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SECOND DIVISION
FEBRUARY 8, 2011

1-09-0342

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. 08 CR5088
)	
TYLER ADAMS,)	Honorable
)	John T. Doody, Jr.,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Karnezis and Harris concurred in the judgment.

ORDER

Held: Defendant's conviction and sentence for possession of less than one gram of controlled substances, cocaine and heroin, with intent to deliver upheld where there was no violation of Supreme Court Rule 431(b); the evidence supported defendant's guilt beyond a reasonable doubt; his conviction as a Class X offender was proper; and his three-year term of MSR was proper.

Following a jury trial in September 2008 in the circuit court of Cook County, the defendant, Tyler Adams, was found guilty of possession of less than one gram of controlled substances, cocaine and heroin, with intent to deliver. The defendant filed a motion for a new trial that was denied. The trial court sentenced the defendant to seven years of imprisonment with three years of mandatory

supervised release. The defendant filed a timely appeal from his conviction and sentence.

On appeal, the defendant raises the following issues: (1) whether the trial court's failure to ask prospective jurors whether they understood the four *Zehr* principles violated Supreme Court Rule 431(b); (2) whether the trial court interfered with the defendant's constitutional right to testify and the guiding hand of counsel when the court refused to rule on his motion *in limine* regarding the use of his prior convictions for impeachment; (3) whether his sentence should be reduced to simple possession of a controlled substance because the evidence did not support a finding beyond a reasonable doubt of the defendant's intent to deliver the controlled substances; (4) whether his sentence as a Class X offender was void because his prior conviction of attempted armed robbery is an unclassified crime and should not have been used to satisfy the statutory requirements of two convictions of Class 2 or greater felonies; and (5) whether the trial court erred in ordering a three-year term of mandatory supervised release (MSR) because the defendant was convicted of a Class 2 offense which requires only a two-year term of supervised release.

We affirm the judgment of the circuit court of Cook County.

BACKGROUND

The testimony at trial disclosed that at approximately noon on February 16, 2008, two Chicago Police Department officers were involved in a narcotics surveillance operation at the corner of 13th Street and Central Park Avenue in Chicago, Illinois. The area was described as a residential area with a high volume of narcotic and drug activity. Officer Wrigley (Wrigley) dropped Officer Beyna (Beyna) off at the location. Wrigley drove to a position a few blocks away in his unmarked police car and the two stayed in radio contact with each other. Beyna assumed a surveillance

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position inside a building. Using binoculars, Beyna saw the defendant standing approximately 75 feet from him. An unknown individual approached the defendant, they had a short conversation, and it appeared that the defendant accepted money. The defendant placed the money into his pocket. The defendant then went around the corner, picked up a glass juice bottle that was stuck in the snow and removed a paper bag from underneath the bottle. The defendant then removed a small item from the paper bag and returned the brown paper bag to the snow, and put the glass bottle on top of the paper bag. The defendant returned to the unknown individual and handed him a small item.

Approximately five minutes later, another unknown individual approached the defendant and had a short conversation with him. The defendant accepted money from this individual also, walked over to and picked up the glass bottle, took the crumpled bag from the snow, removed an item from the bag, and gave the item to the unknown person. Beyna testified that the defendant was in the same location when the two transactions occurred. The furthest distance between the bottle and the defendant during the observation was approximately 25 to 30 feet. The defendant was pacing during the 15 minutes that Beyna observed him, and at one point the defendant crossed the street, but was always in the same general area.

Beyna notified Wrigley of his observation of the two transactions. Beyna walked a short distance after leaving his surveillance post and was picked up by Wrigley in his unmarked vehicle. Beyna testified that no more than five minutes elapsed between the time he left his surveillance position and when he and Wrigley drove to the defendant's location. Once near the defendant's location, the two officers left the vehicle and approached the defendant who had crossed the street from his previous position. Wrigley detained the defendant and Beyna recovered the bag from the

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snow underneath the bottle. The officer looked inside of the crumpled brown paper bag and saw that it contained a black piece of plastic and seven small ziplock bags containing a white powdery substance which he believed was heroin. The defendant was then placed into custody and Beyna kept the suspected narcotics on his person until he arrived at the police station. The juice bottle was not taken by the officers from the location, because, Beyna testified, it did not contain any narcotics.

