FOURTH DIVISION
December 1, 2016

No. 1-15-0325

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 13 CR 03172
	)	
CHARLES ZOHFELD,	)	Honorable
	)	Anna Helen Demacopoulos,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justices McBride and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction and sentence for attempt arson are affirmed; the trial court substantially complied with Supreme Court Rule 401 when it admonished defendant of the correct maximum sentence he faced if found guilty of attempt murder but incorrectly stated the sentence for the lesser charge of attempt arson; defendant's argument that the trial court committed reversible error when it prohibited certain witnesses from testifying fails because defendant did not establish the materiality of their testimony; no reversible error occurred when the trial court allowed a witness to testify who was not disclosed on the State's witness list but who was disclosed in discovery; and defendant was eligible for an extended-term sentence where his prior conviction was of the same or similar class felony as attempt arson.

¶ 2 The State charged defendant, Charles Zohfeld, with attempt murder and attempt arson. The State alleged defendant attempted to kill his former wife, Patricia Zohfeld, by damaging a gas line in the former marital residence in an attempt to cause an explosion. A jury found defendant not guilty of attempt murder and guilty of attempt arson. The circuit court of Cook County sentenced defendant to ten years' imprisonment, the maximum extended-term sentence for attempt arson, based on a prior conviction in federal court. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 Defendant was arrested on December 9, 2012 for the attempt murder of his former wife, Patricia Zohfeld. The State also charged defendant with attempt arson of their former marital residence. The State alleged that Patricia Zohfeld came home to the former marital residence and smelled gas. She saw defendant exiting a crawl space where gas appliances were located. She called the gas company, which discovered a leak and evidence of possible tampering. Police arrested defendant the same day.

¶ 5 Before trial defendant informed the trial court he wished to waive appointed counsel and represent himself. Prior to accepting defendant's waiver, the court told defendant: "Before I allow you to do this, I must make sure that you understand the charges that you are facing, the possible penalties and your rights under the law. Do you understand that you're charged with an attempt murder which is a Class X felony?" When defendant responded he did understand, the court continued: "You understand the minimum sentence on that is a—6 years to a maximum of 30 years in the Illinois Department of Corrections, followed by a possibility of—with [*sic*] followed by 3 years of mandatory supervised release?" Defendant stated he understood. The court also said: "You are also charged with an attempted arson, which is a Class 3 felony punishable by a minimum of two years in the Illinois Department of Corrections, and a

maximum of five years, followed by one year mandatory supervised release. Do you understand the nature of the charges and the possible penalties on that charge?" The court informed defendant of the possibility he could be sentenced to consecutive sentences depending on the facts of the case. However, the prosecutor informed the court: "I don't see anything specifically alleging serious bodily injury. So I don't know if there is any mandatory consecutive issues." Defendant told the court he understood the court's admonishments. The court accepted defendant's waiver of counsel and permitted defendant to proceed *pro se*.

¶ 6 During pretrial proceedings defendant subpoenaed three employees of the plumbing company that replaced gas lines in Patricia's residence after the gas leak was detected. The trial court informed defendant that the employees would have to testify if properly subpoenaed. Before trial began, the State relayed a concern about having all three employees from the small plumbing company testify. The court asked defendant why he needed all three to testify. Defendant responded the three employees each performed different aspects of the work and were in Patricia's home at different times. The court told the State to inform the employees that if they had been properly served they would have to appear and the court would work around their schedules. Defendant also attempted to subpoena a police officer, Officer Hoselton. Defendant told the court the purpose in calling Officer Hoselton was to show Patricia's alleged repeated attempts to get defendant arrested. The court informed defendant Officer Hoselton's testimony was not relevant and defendant's request to hold him would be denied. The court denied defendant's request to subpoena two assistant state's attorneys (ASAs) to testify regarding the grand jury proceedings that resulted in defendant's indictment. The court also denied defendant's request to subpoena two employees of the local building and zoning department to testify about inspecting gas lines in Patricia's house and recent gas service line repairs in the area.

¶ 7 The State tendered discovery responses to defendant that included a list of witnesses. That list did not include Tarah Givens, who testified at the trial. However, the State's witness list contained a "catch-all" phrase specifying as a potential witness "any person named in police reports." Later, the State tendered a Cook County Sheriff's Incident Report to defendant along with other documents. The incident report pertained to an encounter between defendant and Patricia during their dissolution proceedings in which defendant allegedly made a threatening comment to Patricia. The incident report listed Tarah Givens as a witness to the incident. The State subsequently filed a motion to admit evidence of other crimes. The State's motion read, in pertinent part, as follows: "On November 15, 2012, [Patricia] and Defendant appeared in court at the Sixth Municipal District regarding their divorce and property disposition. On that date, the [trial judge] ordered Defendant out of the home by 5:00 p.m. that day. Defendant threatened in a low [tone,] as seen by Deputy Sheriffs and heard by a witness, 'I got something for you.' A report was made that day to the Sheriff's Department. *** The People are also seeking to admit Defendant['s] November 15 threat for the purpose of showing Defendant's motive." During opening statements, the State told the jury defendant threatened Patricia after a court hearing in their dissolution proceedings. The prosecutor stated: "This was overheard by Tarah Givens, somebody who just happened to be in the courtroom that day and has no allegiance to anybody involved in the case."

¶ 8 The State tried defendant before a jury. Patricia Zohfeld testified for the prosecution. Patricia and defendant's marriage was dissolved in 2008. The dissolution judgment awarded Patricia the former marital residence, but both Patricia and defendant continued to live there for a time. Patricia testified that in September 2012 while in the former marital residence defendant told her he was going to blow up the house and kill her. Patricia reported this incident to police. In November 2012, Patricia and defendant appeared in court in their dissolution proceedings.

During that court appearance the trial judge entered an order that the deed to the home should be placed in Patricia's name alone and that defendant must vacate the home within 30 days. The trial judge stayed the order regarding the home until December 14, 2012. Patricia testified that on December 9, 2012, she returned home from the grocery store between 2:00 and 3:00 p.m. She smelled gas immediately upon entering the home. Patricia testified she went into the basement where she saw defendant coming out of the crawl space where the gas furnace and water heater were located. Patricia asked defendant what he was doing and defendant told her it was none of her business. Patricia testified that once back upstairs defendant told her that he was going to go ahead and blow up the house, kill her, and collect her insurance. Patricia called police. The officer who arrived told Patricia to call the gas company, which she did. Patricia testified the gas company employee turned off the gas to the house and placed a lock on the gas meter outside of the house. The gas company employee advised Patricia to have a plumber repair the gas lines. She did, and the plumbers came to the house to repair the gas lines. Patricia signed a complaint against defendant with police. Patricia testified that later that night she was awakened by defendant watching television. She asked defendant to leave and told him the gas had been turned off. She learned that police arrested defendant that night. On cross-examination defendant questioned Patricia about what time she arrived home from the grocery store and whether she told the grand jury she arrived home at 12:30 p.m. Patricia initially stated she arrived home in the afternoon. Patricia admitted on cross-examination that there had been a gas leak in the basement in September 2012. Defendant attempted to question Patricia about their dissolution proceedings, but the trial court sustained objections to that line of questioning.

