

NOTICE
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2012 IL App (4th) 110535-U

NO. 4-11-0535

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
December 5, 2012
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	McLean County
DENNIS EARL JORDAN,)	No. 10CF529
Defendant-Appellant.)	
)	Honorable
)	James E. Souk,
)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Presiding Justice Steigmann and Justice Appleton concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed in part, vacated in part, and remanded, concluding (1) the State proved defendant guilty of unlawful delivery of a controlled substance beyond a reasonable doubt, and (2) the trial court did not err by imposing a \$100 street-value fine, but (3) the trial court erred by imposing a \$3,000 drug treatment assessment where defendant was convicted of and sentenced for a Class 2 felony offense.

¶ 2 Following a March 2011 bench trial, the trial court found defendant, Dennis Earl Jordan, guilty of unlawful delivery of a controlled substance (720 ILCS 570/401(d)(i) (West 2010)). Following a May 2011 hearing, the court sentenced defendant to nine years in prison, ordering him to pay court costs, fines, and fees, including a \$100 mandatory street-value fine and a \$3,000 drug treatment assessment.

¶ 3 Defendant appeals, arguing (1) the State failed to prove him guilty of unlawful delivery of a controlled substance beyond a reasonable doubt, (2) this court should vacate the

\$100 mandatory street-value fine and remand for a hearing because the State did not present evidence concerning the actual street value of the heroin the police seized, and (3) this court should reduce the \$3,000 drug treatment assessment to \$1,000 because defendant was convicted of a Class 2 felony offense, not a Class X offense.

¶ 4 We affirm in part, vacate in part, and remand with directions.

¶ 5 I. BACKGROUND

¶ 6 In June 2010, a grand jury indicted defendant on two counts of unlawful possession of a controlled substance, a Class 2 felony subject to mandatory Class X sentencing due to defendant's prior record (720 ILCS 570/401(d)(i) (West 2010); 730 ILCS 5/5-4.5-95(b) (West 2010)). Count I alleged on or about June 3, 2010, defendant delivered less than one gram of heroin to Normal police department confidential source "555," and count II alleged on or about June 3, 2010, defendant delivered less than one gram of heroin to Normal police department confidential source "570."

¶ 7 In February 2011, defendant waived his right to a jury trial. In March 2011, defendant's bench trial commenced, with the State proceeding only on count II and the trial court dismissing count I. The parties presented the following evidence.

¶ 8 Mark Stephenson testified police arrested him on June 3, 2010, for a drug offense. After being transported to the Normal police department, Stephenson indicated to the detectives he could identify someone from whom he could purchase drugs. Stephenson subsequently agreed to become a confidential source and to carry out a controlled purchase from defendant. According to Stephenson, he used his own phone to call defendant and tell him he had money and needed to "come through." Stephenson then drove his truck to defendant's home with \$40 or

\$50 in buy money the police had given him. Before Stephenson left the station, police searched Stephenson and his vehicle for contraband. The police did not equip Stephenson with any audio equipment.

¶ 9 When Stephenson arrived at defendant's home, he knocked on the door and either defendant or his girlfriend, Sondra McCormick, answered. Stephenson entered the apartment and saw only defendant and McCormick. He gave the buy money to defendant, who handed Stephenson heroin packaged in a piece of tin foil.

¶ 10 After leaving defendant's home, Stephenson drove his truck to Lucca Grill to meet Detective Kevin Kreger, who was waiting in the parking lot. Stephenson did not stop or talk to anybody along the way. Stephenson got into Kreger's car and gave him the heroin he had purchased.

¶ 11 On cross-examination, Stephenson acknowledged he agreed to work as a confidential source in exchange for the police not charging him with his drug offense. The police told Stephenson he could go to prison on the drug offense. At the time Stephenson was arrested, he had been using heroin, crack, and marijuana on a daily basis at McCormick and defendant's home. Stephenson used heroin on the day of the controlled buy.

¶ 12 Stephenson acknowledged on the day of the controlled buy he actually sent a text message asking "can I come over?" Although he sent the message to defendant's phone, he acknowledged both defendant and McCormick use the phone, so he could not "prove" who sent the reply. He stated he was "pretty sure" he also sent a message saying he had "\$50 to spend" because "[McCormick and defendant] always want[ed] to know how much" money he had.