A forensic scientist employed by the police department, Naeemah Powell, testified at trial about the chain of control over the exhibits offered by the State. There were seven bags of white powder in total, two larger bags and five smaller bags. There was also another large ziplock bag that had been wrapped around one of the other bags, and it did not contain any powdery substance. Powell weighed one of the large and one of the small bags and opined that the total weight of the contents of the seven bags was 0.808 grams. Powell's test of a sample 0.1 gram of the powdery substance in the bags determined that it was heroin and cocaine. She did not test the contents of all of the bags.

The last witness was Officer John Wrigley who testified that he was involved in the events as the enforcement officer helping out Beyna. Wrigley searched the defendant and found \$70 on the defendant's person, with no bill being larger than a ten dollar bill. The officer inventoried the brown paper bag and a black plastic bag also recovered that day by Beyna. Wrigley agreed with the other two witnesses that some of the plastic bags had "Batman" logos on them, but this fact was never noted on the police report or inventory list.

After deliberations, the jury found the defendant guilty of possession of a controlled substance with intent to deliver, cocaine, and guilty of possession of a controlled substance with

intent to deliver, heroin. 720 ILCS 570/401(d)(i) (West 2008). The defendant subsequently filed a motion for a new trial which alleged trial court errors not involved in this appeal, with the exception of the issues of whether the State proved the defendant guilty beyond a reasonable doubt of the offense and whether the verdict was against the manifest weight of the evidence. The defendant's motion for a new trial was denied by the trial court.

Following a sentencing hearing, the trial court determined that the two counts the defendant was found guilty of merged for sentencing. Further, the trial court held that the defendant should be sentenced as a Class X felony offender based on his previous convictions. The defendant received a sentence of seven years of imprisonment, with the addition of three years of MSR. The defendant's counsel filed a motion to reconsider the defendant's sentence at the sentencing hearing, which the trial court denied.

The defendant filed a timely notice of appeal to this court in which he raises the issues outlined above.

ANALYSIS

The first issue that the defendant raises on appeal is whether Supreme Court Rule 431(b) was violated by the trial court when it failed to ask prospective jurors whether they understood the four *Zehr* principles. *People v. Zehr*, 103 Ill. 2d 472, 469 N.E.2d 1062 (1984). The defendant claims that he has been denied trial by a fair and impartial jury as a result.

Supreme Court Rule 431(b) requires a trial court to question potential jurors whether they understand and accept each of the four *Zehr* principles: (1) the defendant is presumed innocent; (2) the State must prove the defendant guilty beyond a reasonable doubt; (3) the defendant is not

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required to offer any evidence on his behalf; and (4) the defendant's failure to testify cannot be held against him.

The record discloses that the trial court made the following statements to the *venire* as a group before the individual questioning of each person began:

“It is absolutely essential as the jury is selected that each of you understand and embrace these fundamental principles, that is all persons charged with a crime are presumed to be he [sic] innocent. And that it is the burden of the State who brought the charges to prove the defendant guilty beyond a reasonable doubt.

The defendant has no obligation to testify in his own behalf, or to present any evidence in his defense. The fact that the defendant does not have to testify must not be considered by you in any way in arriving at your verdict.

However, should the defendant elect to testify or present evidence in his behalf, you are to consider the evidence in the same manner and by the same standard as evidence presented by the State.

There is no burden upon the defendant to prove his innocence. The State has the burden to prove the defendant guilty beyond a reasonable doubt.”

Further, after the individual questioning of the potential jurors by the trial judge, he said to the *venire* panel of 28 persons as a whole:

“A defendant in a criminal case is presumed to be innocent until a jury determined after deliberation that the defendant is guilty beyond a reasonable doubt. Does anyone have a problem with this rule of law?”

The State has the burden of proving the defendant’s guilty beyond a reasonable doubt. Does anyone disagree with this rule of law?

A defendant does not have to present any evidence at all and may rely upon the presumption of innocence. Does anyone disagree with this rule of law?

A defendant does not have to testify. Would anyone hold the fact a defendant did not testify at trial against that defendant?”

The record shows that none of the jurors gave a negative response to any of these questions. After further questioning by the trial judge, the jury was selected from this *venire* of 28 persons. An alternate was chosen from a different panel but was dismissed at the end of the trial and did not participate in the deliberations or verdict.

