

NOTICE
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2012 IL App (4th) 100125-U

Filed 1/17/12

NO. 4-10-0125

IN THE APPELLATE COURT
OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	McLean County
CORDARRO L. DUNN,)	No. 08CF1044
Defendant-Appellant.)	
)	Honorable
)	Charles G. Reynard,
)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices McCullough and Cook concurred in the judgment.

ORDER

- ¶ 1 *Held:* (1) Defendant was proved guilty beyond a reasonable doubt by accomplice testimony even though testimony of accomplices contradicted each other.
- (2) Defendant's argument his sentence was excessively disparate from that of accomplices was forfeited as not raised in motion to reconsider sentence.
- (3) Fines levied against defendant by circuit clerk were void as beyond authority of clerk, but vacated and reimposed; violent crime victims fund assessment was vacated and imposed as \$4.
- ¶ 2 Defendant, Cordarro L. Dunn, was convicted of home invasion after a bench trial at which both accomplices testified against him pursuant to guilty plea deals. Both accomplices changed their accounts of incident in question several times prior to trial and at trial testified inconsistently with each other. The trial court found the accomplice whose testimony supported the State's theory of the case to be more credible than the other. One accomplice received a sentence of nine years' imprisonment in exchange for his testimony against defendant and the

other was promised no more than eight years for his testimony. Defendant received a sentence of 20 years' imprisonment. He did not raise the issue of excessive disparity of his sentence in his motion to reconsider sentence. Defendant's sentencing order contained fees for the children's advocacy center and the drug court. These fees are considered fines and were imposed by the circuit clerk rather than the court. The court assessed a fee for the violent crime victim fund.

¶ 3 Defendant argues on appeal he was not proved guilty beyond a reasonable doubt, his sentence was excessively disparate to that of his two accomplices, he should receive credit against the two fees assessed by the circuit clerk, and an adjustment to the fee assessed by the trial court. We affirm as modified in part, vacate in part, and remand with directions.

¶ 4 I. BACKGROUND

¶ 5 Defendant and accomplices, James Manuel and Clarence Thompkins, were charged with residential burglary (720 ILCS 5/19-3(a) (West 2008)) and home invasion (720 ILCS 5/12-11(a)(3) (West 2008)) for an incident on September 9, 2008, in Bloomington. Manuel and Thompkins broke into an apartment shared by Chastity Viruet and Sade Van and her daughter looking for drugs and money supposedly belonging to Van's boyfriend. The intruders wore masks and had handguns. Van called the police while Manuel and Thompkins were ransacking the apartment. When the police arrived, they arrested both Manuel and Thompkins after pursuing them on foot when they ran. Defendant was located hiding in an outside stairwell of the apartment complex where the victims lived and was also arrested. Police found Thompkins' cell phone near defendant in the stairwell. The keys to a car belonging to Manuel's girlfriend were found in defendant's coat pocket. The men had ridden to the victims' apartment complex in that car. Police found a handgun in the car with a fingerprint belonging to defendant.

Despite the masks they wore, the victims were able to identify Manuel by voice as they both went to school with him. Van also identified defendant from a photo array as someone she knew from school. This is the undisputed evidence in this case.

¶ 6 On July 15, 2009, Manuel testified at defendant's trial pursuant to a plea agreement in which the residential burglary charges against him were dropped and he was given a nine year prison sentence on home invasion. Manuel had already been sentenced. He stated his prior statements to police detectives implicating defendant were not true but the police told him to implicate defendant and he did so to obtain a nine-year sentence. Manuel stated on July 2, 2009, in preparation for trial, Detective Richard Barkes asked Manuel to outline his testimony and Manuel told him defendant had nothing to do with it. Detective Barkes told Manuel the plea offer would be void if he failed to implicate defendant. Manuel testified he knew what Thompkins told police and relied on his statements to implicate defendant.

¶ 7 Detective Barkes testified he told Manuel he wanted the truth and Manuel told him no one else was involved. Barkes said they might as well stop as the evidence indicated more than one person was involved. Manuel then testified to the involvement of others. On the tape of the interview, which was entered into evidence, when Manuel stated defendant was not involved, Barkes can be heard saying any lie voids the proffer as evidence clearly shows defendant had something to do with it and he was not going to "sit here" and "listen to B.S."

