

2012 IL App (1st) 082690-UC

No. 1-08-2690

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

FIFTH DIVISION  
November 30, 2012

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 07 CR 14951
	)	
ANTHONY YOUNG,	)	Honorable
	)	John T. Doody,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE HOWSE delivered the judgment of the court.  
Justices Palmer and Taylor concurred in the judgment.

**O R D E R**

¶ 1 *HELD:* We find defendant should not have been convicted of a Class 1 felony for delivery of a controlled substance within 1000 feet of "any school" based on his proximity to a preschool during the offense. Accordingly, we reduce the degree of the offense defendant was convicted of from a Class 1 felony to a Class 2 felony. Any error in admitting a police officer's alleged hearsay testimony regarding a prerecorded funds sheet was harmless in light of the overwhelming evidence presented against defendant. Defendant forfeited any issue regarding the trial court's failure to strictly admonish defendant under Supreme

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Court Rule 431(b). Defendant is entitled to only 445 days' credit for presentencing detention.

¶ 2 Following a jury trial, defendant Anthony Young was convicted of delivery of a controlled substance within 1000 feet of real property comprising any school. On appeal, defendant contends: (1) his conviction should be reduced to simple delivery of a controlled substance because the legislature did not intend a preschool to be considered a school under section 407(b)(2) of the Illinois Controlled Substances Act (720 ILCS 570/407(b)(2) (West 2008)); (2) his conviction should be reversed where the admission of testimony and evidence regarding prerecorded funds violated due process and discovery rules, and where the jury heard impermissible hearsay testimony suggesting that the money recorded consisted of prerecorded funds; (3) the trial court failed to comply with Supreme Court Rule 431(b) (177 Ill. 2d R. 431(b)) by failing to afford each potential juror the opportunity to express their understanding of the Zehr principles; (4) his \$200 DNA analysis fee should be vacated; and (5) his mittimus should be corrected to reflect 446 days of credit for time served while awaiting trial. Defendant also raised an issue regarding the trial court's refusal to rule on his Montgomery motion prior to trial, which he subsequently withdrew in his reply brief in light of our supreme court's recent decision in People v. Averett, 237 Ill. 2d 1 (2010).

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¶ 3 For the reasons that follow, we affirm defendant's conviction as modified and remand the cause to the trial court with directions that a sentence be imposed consistent with this order.<sup>1</sup>

¶ 4 BACKGROUND

¶ 5 At trial, Chicago police officer George Lopez testified that at around 1:37 p.m. on June 28, 2007, he was on duty as a surveillance officer at 4958 West Augusta Boulevard as part of a plan to conduct a controlled narcotics purchase. Officer Lopez said he saw defendant standing on the sidewalk next to a fire hydrant about 30 feet from where he was parked. Defendant was wearing a white t-shirt, black shorts, white socks and white gym shoes. Officer Lopez testified that he saw Officer Evangelides drive towards defendant in an undercover police car. When Officer Evangelides stopped his car, Officer Lopez saw Officer Evangelides and defendant start a conversation. Once the conversation ended, defendant walked towards Lavergne Street and out of Officer Lopez's view.

¶ 6 Officer Lopez said defendant returned to Officer Evangelides' car thirty seconds later. Defendant then leaned inside the car and came out with his hand in a fist, placing what was in his

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<sup>1</sup>Justices Joseph Gordon and Michael Toomin participated in this case. Justice Joseph Gordon has died and Justice Toomin is no longer with this court. Justices Palmer and Taylor have replaced them and have reviewed the briefs in this matter.

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hand in his right side pocket. Officer Lopez said that Officer Evanlides then left the area and defendant walked back to the sidewalk. Officer Lopez testified that based on his experience and involvement in hundreds of narcotics arrests, he believed he had witnessed a narcotics transaction. Officer Lopez admitted, however, that he could not hear the conversation between defendant and Officer Evanlides.

¶ 7 Chicago police officer Nicholas Evanlides testified that on June 28, 2007, he was assigned to conduct undercover narcotics purchases with prerecorded funds that were available to him. Officer Evanlides said that for the prerecorded funds, the officers took money out every month from the bursar and recorded the denominations and serial numbers of the bills on a sheet. The officers then inventoried the list and used it for the month to make controlled undercover purchases. Officer Evanlides said the funds he used on June 28, 2007, were received on June 1, 2007. Officer Evanlides testified that all of his partners had copies of the prerecorded funds list, and that the \$30 in prerecorded funds that he specifically used on that day were documented on the sheet.

¶ 8 According to Officer Evanlides, he saw defendant walking westbound on Augusta when he pulled his car over to the curb. Defendant was standing alone, wearing a white baseball cap, a

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white t-shirt, black shorts and white gym shoes. Officer Evanglides said he rolled down his passenger-side window and asked defendant if he had any "blows," which is a street term for heroin. Officer Evanglides testified that defendant responded, "hey, how many do you want." Officer Evanglides said that when he replied "Let me get three," defendant walked a few steps down the street and out of his view. When defendant returned, he reached into the car and handed Officer Evanglides three clear capsules. Officer Evanglides then handed defendant \$30 of the prerecorded funds. Officer Evanglides said he had a good view of defendant's face during the transaction.