¶ 9 The State called Tarah Givens to testify and defendant objected on the grounds the State had not included her on its witness list. The trial court overruled defendant's objection. Givens testified she was in a courtroom on November 16, 2012 and she heard defendant say to a woman:

"Bitch, watch your back, I got something for you," or "Watch your back, bitch, I'm watching you, I got something for you."

¶ 10 William Woodhall was the employee of the gas company who responded to Patricia's home on December 9, 2012. Woodhall testified he went to Patricia's home at around 3:00 p.m. When Woodhall entered the home he smelled gas right away and a gas-detection device he was carrying also detected the presence of gas. After speaking with Patricia, Woodhall went to the crawl space where he was able to locate the source of the leak from a furnace pipe connection. Woodhall identified a photograph of the piping that was the source of the leak and what he called fresh scratch marks on that pipe. Woodhall turned off the gas to the house from the outside and placed a lock on the gas meter so that the gas could not be turned back on.

¶ 11 Officer Pace of the Midlothian Police Department responded to a call of a gas leak at Patricia's residence at approximately 3:06 p.m. on December 9, 2012. When he arrived, an employee of the gas company was already there. Officer Pace photographed the pipe Woodhall identified as the source of the leak in the crawl space. He saw a pair of channel locks in the crawl space. He saw the gas company employee place a lock on the gas meter. Officer Pace spoke to Patricia, then left to write up a criminal complaint. At approximately 9:40 p.m. the same night, Officer Pace was informed someone was outside cutting the gas meter. Officer Pace returned to the home. When he arrived he saw sparks coming from the front corner of the house where the gas meter was located and saw defendant standing there. Officer Pace testified that defendant told him that he (defendant) was a gas company technician testing for a leak. Officer Pace testified defendant then placed an object, which Pace said was a grinder for cutting metal, inside the house and closed the door. Officer Pace did not see any cutting or grinding marks on the gas meter. Officer Pace arrested defendant on the complaint Patricia had signed.

¶ 12 Three employees of the plumbing company performed the work in Patricia's house. The State had indicated its intent to call one of them to testify, but during trial informed defendant it would not be calling any of those employees to testify. The court told defendant he had to choose one employee to testify. Defendant informed the court the different employees "were doing different things in different places in the house." The court told defendant the plumbers could all testify to the same things and asked defendant which one he wanted to call to testify. Defendant chose Ricardo Herrera.

¶ 13 Ricardo Herrera testified that he suggested to Patricia replacing all of the piping near the furnace and water heater to bring it up to code. Herrera testified he did not see anything in the crawl space that looked like it had been tampered with, and he did not see any tools lying around. Herrera looked at the photograph of the pipe identified as the source of the leak. Herrera saw sealing tape hanging from the pipe. He testified that pipe tape unwinds from the inside of pipe thread if a connection has been unscrewed. Herrera and his co-workers conducted a pressure test after the pipes were replaced. One of Herrera's co-workers found additional leaks in some of the remaining piping in the house. The trial court denied defendant's request to call another plumbing company employee to testify.

¶ 14 Defendant attempted to recall Patricia to testify during his case-in-chief. Defendant told the trial court the purpose in recalling Patricia was to question her about her statement to police and to the grand jury about the December 9, 2012 incident and her testimony as to the timing of the events in those statements. Specifically, in both her statement to police and her testimony before the grand jury Patricia stated she came home at approximately 12:30 p.m., not between 2:00 and 3:00 p.m. as she testified. The trial court denied defendant's request, finding he had already engaged in extensive cross-examination of Patricia.

¶ 15 The jury found defendant not guilty of attempt murder and guilty of attempt arson. Defendant asked the trial court what was the maximum penalty he faced. The court responded: "The attempt arson I believe is a Class 3; two to five. I don't know what your background is and whether you are extendable, which would be five to ten." At defendant's sentencing the State argued defendant's 2008 conviction in federal court for "Delivering in Interstate Commerce a Communication Containing a Threat" made defendant eligible for an extended-term sentence. The court found defendant eligible for an extended-term sentence based on the 2008 federal conviction and sentenced him to the maximum extended term of 10 years' imprisonment.

¶ 16 This appeal followed.

¶ 17 ANALYSIS

¶ 18 Defendant argues his conviction must be reversed and the cause remanded for a new trial because (1) his waiver of counsel was not knowing and voluntary because the trial court failed to inform him of the maximum penalty he could receive if convicted, (2) the trial court denied him his right to present his defense by prohibiting him from examining certain witnesses and limiting the scope of Patricia's cross-examination, and (3) the State committed a discovery violation by failing to disclose the name of a material witness prior to trial. Defendant also argues the extended-term portion of his sentence must be vacated because his 2008 federal conviction did not make him extended-term eligible for his arson conviction, and he is entitled to an additional 44 days credit against his sentence for time spent in presentencing custody.

¶ 19 (1) The trial court substantially complied with Supreme Court Rule 401(a); therefore defendant's waiver of counsel was knowing and voluntary.

¶ 20 Defendant argues his waiver of counsel was not valid where the trial court failed to inform him of the maximum penalty he faced for the offense of attempt arson because of a prior conviction, or the maximum sentence he faced because of consecutive sentencing. The State

initially responds defendant forfeited his claim the trial court did not substantially comply with Rule 401(a) by failing to object at trial and raise the issue in a posttrial motion. Defendant concedes he failed to object to the trial court's admonishments before he waived counsel and did not raise the issue in a posttrial motion, and thus the issue cannot be considered on appeal unless it was plain error. *People v. Wright*, 2015 IL App (1st) 123496, ¶ 44 (citing Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967)). "The plain error doctrine bypasses forfeiture principles and allows a reviewing court to consider unpreserved error when: (1) the evidence is close, regardless of the seriousness of the error; or (2) the error is serious, regardless of the closeness of the evidence. [Citation.]" *Id.* ¶ 44. Defendant asserts the failure to properly admonish a defendant before accepting a waiver of counsel is reviewable under the second prong of the plain error doctrine. In *Wright*, this court said that "we 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." *People v. Pike*, 2016 IL App (1st) 122626, ¶ 109 (citing *People v. Vasquez*, 2011 IL App (2d) 091155, ¶ 14 (citing *People v. Vernon*, 396 Ill. App. 3d 145, 150 (2009), and *People v. Stoops*, 313 Ill. App. 3d 269, 273 (2000))). Accordingly, we will review defendant's claimed error under the plain error doctrine. "The first step of plain-error review is determining whether any error occurred." *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

¶ 21 Defendant had a right to the assistance of counsel at his trial and defendant also had the "correlative right to proceed without counsel." *People v. Maxey*, 2016 IL App (1st) 130698, ¶ 35. The accused must knowingly and intelligently choose to give up the benefits associated with the right to counsel before we will allow an accused to represent himself or herself. *Id.* ¶ 36. The accused should be made aware of the dangers and disadvantages of self-representation so that the record establishes that the accused knows what he or she is doing and that the choice to proceed without counsel is made "with eyes open." *Id.* The purpose of Illinois Supreme Court

Rule 401 (eff. July 1, 1984) is to "ensure that a waiver of counsel is knowingly and intelligently made. [Citation.]" (Internal quotation marks omitted.) *People v. Campbell*, 224 Ill. 2d 80, 84 (2006). Rule 401(a) reads 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." Ill. S. Ct. R. 401(a) (eff. July 1, 1984).

