SECOND DIVISION
September 27, 2016

No. 1-15-0553

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 2118
	)	
BENJAMIN WILSON,	)	Honorable
	)	Nicholas R. Ford,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Hyman and Justice Mason concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's conviction for armed robbery affirmed over his contention that the trial court erred in allowing the State to amend the information during trial and his right to a jury trial was violated because he never made a valid waiver of the right.

¶ 2 Following a bench trial, defendant Benjamin Wilson was found guilty of armed robbery and sentenced to six years' imprisonment. On appeal, defendant contends that: (1) the trial court erred in allowing the State to substantively amend the information during trial to allege that he took a cell phone from the victim rather than money and (2) his right to a jury trial was violated because he never made a valid waiver of his right in open court. We affirm.

¶ 3 The State charged defendant with two counts of armed robbery, both based on the allegation that he took property, "To Wit: United States Currency" from Jaquell Applewhite. Count 1 charged defendant with being armed with a dangerous weapon whereas Count 2 charged him with being armed with a firearm. The State also charged defendant with aggravated unlawful restraint (Count 3).

¶ 4 On July 17, 2013, the parties, with defendant present, appeared in court and the following colloquy occurred:

> "[Defense counsel]: I believe we are going to be ready to set this for jury. There is no affirmative answer at this point.
>
> THE COURT: Bench or jury?
>
> [Defense counsel]: Bench.
>
> THE COURT: Bench indicated with for trial. Whatever date is convenient for the parties."

Defendant's case was continued for a bench trial until August 29, 2013.

¶ 5 On that day, defendant appeared in court without his defense counsel. The trial court informed defendant that counsel had called and agreed to a trial date of October 17, 2013. The court told defendant he was "having a bench trial," to which defendant replied "[o]kay."

¶ 6 On November 5, 2013, after defendant's trial was delayed further, the parties, with defendant present, appeared in court and the following colloquy occurred:

> "[Defense counsel]: Judge, I did inform counsel that there won't be an affirmative defense, but we would like to set this for trial.
>
> THE COURT: Bench or jury?

[Defense counsel]: Bench trial.

THE COURT: Give me a date for bench."

¶ 7 The case proceeded to a bench trial on March 6, 2014, where the State presented testimony from Applewhite, Pamela Roundtree, and Chicago Police Officer Sean Flynn.

¶ 8 On January 10, 2013, at approximately 8:50 p.m., Jaquell Applewhite left the house of his grandmother, Pamela Roundtree, and walked toward a "cigarette house" on the 900 block of North Hamlin Avenue to buy cigarettes for his grandfather. The cigarette house was only four houses down the block from Roundtree's residence. As Applewhite approached the cigarette house, four or five people were standing on the front porch. While he walked up the stairs to the porch, defendant came up to him, told him "give me everything you got" and began hitting him on the right side of head with a small, black and brown firearm. The individuals on the porch subsequently ran away. Defendant attempted to reach into Applewhite's pockets, but Applewhite responded by "rushing" and flipping defendant. A struggle ensued during which, defendant dropped his firearm and Applewhite dropped his cell phone. Applewhite proceeded to run back to Roundtree's house without "look[ing] back" to see if defendant picked up his phone.

¶ 9 After returning to Roundtree's house, Applewhite locked the front door and told Roundtree, who also knew defendant, what happened. Roundtree stated that Applewhite told her he was robbed of money, although at trial, Applewhite denied that defendant took money from him. Roundtree described Applewhite as "hysterical" and observed a "knot" on the side of his head. Defendant then appeared and began "banging" on the front window of the house, telling Applewhite to come outside. Applewhite could not see defendant, but recognized his voice. Roundtree went to the front door and saw defendant, who was with another man, "bamming on

the window." She told defendant to stop and saw a black object in his hand, but defendant continued to hit the window, which eventually broke. Another family member who was present at the residence subsequently called the police.

¶ 10 Chicago Police Officer Sean Flynn and a partner arrived a short time later, but defendant had already left. Flynn observed that the house's front window was broken and that Applewhite had "some swelling" behind his left ear. Applewhite told Flynn that defendant went by the name "Castro" and hangs out near the intersection of Iowa Street and Pulaski Road. Flynn stated that Applewhite told him that defendant "put a gun to his head," demanded money, and eventually took his cell phone and $30. Applewhite and Flynn got in a police vehicle and began searching for defendant. According to Applewhite, after they drove to near the cigarette house, he did not find his phone and at that point, he assumed defendant had taken it.

