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2019 IL App (3d) 150870-U

Order filed February 7, 2019

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2019

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of the 10th Judicial Circuit,
)	Peoria County, Illinois.
Plaintiff-Appellee,)	
)	Appeal No. 3-15-0870
v.)	Circuit No. 13-CF-1074
)	
PERRY J. ROSETTO,)	Honorable
)	Kevin W. Lyons,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Lytton and Wright concurred in the judgment.

ORDER

¶ 1 *Held:* Although the waiver of counsel admonishments were deficient, there was substantial compliance with Rule 401(a) so that the defendant suffered no prejudice and his waiver of counsel was made freely, knowingly, and intelligently. Also, the denial of the defendant's motion to suppress his confession was affirmed upon the finding that the defendant's confession was voluntary.

¶ 2 The defendant, Perry J. Rosetto, appeals from his convictions and sentences for home invasion, armed robbery, residential burglary, and aggravated unlawful restraint.

¶ 3 **FACTS**

¶ 4 The defendant was charged by indictment with home invasion (720 ILCS 5/19-6(a)(3)(West 2012)), two counts of armed robbery (armed with a firearm) (*id.* ¶ 18-2(a)(2)), residential burglary (*id.* ¶ 19-3(a)), and two counts of aggravated unlawful restraint (*id.* ¶ 10-3.1(a)). The charges arose from a break-in at a residence on September 19, 2013, wherein several people entered a home at night, when the residents were sleeping, tied up the residents, and took several items, including vehicles.

¶ 5 The defendant was initially appointed counsel upon his arraignment on November 27, 2013. In a letter dated February 14, 2014, the defendant sought to fire his court-appointed attorney. However, on February 20, 2014, the defendant appeared in court and was informed that his appointed attorney had passed away the day before. The defendant indicated to the trial court at that time that he wanted to proceed *pro se*, but when brought back to court on February 24, the defendant agreed to proceed with new appointed counsel.

¶ 6 On March 21, 2014, the defendant requested another appointed attorney. The trial court denied that request and gave the defendant the choice of proceeding with his appointed counsel or proceeding *pro se*. As part of the admonishments, the trial court directed the State to tell the defendant what sentences he was facing:

“MR. GAST [(ASSISTANT STATE’S ATTORNEY)]: One count of home invasion, two counts of armed robbery, one count of residential burglary and two counts of aggravated unlawful restraint.

The most serious of those offenses are the home invasions and the armed robberies. They carry with it a 15 year tack-on penalty assuming the jury finds the defendant or one of his accomplices was armed with a handgun.

Otherwise the range—the sentencing range on this Class X Felony is from six to thirty years. So the minimum sentence, assuming the jury found him guilty, would be 21 to 45 years.

* * *

I would also note that the home invasion charge, as well as the armed robbery charge in this particular case, 13 CF 1074, also carries [a potential consecutive sentence]. Since they do not qualify with one act, one crime, different elements are required for the jury to find proof of those cases, to find proof that he was found guilty of those cases. So internally in this case, there is a potential for consecutive sentences.”

¶ 7 The trial court granted the defendant’s motion to proceed *pro se*. On May 8, 2014, though, the defendant appeared with a private attorney, who filed a motion to suppress the defendant’s custodial statements.

¶ 8 At the suppression hearing, the redacted video of the interrogation of the defendant was shown. The video from November 25, 2013, showed the defendant being interrogated by Detectives Garner and Ray after his arrest. The defendant was read his *Miranda* warnings. The defendant stated that he was given the stolen items that were found in his possession and that he did not break into anyone’s home. The defendant expressed concern for his mother’s safety if he talked to the detectives. The defendant asked several times to make a telephone call to his mother. The defendant was transferred to the county jail that night. The next day, the defendant was booked and then transferred to the interview room for more interrogation. Detectives Batterham and Moore conducted the interview on November 26. The defendant wanted a deal before he talked. Again, he complained that he could not call his mother. The defendant was

again read his *Miranda* rights, and again the defendant asked to call his mother. The detectives said the defendant could call his mother later.

¶ 9 Jodi Hoos, an assistant state's attorney, was called to the interrogation room. She reminded the defendant that he was being recorded and told him that the more he cooperated, the better it would be for him in the end. She informed the defendant that she could not make a deal with him. The defendant asked for the video recorder to be turned off. While the video was turned off, the defendant again asked for a deal and Hoos again told him that she could not make him any promises. Hoos testified that the defendant said that he wanted to talk to his mother and then he would tell the detectives about the case. Hoos testified that the defendant was given a telephone and allowed to call his mother while the video was turned off. According to Hoos, after the defendant talked to his mother, he indicated that he would speak to the detectives about the investigation. Hoos then left the room. The video was turned back on and the defendant made incriminating statements. Specifically, the defendant stated that he, along with three others, entered the subject residence through an unlocked door. While inside, one of the others tied up the residents and they all searched for valuables. After gathering the valuables, the defendant left in his own truck while the others stole the residents' vehicles. They drove to the defendant's storage unit.

