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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE)	Appeal from the Circuit Court
STATE OF ILLINOIS,)	of Stephenson County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 10-CF-83
)	
DAVID R. TINGLESTAD,)	Honorable
)	Michael P. Bald,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Presiding Justice Burke and Justice Schostok concurred in the judgment.

ORDER

- ¶ 1 *Held:* The *in camera* conference during defendant's sentencing hearing did not violate defendant's due process rights. Defendant's jury waiver was valid. Defendant's convictions did not violate the one-act, one-crime rule. Affirmed.
- ¶ 2 Following a bench trial, the court convicted defendant, David R. Tingelstad, age 38, of burglary (720 ILCS 5/19-1(a) (West 2010)) and theft not in excess of \$300 (720 ILCS 5/16-1(a)(1) (West 2010)). The court sentenced him to seven years' imprisonment for the burglary (a Class 2 offense with a Class X penalty due to prior criminal history (720 ILCS 5/5-4.5-95) (West 2010)) and 180 days for the theft, to be served concurrently. Defendant appeals, arguing: (1) the *in camera*

conference during his sentencing hearing violated his due process rights; (2) he did not knowingly waive his right to a jury; and (3) the court violated the one-act, one-crime rule. We affirm.

¶ 3

I. BACKGROUND

¶ 4

A. The Offense

¶ 5 On April 1, 2010, Officer Brad Curtis was dispatched to 13776 Schudt Road in Waddams Grove. Sandee and Joseph Dvorak owned the property, and it had been vacant for two years. They were trying to sell the property with the help of realtor Jim Sullivan. When Curtis arrived at the property, he saw defendant and his girlfriend behind the house. They were loading radiator coils into their van. Curtis then searched the house and saw that radiator coils had been detached from the wall. Additionally, the sink had been disconnected and a back splash had been removed.¹ Defendant told police that the realtor, Sullivan, had given him permission to remove said items. However, both Sullivan and the Dvoraks denied this. The State charged defendant with burglary (720 ILCS 5/19-1(a) (West 2010)) and theft not in excess of \$300 (720 ILCS 5/16-1(a)(1) (West 2010)).

¶ 6

B. Procedure: Pretrial and Trial

¶ 7 At an October 2010 hearing, defense counsel asked for a conference pursuant to Illinois Supreme Court Rule 402 (eff. July 1, 1997). The court admonished the defendant as to the nature of the conference:

“In a 402 conference, the attorneys, myself will go into chambers and discuss the case. We may discuss some of the facts ***. We may talk about your background as well[.]

¹ Evidence suggested that defendant stole at an earlier date other items identified as missing, such as a refrigerator. However, given that defendant was charged and convicted of theft not in excess of \$300, a discussion of this evidence is not necessary.

but *** it will not be grounds for you to come in and say oh, I have to have a new judge hear the case because he knows something about the facts or my background.”

Defendant stated that he understood. The conference did not result in a plea agreement, and defendant pleaded “not guilty.”

¶ 8 At a February 2011 hearing, defense counsel informed the court that defendant would waive trial by jury. The court admonished defendant that he had a right to a jury trial. The defendant confirmed that he wanted a bench trial and executed a written waiver of his right to a jury trial. At the February 2011 trial, the parties presented evidence consistent with that stated above. The court convicted defendant as charged.

¶ 9 C. Procedure: Sentencing

¶ 10 After convicting defendant, the trial court ordered a pre-sentence investigation report (PSR), set the sentencing date, and informed defendant about the sentencing proceedings:

“Each side has an opportunity to present evidence. We call it aggravation from the State. Mitigation from your side. Then I’ll hear argument as to what the sentence should be. It has to fit somewhere within the legal dispositions for a Class 2 felony [burglary] and a Class A misdemeanor [theft].”

The court further informed defendant that he would have an opportunity to make a statement in allocution. The court asked defendant if he had any further questions about his sentencing hearing, to which defendant answered, “no.” The court then encouraged defendant to speak with his counsel should he think of any questions.

