

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).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
) of Kane County.
Plaintiff-Appellee,)	
)
v.)	No. 09-CF-897
)
FRANCISCO J. SANCHEZ,)	Honorable
) Karen M. Simpson,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justice Hutchinson concurred in the judgment.
Justice Schostok dissented.

ORDER

¶ 1 *Held:* Defendant's convictions of aggravated battery and obstructing justice were reversed where the trial court failed to substantially comply with Illinois Supreme Court Rule 401(a) in accepting defendant's waiver of the right to counsel.

¶ 2 Defendant, Francisco J. Sanchez, appeals from his convictions of aggravated battery (720 ILCS 5/12-4(b)(8) (West 2008) (renumbered as 12-3.05(c) (Pub. Act 96-1551, Art. I, § 5 (eff. July 1, 2011)))) and obstructing justice (720 ILCS 5/31-4(a) (West 2008)) following a bench trial. Defendant argues that he was denied the right to counsel and that the evidence was insufficient to convict him of obstructing justice. For the following reasons, we reverse defendant's convictions

and remand for a new trial.

¶ 3

BACKGROUND

¶ 4 On March 23, 2009, defendant was arrested and charged by complaint with one count of aggravated battery and one count of obstructing justice. On April 1, 2009, the trial court ascertained that defendant was indigent and appointed the public defender's office to represent him.

¶ 5 The grand jury subsequently returned a two-count indictment against defendant, charging the same offenses as the complaint. On July 23, 2009, defendant, represented by an assistant public defender (APD), appeared for arraignment. The court (Judge Mueller) admonished defendant as to the charges against him. The State advised the court that defendant was extended-term eligible. The court told defendant that the Class 3 felony (aggravated battery) was punishable by 5 to 10 years in the Illinois Department of Corrections (IDOC) and that the Class 4 felony (obstructing justice) carried a potential sentence of 3 to 6 years in IDOC.¹ The court further admonished defendant that he was subject to a one-year term of mandatory supervised release and fines. Defendant pleaded not guilty.

¶ 6 On November 12, 2009, the matter came before the trial court (Judge Mueller) for pretrial status. The APD informed the court that the question had arisen as to whether defendant "would be asking for different counsel, private counsel, or representing himself, pro se." The court addressed defendant in the following colloquy:

¹These penalties represented the applicable extended-term sentence ranges. See 730 ILCS 5/5-4.5-40 (West 2008) (Class 3 felony subject to a term of imprisonment of 2 to 5 years; extended term of 5 to 10 years); 730 ILCS 5/5-4.5-45 (West 2008) (Class 4 felony subject to a term of 1 to 3 years; extended term of 3 to 6 years).

“THE COURT: Is that correct, [defendant]?”

DEFENDANT: That’s correct, Your Honor.

THE COURT: You’re hiring a private attorney?

DEFENDANT: No, Your Honor, I would like to represent myself, I would like to exercise my rights.

THE COURT: Pardon?

DEFENDANT: I’m going to exercise my right to defend myself.

THE COURT: [Defendant], do you understand that if you elect to represent yourself, which as you know you have a right to do, that this Court cannot give you any legal advice?

DEFENDANT: I understand that, Your Honor.

THE COURT: You understand further that you will be held to the same standards as any attorney that appears in this courtroom?

DEFENDANT: Correct, Your Honor, I do.

THE COURT: You understand that?

DEFENDANT: Yeah, I understand.

THE COURT: And you understand that the offense for which you’re standing trial in this courtroom is a Class 3 felony punishable by anywhere from two to five years in the penitentiary?

DEFENDANT: Yes, I do.

THE COURT: Okay. And understanding that, if you elect to represent yourself in this matter, no one’s going to be giving you any legal advice, do you understand that?

THE DEFENDANT: I understand that.

THE COURT: Okay. I'll discharge the Public Defender."

The APD tendered discovery to defendant. The court set the case for final pretrial conference on January 8, 2010, and a jury trial on January 11, 2010.

¶ 7 On December 7, 2009, defendant filed the following *pro se* motions: "Motion for Appointment of Counsel, Other Than Public Defender"; "Motion in Limine to Preclude Cross-Examination or Any Evidence of Defendant's Prior Convictions"; and "Motion in Limine to Preclude the Introduction of Evidence Which Is Irrelevant" (regarding his parole status at the time of his arrest). On January 8, 2010, defendant filed a *pro se* "Motion to Dismiss Charges."

¶ 8 On January 8, 2010, the matter came before the trial court (Judge Mueller) for the final pretrial conference. Defendant, *pro se*, informed the court that he wanted to withdraw his motion for appointment of counsel other than the public defender's office because there would not be enough time for counsel to become familiar with the case before the trial on January 11. The court explained that it did not have authority to appoint counsel other than the public defender's office, but that, given defendant's representations in the motion regarding his "ignorance in matters of law," the court would be happy to reappoint the public defender's office. The court reminded defendant of its previous admonishments on November 12, 2009, regarding the risks of going to trial without counsel and that defendant would be held to the same standards as an attorney. Defendant replied, "That's okay, Judge. I would like to withdraw the motion."

