2019 IL App (1st) 152981-U

SIXTH DIVISION
June 28, 2019

No. 1-15-2981

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 12 CR 464
	)	
JAMES SWANIGAN,	)	
	)	Honorable Joseph M. Claps,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Justices Cunningham and Harris concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court properly denied defendant's motion for discharge where the delay due to fitness proceedings did not violate defendant's statutory right to a speedy trial; defendant was subject to a mandatory Class X sentence; defendant's waiver of his right to counsel was unknowing and involuntary where he was misinformed about his Class X status; reversed and remanded.

¶ 2 After a jury trial, defendant, James Swanigan, was convicted of aggravated battery to a peace officer, criminal damage to government-supported property, and domestic battery and sentenced to concurrent prison terms of 17 years, 5 years, and 3 years, respectively. On appeal,

defendant contends that: (1) the trial court erred in denying his motion for discharge where the fitness proceedings initiated against him were frivolous and served no other purpose than to frustrate his demand for a speedy trial; (2) he was not eligible to be sentenced as a Class X offender; (3) his waiver of his right to counsel was unknowing and involuntary because he was not admonished that he was subject to a mandatory Class X sentence; and (4) his 17-year sentence for aggravated battery was excessive. We conclude that defendant's waiver of counsel was unknowing and involuntary and reverse and remand for further proceedings.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged with aggravated battery to a peace officer, criminal damage to government-supported property, and domestic battery after an incident on November 27, 2011. Defendant allegedly hit his wife with a tequila bottle and then kicked out a window while in a police car, which injured a police officer. Below, we summarize the pre-trial proceedings, defendant's trial, and sentencing. Defendant was at various points represented by counsel and represented himself *pro se*. The pre-trial proceedings also included an inquiry into defendant's fitness.

¶ 5 An assistant public defender was initially appointed to represent defendant. However, at a proceeding on March 14, 2012, counsel stated that defendant wanted to represent himself and defendant added that he wished to do so "[d]ue to lack of communication." Defendant explained that he asked to demand trial and counsel told him "we'll demand trial her time." Questioning by the court indicated that defendant had earned a GED, was 37 years old, and worked in "independent contractor sales" and with nonprofit organizations. As part its admonishments before defendant waived counsel, the court stated that defendant was charged "with a number of class two offenses, aggravated battery to [a] peace officer," among other offenses, and that

defendant's sentence for the Class 2 offense could be three to seven years in prison. Defendant ultimately waived his right to counsel and proceeded *pro se*.

¶ 6 At a subsequent proceeding, defendant asserted that his HIPAA rights were violated because the State did not properly obtain an order for defendant's medical records. Defendant sought to dismiss the case, but the court stated that violating HIPAA was not a basis for dismissal.

¶ 7 In court on June 28, 2012, the prosecutor described an incident that occurred when she and a law clerk went to the lockup to play an audio recording for defendant. There, defendant "[ranted] about the admissibility of items" and claimed that the prosecutor had not given him discovery. In court, the prosecutor noted that the court had seen the discovery that was tendered to defendant. Also in the lockup, defendant repeatedly asked the prosecutor to leave and told the prosecutor that she "[had] a look that [defendant's] seen before, that look that he saw in his second ex-wife." Defendant also said, "[M]aybe you need to see some of my work." Defendant accused the prosecutor of antagonizing him and stated he would pray for her. When the court asked defendant for a response to the prosecutor's report, defendant stated, "Well, there were some comments stated but as far as what she is going off into another arena, I don't know what that's about." The court noted that the State had asked for a psychological examination to determine if defendant was fit for trial, but stated, "I have not yet reached that plateau but I might."

¶ 8 Also on June 28, 2012, defendant filed a motion that asserted that all charges should be dismissed because the State violated his HIPAA rights when it obtained his medical records. The court informed defendant that he could file a civil action for issues relating to his medical records, but the punishment for violating HIPAA "doesn't happen here." Commenting on a

subpoena issue, defendant stated, "[I]t's an obstruction of justice that's going on here." The court warned defendant, "you're going to directly cause me to wonder if you need to be examined by a psychiatrist, okay?"

¶ 9 Per defendant's request, on August 28, 2012, the court held a discovery hearing with the evidence technician who had been at the scene. Defendant questioned the evidence technician about what was collected and observed after the incident. Pursuant to another discovery request, defendant obtained portions of notes from the felony review jacket.

¶ 10 At a proceeding on October 19, 2012, defendant asserted that the court never ruled on his HIPAA motion. The court told defendant he was not listening and that the court had "sincere concerns about your mental state." Still, the court repeated that there was no remedy for the HIPAA matter in state court, and so a ruling could not be entered. On November 19, 2012, defendant again asserted that the court never ruled on his HIPAA motion.

¶ 11 On December 10, 2012, the State discussed a plea that had been offered to defendant. The following exchange occurred:

> "MS. MELIN [(ASSISTANT STATE'S ATTORNEY)]: We were able to make an offer on the aggravated battery to a police officer, Class 2, five years. That would be concurrent with the aggravated domestic battery of three years. The aggravated domestic battery is 85 percent. The aggravated battery to PO is 50 percent.
> THE COURT: The aggravated battery of a police officer is a Class 2?
> MS. MELIN: Yes.
> THE COURT: Three to seven?
> MS. MELIN: Yes.
> THE COURT: Is he by background extendible?
> MS. MELIN: I believe he is, Judge. Although I have to check the dates of release.
> THE COURT: If that is true, it would be up to 14."

Defendant rejected the offer.

¶ 12 On December 21, 2012, defendant stated, "I think the last court appearance you asked the State if I was class X extendable." The following exchange occurred:

"THE COURT: Extended term on which case?

DEFENDANT: I remember you asked the State were they going to be inquiring if that was the case 'cause I think one of the Public Defenders, I don't know if it was Keenan Kyan, said that –

THE COURT: Kyan Keenan.

DEFENDANT: Was – class X – I mean some extended term I qualify and I would like for them to show me that because I see otherwise.

MS. MELIN: Judge, by my reading of his background he's not class X mandatory.

THE COURT: Okay. Does he fit any of the qualifications should he be convicted to have any of these terms extended?

MS. MELIN: Strictly looking at his background I do not believe so. His last conviction – his last class one was 1996. He received a sentence of four years so that would put him over ten years from the date of this offense.

THE COURT: So I mean they're saying they're not planning on asking for – should you be convicted –

DEFENDANT: But that's what I was threatened with. I mean allegedly was told me that if you don't take what they're going to be offering that this is what they're going to be seeking.

THE COURT: You don't have a lawyer.

DEFENDANT: No. Actually I'm going to be putting a lawyer on a retainer. *** "

¶ 13 Attorney Raymond Hough filed an appearance for defendant on January 7, 2013. A plea conference was held on April 29, 2013, and the State later reported that it had made a plea offer of 52 months. Defendant rejected the offer.

¶ 14 On August 28, 2013, the State indicated that it was ready for trial. However, defense counsel stated:

> "Defense would be answering ready too except some information has recently come to my attention to suggest that defendant's mental capacity may be an issue in this case. Therefore, I would ask for a behavioral clinical examination."

Defendant objected to his counsel's request. According to defendant, his counsel wanted a behavioral clinical examination (BCX) because he wanted defendant "to cop out," which defendant did not want to do. For its part, the court noted that at the plea conference, defense

counsel shared information from defendant's mother that defendant had been "hospitalized for some mental illness." Defendant disputed this and asserted that in 2001, he had required medical attention after being hit by an 18-wheeler. Defendant also revealed that his mother would state that he was diagnosed "as mentally ill sometime ago," in the early 1990s, but he was later found competent.

