a knowing, voluntary, and intelligent waiver of his right to counsel. We disagree.

¶ 54 The United States and Illinois Constitutions guarantee a criminal defendant the right to counsel at every critical stage of the proceedings against him. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. A defendant may waive this right and proceed without counsel "as long as the waiver is voluntary, knowing, and intelligent." *People v. Wright*, 2017 IL 119561, ¶ 39, 91 N.E.3d 826.

¶ 55 Illinois Supreme Court Rule 401(a) (eff. July 1, 1984) states 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."

¶ 56 Our supreme court has held "substantial compliance with Rule 401(a) is required for an effective waiver of counsel." *People v. Campbell*, 224 Ill. 2d 80, 84, 862 N.E.2d 933, 936 (2006). Thus, "substantial compliance will be sufficient to effectuate a valid waiver if the record indicates that the waiver was made knowingly and voluntarily, and the admonishment the defendant received did not prejudice his rights." *People v. Haynes*, 174 Ill. 2d 204, 236, 673 N.E.2d 318, 333 (1996). "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, 845 N.E.2d 944, 952 (2006). While the State contends defendant forfeited his argument by failing to raise it at the trial level, we note courts have found the denial of the right of self-representation amounts to structural error and the second prong of the plain-error doctrine applies. *People v. Matthews*, 2017 IL App (4th) 150911, ¶ 43, 93 N.E.3d 597; *People v. Sanders*, 2016 IL App (3d) 130511, ¶ 15, 58 N.E.3d 661 (citing *People v. Thompson*, 238 Ill. 2d 598, 609, 939 N.E.2d 403, 410 (2010)).

¶ 57 In this case, the trial court admonished defendant at his arraignment hearing that he had been charged with the offense of armed robbery, a Class X felony, which carried a possible prison sentence of 6 to 30 years in prison. Based on his criminal history, the court stated defendant was eligible for an extended term of 30 to 60 years in prison. The court also admonished him that he had been charged with unlawful possession of a weapon by a felon, a Class 2 felony, which carried a possible prison sentence of three to seven years in prison. The court stated defendant was eligible for an extended term of 7 to 14 years in prison. Defendant indicated he understood the possible penalties.

¶ 58 After the jury found defendant guilty on both counts, he filed a *pro se* motion to dismiss counsel, stating he was not happy with trial counsels' representation and he was seeking to retain new counsel. Following a *Krankel* hearing in July 2015, the trial court dismissed defendant's claims of ineffective assistance of counsel and granted his motion to discharge his attorneys. The court then admonished defendant on the possible penalties. For the Class X felony, the court noted the offense carried a 15-year firearm enhancement and the possible sentence ranged from 21 to 45 years in prison. On the Class 2 felony, the court stated the possible sentence ranged from 3 to 14 years in prison based on defendant's eligibility for an extended-term sentence. Defendant indicated he understood the possible penalties.

¶ 59 Thereafter, defendant indicated his desire to proceed *pro se*. After questioning from the trial court, defendant indicated he was 36 years old, had an associate's degree, and did not suffer from any type of mental disability that would impact his ability to represent himself. While he had never acted *pro se*, defendant noted he had been involved in other legal proceedings and sentencing hearings. After further questioning, defendant decided to ask for the appointment of the public defender. The court did so.

¶ 60 In October 2015, appointed counsel indicated defendant was seeking to proceed *pro se*, and defendant stated he wanted to represent himself. The trial court admonished defendant as to the appropriate penalties for the Class X felony. Defendant indicated he understood. The court then stated the offense of unlawful possession of a weapon by a felon was a Class 3 felony, instead of a Class 2 felony, and the possible sentence ranged from 2 to 10 years in prison. Defendant indicated he understood. Following further admonishment, the court found defendant knowingly, voluntarily, and intelligently waived his right to counsel and allowed him to proceed *pro se*.

¶ 61 Defendant contends the improper admonishment regarding the possible sentence for a Class 3 instead of a Class 2 felony at the October 2015 hearing where he elected to proceed *pro se* resulted in his waiver of counsel not being voluntarily and intelligently made. In *Wright*, 2017 IL 119561, ¶¶ 38-57, 91 N.E.3d 826, the supreme court conducted an extensive analysis of not only the right to self-representation but also the nature of substantial compliance with Illinois Supreme Court Rule 401(a) (eff. July 1, 1984) required for an effective waiver of the right to counsel.

