

three-year term of mandatory supervised release (MSR) must be reduced to two years because he was convicted of a Class 1 felony. Finally, defendant contends, and the State agrees, that the \$20 Preliminary Hearing fee must be vacated because it was erroneously assessed to him. We vacate the fee and affirm defendant's conviction and sentence in all other respects.

¶ 3 The record shows that on March 17, 2009, the State informed the trial court that in three separate cases, defendant was charged with delivering narcotics to an undercover police officer on three different dates. The case numbers were 09 CR 3560, 09 CR 3561 and 09 CR 3562. On the following court date, the State informed the trial court that there was a scrivener's error in the indictment for case number 09 CR 3560. The offense in that indictment was then amended from delivery of a controlled substance to possession of a controlled substance with intent to deliver. The court questioned whether the statutory section in the indictment also needed to be changed, and the State replied that it should remain as 720 ILCS 570/401(c)(2) as stated.

¶ 4 The State elected to first proceed against defendant on case number 09 CR 3562, and eventually dismissed that case as it could not meet defendant's demand for a speedy trial. The State next prosecuted defendant on a charge of possession of a controlled substance with intent to deliver under case number 08 CR 21628, and the trial court found defendant not guilty.

¶ 5 The State next elected to proceed on case number 09 CR 3561, the subject of this appeal. The indictment contained in the common law record indicates that defendant was charged with delivery of a controlled substance. However, where the name of the offense appears, a line was drawn through the word "DELIVERY" and the word "possessed" was handwritten above it. Also, in the description of the offense, a line was drawn through the word "DELIVERED" and the word "possessed" was handwritten above it. In addition, where the statutory section is listed, the number "402" was handwritten underneath the typed section number "401(c)(2)." It appears that a very faint segment of a line was drawn through the numbers "40" in the typed section

number, but the number was not crossed out. There is no indication in the report of proceedings that this indictment in case number 09 CR 3561 was ever amended.

¶ 6 At trial, in his opening statement, the prosecutor asked the court to find defendant guilty of "delivery of a controlled substance." Chicago police officer Michael Clemons testified that on December 19, 2008, he telephoned codefendant Gregory Spates, then met him on the street to purchase narcotics. The men entered a lounge where Spates conversed with defendant, then asked Officer Clemons if he had the money. Officer Clemons gave \$100 to Spates, who handed that money to defendant. Defendant walked to the back of the lounge, then returned and handed Spates 10 clear knotted plastic bags which each contained a rock-like substance. Spates handed the 10 bags of suspect crack cocaine to Officer Clemons, and the two men left the lounge together. Because this purchase was part of an ongoing narcotics investigation, defendant was not arrested until February 2009. The parties stipulated that a forensic chemist tested the contents of one of the plastic bags and found it positive for 1.2 grams of cocaine.

¶ 7 In a motion for a directed finding, defense counsel argued that it was Spates, not defendant, who "delivered drugs" to Officer Clemons, and that the officer had no conversation or contact with defendant. The State argued that it had "proven all the elements of delivery of a controlled substance beyond a reasonable doubt." The trial court denied defendant's motion, then found defendant guilty of delivery of a controlled substance.

¶ 8 Defendant filed a motion for a new trial which expressly stated "[t]he crime for which the Defendant Donnell Wright was indicated [*sic*] and convicted was for Manufacturing/Delivery of a Control[led] Substance." At the hearing on defendant's motion, the trial court stated that it had found defendant "guilty as charged in this cause" and noted that it was "on the charge of delivery of a controlled substance, 401(c)(2)." The trial court denied defendant's motion and sentenced him to eight years' imprisonment as a Class X offender based on his extensive criminal history.

¶ 9 On appeal, defendant first contends that his right to due process was violated when he was convicted of an offense that was not charged in the indictment, and which was not a lesser-included offense of the offense that was charged. Defendant contends that the indictment charged him with simple possession of a controlled substance, but he was convicted of delivery. He acknowledges that the indictment initially charged him with delivery, but claims the State subsequently amended the charge to possession, as indicated by the several handwritten changes on the indictment. Defendant further acknowledges that there was no motion to amend the indictment in this case. Defendant asks this court to reduce his conviction to possession and remand his case to the trial court for resentencing. Defendant concedes that he failed to preserve this issue for appeal, but argues that it should be reviewed as plain error because it constitutes a violation of his fundamental due process right to notice of the charge brought against him.

¶ 10 The State argues that defendant forfeited the issue and that the plain error doctrine cannot be applied here because no error occurred. The State maintains that defendant was charged by indictment and convicted of the delivery offense, and that he has misapprehended the record. The State notes that defendant was being prosecuted in four cases and that the indictment was amended only in case number 09 CR 3560, not this case. It suggests that there was likely a scrivener's error with the indictment, and that this court should look to the report of proceedings where it conflicts with the common law record. In addition, the State argues that defendant was not prejudiced by any error because he knew he was charged with delivery and defended against that charge when he argued that he did not deliver the drugs to Officer Clemons.