¶ 11 When they reached the intersection of Iowa Street and Pulaski Road, Applewhite observed defendant coming out of a gangway and alerted the officers, who exited their vehicle and arrested defendant. After the officers searched defendant, they found three cell phones on him, one of which Applewhite identified as his own, but they did not recover a weapon. As a result of being hit on the head, Applewhite was bleeding and eventually received stitches. Later that night, Roundtree identified defendant in a lineup.

¶ 12 At the conclusion of the State's case, it sought leave to amend Counts 1 and 2 of the information to reflect that defendant took Applewhite's cell phone, not money. Defense counsel objected to the amendment because the State had already presented several witnesses. The court allowed the amendment, finding the naming of the property on the information "[scrivener's] error."

¶ 13 The trial court subsequently granted defendant's motion for a directed verdict on Counts 2 and 3, but denied the motion on Count 1.

¶ 14 Defendant testified that, on January 10, 2013, while he was walking to a house that sold cigars, two boys, whom he knew as "Chug" and "Freak," approached him. One of them asked defendant if he could talk to "Boo-Man," whom defendant identified at trial as Applewhite, because he had allegedly stolen money from the boys. With the boys nearby, Applewhite told defendant that they were "trying to say he owed them money." Applewhite then told Chug and Freak to "get it like Tyson," meaning fight him for the money. Chug and Freak punched Applewhite, and a fight ensued between the three of them. Defendant did not get involved in the fight. Applewhite eventually escaped and tried to run away, but Chug and Freak chased after him. While running away, Applewhite dropped his cell phone.

¶ 15 Defendant picked up the phone and followed Applewhite to his house to give him back the phone. There, defendant observed Chug and Freak "pounding on the window" and heard them tell Applewhite to "[b]ring his ass back outside and give them their money." Defendant told Chug and Freak to stop banging on the window because he knew Roundtree, who was his friend Steve's mother. Defendant saw Roundtree come to the window and tell all three of them to "get off her porch." As they left the porch, Freak punched the window, causing it to shatter.

¶ 16 Defendant left the house, and a few minutes later, while he was coming out of a gas station, the police appeared and asked him why he broke Roundtree's window. Defendant told them he did not break the window, but was only at her house to give Applewhite his phone back. Defendant acknowledged at trial that he had four cell phones on him when the police arrived, including Applewhite's, but he explained two of them belonged to him and the other one was his

girlfriend's. Defendant denied hitting Applewhite at any point, taking his money, taking his phone from him or having a firearm.

¶ 17 In rebuttal, the parties stipulated that defendant had previously been convicted of felonies in case No. 10 CR 21197 for unlawful use of a weapon by a felon, case No. 07 CR 25212 for unlawful use of a weapon by a felon and case No. 06 CR 17726 for delivery of a controlled substance.

¶ 18 The trial court found defendant guilty of armed robbery. It observed that defendant's version of events conflicted with Applewhite and Roundtree's version of events. However, the court noted defendant was a three-time convicted felon, and it found his testimony "[flew] in the face of all the evidence offered by the State" and was "utterly implausible." The court conversely found Applewhite's testimony "plausible and believable."

¶ 19 Defendant filed a motion for new trial, arguing, *inter alia*, that the trial court erred in allowing the State to amend the information during trial because it was "extremely prejudicial" to defendant and "affected" his decision to testify. At the hearing on the motion, defense counsel argued that, because the court allowed the State's amendment, defendant had to testify "to explain why he had the phone." If he did not testify, counsel asserted "it wouldn't make a lot of sense" as to why defendant was in possession of Applewhite's phone. The State responded that all the discovery in the case "indicate[d] that a phone was taken from this victim" and simply because the court allowed the State to amend the charge to reflect that a phone was taken instead of money "in no way prejudice[d]" defendant. In denying the motion, the court found "[t]he amendment was appropriately filed and constitutionally made and over defense objection."

¶ 20 The trial court subsequently sentenced defendant to six years' imprisonment. This appeal followed.