¶ 62 In *Wright*, 2017 IL 119561, ¶ 33, 91 N.E.3d 826, the appellate court reversed the defendant's conviction on four counts of armed robbery due to an improper admonishment of the potential maximum sentence for the offenses charged. The defendant was fully admonished twice by two different judges regarding his right to self-representation, with each judge seeking to convince him of what a bad idea it was. *Wright*, 2017 IL 119561, ¶¶ 48-51, 91 N.E.3d 826. When informing him of the possible sentences, due to both the nature of the charges and statutory enhancements, the defendant was improperly advised he was eligible for a maximum of 60 years in prison when, in fact, the statutory maximum was 75 years. *Wright*, 2017 IL 119561, ¶ 52, 91 N.E.3d 826.

¶ 63 The supreme court found the trial court substantially complied with Illinois Supreme Court Rule 401(a) and, more importantly, the failure to inform the defendant of the proper maximum sentence had nothing to do with the defendant's choice of self-representation. *Wright*, 2017 IL 119561, ¶¶ 53-55, 91 N.E.3d 826. The court noted the importance of proper admonishments regarding possible maximum sentences. *Wright*, 2017 IL 119561, ¶ 54, 91 N.E.3d 826. However, where the defendant's articulated reasons for self-representation do not hinge on the sentence possibilities but instead evince a clear desire to represent himself, it is not

unreasonable to conclude the improper admonishment played no part in a defendant's decision. *Wright*, 2017 IL 119561, ¶ 55, 91 N.E.3d 826. The defendant expressed his desire to represent himself throughout the life of the case, even after being informed of the risks and dangers involved, but his concerns centered on his speedy trial rights and had nothing to do with the maximum sentence possible. *Wright*, 2017 IL 119561, ¶ 55, 91 N.E.3d 826. The supreme court "conclude[d] that despite the trial court's incorrect statement of the maximum potential sentence, the trial court substantially complied with Rule 401(a), and defendant made a voluntary, knowing, and intelligent waiver of counsel prior to being allowed to proceed *pro se*." *Wright*, 2017 IL 119561, ¶ 57, 91 N.E.3d 826.

¶ 64 Here, defendant was properly admonished at arraignment and again after he was found guilty when he filed a *pro se* motion to discharge retained counsel. After a full *Krankel* hearing, the trial court dismissed counsel and again advised defendant of the possible penalties he now faced after his conviction. Defendant then indicated his desire to proceed *pro se*. However, during the Rule 401(a) colloquy, defendant asked for appointment of the public defender, and the court granted his request. Defendant later repeated his desire to represent himself before the sentencing hearing and was again admonished regarding the possible problems with self-representation and again informed of the penalties. This time, however, the court incorrectly informed him of the possible penalties for the Class 3 offense of unlawful possession of a weapon instead of a Class 2 felony. Defendant reiterated he was 36 years old, held an associate's degree, was close to receiving his bachelor's degree, and had previous legal experience and involvement in legal proceedings, including sentencing hearings. He was again informed of the possible 6- to 30-year sentence on the Class X offense of armed robbery, along

with a statutory 15-year add-on resulting in a sentencing range of 21 to 45 years. Defendant maintained his desire to represent himself, and the court obliged.

¶ 65 We find the trial court substantially complied with Rule 401(a) when it properly admonished defendant in all respects, except when it informed him that he faced a lower sentencing range of 2 to 10 years in prison, when it was actually 3 to 14 years. We also find defendant's decision to waive counsel was made freely, knowingly, and intelligently. Along with eliciting pertinent information regarding defendant's background, the court warned him about the perils of proceeding without an attorney, that he would not be given special consideration due to his *pro se* status, and he would not be able to change his mind from then on. Defendant indicated he understood and elected to represent himself.

¶ 66 We also note there is no basis in the record to conclude defendant was prejudiced by the trial court's understatement of the potential sentences on count II. Defendant does not allege he would not have proceeded to represent himself if he had known the possible sentencing range he faced for unlawful possession of a weapon by a felon was actually 3 to 14 years, rather than 2 to 10 years. See *Wright*, 2017 IL 119561, ¶ 56, 91 N.E.3d 826 (finding the defendant was not prejudiced by the court's understatement of the possible maximum sentence and he did "not even make a bare allegation that he would not have proceeded to represent himself if he had known the possible maximum sentence he faced for armed robbery was actually 75 years, rather than 60 years"). Moreover, defendant was fully aware of the range of sentences possible for the more serious charge against him—armed robbery—and the importance of him having specific knowledge of the minimum and maximum sentences for the less serious Class 2 felony pales in comparison. Despite the incorrect admonishment, we conclude the trial court substantially

complied with Rule 401(a) and defendant made a voluntary, knowing, and intelligent waiver of counsel prior to being allowed to proceed *pro se*.