¶ 9 The January 8, 2010, proceedings continued with argument on defendant's motion to preclude evidence of his prior convictions. The trial court (Judge Mueller) ruled that, should defendant choose to testify, it would allow the State to raise for impeachment purposes defendant's 2007 misdemeanor conviction of retail theft and his 2003 felony conviction of burglary, but would

exclude his 1999 felony conviction of aggravated battery.

¶ 10 The trial court next addressed defendant's motion to exclude evidence of his parole status as irrelevant and highly prejudicial. The State asserted that defendant's parole status was relevant to its theory of the obstructing justice charge that defendant provided a false name to police officers because he was on parole. Defendant responded, "Judge, that's not quite correct. Fact of the matter is I believed I had a warrant at the time ***, which I did." The State indicated that it would agree to exclude any reference to defendant's parole status if defendant would stipulate that he had a warrant out for his arrest at the time. The following colloquy ensued:

“THE COURT: Okay. So you would be willing to enter into a stipulation or an agreement that at the time of this arrest on March 23, 2009, you had a valid—a warrant outstanding for your arrest on a misdemeanor charge?

DEFENDANT: Stipulation? Can you clear up stipulation?

THE COURT: Pardon?

DEFENDANT: I believed I had. I don't know for a fact that I had one.

THE COURT: Okay. So you would stipulate that on that date you believed there was a warrant outstanding for your arrest?

DEFENDANT: I believed that there could have been one, yes.

MR. SCHWERTLEY [Assistant State's Attorney]: Well, if he believes there could have been one, that's good enough.

THE COURT: Yeah, right. It's the state of mind as to why he would allegedly give a different name.

MR. SCHWERTLEY: Absolutely.

THE COURT: Okay. So that resolves that issue.

DEFENDANT: Okay.”

The court’s January 8, 2010, order stated *inter alia*, “The [defendant] stipulates that he believed that there could have been a warrant out for him in [*sic*].”

¶ 11 The final matter addressed on January 8, 2010, was defendant’s motion to dismiss, which alleged error in the bill of indictment and lack of a preliminary hearing. The court denied the motion.

¶ 12 On January 11, 2010, the case came on for trial. The trial court (Judge Mueller) granted the State’s motion to continue based on the State’s inability to serve a subpoena on one of its witnesses—the victim of the alleged aggravated battery. On defendant’s motion, the court reappointed the public defender’s office. The case was continued to February 22, 2010, for trial.

¶ 13 On February 19, 2010, the parties appeared before Judge Mueller for the final pretrial conference. Defendant was present with the APD. The State again moved for a continuance, which the trial court granted. The court also granted defendant’s motion to proceed *pro se* and discharged the public defender’s office. The court set a 30-day date to give defendant time to retain counsel, noting that retained counsel would need time to prepare for trial. Defendant indicated that he wanted to continue with the trial and probably could not afford to retain counsel. The court responded that it was “not prepared to go through all of [the] warnings” about self-representation, and that, despite defendant’s comment that the court had “admonished [him] plenty of time[s],” it would address “the risks of representing yourself” if defendant did not retain counsel by the next court date.

¶ 14 On March 19, 2010, defendant appeared *pro se* and informed the trial court (Judge Mueller) that he had not retained counsel and wanted to set the matter for trial. The court set the trial for April

19, 2010. The court provided no admonishments regarding defendant's decision to proceed *pro se*.

¶ 15 On April 16, 2010, at the final pretrial conference, the State provided a written draft of the stipulation, to which defendant had previously agreed in January, for defendant's review and signature. The stipulation consisted of two provisions:

“1. That on March 23, 2009 when Defendant, Francisco Sanchez, was asked by Aurora police officers Patrick Camardo and Robert Dase for his name and date of birth he gave the name of Roberto Perez 04/06/1965.

2. That at the time that the defendant gave that name and date of birth, the defendant believed that he had a warrant out for his arrest.”

After the court (Judge Mueller) asked defendant to read the stipulation, defendant said, “All right. I said that, yes, I said that.” When the court asked defendant if he agreed to the stipulation, defendant replied, “I'm not agreeing to anything. I just said I said that because that's what I believe.”

The court reviewed the written stipulation and the following discussion occurred:

“THE COURT: Okay. What this—the discussion that was held back in January was that if you agreed to have this information introduced into evidence, then police officers would not be called to testify as to this.

MR. SCHWERTLEY: Right, as well as the Department of Corrections for parole would not be called.

THE COURT: Right. So if you—

DEFENDANT: That was from my motion and you read it in evidence, right?

THE COURT: No. This is for the jury trial Monday. So you either would need to sign the stipulation, in which case then these two points, number one and two, will be read

to the jury as facts that the parties have agreed to, or the State is going to be allowed to bring in witnesses and go into the issue of parole.

* * *

DEFENDANT: I'm not stipulating anything.

THE COURT: Then you need to understand that the State is going to be allowed to bring in witnesses.

DEFENDANT: They can bring whoever they want, Your Honor. I don't have any witnesses to bring forth, but I understand who he's got to bring in, whoever he has to bring in. All I know is I didn't want the fact that I was on parole to be mentioned. That doesn't have any bearing with the case."