¶ 11 At the March 2011 sentencing hearing, Joseph Dvorak testified in aggravation. He stated that the removal of the heating coils made it more difficult for him to sell the property. He implied that,

due to the date of the crime in relation to the drop in the real estate market, he may have lost altogether his opportunity to sell the property at what he considered to be market value. Dvorak estimated it would take \$4,500, including 25 hours of labor, to repair the damage caused by defendant. In mitigation, jail chaplain William Dorsey testified that defendant previously had done yard work for him; defendant was a good worker. Defendant's mother testified that, prior to his arrest, defendant lived with her and took her to her medical appointments. Defendant's sister-in-law testified that defendant often spent time with her son and took him fishing.

¶ 12 After hearing the evidence in aggravation and mitigation, the trial court suspended argument, stating that it had just noticed something unusual in the PSR. The PSR reflected two prior Class 2 or greater felony convictions: a 1992 and a 1994 residential burglary. The court noted that this record, if taken at face value, required defendant to be sentenced as a Class X offender for the burglary, not a Class 2 offender. 720 ILCS 5/5-4.5-95 (West 2010) (“When a defendant, over the age of 21 years, is convicted of a Class 1 or Class 2 felony, after having twice been convicted in any state or federal court of an offense that contains the same elements as 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 [so long as] *** the second felony was committed after conviction on the first *** and the third felony was committed after conviction on the second.”) However, the PSR reflected that defendant had been sentenced only to probation for the 1992 residential burglary, which the court characterized as “not *** appropriate for that type of offense[,] ordinarily.” In the court's view, the title charge was inconsistent with the sentence, meaning one or

the other might be inaccurate. The court decided to continue the sentencing hearing until the matter was resolved, stating:

“There may be some explanation. But it makes a big difference in regard to the potential sentence here. So for this reason[,] this case will be continued over for an updated [PSR] concerning the outcome of the previous Class 2 or greater felony.”

¶ 13 In April 2011, the parties reconvened for sentencing. However, the State requested another continuance. It informed the trial court that it had requested from the circuit clerk certified copies of the 1992 and 1994 convictions. However, the clerk sent only the 1994 documents. The State contacted the clerk, and the clerk sent 1992 documents, but they were not certified. The State provided the defense with the documents it had (both certified and uncertified). The State noted that a continuance would allow it more time to obtain the 1992 documents in certified form. The court granted the continuance over defendant’s objection.

¶ 14 In May 2011, the parties again reconvened. The State thought it had the 1992 documents in certified form but, after searching through paperwork, could not locate them and asked for a continuance to the afternoon. The defense objected, stating: “Knowing that there’s not certified copies at this time, *** I would object to a continuance and ask that [defendant] be sentenced today on the Class 2.” The court granted the continuance to the afternoon over defendant’s objection.

¶ 15 Later that day, the parties met again. The State requested that sentencing be continued so that the Dvoraks could be present, but it proceeded to discuss the certification issue. This time, the State had the 1992 documents in certified form. The State reminded the court that the previous continuances had been granted to “clear up an ambiguity with respect to [the] 1992 conviction, the title charge of which was inconsistent with the *** sentence.” The State presented the court with

the 1992 certified documents. The court noted that the 1992 conviction had been for burglary, *not* residential burglary as reflected in the PSR. Therefore, the 1992 matter was resolved; the 1992 conviction *was* a Class 2 or greater and the sentence was consistent with the accurate title charge.

¶ 16 The State then informed the court that it did not have the 1994 documents in certified form after all (despite having represented in the April 2011 hearing that it received them). The State posited, however, that there was no reason to believe that the 1994 offense was not accurately listed in the PSR.

¶ 17 The defense responded that it did not believe the State had established that defendant must be sentenced as a Class X offender. It objected to the continuance to secure the Dvorak's presence and requested sentencing that day as a Class 2 offender.