¶ 22 "The rule provides a procedure which eliminates any doubt that a defendant understands the nature and consequences of the charge against him before a court accepts his waiver of the right to counsel and precludes him from waiving the assistance of counsel without full knowledge and understanding. [Citations.]" (Internal quotation marks omitted.) *Wright*, 2015 IL App (1st) 123496, ¶ 46. "Strict, technical compliance with Rule 401(a) *** is not always required." *Id.* "The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances of that case, including the background, experience, and conduct of the accused. [Citation.]" *Maxey*, 2016 IL App (1st) 130698, ¶ 36. "Whether the trial court's admonishments complied with Rule 401(a) is a question of law, which we review *de novo*." *Wright*, 2015 IL App (1st) 123496, ¶ 46.

¶ 23 Turning to the question of whether the trial court's admonishments complied with the rule, the State does not dispute that the trial court failed to inform defendant of the extended-term sentence defendant could receive for attempt arson because of his prior conviction in federal court, but argues the trial court's admonishments were in substantial compliance with Rule 401. Specifically, the State argues that although the trial court's admonishment did not mention the possibility of extended-term sentencing for attempt arson, this omission did not affect defendant's waiver because "the fact that [defendant] was advised that he faced up to 30 or even 35 years' imprisonment on the attempt murder and attempt arson charges together, and that he was ultimately convicted and sentenced to 10 years on the attempt arson is sufficient to satisfy the rule." The State correctly notes that under the facts of this case, defendant was not subject to mandatory consecutive sentencing due to the absence of the required element of serious bodily injury. See 730 ILCS 5/5-8-4(d)(1) (West 2012). Therefore, the admonishment he received as to the 30-year maximum sentence he faced for attempt murder was correct. We note this fact distinguishes this case from this court's decision in *Wright*, 2015 IL App (1st) 123496, ¶ 47. In *Wright*, the court found that the trial court failed to substantially comply with Rule 401(a) where the court understated the maximum penalty the defendant faced. *Id.*

¶ 24 Substantial compliance with Rule 401(a) is sufficient if the record indicates that the waiver was otherwise made knowingly, intelligently, and voluntarily, and the admonishments the defendant received did not prejudice his rights. *People v. Johnson*, 119 Ill. 2d 119, 132 (1987); *People v. Phillips*, 392 Ill. App. 3d 243, 262 (2009). Absent substantial compliance with Rule 401(a), a waiver of counsel is ineffective and a subsequent conviction will not be allowed to stand. *Campbell*, 224 Ill. 2d at 85. In *People v. Coleman*, 129 Ill. 2d 321, 333-34 (1989), our supreme court found the trial court substantially complied with Rule 401(a). *Id.* In that case the trial court correctly informed the defendant he faced the death penalty but incorrectly

admonished the defendant that his minimum sentence was a 20-year term of imprisonment when in fact the defendant was subject to a minimum sentence of natural life imprisonment. *Id.* at 331-32. The *Coleman* court held that "[w]here a defendant knows the nature of the charges against him and understands that as a result of those charges he may receive the death penalty, his knowledge and understanding that he may be eligible to receive a lesser sentence pales in comparison." *Id.* at 334. In *Johnson*, our supreme court found the trial court substantially complied with the rule, and the defendant suffered no prejudice as a result of the trial court's failure to specify the minimum penalty to which he would be subjected in the event of his conviction. *Johnson*, 119 Ill. 2d at 132-34. Our supreme court noted that the defendant was "fully and repeatedly admonished regarding the possibility that he might receive a death sentence." *Id.* In finding the defendant suffered no prejudice from the trial court's admonishments, our supreme court found that the defendant did "not assert his decision to waive counsel would have been different had he been specifically admonished regarding the possibility of a sentence to life imprisonment and our review of the record, including his alleged reasons for choosing to represent himself, indicates that he could make no such claim." *Id.* at 134. In *Pike*, this court construed our supreme court's decision in *People v. Haynes*, 174 Ill. 2d 204, 243 (1996), and found that our supreme court had found that a trial court substantially complies with Rule 401(a) where the court advises the defendant of the maximum penalty. *Pike*, 2016 IL App (1st) 122626, ¶ 124 ("the holding in *Haynes* that the court's admonishment of the applicable sentencing range substantially complied with Rule 401(a) where the court advised the defendant of the maximum penalty governs").

¶ 25 We hold the trial court substantially complied with Rule 401(a) in this case, and its substantial compliance was sufficient, because prior to accepting his waiver of counsel the court correctly admonished defendant of the maximum penalty he faced, defendant chose to proceed

pro se in the face of *that* maximum penalty, and the penalty defendant received was a sentence below that maximum. Therefore, defendant's waiver of counsel is valid. We first find that defendant's waiver of counsel was made knowingly, intelligently, and voluntarily because defendant received accurate knowledge that he faced a maximum term of imprisonment of 30 years and still decided to waive his right to counsel and still chose to proceed *pro se*. As in *Johnson*, in this case, defendant chose to proceed *pro se* in the face of a possible 30-year prison term. Defendant has not made, nor could he make, a credible claim that his decision would have been different had he known he also faced a potential concurrent 10-year prison term. See also *Coleman*, 129 Ill. 2d at 333 (construing *Johnson* and finding that the court "concluded that Johnson made a knowing and intelligent waiver of counsel"); *Pike*, 2016 IL App (1st) 122626, ¶ 127 ("assuming for the sake of argument that the admonishment regarding the nature of the charge or the sentencing range was somehow insufficient, there is no evidence to suggest that [the] defendant *** would have acted any differently had the court strictly complied with Rule 401(a) on the date it granted defendant's request to proceed *pro se*.").

¶ 26 Second, we find defendant clearly suffered no prejudice from the trial court's admonishments. Although the trial court admonished him he faced a maximum 30-year sentence for attempt murder and a maximum 5-year sentence for attempt arson, when in fact defendant faced a maximum 10-year sentence for attempt arson, defendant's sentence is well below the maximum sentence he was admonished he faced, and did face in this case, for attempt murder. See *Pike*, 2016 IL App (1st) 122626, ¶ 122 ("no prejudice arises from the failure to advise a defendant of the minimum sentence he might receive where the sentence he actually receives is below the maximum sentence of which he has been advised"); *People v. Baker*, 133 Ill. App. 3d 620, 622 (1985) (construing Rule 402 and holding that "while defendant was not told that he could receive consecutive sentences, he was informed that he could receive a sentence of up to

30 years in prison. Given that his actual aggregate sentence was much less than 30 years, we are unable to say that the court's omission operated to the prejudice of the defendant")[1].