¶ 9 Officer Evanglides testified he handed defendant one \$20 bill with the serial number GD19029964 and one \$10 bill with the serial number GD56380958. Officer Evanglides explained that he knew the bills' serial numbers because they had previously been recorded on the prerecorded funds sheet. Defendant walked away from the car after he took the money. Officer Evanglides then drove away from the area. After defendant was arrested, Officer Evanglides returned to the area and identified defendant, without stopping or exiting his car. Officer Evanglides then went to the Area 5 police headquarters, where he placed the items defendant had given him in a marked inventory bag.

¶ 10 During cross-examination, Officer Evanglides said he did not

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see what defendant did with the \$30 he handed him. Officer Evangelides testified the funds used during the transaction were prerecorded, but no markings were made on the money. Officer Evangelides admitted he did not personally check out the prerecorded funds from the bursar's office for the month of June. Officer Evangelides said Officer Flores checked out the prerecorded funds, but was not involved in the controlled buy on June 28, 2007. Officer Evangelides testified that when the inventory list was made on June 1, 2007, to keep track of the prerecorded bills, the serial numbers and denominations would have been double checked to ensure the list was accurate. Officer Evangelides said the document serial numbers and denominations serial numbers were checked on June 28, 2007. Officer Evangelides testified the prerecorded funds were then kept in either a locked file cabinet or his personal locker, and that they were in his possession while on duty for the entire month. He testified that he did not inventory the money recovered from defendant on June 28, 2007. He also testified that he did not bring the prerecorded funds to court, and that he did not know where those particular funds were on the day of defendant's trial. Officer Evangelides admitted he did not make a photocopy of the prerecorded funds used during the controlled purchase.

¶ 11 On redirect, Officer Evangelides explained that after an

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arrest is made, the prerecorded funds are inventoried and then turned over so they can be used for the next controlled narcotics purchase. He said the funds are continually used for the month and then returned at the end of the month.

¶ 12 Chicago police detective Smith testified that a custodial search after defendant was arrested uncovered \$51 in defendant's sock. Detective Smith testified that he believed that \$30 of the money found on defendant consisted of the prerecorded funds because the serial numbers on the bills recovered matched the serial numbers of the bills listed on a document prepared by another officer on June 1, 2007. Detective Smith said he had the inventory sheet on him and checked the serial numbers on the recovered bills against the sheet at the scene of defendant's arrest. Detective Smith admitted he did not make a photocopy of the prerecorded funds, and did not memorize the serial numbers of the bills used. Detective Smith testified that he did not know where the prerecorded funds were on the day of defendant's trial. He explained he returned the funds to his sergeant after defendant's arrest in order to be used by his team in subsequent controlled-buy operations.

¶ 13 A chemist from the Illinois State Police Crime Lab testified he received an inventory bag that contained the clear capsules with a chunky white substance inside. The contents of each

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single capsule weighed .168 grams and tested positive for the presence of heroin. An investigator from the State's Attorney's Office testified he measured the distance from 4958 West Augusta Boulevard to High Mountain Preschool. The distance was 443 feet.

¶ 14 Defendant was convicted of delivery of a controlled substance within 1000 feet of a school. He was sentenced to four years and six months in prison. Defendant appeals.

¶ 15 ANALYSIS

¶ 16 I. Enhancement of Charge

¶ 17 Defendant contends his Class 1 felony conviction for delivery of a controlled substance within 1000 feet of a school should be reduced to simple delivery of a controlled substance, a Class 2 felony as defined by section 401(d) of the Illinois Controlled Substances Act (Act) (720 ILCS 570/401(d) (West 2008)). Specifically, defendant contends the legislature did not intend a preschool to be considered a "school" under the plain language of section 407(b) (2) of the Act, which enhances the charge for delivery of a controlled substance within 1000 feet of "any school" from a Class 2 to a Class 1 felony. See 720 ILCS 570/407(b) (2) (West 2008).

¶ 18 When tasked with interpreting a statute, our primary objective is to give effect to the intent of the legislature. County of DuPage v. Illinois Labor Relations Board, 231 Ill. 2d

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593, 603-04 (2008); People v. Jones, 223 Ill. 2d 569, 580 (2006).

The most reliable indicator of such intent is the language of the statute itself, which is to be given its plain and ordinary meaning. County of DuPage, 231 Ill. 2d at 604; People v. McClure, 218 Ill. 2d 375, 382 (2006). Statutory interpretation issues are reviewed de novo. County of DuPage, 231 Ill. 2d at 603.

¶ 19 Where the legislature's intent is in any way clouded or uncertain, the court must follow the established rules of construction relating to penal statutes. People v. Owens, 240 Ill. App. 3d 168, 171 (1992). In general, penal statutes are strictly construed in the defendant's favor. People v. Whitney, 188 Ill. 2d 91, 97-98 (1999). "Any ambiguity in a penal statute should be construed and resolved in favor of the defendant." Whitney, 188 Ill. 2d at 98. However, we are required to construe a legislative enactment "in such a way as to promote its essential purposes and must not read it so rigidly as to defeat the legislature's intent." Owens, 240 Ill. App. 3d at 171, citing People v. Jordan, 103 Ill. 2d 192, 205 (1984). "To ascertain the legislature's intent, 'we may properly consider not only the language of the statute, but also the purpose and necessity for the law, and evils sought to be remedied, and goals to be achieved.' " People v. Collins, 214 Ill. 2d 206, 214

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(2006), quoting People ex rel. Sherman v. Cryns, 203 Ill. 2d 264, 279 (2003). When a statute is capable of more than one reasonable interpretation, however, we may consider extrinsic aids to construction, such as legislative history and debates, to resolve the ambiguity. Collins, 214 Ill. 2d 206 at 214.