¶ 8 At trial, Manuel started to testify he met up with defendant on the evening of September 8, 2009, to buy marijuana from him prior to robbing the home of the victims. Defendant asked Manuel for a ride to the apartment complex where Manuel was going to rob the victims in order to visit a friend. Manuel did not tell defendant about the planned robbery. The

State was then allowed to question Manuel as a hostile witness from that time forward.

¶ 9 Manuel then testified he had earlier told the police defendant called him at work, told him he had a robbery to do and told Manuel to bring along a friend. Manuel called Thompkins and Thompkins picked up Manuel and defendant in a car belonging to Manuel's girlfriend. Manuel stated Thompkins had been a friend of his from school and the two committed robberies together. During the home invasion, defendant was a lookout. Manuel testified defendant called him while he was ransacking the apartment to ask what he was doing as police were outside. Later, he testified defendant did not call him.

¶ 10 Finally, Manuel testified he lied when he told police defendant organized the home invasion, served as lookout, and provided the weapons. The guns were actually Manuel's.

¶ 11 Thompkins testified he pleaded guilty to residential burglary and the home invasion charge against him was dismissed. Pursuant to the plea agreement, he would receive no more than eight years in prison if he fulfilled his end of the bargain by testifying against defendant.

¶ 12 Thompkins testified Manuel was a good friend but he never met defendant prior to that night. He denied he committed residential burglaries with Manuel. On the night of September 8-9, 2008, Manuel called him and told him someone needed help with something. Thompkins got Manuel's girlfriend's car and picked up Manuel and defendant at defendant's house. Following defendant's directions, he drove to Todd Drive. Defendant handed him a gun. Defendant also had a gun. Defendant told him there would be \$10,000 plus drugs in the apartment. Thompkins testified both he and Manuel crawled through a window of a vacant apartment before later testifying only Manuel crawled through the vacant apartment and let him

and defendant in through a door. Defendant was with them when he and Manuel kicked in the apartment door. Thompkins told the police all three had kicked in the door. He also testified defendant ran when he and Manuel kicked in the door. Thompkins claimed no telephone call was made to Manuel during the home invasion.

¶ 13 After his arrest at the scene of the crime, Thompkins told the police he knew nothing. Later that day, he implicated himself as well as Manuel and defendant. The next day he contacted police and stated everything he told them the day before was fabricated. He stated he had been at his sister's residence on Todd Drive, smoking marijuana with Manuel. Later, Thompkins' attorney contacted the police on his behalf and he gave the police a statement consistent with his testimony in exchange for his plea agreement.

¶ 14 Defendant did not testify nor put on any other evidence in his behalf.

¶ 15 On October 22, 2009, the trial court issued its written order finding defendant guilty of home invasion and finding residential burglary to be a lesser included offense and did not enter judgment on that charge. In the order, the court found Thompkins to be a more credible witness than Manuel because although his demeanor was "reluctant and embarrassed, [Thompkins] furnished a quantum and quality of narrative detail that was far more self-incriminating than was necessary to fulfill his agreement of cooperation." The court found Thompkins' demeanor to be "authentic" while it found Manuel's demeanor to be "arrogant, resistive and palpably forced, illogical and unbelievable, while his earlier statements appeared considerably more authentic."

¶ 16 On December 11, 2009, the trial court sentenced defendant to 20 years' imprisonment, with \$2,280 pretrial detention credit. On January 14, 2010, the court denied defendant's

motion to reconsider his sentence.

¶ 17 This appeal followed.

¶ 18 II. ANALYSIS

¶ 19 A. Sufficiency of the Evidence

¶ 20 Defendant argues he was not proved guilty beyond a reasonable doubt because one accomplice testified in exchange for leniency and was inconsistent in his testimony while the other accomplice testified defendant was not involved. He contends the wrong accomplice testimony was found credible.