¶ 15 The next day, defendant's mother, Deborah Dunlap, appeared in court to answer questions about defendant's history. Dunlap stated that over 20 years ago, defendant was hospitalized and saw a psychiatrist for a behavior disorder. However, Dunlap also stated that defendant was not hospitalized and instead received outpatient therapy for six months. In 2000, defendant was hit by an 18-wheeler, which caused injuries to his intestines and the area around his heart. Defendant did not suffer head injuries, but has had palpitations and shortness of breath. Defendant told Dunlap that he had a panic attack while in the police car during the November 2011 incident. Defense counsel affirmed his request for a BCX and the court granted it, stating "we'll see what's going on."

¶ 16 In a letter dated September 30, 2013, Dr. Nicholas Jasinski stated that he tried to evaluate defendant, but he "was uncooperative and the evaluation was unable to be completed." At a subsequent proceeding, Dr. Jasinski recalled that defendant was very reticent to participate and asked numerous questions about the evaluation. Defendant also "made a number of cynical statements regarding the legal system, comments about the legal system, kind of despised [*sic*] against him, and his comments about his attorney not doing his job correctly and so on." Defendant's responses "were oppositional" and "essentially nonresponsive." Defendant gave half-answers and if Dr. Jasinski questioned further, defendant "would either not respond or provide answers that were essentially non-cooperative." The court asked defendant if he would

return to the session and answer questions to the best of his ability, to which defendant responded, "I did it already." The court re-ordered a BCX "because [defendant] keeps saying he did [answer questions] and I know he didn't."

¶ 17 In a letter dated October 21, 2013, Dr. Jasinski stated that he tried to evaluate defendant again, but defendant "declined to participate and refused to leave the holding area." In court, the State indicated it would contact Forensic Clinical Services to identify the options for moving forward. Defendant objected, demanded a speedy jury trial, and asked that his lawyer no longer represent him because "a lawyer and client confidentiality clause" had been broken. The court denied defendant's requests.

¶ 18 On November 7, 2013, the State proposed that the court issue an order for a new BCX and an order that defendant must comply. If defendant failed to comply, the State would ask the court to hold defendant in contempt and defendant would be held in custody until he complied. The court disagreed with the State's proposal, stating that "when you are doing a BCX until you know someone is fit I don't know how you do anything with them." Asked if he understood, defendant stated that he was "demanding from this day forward" and that he wanted a jury to determine if he was fit for trial. Defendant also maintained that he complied and "answered [the questions] to the best of my ability." The court stated:

> "Here is my question. Do you understand that I am ordering you to comply with the requests and questions put to you by Forensic Clinical Services? Do you understand that request?
>
> Are you going to answer? This is your idea of complying? Let the record reflect the defendant has failed to respond to my question."

The court added that it would determine what its options were from Forensic Clinical Services. Defendant again demanded "a speedy jury trial from this day forward."

¶ 19 On November 18, 2013, the court stated that it had spoken with Dr. Markos from Forensic Clinical Services, who had recommended that defendant be remanded to Cermak Health Services (Cermak) for seven days for a mandatory fitness evaluation. The court entered a written order accordingly. Defendant subsequently stated he no longer wanted Raymond Hough to represent him. The court responded, "We will talk about your representation when I determine whether or not you are fit for trial."

¶ 20 In a report dated December 11, 2013, Dr. David Kelner, the Chief of Psychiatry at Cermak, stated as follows. Although defendant declined to be interviewed on three different days, Dr. Kelner reviewed defendant's medical records and summarized defendant's behavior in the facility. On December 4, defendant interacted and engaged appropriately with other patients and watched TV. Defendant did not express delusions, respond to hallucinations, or display any striking behaviors. Defendant avoided interactions with staff and did not participate in offered therapeutic activities. On December 5, defendant only responded to questions that did not directly relate to his well-being or history of treatments. Defendant refused to participate in therapeutic programming, but was calm and no behavioral concerns were noted. On December 6, defendant interacted with patients and non-clinical staff, but refused to answer questions about his mood, well-being, and feelings. Defendant was overheard saying that he "will remain on the unit until they figure me out." Defendant's thought process was relevant, logical, and organized. On December 8, defendant joined a clinical group "during which he became disruptive with inappropriate comments about suing the County and his lawsuit against the County." On December 9, defendant interacted with other detainees appropriately and though his "affect was

irritated," no striking behaviors were noted and his thought process was organized and goal-directed. Defendant also threatened to call the Chicago Sun Times about the maltreatment of detainees at the jail. Defendant spoke about an epiphany he had after a car accident, as well as discussed his faith and the need for the therapists to focus on patients' spiritual needs. When defendant joined therapeutic groups, "limits had to be set with him due to his tendency to monopolize groups and speak about what concerned him." Defendant was overheard saying, "if he does not speak with doctors here, they will not be able to diagnose him." Dr. Kelner concluded that "in the absence of any verbal production," he could not access and assess defendant's thought content or estimate his cognitive abilities. Ultimately, there was "no conclusive psychiatric evidence to either diagnose [defendant] with mental illness or categorically exclude it."

¶ 21 The court sent Dr. Kelner's report to Forensic Clinical Services to render an opinion about whether defendant was fit for further proceedings. In court, defendant stated that he objected to any continuances, his attorney was no longer supposed to be representing him, and he wanted a jury to render an opinion about his fitness. The court responded, "First we've got to get the opinion, then you can have a jury trial as to the fitness."

¶ 22 In a report dated December 23, 2013, Dr. Jasinski stated that defendant was fit to stand trial. In court, defense counsel noted that defendant had stated repeatedly that he did not want counsel to represent him. The court stated defendant could fire his attorney if defendant was found fit after the fitness hearing. The parties and the court also discussed the date for the fitness hearing:

> "THE COURT: Let's try to get this wrapped up on the 24th ***. Fitness hearing, 24th."
> MR. HOUGH [Defense Counsel]: 24th of February?
> MS. OLSON [Assistant State's Attorney]: January."

The written order entered after the proceeding indicated that the next court date was February 24, 2014.

¶ 23 In court on February 24, 2014, the prosecutor stated, "I left a message for counsel. It was supposed to be up in – January 24th the doctor was rescheduled. It was not." Further, Dr. Jasinski's report was now outdated. Defense counsel stated that he came to court on January 24 and the common law record had indicated that the case was up on February 24, which the prosecutor acknowledged was an error. The court asked defense counsel what he wanted to do. Defense counsel replied, "Judge, I'm at the court's mercy. I'm just following the case. *** Whatever your Honor wants." After the prosecutor indicated that she would have to complete another order for defendant to be evaluated again, defendant demanded a speedy trial and refused all medical treatment. The court entered an order for Forensic Clinical Services to evaluate defendant.

¶ 24 In a letter dated March 12, 2014, Forensic Clinical Services recounted the three prior evaluation requests and further stated as follows. Dr. Jasinski was scheduled to testify at a fitness hearing on January 24, 2014, but was not called to testify on that date. Subsequently, Forensic Clinical Services received a fourth order to evaluate defendant yet again. The letter asserted that "[a]t this point, Forensic Clinical Services has exhausted its efforts in attempting to evaluate [defendant]." Defendant had been evaluated three times by Dr. Jasinski and had refused to participate each time. Yet, Dr. Jasinski, "with an extraordinary effort," had opined that defendant was fit to stand trial after defendant was ordered to Cermak for observation. Given that the department received over 2,000 referrals a year, the current request for another evaluation "is clearly a misuse of our services," as repeat examinations exhaust limited staff resources and compromise Forensic Clinical Services's ability to serve the court in a timely manner. In court,

the prosecutor suggested that the matter be set for a hearing. Defendant objected, stating that his counsel was no longer supposed to be representing him and that a fitness hearing would be "over the statute of limitations."