¶ 10 The defendant's mother, Melody Hudson, testified that the police came to execute a search warrant at her house on November 26, 2013. They had the defendant's keys and told her that the defendant had been arrested. As part of the search, the defendant's computers were seized. Since the telephone was hooked up to the computer modem, the home telephone did not work. Hudson testified that she told the police that she did not have a cell phone, and, after they tried to re-hook up the house telephone, they told her they would be back with a telephone. Later

that day, the police brought her a cell phone and allowed her to talk to the defendant. One officer told Hudson that if she did not let the defendant know it was in his best interest to tell the police everything he knew, they could take her downtown and interrogate and possibly arrest her. When she spoke to the defendant, she told him to tell the truth and that she could be arrested if he did not.

¶ 11 The defendant testified that he asked for an attorney and a telephone call while in the holding cell prior to his interrogation. The defendant also testified regarding what he said during the videotaped interrogation, which was essentially that he made several requests to call his mother and told the detectives several times that he was done talking to them. As noted above, the requests to call his mother were on the videotape. The defendant's claims that he told the detectives numerous times that he was done talking to them, and that they failed to cease their interrogation, is not supported by the video. Rather, the video only indicates that the defendant said he was done talking without a deal. Also, the defendant acknowledges that he did not ask for an attorney after he was informed of his rights initially in the interview room, and he did not believe he asked for an attorney the entire time his interrogation was videotaped. While the video was turned off, after Hoos came to the interrogation room, the defendant testified that the detectives told him that he could call his mother if he agreed to cooperate. The defendant also testified that, while the video was off, one of the detectives said he was going to go put handcuffs on the defendant's mother and bring her to jail until the defendant told the detective what the detective wanted to know. The defendant testified that he was allowed to talk to his mother while the video was off. She told him to tell the truth and cooperate with the police. The defendant testified that he told his mother that he had not been allowed to call an attorney and asked her to call one for him. He did not ask for an attorney after the video recorder was turned back on.

¶ 12 The trial court made its ruling after watching the videotaped interrogation. The trial court found that the evidence did not support the defendant's claim that the manner of questioning or the environment supported a coerced result. The trial court found that the evidence did not support the claim that the defendant attempted to exercise his *Miranda* rights. Thus, the trial court denied the motion to suppress.

¶ 13 On January 23, 2015, the defendant attempted to fire his private attorney, but the trial court denied the motion to withdraw since the trial was scheduled to start on January 26, the following Monday. Then, on Monday, the defendant's attorney indicated that he and the defendant had agreed that counsel would continue to represent the defendant. The trial date was reset to March 30, 2015. On February 23, 2015, the defendant filed another motion to proceed *pro se*. In court on February 27, the trial court again admonished the defendant regarding his right to counsel and to represent himself. With regard to penalties, the trial court stated, in part:

“[THE COURT:] First, you're charged with the Class X felony of home invasion. If convicted, you would be subject to a sentence of from 6 to 30 years in the Illinois Department of Corrections followed by a period of three years of mandatory supervised release or what we used to call parole.

In Count 2, you are charged with armed robbery, a Class X felony. The penalty is the same.

In Count 3 you are charged with a Class X felony of armed robbery. The penalty is the same.

* * *

Depending upon your background of prior convictions, I believe that the terms of imprisonment are those that I mentioned and that unless I'm mistaken, is the defendant eligible for an extended term on anything?

MR. GAST [(ASSISTANT STATE'S ATTORNEY)]: Judge, he's not eligible for an extended term. However, on the counts concerning the home invasion and the armed robberies, there is an allegation that a firearm was used which would make the defendant eligible for the 15-year tack-on were that proven.

THE COURT: All right. So if in a special interrogatory given to the jury they were to find beyond a reasonable doubt that you used a firearm or that you were armed with a firearm while committing any of the first three counts, the Class X felonies, *** the lowest penalty would be that you would receive 15 years in addition to the six years making the minimum penalty for you 21 years in the Illinois Department of Corrections as opposed to six years. ***

THE COURT: The sentence would be day for day. But the minimum sentence if they found that a firearm was used, you were armed *** during any of those three offenses, the minimum penalty would be 21 years.”

¶ 14 After the defendant indicated that he understood the admonishments, the trial court granted the motion to proceed *pro se*. The court retained the March 30 trial date, but entered orders requiring discovery to be delivered to the defendant so that he could be prepared. The trial court also required the defendant's private attorney to perform the administrative tasks, such as issue subpoenas and set hearing dates for any motions filed by the defendant. However, the

defendant had technical difficulties viewing some of the DVDs in discovery, so the trial court rescheduled the trial to allow the defendant time to view the DVDs.