The defendant argues that although the questions posed by the trial court may reasonably be construed as inquiring into the jurors’ acceptance of the *Zehr* principles, the trial court never conducted the required inquiry into the jurors’ *understanding* of these principles. The defendant further contends that questions about disagreements with a principle do not inquire into an individual’s understanding of that principle. Rule 431(b) expressly requires that a trial court inquire

into both the potential juror's acceptance and *understanding* of all four principles, and according to the defendant, the court failed to satisfy the requirements of the rule. *People v. Graham*, 393 Ill. App. 3d 268, 275, 913 N.E.2d 99, 105 (2009). A reviewing court's standard of review of supreme court rules is *de novo*. *People v. Suarez*, 224 Ill. 2d 37, 41-42, 862 N.E.2d 977, 979 (2007).

The defendant concedes that his counsel did not object to the form of questioning of the potential jurors by the trial judge, nor did he include this issue in his post-trial motion. The defendant argues, however, that if this court does find the issue forfeited, the substantial right at stake permits a plain error review. *People v. Madrid*, 395 Ill. App. 3d 38, 45, 916 N.E.2d 1273, 1279 (2009). In order to proceed in this line of reasoning, we must first determine whether an error was committed by the trial court. *People v. Johnson*, 218 Ill. 2d 125, 139, 842 N.E.2d 714, 722 (2005).

In a recent supreme court decision, *People v. Thompson*, No. 109033, slip op. at 4 (October 21, 2010), the court stated that Rule 431(b) "mandates a specific question and response process." There must be a questioning of the potential jurors whether they both understand and accept all four of the principles. *Thompson*, slip op. at 4. Here, the form of questioning by the trial judge was whether the jurors had a problem with the principles, or disagreed with any of the principles. It is unfortunate that the trial court selected certain words used in the common vernacular instead of the specific statutory language to question whether each juror understood and accepted the principles of *Zehr* as codified in Rule 431(b). However, after reading the trial judge's explanations and questions posed to the *venire*, we conclude that the concept of each of the four *Zehr* principles were covered by the judge and conveyed to the jurors with an opportunity for the jurors to indicate understanding and acceptance. This is highlighted by the fact that the *venire* was given an

opportunity to respond to the question of whether they understood the principles. It has been held that there is no magic language that must be used in order to determine whether the potential jurors understood and accepted the *Zehr* principles. *People v. Raymond*, No. 1-08-2891, slip op. at 21 (August 13, 2010). In this case, because the trial judge's language did not track the statute, the defendant has seized upon that to bolster his argument. However, the entirety of the exchange between the trial judge and the *venire* reveals that the defendant's argument is meritless. Thus, there was no error on the part of the trial court.

Even assuming, *arguendo*, that we did hold that the trial court committed error by not using specific words in conveying the *Zehr* principles to the *venire*, the supreme court in *Thompson* held that a *Zehr* violation does not constitute a structural error which would require an automatic reversal. *Thompson*, slip op. at 6. Under the theory of plain error, a reviewing court may consider a forfeited error. There is a two prong analysis when considering a forfeited issue under the plain error rule. They are: (1) the evidence is closely balanced, regardless of the seriousness of the error; or (2) the error is serious, regardless of the closeness of the evidence. *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 410 (2007). Our review of the record discloses that the evidence in this case was not closely balanced. The testimony of the surveillance officer as to the defendant's actions was credible. Also, there was credible evidence that the substances in the brown paper bag were heroin and cocaine. This was strong evidence that the defendant possessed and delivered the controlled substances in question. Thus, we cannot conclude that the evidence was closely balanced as required by the first prong of the *Strickland* test.

Our supreme court in *Thompson* addressed the second prong of the plain error analysis,

which requires that the defendant show that the error is serious, regardless of the closeness of the evidence. For example, the defendant has the burden of providing evidence that the jury in his case was biased as a result of the alleged violation. *Thompson*, slip op. at 8. Although the defendant in this case filed his briefs prior to the supreme court's ruling in *Thompson*, we have examined the record and find no basis for suggesting that the jury was biased because of the trial judge's treatment of the questioning as related to the *Zehr* principles.

The defendant next raises the issue of whether the trial court impermissibly interfered with his ability to knowingly exercise his constitutional right to testify and to the guiding hand of his defense counsel when the court refused to rule on his motion *in limine* regarding the admissibility of his prior convictions. In the defendant's reply brief, however, he withdraws this argument based upon the ruling in *People v. Averett*, 237 Ill. 2d 1, 927 N.E.2d 1191 (2010). The court in *Averett* ruled that the use of a blanket policy by a trial court to refuse to rule *in limine* on the admissibility of a defendant's prior convictions is an abuse of discretion, but is not appealable where the defendant, as in this case, chose not to testify at trial. *Averett*, 237 Ill. 2d at 21, 927 N.E.2d at 1202-03.