¶ 18 The court asked the State as to the nature of the uncertified 1994 documents. The State answered that it had: (1) a 1994 bill of indictment for residential burglary; (2) a 1994 criminal complaint for residential burglary; (3) documentation reflecting a 1994 guilty plea; (4) a mittimus for the 1994 residential burglary dated March 1995; (5) a statement of credit for time served; and (6) a police department disposition sheet with the appropriate case number. The court responded:

“What’s listed in the [PSR as to the 1994 offense] is a residential burglary conviction, pled guilty, sentenced to serve six and a half years. I can indicate if we go forward today, I’m going to go forward with the idea that there was a burglary conviction in [1992, for which the State presented certified documentation] and a residential burglary conviction in [1994] as is listed in the [PSR] and is shown by the [six] documents. So[,] [defense,] if you want to go forward, it will be with this as a Class X sentencing.”

¶ 19 Defense counsel then asked for another opportunity to argue that defendant should not be sentenced as a Class X offender, which the court allowed. Counsel set forth three ways it believed the circumstances of the case did not meet the requirements for Class X sentencing under section 5-4.5-95 (730 ILCS 5/5-4.5-95 (West 2010)). First, counsel implied that, because an Illinois Department of Corrections inmate status form reflected a simultaneous entry for both the 1992 and the 1994 offenses, those offenses were not the result of separate incidents. Second, defendant, who was born in 1973, was not over 21 when the 1992 offense was committed (and may not have been over 21 when the 1994 offense was committed) (citing *People v. Baaree*, 315 Ill. App. 3d 1049, 1053 (2000)). Third, defendant was not notified in the charging instrument that he could be sentenced as a Class X offender (citing *People v. Beasley*, 307 Ill. App. 3d 200, 211-12 (1999)).

¶ 20 The court implicitly rejected defendant's arguments, reiterating its position that defendant must be sentenced as a Class X offender. However, the court continued the matter to allow the defense to present more formally any objections to sentencing as a Class X offender.

¶ 21 In May 2011, the parties met again for sentencing. Both parties informed the court that they were ready for sentencing. The defense began by informing the court that it had "some matters [it and the State] wanted to bring to the court's attention." Then, the following exchange, central to the instant appeal, took place:

“DEFENSE: Both the State and myself, and I think the best way to do that would be, I don't know, for lack of better terms, a [Rule] 402 conference, we would request[,] even though I know it is not a plea that we are entering into at this point.

COURT: I understand. [State].

STATE: That's accurate, judge.

COURT: Maybe we should have some conversations. We will talk about the possibilities and things in chambers, if that is all right. Okay. Now, [defendant], this is in regard to a conversation that the attorneys and myself will have. We are going to discuss in chambers the potentials and some primers. You know, as well as I do, we have had some questions about some things that have come up. Things that were missing from the criminal history potentially, and it will impinge on the potential sentences that you are facing, but it is probably well worth having this discussion at this time. So what we do is we will st[ep] down and we will begin this sentencing proceeding shortly. *** [Recess].”

Upon return to the courtroom, the court summarized:

“COURT: As I indicated, previously we had a [PSR] prepared that unfortunately we found was lacking somewhat in regard to information contained therein, but it has been supplemented with previous hearings. *** [T]here *** w[ere] some missing matters from within as far as prior criminal history. Now, I believe at this time, following a [‘]402 conference[’] in which we discussed some of the things in the prior criminal history and some parameters, I think we are ready to proceed.

COURT: [E]ach side has a copy of the [PSR], correct?

[PARTIES]: [yes.]

COURT: *** [T]here were a number of previous convictions, and then the State brought up some additional supplemental ones. Do you want to refer to those, [State]?

STATE: Judge, with respect to at least [the 1992 offense], that charge should be burglary, not residential burglary. I believe that is the extent of the State's additions or corrections with respect to the criminal history at this time.

COURT: I should point out that I have in hand the certified copies of that incident. Now, [defense], first of all, any objection to that; what was stated there?

