2017 IL App (2d) 150183-U
No. 2-15-0183
Order filed July 12, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MAURICE U. HALL, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 06-CF-506 Honorable Daniel P. Guerin, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Schostok and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court substantially complied with Rule 401(a), where, although the court did not admonish defendant that he had a right to counsel and, if indigent, appointed counsel, defendant had previously been represented by both the public defender's office and private counsel and the court made a reference to the right to counsel during questioning after defendant announced that he wished to proceed *pro se*. Affirmed.

¶ 2 In 2007, a jury found defendant, Maurice U. Hall, guilty of aggravated battery of a child (720 ILCS 5/12-4.3(a) (West 2006)) and aggravated criminal sexual abuse (720 ILCS 5/12-16(d) (West 2006)), and he was sentenced to 23 years' imprisonment on the battery conviction and a consecutive term of 5 years' imprisonment on the sexual-abuse conviction. Defendant appealed,

and this court reversed and remanded for a new trial. *People. v. Hall*, 2012 IL App (2d) 100307-U (holding that defendant's statements should have been suppressed).

¶ 3 In 2014, on remand, defendant decided, after the public defender had been representing him, to forego such representation and proceed *pro se*. Following a bench trial, he was found guilty of aggravated criminal sexual abuse and sentenced to five years' imprisonment. (Defendant was acquitted of aggravated battery of a child.) Defendant appeals, arguing that he was not properly admonished, pursuant to Illinois Supreme Court Rule 401(a)(3) (eff. July 1, 1984), as to his right to counsel and, if indigent, his right to appointed counsel. We affirm.

¶ 4 I. BACKGROUND

¶ 5 After defendant was arrested in 2006, the public defender was appointed as his counsel. On April 10, 2006, the public defender's office withdrew and private counsel filed an appearance on defendant's behalf. On July 7, 2006, private counsel withdrew and the public defender was again appointed to represent defendant.

¶ 6 On December 10, 2007, the jury trial commenced. The evidence as to the aggravated-criminal-sexual-abuse charge showed that defendant, age 28, entered into an ongoing sexual relationship with C.O., then age 15, which resulted in a child, J.O. The evidence as to the aggravated-battery-of-a-child charge showed that defendant shook, squeezed, and otherwise inflicted physical trauma to infant J.O. that resulted in a fractured skull, lacerated liver, cerebral hemorrhaging, and cracked ribs. Defendant was convicted of both charges and sentenced to 5 years imprisonment for the sex crime and 23 years' imprisonment for the aggravated battery of a child.

¶ 7 In the first appeal, this court overturned both convictions, holding that defendant's statements to police should have been suppressed. *People v. Hall*, 2012 IL App (2d) 100307-U, ¶ 74.

¶ 8 On remand, the public defender was appointed, on March 14, 2013, to represent defendant, but was granted leave to withdraw when, on April 30, 2014, defendant sought to proceed *pro se*. Prior to allowing defendant to represent himself, the trial judge admonished defendant about the nature of the charges, the potential penalties, and some of the potential consequences of not having an attorney represent him. The court did not admonish defendant "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)(3) (eff. July 1, 1984). Finally, the following exchange occurred:

> "[Trial judge:] Well here I have to tell you a few things under the law to make sure that you're intelligently and knowingly waiving *your right to counsel*, which is what you're asking to do. You understand that, right?
>
> [Defendant:] Yes." (Emphasis added.)

¶ 9 A. Evidence

¶ 10 At the 2014 bench trial, C.O. testified that she was born on December 16, 1989. She met defendant, who worked delivering newspapers with her mother, in January or February 2004, when she was a high school freshman. Although C.O. was only 14 years old at the time, she started talking to defendant, who was born on February 5, 1976, and, at the time, was 28 years old. C.O. and defendant started dating, and the relationship became romantic. C.O. moved into defendant's apartment in March 2004. She testified that defendant would pick her up from school. Defendant asked C.O. to wear her hair and makeup a certain way to make herself appear older.