The next issue the defendant raises is that the State failed to prove him guilty beyond a reasonable doubt of possession of a controlled substance with intent to deliver. A court of review does not retry the defendant or substitute its judgment for that of the trial court. *People v. Evans*, 209 Ill. 2d 194, 209, 808 N.E.2d 939, 947 (2004). The relevant inquiry for a reviewing court is whether, after examining the evidence in the light most favorable to the prosecution, any rational trier of fact could have concluded, beyond a reasonable doubt, that the essential elements of the

crime were proved. *People v. Woods*, 214 Ill. 2d 455, 470, 828 N.E.2d 247, 257 (2005). To overturn a trier of fact's judgment, the evidence must be so unsatisfactory, improbable or implausible as to justify a reasonable doubt as to the defendant's guilt. *People v. Wheeler*, 226 Ill. 2d 92, 115, 871 N.E.2d 728, 740 (2007).

The elements of the crime of possession of a controlled substance with intent to deliver are: (1) the defendant had knowledge of the presence of the narcotics; (2) the controlled substance was in the immediate possession or control of the defendant; and (3) the defendant intended to deliver the controlled substance. *People v. Burks*, 343 Ill. App. 3d 765, 768, 799 N.E.2d 745, 748, (2003). The elements of the crime may be proved through circumstantial evidence. *People v. Larry Jones*, 295 Ill. App. 3d 444, 453, 692 N.E.2d 762, 769 (1998).

The defendant argues that the evidence in his case was not sufficient to prove beyond a reasonable doubt his intent to deliver a controlled substance for the following reasons: (1) it was not proven that the items sold by him to two unidentified individuals were illegal substances; (2) there was no evidence that he intended to engage in further transactions; (3) because only 0.1 gram of the powdery substance was tested, there was no evidence presented that all he had remaining in the bag to sell were illegal drugs.

The defendant claims that because his intent to deliver was not sufficiently established, his conviction should be reduced to simple possession of an illegal substance. The first element of the offense is thus admitted by the defendant, that he had knowledge of the presence of the narcotics.

The next element, that the defendant had immediate control of the illegal substance is shown by the fact that he was the only person observed by Beyna who exercised control over the location

where brown paper bag was hidden beneath the bottle. Further, the defendant was never more than 30 feet from the bag at all times. The facts of this case are similar to the facts in *People v. Bush*, 214 Ill. 2d 318, 827 N.E.2d 455 (2005), where the defendant was observed engaging in a brief conversation with two separate unknown individuals, taking money from the individuals, reaching under a fence to retrieve a small item from a paper bag, and then delivering the item to the individual who had given her money. The defendant in the *Bush* case only had two \$10 bills on her person and the brown bag contained less than 0.1 gram of cocaine. The defendant in *Bush* claimed, as defendant does here, that because the two persons observed taking an item from the defendant were never arrested, it is not known what was sold to them; further, the small amount of cocaine that was left in the bag may have been for the defendant's personal use.

The court in *Bush* examined the factors that may be considered when determining if intent to deliver controlled substances is present, *i.e.*, the high purity and manner of packaging of the drug confiscated, the large quantity of the drug which indicates it is not for the defendant's personal consumption, and the defendant's possession of weapons, cash, police scanners, beepers, cellular telephones and drug paraphernalia. *People v. Robinson*, 167 Ill. 2d 397, 408, 657 N.E.2d 1020, 1026 (1995). The *Robinson* court noted that there are an infinite number of factual scenarios in every controlled substance case, and thus a hard and fast rule cannot be applied. *Robinson*, 167 Ill. 2d at 414, 657 N.E.2d at 1030. Even though the *Robinson* factors were not present in the *Bush* case, our supreme court nevertheless held that there were other factors which were present which, when taken together, were indicative of an intent to deliver a controlled substance. *Bush*, 214 Ill. 2d at 328, 827 N.E.2d at 461.