DEFENSE: No, judge. That's accurate.

COURT: Okay. Now, any objection to the court receiving the [PSR] plus the addendum being corrected in the [1992] matters?

DEFENSE: No, your Honor.

COURT: Now, this does have one offshoot of it and that is that the penalty that is indicated on the [PSR] would therefore be incorrect because it indicates a Class 2. I believe, as discussed previously, that this would be a sentenced as a Class X sentence, is that correct, State?

STATE: Yes, judge.

COURT: [Defense] as well?

DEFENSE: I believe it should be, and I believe [defendant] and I, we have spoken about this, we agree that based on what has been presented it should be sentenced as a Class X but would still remain as a conviction of a Class 2 felony.

COURT: That is correct. It would be a Class 2 conviction but it has to be sentenced as a Class X per the statutes.”

¶ 22 Before beginning argument, the trial court allowed additional evidence. It received in mitigation two letters regarding defendant's involvement in an adult literacy program.

¶ 23 At argument, the State recapped that, after continuously discussing the matter with defendant's attorney since the trial in February 2011, the parties agreed to recommend the same sentence to the court: seven years for the burglary, \$4,500 restitution, and 180 days for the theft. The State thought this was an appropriate sentence because it would be defendant's longest sentence to date by one-half of a year, and it would "go a distance toward[] seeing that the victims receive restitution." The State acknowledged that the court did not need to accept the recommendation.

¶ 24 The defense recapped that, initially, at the very first sentencing hearing, it had anticipated arguing for probation. However, "through the past sentencing hearings or attempted sentencing hearings," it came to accept that defendant would need to be sentenced as a Class X offender. The defense acknowledged that "everything that has been submitted to this point seems to back that up." The defense stated that seven years seemed reasonable, given that the minimum was six years. The defense noted that it "th[ought] defendant agree[d] with this as well."

¶ 25 Given the opportunity to make a statement in allocution, defendant simply stated: "I just want to apologize for the inconvenience for everybody here. That's it."

¶ 26 In sentencing defendant, the court noted that defendant had 10 previous felony convictions, two of which were Class 2 or higher, requiring defendant to be sentenced as a Class X offender. The court adopted the agreed-to recommendation of the parties and sentenced defendant as stated. This appeal followed.

¶ 27

II. ANALYSIS

¶ 28 Defendant argues that his due process rights were violated because he was denied his right to be present at a critical stage of the proceedings when, during the May 2011 portion of the sentencing hearing, the defense, State, and judge adjourned to discuss defendant's sentence *in camera*. Defendant did not raise this issue in a posttrial motion. In fact, he did not even file a motion to reduce sentence. Nevertheless, the denial of the fundamental right to due process would constitute plain error, and we address defendant's argument for that reason. *People v. Bean*, 137 Ill. 2d 65, 81 (1990).

¶ 29 Both the federal and state constitutions afford criminal defendants the right to be present at all critical stages of the proceedings, from arraignment to sentencing. *People v. Lindsey*, 201 Ill. 2d 45, 55 (2002). The right is implied under the sixth amendment's confrontation clause (*Illinois v. Allen*, 397 U.S. 337, 338 (1970)) and the fourteenth amendment's due process clause (*Lindsey*, 201 Ill. 2d at 55). Additionally, Article I, section 8, of the Illinois Constitution grants criminal defendants the express right to "appear and defend in person and by counsel." Ill. Const. 1970, art. I, § 8. Although a defendant has a general right to be present during a critical stage, his or her absence is not a *per se* constitutional violation. *Lindsey*, 201 Ill. 2d at 57. Rather, defendant's absence must have: (1) caused the proceedings to be unfair; or (2) resulted in a denial of an underlying substantial right, such as the right to present a defense, the right to effective assistance of counsel due to lack of access, the right to confront witnesses, or the right to an impartial jury (where defendant is left out of the jury selection process). *Id.* at 57, 59-60; *Bean*, 137 Ill. 2d at 81. For the reasons that follow, even if we were to agree with defendant that the *in camera* conference was part of the sentencing hearing from which he was denied his right to be present, we cannot find that defendant was denied

an underlying fundamental right or that the *in camera* conference caused the sentencing proceeding to be unfair.