The court explained that, on January 8, 2010, in arguing his motion to exclude parole-status evidence, defendant had agreed to stipulate that he believed that he had an outstanding arrest warrant in exchange for the exclusion of any evidence of his parole status. Defendant said, "On that motion I just wanted the State not to bring in the fact that I was on parole." The court said, "And this was the way to get around that issue on your motion." The court further told defendant that if he did not sign the stipulation then the court would likely continue the case to allow the State to locate a parole officer to testify. The court said, "So it's your choice." Defendant said he did not want a continuance. The following exchange ensued:

"THE COURT: This gives you the opportunity to argue to the jury that the reason you gave false information to the police officers was because you thought there was a warrant out.

DEFENDANT: Okay.

THE COURT: And avoids the need for us getting into the issue of parole. It won't come up.

DEFENDANT: Okay.

THE COURT: You understand?

DEFENDANT: All right. I do.

THE COURT: Then you need to sign the stipulation.”

Defendant signed the stipulation.

¶ 16 Defendant failed to appear for trial on April 19, 2010. Thereafter, through the end of 2010, the case was continued several times with defendant alternately appearing *pro se* or being represented by the public defender's office. Judge Mueller set the case for trial on January 18, 2011.

¶ 17 On December 17, 2010, the parties appeared before Judge Simpson, who had been assigned to the case. Defendant, *pro se*, expressed his concern that he was “having bad luck with the Public Defender's Office.” The court explained that a new APD had been assigned to the courtroom. The court reappointed the public defender's office and instructed the APD to talk with defendant about his concerns. The court continued the matter to January 13, 2011.

¶ 18 On January 13, 2011, defendant appeared with the APD and informed the trial court (Judge Simpson) that he wished to proceed *pro se*. The court thoroughly admonished defendant of his right to counsel. The court ascertained that defendant understood his right and wished to voluntarily waive it and proceed *pro se*. The court accepted defendant's waiver of his right to counsel and discharged the public defender's office.

¶ 19 On January 18, 2011, *pro se* defendant waived his right to a jury trial, and a bench trial was conducted before Judge Simpson. The State's evidence included the testimony of Aurora police

officers Patrick Camardo and Che Earwood and the victim, Consuela Lee, as well the April 16, 2010, stipulation. Defendant testified on his own behalf. The evidence adduced at trial established that on March 23, 2009, police officers responded to a call regarding a disturbance in the business district of Aurora, Illinois. The scene of the incident was an alley running between two local businesses from the street to a public parking lot in the rear of the businesses; an aerial photograph of the area was admitted into evidence. Lee told Officer Earwood that defendant was the person who battered her. He observed various abrasions about Lee's body, and several photographs of her injuries were admitted. It was undisputed that defendant initially gave Officer Camardo a false name and birth date. (Defendant testified on cross-examination that he gave a false name because he was on parole.) When Camardo ran the information through LEADS and found that defendant was probably lying, he removed some paperwork from defendant's shirt pocket and ascertained his true identity.

¶ 20 Lee testified that she was acquainted with defendant as they had had drinks together at the local bar before. She and defendant were in front of the bar when defendant offered to give her a ride home. Lee and defendant walked through an alley between businesses to a public parking lot in the back toward, what Lee assumed was, defendant's truck. Lee testified that defendant grabbed her breasts. Lee pushed him away and defendant tore her shirt. As Lee continued to try to push defendant away, he picked up a stick and began hitting her. Lee yelled for help and witnesses called police. Lee described her injuries and testified that she was "pretty sore."

¶ 21 Defendant testified that Lee had asked defendant for a "date" and agreed to perform sexual favors in exchange for \$10. While Lee was performing the sexual favors in the back of the building, defendant's pants fell down, and Lee "tried to take off with the money." Defendant said he grabbed

Lee by the coat but did not strike her.

¶ 22 During the State’s rebuttal, Officer Earwood testified that he searched Lee and found no money on her person. The court admitted evidence of two of defendant’s prior convictions.

¶ 23 After hearing closing arguments, the trial court found defendant guilty of both counts of the indictment—aggravated battery and obstructing justice. The court reappointed the public defender’s office for posttrial proceedings. On April 8, 2011, the court discharged the public defender’s office on defendant’s motion. On August 17, 2011, the court denied defendant’s posttrial motions and sentenced defendant to five years’ imprisonment on the aggravated battery conviction and three years’ imprisonment on the obstructing justice conviction, to run concurrently.

¶ 24 Defendant timely appeals.

¶ 25 ANALYSIS

¶ 26 Defendant raises two arguments: (1) the State failed to prove him guilty beyond a reasonable doubt of obstructing justice, and (2) he was denied the right to counsel. We begin with defendant’s second argument.

¶ 27 Under the sixth amendment of the federal constitution, a criminal defendant facing incarceration has the right to counsel at all “critical stages” of the criminal process. *Iowa v. Tovar*, 541 U.S. 77, 80-81 (2004). A critical stage is one at which “ ‘substantial rights of a criminal accused may be affected.’ ” *People v. Vernon*, 396 Ill. App. 3d 145, 153 (2009) (quoting *Mempa v. Rhay*, 389 U.S. 128, 134 (1967)). Based on United States Supreme Court decisions, Illinois case law characterizes a critical stage as “any proceeding at which constitutional rights can be asserted or waived, or where events occur that could prejudice the defendant’s trial.” (Internal quotation marks omitted.) *Vernon*, 396 Ill. App. 3d at 154; see also *People v. Bonner*, 37 Ill. 2d 553, 558 (1967) (“[A] stage in the proceedings against an accused is properly designated as ‘critical,’ irrespective of

how it is labeled, when events transpire there which are likely to prejudice his subsequent trial.” (Internal quotation marks omitted.)).

