

NOTICE

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

2014 IL App (4th) 130251-U

NO. 4-13-0251

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

May 29, 2014
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	McLean County
JEREMY A. KENNEDY,)	No.12CM1947
Defendant-Appellant.)	
)	Honorable
)	David W. Butler,
)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Harris and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held:* Failure to comply with Illinois Supreme Court Rule 401(b) (eff. July 1, 1984) and provide a record demonstrating defendant waived his right to counsel after being admonished pursuant to Illinois Supreme Court Rule 401(a) (eff. July 1, 1984) is error, requiring we vacate defendant's conviction for domestic battery and remand for a new trial.

¶ 2 Following a February 2013 bench trial, the trial court found defendant, Jeremy A. Kennedy, guilty of domestic battery (720 ILCS 5/12-3.2(a)(1) (West 2012)). In March 2013, the court sentenced defendant to 18 months' conditional discharge. Defendant appeals, arguing his conviction and sentence should be vacated because there is no verbatim transcript of the trial court's admonishment of defendant and defendant's waiver of counsel. We vacate and remand with directions.

¶ 3

I. BACKGROUND

¶ 4 The record before us does not contain a transcript or bystander's report (Ill. S. Ct. Rs. 323(b), (c) (eff. Dec. 13, 2005)) of any of the proceedings in this case. The following facts are taken from the trial court's docket entries and documents contained in the common-law record.

¶ 5 In November 2012, the State charged defendant by information with domestic battery (720 ILCS 5/12-3.2(a)(1) (West 2012)). Following his arrest, defendant appeared in front of the trial court, which entered an order releasing defendant on a recognizance bond and appointing the public defender as counsel.

¶ 6 In December 2012, the assistant public defender filed a motion to withdraw as counsel based on the court screening officer's recommendation that the public defender "not be appointed *** because the [d]efendant is above the monthly income guideline." Counsel's motion was granted and defendant proceeded *pro se*. There is no indication in the record the trial court admonished defendant before allowing defendant to represent himself.

¶ 7 Upon conclusion of a February 2013 bench trial, the trial court found defendant guilty of domestic battery. In March 2013, the court denied defendant's *pro se* motion for a new trial and sentenced him to 18 months' conditional discharge, including as a condition a 30-day jail sentence to be stayed.

¶ 8 This appeal followed.

¶ 9

II. ANALYSIS

¶ 10 Defendant argues that although he failed to include the issue in his *pro se* motion for a new trial, the absence of a verbatim transcript renders any waiver of counsel ineffective and is therefore reversible plain error. The State concedes error. We agree and accept the State's

concession. "This court has consistently held that the right to counsel is so fundamental that we will review as plain error a claim that there was no effective waiver of counsel" even where the issue was not raised in the court below. *People v. Herring*, 327 Ill. App. 3d 259, 262, 762 N.E.2d 1186, 1188 (2002).

¶ 11 To accomplish a valid waiver of counsel, Illinois Supreme Court Rule 401 (eff. July 1, 1984) requires as follows:

"(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 he understands the following:

(1) the nature of the charge;

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

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

(b) Transcript. The proceedings required by this rule to be in open court shall be taken verbatim, and upon order of the trial

court transcribed, filed[,] and made a part of the common[-]law record." (Emphasis added.)

¶ 12 "There can be no effective waiver of counsel without proper admonitions." *People v. Langley*, 226 Ill. App. 3d 742, 749, 589 N.E.2d 824, 829 (1992). A waiver of counsel can be effective if the admonitions given substantially comply with those found in Rule 401(a). *People v. Stoops*, 313 Ill. App. 3d 269, 273-74, 728 N.E.2d 1241, 1244 (2000). "Whatever admonishments are given to a defendant, however, must be included in the record since Rule 401(b) requires that when a defendant waives the right to counsel, the proceedings must be recorded verbatim, and strict compliance with Rule 401(b) is required." *Id.* at 274, 728 N.E.2d at 1244.

¶ 13 In this case, Rule 401 was not complied with because no verbatim record shows whether defendant knowingly and voluntarily waived his right to counsel. Given the nature of the charge against defendant, the court was required to comply with Rule 401. See Ill. S. Ct. R. 401(a) (eff. July 1, 1984) (the court must give the admonishments regarding waiver of counsel to "a person accused of an offense punishable by imprisonment"). Defendant was charged with domestic battery, a Class A misdemeanor (720 ILCS 5/12-3.2(b) (West 2012)) punishable by a term "of less than one year" in jail (730 ILCS 5/5-4.5-55(a) (West 2012)), and the trial court was obligated to properly admonish defendant in accordance with Rule 401(a). The fact that defendant was sentenced to conditional discharge rather than a jail term does not affect the applicability of the rule. See *Herring*, 327 Ill. App. 3d at 263, 762 N.E.2d at 1189. Since no verbatim transcript was taken and the record fails to show that defendant was given the admonishments required by Rule 401(a), any purported waiver of counsel was ineffective. See *id.* at 262, 762 N.E.2d at 1188. Accordingly, we vacate defendant's conviction for domestic

battery and remand for a new trial. See *People v. Montgomery*, 298 Ill. App. 3d 1096, 1100, 700 N.E.2d 1085, 1089 (1998).

¶ 14 On remand, if defendant expresses a desire to represent himself, the proper admonishments must be given and recorded verbatim. If defendant seeks counsel and the court determines defendant is indigent, the public defender should be appointed. In the event the court determines defendant is not indigent and defendant fails to hire counsel, the court could appoint counsel. Upon conclusion of the matter, the court could conduct a hearing pursuant to section 113-3.1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/113-3.1 (West 2012)) to set an amount for defendant to pay for appointed counsel. See *Stoops*, 313 Ill. App. 3d at 275, 728 N.E.2d at 1245.

¶ 15 III. CONCLUSION

¶ 16 For the foregoing reasons, we vacate the trial court's judgment and remand this case with directions to give defendant a new trial.

¶ 17 Vacated and remanded with directions.