¶ 15 The case proceeded to a jury trial where the defendant represented himself. Prior to trial, the trial court repeated the charges against the defendant. The State listed the penalties applicable to each charge, indicating each penalty and noting that if the trial court made certain findings, convictions on counts 1 and 2 could be consecutive, with a maximum sentence of 90 years. The trial court summarized the State's information, telling the defendant that he faced 21 to 45 years on each of the first three counts, if the State proved that a handgun was used in the commission of the offense. The court informed the defendant that it could sentence the defendant to consecutive terms on the home invasion and armed robbery counts. The defendant indicated that he understood the charges and the penalties. He was found guilty on all counts. The trial court entered judgment on the first three counts: one count of home invasion and two counts of armed robbery. It sentenced the defendant to 43 years' imprisonment for home invasion, to be served consecutive to 44 years' imprisonment for each of the armed robbery convictions, which were to be served concurrently.

¶ 16 The defendant's motion to reconsider sentence was denied, and the defendant appealed.

¶ 17 ANALYSIS

¶ 18 I. Waiver of Counsel

¶ 19 The defendant argues that his waiver of counsel was invalid because the trial court did not properly admonish him of the maximum prison sentence that could be imposed. The defendant contends that, since the trial court failed to substantially comply with Illinois Supreme Court Rule 401(a) (eff. July 1, 1984), his waiver of counsel was rendered unknowing and involuntary. The State contends that there was substantial compliance with Rule 401(a) and the

defendant's waiver of counsel was knowing and voluntary, so there was no clear or obvious error.

¶ 20 For an effective waiver of counsel, there must be substantial compliance with Rule 401(a). *People v. Wright*, 2017 IL 119561, ¶ 41. 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. *Id.* Rule 401(a) requires that the court advise a defendant of the nature of the charge, the minimum and maximum sentences possible, and the right to counsel, including the right of an indigent defendant to appointed counsel. *Id.* We review *de novo* a trial court's compliance with the admonition requirements of Rule 401(a). *People v. Campbell*, 224 Ill. 2d 80, 84 (2006).

¶ 21 The defendant acknowledges that he did not object at trial, so he seeks plain error review. The plain error doctrine allows a reviewing court to consider an unpreserved error when the evidence is close, regardless of the seriousness of the error, or when the error is serious, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167, 187 (2005). The defendant seeks review under the second, serious error, prong of the plain error rule. The defendant carries the burden of persuasion under both prongs of the plain error rule. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009).

¶ 22 The defendant argues that he waived his right to counsel twice, and neither time was he informed of the maximum sentence of 90 years. The defendant acknowledges that, at the first waiver in March 2014, he was informed that home invasion and armed robbery both carried prison sentences of up to 45 years because of the 15-year firearm enhancement. The prosecutor stated that the sentences imposed in any later cases would be consecutive to the sentence in this case and also stated that the armed robbery charge and home invasion charge carried different

elements, so there was a potential for consecutive sentences. The judge summarized, stating a minimum of 21 years and a maximum of 60 years, which the prosecutor corrected to 45 years. The defendant contends, though, that when he waived counsel again in February 2015, the trial court never mentioned the possibility of consecutive sentences. The State argues that the defendant was properly admonished regarding each penalty and that the trial court did not need to do the math for the defendant. The State seems to concede that consecutive sentences were not mentioned at the second waiver, but argues that the defendant was advised of the possibility of consecutive sentences at the first waiver.

¶ 23 In *People v. Wright*, the trial court improperly admonished the defendant that his possible maximum sentence was 60 years, when it was actually 75 years based upon the defendant's prior history. *Wright*, 2017 IL 119561, ¶ 52. The supreme court found, however, that the defendant's decision to waive counsel was made freely, knowingly, and intelligently. *Id.* ¶ 55. In that case, the defendant's articulated reason for proceeding *pro se* was due to speedy trial concerns and did not hinge upon the maximum sentence allowed for the charged offenses. *Id.* Further, the supreme court found no prejudice by the understatement of the potential maximum sentence where the defendant did not allege that he would not have proceeded *pro se* if he had known, and he was actually sentenced below the stated maximum. *Id.* ¶ 56. Conversely, in *People v. LeFlore*, the Second District held that the trial court failed to comply with Rule 401(a) when it misstated the maximum penalty as 15 years rather than 30 years, and sentenced the defendant to 20, which clearly prejudiced the defendant and denied him his fundamental right to representation by counsel. *People v. LeFlore*, 2013 IL App (2d) 100659, ¶ 60, *aff'd in part, rev'd in part*, 2015 IL 116799. Similarly, in *People v. Bahrs*, the defendant was prejudiced by admonitions that failed

to inform him that his sentences could be consecutive, giving him an exposure of 33 years, rather than the maximum of 30 years. *People v. Bahrs*, 2013 IL App (4th) 110903, ¶ 14.