¶ 27 The failure to admonish defendant about the possible concurrent term of imprisonment of 10 years does not mean the trial court did not substantially comply with the rule where the court properly admonished defendant of the maximum potential sentence of 30-years imprisonment. See *People v. Koch*, 232 Ill. App. 3d 923, 927-28 (1992) ("the 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. Accordingly, when (as here) a defendant is given a sentence in *excess* of the maximum he was informed of at the time he waived counsel, we hold that the defendant's waiver of counsel can never be valid.") (Emphases added.). Moreover, we cannot say defendant did not make his choice to proceed without counsel "with eyes open." *Maxey*, 2016 IL App (1st) 130698, ¶ 36. The record establishes that defendant was aware of the dangers and disadvantages of self-representation and the harshest consequence such that defendant knew what he was doing when he chose to proceed without counsel. *Id.* Defendant's waiver of counsel is valid where he was properly admonished regarding the maximum sentence and received a sentence lower than the maximum. See *Haynes*, 174 Ill. 2d at 243 ("In this case, as in *Coleman* and *Johnson*, the information omitted from the admonishments did not invalidate the defendant's waiver of counsel. Here, as in those cases, the defendant was fully aware of the range of sentences possible for the most serious charge against him, first degree murder, including the possibility of the death sentence. Given that, the importance of the defendant's having specific knowledge of the minimum and maximum sentences for the significantly less serious charge of burglary clearly 'pales in comparison.'

[1]In construing Rule 401, Rule 402 cases "may be instructive." *Wright*, 2015 IL App (1st) 123496, ¶ 59 (citing *People v. Bahrs*, 2013 IL App (4th) 110903, ¶ 31).

[Citation.]"). Since we find there is no error, there can be no plain error. *People v. Herron*, 215 Ill. 2d 167, 187 (2005).

¶ 28 Although we have found the court substantially complied with Supreme Court Rule 401(a), had we found the trial court erred when it failed to admonish defendant as to his eligibility for extended-term sentencing, we would find that error did not rise to the level of plain error. "[F]inding an error has occurred [(which we do not)] does not mean that the second prong of plain error test has been met and that relief would automatically be awarded. Rather, the burden would then be on defendant to show that the error was plain and obvious, and it was so serious 'that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process.' [Citation.]" *Maxey*, 2016 IL App (1st) 130698, ¶ 74. "Plain error review is a narrow and limited exception to general forfeiture principles [and] only after a reviewing court has concluded that an error has occurred, does the reviewing court go on to determine whether the defendant has established that the plain and obvious error infected the entire proceedings so as to deny the defendant his fundamental right to a fair trial." *Id.* ¶ 77. In *Maxey*, this court found that the defendant had "not demonstrated that the lack of any admonishment affected the fairness of his trial and challenged the integrity of the judicial process." *Id.* ¶ 74. More specifically, the court found, the defendant failed to demonstrate that the failure to admonish him impacted the court's ruling in the pretrial proceeding the defendant lost in which he appeared *pro se*. *Id.* "Therefore, defendant has not established plain error such that it did not deny him the right to a fair trial." *Id.*

¶ 29 In this case, as to *plain* error defendant argues "the first prong of plain error review is satisfied here as the evidence at [defendant's] trial was closely balanced so much so that [defendant] was acquitted of the most serious charge, attempt murder." We disagree. First, the fact the jury acquitted defendant of one charge does not mean the evidence at trial was closely

balanced. Second, we find the evidence was not closely balanced. The State's evidence included multiple threats by defendant directed toward Patricia including a threat to do precisely what he was charged with doing. An independent witness corroborated one of those threats. Patricia testified as to defendant's suspicious activity when she smelled gas. A leak was in fact found in the area she testified defendant had been. Physical evidence (the condition of the gas pipe) corroborated the State's theory of the case.

¶ 30 Defendant also argues the appellate court "has repeatedly held the trial court's failure to comply with Rule 401(a) *** is *reviewable* as plain error under the second prong of the doctrine." (Emphasis added.) We agree, and thus have engaged in a review of defendant's claimed error. The first step in the plain error analysis is to determine if any error occurred. We have found the trial court substantially complied with Rule 401. Regardless, defendant has neglected the second step in a plain error analysis, which requires a defendant to "show that the lack of the admonishment so infected the entire trial proceedings or challenged the integrity of the judicial process so as to deny the defendant his fundamental right to a fair trial. [Citation.]" *Id.* ¶ 86. Defendant did not argue how the outcome of the trial would have been affected had defendant been represented by counsel. The trial court noted how defendant subjected Patricia, the key State witness, to grueling cross-examination. Further, defendant was successful in avoiding conviction for the most serious charge. Defendant points to nothing to establish that the fact he proceeded *pro se* denied his fundamental right to a fair trial.

¶ 31 We also reject defendant's argument the trial court's error rose to the level of a structural defect in his trial. The authority on which defendant relies does not support the proposition. We have found nothing more than a violation of a supreme court rule. Our supreme court has found that strict compliance with that rule is not required, as it could have. Where our supreme court has not required strict compliance with its own rule, we cannot say that a failure of compliance

with the rule is a "structural defect affecting the framework within which the trial proceeds." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). Had we reached the issue, we would find defendant has failed to establish plain error. However, the trial court's admonishments were in substantial compliance with Rule 401(a), therefore, no error occurred. Where there is no error, there can be no plain error. Defendant's argument his conviction should be reversed because the trial court failed to comply with Rule 401(a) fails.

¶ 32 (2) Defendant was not denied his right to present a defense.

¶ 33 Defendant argues the trial court denied his right to present a full defense when it prohibited him from calling several witnesses in his case-in-chief and when it prevented him from cross-examining Patricia concerning alleged prior inconsistent statements and matters contained in their dissolution proceedings.

¶ 34 A. Additional Witnesses

¶ 35 Defendant argues the trial court erred in keeping him from calling as witnesses two additional employees from the plumbing company, a police officer, and an ASA.