¶ 30 Here, defendant does not name an underlying fundamental right, though perhaps, as will be discussed, he implicates the right to appeal. Rather, the thrust of defendant's argument is that the *in camera* conference caused the sentencing proceedings to be unfair. Defendant asserts that the procedure was not authorized by law and that the parties "grasped" at a justification for the proceeding by likening it to a Rule 402 conference, which, of course, occurs before the entrance of a plea and comes with procedural safeguards not followed here. Defendant cites to general propositions about his right to be present, but he does not cite specific case law to support his assertion that the procedure followed by the court so deviated from standard sentencing procedure that he was denied a fair sentencing hearing. However, because this case presents such an unusual fact pattern and because defendant did attempt to draw from established principles, we proceed to address the fairness of defendant's sentencing hearing.

¶ 31 Defendant's argument may be characterized as a challenge to the adequacy of the sentencing proceeding. The majority of the case law concerning the adequacy of sentencing hearings dates from the early 1970's, when the disputed question was whether a sentencing hearing is mandatory even if the defendant did not request it. See, e.g., *People v. Jackson*, 2 Ill. App. 3d 120 (1971); *People v. Olejniczak*, 130 Ill. App. 2d 51 (1970). In 1973, the legislature amended the sentencing hearing statute, making a sentencing hearing mandatory whether requested by the defendant or not. 730 ILCS 5/5-4-1 (West 2010) (council commentary). Where a court fails to give to a defendant the statutorily required sentencing hearing, remand for a new sentencing hearing is appropriate. *People v. Coleman*, 212 Ill. App. 3d 997, 1004 (1991). However, omission of procedures in a sentencing

hearing that amounts to a technical or formal error, without prejudice to a defendant, does not require remedy. See *People v. Lewis*, 175 Ill. App. 3d 156, 163 (1988) (failure to offer defendant opportunity for statement in allocution, where defendant otherwise had ample opportunity to present evidence in mitigation, did not require reversal). Therefore, the procedures set forth by statute require only substantial compliance. See *People v. Barto*, 63 Ill. 2d 17, 21 (1976).

¶ 32 Section 5-4-1 of the Unified Code of Corrections (Code) states:

“*** [A]fter a determination of guilt, a hearing shall be held to impose the sentence. *** At the hearing the court shall: (1) consider the evidence, if any, received upon the trial; (2) consider any presentence reports; (3) consider the financial impact of incarceration ***; (4) consider evidence offered by the parties in aggravation and mitigation; (4.5) consider substance abuse treatment ***; (5) hear arguments as to sentencing alternatives; [and] (6) afford the defendant the opportunity to make a statement on his own behalf; ***.” 730 ILCS 5/5-4-1(a) (West 2010).

The Code also directs that the sentence “shall be imposed by the judge based upon his independent assessment of the elements specified above and any agreement as to sentence reached by the parties.” 730 ILCS 5/5-4-1(b) (West 2010).

¶ 33 Here, defendant’s sentencing hearing took place in several stages. The court was reminded of the circumstances of the crime. The court and parties thoroughly considered the PSR. Defendant was twice given an opportunity to present evidence in mitigation (in March 2011 through the testimony of his jail chaplain, mother, and sister-in-law, and in May 2011 through letters from the adult literacy program). The parties presented not so much argument as a recommendation on the sentence, acknowledging that the court did not have to adopt the recommendation. Defendant was

afforded the opportunity to make a statement in allocution. From all of this, the trial court was free to make an independent assessment of the evidence and of the parties' recommended sentence. Therefore, we cannot say that the sentencing hearing was inadequate or unfair.