¶ 20 The term "school" remains undefined within either section 407 or any other portion of the Act.

¶ 21 In People v. Goldstein, 204 Ill. App. 3d 1041, 1048 (1990), the defendant contended it was obvious some limitation must be placed on the scope of the words "any school" as used in section 407(b)(2), which otherwise would include endless possibilities such as a "Barber College" or a "Truck Driving School." The court examined the legislative history and debates pertaining to Public Act 84-1075 and determined the legislature intended the term "any school," as used in section 407(b) of the Act, to specifically include "any public or private, elementary or secondary school, community college, college or university." The court noted:

"although the words 'any school' literally could refer to many more institutions of learning than those enumerated precisely and identically on three different occasions in Public Act 84-1075 by the words 'any public

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or private elementary or secondary school, community college, college or university,' we think that under all of these circumstances the legislature intended such a limitation with respect to section 407(b)(2)."

Goldstein, 204 Ill. App. 3d at 1048-49.

¶ 22 The court also looked to the legislative history of Public Act 84-1075, which created and amended numerous pieces of legislation, including the Illinois Controlled Substances Act, in order to increase the penalty for violations if the offense took place on school grounds. The court noted the various legislative debates surrounding Public Act 84-1075 made clear the primary purpose behind the amendment was to make Illinois schools a safer environment by freeing students from the pressure placed on them, primarily by gangs but also by others, to buy and sell firearms and drugs. Goldstein, 204 Ill. App. 3d at 1048. In rejecting the defendant's argument that the application of section 407(b)(2) was only intended to apply to "grade schools and high schools," the court noted the legislatures' purpose in attempting to eliminate drugs from the schools of this state reasonably extended to those institutions where large numbers of young persons of college age commonly live and study. Goldstein, 204 Ill. App. 3d at 1048-49. See also People v. Owens, 240 Ill. App.

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3d 168, 172 (1992) (“we find no evidence that the legislature intended to protect only rural school zones and not urban ones when it enacted the ‘1,000 feet’ safe school boundary under section 407(b), and we are not free to ‘read a limitation into a statute that the legislature has not seen fit to enact.’ ”)

¶ 23 However, this court has previously noted in a different context that when the legislature has intended to impose a distance restriction involving preschools or child day care centers, it has explicitly done so. See Bailey v. Illinois Liquor Control Commission, No. 1-09-3375, slip op. at 5 (November 10, 2010) (finding a not-for-profit organization that participated in the Preschool for All program did not qualify as a “school” for purposes of section 6-11 of the Liquor Control Act (235 ILCS 5/6-11 (West 2006), which prohibits the retail sale of alcohol within 100 feet of “any \*\*\* school.”)

¶ 24 For example, section 11-9.3 of the Criminal Code of 1961 (Code) (720 ILCS 5/11-9.3(b) (West 2008) prohibits sex offenders from being present in a school building, on school property, or on a school bus. Section 11-9.4(b-5), on the other hand, specifically prohibits sex offenders from residing within 500 feet of a “playground, child care institution, day care center.” 720 ILCS 5/11-9.4(b-5) (West 2008). Section 20-1.1 of the Code provides, in pertinent part, that a person commits aggravated

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arson when he or she knowingly damages, partially or totally, all or any part of a school building. 720 ILCS 5/20-1.1(a) (West 2008). The legislature specifically defined a "school building" in section 20-1.1 of the Code to mean "any public or private preschool, elementary or secondary school, community college, college, or university." 720 ILCS 5/20-1.1(a) (3) (West 2008).

¶ 25 The Missing Children Records Act also specifically distinguishes between enrollment in a "school, preschool educational program, child care facility, or day care home" for purposes of reporting a missing child. 325 ILCS 50/5(a) (West 2008). As the above examples illustrate, the legislature could have specifically listed a preschool to fall within the definition of "any school" found in section 407 of the Act if it had intended such a result. The fact that the plain language of section 407 of the Act itself does not indicate a preschool was intended to fall within the definition of "any school," mixed with the fact that the legislative history surrounding the creation of section 407(b) strongly suggests the term "any school" was meant by the legislature to only include "any public or private elementary or secondary school, community college, college or university," indicates the statute is impermissibly ambiguous as to whether preschools were intended to be included within the penalty enhancement created by the legislature in

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Public Act 84-1075. See Goldstein, 204 Ill. App. 3d at 1048-49.

¶ 26 Because “[a]ny ambiguity in a penal statute should be construed and resolved in favor of the defendant,” we find defendant should not have been convicted of a Class 1 felony for delivery of a controlled substance within 1000 feet of “any school” based on his proximity to a preschool during the offense. See Whitney, 188 Ill. 2d at 98. Accordingly, under the power granted by Supreme Court Rule 615(b)(3) (134 Ill. 2d R. 615(b)(3)), we reduce the degree of the offense defendant was convicted of from a Class 1 felony under section 407(b)(2) of the Act to a Class 2 felony under section 401(d) of the Act.

#### ¶ 27 II. Prerecorded Funds

¶ 28 Defendant contends his conviction should be reversed because the admission of testimony and evidence regarding the prerecorded funds violated due process and discovery rules. Defendant also contends the jury heard impermissible hearsay testimony suggesting the money recorded consisted of prerecorded funds.