¶ 21 The standard of review for a sufficiency of the evidence claim, is whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 278, 818 N.E.2d 304, 307 (2004). A criminal conviction will not be set aside on grounds of insufficient evidence unless it is so unreasonable, improbable, or unsatisfactory there is a reasonable doubt as to the defendant's guilt. *People v. Collins*, 106 Ill. 2d 237, 261, 478 N.E.2d 267, 276 (1985). Accomplice testimony is subject to careful scrutiny but, whether corroborated or not, it is sufficient to sustain a criminal conviction if it convinces the trier of fact of the defendant's guilt beyond a reasonable doubt. *People v. Williams*, 147 Ill. 2d 173, 233, 588 N.E.2d 983, 1006 (1991). The determination of the weight to be given to witnesses' testimony, its credibility, and the resolution of inconsistencies and conflicts in the evidence and the reasonable inferences to be drawn from the testimony are the exclusive responsibility of the trier of fact. *People v. Sutherland*, 223 Ill. 2d 187, 242, 860 N.E.2d 178, 217 (2006).

¶ 22 In support of his argument, defendant notes the trial court's order finding defendant guilty included findings that were erroneous. The court found defendant had called Manuel during the home invasion, using Thompkins' cell phone. Manuel testified both defendant had called him and he had not. Thompkins claimed there was no call. The State later conceded other than defendant's possession of a cell phone, the State provided no evidence supporting Manuel's testimony defendant had called him during the home invasion. The court also found defendant's fingerprint was on the gun Thompkins used during the home invasion when it was actually found on a gun recovered from the rear seat of the car used by all three men to get to the location of the crime.

¶ 23 As for the trial court's finding Thompkins was more credible than Manuel, defendant argues Thompkins agreed to testify against defendant for leniency. He was allowed to plead guilty to residential burglary instead of the greater charge of home invasion as Manuel had done. He was awaiting sentencing when he testified and his lenient deal gave him greater incentive to falsely implicate defendant than Manuel had, who was already sentenced when he testified. Pending charges establish a witness' motive to curry favor with the prosecution by testifying falsely on the State's behalf. *People v. Hughes*, 168 Ill. App. 3d 758, 762, 522 N.E.2d 1275, 1278 (1988). His role as an accomplice also affects Thompkins' credibility. Such testimony has serious infirmities and caution should be exercised in relying on such testimony alone. *People v. Hansen*, 28 Ill. 2d 322, 332, 192 N.E.2d 359, 365 (1963).

¶ 24 Defendant argues further inconsistencies in Thompkins' testimony show he fabricated his story to curry favor with the State. He told the police defendant helped kick in the apartment door. At trial, he swore defendant did not. He stated he and Manuel entered the

apartment building through an empty apartment with no explanation as to how defendant got into the building so he could be present for the door kicking. He also stated only Manuel entered through the empty apartment and after he did so, he let Thompkins and defendant into the building through the door.

¶ 25 Defendant also noted Thompkins kept changing his story. Thompkins gave the police a statement implicating the three men the day he was arrested. The next day, he told police he knew nothing and his previous statement was "fabricated," stating he did not go into the apartment and said defendant had not been with him or Manuel that day. He stated he and Manuel were at his sister's apartment smoking marijuana. He found a gun, picked it up, jumped a fence, ran, and was arrested. At trial, he claimed that statement was a lie.

¶ 26 Defendant contends Manuel's testimony at trial was more credible than that of Thompkins for the same reasons Thompkins' testimony was not credible. Manuel's testimony exonerating defendant could have voided his plea agreement, permitting the State to prosecute him for both charges and allowing a sentence longer than the nine years he received. Because he was already sentenced, he could not have been expecting any further leniency from the State, so he had no motive to curry favor other than to avoid abrogation of his plea agreement. Further, defendant contends at least one of the reasons the trial court found Thompkins the more credible witness applies equally to Manuel, that Thompkins' testimony was "far more self-incriminating than was necessary to fulfill his agreement of cooperation."

¶ 27 In his testimony, Manuel took the blame for himself, stating it was his idea to commit the crime and he provided the guns. Thompkins, in contrast, placed more blame on Manuel than himself by stating he was contacted by Manuel and recruited to commit the offense.