¶ 28 A defendant may represent himself “only if he voluntarily, knowingly, and intelligently waives his right to counsel.” *People v. Black*, 2011 IL App (5th) 080089, ¶ 11 (citing *People v. Campbell*, 224 Ill. 2d 80, 84 (2006)). Before accepting a defendant’s waiver, the trial court must “fully inform a defendant of both the nature of the right being abandoned and the consequences of the decision.” *Black*, 2011 IL App (5th) 080089, ¶ 11 (citing *People v. Kidd*, 178 Ill. 2d 92, 104-05 (1997)). Illinois Supreme Court Rule 401(a) (eff. July 1, 1984) directs that, prior to permitting a waiver of counsel, the trial court must inform the defendant of, and determine that he understands, the following: (1) the nature of the charge; (2) the minimum and maximum sentence prescribed by law, including any applicable extended-term or consecutive sentencing; and (3) that he has a right to counsel and to appointed counsel if he is indigent. *Black*, 2011 IL App (5th) 080089, ¶ 12. A valid waiver of counsel requires substantial compliance with Rule 401(a). *Vernon*, 396 Ill. App. 3d at 152.

¶ 29 Defendant acknowledges that he did not preserve this issue for review and asks that we consider it under the doctrine of plain error because the right to counsel is a fundamental right. We may review forfeited issues under the plain-error doctrine when:

“(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant’s trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.” (Internal quotation marks omitted.) *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

We agree with defendant that we may review his contention of error under the second prong of the plain-error doctrine. *Vernon*, 396 Ill. App. 3d at 150 (“Deprivation of the sixth amendment right to counsel is a classic area of plain-error review.”). Whether the trial court complied with Rule 401(a) is reviewed *de novo*. *People v. Bahrs*, 2013 IL App (4th) 110903, ¶ 13.

¶ 30 Defendant first contends that he was denied the right to counsel during critical stages of the pretrial proceedings. Specifically, he points to the January 8, 2010, proceeding at which several *pro se* motions were argued and decided, and to the April 16, 2010, proceeding at which defendant signed a stipulation. Given that the right to counsel is enjoyed only at critical stages of the proceedings (*Tovar*, 541 U.S. at 80-81), we address the threshold question of whether the January 8, 2010, and April 16, 2010, proceedings were critical stages.

¶ 31 The events that transpired on January 8, 2010, could have prejudiced defendant’s trial, and therefore, constituted a critical stage of the proceedings. See *Vernon*, 396 Ill. App. 3d at 154 (describing a critical stage as a proceeding “where events occur that could prejudice the defendant’s trial”). Initially, we observe that, because defendant’s motion to dismiss was decided, the proceeding qualified as a critical stage. See *Vernon*, 396 Ill. App. 3d at 154 (“A motion to dismiss, because it places a defendant in a position where he or she is likely to make admissions, is a critical stage.”). Also, the court decided defendant’s motion to exclude his prior convictions, ruling that two prior convictions would be admissible for impeachment purposes, which could have impacted defendant’s decision to testify.

¶ 32 Especially significant on January 8, 2010, was the court’s consideration of defendant’s motion to exclude evidence of defendant’s parole status. It was during the discussion on that motion that defendant agreed to stipulate that he believed he had an outstanding warrant in exchange for the State’s agreement to exclude parole-status evidence. By agreeing to this stipulation, defendant

essentially admitted to the intent element of the offense of obstructing justice. See 720 ILCS 5/31-4(a)(1) (West 2008) (providing that a person commits the offense of obstructing justice when, “with intent to prevent the apprehension *** of any person, he or she knowingly *** furnishes false information”); Illinois Pattern Jury Instructions, Criminal, No. 22.20 (4th ed. 2000) (hereinafter IPI Criminal 4th No. 22.20) (elements to be proved include the knowing providing of false information and the intent to prevent a person’s apprehension). Thus, defendant’s uncounseled decision to agree to the stipulation could have prejudiced his trial.

¶ 33 Similarly, the April 16, 2010, proceeding, during which defendant signed the written stipulation, constituted a critical stage. Although on January 8, 2010, defendant orally agreed to stipulate only to his belief about an outstanding warrant, the written stipulation included not only that provision, but also a provision that defendant had given a false name and birth date to police officers. Thus, the written stipulation constituted evidence both of his intent and of his furnishing false information to officers. See 720 ILCS 5/31-4(a)(1) (West 2008); IPI Criminal 4th No. 22.20.

¶ 34 Because the proceedings on January 8 and April 16, 2010, were critical stages, defendant had a right to be represented by counsel at those proceedings. See *Tovar*, 541 U.S. at 80-81 (criminal defendant has the right to counsel at all “critical stages” of the criminal process). Therefore, since defendant represented himself on those dates, we must determine whether he had validly waived his right to counsel on November 12, 2009.² See *Black*, 2011 IL App (5th) 080089, ¶ 11 (a defendant

²As the parties seem to agree, the validity of defendant’s waiver as to both the January 8 and April 16, 2010, proceedings depends on the court’s admonishments on November 12, 2009. If the November 12, 2009, waiver was valid, then, under the continuing-waiver doctrine, it applied to the January 8, 2010, proceeding. See *People v. Ware*, 407 Ill. App. 3d 315, 342 (2011) (a valid waiver

may represent himself “only if he voluntarily, knowingly, and intelligently waives his right to counsel”).