¶ 25 The fitness hearing was nonetheless held on March 20, 2014. Initially, defendant again objected to his counsel, asserting that there was a conflict of interest and defendant had not heard from his counsel since August. Defendant further stated that he had asked for "a jury trial for the jury to deliberate on the decision not for the judge's decision." The court stated, "All right," and told Dr. Jasinski to "[g]o ahead."

¶ 26 Dr. Jasinski testified as follows. As part of the evaluation, Dr. Jasinski reviewed police documents pertaining to the alleged offense, previous psychological summaries completed in September and October 2013, a psychosocial history report, and Dr. Kelner's report. Dr. Jasinski met with defendant on December 20, 2013, but defendant refused to leave the holding area and did not make "any verbalizations or anything." Defendant appeared calm and was not isolating himself. During previous meetings with Dr. Jasinski, defendant did not display problems understanding what was said to him. Based on his review of records, observations, and an interview with defendant's mother, Dr. Jasinski opined that defendant was currently fit to stand trial. The trial judge asked Dr. Jasinski if fitness could be related to an inability to communicate with counsel. Dr. Jasinski stated that the inability to cooperate with counsel would have to be the result of a mental or physical condition, such as a severe cognitive impairment, mood disorder, or psychotic disorder, and defendant did not manifest any of those conditions. At the end of the hearing, the court found defendant fit for trial.

¶ 27 The court next addressed defendant's desire to discharge his attorney. Defendant confirmed that he still wanted to fire his attorney and the court discharged him accordingly. The next day, the trial judge admonished defendant in part as follows:

> "These are Class 2, 3 and 4 offenses, and I need to make sure that you understand and I'm making an intelligent and knowing waiver of your right to counsel, which is your Constitutional right.
>
> * * *
>
> And knowing – oh, and I'm sorry, and these are Class 2 and Class 4 offenses, possible penalties although they are probational is, on the Class 2, three to seven years, on the Class 3, two to five years, on the Class 4, one to three years ***."

Defendant ultimately waived his right to counsel.

¶ 28 Subsequently, defendant filed a motion to dismiss that asserted in part that the trial court improperly "reset the clock" when it rescheduled the fitness hearing. Defendant also sought dismissal for a violation of a fair and speedy trial under section 103-5 of the Code of Criminal Procedure (Code) (725 ILCS 5/103-5 (West 2010)). The State maintained that "[a] fitness hearing not being held on the date selected by the defendant is not a basis to dismiss the indictment." The court denied defendant's motion to dismiss.

¶ 29 Proceedings continued and on August 19, 2014, the State extended a plea offer of three years in prison for aggravated battery to a peace officer, which was "the minimum that the defendant could be sentenced to on this case[.]" Defendant rejected the offer.

¶ 30 Defendant's jury trial began on September 22, 2014. At one point during jury selection, defendant told the jury, "I have been locked up for 34 months in this case, and he is trying to force me to go into a trial. *** I don't agree to go into trial with this guy." The court informed the jury that defendant's statements were not evidence. The court also found defendant in contempt and sentenced him to six months in custody, with the sentence stayed pending the trial's outcome.

¶ 31 After opening statements, Hellen Coleman, who was defendant's wife at the time of the incident, testified as follows. After work on November 27, 2011, Coleman went to the liquor store and bought beer, lime juice, and a pint of tequila. At the time, Coleman thought she and defendant should separate. Coleman picked up defendant from his house at 93rd and Calumet in Chicago so they could talk. While they were driving, defendant "totally snapped," becoming belligerent and calling Coleman names. Using the tequila bottle that was in the car, defendant hit Coleman in the head multiple times. Defendant eventually stopped and told Coleman to drive. At one point, Coleman raised her bleeding hand after she saw defendant's mother. A Chicago State University police car approached a short time later. After the officers asked if everything was okay, defendant responded that "everything was fine," and Coleman followed suit, saying "everything is fine, it's okay, everything is fine." The officers asked Coleman and defendant to get out of the car. Defendant was handcuffed and placed in a Chicago State police car. Officers from the Chicago Police Department (CPD) arrived and defendant was transferred to the back seat of their car. Coleman observed defendant's feet planted on the window of the police car and heard glass crashing to the ground. Coleman was taken to a hospital, where she was treated for lacerations to the back of her head and a cut on her hand.

¶ 32 Officer Adam Batson, a patrolman with the Chicago State University police department, testified that on November 27, he was flagged down by two women. He went to 93rd and Indiana, where he saw defendant and Coleman in a parked car. Coleman would not make eye contact or answer the general questions that Officer Batson asked. When Coleman got out of the car, a large amount of glass fell out of her lap and her head was bleeding. A broken tequila bottle in the car appeared to have blood on it. Defendant was placed in the back of a Chicago State squad car until CPD officers arrived, whereupon defendant was placed in the back of a CPD

squad car. There, defendant kicked the back window. One of the CPD officers—Officer Ruhnke—opened the door of the squad car and told defendant to stop kicking the window. However, after the door closed, defendant kicked out the back window. Defendant was removed from the car and placed in a different squad car. Officer Ruhnke had blood on his face and a little blood on his hand.

¶ 33 CPD officer Erik Ruhnke testified that on November 27, he and his partner responded to a call of a domestic battery at approximately 93rd and Indiana. When Officer Ruhnke arrived, he placed defendant in the back of his squad car and went to talk to other officers at the scene. After Officer Ruhnke heard a loud bang, he observed that defendant had rolled himself onto his back and was kicking at the back passenger window. Officer Ruhnke told defendant to stop because breaking the window was a felony. Officer Ruhnke was about 18 inches away from the squad car. Defendant nonetheless kicked the window again with both legs, shattering the glass, which shot out from the squad car and hit Officer Ruhnke on the face and hand. The frame of the door was also bent out. The cost to repair the squad car was $622.40.

¶ 34 After the State rested, defendant called several witnesses. Defendant also testified, denying that he put his hands on Coleman and maintaining that Coleman told the police that she slipped and fell.

¶ 35 After closing arguments and jury deliberations, the jury found defendant guilty of aggravated battery to a peace officer, criminal damage to government-supported property, and domestic battery.

¶ 36 On October 20, 2014, attorney Leslie Starks entered his appearance for defendant. Starks filed a motion for a new trial, contending that the charges should have been dismissed because the speedy trial term was violated. The motion further stated that the repeated referrals for BCXs

and the failure of witnesses to appear delayed and otherwise curtailed defendant's demand for a speedy trial. The court denied the motion.

¶ 37 At a proceeding on June 8, 2015, defendant asked whether the State was seeking a "sentence enhancement for extended term," even though the State had previously indicated it would not do so. Starks had told defendant that the State was seeking Class X sentencing.

¶ 38 On July 13, 2015, the court asked for defendant's background and the State responded that defendant was Class X mandatory based on two prior convictions. Defendant had a 1995 Class 2 drug conviction for which he was initially sentenced to probation, but was later sentenced to four years in prison after he violated his probation. Defendant also had a 1996 Class 2 attempted aggravated robbery conviction, for which defendant was sentenced to four years in prison. Defendant asserted that the State previously indicated that it would not seek an extended term. Starks also noted that defendant was offered a plea that was other than a Class X sentence, "[s]o I don't know if we have a detrimental reliance or an inadvertent misrepresentation that caused [defendant] not to go forward with what was presented to him as an option."