¶ 34 Likewise, we cannot say that the *in camera* proceeding itself led to any unfairness. Defendant asserts that the conference was unfair because, unlike a Rule 402 conference, the *in camera* conference here did not come with procedural safeguards. The Rule 402 procedural safeguards ensure that: (1) any plea is entered into voluntarily and with knowledge of the consequences, such as the maximum and minimum sentences and the knowing relinquishment of the right to a jury trial, the right to confront witnesses, and the right against self-incrimination; and (2) defendant is made aware that the judge may learn information about the crime and defendant's criminal history that it otherwise may not have learned unless the case proceeded to trial and/or sentencing. Il. S. Ct. Rule 402. Additionally, Rule 402 jurisprudence affords relief where the State fails to recommend the agreed sentence. *Robinson v. People*, 66 Ill. App. 3d 601, 603 (1978). Here, none of the rights protected by the Rule 402 procedural safeguards have been implicated. There is no issue as to the voluntariness of defendant's plea; he was convicted following a bench trial. There is no issue as to the trial court receiving a "sneak peak" of the crime and the criminal history; the case had already proceeded to sentencing. Finally, there is no issue as to the State's reliability; the State recommended the agreed sentence (and, unlike a Rule 402 conference, the State did not secure a guilty plea in return). We conclude that the defense's analogy to a Rule 402 conference did not so much instruct procedure as it did indicate for the record the *in camera* topic of reaching a sentencing agreement.

¶ 35 We reject defendant’s argument that, because no record exists of the *in camera* discussions concerning the facts, circumstances, and arguments, if any, that were presented to and considered by the court, it is impossible to know the trial court’s reason for imposing a greater-than-minimum sentence, and “a meaningful appellate review is a virtual impossibility.” Defendant may not now challenge a lawful sentence to which he agreed at the sentencing hearing. See, e.g., *People v. Williams*, 384 Ill. App. 3d 415 (2008) (defendant may not challenge a sentence to which he or she agrees as part of a plea *or other sentencing agreement*). Therefore, appellate review of the actual sentence, which is different than a review of the fairness of the sentencing hearing itself, is not an issue in this case.

¶ 36 Further, the record reflects a fair attempt on the part of the court to recap for the record the content of what was said *in camera*. The parties’ debate as to whether defendant should be sentenced as a Class X offender was well documented. When the parties returned from the *in camera* conference, they stated for the record that they agreed to a Class X range. On this point, we see no indication that the *content* of what was said *in camera* contributed to any alleged unfairness. In fact, defendant maintains on appeal that he was rightfully sentenced as a Class X offender, a position that was apparently established during the *in camera* proceeding. Moreover, the record supports that defendant was rightfully sentenced as a Class X offender. The defense’s three earlier arguments, raised prior to the final sentencing hearing, do not give us pause. It is not problematic that there is a disposition in 1994 concerning both the 1994 offense and the 1992 offense. This does not indicate that the crimes arose from the same incident. Rather, as the defense appeared to concede, the 1994 conviction caused defendant’s 1992 probation to be revoked. Additionally, it is not problematic that defendant may have been only 20 when he committed the 1992 offense. The

statute requires defendant to be over 21 years when convicted of the offense for which he will be sentenced as a Class X offender. 720 ILCS 5/5-4.5-95 (West 2010); *Baaree*, 315 Ill. App. 3d at 1053. Defendant was 38 years old at conviction. Finally, it is not problematic that defendant was not notified in the charging instrument that he would be sentenced as a Class X offender. Such notice is not required when the enhanced sentence does not elevate the class of the crime. *Beasley*, 307 Ill. App. 3d at 211-12. Here, although defendant was sentenced as a Class X offender, the conviction on record was for a Class 2 offense.