¶35 Substantial compliance with Rule 401(a) is sufficient to effectuate a valid waiver if the record as a whole demonstrates that the defendant waived his rights knowingly and voluntarily and that the admonishment given did not prejudice the defendant’s rights. *People v. Haynes*, 174 Ill. 2d 204, 236 (1996). Under Rule 401(a), the trial court was required to advise defendant: (1) of the nature of the charge; (2) of the minimum and maximum sentence prescribed by law, including any applicable extended-term or consecutive sentencing; and (3) that he had a right to counsel and to appointed counsel if he is indigent. On November 12, 2009, the trial court advised defendant that, if he proceeded *pro se*, neither the court nor anyone else would give him legal advice and that he would be subject to the same standards as any attorney. The court further told defendant that “the offense for which [defendant was] standing trial *** [wa]s a Class 3 felony punishable by anywhere from two to five years in the penitentiary.”

generally continues throughout the proceedings). However, because the public defender’s office was reappointed on January 11, 2010, the trial court was required to re-admonish defendant before accepting a subsequent waiver. See *Ware*, 407 Ill. App. 3d at 342 (exception to continuing-waiver doctrine if the defendant later requests counsel). However, the court failed to do so on February 19 and March 19, 2010, when defendant once more decided to proceed *pro se*. Thus, only the November 12, 2009, waiver had potential applicability to the April 16, 2010, proceeding under the continuing waiver doctrine. (Despite defendant’s apparent concession of this proposition, the applicability is doubtful. However, given our conclusion that the November 12, 2009, waiver was not valid, we need not discuss the question further.)

¶ 36 The trial court's November 12, 2009, admonishment was marked by several omissions. With respect to the nature of the charge, the court completely omitted any reference to the obstructing justice charge and did not mention the aggravated battery charge by name. Regarding the right to counsel, the court did not tell defendant that he had a right to counsel and to appointed counsel if indigent. The most problematic omission, however, was with regard to the potential sentence. The court failed to advise defendant of the extended-term sentence, for which he was eligible. Thus, the court's admonition informed defendant that the maximum penalty he faced was 5 years' imprisonment, rather than 10 years' imprisonment. This inaccurate admonishment regarding the maximum penalty compels the conclusion that defendant's waiver was not knowingly made. See *Bahrs*, 2013 IL App (4th) 110903, ¶¶ 14, 15, 59 (stating that omission of the maximum penalty, or an understatement of it, does not satisfy Rule 401(a); reversing and remanding for further proceedings where the trial court failed to advise the defendant that he was subject to consecutive sentencing); *People v. Koch*, 232 Ill. App. 3d 923, 927-28 (1992) (reversing and remanding for further proceedings where the trial court failed to admonish the defendant of the maximum penalty he faced under the applicable extended-term sentencing range).

¶ 37 Nonetheless, the State urges that the record as a whole demonstrates that defendant's waiver was knowingly made. The State points to the April 1, 2009, proceedings when defendant first appeared in court and was advised that he was charged with aggravated battery, a Class 3 felony, and obstructing justice, a Class 4 felony. The State additionally notes that, at his July 23, 2009, arraignment, defendant was advised not only of the charges against him, but also of the applicable extended-term sentencing range on each charge, just three and one-half months prior to his waiver of counsel on November 12, 2009. According to the State, this record demonstrates that on November 12, 2009, defendant knew the nature of the charges against him as well as the maximum

penalty he faced. The State asserts that further evidence of defendant's knowledge is found in the *pro se* motions he filed on December 7, 2009, just 25 days after his waiver, wherein defendant stated each charge against him as well as the felony class of each.

¶ 38 The proceedings on April 1 and July 23, 2009, are irrelevant to the analysis of whether defendant's subsequent waiver on November 12, 2009, was knowingly made. Again, the most significant problem with the trial court's admonishment was its failure to accurately inform defendant of the maximum penalty he faced. "Rule 401(a) admonishments must be provided *at the time the court learns that a defendant chooses to waive counsel*, so that the defendant can consider the ramifications of such a decision." (Emphasis added.) *People v. Jiles*, 364 Ill. App. 3d 320, 329 (2006). That defendant was accurately advised of the maximum penalty at his arraignment, more than three months before he waived counsel, and before he made a request to waive counsel, does not render his waiver knowing. See *Jiles*, 364 Ill. App. 3d at 329-30 (reasoning that admonishments given during arraignment more than three months before the defendant expressed a desire to waive his right to counsel could not be applied to satisfy Rule 401(a)). As the court in *People v. Langley*, 226 Ill. App. 3d 742 (1992), explained:

"A defendant cannot be expected to rely only on the admonishments given to him several months earlier—at a point when defendant was not requesting to waive counsel. The admonishments pursuant to Rule 401(a) must be provided when the court learns defendant chooses to waive counsel so that defendant can consider the ramifications of such a decision. Prior admonishments *** do not somehow cause defendant to forgo the right to be fully informed of the ramifications of acting on his own behalf." *Langley*, 226 Ill. App. 3d at 749-50.