¶ 11 After she moved into defendant's apartment, defendant had C.O. sign a contract, detailing the terms of their sexual relationship. It stated that C.O. would "do everything" defendant asked her to do, "without asking questions," and that, when defendant is "doing her," he would decide whether "it's in front or back." The contract also provided that C.O. would "do" defendant "on top" how he taught her, that C.O. would not accuse defendant of "cheating or lying," and that C.O. would not complain to her mother about him. It also stated about defendant that, "I don't answer or run to nobody but God, so don't tell me I do. Cook, clean, whatever, and wash. I play whenever I want to. I already told you before we started, if you can't handle it, don't be with me." C.O. and defendant signed the document. C.O. testified that the failure to follow defendant's rules resulted in defendant hitting her with a partially-closed fist.

¶ 12 C.O. further testified that she had sexual intercourse with defendant while she lived with him and that she did not use birth control. In March 2005, when she was 15 years old, she learned that she was pregnant. Defendant insisted that C.O. get an abortion, even though C.O. did not want to, and C.O. was driven to an abortion clinic on two occasions. On the first occasion, C.O.'s sister drove C.O. to a clinic in Chicago, but C.O. did not go through with the procedure because she was scared. On the second occasion, defendant drove C.O. to a clinic, but, again, C.O. did not go through with the procedure because defendant did not have enough money to pay for it.

¶ 13 J.O. was born on December 15, 2005. He was healthy. C.O. lied about J.O.'s paternity and did not list defendant as the father on J.O.'s birth certificate. Pursuant to a court order, in July 2014, investigator Steve Arp obtained DNA samples from defendant, C.O., and J.O. Vanessa Marticucci, a forensic-biology and DNA-analysis expert testified that she analyzed the

samples and calculated the probability of paternity. She opined that there is a 99.9999998411% probability that defendant is J.O.'s biological father.

¶ 14 After C.O. was released from the hospital, she took a leave of absence from school to take care of her child. However, she eventually returned to school, and defendant took care of J.O. C.O. testified that, on February 9, 2006, she left a healthy J.O. in defendant's care before going to school. When defendant came to pick her up from school with J.O. in the car, C.O. noticed that J.O. had a fever. Over the next few days, C.O. cared for J.O.'s fever after school and defendant watched J.O. the rest of the day. A few days after she noticed the fever, C.O. noticed J.O.'s eyes had rolled back and one eye was twitching when defendant brought J.O. to pick up C.O. from school. C.O. also noticed that, unlike before, J.O.'s body was stiff, and his temperature was 108 degrees.

¶ 15 According to C.O., defendant refused to take her and J.O. to the hospital. C.O. did not have a driver's license. On February 11, 2006, defendant agreed to take J.O. to the hospital, where the infant was diagnosed with a blood clot, bone fractures, and a laceration of the liver. C.O. testified that defendant had instructed her to take the blame and lie to police because she was still a minor and would not get in as much trouble as defendant. C.O. testified that the only two people who ever cared for J.O. were her and defendant and that she never hurt or injured J.O. in any way.

¶ 16 Dr. Emalee Flaherty, the State's final witness and chief of the child abuse, pediatrics division at Lurie Children's Hospital, testified as an expert in pediatrics and child abuse pediatrics. Dr. Flaherty testified that, when J.O. was brought to the hospital on February 11, 2006, he was suffering from a skull fracture, which was the result of a blunt impact between his skull and something hard. Tests revealed that J.O. was also suffering from multiple subdural

hemorrhages, covering the entirety of his brain, and a bruise to his knee. Dr. Flaherty explained that the subdural hemorrhages were a sign of a devastating injury with long-term "devastating consequences" for J.O. and that the knee bruise was highly suggestive of child abuse, as children of J.O.'s age are not capable of being active on their own. She also testified that J.O. had 11 rib fractures, some occurring within five days, a broken left distal humerus, and a laceration of the liver. Dr. Flaherty testified that all of these injuries were not the result of normal handling of a child and that they resulted from child abuse. In her opinion, the disabilities J.O. suffers from today, including daily seizures, cerebral palsy with quadriplegia and brain damage that prevents J.O. from communicating with others, are the result of child-abuse related injuries discovered on February 11, 2006.

¶ 17 The State rested, and defendant presented no evidence.