Here, the defendant briefly talked to two individuals, took money from them, and then handed them small items from the brown paper bag, a sample of which was tested and found to contain heroin and cocaine. This is sufficient evidence upon which a trier of fact could conclude that the defendant had the intent to deliver controlled substances.

The defendant contrasts the facts in the *Bush* case with those in his case. He claims that because the location where he was apprehended was across the street from the location of the brown bag, it cannot be inferred that he intended to continue selling. However, at no time during the surveillance did the defendant act in a manner that suggested that he had abandoned the brown paper bag. He returned to the bag a second time after he was initially observed retrieving something from the bag. Although the defendant in *Bush* was closer to the narcotics, the evidence in this case is still sufficient to show that a reasonable trier of fact could conclude that the defendant intended to continue his behavior of selling items from the brown paper bag. See, *Larry Jones*, 295 Ill. App. 3d at 453-54, 692 N.E.2d at 768-69, where the defendant was found guilty of possession with intent to deliver cocaine after the evidence established that he engaged in conversation with an individual, accepted money from this individual, nodded his head at his accomplices, and then one of the accomplices crossed the street, picked up a rock and retrieved cocaine from a plastic bag that was under the rock and handed it to the individual. The defendant in *Larry Jones* was found by the court to have constructive possession of the cocaine when his actions were interpreted to show that he knew where the drugs were located, he always intended to maintain control of the drugs, and he never abandoned the drugs. *Larry Jones*, 295 Ill. App. 3d at 453-54, 692 N.E.2d at 769.

Further, the defendant in this case claims that because only a sample of the contents of the

plastic bags was tested, a trier of fact should not be allowed to simply speculate that the remaining bags also contained narcotics. The defendant cites *People v. Tony Jones*, 174 Ill. 2d 427, 675 N.E.2d 99 (1996), where the supreme court ruled that when testing was done on only two of the five plastic packets found in the defendant's possession, it was error for the trial court to merely speculate that the remaining three packets contained cocaine. *Tony Jones*, 174 Ill. 2d at 430, 675 N.E.2d at 101. The defendant in *Tony Jones* was convicted of possession with intent to deliver 1.4 grams of cocaine. The State in that case only tested 0.59 grams of the white substance which confirmed the presence of cocaine. The appellate court held, and the supreme court affirmed, that the defendant should only be convicted of possession with intent to deliver 0.59 grams of cocaine. *Tony Jones*, 174 Ill. 2d at 430, 675 N.E.2d at 101.

In the instant case, the defendant was charged with possession with intent to deliver a controlled substance weighing less than one gram. The defendant was found to have 0.808 grams of a white powdery substance in his possession when he was arrested, and the forensic scientist only tested 0.1 gram of the substance. The defendant in this case is not disputing the quantity of the controlled substance involved in the offense he is charged with, as the defendant in the *Tony Jones* case was, and thus the two cases are distinguishable.

The inference that the jury made in this case was that the remaining substances, which were identical in appearance to the substances tested, were in fact narcotics that the defendant intended to sell. This inference is a reasonable one. All of the plastic bags were kept together in one brown bag, the contents were similar in appearance and the defendant had been observed making two prior sales. See, *People v. Little*, 322 Ill. App. 3d 607, 750 N.E.2d 745 (2001), where the court held that

although the factors traditionally considered in determining intent were not present, but the defendant was observed during two transactions giving some type of object never confiscated to unknown persons, the element of intent to deliver was sufficiently demonstrated by the evidence; further, the court held that the nature of the unknown objects could be reasonably inferred from the circumstances; *People v. Bell*, 343 Ill. App. 3d 110, 796 N.E.2d 1114 (2003) where the court found a reasonable trier of fact could conclude the elements of intent to deliver controlled substances were present where the defendant was observed giving items that were not identified to persons not apprehended; *People v. Clark*, 349 Ill. App. 3d 701, 812 N.E.2d 584 (2004) where the court held the evidence showing the defendant engaging in conversations and accepting money from unknown individuals after which the codefendant retrieved items from a crumpled piece of paper which contained what was later determined to be heroin; and *People v. Elders*, 349 Ill. App. 3d 573, 812 N.E.2d 649 (2004) where the defendant's conviction for intent to deliver narcotics was upheld because he engaged in four conversations with unknown individuals, accepted money, and then took items, later found to be cocaine, from a plastic bag lying near the base of a tree and gave the items to the individuals.