¶ 36 "[A]n accused has the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." *People v. Manion*, 67 Ill. 2d 564, 576 (1977) (citing *Washington v. Texas*, 388 U.S. 14, 19 (1967)). The accused must have a sufficient opportunity to respond to the State's accusations by presenting crucial matters to explain his or her actions. *Manion*, 67 Ill. 2d at 577. A defendant has a right to cross-examine to show bias, interest, or motive to testify falsely, and the trial court has no discretionary power to deny a defendant this right. *People v. Triplett*, 108 Ill. 2d 463, 475 (1985). However, "the circuit court does have broad discretion to preclude repetitive or unduly harassing questioning on these matters." *Id.*

> "When a defendant claims that he has not been given the opportunity to prove his case because the trial court improperly barred evidence, he must provide [the] reviewing court with an adequate offer of proof as to what the excluded evidence would have been. [Citation.] Such an offer of proof serves dual purposes: (1) it discloses to the court and opposing counsel the nature of the offered evidence, thus enabling the court to take appropriate action, and (2) it provides the reviewing court with an adequate record to determine whether the trial court's action was erroneous. [Citation.]" *People v. Pelo*, 404 Ill. App. 3d 839, 875 (2010).

"[T]he right to offer testimony is grounded in the sixth amendment." *People v. McLaurin*, 184 Ill. 2d 58, 89 (1998). The amendment does not grant a defendant "the right to secure the attendance and testimony of any and all witnesses. [Citation.]" *Id.* To establish a violation of the rights the sixth amendment guarantees, a "defendant must make at least some plausible showing of how the testimony of the witness would have been both material and favorable to his defense. [Citations.]" *Id.* "Evidence is material when it tends to raise a reasonable doubt of the defendant's guilt. [Citation.] The pertinent inquiry with respect to materiality is not whether the evidence might have helped the defense but whether it is reasonably likely that the evidence would have affected the outcome of the case. [Citations.]" *Id.* Evidentiary rulings are within the discretion of the trial court and will not be reversed absent an abuse of that discretion. See *Pelo*, 404 Ill. App. 3d at 864 and 875.

¶ 37 First, with regard to calling two additional employees from the plumbing company as witnesses, defendant argues all three employees were necessary for a full defense because each employee's testimony was "vital to rebut the State's version of events that [defendant] was the person who had allegedly caused the gas lines to leak by tampering with them." Defendant

argues that without the testimony of the two additional employees, the jury "was left with an unclear picture as to how the leaks in the gas line were potentially created or by who [*sic*]." The State responds the testimony of the employee who did testify "revealed the full degree of [the company's] participation, and further testimony from the other employees would not have supported defendant's theory, and would have been merely redundant." After reviewing the testimony of the plumbing company employee who testified at trial and defendant's arguments on appeal, we hold defendant has failed to demonstrate the trial court abused its discretion in prohibiting defendant from calling two additional employees to testify.

¶ 38 Defendant has not made a plausible showing that the additional witnesses' testimony would have been material to his defense. We understand defendant to assert that these additional witnesses would have offered testimony to help establish that the gas leaks in the home were naturally occurring or due to causes other than defendant's tampering. We cannot say that the trial court excluded a crucial part of defendant's case such that defendant had an insufficient opportunity to respond to the State's accusations. Rather, defendant had the opportunity to present evidence from the company that replaced the gas lines in Patricia's home to support his defense theory that the gas leak at issue was not caused by tampering. The witness from the plumbing company who appeared at trial did testify that from his visual inspection in the crawl space "it didn't look like anything was tampered with or tooken [*sic*] loose." He testified that he did not see any tools on the furnace or anything lying around the furnace or any tools in the crawl space. Defendant has not made any demonstration that the additional employees' testimony would not be merely redundant or that they would add any information helpful to his defense. The witness testified that other employees found additional gas leaks when they performed pressure testing on the gas lines—defendant has not asserted what else the additional employee-witness would offer in their testimony. Defendant has made only conclusory

assertions that their testimony was "vital to rebut the State's version of events." But defendant has not stated how their testimony would rebut the State's theory defendant tampered with the gas lines *in the crawl space*. Absent that showing by defendant, we cannot say the trial court abused its discretion in excluding the testimony. *McLaurin*, 184 Ill. 2d at 89; *Pelo*, 404 Ill. App. 3d at 875.

¶ 39 Second, with regard to employees from the local building department, defendant asserts they would have testified "about what they saw in Patricia's house when they inspected the gas lines as well as recent gas line repairs in the house's surrounding area pre-dating the incident," and that this testimony would have been "relevant to whether or not there had been gas line leaking in the past at the residence, and thus providing more evidence that the leaks in Patricia's house were accidentally or naturally occurring." In a pretrial hearing discussing defendant's subpoenas of the Building Department employees, the trial court asked defendant what relevant testimony the two employees would offer. Defendant stated the employee from the building department was an expert in the area of gas pipes and could "lay the foundation that Teflon Pipe Sealant, there is [*sic*] two different types: white and yellow." The court asked defendant what good faith basis he had that the proposed witnesses would give that testimony and defendant admitted neither he nor anyone on his behalf had interviewed the witnesses. When the court challenged defendant on whether the witnesses were experts defendant responded they were experts because they are "paid to reject work that is put together like the pipe was put together" in the picture of the gas pipe the gas company identified as the strongest source of the gas leak in Patricia's home. Defendant also stated that the relevance of the city employees' testimony was that defendant expected them to tell the jury that the gas company had been replacing service lines to houses in the area of Patricia's home "due to the fact that the pipes in the ground are leaking gas." But defendant admitted that information came from another potential witness

defendant had not subpoenaed. Defendant claimed the relevance of the allegedly leaking ground pipes was to explain how water could have gotten into the gas line. The court rejected defendant's arguments telling defendant: "If you want to bring somebody in from [the gas company,] that's your decision to make but you have not given me a good faith basis as to how these individuals from the Building Department and the Zoning Department would be able to introduce that as relevant testimony."

¶ 40 We hold that based on defendant's representations the trial court did not abuse its discretion in prohibiting defendant from calling the village employees to testify. "The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence. [Citation.] In the exercise of this right [to present witnesses in his own defense], the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence. [Citation.]" *People v. Hillis*, 2016 IL App (4th) 150703, ¶ 118. "Under Illinois law, the testimony of a lay witness must be confined to statements of fact of which the witness has personal knowledge. [Citation.]" (Internal quotation marks omitted.) *People v. McCarter*, 385 Ill. App. 3d 919, 934 (2008). Defendant was not aware whether or not the witnesses he subpoenaed inspected the gas pipe at issue. Defendant admitted he only knew that the Building Department was on the scene when Patricia called police. (The State informed the trial court that one of the subpoenaed witnesses had been hired within 6 months of the hearing date of October 2, 2014.) Defendant asserted the witnesses could testify about the two types (or perhaps colors) of tape used to seal the gas pipe, but he did not argue in the trial court or to this court how that testimony would be relevant or material to his defense. When defendant did explain that he wished to call the village employees to testify about the gas company replacing leaking ground pipes in the area as a basis to argue about water possibly getting into

the gas line from the underground pipes leading into Patricia's home (and possibly causing the leak), defendant admitted the information about pipes being replaced came from another source.[2] The trial court correctly held that defendant failed to establish either the relevance or the admissibility of the proffered evidence. The witnesses were properly excluded. See *Hillis*, 2016 IL App (4th) 150703, ¶ 118; *McCarter*, 385 Ill. App. 3d at 934.

