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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Kane County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 07-CF-829
)	
FREDERICK HAMPTON,)	Honorable
)	Patricia Piper Golden,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Hutchinson and Birkett concurred in the judgment.

ORDER

Held: The trial court committed plain error by accepting defendant's waiver of counsel without having admonished him, per Rule 401(a), of the maximum penalty he faced; we reversed his conviction and remanded the cause. The error was due in part to the trial court's reliance on the State's representation resulting in an admonishment that the maximum penalty was for a Class 2 felony where defendant's prior convictions required him to be sentenced as a Class X offender, thus violating Rule 401(a).

¶1 Following a jury trial in the circuit court of Kane County, defendant, Frederick Hampton, was found guilty of aggravated domestic battery (720 ILCS 5/12-3.3(a) (West 2006)) and was sentenced as a Class X offender to a 14-year prison term. Defendant represented himself at trial. On appeal,

he argues that he did not validly waive his right to counsel. We agree, and, therefore, we reverse his conviction and remand for a new trial.

¶ 2 Although an attorney had initially been appointed to represent defendant, during a hearing before Judge Philip L. DiMarzio defendant expressed dissatisfaction with the representation he was receiving. When Judge DiMarzio advised defendant that he would not appoint substitute counsel, defendant indicated that he would prefer to proceed without an attorney. Judge DiMarzio advised defendant of the charges against him and that he had the right to an attorney. Judge DiMarzio also advised defendant that aggravated domestic battery is a Class 2 felony and that if convicted of that offense he faced a fine of up to \$25,000 and could be sentenced to probation for up to 48 months or imprisoned for a term ranging from 3 to 7 years. Judge DiMarzio did not explain that defendant might face a more severe penalty as a result of prior convictions. Thus advised, defendant confirmed that he still wished to represent himself, and the trial court granted him leave to do so.

¶ 3 Judge Patricia Piper Golden presided over defendant's jury trial. Evidence at trial established that, in 2007, defendant's then-girlfriend (they later wed and were husband and wife at the time of trial) suffered a brutal beating that left her with potentially life-threatening injuries. At trial, she claimed not to know who inflicted her injuries, but she admitted that she had told a police officer, in a tape-recorded statement, that defendant had attacked her. She testified that she had lied to the officer, but her admission that she had made the statement permitted the State to introduce it as substantive evidence. See 725 ILCS 5/115-10.1(c)(2)(B) (West 2008); *People v. Bannister*, 378 Ill. App. 3d 19, 37-38 (2007), *aff'd*, 236 Ill. 2d 1 (2010).

¶ 4 Defendant moved for a directed verdict on the basis that the complaining witness had recanted the incriminating statement. The trial court denied the motion and the State apparently

persuaded the jurors that the complaining witness had testified falsely to protect defendant, her husband. Defendant subsequently moved for entry of a judgment notwithstanding the verdict. The trial court denied the motion. At the conclusion of the hearing on the motion, the prosecutor indicated that, based on his review of defendant's presentence investigation report, it appeared that, because of defendant's prior criminal history, it was necessary to sentence him as a Class X offender (see 730 ILCS 5/5-5-3(c)(8) (West 2006)). At a subsequent hearing, defendant argued that sentencing him as a Class X offender would be improper because the State had not charged him in compliance with section 111-3 of the Code of Criminal Procedure of 1963 (725 ILCS 5/111-3(3) (West 2006)), which provides, in pertinent part, that "[w]hen the State seeks an enhanced sentence because of a prior conviction, the charge shall also state the intention to seek an enhanced sentence and shall state such prior conviction so as to give notice to the defendant." Relying on *People v. Jameson*, 162 Ill. 2d 282 (1994), the trial court rejected the argument. The trial court sentenced defendant to a 14-year prison term and this appeal followed.