¶ 18 B. Verdict and Subsequent Proceedings

¶ 19 The court found defendant guilty of aggravated criminal sexual abuse and not guilty of aggravated battery to a child.

¶ 20 At sentencing, the State presented previously-excluded evidence in which defendant, in recorded statements to police, confessed to have shaken J.O. numerous times prior to him being taken to the hospital. The court sentenced defendant to five years' imprisonment. Defendant appeals.

¶ 21 II. ANALYSIS

¶ 22 Defendant contends that his waiver of counsel was invalid, where the court failed to fully comply with Rule 401(a), specifically, failing to admonish him "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)(3) (eff. July 1, 1984). He requests that we vacate his conviction and remand for a new trial.

Defendant acknowledges that he did not object to the incomplete admonishment below and, thus, it would normally be forfeited. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (explaining that both a trial objection and a written posttrial motion are required to preserve an error for review). He maintains, however, that this issue can be reviewed for plain error. For the following reasons, we reject defendant's argument and conclude that the trial court substantially complied with the rule.

¶ 23 The plain-error doctrine allows courts to review arguments that have been forfeited when: (1) the evidence is close, regardless of the seriousness of the error; or (2) the error is so serious that the defendant was denied a substantial right, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167, 187 (2005). A defendant has a fundamental right to be represented by counsel (*People v. Black*, 2011 IL App (5th) 080089, ¶ 24), and it is well settled that a trial court's failure to substantially comply with Rule 401(a) denies that right. *People v. LeFlore*, 2013 IL App (2d) 100659, ¶ 51, *rev'd on other grounds*, 2015 IL 116799; *Black*, 2011 IL App (5th) 080089, ¶ 24. Accordingly, regardless of whether the argument was preserved, whether the court's admonishments substantially complied with Rule 401(a) is reviewable under the second prong of plain error. *Black*, 2011 IL App (5th) 080089, ¶ 24. Under the second prong of plain-error review, "[p]rejudice to the defendant is presumed because of the importance of the right involved." *Herron*, 215 Ill. 2d at 187. There can be no plain error, however, unless we first determine that error occurred. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

¶ 24 The sixth amendment of the United States Constitution guarantees a criminal defendant the right to effective assistance of counsel at all critical stages of judicial proceedings and the correlative right to proceed without counsel. U.S. Const., amend. VI; *Faretta v. California*, 422 U.S. 806, 833-34 (1975); *People v. Hughes*, 2012 IL 112817, ¶ 44; *People v. Lego*, 168 Ill. 2d

561, 564 (1995). The right attaches at the commencement of proceedings (*Black*, 2011 IL App (5th) 080080, ¶ 11) and is guaranteed at all stages where a defendant's rights may be substantially affected. *Hughes*, 2012 IL 112817, ¶ 44.

¶ 25 We review for an abuse of discretion whether a defendant's waiver of counsel was knowing and voluntary. *People v. Pike*, 2016 IL App (1st) 122626, ¶ 114. However, "[w]hether the trial court's admonishments complied with Rule 401(a) is a question of law, which we review *de novo*." *People v. Wright*, 2015 IL App (1st) 123496, ¶ 46.

¶ 26 "Rule 401(a) governs the trial court's acceptance of an accused's waiver of counsel. Pursuant to Rule 401(a), certain admonishments must be given by the trial court before a defendant may be found to have *knowingly and intelligently* waived counsel." (Emphasis added.) *People v. Haynes*, 174 Ill. 2d 204, 235-36 (1996).

¶ 27 Rule 401(a) provides:

> "(a) Waiver of Counsel. 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[or her] of and determining that he [or she] *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 [or she] has a right to counsel and, if he [or she] is indigent, to have counsel appointed for him [or her] by the court." (Emphasis added.) Ill. S. Ct. R. 401(a) (eff. July 1, 1984).