#### ¶ 29 A. Due Process

¶ 30 Defendant contends the admission of evidence indicating he was in possession of prerecorded funds used by the police to buy drugs violated Illinois Supreme Court Rule 412 (188 Ill. 2d R. 412) and denied him due process. We disagree.

¶ 31 Rule 412(a)(v) provides that the State shall, upon written

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motion of defense counsel, disclose to defense counsel "any books, papers, documents, photographs or tangible objects which the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belong to the accused." 188 Ill. 2d R. 412(a)(v). Rule 412(f) also requires the State to "ensure that a flow of information is maintained between the various investigative personnel and its office sufficient to place within its possession or control all material and information relevant to the accused and the offense charged." 188 Ill. 2d R. 412(f). While compliance with the discovery rules is mandatory, the failure to comply with the rules does not require reversal absent a showing of prejudice. People v. Hendricks, 325 Ill. App. 3d 1097, 1102 (2001). A new trial should be granted only if the defendant is prejudiced by the discovery violation and the trial court fails to eliminate the prejudice. Hendricks, 325 Ill. App. 3d at 1102, citing People v. Tripp, 271 Ill. App. 3d 194, 201 (1995).

¶ 32 Defendant contends that despite its obligation under Rule 412, the State did not disclose the actual \$20 and \$10 prerecorded bills recovered from defendant by the police after defense counsel filed a motion for the production of any "tangible objects which the prosecution intends to use in the hearing or trial and/or which were obtained from or belong to the

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accused or codefendants.” Defendant contends he was prejudiced by the State’s alleged discovery violation in this case because: (1) he was denied his constitutional right to test the State’s evidence “in the crucible of cross-examination,” pursuant to Crawford v. Washington, 541 U.S. 36, 158 L. Ed. 2d 177, 124 S. Ct. 1354 (2004); (2) by allowing the prerecorded bills to be relinquished immediately after defendant’s arrest, the police and the State denied defendant the additional safeguard of having the prosecution conduct an independent evaluation of the evidence against defendant to determine whether he should be charged with a crime; and (3) he was denied due process when the police discarded potentially exculpatory evidence he was entitled to examine.

¶ 33 Initially, the State notes defendant neither objected at trial to the State’s failure to disclose the actual prerecorded bills allegedly used during the transaction nor raised the issue in a post-trial motion. In order to properly preserve any alleged error for appellate review, “a defendant must specifically object at trial and raise the issue again in a posttrial motion.” People v. Woods, 214 Ill. 2d 455, 470 (2005); People v. Enoch, 122 Ill. 2d 176, 186 (1988).

¶ 34 Notwithstanding, defendant contends the issues should be reviewed for plain error. The plain-error doctrine allows a

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reviewing court to reach a forfeited error when either (1) the evidence in the case is closely balanced, 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, 178-79 (2005). The first step in conducting a plain-error analysis is to determine whether an error occurred at all. People v. Hudson, 228 Ill. 2d 181, 191 (2008).

¶ 35 We find the State did not prejudice defendant by failing to tender to the defense the actual prerecorded bills allegedly used by Officer Evanglides to purchase the narcotics from defendant.

¶ 36 In support of his contentions, defendant cites our supreme court's decision in People v. Newberry, 166 Ill. 2d 310 (1995). In that case, the defendant contended his indictment for unlawful possession of a controlled substance should be dismissed because the State destroyed the substance in question after defense counsel had made a discovery request for it in accordance with Rule 412. The supreme court held dismissal of the charges was mandated by due process and was an appropriate discovery sanction under Supreme Court Rule 415(g)(I) (134 Ill. 2d R. 415(g)(I)). Newberry, 166 Ill. 2d at 313-14. The supreme court noted that although the State did not dispute that the failure by police to preserve evidence may violate due process (see People v. Ward,

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154 Ill. 2d 272, 297-99 (1992)), the State contended that under Arizona v. Youngblood, 488 U.S. 51, 102 L. Ed. 2d 281, 109 S. Ct. 333 (1988), the destruction of evidence only rises to the level of a due process violation where a defendant can show that the police officers responsible for the destruction acted in bad faith. The State argued that because the police evidence technician simply made a mistake when he discarded the disputed substance and did not act in bad faith, the failure to preserve the evidence could not justify dismissal of the grand jury's indictments on due process grounds.

¶ 37 The court noted that in Youngblood, the United States Supreme Court rejected the defendant's contention that his due process rights were violated because the State failed to promptly test samples found on the victim's clothing or to properly refrigerate the clothing so that it could be properly tested later. Newberry, 166 Ill. 2d at 314-15, citing Youngblood, 488 U.S. at 57, L. Ed. 2d at 289, 109 S. Ct. at 337. Youngblood recognized that the good or bad faith of the State is irrelevant when the State fails to disclose to the defendant exculpatory evidence that is material. Newberry, 166 Ill. 2d at 314-15, citing Youngblood, 488 U.S. at 57, L. Ed. 2d at 289, 109 S. Ct. at 337. Youngblood concluded, however, that the due process clause requires a different result when no more can be said of

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the evidence " 'than that it could have been subjected to tests, the results of which might have exonerated the defendant.' "

Newberry, 166 Ill. 2d at 314-15, quoting Youngblood, 488 U.S. at 57, L. Ed. 2d at 289, 109 S. Ct. at 337. According to the

Supreme Court, police do not have " 'an undifferentiated and absolute duty to retain and preserve all material that might be of conceivable evidentiary significance in a particular

prosecution.' " Newberry, 166 Ill. 2d at 315, quoting Youngblood, 488 U.S. at 57, L. Ed. 2d at 289, 109 S. Ct. at 337.