¶ 39 On a subsequent date, Starks stated that defendant insisted on representing himself. Further, Starks recalled that the State had earlier maintained that it would not seek an enhanced or extended term sentence. Starks added that if defendant had known he was Class X mandatory, he would have "[c]onceivably accepted the offer that had been presented to him. Whether or not that would have been a legal sentence is a different issue I believe that surfaces." Meanwhile, defendant objected to using the 1995 drug conviction for Class X sentencing because his records showed that the conviction was for a Class 4 offense.

¶ 40 On August 6, 2015, defendant stated he wanted to discharge Starks as his attorney because Starks did not properly present his posttrial motion. After granting Starks leave to

withdraw, the court admonished defendant about waiving his right to counsel, including that defendant could be sentenced to between 6 and 30 years in prison if the court found he was Class X mandatory. Defendant responded that it had never been brought to his attention that he was Class X mandatory and asked for counsel "since you are not going to explain to me why I'm class X sentence mandatory." Defendant reiterated that his 1995 conviction was for a Class 4 offense. After further back-and-forth, defendant stated he wanted to consult a lawyer.

¶ 41 On August 11, 2015, defendant returned to court and stated that he wanted to proceed *pro se*. Defendant also asked for the statute that the State relied on to determine that he was a Class X offender. Two days later, proceedings were held related to other *pro se* posttrial motions filed by defendant, including a "Motion *in Limine* to Sentence the Defendant Under the Original Sentencing Guideline Excluding Class X Sentencing." When the court asked the State how it could have made an offer of three years for aggravated battery to a peace officer, the State conceded that such a sentence would have been illegal. Defendant stated that when he "first came in here, you stated that case carried three to seven." The court denied defendant's motions.

¶ 42 After a sentencing hearing, the court found that defendant was Class X mandatory and sentenced him to concurrent prison terms of 17 years for aggravated battery to a peace officer, 5 years for criminal damage to government-supported property, and 3 years for domestic battery. The six months previously imposed for the contempt citation was already served. Defendant subsequently appealed.

¶ 43 II. ANALYSIS

¶ 44 A. Fitness Proceedings

¶ 45 On appeal, defendant first contends that the trial court erred in denying his motion for discharge where the fitness proceedings were arbitrary and served no other purpose than to

frustrate his demand for a speedy trial. Defendant argues that the speedy trial period was not tolled during the 204 day-long fitness proceedings due to numerous errors.

¶ 46 Defendant relies on the statutory right to a speedy trial, which specifies certain time periods in which a defendant must be brought to trial and states in part:

> "(a) Every person in custody in this State for an alleged offense shall be tried by the court having jurisdiction within 120 days from the date he was taken into custody unless delay is occasioned by the defendant, by an examination for fitness ordered pursuant to Section 104-13 of this Act, by a fitness hearing, by an adjudication of unfitness to stand trial, by a continuance allowed *** after a court's determination of the defendant's physical incapacity for trial, or by an interlocutory appeal. Delay shall be considered to be agreed to by the defendant unless he *** objects to the delay by making a written demand for trial or an oral demand for trial on the record." 725 ILCS 5/103-5 (West 2010).

¶ 47 The statute provides that a fitness examination and fitness hearing toll the 120-day speedy trial term. However, defendant contends that the speedy trial term was not tolled here because the fitness proceedings were conducted improperly. Before we address defendant's argument, we review general principles for fitness proceedings. A defendant is presumed fit to stand trial. *People v. Harris*, 2013 IL App (1st) 111351, ¶ 80. A defendant is unfit "if, because of his mental or physical condition, he is unable to understand the nature and purpose of the proceedings against him or to assist in his defense." 725 ILCS 5/104-10 (West 2010). A due process violation occurs if a defendant is subjected to trial when he is unable to understand the nature and purpose of the criminal proceedings and assist defense counsel. *People v. Hanson*, 212 Ill. 2d 212, 218 (2004).

¶ 48 Section 104-11 of the Code sets out part of the procedure for determining a defendant's fitness:

> "(a) The issue of the defendant's fitness for trial, to plead, or to be sentenced may be raised by the defense, the State or the Court at any appropriate time before a plea is entered or before, during, or after trial. When a *bona fide* doubt of the defendant's fitness is raised, the court shall order a determination of the issue before proceeding further.
>
> (b) Upon request of the defendant that a qualified expert be appointed to examine him *** to determine prior to trial if a *bona fide* doubt as to his *** fitness to stand trial may be raised, the court, in its discretion, may order an appropriate examination. However, no order entered pursuant to this subsection shall prevent further proceedings in the case.***" 725 ILCS 5/104-11 (West 2010).

Sections 104-11(a) and 104-11(b) present different procedures depending on whether or not the trial court has found a *bona fide* doubt of the defendant's fitness. If *bona fide* doubt has been raised, section 104-11(a) " 'places a mandatory burden on the trial judge to order a determination of a defendant's fitness.' " *People v. Garcia*, 2012 IL App (1st) 103590, ¶ 124 (quoting *People v. Mitchell*, 189 Ill. 2d 312, 330 (2000)). If a *bona fide* doubt has not been raised, section 104-11(b) permits the defendant to request, and the court to appoint, an expert to help determine if *bona fide* doubt exists. *Id*. Overall, "section 104-11(a) of the Code ensures that a defendant's due process rights are not violated when the trial court has already found *bona fide* doubt to have been raised," while section 104-11(b) helps the trial court decide whether there is a *bona fide* doubt of fitness. *Hanson*, 212 Ill. 2d at 218. If the trial court determines there is a *bona fide*

doubt after a fitness examination, then a fitness hearing is mandatory under section 104-11(a). *People v. Washington*, 2016 IL App (1st) 131198, ¶ 75.

¶ 49 Here, the fitness proceedings began under section 104-11(b) of the Code, when defense counsel requested a BCX on August 28, 2013. When granting the request, the court stated, "[W]e'll see what's going on." The court's comment indicates that it was not yet convinced that there was a *bona fide* doubt, which indicates that section 104-11(b) applied.

¶ 50 Defendant asserts that the speedy trial term is not tolled by proceedings under section 104-11(b), pointing to language stating that "no order entered pursuant to this subsection shall prevent further proceedings in the case." 725 ILCS 5/104-11(b) (West 2010). Defendant also relies on *People v. Bickham*, 39 Ill. App. 3d 358, 364 (1976), and *People v. Gibson*, 21 Ill. App. 3d 692, 694-95 (1974), to contend that if the trial court has not found a *bona fide* doubt of the defendant's fitness, the competency proceeding does not toll the speedy trial term.

¶ 51 Defendant is incorrect. Current case law holds that the speedy trial term is indeed tolled when a fitness examination is ordered under either section 104-11(a) or (b). The statutory fitness provisions were amended in 1979, after *Bickham* and *Gibson*. *People v. Sonntag*, 128 Ill. App. 3d 548, 555 (1984). Under the amendment, the language in subsection (b) that "no order entered pursuant to this subsection shall prevent further proceedings in the case" was not intended to be correlated to the speedy trial statute. *Id*. at 557. The language merely gives the court the discretion to continue the pre-trial proceedings while the fitness examination is conducted. *Id*. Still, a fitness examination by experts "will generally cause some delay," and so a delay caused by a fitness examination under either section 104-11(a) or (b) tolls the speedy trial term. *Id*. at 558. See also *People v. Clark*, 148 Ill. App. 3d 669, 677 (1986) (speedy trial term is tolled by a fitness examination that was requested by the defendant, even though such an order does not by

itself raise a *bona fide* doubt of fitness). Thus, the order for a fitness examination under section 104-11(b) tolled the speedy trial term as a general matter.