After reviewing the record in this case, we cannot agree with the defendant that the evidence does not support a finding beyond a reasonable doubt of his intent to deliver the controlled substances. The trier of fact, in this case the jury, made reasonable inferences from the defendant's actions observed and credibly testified to by the surveillance officer. Therefore we find this issue to be meritless.

The next issue the defendant raises on appeal is whether his sentence as a Class X offender

was void because his prior conviction for attempted armed robbery is an unclassified crime that could not be used as a Class 2 or greater offense to satisfy the statutory enhancement requirements. One of the requirements under the Unified Code of Corrections (the Code) for sentencing a defendant as a Class X offender is the defendant must have two prior convictions of Class 2 or greater Class offenses that were separately brought and tried and arose out of different series of acts. 730 ILCS 5/5-5-3(c)(8) (West 2006). A reviewing court will examine the interpretation of statutory requirements *de novo*. *People v. Ernst*, 311 Ill. App. 3d 672, 675, 725 N.E.2d 59, 63 (2000).

The State argues initially that the defendant forfeited this issue because he did not object to his sentence at the sentencing hearing, and did not include the issue in his motion to reconsider his sentence. *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124, 1130 (1988). The State continues that even if the issue is not forfeited, the trial court was correct in sentencing the defendant as a Class X offender.

The defendant had received two convictions for robbery on November 6, 1987, but because they were entered on the same day, the trial court counted only one of those convictions as one prior Class 2 offense in applying the Class X statute. For the second prior conviction, the court looked to the defendant's attempted armed robbery conviction in 1985. The defendant argues that an attempted crime is an unclassified crime, and as such, the legislature intended that a conviction for an attempted crime should be a Class 4 felony. When examining the language in the statute regarding attempted crimes, the defendant notes that the familiar language defining the class of almost every other offense is missing: *i.e.*, the statute does not say that the crime "is" a specific class felony. 720 ILCS 5/8-4 (West 2006). The defendant argues that the legislature made it clear that

it intended convictions for attempt crimes to be unclassified, and as such, Class 4 felonies. 730 ILCS 5/5-5-2(a). The attempt statute states that the sentence for an attempt to commit a Class X felony is the sentence for a Class 1 sentence. 720 ILCS 5/8-4(c)(2) (West 2006).

The defendant cites the case of *People v. Pullen*, 192 Ill. 2d 36, 733 N.E.2d 1235 (2000), for the proposition that the class of the defendant's crime in the underlying case remains unchanged by enhancement under 730 ILCS 5/5-5-3(c)(8). He further argues that where a sentencing provision is based upon the class of felony committed, the court must apply the statute as written, despite any anomalies it might create. *Pullen*, 192 Ill. 2d at 43-45, 733 N.E.2d at 1239. The defendant in *Pullen* entered into a negotiated plea of guilty to five counts of burglary, a Class 2 offense, but was sentenced as a Class X offender because of his prior convictions. According to the terms of his plea agreement, the defendant was sentenced to 15 years' imprisonment on each of the five counts of burglary. The 15-year terms on the first two counts ran consecutively to the 15-year terms on the remaining counts, resulting in an aggregate sentence of 30 years. The defendant moved to withdraw his guilty plea because his sentence exceeded the maximum allowable sentence. The sentencing statute at the time of the defendant's trial allowed for a maximum of up to 14 years for a Class 2 felony and the aggregate of consecutive sentences could not exceed the sum of the maximum terms for the two most serious felonies involved. *Pullen*, 192 Ill. 2d at 40-41, 733 N.E.2d at 1237. The court also examined the statutory requirements which required the defendant to be classified as a Class X offender. 730 ILCS 5/5-5-3(c)(8) (West 1994). The question the court answered was whether the maximum sentence of the two most serious felonies committed by the defendant meant the sum of the maximum permissible extended-term sentences for two Class X offenses, which

would equal 120 years (730 ILCS 5/5-8-2(a)(2) (West 1994)), or, on the other hand, was it the sum of the maximum permissible extended-term sentences for two Class 2 felonies, which would equal 28 years (730 ILCS 5/5-8-2(a)(4) (West 1994)). The court reasoned, after looking at the plain language of the statutes, that because burglary is a Class 2 felony with a maximum sentence of 14 years, then the defendant's maximum aggregate sentence had to be 28 years.