¶ 39 The State contends that *Langley* is distinguishable. In *Langley*, the defendant was given no

admonishments at the time he waived counsel, and the court held that admonishments given at the arraignment, seven months earlier, did not cure the defect. *Langley*, 226 Ill. App. 3d at 749-50. Here, it is true that, as the State points out, defendant received a partial admonishment on November 12, 2009, when he waived counsel. However, this is a distinction without a difference. In both cases, the trial courts failed to substantially comply with Rule 401(a) at the time the defendants waived counsel. Nor does the State explain what possible benefit the partial admonishment given in the present case could have provided that would justify a result different from *Langley*. Indeed, if anything, the partial admonishment here could have misled defendant into believing that he was no longer subject to extended-term sentencing, since the court had admonished him of it at the arraignment but did not mention it later on November 12, 2009.

¶ 40 Neither are we persuaded that defendant's December 7, 2009, *pro se* motions demonstrate knowledge on defendant's part sufficient to cure the trial court's insufficient admonishment. See *Koch*, 232 Ill. App. 3d at 927 ("[T]he trial court's admonitions under Rule 401(a) regarding the maximum sentence which could be imposed upon a defendant must be accurate *before* the court accepts a defendant's waiver of counsel." (Emphasis in original.)). In *Koch*, the court declined to apply retroactively the trial court's admonishments regarding the defendant's guilty plea under Illinois Supreme Court Rule 402(a) (eff. July 1, 2012) that immediately followed the defendant's waiver of counsel. *Koch*, 232 Ill. App. 3d at 927. Here, even assuming *arguendo*, that defendant's knowledge of the nature of the charges could be inferred from his subsequent motions, they have no bearing on his knowledge of the maximum penalty he faced.

¶ 41 The State relies on *People v. Phillips*, 392 Ill. App. 3d 246 (2009), to support its position that the record reflects that defendant's waiver was knowing. In *Phillips*, the trial court accurately admonished the defendant of the minimum and maximum penalty he faced, but failed to admonish

him about the nature of the charges or his right to counsel. *Phillips*, 392 Ill. App. 3d at 262-63. The appellate court held that there was substantial compliance with Rule 401(a). The court reasoned that, with regard to the nature of the charges, the charges were fairly simple and the defendant had been advised of the charges earlier in the proceedings. *Phillips*, 392 Ill. App. 3d at 263. Regarding the right to counsel, the court reasoned that defendant was aware of the right since he had been represented by appointed counsel up until he waived it. *Phillips*, 392 Ill. App. 3d at 264.

¶ 42 *Phillips* is inapposite. Assuming without deciding that, following the reasoning in *Phillips*, the trial court's omissions regarding the nature of the charges and the right to counsel were not fatal, we would still have to conclude that the failure to accurately admonish defendant of the maximum penalty was fatal. *Bahrs*, 2013 IL App (4th) 110903, ¶ 15 (understating the maximum penalty does not satisfy Rule 401(a)).

¶ 43 The State also argues that defendant failed to demonstrate prejudice, which defeats his argument. As defendant observes in his reply brief, the State seems to conflate the prejudice addressed in the substantial-compliance analysis with the prejudice addressed under the plain-error doctrine. We reiterate that substantial compliance with Rule 401(a) is sufficient to effectuate a valid waiver if the record as a whole demonstrates that the defendant waived his rights knowingly and voluntarily *and* that the admonishment given did not prejudice the defendant's rights. *Ware*, 407 Ill. App. 3d at 341 (citing *Haynes*, 174 Ill. 2d at 236). Thus, to demonstrate the trial court's failure to substantially comply, a defendant must show either that his waiver was not knowing *or* that he was prejudiced by the admonishment given. Here, we hold that defendant established that his waiver was not knowingly made. Accordingly, he need not demonstrate actual prejudice. See *Bahrs*, 2013 IL App (4th) 110903, ¶ 57 (rejecting the State's attempt to "erect a checkpoint in front of the issue of whether the waiver of counsel was knowing, such that we would not even reach that issue until

defendant first proved, or at least plausibly claimed, that, but for the omission of the admonition, he would have chosen differently, that he would have retained defense counsel instead of choosing to represent himself”).

¶ 44 Nor was defendant required to show prejudice under the plain-error doctrine. Our conclusion that the trial court did not substantially comply with Rule 401(a) satisfies the first step of plain-error review—ascertaining that error occurred. See *Thompson*, 238 Ill. 2d at 613 (concluding that error occurred when the trial court failed to comply with Illinois Supreme Court Rule 431(b) (eff. July 1, 2012)). Under the second prong of plain-error review, a defendant need not show prejudice as it is presumed due to the importance of the right involved. *Thompson*, 238 Ill. 2d at 613. However, the State relies on *Thompson* to support its contention that defendant must show prejudice from the trial court’s lack of substantial compliance with Rule 401(a). The court in *Thompson* reasoned that the right at issue there—the right to an impartial jury—was not necessarily violated by the trial court’s failure to comply with Rule 431(b), which serves to promote the selection of an impartial jury by mandating particular questions during *voir dire*. *Thompson*, 238 Ill. 2d at 614. Similarly, according to the State, simply because the trial court here did not substantially comply with Rule 401(a) does not mean that defendant was denied the right to counsel.