¶ 37 We enter this ruling with caution, mindful that there may be different circumstances where the practice of holding an *in camera* conference in the middle of a sentencing hearing would lead to the denial of a fundamental right or cause the sentencing hearing to be unfair. Indeed, we do not quite understand why defense counsel and the State did not strike their agreement outside of the judge's presence before presenting it in open court or why there was a need to first resolve the Class X categorization off the record in a "test-run" manner. Still, to warrant relief, defendant's absence must have caused the denial of an underlying fundamental right or caused the sentencing hearing to be unfair.

¶ 38 In sum, the *in camera* conference did not cause defendant to lose his right to appeal the sentence length; defendant forfeited that possibility by agreeing to the sentence. Likewise, the *in camera* conference did not cause defendant's sentencing hearing to be unfair where the record shows that defendant was informed in advance as to the nature of the sentencing proceeding, the statutory requirements of the sentencing hearing were substantially satisfied, Rule 402 procedural safeguards did not apply, the subject matter of the *in camera* proceeding was apparent from the record (resolution of the Class X issue and an attempt to reach a sentencing agreement), defense counsel

did not make any undue concessions *in camera* as the statute required a Class X sentencing range (despite counsel's initial attempts through argument and objections to continuances to secure a Class 2 sentencing range), and defense counsel twice stated on record that defendant agreed with the sentence (indicating that, although defendant was not present *in camera*, he maintained an open dialogue with counsel, and counsel represented his interests). Simply put, the *in camera* conference did not compromise defendant's constitutional rights, including his right to a fair proceeding. We turn now to defendant's remaining two arguments.

¶ 39 B. Adequate Waiver of Jury Trial

¶ 40 Defendant next challenges the adequacy of his jury waiver, arguing that the trial court's admonitions were insufficient to assure a knowing and intelligent waiver. The trial court has a duty to ensure that a defendant waives the right to a jury trial "expressly and understandingly." *People v. Bannister*, 232 Ill. 2d 52, 66 (2009). Because the court is not charged with delivering a specific, scripted admonition, the validity of a jury waiver depends on the facts and circumstances of each case. *Id.* Defendant failed to raise this issue in a posttrial motion; however, an inadequate waiver of the fundamental right to a jury would constitute plain error. *In re R.A.B.*, 197 2d 358, 362 (2001). Therefore, we consider defendant's argument.

¶ 41 Here, after being informed that defendant wished to waive his right to a jury trial, the trial court admonished defendant:

"[Y]ou have a right to a jury trial. In a jury trial, *** they bring in a number of citizens. *** We go through *** a jury selection process [explanation]. But you do have the right if you want to waive your right to that jury trial and not have that kind of trial, instead have the matter set for a bench trial. In a bench trial, myself or another judge would hear the

case and we would decide based on the evidence and arguments if you are guilty or not guilty. So[,] the question I have for you first is do you wish to waive your right to a jury trial?”

The defendant answered “yes,” and he confirmed that he wanted a bench trial. Defendant then executed a written waiver of his right to a jury trial.

¶ 42 Defendant concedes that, under ordinary circumstances, this would constitute a valid jury waiver. However, defendant argues that, because the court did not make clear during the earlier Rule 402 admonishments that it would hear facts about the case it would not otherwise hear unless the case went to trial, defendant’s subsequent jury waiver was not knowingly or intelligently made. Defendant notes that it is odd to request a bench trial after an unfruitful Rule 402 conference, wherein the same judge who will act as trier of fact was likely informed that defendant was willing to plead guilty and that the facts support a guilty plea.

¶ 43 That defendant may have made a strategic error is not reason to reverse. Defendant fails to establish that such an omission during Rule 402 admonishments *per se* prevents a defendant from later being able to knowingly waive his or her right to a jury trial. Rule 402 did not require such an admonishment at the time. See Ill. S. Ct. Rule 402(d)(1) (eff. July 1, 2012) (the post-2012 version requiring that the trial judge present the admonishment but the pre-2012 version requiring only that the trial judge not initiate plea discussions). Perhaps more obviously, defendant also fails to establish his basic allegation that the trial court did not make clear during the Rule 402 admonishments that it would likely hear facts about the case it would not otherwise hear unless the case went to trial. The record demonstrates that the trial judge *did* inform defendant during the Rule 402 admonishments that he could hear facts about the case during the conference:

“In a 402 conference, the attorneys, myself will go into chambers and discuss the case. We may discuss some of the facts ***. We may talk about your background as well[,] but *** it will not be grounds for you to come in and say oh, I have to have a new judge hear the case because he knows something about the facts or my background.”