"Where evidentiary material is only 'potentially useful,' the failure to preserve that material does not constitute a denial of due process unless a criminal defendant can show bad faith on the part of the police." Newberry, 166 Ill. 2d at 314-15, citing

Youngblood, 488 U.S. at 58, L. Ed. 2d at 289, 109 S. Ct. at 337.

¶ 38 Our supreme court distinguished Youngblood in Newberry, noting the evidence in Newberry was more than just "potentially useful." Newberry, 166 Ill. 2d at 315. The court noted the defendant could not be convicted of the drug possession charges absent proof of the content of the disputed substance, nor could he have any realistic hope of exonerating himself absent the opportunity to have the substance examined by his own experts.

Newberry, 166 Ill. 2d at 315. Moreover, unlike Youngblood, the police destroyed the substance after defense counsel had

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specifically requested access to it in his discovery motion. The court held “[w]here evidence is requested by the defense in a discovery motion, the State is on notice that the evidence must be preserved, and the defense is not required to make an independent showing that the evidence has exculpatory value in order to establish a due process violation.” Newberry, 166 Ill. 2d at 317. See also People v. Ruffalo, 69 Ill. App. 3d 532, 536-37 (1979) (“withholding requested evidence, a bad faith action, constitutes denial of due process simply because evidence was requested and withheld, without regard to the nature of the evidence. On the other hand the mere fact of noncommunication of evidence constitutes a denial of due process where the evidence is of a character favorable to the defense, notwithstanding the good faith of the prosecution.”)

¶ 39 By contrast, in People v. Hovanec, 76 Ill. App. 3d 401, 415-16 (1979), this court rejected the defendant’s contention that the State suppressed evidence material to the proof of his innocence and thereby violated his due process rights. The defendant was charged and convicted of taking \$49, 167 cartons and 125 packages of cigarettes from the victim while armed with a knife. The defendant’s defense was that he had actually purchased the cigarettes in Indiana, which by Indiana law must bear tax stamps that would support his argument that he legally

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purchased the cigarettes outside of Illinois. He contended that by returning the cigarettes that had been recovered from him to the victim prior to his trial, the State did not make available to him evidence that would have conclusively established his guilt or innocence.

¶ 40 In rejecting the defendant's contention, the court noted there was no specific request made for the cigarettes.

Accordingly, the defense motion had to be considered a general request. Hovanec, 76 Ill. App. 3d at 416. The court noted that " '[i]f there is a duty to respond to a general request of that kind \*\*\*, it must derive from the obviously exculpatory character of certain evidence in the hands of the prosecutor.' " Hovanec, 76 Ill. App. 3d at 416, quoting United States v. Agurs, 427 U.S. 97, 107, 49 L. Ed. 2d 342, 351, 96 S. Ct. 2392, 2399 (1976). In addition, the court noted that in order for the defendant to show a violation of his due process rights, he must show that "(a) the evidence was suppressed by the prosecution after a request for it by defendant; (b) the evidence was favorable to defendant; and (c) the evidence was material." Hovanec, 76 Ill. App. 3d at 416, citing People v. Nichols, 63 Ill. 2d 443 (1976). The court held that since the State was not aware of the defendant's defense until much later at trial, the prosecutor had no duty to produce the cigarettes in response to defendant's general request absent

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a showing that he was aware of their exculpatory nature.

Hovanec, 76 Ill. App. 3d at 417. Additionally, since the cigarettes were immediately returned to the victim by the police, the court held they were not in the hands of the prosecution to produce for discovery. Hovanec, 76 Ill. App. 3d at 417. The court recognized that in the absence of a specific request for their production, any obviously exculpatory nature, or any effort to preserve them by the defense, there was no duty to retain any of the cigarette packs for trial. Hovanec, 76 Ill. App. 3d at 417. The court also noted the return of the cigarettes to the victim "did not amount to an unnecessary destruction of evidence which denied the opportunity for meaningful confrontation of the State's evidence." Hovanec, 76 Ill. App. 3d at 417.

¶ 41 Likewise, in Illinois v. Fisher, 540 U.S. 544, 157 L. Ed. 2d 1060, 124 S. Ct. 1200 (2004), the United States Supreme Court considered whether the due process clause required the dismissal of criminal charges against an Illinois defendant because the police, acting in good faith and according to normal police procedures, destroyed evidence the defendant requested more than 10 years earlier in a discovery motion. In Fisher, the defendant was charged with possession of cocaine in the Circuit Court of Cook County in October 1988. He filed a motion for discovery eight days later requesting all physical evidence the State

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intended to use at trial. While released on bond pending trial, the defendant fled and remained a fugitive for over 10 years. When the defendant was apprehended on other charges, the State reinstated the 1988 possession charge. Before trial, the State told defendant that in September 1999, the police, acting in accord with established procedures, had destroyed the substance seized from him during his arrest. The defendant formally requested production of the substance and filed a motion to dismiss the charge based on the State's destruction of the evidence. The trial court denied the motion, and the defendant was subsequently convicted and sentenced to a one-year prison term. The appellate court reversed the conviction, relying on Newberry.