Manuel testified he and Thompkins committed burglaries in the past but Thompkins denied that. Thus, Manuel's testimony was more self-incriminatory than necessary.

¶ 28 Other than the testimony of Thompkins and Manuel, the evidence against defendant was all circumstantial. Defendant was arrested near the scene of the crime, hiding. This could be explained because defendant was on probation and fled and then hid because he did not want to be implicated in the police action. Thompkins' cell phone was found near defendant and the keys to the car were in defendant's pocket. A gun with defendant's fingerprints were found in the car. Mere presence at the scene of a crime is insufficient to establish guilt. *People v. Boyd*, 17 Ill. 2d 321, 327, 161 N.E.2d 311, 315 (1959). Manuel explained he gave a ride to defendant but he never told him they planned to rob a drug dealer nor was defendant involved. Defendant may have examined the gun found in the car, thus leaving his fingerprint. Possessing Thompkins' cell phone did not prove defendant knew about the crime or was a lookout. Even if Manuel's testimony was believed defendant called him, he stated defendant asked what was going on. If defendant had been a lookout, he would have *known* what was going on.

¶ 29 A conviction will not be reversed simply because a defendant claims a witness is not credible. *People v. Byron*, 164 Ill. 2d 279, 299, 647 N.E.2d 946, 956 (1995). The record supports defendant's conviction. The victims stated two men entered their home with guns. These men were identified as Thompkins and Manuel. Both Thompkins and Manuel agreed they were looking for drugs and money. Thompkins testified defendant was the one who provided three guns and masterminded the plan. Manuel's testimony he found the three guns in an alley was simply not believable. Defendant remained outside and acted as lookout. Manuel con-

that received by Thompkins (four years) and Manuel (nine years) for the same incident where Thompkins and Manuel actually took action to put the victims in danger while defendant only acted as a lookout.

¶ 34 This issue has been forfeited on appeal as it was not raised in defendant's motion to reconsider sentence. He did not properly raise the issue in his arguments at the hearing on his motion. *People v. Reed*, 177 Ill. 2d 389, 391, 686 N.E.2d 584, 585 (1997); *People v. Bailey*, 364 Ill. App. 3d 404, 408, 846 N.E.2d 147, 150 (2006).

¶ 35 Even if not forfeited, mere sentencing disparity between codefendants, without more, does not warrant a reduction of the punishment imposed by the trial court. *People v. Nieto*, 162 Ill. App. 3d 437, 448, 515 N.E.2d 376, 383 (1987). Only arbitrary and unreasonable disparity between sentences of similarly situated codefendants is impermissible. *People v. Craddock*, 163 Ill. App. 3d 1039, 1049, 516 N.E.2d 1357, 1364 (1987). A disparity may be justified by differences in the nature and extent of the concerned defendant's participation in the offense or by differences in criminal records. *People v. Ramsey*, 147 Ill. App. 3d 1084, 1092, 496 N.E.2d 1054, 1060 (1986).

¶ 36 Defendant is not similarly situated with Thompkins and Manuel in this case. They pleaded guilty and defendant did not. They agreed to assist the State by testifying against defendant. A plea of guilty is a relevant mitigating factor. *People v. Bailey*, 364 Ill. App. 3d 404, 409, 846 N.E.2d 147, 151 (2006). Further, defendant masterminded the plan, chose the location and provided the weapons. It is not the disparity itself which is controlling but the reason for the disparity. *People v. Spriggle*, 358 Ill. App. 3d 447, 455, 831 N.E.2d 696, 704 (2005). Further, defendant committed this crime while already on probation for attempt (home

invasion) and attempt (residential burglary), similar offenses to those charged in this case.

¶ 37 Finally, if a sentence is imposed within statutory guidelines, it is not deemed excessive unless the sentence is greatly at variance with the spirit or purpose of the law and the nature of the offense. *People v. Hauschild*, 226 Ill. 2d 63, 90, 871 N.E.2d 1, 16 (2007). In this case, the sentence was within the statutory guidelines and in keeping with the nature of the offense.