¶ 13 On occasion, defendant fronted drugs to Stephenson for personal use, and

Stephenson would pay defendant back later when he had enough money. Although he sometimes smoked crack cocaine with McCormick at defendant's home, Stephenson did not keep heroin or crack cocaine there.

¶ 14 Sondra McCormick testified in June 2010 she was charged and later convicted of possession of heroin in connection with the police search of her and defendant's home. Police had previously arrested McCormick in 2005 and again in 2006 for unlawful possession of crack cocaine. McCormick said shortly before her June 2010 arrest, she and defendant drove to Chicago to pick up heroin and crack. They brought the drugs back to Bloomington, where they set aside some for resale and the rest for personal consumption. Although McCormick said both she and defendant sold the drugs from Chicago, she denied selling any heroin to Stephenson on the day of her June arrest.

¶ 15 McCormick said Stephenson visited the apartment she shared with defendant "all the time" and sometimes kept stashes of drugs in their apartment. She did not know where Stephenson kept his stash, but said she knew he kept some drugs at her apartment because she heard a "conversation about coming to get his stuff." She acknowledged, however, she was "usually really high" when she heard conversations between defendant and Stephenson.

¶ 16 McCormick said she and Stephenson shared drugs, and "at times" Stephenson would later pay her back for the drugs he used. On the day of Stephenson's controlled buy, he visited McCormick and defendant's apartment "three or four times." During the last time Stephenson visited, McCormick was in the bedroom getting high. She came out of her bedroom and saw defendant and Stephenson having a conversation, but she was not "100-percent sure" whether she saw drugs or money being exchanged. She did not know how much money

Stephenson owed defendant on the day of the controlled buy.

¶ 17 Twenty minutes after Stephenson left McCormick's apartment for the last time on the day of the controlled buy, police arrived at McCormick's home. They seized heroin from McCormick's billfold, as well as money she already had in her purse. She did not have any marked money on her. Later that day, a detective interviewed McCormick. She had "been up" on heroin and crack cocaine for three or four days and was not sober during the interview. She admitted to the detective she sometimes sold drugs to friends and allowed others to sell drugs from her house. McCormick ultimately resolved her case by pleading guilty, for which she received a sentence of two years' probation.

¶ 18 Detective Kevin Kreger testified he first met Stephenson after Stephenson was arrested. He told Stephenson if Stephenson acted as a confidential source, Kreger would tell the prosecuting authorities about "the extent of his cooperation." He did not, however, tell Stephenson the charges would be dropped if he cooperated.

¶ 19 In conjunction with the controlled purchase, Kreger observed Stephenson type and send a text message asking "are you good?" to a number Stephenson said was defendant's. Shortly after, Stephenson received a reply telling him to "come by." Kreger admitted he did not know who sent the reply text message. After Kreger searched Stephenson for contraband and another officer searched Stephenson's vehicle, the police provided Stephenson with \$50 in prerecorded buy money. Kreger then followed Stephenson to defendant's home, where another officer took over surveillance of Stephenson. Approximately five minutes later, an officer alerted Kreger that Stephenson had left the apartment, and Kreger drove to a nearby parking lot to meet Stephenson. Stephenson then handed Kreger a tan, chunky substance wrapped in tin foil

that Kreger later field-tested and weighed in the Normal police department. He did not recover any money or other contraband on Stephenson.

¶ 20 Police later executed a search warrant at defendant and McCormick's apartment. Upon entering, officers found McCormick on the bathroom floor, the toilet still running. Defendant had been in the bathroom also, but was thrown on a bed in the bedroom by Detective Jonathan Cleveland upon the detective's entering the bathroom. Throughout the apartment, officers discovered a scale, chunks of aluminum foil, a bottle of Sleep Aid (commonly used for cutting heroin), and plates and straws containing white powder residue. They did not recover any drugs but inferred the drugs had been destroyed by flushing. Kreger also recovered a cellular phone from defendant's apartment that rang when Kreger dialed the same number to which Stephenson had previously sent the text message.

¶ 21 Kreger placed defendant in custody and searched him, finding a total of \$514 in his pants pocket, \$40 of which had serial numbers matching the numbers of the prerecorded buy money. Police did not recover the remaining \$10 of buy money. Defendant denied selling drugs out of his apartment and told Kreger he had receipts for his money from Wal-Mart.