¶ 42 The United States Supreme Court noted it has consistently held that "when the State suppresses or fails to disclose material exculpatory evidence, the good or bad faith of the prosecution is irrelevant: a due process violation occurs whenever such evidence is withheld." Fisher, 540 U.S. at 548, 157 L. Ed. 2d at 1067, 124 S. Ct. at 1202. However, the due process clause requires a different result when the State fails to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant. Fisher, 540 U.S. at

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548, 157 L. Ed. 2d at 1067, 124 S. Ct. at 1202. The failure to preserve such "potentially useful evidence" does not violate due process unless a criminal defendant can show bad faith on the part of the police. Fisher, 540 U.S. at 548, 157 L. Ed. 2d at 1067, 124 S. Ct. at 1202. The Supreme Court held the substance seized from the defendant in Fisher was plainly the sort of "potentially useful evidence" referred to in Youngblood, not the material exculpatory evidence addressed in Argurs. Fisher, 540 U.S. at 548, 157 L. Ed. 2d at 1067, 124 S. Ct. at 1202. Because the record indicated the police acted in "good faith and in accord with their normal procedure" in destroying the substance, the Supreme Court held the defendant had failed to establish a due process violation. Fisher, 540 U.S. at 548, 157 L. Ed. 2d at 1067, 124 S. Ct. at 1202.

¶ 43 In reaching its conclusion, the Supreme Court noted it had never held or suggested that the existence of a pending discovery request eliminates the necessity of showing bad faith on the part of the police. Fisher, 540 U.S. at 548, 157 L. Ed. 2d at 1067, 124 S. Ct. at 1202. The Supreme Court also disagreed with the outcome-determinative analysis set forth in Newberry, finding the applicability of the bad-faith requirement in Youngblood does not depend on the "centrality of the contested evidence to the prosecution's case or the defendant's defense." Fisher, 540 U.S.

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at 548, 157 L. Ed. 2d at 1067, 124 S. Ct. at 1202. The Court reiterated its holding that the bad-faith requirement applies where the evidence destroyed is only "potentially useful" evidence and not "material exculpatory" evidence. Fisher, 540 U.S. at 548, 157 L. Ed. 2d at 1067, 124 S. Ct. at 1202. See also People v. Sutherland, 223 Ill. 2d 187, 239-40 (2006).

¶ 44 We recognize "[w]here evidence is requested by the defense in a discovery motion, the State is on notice that the evidence must be preserved, and the defense is not required to make an independent showing that the evidence has exculpatory value in order to establish a due process violation. Newberry, 166 Ill. 2d at 317, citing People v. Sleboda, 166 Ill. App. 3d 42, 53 (1988). However, in this case, unlike Newberry, defendant did not specifically request access to the actual prerecorded funds evidence recovered from defendant in his discovery motion. Because there was no specific request made for the actual funds, the defense motion must be considered a general request. See Hovanec, 76 Ill. App. 3d at 416. " 'If there is a duty to respond to a general request of that kind ('all Brady material' or 'anything exculpatory'), it must derive from the obvious exculpatory character of certain evidence in the hands of the prosecutor.' " Hovanec, 76 Ill. App. 3d at 416, quoting Argus, 427 U.S. at 107, 49 L. Ed. 2d at 351, 96 S. Ct. at 2399.

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¶ 45 Additionally, the record reflects Officer Smith immediately returned the recovered funds to his sergeant in order for the funds to be reused for subsequent controlled-buy narcotic transactions conducted by the police team. Since the funds were immediately returned, they were not in the hands of the prosecutor to produce for discovery. " 'In such a situation, 'where neither the prosecution nor its agents are in possession of such evidence, the prosecution may hardly be accused of suppressing it.' " Hovanec, 76 Ill. App. 3d at 417, quoting People v. Gaitor, 49 Ill. App. 3d 449, 454 (1977).

¶ 46 Moreover, we find the actual prerecorded funds evidence in this case clearly constituted the type of "potentially useful" evidence identified in Youngblood and Fisher, not the type of "material exculpatory" evidence identified in Newberry.

Therefore, defendant is required to show the police acted in bad faith when destroying the evidence in order to support his due process claims. See Fisher, 540 U.S. at 548, 157 L. Ed. 2d at 1067, 124 S. Ct. at 1202. After carefully reviewing the record, we cannot say the police acted in bad faith by not preserving the actual prerecorded funds for defendant's trial. In fact, Officer Smith's trial testimony plainly indicates he was acting in "good faith and in accord with their normal procedure" when he returned the prerecorded funds allegedly recovered from defendant to his

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sergeant after defendant's arrest to be reused in subsequent investigations. See Fisher, 540 U.S. at 548, 157 L. Ed. 2d at 1067, 124 S. Ct. at 1202. We find defendant is unable to prove the requisite bad-faith finding necessary to establish a due process violation based on the State's failure to produce the actual prerecorded funds recovered from defendant or photocopies of the actual funds during discovery in this case. Accordingly, we find defendant forfeited his due process and discovery violation contentions.

¶ 47 B. Hearsay

¶ 48 Defendant also contends the State improperly used a document prepared by a non-testifying officer in order to elicit irrelevant hearsay testimony to suggest that the bills recovered from defendant had the same serial numbers as the bills used in the undercover narcotics transaction.