¶ 11 The plain error doctrine is a limited and narrow exception to the forfeiture rule that applies only where the error is so substantial that it deprived defendant of a fair trial, or where the evidence is so closely balanced that the finding of guilt may have resulted from the error. *People v. Caffey*, 205 Ill. 2d 52, 103 (2001). To obtain relief under this doctrine, defendant must first establish that a clear or obvious error occurred. *People v. Hillier*, 237 Ill. 2d 539, 545

(2010). The burden of persuasion is on defendant, and if he fails to meet his burden, the forfeiture will be honored. *Id.* Although the common law record is presumed to be correct, where it is contradicted by the report of proceedings, the reviewing court must examine the record as a whole to resolve the contradictions. *People v. Durr*, 215 Ill. 2d 283, 306 (2005).

¶ 12 Here, our examination of the complete record reveals that defendant was charged by indictment with the offense of delivery of a controlled substance, not possession. As noted above, defendant acknowledges that the indictment initially charged him with delivery, and that there was no motion to amend the indictment in this case. The report of proceedings shows that defendant was charged with delivering narcotics to an undercover police officer in three separate, consecutively numbered cases. All three of these cases were initially before the court at the same time. The record further shows that the indictment in case number 09 CR 3560 was the only one of the three that was subsequently amended to the offense of possession of a controlled substance with intent to deliver.

¶ 13 Our review of the trial transcript establishes that at all times throughout the proceedings in this case, both parties and the trial court proceeded with the common understanding that defendant had been charged with, and was being prosecuted for, the offense of delivery of a controlled substance. In his opening statement, the prosecutor asked the court to find defendant guilty of "delivery of a controlled substance." The State then presented evidence that defendant handed the drugs to codefendant, who handed them to Officer Clemons. In his motion for a directed finding, defense counsel argued that it was codefendant Spates, not defendant, who "delivered drugs" to the officer. The State argued that it had proven all the elements for the delivery offense, and the trial court found defendant guilty of that offense. Significantly, in his posttrial motion, defendant expressly noted that he had been indicted and convicted of delivery of a controlled substance. At the hearing on that motion, the court stated that it found defendant

"guilty as charged," noting that it was "on the charge of delivery of a controlled substance, 401(c)(2)."

¶ 14 The only indication of a possession charge in this case appears on the unexplained handwritten notations on the indictment contained in the common law record. The report of proceedings is devoid of any mention of these notations. Also, the record does not contain the indictments from the other two cases. The State suggests that a scrivener's error occurred. Possibly the notations were made on the wrong indictment when all three cases were before the trial court. This court, however, will not resort to speculation to resolve the issue. Our review of the record as a whole shows that defendant was charged by indictment with delivery of a controlled substance, that he presented a defense against that charge at trial, and that he was convicted of that offense. Based on this record, we find that no error occurred in this case. Accordingly, defendant's procedural default of this issue cannot be excused. *Hillier*, 237 Ill. 2d at 545.

¶ 15 Defendant next contends that the trial court erred when it imposed a three-year term of MSR because, although he was sentenced as a Class X offender, he was convicted of a Class 1 felony, and therefore, should serve a two-year term of MSR. Defendant argues that the MSR term is based on the class of felony committed, not the sentencing range imposed. Defendant acknowledges that this court rejected the same argument he presents here over 10 years ago in *People v. Anderson*, 272 Ill. App. 3d 537, 541-42 (1st Dist. 1995), and *People v. Smart*, 311 Ill. App. 3d 415, 417-18 (4th Dist. 2000). He argues that those decisions should not be followed because our supreme court's subsequent decision in *People v. Pullen*, 192 Ill. 2d 36 (2000), dictates a different result. In *Pullen*, the court considered the issue of the maximum aggregate length of consecutive sentences a court could impose.

¶ 16 Defendant further acknowledges that several recent cases have considered the issue in light of *Pullen* and have continued to reject his argument, finding that *Pullen* does not change

our court's previous conclusion as held in *Anderson and Smart*. See *People v. Rutledge*, 409 Ill. App. 3d 22, 26 (1st Dist. 2011); *People v. Lampley*, 405 Ill. App. 3d 1, 13-14 (1st Dist. 2010); *People v. Holman*, 402 Ill. App. 3d 645, 652-53 (2d Dist. 2010); *People v. McKinney*, 399 Ill. App. 3d 77, 82-83 (2d Dist. 2010); *People v. Lee*, 397 Ill. App. 3d 1067, 1072-73 (4th Dist. 2010). Defendant also notes that in *People v. Watkins*, 387 Ill. App. 3d 764, 766-67 (3d Dist. 2009), his argument was rejected without mentioning *Pullen*. See also *People v. Allen*, 409 Ill. App. 3d 1058, 1078 (4th Dist. 2011). Defendant urges this court not to follow these cases, claiming they were wrongly decided in that they misread the plain language of the MSR statute and conflict with the logic of *Pullen*. We decline to depart from the reasoning of our earlier decisions, which has been followed by all of the districts of this court that have considered the issue. We therefore find that the three-year term of MSR imposed on defendant as a Class X offender was proper.

¶ 17 Finally, defendant contends, and the State agrees, that the \$20 Preliminary Hearing fee under section 4-2002.1(a) of the Counties Code (55 ILCS 5/4-2002.1(a) (West 2008)) was erroneously assessed to him because no preliminary examination was held. We therefore vacate that part of the Fines, Fees and Costs order assessing the \$20 Preliminary Hearing fee. *People v. Smith*, 236 Ill. 2d 162, 174 (2010).

¶ 18 For these reasons, we vacate the \$20 Preliminary Hearing fee, strike it from the Fines, Fees and Costs order and affirm defendant's conviction and sentence in all other respects.

¶ 19 Affirmed as modified.