¶ 52 Defendant asserts that the speedy trial clock was also not tolled here because the trial court never found there was a *bona fide* doubt of defendant's fitness, and even if it did, any such implied finding was error. We conclude otherwise.

¶ 53 Determining whether there is a *bona fide* doubt is within the sound discretion of the trial court, which "is in a superior position to observe and evaluate the defendant's conduct." *People v. Seaman*, 203 Ill. App. 3d 871, 879 (1990). The trial court abuses its discretion "only where no reasonable person would take the court's view or where its ruling is arbitrary, fanciful, or unreasonable." *Washington*, 2016 IL App (1st) 131198, ¶ 72. The test of a *bona fide* doubt is objective, and examines whether "facts raise a 'real, substantial, and legitimate doubt' " of the defendant's mental capacity to meaningfully participate in his defense. *Id*. (quoting *People v. Eddmonds*, 143 Ill. 2d 501, 518 (1991)). Relevant factors in the assessment include a defendant's irrational behavior, his demeanor at trial, any prior medical opinion on competence to stand trial, and the representations of defense counsel about the defendant's competence. *Eddmonds*, 143 Ill. 2d at 518. "There are no fixed or immutable signs that invariably indicate the need for further inquiry into [the] defendant's fitness." *People v. Qurash*, 2017 IL App (1st) 143412, ¶ 42. The question is often a difficult one and implicates "a wide range of manifestations and subtle nuances." *Eddmonds*, 143 Ill. 2d at 518.

¶ 54 Here, the trial court found a *bona fide* doubt of defendant's fitness before ordering a fitness hearing. The court acknowledged receipt of Dr. Jasinski's final report and set the matter for a fitness hearing, which constituted an implied finding of a *bona fide* doubt of defendant's fitness. See *Washington*, 2016 IL App (1st) 131198, ¶ 75 (a fitness hearing is required if the trial

court finds a *bona fide* doubt after a fitness examination). And, that the finding was implicit rather than explicit was not an error. See *Qurash*, 2017 IL App (1st) 143412, ¶ 48 (court implicitly found no *bona fide* doubt where it acknowledged receipt of evaluation summaries in the same proceeding where it set trial for the following month). While appellate review would be enhanced if trial courts briefly stated the bases for their fitness findings, there is no rule that requires them to do so. See *People v. Goodman*, 347 Ill. App. 3d 278, 287 (2004).

¶ 55 Moreover, the finding of a *bona fide* doubt was not an abuse of discretion. We acknowledge that defendant navigated several matters, including raising a HIPAA violation, requesting discovery, and questioning an evidence technician. Yet, defendant exhibited other behaviors inside and outside of the courtroom from which the court could find a *bona fide* doubt of his fitness. At the proceeding where defense counsel requested the BCX, the court noted that defendant's mother had previously indicated that defendant had been hospitalized for a mental illness at some point. Defendant's mother later told the court that defendant had seen a psychiatrist for a behavior disorder, received outpatient therapy for six months, and had told her that he had a panic attack during the incident. Defense counsel's request for a BCX was not the first time that concerns about defendant's mental health were raised. In June 2012, after the State described an interaction with defendant in the lockup, the court stated that it had "not yet reached that plateau" of ordering a BCX, but it might. In October 2012, the court told defendant it had "sincere concerns" about defendant's mental state because defendant kept insisting on a ruling on the HIPAA issue despite the court having already addressed it.

¶ 56 All this did not apparently rise to the level of *bona fide* doubt, but the fitness examination process raised more questions about defendant's capacity to meaningfully participate in his defense. It took multiple attempts to evaluate defendant. After the first attempt, Dr. Jasinski

reported that he could not complete the evaluation because defendant was uncooperative. Dr. Jasinski stated in court that defendant made various comments and cynical statements about the legal system and his responses were oppositional and "essentially nonresponsive." Defendant maintained that he had answered the questions to the best of his ability. After the second attempt, Dr. Jasinski reported that defendant "declined to participate and refused to leave the holding area." Defendant still maintained that he had answered the questions to the best of his ability. Defendant did not respond when the court asked if he understood that the court was ordering him to comply with the requests and questions from Forensic Clinical Services. At Cermak, defendant was calm and his thought process was organized, but he refused to answer questions. In a group, he was disruptive with inappropriate comments. Ultimately, the examining doctor at Cermak could not access and assess defendant's thought content or estimate his cognitive abilities. There was no conclusive evidence to either diagnose or categorically exclude mental illness. Dr. Jasinski later concluded that defendant was fit to stand trial, but that evaluation took "an extraordinary effort." Overall, the fitness examination process was not entirely conclusive given defendant's refusal to participate.

¶ 57 Importantly, defendant appeared in court throughout the examination process, where the court had the opportunity to observe him and become familiar with how defendant presented himself. See *Washington*, 2016 IL App (1st) 131198, ¶ 81 (frequent court dates between indictment and sentencing hearing "bespeaks the trial court's deep familiarity" with the defendant's mental state and competency). Based on the evaluation process and the trial court's interactions with defendant, we conclude that the trial court's finding of a *bona fide* doubt of defendant's fitness was not an abuse of discretion. As a result, the trial court properly ordered a fitness hearing.

¶ 58 Defendant next contends that regardless of whether the trial court correctly found a *bona fide* doubt, the rest of the fitness proceedings were plagued with error and not conducted in good faith. Relying on *People v. Hugley*, 1 Ill. App. 3d 828, 830-31 (1971), defendants asserts that bad faith fitness inquiries do not toll the speedy trial term. Defendant raises five alleged errors: (1) defense counsel requested a fitness hearing to avoid going to trial; (2) the trial court improperly ordered defendant into custody at Cermak for a seven-day inpatient evaluation; (3) the fitness hearing was held outside the statutory 45-day time limit from when the court received the last evaluation; (4) the breach of the 45-day time limit was due to the trial court's abuse of services provided by Forensic Clinical Services; and (5) the fitness hearing was not conducted before a jury, despite defendant's repeated and explicit demands. We will consider each alleged error in turn.

¶ 59 Defendant asserts that counsel's decision to seek a BCX is suspect because counsel had been interacting with defendant for eight months and had not seen a reason to request a BCX. Defendant also states that counsel cited information when requesting the BCX that indicated defendant had a mental illness, but mental illness is not equivalent to unfitness. Defendant also contends that defense counsel abandoned any pursuit of the fitness proceedings when he stated he was "at the court's mercy" and "just following the case."

¶ 60 Defendant correctly notes that unfitness is not the same as mental illness. See *People v. Garcia*, 2015 IL App (1st) 131180, ¶ 52 (fitness only speaks to a person's ability to function in the context of a trial, and a defendant can be fit for trial even though his mind may be otherwise unsound). Nonetheless, counsel did not have to present a *bona fide* doubt of defendant's fitness to request the BCX because, as noted above, counsel requested the BCX under section 104-11(b) of the Code. See *Garcia*, 2012 IL App (1st) 103590, ¶ 124 (section 104-11(b) helps the trial

court decide whether there is a *bona fide* doubt of fitness). Moreover, there is no basis in the record to conclude that defense counsel requested the BCX just to avoid trial. While the information shared when counsel requested the BCX did not necessarily rise to *bona fide* doubt, defense counsel's concern about defendant's mental capacity was not unfounded and was confirmed by defendant's mother. Further, as noted above, defense counsel's statement was not the first time that defendant's mental capacity was raised as an issue. We reiterate that it is a due process violation to try a defendant who is unfit. See *Hanson*, 212 Ill. 2d at 218. We will not conclude that the request for a BCX was merely a delay tactic.