¶ 49 Initially, we note defendant forfeited any hearsay objection to Officer Evanglides' testimony regarding the creation of the prerecorded funds sheet by Officer Flores by failing to object to the testimony at trial or raise the issue in his post-trial motion for a new trial.

¶ 50 Waiver aside, we note that in People v. Rivas, 302 Ill. App. 3d 421, 432 (1998), this court rejected the defendant's contention that the trial court erred in allowing the State to

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admit into evidence a sheet containing information concerning the prerecorded funds that the police department issued for use by an officer to buy cocaine from the defendant. The defendant contended the sheet amounted to a police report, which he argued was hearsay and was not covered by any exceptions. This court held the prerecorded funds sheet qualified as a " 'routine, ministerial and non-evaluative matter, the preparation of which would indicate trustworthiness.' " Rivas, 302 Ill. App. 3d at 432, quoting People v. Flippen, 46 Ill. App. 3d 246 (1977).

¶ 51 Moreover, we note that even if Officer Evanglides' testimony regarding the prerecorded funds sheet amounted to inadmissible hearsay, we find any such error was harmless in light of the overwhelming evidence offered against defendant. See Rivas, 302 Ill. App. 3d at 432.

¶ 52 III. Zehr Principles

¶ 53 Defendant contends his sixth amendment right to a trial by a fair and impartial jury was denied when the trial court violated Supreme Court Rule 431(b) (177 Ill. 2d R. 431(b)) by failing to question the prospective jurors as to whether they understood any of the four principles set forth in People v. Zehr, 103 Ill. 2d 472, 483 (1984), and codified in Rule 431(b).

¶ 54 During voir dire, the trial court admonished the entire panel of prospective jurors that: every defendant is presumed

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innocent and this presumption remains throughout trial; the State has the burden of proving defendant guilty beyond a reasonable doubt; a defendant is not required to testify or provide any evidence on his own behalf; and the fact that a defendant does not testify cannot be considered when reaching a verdict. The court also told the jury panel that defendant's presumption of innocence was not overcome unless the jury "individually and collectively" was convinced beyond a reasonable doubt of defendant's guilt. The potential jurors were informed that it was "absolutely essential" that each of the jurors "understand and embrace these fundamental principles."

¶ 55 While questioning the first panel of prospective jurors, the court admonished the panel of each of the Zehr principles. After each principle, the court asked whether any of the potential jurors had a problem with the rule of law and whether anyone disagreed with the rule of law. None of the potential jurors responded. The second panel of prospective jurors was again admonished of the principles. After each principle, the court asked whether the jurors disagreed with or had any problem with any of the principles. None of the potential jurors responded.

¶ 56 Defendant neither objected to the trial court's Rule 431(b) admonishments at trial nor raised the issue in his post-trial motion. Accordingly, the State contends defendant waived the

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issue. People v. Cloutier, 156 Ill. 2d 483, 507 (1993).

Notwithstanding, defendant contends the trial court's failure to adhere to the Zehr principles is reviewable here under the "second prong" of the plain error doctrine. Specifically, defendant contends the trial court's failure to comply with Rule 431(b) is of such a magnitude that it denied defendant a fair and impartial trial, irregardless of whether he is able to establish prejudice. Defendant does not contend the evidence presented at trial was "closely balanced."

¶ 57 Under the plain error doctrine, a reviewing court may consider unpreserved error when: (1) a clear or obvious error occurs, and the evidence is so closely balanced that the error alone threatens to tip the scales of justice against the defendant; or (2) a clear or obvious error occurs and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. People v. Herron, 215 Ill. 2d 167, 187-88 (2005). In order to find plain error, we must first find the trial court committed some error. People v. Rodriguez, 387 Ill. App. 3d 812, 821 (2008). Naturally, if the trial court failed to follow Rule 431(b) in this case, an error would have occurred pursuant to Rodriguez, opening the door to a plain error analysis.

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¶ 58 We note Rule 431(b) was amended in 1997 to require the trial court, if requested by the defendant, to ask potential jurors, individually or as a group, whether they understand the principles stated by defense counsel in Zehr. People v. Yarbor, 383 Ill. App. 3d 676, 681 (2008); 177 Ill. 2d R. 431(b). The amendment "seeks to end the practice where the judge makes a broad statement of the applicable law followed by a general question concerning the juror's willingness to follow the law. Yarbor, 383 Ill. App. 3d at 681, citing 177 Ill.2d R. 431(b), Committee Comments, at lxxix. Rule 431(b) was further amended on May 1, 2007, to remove the phrase, "if requested by the defendant." Yarbor, 383 Ill. App. 3d at 682. Because the trial in this case began after May 1, 2007, the amended Rule 431(b) applies here.

¶ 59 The 2007 amended version now reads:

"The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt;

(3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that the defendant's failure to testify cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's failure to testify when the defendant objects.

The court's method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section."

Official Reports Advance Sheet No. 8 (April 11, 2007), R. 431(b), eff. May 1, 2007.

¶ 60 Rule 431(b), as amended, currently imposes a duty on the trial court to question each potential juror as to whether he understands and accepts each of the Zehr principles. Yarbor, 383 Ill. App. 3d at 682.

¶ 61 In this case, defendant contends the trial court did not comply with Rule 431(b) because the court did not specifically ask whether the prospective jurors "understood and accepted" each of the applicable Zehr principles. Even if we were to determine the court's approach here did not strictly satisfy Rule 431(b), however, we find defendant has failed to meet his burden under a

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plain error analysis of showing the alleged error affected the fairness of his trial and challenged the integrity of the judicial process.