The court in *Pullen* addressed the State's argument that because the defendant was sentenced as a Class X offender, his offenses should be treated as Class X felonies for purposes of determining the maximum permissible aggregate sentence. The court rejected the State's line of reasoning because of the plain language in section 5-5-3(c)(8) which states that persons subject to its provisions are to be sentenced as Class X offenders, not that their offenses are to be treated as Class X felonies for sentencing purposes. The court looked to case law which held that section 5-5-3(c)(8) did not change the character or classification of the felonies committed. "A defendant who commits a Class 1 or Class 2 felony, even though he is subject to sentencing as a Class X offender pursuant to section 5-5-3(c)(8), still has only committed a Class 1 or Class 2 felony." *Pullen*, 192 Ill. 2d at 43, 733 N.E.2d at 1239. We do not find the *Pullen* case, which concerned the imposition of consecutive sentences and had nothing to do with classifications of attempted crimes, to be supportive of the defendant's argument here.

A relevant case, and one in which the defendant acknowledges that the second district of the Illinois Appellate court rejected the same argument which he is advancing here, is *People v. Baumann*, 314 Ill. App. 3d 947, 733 N.E.2d 417 (2000). There, the court upheld the defendant's Class X and extended-term sentence which was based on his prior offenses of attempted armed

robbery and attempted residential burglary. The defendant in the *Baumann* case also argued that because his prior offenses were attempted offenses and unclassified, they should have been considered Class 4 felonies. The court stated that the essence of the defendant's argument had been rejected several times and that it "read section 8-4(c)(2) [of the Code] to mean that, although an attempt to commit a Class X felony is unclassified, it is to be treated as a Class 1 felony for all sentencing purposes, not merely for 'sentencing for the immediate offense.'" *Baumann*, 314 Ill. App. 3d at 950, 733 N.E.2d at 420, quoting in part, *People v. Perkins*, 247 Ill. App. 3d 834, 838, 655 N.E.2d 325, 329 (1995). Therefore, the court concluded, the defendant's convictions for the attempted crimes were properly treated as Class 2 or greater class felonies for the purpose of sentence enhancements. *Baumnn*, 314 Ill. App. 3d at 950, 733 N.E.2d at 420. The legislative intent, the court reasoned, was that because a defendant's eligibility under the enhancement statutes was based upon the seriousness of his prior crimes, those crimes could not then be considered relatively mild, as the defendant claimed. *Baumann*, 314 Ill. App. 3d at 950, 733 N.E.2d at 420. We decline the defendant's invitation to depart from established case law in order to rule in his favor. We hold that the trial court properly found the defendant eligible to be sentenced as a Class X offender.

The last issue that the defendant presents is that the trial court erred in sentencing him to a three-year term of MSR as prescribed under the Code for a Class X offense, (730 ILCS 5/5-8-1(d)(1)). He claims that his conviction for the Class 2 offense of possession with intent to deliver a controlled substance requires only a two-year term of MSR (730 ILCS 5/5-8-1(2)). In his reply brief, the defendant acknowledges that case law does not support his argument. He admits that both the case of *People v. Anderson*, 272 Ill. App. 3d 537, 650 N.E.2d 648 (1995) and *People v. Smart*,

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311 Ill. App. 3d 415, 723 N.E.2d 1246 (2000) have held that the three-year MSR was appropriate for Class X offenders because the conduct justifying the enhanced sentences also justified the enhanced period of MSR. However, the defendant argues, in light of the *Pullen* case decided after those two cases, the reasoning in the two cases is faulty.

We agree with the reasoning and conclusions reached in *Anderson* and *Smart*. Further, we find that the *Pullen* case relied upon by the defendant is not relevant to the issue in this case. Specifically, “ ‘since the MSR term is part of the sentence under section 5-8-1(d) of the Unified Code and the sentence must be a Class X sentence under section 5-5-3(c)(8) of the Unified Code, a reading of the two provisions together requires a Class X MSR term,’ and *Pullen* is distinguishable.” *People v. McKinney*, 399 Ill. App. 3d 77, 83, 927 N.E.2d 116, 121 (2010), quoting *People v. Lee*, 397 Ill. App. 3d 1067, 1073, 926 N.E.2d 402, 407 (2010).

The statute as written clearly states that the MSR for a Class X offender is three years, as supported by established precedent. We therefore reject the argument that the defendant advances regarding this issue.

For the reasons stated, the defendant’s convictions and sentences of the circuit court of Cook County are affirmed.

Affirmed.