¶ 45 Our supreme court’s reasoning regarding Rule 431(b) and the right to an impartial jury has no application in the context of Rule 401(a) and the right to counsel. Rule 431(b) requires that the trial court question prospective jurors as to whether they understand and accept that the defendant is presumed innocent, that the State bears the burden of proving the defendant guilty beyond a reasonable doubt, that the defendant is not required to produce any evidence, and (unless the defendant objects) that the defendant’s decision not to testify cannot be held against him. Ill. S. Ct. R. 431(b) (eff. July 1, 2012). It is significant that these principles also are covered in jury

instructions (see Illinois Pattern Jury Instructions, Criminal, No. 2.03 (4th ed. 2000)), as it will not be presumed that jurors ignored the instructions (*People v. Glasper*, 234 Ill. 2d 173, 201 (2009)). Thus, under a prong-two plain-error analysis in the context of Rule 431(b), a defendant must establish not only that the trial court failed to comply with Rule 431(b) but also that he was actually tried before a biased jury. *Thompson*, 238 Ill. 2d at 614-15.

¶ 46 In contrast, here, the trial court's failure to substantially comply with Rule 401(a) resulted in defendant's unknowing waiver of counsel. That defendant then proceeded to represent himself, without counsel, represents an actual denial of the right to counsel. *Vernon*, 396 Ill. App. 3d at 152 ("When a defendant with a sixth amendment right to counsel has not made a knowing and voluntary waiver of that right, that person's proceeding without counsel (at a critical stage) is a sixth amendment violation."). Therefore, prejudice will be presumed, and we need not address the State's arguments directed to that issue. Accordingly, we hold that plain error occurred, compelling reversal. *Black*, 2011 IL App (5th) 080089, ¶ 25 (rejecting the State's argument that the defendant was required to show prejudice under prong-two plain-error analysis where the trial court failed to comply with Rule 401(a)).

¶ 47 Given our holding, we need not address defendant's remaining arguments about the denial of his right to counsel during posttrial proceedings. However, because we are reversing defendant's convictions, we must consider whether double jeopardy principles bar retrial. Retrial is barred if, during the first trial, the State failed to meet its burden of proof beyond a reasonable doubt. *Jiles*, 364 Ill. App. 3d at 331. In a double jeopardy analysis, we review the evidence in the light most favorable to the prosecution. *Black*, 2011 IL App (5th) 080089, ¶ 29.

¶ 48 Regarding his conviction for obstructing justice, defendant argues that the State failed to prove him guilty beyond a reasonable doubt because it did not prove that his conduct materially

impeded the police investigation. The State concedes this point. As noted above, a person commits the offense of obstructing justice when, “with intent to prevent the apprehension *** of any person, he or she knowingly *** furnishes false information.” 720 ILCS 5/31-4(a)(1) (West 2008); IPI Criminal 4th No. 22.20 (including two elements to be proved: the knowing providing of false information and the intent to prevent a person’s apprehension). This court recently held that “the relevant issue in weighing a sufficiency-of-the-evidence challenge to a conviction for obstruction of justice is whether the defendant’s conduct actually posed a material impediment to the administration of justice.” *People v. Taylor*, 2012 IL App (2d) 110222, ¶ 17 (relying on *People v. Baskerville*, 2012 IL 111056).

¶ 49 The stipulation admitted into evidence, as well as defendant’s testimony on cross-examination, established that defendant knowingly provided false information to officers with the intent to prevent his own apprehension. However, we agree with the parties that the State’s evidence did not prove beyond a reasonable doubt that defendant’s conduct materially impeded the officers’ investigation of the aggravated battery. Upon Officer Earwood’s arrival at the scene, the victim had identified defendant, whatever his name, as her attacker; thus, defendant’s identity was not at issue. Moreover, although defendant provided false information to Officer Camardo, who ran the information through LEADS, any delay in ascertaining defendant’s true identity was minimal given that Camardo almost immediately retrieved the paperwork from defendant’s shirt pocket, which included his identification. Accordingly, double jeopardy bars defendant’s retrial for obstructing justice.

¶ 50 Regarding defendant’s conviction of aggravated battery, as pertinent here, a person commits the offense of aggravated battery when, in committing a battery, the accused or the victim was on or about a public way, public property, or a public place of accommodation. 720 ILCS 5/12-4(b)(8)

(West 2008) (renumbered as 12-3.05(c) (Pub. Act 96-1551, Art. I, § 5 (eff. July 1, 2011))). A person commits the offense of battery if he or she knowingly, without legal justification, causes bodily harm to an individual. 720 ILCS 5/12-3 (West 2008).