¶ 38 C. Credit for Fines and Recalculation of Crime Victim Fund

¶ 39 Defendant was assessed a \$15 children's-advocacy-center fee and a \$10 drug-court fee. Because these are fines (*People v. Sulton*, 395 Ill. App. 3d 186, 193, 916 N.E.2d 642, 648 (2009) (drug-court fee); *People v. Jones*, 397 Ill. App. 3d 651, 664, 921 N.E.2d 768, 778 (2009) (children's-advocacy-center fee)), he argues he is entitled to a \$5 credit for each day spent in pre-sentence custody against those fines. 725 ILCS 5/110-14 (West 2010). He maintains his \$20 fine under the Violent Crime Victims Assistance Fund should be reduced.

¶ 40 Credit is generally awarded against such fines. However, in this case, the fees were not assessed by the trial court but appeared in the "Notice to Party" prepared by the circuit clerk, listing the fees and fines imposed on defendant in regard to his conviction. The imposition of a fine is a judicial function beyond the authority of the clerk. *People v. Allen*, 371 Ill. App. 3d 279, 285, 868 N.E.2d 297, 303 (2006). The clerk only has the authority to collect judicially imposed fines. See *People v. Shaw*, 386 Ill. App. 3d 704, 710, 898 N.E.2d 755, 762 (2008).

¶ 41 Thus, as the children's-advocacy-center fee and drug-court fee were not imposed by the trial court, they are void and not applicable to defendant. The State argues the fees should be vacated and remanded for imposition by the trial court, and the VCVA assessment was proper

as no other fines were imposed. Defendant replies if the drug court and children's advocacy fees are added, his VCVA assessment should be recalculated to \$4. We agree with defendant.

¶ 42 The children's-advocacy-center and drug-court assessments have been found to constitute fines, which cannot be imposed by the circuit clerk. *People v. Folks*, 406 Ill. App. 3d 300, 306, 943 N.E.2d 1128, 1133 (2010). They have also been found to be mandatory. *Folks*, 406 Ill. App. 3d at 305, 943 N.E.2d at 1132. These mandatory fines may be reimposed by this court, regardless of their origin. *Folks*, 406 Ill. App. 3d at 306, 943 N.E.2d at 1133. We vacate the clerk's imposition of these assessments, reimpose them, and accord them full credit based on defendant's \$2,280 available credit for time served prior to sentencing.

¶ 43 Because these assessments are considered fines and are imposed here, the Violent Crime Victims Assistance Fund (VCVA) assessment under section 10(c)(2) of the Violent Crime Victims Assistance Act (725 ILCS 240/10(c)(2) (West 2010) (\$20 VCVA assessment is to be imposed only where the defendant is convicted of a qualifying felony and no other fine is imposed)) must be vacated and recalculated under section 10(b) (725 ILCS 240/10(b) (West 2010)); see also *People v. Brown*, 388 Ill. App. 3d 104, 114, 904 N.E.2d 139, 148-49 (2009) (finding "section 10(b) of the [VCVA] is the operative provision here where other fines were imposed"). Under section 10(b), the assessment must be calculated as "\$4 for each \$40, or fraction thereof, of fine imposed." 725 ILCS 240/10(b) (West 2010). As the children's-advocacy-center fine is \$15 and the drug-court fine is \$10, for a total of \$25, the VCVA assessment is \$4 and is not subject to offset. 725 ILCS 240/10(b) (West 2010); see also *People v. Jones*, 397 Ill. App. 3d 651, 664, 921 N.E.2d 768, 778 (2009).

¶ 44

III. CONCLUSION

¶ 45 For the foregoing reasons, we vacate the \$15 children's-advocacy-center fine and the \$10 drug-court fine imposed by the circuit clerk and the \$20 VCVA fine imposed by the trial court. We reimpose the \$15 children's-advocacy-center fine and the \$10 drug-court fine and a \$4 VCVA fine and remand for issuance of an amended sentencing judgment consistent with this order. We affirm in all other respects. As part of our judgment, we grant the State its statutory assessment of \$50 against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2010).

¶ 46 Affirmed as modified in part, vacated in part, and cause remanded with directions.