¶ 22 The parties stipulated to the contents of a State Police laboratory report, confirming the substance recovered from Stephenson was 0.1 grams of heroin.

¶ 23 On this evidence, the trial court found defendant guilty of unlawful delivery of a controlled substance (720 ILCS 570/401(d)(i) (West 2010)). The court explicitly stated it found Stephenson credible, noting the other evidence strongly corroborated Stephenson's testimony.

¶ 24 In April 2011, defense counsel filed a motion for judgment of acquittal or a new trial, arguing the State had not proved defendant guilty beyond a reasonable doubt. The same

month, defendant *pro se* filed a motion for a new trial based on ineffective assistance of counsel. The parties appeared before the trial court in May 2011, at which time the court questioned both defendant and defense counsel about the contents of defendant's motion. Finding defendant's complaints were "not the type of things that rise to the level of requiring the appointment of new counsel," the court declined to appoint counsel to pursue any further issues of ineffective assistance of counsel.

¶ 25 The trial court then addressed defense counsel's motion for judgment of acquittal or, in the alternative, for a new trial. After hearing arguments from defense counsel and the State, the court denied counsel's motion.

¶ 26 The matter then proceeded to sentencing. The State and defense counsel agreed the indictment incorrectly stated defendant's offense was subject to mandatory Class X sentencing. Instead, defendant's prior record made his charge nonprobationable, extended-term eligible. After hearing both parties' arguments and defendant's statement in allocution, the trial court sentenced defendant to nine years in prison, with 172 days' credit for time previously served. The court ordered defendant to pay, among other fines and fees, a \$3,000 drug treatment assessment fee and a \$100 mandatory street-value fine, crediting defendant with \$860 for pretrial detention.

¶ 27 This appeal followed.

¶ 28 II. ANALYSIS

¶ 29 On appeal, defendant argues (1) the State failed to prove him guilty beyond a reasonable doubt of unlawful delivery of a controlled substance, (2) this court should vacate the \$100 mandatory street-value fine and remand for a hearing because the State did not present

evidence concerning the actual street value of the heroin police seized, and (3) this court should reduce the \$3,000 drug treatment fine to \$1,000 because defendant was convicted of a Class 2 felony, not a Class X offense. We address defendant's arguments in turn.

¶ 30 A. Sufficiency of the Evidence

¶ 31 Defendant contends the State failed to prove him guilty beyond a reasonable doubt of unlawful delivery of a controlled substance. Specifically, defendant asserts the State's primary witnesses, Stephenson and McCormick, presented "inherently suspicious and unreliable" testimony because they were both admitted drug abusers, and Stephenson had cooperated with the State in exchange for leniency.

¶ 32 We review a challenge to the sufficiency of the evidence by inquiring whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *People v. Martin*, 2011 IL 109102, ¶ 15, 955 N.E.2d 1058, 1062. In doing so, we view the evidence in the light most favorable to the prosecution, drawing all reasonable inferences from that evidence in the prosecution's favor. *Id.* Generally, the trier of fact is in a better position to determine the credibility of witnesses and weigh the evidence, and its decision will not be reversed unless "the evidence is so unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt of defendant's guilt." *People v. Wheeler*, 226 Ill. 2d 92, 115, 871 N.E.2d 728, 740 (2007).

¶ 33 Courts should closely scrutinize the testimony of an informant who abuses unlawful substances and participates in an undercover operation to minimize punishment for his illegal activity. *People v. Anders*, 228 Ill. App. 3d 456, 464, 592 N.E.2d 652, 657 (1992). The reasonable doubt threshold can be overcome, however, when the informant's testimony is

partially corroborated. *Anders*, 228 Ill. App. 3d at 464, 592 N.E.2d at 657.

¶ 34 Here, the evidence showed police arrested Stephenson for possession of heroin on June 3, 2010, and he subsequently agreed to become a confidential source in exchange for the police telling the State about "the extent of his cooperation." Both Stephenson and McCormick testified they habitually used drugs and used them on the day of the controlled buy. Accordingly, defendant is correct in his assertion that Stephenson and McCormick's testimony was "subject to suspicion." (Internal quotation marks omitted.) *People v. Strother*, 53 Ill. 2d 95, 99, 290 N.E.2d 201, 204 (1972).