¶ 51 Considering the evidence in the light most favorable to the State, it was sufficient to prove defendant's guilt beyond a reasonable doubt. Officer Earwood described the crime scene as consisting of an alley running between two businesses from the street to a public parking lot in the rear and testified that the area was accessible to the public. An aerial photograph of the area corroborated his testimony. The victim, Lee, clearly testified that she suffered bodily harm at defendant's hands. Her testimony was corroborated by the officers' testimony of their observations and by the photographs of Lee admitted into evidence. The evidence adduced at trial was more than sufficient to prove beyond a reasonable doubt both that Lee was on or about a public place of accommodation at the time of the incident and that defendant caused her bodily harm. See *People v. Williams*, 161 Ill. App. 3d 613, 619-20 (1987) (holding that the aggravated battery statute applied to an offense occurring in a parking lot, which was accessible to the public and, therefore, a public way); *People v. Handley*, 117 Ill. App. 3d 949, 952 (1983) (observing that the legislature chose a general description of areas frequented by the public ("public way," "public property," or "public place of accommodation or amusement") rather than spelling out each example of a public way or public amusement); *People v. Foster*, 103 Ill. App. 3d 372, 377 (1982) ("In order to establish 'bodily harm' in a battery case, there is no requirement that the evidence demonstrate a visible injury such as bruising, scratching, or bleeding." (Internal quotation marks omitted.)). Defendant's testimony that he and Lee were under an outdoor stairway in the back of a building, not in the parking lot, and that he only grabbed Lee's coat and did not harm her, does not compel a different conclusion. We reiterate that we are to view the evidence in the light most favorable to the prosecution. *Black*, 2011

IL App (5th) 080089, ¶ 29. Moreover, the court was in the best position to judge the credibility of the witnesses and to weigh the evidence. See *People v. Sweigart*, 2013 IL App (2d) 110885, ¶ 18 (“The trier of fact is responsible for determining the witnesses’ credibility, weighing their testimony, and deciding on the reasonable inferences to be drawn from the evidence.”). Accordingly, retrial on the aggravated battery charge will not offend double jeopardy principles.

¶ 52 For the foregoing reasons, the judgment of the circuit court of Kane County is reversed. The cause is remanded for a new trial on the aggravated battery charge; the conviction of obstructing justice is reversed outright.

¶ 53 Reversed and remanded.

¶ 54 JUSTICE SCHOSTOK, dissenting.

¶ 55 Although the general rule is that a defendant must be given his Rule 401(a) admonishments at the time he expresses a desire to waive counsel (see *Jiles*, 364 Ill. App. 3d at 329-30), there is an exception to that rule. That is, if the defendant had (1) received some prior admonishments and (2) demonstrated a level of legal sophistication, then the defendant will not be found to have been prejudiced and thus will not be entitled to a new trial. *People v. Jackson*, 59 Ill. App. 3d 1004, 1008 (1978). Here, both conditions for the exception to apply are satisfied. First, at his July 23, 2009, arraignment, the defendant was properly admonished as to the nature of the charges against him and the minimum and maximum penalties. Furthermore, the record indicates that the defendant was aware that he had a right to counsel and that counsel could be appointed if the defendant was indigent. The trial court already had ascertained the defendant’s indigency and appointed counsel for him in April 2009. See *People v. Phillips*, 392 Ill. App. 3d 243, 264 (2009) (noting that since defendant had been represented by appointed counsel, he was aware that he had a right to counsel and to appointed counsel if indigent).

¶ 56 Second, the record demonstrates that the defendant had a high level of legal sophistication. This is in part evident from his many prior convictions dating back to at least 1997. See *Jackson*, 59 Ill. App. 3d at 1008 (defendant achieved level of legal sophistication through his long criminal history and familiarity with court system). The defendant's legal sophistication is also apparent from the numerous *pro se* motions that he filed which demonstrated he was aware of the charges against him and knew the felony class of each. Accordingly, the record demonstrates that the defendant knowingly waived his right to counsel on November 12, 2009, as he was aware of the nature of the charges, the possible penalties, and his right to an attorney.

¶ 57 The record also demonstrates that any flaws in the trial court's admonishments did not prejudice the defendant in any way. Although the trial court's admonishments at November 12, 2009, hearing were not precise, they do not warrant the defendant receiving a new trial. At that hearing, the trial court informed the defendant that he was charged with a class 3 felony that had a sentencing range of 2 to 5 years. In reality, the defendant was charged with both a class 3 felony for aggravated battery and a class 4 felony for obstructing justice. The trial court's omission of the obstructing justice charge was not prejudicial, however, as that conviction must be vacated based on the State's concession that the evidence as to that charge was insufficient. Similarly, as to the aggravated battery charge, the defendant was eligible for extended-term sentencing, which carried with it a sentence of up to 10 years' imprisonment. However, the defendant was not prejudiced by the trial court's failure to inform him that he could be sentenced to an extended-term sentence because, in fact, he was not sentenced to such a sentence. *People v. Hrebenar*, 131 Ill. App. 2d 877, 879-80 (1971) (there is no prejudice where the trial court understates the possible maximum penalty but then sentences the defendant within the limits it had stated).

¶ 58 Finally, I disagree with the majority's suggestion, in the second footnote, that even if they

were to find that the defendant validly waived his right to counsel on November 12, 2009, they might still find that the defendant was entitled to a new trial based on the trial court's failure to re-admonish him on February 19 and March 19, 2010. See *Ware*, 407 Ill. App. 3d at 347-48 (where defendant was represented by counsel and then proceeded *pro se*, and then requested counsel again and again proceeded *pro se*, readmonishment under Rule 401(a) was not required where record as a whole demonstrated that previous admonishments substantially complied with that rule).

¶ 59 For the foregoing reasons, I respectfully dissent. I would reverse the defendant's conviction for obstructing justice, affirm the defendant's conviction for aggravated battery, and address the question of whether the defendant was denied his right to counsel during posttrial proceedings.