¶ 21 Defendant first contends that the trial court erred when it allowed the State to amend the information during trial to change the identity of the property taken from Applewhite from money to a cell phone because the amendment substantively changed the allegations against him. Defendant argues that, because the amendment was substantive, the State needed to re-verify the information and hold a new preliminary hearing, and allow him the opportunity to re-plead to the charged offense and prepare a defense. The State responds that it properly amended the information during trial because the amendment did not change a material element of the charged offense and defendant did not suffer prejudice as a result.

¶ 22 Section 111-5 of the Code of Criminal Procedure of 1963 (Code) allows the State, upon its motion, to amend an information "at any time because of formal defects," such as a "miswriting, misspelling or grammatical error," or "[t]he presence of any unnecessary allegation." 725 ILCS 5/111-5 (West 2012); see, *e.g.*, *People v. Jones*, 2012 IL App (2d) 110346, ¶¶ 51-65 (amending an indictment to change the name of the victim of an aggravated battery from one police to another police on the day of trial was formal); *People v. Ross*, 395 Ill. App. 3d 660, 670-73 (2009) (amending an indictment to change the manner in which the defendant committed a criminal sexual assault was formal). The list of formal defects in section 111-5 is not exclusive. *Jones*, 2012 IL App (2d) 110346, ¶ 53. Amending formal defects in an information "is warranted especially where there is no resulting surprise or prejudice to the defendant or where the record clearly shows that he was otherwise aware of the charge against him." *Ross*, 395 Ill. App. 3d at 667.

¶ 23 Formal defects in an information are different than substantive changes to an information. *Id.* at 668. A substantive amendment is when the change "alters an essential element of the offense for which the" defendant was charged. *People v. Kelly*, 299 Ill. App. 3d 222, 227 (1998); see, *e.g.*, *People v. Patterson*, 267 Ill. App. 3d 933, 938-39 (1994) (amending an indictment to change the quantity of a controlled substance that the defendant allegedly possessed with the intent to deliver from more than 15 but less than 100 grams to more than 400 but less than 900 grams was substantive). If an amendment is substantive, the State must file a new information (*People v. Terry*, 2012 IL App (4th) 100205, ¶ 50), and re-verify it. 725 ILCS 5/102-12 (West 2012); *People v. Hewitt*, 212 Ill. App. 3d 496, 504 (1991). We review the trial court's decision to allow the amendment for an abuse of discretion. *Ross*, 395 Ill. App. 3d at 668.

¶ 24 We first must determine whether the State's amendment to the information was a substantive change or formal defect, which requires us to review the essential elements of the offense. See *Kelly*, 299 Ill. App. 3d at 227. The essential elements of armed robbery are (1) those of robbery and (2) being armed. See *People v. Lewis*, 165 Ill. 2d 305, 340 (1995); *People v. Reese*, 2015 IL App (1st) 120654, ¶ 96, *appeal allowed*, No. 120011 (Mar. 30, 2016). The essential elements of robbery are "taking property by force or threat of force." *Lewis*, 165 Ill. 2d at 340. The precise identity of the property taken, however, is not an essential element of the offense. See *People v. Lawler*, 23 Ill. 2d 38, 39 (1961) ("Under an indictment for robbery it is not necessary to prove the particular identity or value of the property taken, further than to show it was the property of the victim or in his care and had a value."); *Reese*, 2015 IL App (1st) 120654, ¶ 96 ("[T]he naming [in the indictment] of the item that defendant attempted to take from [the victim] was surplusage" in charge for attempted armed robbery).

¶ 25 Here, where the State's amendment to the information only changed the identity of the property taken from the victim, *i.e.*, a cell phone instead of money, this change did not alter an essential element of the armed robbery charge. Therefore, the State's amendment was not a substantive change to the information, but rather only corrected a formal defect.

¶ 26 Defendant's reliance on *People v. Troutt*, 51 Ill. App. 3d 656 (1977) for support that the State materially changed the nature and elements of the armed robbery charge is unpersuasive. In *Troutt*, the defendant was originally charged by information of unlawful possession of less than 30 grams of amphetamine, a controlled substance. *Id.* at 658. Later, the trial court allowed the State to amend the information to state that the defendant unlawfully possessed less than 300 grams of phencyclidine, a different controlled substance. *Id.* at 658-59. The appellate court found that the amendment materially changed the nature and elements of the offense, despite the offense arising out of the same statutory section and the potential penalties remaining the same. *Id.* at 661-62.