¶ 61 Moreover, defense counsel did not abandon the fitness proceedings in a way that suggests bad faith or a desire to avoid trial. Defendant ignores the context for counsel's statement that he was "at the court's mercy" and "just following the case," which was made in February 2014. In October 2013, November 2013, and December 2013, defendant stated that he no longer wanted his counsel to represent him. Further, when defense counsel made the subject statement in February 2014, the parties were discussing what to do after a scheduling error had made the final report outdated. Defense counsel was more likely acknowledging a difficult situation, which included defendant no longer wanting his representation and the consequences of the scheduling error.

¶ 62 We also do not find evidence of bad faith from the court's order of a seven-day inpatient evaluation at Cermak. Defendant argues that the inpatient evaluation was improper because he did not fail to keep appointments for his BCX and the recommendation for mandating him to Cermak came from a statutorily impermissible source.

¶ 63 Section 104-13(c) of the Code provides:

> "If the defendant fails to keep appointments without reasonable cause or if the person conducting the examination reports to the court that diagnosis requires hospitalization or extended observation, the court may order the defendant admitted to an appropriate facility for an examination." 725 ILCS 5/104-13(c) (West 2010).

¶ 64 We agree that defendant did not technically fail to keep appointments without reasonable cause. However, defendant had twice refused to be evaluated. The first time, defendant was "essentially nonresponsive," and the second time, defendant refused to leave the holding area to speak with Dr. Jasinski. Further, defendant stood mute when the court asked whether he understood he was being ordered to comply with the evaluation. The State proposed holding defendant in custody until he complied, but the court did not want to do so, stating, "until you know how someone is fit I don't know how you do anything with them." Thus, the court was at an impasse and could not end the fitness proceedings without risking a violation of defendant's due process rights. See *Goodman*, 347 Ill. App. 3d at 287 (" 'due process clauses of the Illinois and United States Constitutions prohibit the prosecution of a defendant who is unfit for trial' "). Faced with the need to come to a conclusion about defendant's fitness and defendant's refusal to participate, the court consulted Dr. Markos from Forensic Clinical Services, who recommended the inpatient evaluation. To be sure, Dr. Markos was not the same "person conducting the examination." See 725 ILCS 5/104-13(c) (West 2010). However, per the letterhead on Dr. Jasinski's reports, Dr. Markos was the director of Forensic Clinical Services. Defendant does not cite authority that holds that the director was an improper person for the court to consult about its predicament. Under the circumstances here, we do not find that relying on Dr. Markos's

recommendation was evidence of bad faith. Rather, the court was trying to protect defendant's due process rights in the face of questions about defendant's fitness and refusal to participate.

¶ 65 As another example of bad faith, defendant notes that the fitness hearing that was ultimately conducted was held outside the statutorily mandated 45-day time period. Section 104-16(a) of the Code provides that the court "shall conduct" a fitness hearing within 45 days of receipt of the final written report of the person who conducted the BCX. 725 ILCS 5/104-16(a) (West 2010). It is undisputed that the court held the fitness hearing more than 45 days from when Dr. Jasinski submitted his report. Although not meeting the 45-day deadline has been recognized as error, the fitness statute "provides no sanction for such a violation" and "[o]rdering a discharge *** for tardiness in holding the fitness hearing is neither appropriate nor required." *People v. Durham*, 142 Ill. App. 3d 473, 484 (1986). See also *People v. Oliver*, 367 Ill. App. 3d 826, 832 (2006) (section 104-16 of the Code does not provide a sanction for its violation). Acknowledging *Durham* and *Oliver*, defendant does not claim that the 45-day violation should result in its own relief. Instead, defendant asserts that the violation of the statute was another example of how the fitness proceedings had devolved into a sham.

¶ 66 Our review of the record indicates that the fitness hearing was untimely due to an accidental scheduling error. When the parties and the court discussed Dr. Jasinski's report on December 30, 2013, the court stated the next date would be for a fitness hearing "on the 24th." Defense counsel asked if the next date was February 24, and the prosecutor stated the next date would be January 24. The written order entered after the proceeding indicated the next date was February 24. Defense counsel apparently came to court on January 24, but the fitness hearing was not held on that date. The assistant state's attorney conceded that the February 24 date was

an error. The fitness hearing was ultimately scheduled and held on March 20, 2014. The record suggests that the missed deadline was due to confusion over dates and not bad faith.

¶ 67 Defendant points to Forensic Clinical Services's statement that the court was trying to "misuse" its services as another example of bad faith. We disagree. After the court and the parties recognized that the fitness report was outdated due to the scheduling error, another BCX was ordered in an attempt to comply with the 45-day deadline. See 725 ILCS 5/104-16(a) (West 2010). In response, Forensic Clinical Services refused to re-examine defendant a fourth time, stating that it had exhausted its efforts to try to evaluate him and that the current request was "clearly a misuse" of its services because repeat examinations exhaust limited staff resources and compromise its ability to serve the court in a timely manner. The letter was strongly worded. Still, the larger context indicates that the court was not trying to needlessly prolong the fitness proceedings. Instead, the court was trying to facilitate a hearing being held within 45 days of a final report.

¶ 68 Defendant further claims that the court knew as early as December 2013—when Dr. Jasinski filed his final report—that defendant was fit to stand trial, but initiated a fourth examination anyway. Defendant overlooks the court's duty to make the ultimate decision as to defendant's fitness. See *People v. Contorno*, 322 Ill. App. 3d 177, 179 (2001). A court "must analyze and evaluate the basis for an expert's opinion instead of merely relying upon the expert's ultimate opinion." *Id*. The court could not properly end the fitness inquiry in December 2013 and the request for a fourth examination was not evidence of bad faith.

¶ 69 Defendant further asserts that the trial court conducted the fitness hearing without a jury, despite defendant's repeated insistence that a jury be provided. We agree that the court should have heeded defendant's request. A defendant has the right to personally demand a jury

determination of his fitness and a trial court errs when it disregards that request. *People v. McCoy*, 2014 IL App (2d) 130632, ¶ 25. Defendant demanded that a jury decide his fitness throughout the fitness proceedings. When defendant demanded a jury a final time in March 2014, just before the fitness hearing, the court stated, "All right," but went ahead with the fitness hearing without a jury. The ordinary remedy for this violation is a remand (*id*. ¶ 30), but defendant states that a remand for new fitness proceedings would be a waste of time and resources. It is unclear why the trial court ignored defendant's demand for a jury. Still, this error alone does not taint the entire proceedings with bad faith and defendant does not provide any authority supporting such a conclusion.

¶ 70 As additional grounds for finding that the speedy trial term was not tolled, defendant contends that the delay from the fitness proceedings cannot be attributed to him, despite his counsel agreeing to continuances, because he clearly and convincingly attempted to discharge his attorney and proceed to an immediate trial. See *People v. Mayo*, 198 Ill. 2d 530, 537 (2002) (a defendant is not bound by his attorney's actions when he "clearly and convincingly attempted to assert his right to discharge his attorney and proceed to an immediate trial"). However, because questions remained about defendant's fitness, the court properly delayed ruling on defendant's request to represent himself. See *People v. Rath*, 121 Ill. App. 3d 548, 551 (1984) ("[u]ntil the shadow of defendant's questioned ability to understand the nature of the charges against him and his ability to cooperate in his own defense was removed, he was not only entitled to be represented by competent counsel, it was required, even if against his will").