¶ 28 Again, the purpose of the rule is to ensure that a waiver of counsel is knowingly and intelligently made. *People v. Johnson*, 119 Ill. 2d 119, 132 (1987). Strict compliance with Rule 401(a) is not always necessary: "[s]ubstantial compliance with Rule 401(a) is sufficient to effectuate a valid waiver of counsel if the record indicates the waiver was made knowingly and intelligently [citation] and the admonishment the defendant received did not prejudice his [or her] rights." *People v. Kidd*, 178 Ill. 2d 92, 113 (1997). Here, when defendant stated that he wished to proceed *pro se*, the court did not admonish him 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)(3) (eff. July 1, 1984). Thus, the court did not strictly comply with Rule 401(a) and the question here is whether there was substantial compliance.

¶ 29 There are two categories of substantial compliance. *Pike*, 2016 IL App (1st) 122626, ¶ 112. We will find substantial compliance where the failure to fully provide the admonishment does not prejudice defendant because either: (1) the defendant "was already aware of the information that was omitted" from the admonishment; or (2) the defendant's level of legal sophistication reflects that the defendant was aware of the information that would have been conveyed had the court complied with the rule. *People v. Gilkey*, 263 Ill. App. 3d 706, 711 (1994). The dispositive question "is whether the waiver of counsel was knowingly, understandingly[,] and effectively made, in light of the entire record." *Id.* Here, we focus on the first category—whether defendant was already aware of the omitted information. The State argues in the alternative that defendant possessed a degree of sophistication that showed that he was aware of his right to counsel. However, the case law reflects that the high-degree-of-legal-sophistication alternative does not apply to the circumstances in this case, where the defendant

did *not* have the relevant background or degree of sophistication.[1] Compare *People v. Houston*, 174 Ill. App. 3d 584, 589 (1988) (holding that there was substantial compliance with Rule 401(a) based on the defendant's legal sophistication, where the defendant had worked as a paralegal, filed several *pro se* motions, made statements at a preliminary hearing demonstrating he understood the purpose and nature of the proceeding, and where he told the court that he was in the process of attempting to obtain counsel), with *People v. Black*, 2011 IL App (5th) 080089, ¶ 22 (no compliance, where two letters written by the defendant "do not display [the] knowledge that is supposed to be imparted by Rule 401").

¶ 30 Defendant relies on *People v. Vernon*, 396 Ill. App. 3d 145 (2009). In that case, the trial court failed to give *any* Rule 401(a) admonishments, including admonishing the defendant of his right to counsel, before the defendant proceeded *pro se* on a motion to dismiss. *Id.* at 152. The *Vernon* court held that, where the defendant did not receive the required Rule 401(a) admonishments, he could not give a proper waiver of his right to counsel. *Id.* at 154.[2] Further, because the defendant lacked counsel at a critical stage of the proceedings, the court was required to presume that the defendant was prejudiced by the lack of counsel and it remanded for a new trial. *Id.*

[1] Defendant's prior involvement with the criminal justice system includes two convictions for driving with a suspended license, during which he was represented by counsel.

[2] The court noted that defendant had some degree of sophistication and that this is generally relevant in assessing whether there is substantial compliance; however, the record before the court "suggest[ed] no compliance at all." *Id.* at 152 n.2. Thus, the court did not address the import of defendant's sophistication.

¶ 31 The State responds that *Vernon* is distinguishable because the court in that case failed to give *any* Rule 401(a) admonishments, whereas, here, the court did admonish defendant as to the charges and penalties he was facing. The State relies on *People v. Love*, 139 Ill. App. 3d 104, 114 (1985), where the court held in the *alternative* that the trial court had sufficiently complied with Rule 401(a). It noted that the defendant "knew of his right to counsel" because the public defender's office had been appointed to represent him at his guilty plea, but the defendant thereafter decided to not continue that representation. *Id.* Further, the defendant had dismissed two appointed attorneys. *Id.*

¶ 32 Defendant contends that *Love* is distinguishable because the defendant in that case was appointed standby counsel. *Id.* at 113. The *Love* court's *primary* holding on the Rule 401(a) issue was that, when a defendant requests, and is granted, standby counsel, the defendant does not waive his or her right to counsel and, thus, the Rule 401(a) admonishments need *not* be given at all. *Id.* (quoting *People v. Pittman*, 75 Ill. App. 3d 683, 687 (1979)). Here, defendant requests that the *alternative Love* holding upon which the State relies should not control because the *Love* facts—no waiver of counsel—are not the same as the facts here—a waiver of counsel. Defendant also contends that, if the prior appointment of a public defender is sufficient to reflect compliance with the rule, then, any time a public defender is appointed, the rule's admonishment is essentially rendered superfluous.