¶ 35 However, the trial court could reasonably find Stephenson and McCormick's testimony credible in light of the corroborating evidence the State presented. Specifically, Kreger testified officers inspected Stephenson and his vehicle before following Stephenson to defendant's apartment and watching Stephenson enter the apartment with \$50 in prerecorded buy money. Shortly thereafter, Stephenson met Kreger in a nearby parking lot and handed him a tan, chunky substance, which a lab report later confirmed was heroin. Later that day, officers executed a search warrant at defendant and McCormick's home and found \$40 in defendant's pocket with serial numbers matching those of the prerecorded buy money. Moreover, while officers did not find drugs in the apartment, they did find a scale, aluminum foil, a bottle of Sleep Aid, and white powder residue on plates and straws. Officers also saw McCormick in the bathroom next to the toilet, which was still running, which led them to infer either defendant or McCormick had destroyed the drugs by flushing them. In light of this evidence, a reasonable trier of fact could find defendant guilty of unlawful delivery of a controlled substance.

¶ 36 Defendant contends this case is analogous to *People v. Newell*, 103 Ill. 2d 465,

469 N.E.2d 1375 (1984). We conclude *Newell* is inapposite, however, because in *Newell*, the only evidence of the defendant's guilt presented at trial was the conflicting testimony of three accomplices, all convicted felons, without any corroborating evidence. *Newell*, 103 Ill. 2d at 471, 469 N.E.2d at 1378.

¶ 37 Defendant further asserts other "uncertainties and inconsistencies in the evidence" created reasonable doubt as to defendant's guilt. Specifically, defendant points out (1) police did not equip Stephenson with audio equipment during his controlled buy, (2) Stephenson's testimony conflicted with McCormick's testimony, (3) the State did not establish who sent a reply text message from the phone number to which defendant sent a text message, and (4) the police recovered only \$40 of the \$50 in prerecorded buy money. However, it is not the appellate court's function to retry the defendant. *People v. Collins*, 106 Ill. 2d 237, 261, 478 N.E.2d 267, 277 (1985). Based on the other evidence presented in this case, we conclude the trial court could reasonably find defendant guilty of unlawful delivery of a controlled substance.

¶ 38 B. The \$100 Mandatory Street-Value Fine

¶ 39 Defendant next argues the trial court erred in ordering him to pay a \$100 mandatory street-value fine, as the parties did not present evidence concerning the actual value of the heroin the police seized from defendant. Because defendant did not object to the amount of the fine or include the issue in a posttrial motion, defendant urges this court to review the matter pursuant to the plain-error rule.

¶ 40 The plain-error doctrine allows an appellate court to consider unpreserved error when either "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the

seriousness of the error, or (2) a clear or obvious error occurred 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." (Internal quotation marks omitted.) *People v. Walker*, 232 Ill. 2d 113, 124, 902 N.E.2d 691, 697 (2009). Because the Illinois Supreme Court recently concluded that imposing a street-value fine without any evidentiary support implicated a defendant's "right to a fair sentencing hearing," we will apply a plain-error analysis to address defendant's claim. *People v. Lewis*, 234 Ill. 2d 32, 48, 912 N.E.2d 1220, 1230 (2009). Our first step in conducting such an analysis is to determine whether error occurred at all. *Walker*, 232 Ill. 2d at 124, 902 N.E.2d at 697.

¶ 41 Section 5-9-1.1(a) of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-9-1.1(a) (West 2010)) provides, in relevant part, when a person is adjudged guilty of certain drug-related offenses, "a fine shall be levied by the court at not less than the full street value of the *** controlled substances seized." 730 ILCS 5/5-9-1.1(a) (West 2010). That section of the Unified Code further states as follows:

" 'Street value' shall be determined by the court on the basis of testimony of law enforcement personnel and the defendant as to the amount seized and such testimony as may be required by the court as to the current street value of the *** controlled substance seized." 730 ILCS 5/5-9-1.1(a) (West 2010).

¶ 42 Accordingly, the "trial court must have some evidentiary basis for current value to ensure imposition of a fine at least equal to that amount." *Lewis*, 234 Ill. 2d at 44-45, 912 N.E.2d at 1228.