¶ 5 It is well settled that "a defendant may engage in self-representation only if he voluntarily, knowingly, and intelligently waives his right to counsel." *People v. Black*, 2011 IL App (5th) 080089, ¶ 11. Defendant argues that his purported waiver of counsel was ineffective because the trial court did not accurately admonish him in accordance with Illinois Supreme Court Rule 401(a) (eff. July 1, 1984), which provides as follows:

"Any waiver of counsel shall be in open court. The court shall not permit a waiver of counsel by a person accused of an offense punishable by imprisonment without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:

(1) the nature of the charge;

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

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

¶6 For a waiver of counsel to be effective, there must be at least substantial compliance with this rule. *People v. Vasquez*, 2011 IL App (2d) 091155, ¶ 14. “Where a court has not advised a defendant of, among other things, the possible penalties for an offense, substantial compliance has not occurred.” *Id.*

¶7 Defendant’s posttrial motion did not allege any error with respect to the admonitions required under Rule 401(a). Ordinarily, the failure to raise an issue in a posttrial motion results in forfeiture and the issue will not be considered on appeal. See generally *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). However, it would be patently unfair to deprive a defendant of counsel without a proper waiver, and then insist that the defendant, without the benefit of counsel, recognize the invalidity of the waiver and adhere to the procedural requirements necessary to preserve the error for review. In any event, Illinois Supreme Court Rule 615(a) (eff. January 1, 1967) provides, in pertinent part, that “[p]lain errors or defects affecting substantial rights may be noticed [on appeal] although they were not brought to the attention of the trial court.” As the State acknowledges, the deprivation of the right to counsel, in the absence of an effective waiver, is plain error. *People v. Vernón*, 396 Ill. App. 3d 145, 150 (2009). Thus, “[b]ecause the right to counsel is fundamental, an appellate court may

review a failure to substantially comply with Rule 401(a) under the plain-error doctrine despite a defendant's failure to properly preserve such an error." *Vasquez*, 2011 IL App (2d) 091155, ¶ 14.

¶ 8 Here, the trial court did not comply with the requirement of Rule 401(a)(2) that a defendant be informed of the maximum and minimum penalties applicable in light of his criminal history. Because defendant's criminal history made it necessary to sentence him as a Class X offender, he faced a mandatory prison term of 6 to 30 years. Defendant waived counsel after being told that he might receive probation or a prison term of three to seven years.

¶ 9 We note that, when it appears that a defendant has a highly sophisticated understanding of the criminal justice system, strict compliance with Rule 401(a) may be excused. *People v. Meeks*, 249 Ill. App. 3d 152, 172 (1993). It does appear that defendant had more than a passing familiarity with the judicial process. In particular, defendant represented himself capably in pretrial proceedings pertaining to whether the State was obligated to turn over audiotapes recorded at the Kane County jail, during a period when the complaining witness was an inmate, of conversations between the complaining witness and defendant or other visitors. That said, however, the State has not argued that defendant's level of sophistication justifies relaxing the requirements of Rule 401(a). Furthermore, despite demonstrating some knowledge of criminal procedure, defendant appears to have labored under a misunderstanding about certain critical legal concepts. Notably, defendant seemed unable to grasp that the complaining witness's recantation of her statement identifying him as her attacker did not, *per se*, give rise to a reasonable doubt of his guilt (see, *e.g.*, *People v. Curtis*, 296 Ill. App. 3d 991, 997 (1998)), or that Judge Golden's recognition of this principle, and her consequent refusal to direct a verdict of acquittal, did not establish bias that disqualified her from presiding over the case. Moreover, defendant's behavior during the proceedings below—which was,

at times, quite volatile and disruptive—contributes to our doubts that defendant can be considered sophisticated enough to effectively waive his right to counsel without being properly admonished in accordance with Rule 401(a).