¶ 67 F. *Krankel* Inquiry

¶ 68 Defendant argues new counsel was required to determine his *pro se* motion alleging ineffective assistance of trial counsel. We disagree.

¶ 69 When confronted with a defendant's posttrial allegations of ineffective assistance of counsel, our supreme court set out the procedural steps to follow in *People v. Moore*, 207 Ill. 2d 68, 797 N.E.2d 631 (2003) (noting the rule that had developed since *Krankel*).

> "New counsel is not automatically required in every case in which a defendant presents a *pro se* posttrial motion alleging ineffective assistance of counsel. Rather, when a defendant presents a *pro se* posttrial claim of ineffective assistance of counsel, the trial court should first examine the factual basis of the defendant's claim. If the trial court determines that the claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the *pro se* motion. However, if the allegations show possible neglect of the case, new counsel should be appointed." *Moore*, 207 Ill. 2d at 77-78, 797 N.E.2d at 637.

¶ 70 "The purpose of the preliminary inquiry is to ascertain the underlying factual basis for the ineffective assistance claim and to afford a defendant an opportunity to explain and support his claim." *People v. Ayres*, 2017 IL 120071, ¶ 24, 88 N.E.3d 732. A court can conduct an inquiry into allegations counsel was ineffective by doing one or more of the following: "(1) questioning the trial counsel, (2) questioning the defendant, and (3) relying on its own

knowledge of the trial counsel's performance in the trial." *People v. Peacock*, 359 Ill. App. 3d 326, 339, 833 N.E.2d 396, 407 (2005). A defendant's "clear claim asserting ineffective assistance of counsel, either orally or in writing, *** is sufficient to trigger the trial court's duty to conduct a *Krankel* inquiry." *Ayres*, 2017 IL 120071, ¶ 18, 88 N.E.3d 732. "The operative concern for the reviewing court is whether the trial court conducted an adequate inquiry into the defendant's *pro se* allegations of ineffective assistance of counsel." *Moore*, 207 Ill. 2d at 78, 797 N.E.2d at 638. "The issue of whether the circuit court properly conducted a preliminary *Krankel* inquiry presents a legal question that we review *de novo*." *People v. Jolly*, 2014 IL 117142, ¶ 28, 25 N.E.3d 1127.

¶ 71 At the *Krankel* hearing on defendant's claims of ineffective assistance of counsel, the trial court engaged in an extensive recitation of the applicable law. The court then went through defendant's allegations "point by point." Issues addressed included defendant's claims he was not allowed to accept the State's plea offer and his attorneys refused to file two motions to suppress, failed to admit into evidence a notarized affidavit from a witness, failed to impeach Green, failed to ask for a mistrial, kept him from testifying, and failed to call witnesses. Going through each issue, the court asked defendant for his reasons to support his claim and allowed trial counsel to respond. Along with hearing responses from defendant and counsel, the court relied on its recollections from the trial. The court concluded defendant's claims were without merit and further inquiry was not required.

¶ 72 On appeal, defendant contends the trial court erred in (1) permitting trial co-counsel to offer explanations for acting as he did and (2) deeming matters as trial strategy. Defendant does not cite authority to support his claim. Moreover, in examining the factual bases of defendant's claims, the case law is clear that the court is permitted to question defendant and

trial counsel, rely on counsel's performance at trial, and base its evaluation on the insufficiency of defendant's allegations on their face. *Moore*, 207 Ill. 2d at 78-79, 797 N.E.2d at 638. We find the court conducted an adequate inquiry into defendant's claims and the appointment of new counsel was not required.

¶ 73 G. Prejudicial Errors

¶ 74 Defendant argues prejudicial errors denied him a fair trial and due process of law. We disagree.

¶ 75 First, defendant argues "the jury should not have been advised of the defendant giving his statements according to the *Miranda*" and "suggests that this is totally improper and gives greater weight to the statements that he made." Defendant also claims "[p]lain error occurred when a police officer testified during interrogation that the defendant exercised his rights to silence in counsel." Along with failing to clearly articulate the claim of error, we have no idea which statements defendant is referring to because defendant does not cite to the record where they can be found. See Ill. S. Ct. R. 341(h)(7) (eff. Nov. 1, 2017). Thus, we find the issue forfeited. See *People v. Snow*, 2012 IL App (4th) 110415, ¶ 11, 964 N.E.2d 1139 (finding the defendant's failure to support his contentions in the argument section of a brief with citation to legal authority and the pages of the record relied on results in forfeiture of the argument).