¶ 41 Third, defendant stated Officer Hoselton's testimony would have shown that Patricia had previously made false complaints against defendant. Defendant argues Officer Hoselton's testimony would have supported defendant's theory that "Patricia's instant allegations were just as false as her prior allegations that [defendant] had committed crimes against her." Prior to jury selection, as the parties were again discussing multiple witnesses' responses to defendant's subpoenas, the trial court asked defendant how Officer Hoselton would corroborate that Patricia had lied. Defendant explained Officer Hoselton could testify that Patricia told the officer she worked for the FBI when she does not, and in another instance she called police to report that defendant had stolen items from her home but later admitted the items belonged to defendant but defendant was not supposed to be removing items from her home. The trial court concluded Officer Hoselton's testimony was not relevant. We agree. "[S]pecific instances of untruthfulness are not admissible to attack a witness's believability." *People v. Morrow*, 303 Ill. App. 3d 671, 680 (1999). Defendant could not elicit evidence Patricia had lied on a specific occasion to attack the believability of her testimony. See *People v. Santos*, 211 Ill. 2d 395, 403-04 (2004) (what defendant wished to do by introducing this evidence was to impeach the victim's credibility with a specific act of untruthfulness. He wished to show the jury that T.K.

[2] The court asked defendant: "And what's your good faith basis for making that argument or that assumption?" Defendant responded: "I was told that by the front clerk of the Village Hall the month before I was arrested."

had lied on one occasion—when she told medical personnel she had not had sexual intercourse with anyone else in the previous 72 hours—in order to support his argument that when she testified in court she was lying about what had occurred between her and the defendant."). The trial court properly excluded Officer Hoselton's testimony offered for an improper purpose.

¶ 42 Finally, defendant argues the trial court erred in denying him the opportunity to call an ASA to testify regarding Patricia's grand jury testimony because that testimony was substantively admissible (725 ILCS 5/115-10.1(c)(1) (West 2012) (Admissibility of Prior Inconsistent Statements)) or admissible for impeachment. The trial court did not abuse its discretion in prohibiting defendant from calling the ASA as a witness. The alleged inconsistency in Patricia's testimony before the grand jury and her testimony at trial pertains to the time she arrived home to smell gas and discover defendant leaving the crawl space. She allegedly told the grand jury she arrived home around 12:30 p.m. but testified she arrived home between 2:00 and 3:00 p.m. Defendant argues this "evidence was crucial as [police] were at the house around 1:00 p.m. to assist [defendant] with his towed car *** and it was only later at 3:00 p.m. when [police] returned *** that there was the smell of gas at the house." Defendant asserts the ASA's testimony "would have cast severe doubt on Patricia's trial version of events." We find this assertion speculative. We also do not believe this minor discrepancy in Patricia's testimony as to the timing of events was likely to affect the outcome of defendant's trial. Defendant has not shown that the evidence he could have elicited from the ASA was material, thus defendant has not established a violation of his right to present a defense. *McLaurin*, 184 Ill. 2d at 89 (To establish a violation of the rights the sixth amendment guarantees, a "defendant must make at least some plausible showing of how the testimony of the witness would have been both material and favorable to his defense. [Citations.] Evidence is material when it tends to raise a reasonable doubt of the defendant's guilt. [Citation.] The pertinent inquiry with respect to

materiality is not whether the evidence might have helped the defense but whether it is reasonably likely that the evidence would have affected the outcome of the case. [Citations.]").

¶ 43 B. Restriction on Examination of Patricia Zohfeld

¶ 44 Turning to the scope of the examination of Patricia, defendant argues the trial court erroneously prevented him from questioning Patricia about allegedly false statements in their dissolution proceedings accusing defendant of breaking into their home and about the discrepancy in her statements as to when she arrived home to the smell of gas and defendant coming out of the crawl space. Defendant argues that both the "prior fabrications as to [defendant's] alleged break-ins and her prior inconsistent statement as to the timing of events were relevant evidence that showed her potential interest, bias, and motive to lie." When defendant argued to the trial court that he should be allowed to question Patricia about allegations she made against him in the dissolution proceedings the court ruled that the evidence was not admissible under Illinois Rule of Evidence 404(b). Rule 404(b) provides as follows:

> "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith ***. Such evidence may also be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ill. R. Evid. 404(b) (eff. Jan. 1, 2011).

¶ 45 The trial court found that although defendant sought to introduce the statements in the dissolution proceedings to show Patricia's motive, the pleadings were inadmissible evidence. During trial, when defendant attempted to cross-examine Patricia about allegations she may have made in the dissolution proceedings against him, the court ruled that certified copies of court orders from the dissolution court were admissible and defendant could question Patricia about those, but not about pleadings. "Verified statements in pleadings from one case, when used in

another case, are *** ordinary evidentiary admissions which may be used in a later action as statements against interest, but which may be controverted or explained." *In re Marriage of O'Brien*, 247 Ill. App. 3d 745, 749 (1993). A statement against interest is one "which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." Ill. R. Evid. 804(b)(3) (eff. Jan. 1, 2011). Defendant does not contend Patricia's statements in her pleadings were statements against interest. The trial court properly ruled those statements were inadmissible.

¶ 46 We also hold the trial court properly circumscribed defendant's cross-examination of Patricia as to the alleged discrepancy in her statements as to the timing of events related to the discovery of the gas leak. "The admissibility of impeachment evidence is a matter within the sound discretion of the trial judge." *People v. Bailey*, 374 Ill. App. 3d 1008, 1019 (2007). "Impeachment of a witness is limited to relevant matters." *People v. Harris*, 182 Ill. 2d 114, 138 (1998). The trial court ruled the evidence of Patricia's grand jury testimony was not impeaching because Patricia testified she could not be specific about the time and could only say the events occurred in the afternoon. The court found that testimony was not inconsistent with her court testimony and was not inconsistent with a prior statement that the events occurred around 12:30 p.m. We agree. "[E]vidence of a prior inconsistent statement is only admissible for purposes of impeachment if there exists a requisite degree of variance between the extrajudicial statement and the witness'[s] testimony and the two statements relate to a material matter." *Dari v. Uniroyal, Inc.*, 41 Ill. App. 3d 122, 127 (1976). In this case, we agree with the trial court that Patricia's statements do not demonstrate the requisite degree of variance. Further, defendant has failed to demonstrate how the timing of events is material to his defense. To the extent

defendant sought to cast doubt on Patricia's testimony for the jury, her testimony that she could not be certain of the time was sufficient to satisfy defendant's rights. "Defense counsel should be permitted to expose facts from which the trier of fact could appropriately draw inferences relating to the credibility and reliability of the witness." *People v. Robinson*, 368 Ill. App. 3d 963, 981 (2006). However, "[u]nder the confrontation clause, defense counsel is guaranteed an opportunity for effective cross-examination, 'not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' [Citation.]" *Id.* at 980. See also *Triplett*, 108 Ill. 2d 463, 475 (the circuit court does have broad discretion to preclude repetitive or unduly harassing questioning). We find no error in the trial court's orders with regard to defendant's questioning of Patricia.