¶ 71 Because we find that the trial court properly found a *bona fide* doubt of defendant's fitness and the fitness proceedings were not conducted in bad faith, the speedy trial term was tolled during the fitness proceedings. The motion for discharge was properly denied.

¶ 72 B. Eligibility for Class X Sentencing

¶ 73 Next, defendant contends that he was incorrectly sentenced as a Class X offender because the sequence of convictions required for Class X sentencing was not satisfied. As background, defendant was sentenced as a Class X offender based on two prior cases. In case number 95 CR 17769, defendant pled guilty and was sentenced to probation on September 22, 1995. On April 1, 1996, the State filed a petition to revoke defendant's probation, which was the same date that defendant was charged in a second case, with case number 96 CR 09234. On July 12, 1996, defendant was sentenced for the probation violation, at the same time he was sentenced in case number 96 CR 09234. Defendant argues that the conviction in 95 CR 17769 was not final until he was sentenced on July 12, 1996. Thus, the second felony was not committed after conviction on the first, as would be required for Class X sentencing.

¶ 74 Defendant did not raise this precise issue in the trial court and urges this court to review the matter for plain error. The plain error doctrine "allows a reviewing court to consider unpreserved error when either (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). The first step in plain error review is to determine whether error occurred at all. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). Here, there was no error because defendant qualified for a Class X sentence.

¶ 75 The Unified Code of Corrections includes the following provision related to Class X sentencing:

> "(b) When a defendant, over the age of 21 years, is convicted of a Class 1 or Class 2 felony, after having been twice convicted in any state or federal court of an offense that contains the same elements of an offense now (the date the

> Class 1 or Class 2 felony was committed) classified in Illinois as a Class 2 or greater Class felony and those charges are separately brought and tried and arise out of different series of acts, that defendant shall be sentenced as a Class X offender. This subsection does not apply unless:
>
> (1) The first felony was committed after February 1, 1978 ***;
>
> (2) the second felony was committed after conviction on the first; and
>
> (3) the third felony was committed after conviction on the second."

730 ILCS 5/5-4.5-95(b) (West 2010).

¶ 76 Defendant's argument is based on *People v. Lemons*, 191 Ill. 2d 155 (2000). There, the court found that for the purposes of extended-term sentencing based on a prior conviction, the applicable 10-year limitation period began to run on the date that the defendant's sentence of probation was last revoked and he was last sentenced, rather than the original date of sentencing. *Id*. at 160. The court stated that to use the date that the original probation was handed down "would lead to absurd results" because a defendant could avoid extended-term sentencing by violating his probation and postponing resentencing on the revocation of probation. *People v. Lemons*, 191 Ill. 2d 155, 160 (2000). As the court did in *Lemons* for extended-term sentencing, defendant wants to use as the operative date for Class X sentencing the date he was resentenced for the 1995 case, rather than the date he was originally sentenced to probation.

¶ 77 We disagree that *Lemons* applies here. *Lemons* involved an entirely different sentencing statute. Further, defendant was convicted of the first offense when he was sentenced to probation. Section 5-1-5 of the Unified Code of Corrections defines "conviction" as "a judgment of conviction or sentence entered upon a plea of guilty or upon a verdict or finding of guilty of an offense, rendered by a legally constituted jury or by a court of competent jurisdiction

authorized to try the case without a jury." 730 ILCS 5/5-1-5 (West 2010). Thus, a conviction is a finding of guilt combined with a sentence. We also note that the imposition of probation following conviction of a criminal offense is a final and appealable order. *People v. McCarty*, 101 Ill. App. 3d 355, 357 (1981), *aff'd in part and rev'd in part on other grounds*, 94 Ill. 2d 28 (1983); *People v. Lambert*, 23 Ill. App. 3d 615, 618 (1974). Resentencing is not reconviction. Defendant's second felony was committed after defendant was convicted for the first felony and defendant qualified for Class X sentencing under the plain language of the statute. We recognize that the same scenario leads to different consequences under the Class X statute and the extended-term statute. However, our result is consistent with the legislature's intent, which is to " 'punish recidivist criminals more harshly than first-time offenders.' " *People v. Davis*, 2012 IL App (5th) 100044, ¶ 30 (quoting *People v. Lee*, 397 Ill. App. 3d 1067, 1071 (2010)). Defendant was properly sentenced as a Class X offender.

¶ 78 C. Waiver of Counsel

¶ 79 Though defendant was indeed eligible for Class X sentencing, the admonishments he was given when he waived counsel did not include that information. Moreover, defendant was *affirmatively told* that he was not facing a Class X sentence. As defendant correctly contends, his waiver of counsel was unknowing and involuntary, and as a result, we must reverse his convictions and remand for a new trial.

¶ 80 Initially, the State contends that defendant forfeited his argument by failing to raise it at trial or in a posttrial motion. See *People v. Johnson*, 238 Ill. 2d 478, 484 (2010) (a defendant forfeits ordinary appellate review of an error that he did not object to at trial and include in a posttrial motion). Defendant objected in the trial court to his Class X eligibility, but did not assert that his waiver of counsel was invalid. Nonetheless, as defendant asserts, the failure to issue the

admonitions related to waiving counsel has been recognized as plain error. See *People v. Brzowski*, 2015 IL App (3d) 120376, ¶ 42 (right to counsel is fundamental and failure to issue admonitions amounts to plain error); *People v. Black*, 2011 IL App (5th) 080089, ¶ 24 (noting cases where failure to issue admonitions was plain error).

¶ 81 The sixth amendment to the United States Constitution (U.S. Const., amend. VI) guarantees a defendant the right to the assistance of counsel and the right to proceed without counsel. *People v. Wright*, 2017 IL 119561, ¶ 39. "The right of self-representation is 'as basic and fundamental as [the] right to be represented by counsel.' " *People v. Haynes*, 174 Ill. 2d 204, 235 (1996) (quoting *People v. Nelson*, 47 Ill. 2d 570, 574 (1971)). A defendant may waive his constitutional right to counsel if the waiver is voluntary, knowing, and intelligent. *Id*.

¶ 82 Illinois Supreme Court Rule 401(a) (eff. July 1, 1984) lists the admonitions that the trial court must give a defendant before he waives counsel:

> "(a) Waiver of Counsel. 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 the 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."

¶ 83 The trial court must comply with Rule 401(a) for an effective waiver of counsel, but strict technical compliance is not always required. *Wright*, 2017 IL 119561, ¶ 41. Substantial compliance is sufficient if the record indicates that the waiver was made knowingly and voluntarily, and the admonishment did not prejudice the defendant's rights. *Id*. A trial court substantially complied with Rule 401(a), and the failure to fully admonish the defendant did not prejudice him, when either (1) the absence of a detail did not impede the defendant from giving a knowing and intelligent waiver, or (2) the defendant had a degree of knowledge or sophistication that excused the lack of admonition. *People v. Pike*, 2016 IL App (1st) 122626, ¶ 112. It has also been stated that a trial court substantially complied with Rule 401(a) if the defendant was aware of the omitted information, either due to his degree of legal sophistication or other means. See *People v. Maxey*, 2018 IL App (1st) 130698-B, ¶ 43. Ultimately, each case must be evaluated on its own particular set of facts. *Wright*, 2017 IL 119561, ¶ 54.