We do not believe the circumstances of this case warrant further discussion as to just how precisely the trial judge’s admonishments followed the new format set forth in the post-2012 Rule 402. The bottom line is that, here, defendant was adequately informed as to the nature of the proceedings such that he was able to knowingly waive his right to a jury trial.

¶ 44 C. No Violation of One-Act, One-Crime Rule

¶ 45 Lastly, defendant contends that his convictions for the charged offenses of theft not in excess of \$300 (720 ILCS 5/16-1(a)(1) (West 2010)) and burglary (720 ILCS 5/19-1(a) (West 2010)) violate the one-act, one-crime rule. We disagree.

¶ 46 A violation of the one-act, one-crime doctrine occurs when a defendant is convicted of: (1) more than one offense carved from the same physical act; *or* (2) with regard to multiple acts, more than one offense, some of which are, by definition, lesser-included offenses. *People v. King*, 66 Ill. 2d 551, 566 (1977). The term “act” means any overt or outward manifestation that will support a different offense. *Id.*

¶ 47 Defendant argues that this case falls under the first type of violation, multiple convictions based on precisely the same physical act. Defendant, citing *People v. Hamilton*, 179 Ill. 2d 319 (1997), states that the single act at issue was his unauthorized exertion of control over property because that was the only act for which there was direct, rather than circumstantial, evidence.

¶ 48 Defendant’s argument has no merit. *Hamilton* did not concern multiple convictions for the same act, nor did it redefine an “act” to include only those acts established by direct evidence.² Here, it is simply not true that only one act is at issue. Rather, defendant committed a series of closely related acts. He entered a home without authorization. He removed heating coils and back splash. He put these items in his own van.

¶ 49 If defendant is to allege a violation of the one-act, one-crime rule at all, his challenge must concern the second type of violation, lesser-included offenses. See *King*, 66 Ill. 2d at 566. Where, as here, both offenses were charged, this court applies an abstract elements approach in determining whether one offense is a lesser-included offense of the other. *People v. Miller*, 238 Ill. 2d 161, 175 (2010). Under the abstract elements approach, we compare the statutory elements of the two offenses. *Id.* at 166. “If all of the elements of one offense are included within a second offense and the first offense contains no element not included in the second offense, the first offense is deemed a lesser-included offense of the second.” *Id.* Under section 19-1(a), “A person commits burglary when without authority he knowingly enters *** with intent to commit therein a felony or theft.” 720 ILCS 5/19-1(a) (West 2010). Under section 16-1(a)(1), “A person commits theft when he or she knowingly [o]btains or exerts unauthorized control over property of the owner.” 720 ILCS 5/16-1(a)(1) (West 2010). Not all of the elements of theft are included in the offense of burglary, and theft

² *Hamilton* addressed a scenario not at issue here: the greater offense was charged and the lesser offense was not. The *Hamilton* court held that the jury should have been instructed on the uncharged, lesser offense of theft because the evidence presented at trial could have rationally sustained a conviction for theft (for which there was direct evidence) but an acquittal for the charged burglary (for which there was circumstantial evidence). *Id.* at 328.

contains elements that are not included in burglary. Theft requires control over property, whereas burglary does not. Burglary requires unauthorized entry, whereas theft does not. Theft is not a lesser-included offense of burglary, and there is no violation of the one-act, one-crime rule.

¶ 50

III. CONCLUSION

¶ 51 For the aforementioned reasons, we affirm the trial court's judgment.

¶ 52 Affirmed.