¶ 47 (3) Defendant was not prejudiced by the State's discovery responses.

¶ 48 We next address defendant's argument the State committed a discovery violation when it failed to specifically name Tarah Givens as a witness on its witness list rather than merely in its catchall listing of any person named in police reports as a potential witness. Defendant argues the State violated Illinois Supreme Court Rule 412, which provides in pertinent part as follows:

> "(a) Except as is otherwise provided in these rules as to matters not subject to disclosure and protective orders, the State shall, upon written motion of defense counsel, disclose to defense counsel the following material and information within its possession or control:
>
> (i) the names and last known addresses of persons whom the State intends to call as witnesses, together with their relevant written or recorded statements, memoranda containing substantially verbatim reports of their oral statements, and a list of memoranda reporting or summarizing their oral statements;

> (ii) any written or recorded statements and the substance of any oral statements made by the accused or by a codefendant, and a list of witnesses to the making and acknowledgment of such statements." Ill. S. Ct. R. 412(a)(i), (a)(ii) (eff. Mar. 1, 2001).

¶ 49 The State argues it was not required to specifically list Givens as a witness on its witness list under discovery rules. The flaw in the State's argument is that it focuses on Rule 412(a)(ii), rather than Rule 412(a)(i), arguing that the "disclosure to defendant of the incident report was sufficient to provide him with notice that his *threat* *** would be brought forth at trial and, thus, no Rule 412 violation occurred." (Emphasis added.) The crux of the State's response is that defendant "was aware of the *** incident and that the *threat* could be elicited at his jury trial." (Emphasis added.)

> "Supreme Court Rule 412 provides that the State shall, upon motion of the defense, disclose the names and last known addresses of the persons whom the State intends to call as witnesses, together with their relevant written or recorded statements. [Citation.] By requiring disclosure prior to trial, it is hoped that the fruits of discovery can be harvested. Or in the event the parties have been unable to arrange a guilty plea or a dismissal, the disclosure assures defense counsel adequate time to prepare. Pre-trial disclosure of this nature not only affords defense counsel adequate opportunity to investigate the case, but also ensures the end of untimely interruptions at trial occasioned by disclosures of statements at trial. [Citations.] It is within the discretion of the trial court to allow a previously unlisted witness to testify at trial. However, a reviewing court will find an abuse of discretion when the record demonstrates surprise or prejudice to the defendant. [Citations.]" *People v. Millan*, 47 Ill. App. 3d 296, 300 (1977).

¶ 50 The State does not specifically argue that the answer to discovery in which it stated that it may call any person named in police reports as a witness was sufficient to satisfy Rule 412(a)(i). We do not need to reach that question. The State argues, and we agree, that even if there was a discovery violation, the error was harmless beyond a reasonable doubt because defendant suffered no prejudice. We agree with the State that defendant "failed to demonstrate any probability that even if he was unaware of Tarah Givens, the result of the proceeding would have been different." The following factors are used to determine whether the State's discovery responses were so deficient that the defendant is entitled to a new trial: "the closeness of the evidence, the strength of the undisclosed evidence, the likelihood that prior notice would have helped the defense discredit the evidence, and the willfulness of the State in failing to disclose the new evidence." See *People v. Matthews*, 299 Ill. App. 3d 914, 919 (1998). We have already explained that the evidence in this case was not close. *Supra* ¶ 34. We do not believe Tarah Givens' testimony was a material factor in defendant's conviction. We disagree with defendant and believe that Tarah Givens' testimony was cumulative of Patricia's testimony. Moreover, the more harmful evidence of defendant's motive came in the form of Patricia's testimony that defendant had in fact threatened to do precisely what he was charged with doing—attempting to blow up the former marital residence. Defendant has made no argument he could have discredited Givens' testimony. Finally, the State made defendant fully aware the incident where he threatened Patricia following a court hearing would be an issue at trial, and it supplied defendant with the police report of that incident. Under the facts of this case, we hold the State's discovery responses did not result in unfair surprise or prejudice to defendant.

¶ 51 (4) Defendant was eligible for extended term sentencing.

¶ 52 Next, we address the argument the trial court erroneously determined defendant was eligible for extended-term sentencing. At defendant's sentencing hearing, the State sought

extended-term sentencing pursuant to section 5-5-3.2(b)(1) of the Code of Corrections, which states that the trial court may consider, as a reason to impose an extended-term sentence under section 5-8-2[3], that the defendant was convicted of a felony "after having been previously convicted in Illinois or any other jurisdiction of the same or similar class felony or greater class felony, when such conviction has occurred within 10 years after the previous conviction." 730 ILCS 5/5-5-3.2(b)(1) (West 2012). The State asserted that defendant's conviction in 2008 in federal court for "Delivering in Interstate Commerce a Communication Containing a Threat" made defendant eligible for extended-term sentencing because that federal conviction was of the same or similar class to the Class 3 felony attempt arson. The State argued the federal offense was of the same or similar class of attempt arson because they carry similar sentencing ranges. The sentencing range for a Class 3 felony in Illinois is 2 to 5 years and the extended-term sentencing range for a Class 3 felony is 5 to 10 years. 730 ILCS 5/5-4.5-40(a) (West 2012). Defendant argues that although "the United States Code generally allows for imprisonment of not more than [5] years," the sentencing range *he* faced for his federal conviction was 18 to 24 months' imprisonment. The trial court found that the sentencing range for defendant's federal conviction was 18 months to 5 years, making it of a same or similar class as an Illinois Class 3 felony with a sentencing range of 24 months to 5 years.

¶ 53 Both in the trial court and on appeal, defendant argued the trial court had to look at both the sentencing range for the prior conviction as well as the elements of the offense for the prior conviction to determine whether the prior conviction was of the same or similar class as the

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[3]"(a) A judge shall not sentence an offender to a term of imprisonment in excess of the maximum sentence authorized by Article 4.5 of Chapter V for an offense or offenses within the class of the most serious offense of which the offender was convicted unless the factors in aggravation set forth in Section 5-5-3.2 or clause (a)(1)(b) of Section 5-8-1 were found to be present." 730 ILCS 5/5-8-2(a) (West 2012).

instant conviction. Defendant relies on the decision in *People v. Bailey*, 2015 IL App (3d) 130287, in which the court held that "trial courts should consider both the sentencing range *and* the elements of the offense in determining whether the defendant is eligible for an extended-term sentence." (Emphasis added.) *Bailey*, 2015 IL App (3d) 130287, ¶ 15. In *Bailey*, it was the State that asserted trial courts should look to the elements of the crime when determining if two offenses are of the same or similar class. *Id.* ¶ 12. The *Bailey* defendant argued "similar class" means comparing offenses by analyzing the sentencing ranges and not the elements of the offense. *Id.* ¶ 10. The *Bailey* court noted that different extended-term sentencing provisions direct the court to "evaluate only the elements of the similar offense." *Id.* ¶ 13. Thus, "[w]hen the legislature intends to limit sentencing considerations to an analysis of only the elements of an offense, it will expressly do so." *Id.* Since the section at issue did not limit the court's consideration of the elements of the offense, the court concluded that "consideration of the elements, while appropriate, is not the only mode of analysis." *Id.* The *Bailey* court held as follows: "After reviewing the statute and applying the rules of statutory construction, we believe the legislative intent was to consider both the sentencing range and the elements in determining whether a conviction in another jurisdiction is of 'the same or similar class felony.' " *Id.* ¶ 14.