¶ 84 We summarize the information that defendant was given about his potential sentence when he was given Rule 401(a) admonishments and at other times in the proceedings. In March 2012, defendant stated that he wanted to proceed *pro se*. As part of the admonishments, the court informed defendant that he was charged with a number of Class 2 offenses and that the sentence for a Class 2 offense ranged from three to seven years in prison.

¶ 85 In December 2012, defendant was given a plea offer of five years for aggravated battery to a peace officer, which was a Class 2 offense. The court asked if defendant was extendible by background and the prosecutor replied, "I believe he is, Judge. Although I have to check the dates of release." The court stated that defendant could receive up to 14 years in prison if he was indeed extendible. On December 21, 2012, defendant stated that the court had previously asked the State if he was "class X extendable." The prosecutor stated, "[B]y my reading of his

background he's not class X mandatory." Defendant recalled that his public defender had warned him that "if you don't take what they're going to be offering that this is what they're going to be seeking."

¶ 86 Sometime later, defendant retained counsel. In April 2013, the State made a plea offer of 52 months, which defendant rejected.

¶ 87 In March 2014, when the fitness proceedings ended, defendant discharged his attorney. As part of the Rule 401(a) admonishments, the court stated that defendant was charged with Class 2, 3, and 4 offenses, and the possible penalties were three to seven years on the Class 2 offense, two to five years on the Class 3 offense, and one to three years on the Class 4 offense. In August 2014, the State extended a plea offer of a three-year sentence for aggravated battery to a peace officer, which was "the minimum that the defendant could be sentenced to on this case[.]"

¶ 88 After defendant was found guilty at trial, he retained counsel, who learned that the State was seeking Class X sentencing. The State confirmed this at a proceeding in July 2015, asserting that defendant was Class X mandatory. Defense counsel noted the previous plea offers and raised the possibility of "detrimental reliance or an inadvertent misrepresentation" that had caused defendant not to accept the previous plea offers. Defense counsel later also recalled that the State had previously represented that it would not seek an enhanced or extended-term sentence.

¶ 89 On August 6, 2015, defendant discharged his attorney. This time, defendant was admonished that if he was found to be Class X mandatory, he could be sentenced to between 6 and 30 years in prison. Defendant stated he had never been told that he was Class X mandatory and asked for counsel. However, defendant ultimately represented himself *pro se* for the rest of the proceedings. Defendant's sentence included a 17-year term for aggravated battery to a peace officer.

¶ 90 The record compels the conclusion that the trial court did not substantially comply with Rule 401(a). Defendant was twice admonished that the sentencing range for the most serious offense, aggravated battery to a peace officer, was three to seven years. He was later sentenced to 17 years in prison for this offense. A waiver is invalid when a defendant is sentenced to a longer term than the maximum he was informed of when he waived counsel. *People v. Koch*, 232 Ill. App. 3d 923, 928 (1992). An exception is "the unusual case in which the defendant has such a high degree of legal expertise that one may confidently assume he *** already knows the maximum penalty." *People v. Bahrs*, 2013 IL App (4th) 110903, ¶ 15. Defendant does not appear to have that level of legal expertise, and moreover, even if defendant's public defender initially warned him that Class X sentencing was a possibility, the State affirmatively told him in December 2012 that it was not. Adding to defendant's false sense of security, the State extended three plea offers that were below the Class X sentencing range. Two of those plea offers were explicitly for the Class 2 offense of aggravated battery to a peace officer, for which he ultimately received a Class X sentence of 17 years.

¶ 91 Defendant's situation is analogous to that of the defendant in *People v. LeFlore*, 2013 IL App (2d) 100659, *aff'd in part and rev'd in part on other grounds*, 2015 IL 116799, where the court reversed and remanded for a new trial where the defendant was not admonished that he was Class X mandatory. The defendant was twice misinformed of that the sentencing range was 4 to 15 years in prison for the most serious charge. *Id*. ¶ 53. Defendant was actually sentenced to 20 years in prison. *Id*. As in *LeFlore*, here, neither the trial court nor the State appeared to know that Class X sentencing applied when defendant waived counsel the first two times, "and we will not hold defendant to a higher level of knowledge." *Id*.[1]

[1] As noted above, *LeFlore* was affirmed in part and reversed in part on other grounds. In the supreme court, the State conceded that the appellate court correctly determined that defendant had to be

¶ 92 The State asserts that even if he had been correctly admonished, defendant still would have waived counsel because his decision did not hinge on the range of sentence he was told he was facing. Yet, the record indicates that defendant's eligibility for Class X sentencing was an important consideration for him. Defendant asked as early as December 2012 if he was Class X mandatory. After trial, defense counsel stated that if defendant had known he was Class X mandatory, he would have "[c]onceivably accepted the offer that had been presented to him." Further, after defendant was finally admonished that he was Class X, defendant asked for counsel, though he later decided to represent himself. Defendant also vigorously objected to his Class X eligibility, albeit on different grounds than he asserts here. Unlike *Wright*, 2017 IL 119561, ¶ 56, where there was not even a "bare allegation" that defendant would not have represented himself if he had known the possible maximum sentence, and *Maxey*, 2018 IL App (1st) 130698-B, ¶ 69, where "[n]othing in [the] record" suggested that defendant was prejudiced or would have changed his mind about appearing *pro se*, here the record indicates that whether defendant was Class X mandatory was a factor in his decision-making.

¶ 93 We are also not persuaded by the State's reliance on other cases where the trial court substantially complied with Rule 401(a) despite incomplete admonishments. In *Haynes*, 174 Ill. 2d at 243, the defendant was fully aware of the range of possible sentences for the most serious charge, including the death penalty, even though the admonishments did not include the minimum and maximum sentences for a less serious charge. In *People v. Coleman*, 129 Ill. 2d 321, 331-32, 334 (1989), the trial court incorrectly admonished the defendant about the minimum sentence, but the defendant was told the correct maximum sentence. Lastly, in *People v. Johnson*, 119 Ill. 2d 119, 132-34 (1987), the trial court did not advise the defendant as to the

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retried based on the lack of proper admonishments under Rule 401(a). *People v. LeFlore*, 2015 IL 116799, ¶ 13.

mandatory minimum sentence, but the record revealed the defendant was nonetheless aware of this penalty and was fully apprised of the maximum sentence. Unlike in *Haynes*, *Coleman*, and *Johnson*, defendant was twice misinformed about the maximum sentence for the most serious charge. He even tried to confirm his Class X status on his own, to which the State gave wrong information that was repeated in plea offers. Those cases do not apply here.

¶ 94 Defendant's waiver was not voluntary and knowing. Thus, we must reverse defendant's convictions and remand the cause for a new trial. See *LeFlore*, 2013 IL App (2d) 100659, ¶ 60. Based on that determination, we will not address defendant's argument that his sentence was excessive.

¶ 95 We also note, for double jeopardy purposes, that the evidence here was sufficient to support defendant's convictions. See *People v. Taylor*, 76 Ill. 2d 289, 309 (1979); *People v. Stofer*, 180 Ill. App. 3d 158, 171 (1989) (when the appellate court reverses a conviction for trial error, appellate court must decide whether the evidence was sufficient to sustain the conviction). Our holding does not imply that we have made a finding as to defendant's guilt that would be binding on retrial. See *Taylor*, 76 Ill. 2d at 310.

¶ 96 For the foregoing reasons, we reverse and remand for a new trial.

¶ 97 Reversed and remanded.