¶ 76 Second, defendant argues he was prejudiced when defense counsel did not move to suppress the identification of Green based on a photographic lineup. He claims "the suppression hearing may well have indicated that Green was impermissibly identified and therefore the defendant would not have been arrested." Defendant has not shown error, let alone plain error. Wallace identified Green from a photo array, which included several similarly appearing individuals. She identified Green as the armed robber due in part to the distinctive

tattoos around his neck area. At trial, Green's image was shown in the surveillance video and he testified he was the armed robber. Thus, defendant's claim has no merit.

¶ 77 Third, defendant argues "it is prejudicial error under the plain error doctrine of a conflict of interest between his attorney and a current client," defense counsel "contemporaneously represents a witness whom the State desired to call by Affidavit," and "counsel failed to interview the witness, who had favorable information to the defendant." Defendant concludes "[t]his prejudice requires recusal."

¶ 78 We find this issue forfeited. Not only does defendant fail to properly develop his argument in any meaningful way, he cites only one page of the transcript in support. Moreover, "[a] conclusory assertion, without supporting analysis, is not enough." *Wolfe v. Menard, Inc.*, 364 Ill. App. 3d 338, 348, 846 N.E.2d 605, 613 (2006).

¶ 79 Fourth, defendant argues he was denied due process of law and a fair trial "when a limiting instruction was not given pertaining to the testimony of an accomplice, Green, and further the defendant again raises the issue that the court erred in not determining that counsel was ineffective." The State notes the jury was instructed that "[w]hen a witness says he was involved in the commission of a crime with the defendant, the testimony of that witness is subject to suspicion and should be considered by you with caution. It should be carefully examined in light of the other evidence in this case." In his reply brief, defendant argues this instruction "was not sufficient as to the testimony of Green on the videotape." He contends the instruction "does not direct itself to the video statements of Paragraph[s] 7 and 8 of Defendant's Motion *in Limine*" and "[p]rejudice is established by the court's comments that it would give a limiting instruction to clarify the evidence."

¶ 80 Defendant does not show how his cited case supports his argument, and his reply brief fails to articulate how the instruction given "was not sufficient." The citations to pages in the record offer no help in deciphering defendant's argument, and he presents nothing more than a conclusory statement that he was prejudiced. We find this issue forfeited.

¶ 81 Fifth, defendant argues "as prejudicial error under the plain error doctrine that counsel failed to poll the jury." Defendant contends it was important to poll the jury because one juror fell asleep during portions of the trial, and "[t]he verdict would not have been unanimous but for the prejudicial error of the counsel."

¶ 82 "In every criminal trial, the defendant has the absolute right to poll the jury after it returns its verdict." *People v. McGhee*, 2012 IL App (1st) 093404, ¶ 15, 964 N.E.2d 715. "The purpose of polling the jury is to ensure that the verdict is in fact unanimous." *McGhee*, 2012 IL App (1st) 093404, ¶ 15, 964 N.E.2d 715.

¶ 83 In this case, the trial court read the verdict forms and asked the jurors, "[B]y a show of hands, is this your verdict?" All of the jurors raised their hand. The court then asked the prosecutor and defense counsel whether they wanted the jurors polled individually. Both indicated they did not.

¶ 84 We find plain-error analysis does not apply to this issue. "Plain-error analysis applies to cases involving procedural default [citation], not affirmative acquiescence [citation]." *People v. Bowens*, 407 Ill. App. 3d 1094, 1101, 943 N.E.2d 1249, 1258 (2011); see also *People v. Scott*, 2015 IL App (4th) 130222, ¶ 24, 25 N.E.3d 1257 (stating "[w]here a defendant acquiesces to the actions taken by the trial court, he waives his right to challenge those actions on appeal"). By not requiring the trial court to individually poll the jury, we find defendant has affirmatively waived his argument.

¶ 85 Sixth, defendant winds up his brief with the following claim: "All of the errors the defendant suggested are the result of the ineffective assistance of counsel demanding a new trial." Defendant, however, fails to even cite the well-known standard for ineffective-assistance-of-counsel claims set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). We find this issue forfeited.

¶ 86 III. CONCLUSION

¶ 87 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $75 statutory assessment against defendant as costs of this appeal.

¶ 88 Affirmed.