¶ 27 However, "in a drug case, the quantity of a controlled substance possessed by a defendant is an essential element of the charge." *Patterson*, 267 Ill. App. 3d at 939. Thus, by amending the indictment in *Troutt*, the State changed an essential element of the charge, *i.e.*, the quantity of the controlled substance from less than 30 grams of amphetamine to less than 300 grams of phencyclidine. Here, by comparison, the amendment did not alter an essential element of the offense, as the precise identity of the property taken in an armed robbery is not essential. See *Lawler*, 23 Ill. 2d at 39; *Reese*, 2015 IL App (1st) 120654, ¶ 96.

¶ 28 Given the State's amendment was only formal, we next look to whether there was any resulting surprise or prejudice to the defendant or if the record clearly shows that he was

otherwise aware of the charge against him. See *Ross*, 395 Ill. App. 3d at 667. We find no prejudice or surprise.

¶ 29 Defendant's arrest report stated that he took "a cellular phone" from the victim and "a black LG cellular phone" was recovered after a custodial search of defendant, which the victim identified as his own. Similarly, the complaint for preliminary examination alleged that defendant "[k]knowingly took property, thirty dollars and LG Virgin Mobile cellular telephone" from the victim. At trial, Applewhite consistently testified that defendant took his cell phone and not money. Officer Flynn testified that Applewhite told him that defendant took his cell phone, and Flynn recovered a cell phone from defendant, which Applewhite identified as his own. Furthermore, defense counsel cross-examined Applewhite about his missing cell phone, attempting to show that defendant did not take the cell phone from Applewhite, but merely picked it up off the ground. Therefore, the record reveals no surprise or prejudice to defendant, and the trial court did not abuse its discretion in allowing the amendment. Although the court found the misnaming of the property in the information was simply scrivener's error, we may affirm on any basis supported by the record. See *People v. Lee*, 2016 IL App (2d) 150359, ¶ 14.

¶ 30 Nevertheless, defendant argues he was prejudiced by the amendment because it "affected" his decision to testify. He claims that, because of the amendment and the fact he had Applewhite's phone when he was stopped by the police, he "was forced to testify [at trial] and explain why he had come into possession of the phone." We disagree. Because the identity of the property taken is not an essential element of armed robbery and only the essential elements of the offense are required to sustain a conviction (*Lewis*, 165 Ill. 2d at 340), the State could have sufficiently proved the essential elements of the offense without the amendment. See *Reese*,

2015 IL App (1st) 120654, ¶¶ 93-99 (no fatal variance between attempted armed robbery indictment alleging the defendant reached for the victim's firearm and proof at trial which showed the defendant reached for the victim's keys because the indictment set forth the essential element of the offense). We do not find that the State's amendment to the information compelled defendant to testify where the uncontested evidence established that he was found in possession of Applewhite's cell phone.

¶ 31 Defendant next contends that his right to a trial by jury was violated because he never made a valid waiver of this right in open court. He acknowledges failing to raise the issue in the trial court, which generally results in forfeiture of the claim of error on appeal. *In re R.A.B.*, 197 Ill. 2d 358, 362 (2001). However, he argues, and the State concedes, review for plain error is appropriate. See *People v. Bracey*, 213 Ill. 2d 265, 270 (2004); *In re R.A.B.*, 197 Ill. 2d at 363. Before determining whether there is plain error, we must first determine whether an error actually occurred because absent error, there can be no plain error. *People v. Bannister*, 232 Ill. 2d 52, 65, 71 (2008).

¶ 32 "The right to a trial by jury is a fundamental right guaranteed by our federal and state constitutions." *Bracey*, 213 Ill. 2d at 269. A defendant also has the right to waive a trial by jury and elect a bench trial. 725 ILCS 5/103-6 (West 2012); *Bracey*, 213 Ill. 2d at 269. However, any such waiver must be "understandingly waived by defendant in open court." 725 ILCS 5/103-6 (West 2012). The trial court is not required to give a specific admonishment to the defendant before a valid waiver of this right. *People v. Tooles*, 177 Ill. 2d 462, 469 (1997).