¶ 54 The State argues "[c]lass *** is not assessed via elements—rather it is assessed by looking to whether the prior offense carried the same or greater penalty range." It argues that because the legislature did not expressly *include* a consideration of the elements of the offense in the extended-term sentencing statute, it did not intend for the elements to be considered when applying the extended-term sentencing statute. The State claims that the plain language of the statute requires that the trial court look *only* to the sentencing range of the prior conviction and had the legislature intended otherwise it would have included a same-elements test as it did in other sentencing statutes.

¶ 55 While we agree the extended-term statute does not expressly direct courts to compare the elements of the two offenses at issue, it also does not expressly direct courts to consider the sentencing ranges of the two offenses at issue; nor does the statute direct courts to only consider the sentencing range. Instead the statute refers only to the "Class" of the offense. Nonetheless, in Illinois, "Class" is a categorization of offenses by sentencing range regardless of the type of offense. Illinois has a vast array of offenses with different elements that are of the same sentencing class and, therefore, carry the same sentence.

¶ 56 The *Bailey* court wrote that different extended-term sentencing provisions direct the court to "evaluate *only* the elements of the similar offense." (Emphasis added.) *Id.* ¶ 13. The *Bailey* court determined that the legislature intended courts to examine both the elements and the sentencing range because it did not similarly limit consideration in the extended-term sentencing statute to *only* the elements of the offense. The implication that the sentencing statutes *Bailey* compared were *limited* to consideration of the elements of the offense is not totally accurate. The sentencing provisions that direct courts to examine the elements of a prior offense from a foreign jurisdiction do so, at least in part, for purposes of determining what Class the foreign conviction would fall into in Illinois. See 730 ILCS 5/5-5-3(2)(F) (West 2012)[4]; 730 ILCS 5/5-4.5-95 (West 2012)[5]. If a defendant previously committed acts in another jurisdiction that

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[4]" A Class 2 or greater felony if the offender had been convicted of a Class 2 or greater felony, including any state or federal conviction for an offense that contained, at the time it was committed, the same elements as an offense now (the date of the offense committed after the prior Class 2 or greater felony) classified as a Class 2 or greater felony, within 10 years of the date on which the offender committed the offense for which he or she is being sentenced, except as otherwise provided in Section 40-10 of the Alcoholism and Other Drug Abuse and Dependency Act." 730 ILCS 5/5-5-3(c)(2)(F) (West 2012).

[5]" Every person who has been twice convicted in any state or federal court of an offense that contains the same elements as an offense now (the date of the offense committed after the 2 prior convictions) classified in Illinois as a Class X felony, *** and who is thereafter convicted

Illinois would consider a Class X felony, Illinois will consider the defendant a habitual criminal (730 ILCS 5/5-4.5-95 (West 2012)), or will mandate imprisonment for a Class 2 felon who previously committed an offense Illinois considers a Class 2 or greater felony (730 ILCS 5/5-5-3(c)(2)(F) (West 2012)). In other words, the sentencing provisions on which the *Bailey* court relied as examples of limiting sentencing considerations to an analysis of *only* the elements of an offense are concerned with the elements of the offense primarily insofar as they determine the Class—or sentencing range—that a prior foreign offense would have if the offense had been committed in Illinois. See *Id.* "The legislative intent underlying section 5-5-3.2(b)(1) and other recidivist statutes is to impose harsher sentences on offenders whose repeated convictions have shown their resistance to correction. [Citation.]" (Internal quotation marks omitted.) *People v. Johnson*, 2013 IL App (1st) 120413, ¶ 18. Given that purpose, what is most relevant is whether or not the defendant is continuing to commit serious offenses or is committing more serious offenses. The plain language of the extended-term statute directs the courts to consider the foreign jurisdiction's assessment of the seriousness of the prior offense as reflected by the applicable sentencing range (or "Class") for that offense to determine whether, from the defendant's perspective, the defendant has again committed a similarly serious offense and should be eligible for an extended sentence.

¶ 57 We find *Bailey* unpersuasive and the plain language of the statute clear, unambiguous, and reasonable. *People v. Hanna*, 207 Ill. 2d 486, 497-98 (2003) ("The most reliable indicator of legislative intent is found in the language of the statute itself [citation] and that language should be given its plain, ordinary and popularly understood meaning [citation]. However, where a plain or literal reading of a statute produces absurd results, the literal reading should yield.").

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of a Class X felony, criminal sexual assault, or first degree murder, committed after the 2 prior convictions, shall be adjudged an habitual criminal." 730 ILCS 5/5-4-95(a)(1) (West 2012).

We reject defendant's argument the trial court is required to consider the elements of the prior offense when applying the extended-term-sentencing statute. We also reject defendant's argument his extended-term sentence is improper "even under the [trial court's] misinterpretation" of the statute because his applicable sentencing range was 18 to 24 months and not 18 months to 5 years. We acknowledge defendant's argument that the Court of Appeals for the Seventh Circuit found that the parties agreed that federal sentencing guidelines range for defendant was 18 to 24 months' imprisonment. However, defendant concedes the maximum sentence for his federal offense is 5 years' imprisonment. Defendant cited no authority that, for purposes of comparing the sentencing ranges under the extended-term statute, the maximum sentence in the range that must be considered when the prior conviction is from the federal court is the maximum sentence for the individual defendant under the federal sentencing guidelines rather than the maximum sentence for the offense the defendant committed. Because the extended-term statute compares offenses, not sentences, we hold the trial court correctly considered the maximum possible sentence for the federal offense when determining if it was of the same or similar class as attempt arson. See 18 U.S.C. § 875(c) (2012) ("Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both."). We find no error in defendant's sentence.

¶ 58 (5) Defendant is entitled to additional presentence credit.

¶ 59 Defendant argues he is entitled to an additional 44 days of credit against his sentence for time spent in presentencing custody, and the State agrees. Pursuant to this court's authority to correct a mittimus without remand (*Maxey*, 2016 Il App (1st) 130698, ¶ 145), we direct the clerk of the circuit court to correct the mittimus to reflect an additional 44 days of presentence custody credit.

¶ 60 CONCLUSION

¶ 61 For the foregoing reasons, the circuit court of Cook County is affirmed.

¶ 62 Affirmed.