¶ 24 “Substantial compliance means a deficiency in the admonishments does not prejudice the defendant, either because the defendant already knows of the omitted information or because the defendant’s degree of legal sophistication makes evident his or her awareness of the omitted information.” *People v. Moore*, 2014 IL App (1st) 112592, ¶ 38. The State argues that the entire record established substantial compliance with the rule: the defendant was informed of the possibility of consecutive sentences when he first waived counsel, knowledge he then had when he later reiterated his waiver of counsel.

¶ 25 We find that although the admonishments were deficient, there was substantial compliance so that the defendant was not prejudiced by the deficiency. The defendant was made aware of the consecutive nature of the sentences at the first waiver of counsel, so he already knew the omitted information at the time of the second waiver of counsel. This conclusion is supported by the fact that the defendant did not express surprise and, in fact, indicated that he understood the charges and penalties when they were explained to him just prior to trial, when the possible 90-year sentence was clearly noted. While the explanation of charges and penalties just prior to trial, when the defendant was already proceeding *pro se*, was too late to qualify as proper admonishments, it was evidence of the defendant’s knowledge and awareness. Thus, we find that since there was substantial compliance with Rule 401(a), and the defendant suffered no prejudice, the defendant’s decision to waive counsel was made freely, knowingly, and intelligently.

¶ 26 II. Suppression Motion

¶ 27 The defendant also argues that his statements to police had to be suppressed because they were coerced. The State argues that the defendant's confession was voluntary and the defendant's motion to suppress was correctly denied.

¶ 28 We review constitutional suppression issues under a bifurcated standard of review: factual findings are reversed only if they are against the manifest weight of the evidence, but the ultimate legal conclusion about whether suppression is warranted is reviewed *de novo*. *In re Christopher K.*, 217 Ill. 2d 348, 373 (2005).

¶ 29 At a suppression hearing, the State has the burden of proving the confession was voluntary by a preponderance of the evidence. 725 ILCS 5/114-11(d) (West 2012); *People v. Braggs*, 209 Ill. 2d 492, 505 (2003). A confession is not voluntary if the defendant did not make a knowing and intelligent waiver of his privilege against self-incrimination and his right to counsel. *Id.* Courts consider the totality of the circumstances when weighing the voluntariness of a confession, considering things such as the duration of the detention and the defendant's age, intelligence, background, experience, education, mental capacity, and physical condition. *People v. Hughes*, 2015 IL 117242, ¶ 31. Courts also consider whether there was any physical or mental abuse, including if police made threats or promises to a defendant. *Id.* The question is usually whether the defendant's will was overborne at the time he confessed. *People v. Terrell*, 132 Ill. 2d 178, 198 (1989).

¶ 30 The defendant argues that his confession was coerced because he was not allowed to call his mother until he agreed to cooperate, and he was threatened that his mother would be arrested if he did not confess. The evidence at the suppression hearing indicated that the defendant was 43 years old, had previous experience with the criminal justice system, and was aware of the consequences of confessing. He was given his *Miranda* warnings and understood those rights.

The defendant was held and questioned over two days, but it was not such a lengthy interrogation during incommunicado detention that has been held to result in an involuntary confession. See *Id.* at 199 (interrogation for 8 hours, with breaks, did not make confession involuntary; the court distinguished the length of the detention from cases involving 5 and 16-days of incommunicado detention that resulted in involuntary confessions). Also, he was informed that the police had executed a search warrant at his mother’s home, so she knew where he was. Although the defendant testified that he asked for an attorney while in the holding cell, he never did so while being interrogated on video. He asked to call his mother many times, but he never said that he wanted to call her so that she could call an attorney. In fact, the defendant indicated that he wanted to contact his mother because he was concerned for her safety and wanted to talk to her regarding her care if he was unavailable. The detectives were consistent in their responses to the defendant; they did not have authority to offer the defendant a deal, partly because they did not know what information the defendant had to offer. The detectives acknowledged the defendant’s concern for his mother, and, while they did not allow the defendant to call her, they offered to send the police to check on her.

¶ 31 The defendant was a 43-year old man who had served time in prison—he was not a teenager like the defendant in *People v. Sanchez*, 2018 IL App (1st) 143899 (18-year-old defendant with no criminal background). Although the defendant contends that his confession was conditioned upon being allowed to call his mother, the trial court did not find that testimony to be credible and it was not supported by the video. There was no evidence that the defendant’s will was overcome. We find that the trial court’s conclusion that the defendant’s confession was voluntary was not against the manifest weight of the evidence.

¶ 32

CONCLUSION

¶ 33 The judgment of the circuit court of Peoria County is affirmed.

¶ 34 Affirmed.