¶ 10 In compliance with her obligations under Rule 3.3(a)(2) of the Illinois Rules of Professional Conduct, counsel for the State has directed our attention to *People v. Koch*, 232 Ill. App. 3d 923 (1992). *Koch* illustrates that the failure to properly advise a defendant about the minimum and maximum sentences for an offense may invalidate the defendant's waiver of counsel, even though the defendant has been admonished of the nature of the charge and the right to counsel. In *Koch*, the defendant expressed his intent to waive his right to counsel and plead guilty to a charge of deceptive practices, a Class 4 felony. In admonishing the defendant under Rule 401(a), the trial court correctly explained that a Class 4 felony carries a possible prison term of no less than one year and no more than three years. The court neglected to mention, however, that the defendant might receive an extended-term sentence of no less than three years' imprisonment and no more than six years' imprisonment. Although the court did correct the omission before accepting the defendant's guilty plea and imposing a five-year extended-term sentence, the *Koch* court held that the waiver of counsel was ineffective. However, citing *People v. Coleman*, 129 Ill. 2d 321 (1989), *People v. Johnson*, 119 Ill. 2d 119 (1987), and *People v. Phillips*, 392 Ill. App. 3d 243 (2009), the State argues that defendant has not shown error, because he did not assert that, if he had been properly admonished, he would have opted to proceed with counsel. Thus, the State essentially argues that we should presume that the failure to properly admonish defendant had no effect on his decision to proceed *pro se*. The *Koch* court rejected an identical argument (*Koch*, 232 Ill. App. 3d at 927) and also concluded that two of the three cases that the State cites here—*Coleman* and *Johnson*—were

inapposite. The *Koch* court noted that the defects in the admonitions in *Coleman* and *Johnson* related to the minimum sentence; in each case “the trial court correctly admonished the defendant regarding the maximum sentence (the death penalty) and later imposed it.” *Id.* at 927. The *Koch* court held that “when (as here) a defendant is given a sentence in excess of the maximum he was informed of at the time he waived counsel, *** the defendant’s waiver of counsel can *never* be valid.” (Emphasis in original.) *Id.* at 928.

¶ 11 The State’s reliance on *Phillips*, is similarly misplaced. In *Phillips*, the trial court properly advised the defendant about the maximum and minimum sentences, but failed to advise him of the nature of the charges and of his right to counsel. However, the defendant had previously been fully admonished about the nature of the charges, which were fairly straightforward—he allegedly punched a peace officer. *Phillips*, 392 Ill. App. 3d at 263. Moreover, before deciding to proceed *pro se*, the defendant in *Phillips* had been already represented by appointed counsel, so “he knew that he had a right both to counsel in general and to appointed counsel due to being indigent.” *Id.* at 264. Here, however, there is no reason to believe that defendant was aware that he faced sentencing as a Class X offender.

¶ 12 Citing *People v. Thompson*, 238 Ill. 2d 598 (2010), and *People v. Glasper*, 234 Ill. 2d 173 (2009), the State argues that the failure to admonish defendant about the maximum sentence he faced was not a “structural error” affecting the integrity of the judicial process. Each case involved the failure to strictly comply with Illinois Supreme Court Rule 431(b) (eff. May 1, 2007), which requires the trial court to ask prospective jurors whether they understand and accept that the defendant is presumed innocent, that the State bears the burden of proving the defendant’s guilt beyond a reasonable doubt, and that the defendant is not required to introduce any evidence. In *Thompson* and

Glasper, our supreme court reasoned that, although the questioning required under Rule 431(b) is a useful safeguard against jury bias, failure to conduct the questioning does not invariably result in a biased jury. *Thompson*, 238 Ill. 2d at 611; *Glasper*, 234 Ill. 2d at 200. Significantly, the principles covered by Rule 431(b) are also addressed by a jury instruction (Illinois Pattern Jury Instructions, Criminal, No. 2.03 (4th ed. 2000)), and it will not be presumed that the jurors ignored the instructions. *Glasper*, 234 Ill. 2d at 201. This reasoning has no application here. There is nothing in the record suggesting that defendant was aware that, if convicted, he would be sentenced as a Class X offender, and, as previously discussed, in accordance with *Koch* we will not presume that this information was immaterial to his decision to proceed without counsel.

¶ 13 For the foregoing reasons, we reverse the judgment of the circuit court of Kane County, and we remand for further proceedings in accordance with this order.

¶ 14 Reversed and remanded.