¶ 33 Here, during his first trial, defendant was initially represented by the public defender. After the public defender withdrew, private counsel represented defendant until private counsel withdrew, at which point defendant was again represented by the public defender. On remand after his appeal, the public defender was appointed to represent defendant for his second trial, but was granted leave to withdraw when defendant sought to proceed *pro se*. The court advised

defendant as to some of the Rule 401(a) admonishments, but omitted the admonishment concerning defendant's right to counsel. Finally, there occurred the exchange where the court made the reference to "your right to counsel," and to which defendant replied that he understood.

¶ 34 We believe that this case falls in between the scenarios in *Vernon* and *Love*. This case is not precisely like *Vernon*, where the defendant, who had *not* been previously represented by counsel, received none of the Rule 401(a) admonishments because, here, defendant received two of the three admonishments. However, similar to the defendant in *Love*, defendant, here, had been represented by the public defender's office three separate times (twice at the first trial, and once at the second trial). With the public defender again appointed to represent him during his second trial, he ultimately decided to represent himself. Turning to *Love*, defendant, here, unlike *Love*, was not appointed standby counsel and this distinction is somewhat difficult to ignore even when assessing the *Love* court's *alternative* holding that, even if the trial court was obligated to comply with the rule, the defendant's prior representation by the public defender reflected his knowledge of Rule 401(a) and, thus, the trial court sufficiently complied with it. *Love*, 139 Ill. App. 3d at 114. In light of these cases and notwithstanding the distinction with *Love* (*i.e.*, appointment of standby counsel), we believe the *Love* holding is sound. Defendant's prior representation by the public defender reflects, in our view, that he "was already aware of the information that was omitted" from the court's admonishments. *LeFlore*, 2013 IL App (2d) 100659, ¶ 52. Until he elected to proceed *pro se* at his second trial, defendant was represented by the public defender. Even during his first trial, he was twice represented by the public defender, with brief representation by private counsel in between. Clearly, he was aware of his right to counsel and, if indigent, to appointed counsel.

¶ 35 We find additional support for our holding in the following exchange at the second trial:

> "[Trial judge:] Well here I have to tell you a few things under the law to make sure that you're intelligently and knowingly waiving *your right to counsel*, which is what you're asking to do. You understand that, right?
>
> [Defendant:] Yes." (Emphasis added.)

We agree with the State that this exchange reflects that defendant acknowledged that he was "waiving his right to counsel," despite the trial court explaining to defendant the numerous advantages to having representation. We disagree with defendant that this exchange is much more ambiguous than the State presents. In defendant's view, his affirmative response was to the specific question, "You understand that, right?" He contends that it is unclear whether his response was that he understood that the judge had "to tell you a few things under the law," or whether the judge was asking him to waive his right to counsel. In either event, defendant argues, the exchange is not an unambiguous admonishment about the right to counsel and does not satisfy Rule 401(a). We find that the reference to the right to counsel further reflects defendant's awareness of the omitted information. *LeFlore*, 2013 IL App (2d) 100659, ¶ 52. It is clear that the subject of the trial court's statement is the right to counsel. In light of this statement and the alternative *Love* holding, we cannot find error.

¶ 36 Finally, we remind trial judges that they must fully comply with Rule 401(a). Our holding does not imply that courts may disregard the admonishments. The goal is that the court recite *all* of the admonishments. See *People v. Johnson*, 119 Ill. 2d 119, 138 (1987).

¶ 37 In summary, the trial court's admonishments substantially complied with Rule 401(a) and, therefore, no error occurred. Where there is no error, there can be no plain error. We honor the procedural default; defendant's argument is forfeited.

¶ 38 III. CONCLUSION

¶ 39 For the reasons stated, the judgment of the circuit court of Du Page County is affirmed.

¶ 40 Affirmed.