¶ 33 Although section 115-1 of the Code (725 ILCS 5/115-1 (West 2012)) states that "[a]ll prosecutions except on a plea of guilty or guilty but mentally ill shall be tried by the court and a

jury unless the defendant waives a jury trial in writing," complying with this procedure is not mandatory for a valid waiver. See *Bracey*, 213 Ill. 2d at 270 ("Nor is the lack of a written waiver fatal, if it can be ascertained that the defendant understandingly waived his right to a jury trial."). Conversely, the presence of a written jury waiver does not automatically mean the defendant has validly waived his right to a trial by jury. *Id.* at 269-70. Consequently, the validity of a jury waiver "cannot be determined by application of a precise formula, but rather turns on the particular facts and circumstances of each case." *Id.* at 269. A valid waiver may be had "if it is made by defense counsel in the defendant's presence and the defendant does not object." *In re R.A.B.*, 197 Ill. 2d at 364. Where the facts are not in dispute, as is the case here, we review the sufficiency of a jury waiver *de novo*. *Id.* at 362.

¶ 34 We find *People v. Asselborn*, 278 Ill. App. 3d 960 (1996) instructive in resolving this issue. In *Asselborn*, while the defendant was present in court, the trial court stated "[j]ury waiver. Bench or jury?" *Id.* at 962. Defense counsel responded "[i]t will be a bench your Honor." *Id.* The defendant did not object and additionally, he did not execute a written jury waiver. *Id.* at 962-63. The appellate court found that:

> "[T]he colloquy between defense counsel and the trial court occurred prior to the onset of opening statements by counsel. *** A defendant, who permits his counsel in his presence and without objection to waive his right to a jury trial, is deemed to have acquiesced in, and is bound by his counsel's actions." *Id.*

Consequently, the appellate court held that, based on this brief colloquy between the trial court and counsel, the defendant knowingly and understandingly waived his right to a jury trial. *Id.* at 963.

¶ 35 Following *Asselborn*, we find defendant knowingly and understandingly waived his right to a jury trial. Twice before trial and while defendant was present in court, the trial court asked whether he wanted a bench trial or jury trial. Both times, defense counsel responded and requested a bench trial. Defendant never objected to his counsel's selection of a bench trial. Furthermore, at another court date where defense counsel was not present, the court informed defendant that his counsel had set a date for trial. It further stated defendant was having a bench trial and defendant replied "[o]kay." He did not voice an objection, confusion or a desire to not have a bench trial. Additionally, defendant's criminal background consisted of seven prior felony convictions, including several narcotics offenses and two unlawful use of a weapon by a felon offenses, which is relevant in determining whether he entered a valid jury waiver. See *Tooles*, 177 Ill. 2d at 471.

¶ 36 Nevertheless, defendant cites *In re R.A.B.*, 197 Ill. 2d 358, *People v. Scott*, 186 Ill. 2d 283 (1999) and *People v. Williamson*, 311 Ill. App. 3d 54 (1999) in support of his argument that he did not validly waive his right to a jury trial. However, these cases are distinguishable.

¶ 37 In both *In re R.A.B.* and *Scott*, our supreme court found the respective defendants' jury waivers invalid because they did not waive their right in open court. *In re R.A.B.*, 197 Ill. 2d at 367; *Scott*, 186 Ill. 2d at 284-86. In *Williamson*, although a colloquy occurred similar to the ones in the present case where the trial court asked defense counsel if he was "indicating juries at this time or benches," the appellate court could not determine from the record on appeal whether the defendant was present in court during the colloquy. *Williamson*, 311 Ill. App. 3d at 55, 60. In the present case, it was clear defendant was present in court both times when the trial court asked

him if he wanted a jury or bench trial to which defense counsel responded requesting a bench trial.

¶ 38 We appreciate the nature of the criminal court trial calendar is conducive to creating a familiarity with the matters and defendants that appear over several years that may result, not surprisingly, in experienced trial judges mistakenly believing that required admonishments have been given and knowingly waived. Every judge can benefit from some type of reminder to assure that a defendant has been admonished regarding his right to a jury trial, ascertain that the defendant understands and knowingly waived that right and obtain a signed waiver. This would eliminate unnecessary issues on appeal. But the trial judge's failure to follow these procedures in the circumstances presented here does not invalidate defendant's jury waiver.

¶ 39 Accordingly, defendant's right to a trial by jury was not violated because he made a valid waiver of this right. Because there was no error, there can be no plain error. See *Bannister*, 232 Ill. 2d at 71.

¶ 40 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 41 Affirmed.