¶ 62 We note our supreme court recently held "a trial court's failure to comply with the Rule 431(b) does not automatically result in a biased jury, regardless of whether that questioning is mandatory or permissive under our rule." People v. Thompson, No. 109033, slip op. at 9 (October 21, 2010). While the supreme court recognized compliance with Rule 431(b) is important, the court held "violation of the rule does not necessarily render a trial fundamentally unfair or unreliable in determining guilt or innocence." Thompson, No. 109033, slip op. at 9. Although the supreme court recognized a trial before a biased jury is structural error subject to automatic reversal, the supreme court noted failure to comply with the amended version of Rule 431(b) alone does not necessarily result in a biased jury, and, therefore, does not require automatic reversal as structural error. Thompson, No. 109033, slip op. at 9-10.

¶ 63 With regards to plain error, the supreme court noted a finding that the defendant was tried by a biased jury would certainly satisfy the second prong of plain-error review because it would affect his right to a fair trial and challenge the integrity of the judicial process. Thompson, No. 109033, slip

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op. at 12. The supreme court noted, however, that “[a] violation of Rule 431(b) does not implicate a fundamental right or constitutional protection, but only involves a violation of this court’s rules.” Thompson, No. 109033, slip op. at 13, citing People v. Glasper, 234 Ill. 2d 173, 193 (2009). Despite the amendment to the rule, the supreme court concluded Rule 431(b) questioning is not indispensable to the selection of an impartial jury. Thompson, No. 109033, slip op. at 13. Accordingly, the supreme court held it could not presume a jury was biased simply because the trial court erred in conducting Rule 431(b) questioning. Thompson, No. 109033, slip op. at 12.

¶ 64 Here, similar to Thompson, the prospective jurors received at least some, if not all, of the required Rule 431(b) admonishments. Defendant has failed to establish that the trial court’s violation of Rule 431(b) resulted in a biased jury. Because defendant has failed to meet his burden of showing the error affected the fairness of his trial and challenged the integrity of the judicial process, we find the second prong of plain-error review does not provide a basis for excusing defendant’s procedural default. Accordingly, we find defendant has forfeited the issue. See Thompson, No. 109033, slip op. at 13.

¶ 65 IV. DNA Analysis Fee

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¶ 66 Defendant contends his \$200 DNA analysis fee was improper because he provided a DNA sample and was assessed the analysis fee following a prior felony conviction. Our supreme court has recently determined<sup>2</sup> that the DNA analysis fee may not be assessed under such circumstances. *People v. Marshall*, 242 Ill. 2d 285 (2011).

¶ 67 V. Mittimus

¶ 68 Defendant contends he was erroneously credited 445 days for presentencing detention when he is actually entitled to 446 days' credit, including the day of sentencing.

¶ 69 The record reflects defendant was arrested on June 28, 2007, and remained in custody until he was sentenced on September 16, 2008. Accordingly, defendant is entitled to 445 days of credit if the sentencing day is not included or 446 if it is. 730 ILCS 5/5-8-7(b) (West 2008) (a defendant "shall be given credit on the determinate sentence \*\*\* for time spent in custody as a result of the offense for which the sentence was imposed.")

¶ 70 Except for certain specified offenses, a prisoner receives one day of good conduct credit for each day of his prison sentence. 730 ILCS 5/3-6-3(a)(2.1) (West 2008). A sentence of

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<sup>2</sup>We initially found that assessment of the DNA analysis fee was proper. However, in denying defendant leave to appeal, the supreme court has ordered us to vacate our order of December 3, 2010, and reconsider in light of *Marshall*. *People v. Young*, No. 111745 (January 25, 2012).

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imprisonment begins on the date when a defendant is received by the Department of Corrections. 730 ILCS 5/5-8-7(a) (West 2008). ¶ 71 In People v. Williams, 394 Ill. App. 3d 480 (2009), *pet. for leave to appeal granted* 235 Ill. 2d 603 (2010), this court recognized a split in authority regarding whether the calculation of presentencing should include the day of sentencing. The court noted cases excluding the day of sentencing from the credit seek to prevent a defendant from receiving double credit: one day of credit under section 5-8-7 for the portion of the sentencing day spent in presentencing detention and one day of credit under section 3-6-3 for good conduct for the portion of the same day spent in the Department of Correction's legal custody after the mittimus has issued. Williams, 394 Ill. App. 3d at 483. Finding the concern over double credit persuasive, the court held a defendant is not entitled to credit for the day of sentencing if the mittimus is issued effective the same day. Williams, 394 Ill. App. 3d at 483. Conversely, if the mittimus is not issued or is not effective on the day of sentencing, the defendant is not yet in the Department's custody and the presentencing credit under section 5-8-7 should apply. Williams, 394 Ill. App. 3d at 483.

¶ 72 Here, similar to Williams, defendant's mittimus issued on the day of his sentencing. Accordingly, we find he is entitled

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to only 445 days' credit for presentencing detention. See Williams, 394 Ill. App. 3d at 483.

¶ 73 CONCLUSION

¶ 74 We affirm defendant's conviction as modified and remand the cause to the trial court with directions that a sentence be imposed consistent with this order. The DNA analysis fee is vacated.

¶ 75 Affirmed as modified; remanded with directions.