¶ 43 Here, the trial court imposed a \$100 street-value fine. The evidence at trial established Kreger gave Stephenson \$50 in prerecorded buy money. Stephenson then entered defendant's home and returned with a tan, chalky substance that lab testing later confirmed was 0.1 grams of heroin. Shortly after Stephenson's controlled buy, police found \$40 of the marked bills in defendant's pocket. They did not find any marked bills on Stephenson. We conclude this testimony established Stephenson paid defendant \$50 for the heroin, thereby establishing the "street value" of the heroin. See *People v. Lowry*, 231 Ill. App. 3d 788, 797, 596 N.E.2d 1218, 1224 (1992) ("The trial court acted within its discretion in setting the 'street-value' fine at the same amount as was paid for the cocaine.").

¶ 44 Defendant asserts the supreme court's decision in *People v. Lusietto*, 131 Ill. 2d 51, 544 N.E.2d 785 (1989), and the First District's decision in *People v. Carrasquilla*, 167 Ill. App. 3d 1069, 522 N.E.2d 139 (1988), require the State to introduce testimony from the defendant and police officers about the current price of a drug to establish the "street value" of that drug. *Lusietto*, however, is inapposite, because in *Lusietto*, the defendant and the police informant did not agree upon a sale price for the cocaine police recovered. *Lusietto*, 131 Ill. 2d at 52, 544 N.E.2d at 785. Likewise, in *Carrasquilla*, police officers executed a search warrant and seized cocaine from the defendant's home that had not yet been sold. *Carrasquilla*, 167 Ill. App. 3d at 1072, 522 N.E.2d at 140. Thus, neither *Lusietto* or *Carrasquilla* involved a scenario like defendant's in which the drugs at issue were exchanged for an actual purchase price. We do not interpret either case as standing for the proposition an actual purchase price is an insufficient evidentiary basis for establishing a "street value" within the meaning of section 5-9-1.1(a) of the Unified Code (730 ILCS 5/5-9-1.1(a) (West 2010)).

¶ 45 The testimony at defendant's trial established defendant sold Stephenson heroin for \$50. Accordingly, we conclude the trial court did not err in imposing a street-value fine of \$100, an amount "not less than the full street value of the *** controlled substances seized." 730 ILCS 5/5-9-1.1(a) (West 2010).

¶ 46 C. The \$3,000 Drug Treatment Assessment Fee

¶ 47 Finally, defendant argues the trial court erred in imposing a \$3,000 drug treatment assessment, because defendant was sentenced as a Class 2 felon, not a Class X felon. The State concedes the drug treatment assessment should be reduced and further suggests the Violent Crime Victims Assistance Act (VCVA) fines and lump-sum surcharge should also be modified to reflect the change in the drug treatment assessment. Defendant, in his reply brief, agrees with the State's suggestion.

¶ 48 A defendant convicted of a Class 2 felony under the Illinois Controlled Substances Act must pay a \$1,000 fine, whereas a defendant convicted of a Class X felony must pay a \$3,000 fine. 720 ILCS 570/411.2(a)(1), (a)(3) (West 2010). Here, the trial court convicted defendant of a Class 2 felony offense. Although the State's charge originally alleged defendant's prior convictions made him subject to Class X sentencing, the State later clarified defendant was eligible only for Class 2, nonprobationable, extended-term sentencing. Thereafter, the court sentenced defendant as a Class 2 offender. We therefore agree with defendant his \$3,000 fine should be reduced to \$1,000.

¶ 49 The parties agree that a change in defendant's drug treatment assessment requires recalculation of defendant's lump-sum surcharge and VCVA fines. VCVA fines are calculated by assessing an "additional penalty of \$4 for each \$40, or fraction thereof" of the fines imposed

on a defendant convicted of a felony. 725 ILCS 240/10(b) (West 2010). Likewise, the lump-sum surcharge is calculated by adding "\$10 for each \$40, or fraction thereof," of the fines imposed on a defendant. 730 ILCS 5/5-9-1(c) (West 2010).

¶ 50 Here, the trial court imposed the following fines: (1) a \$100 mandatory street-value fine (730 ILCS 5/5-9-1.1(a) (West 2010)); (2) a \$100 drug trauma center fund fine (730 ILCS 5/5-9-1.1(b) (West 2010)); and (3) a \$25 "TF/MEG Assessment" (730 ILCS 5/5-9-1.1(e) (West 2010)). Thus, with the \$1,000 drug treatment assessment, defendant's fines totaled \$1,225. Based on this sum, defendant's recalculated lump-sum surcharge is \$310 (\$1,225 divided by 40 equals 30 plus a "fraction thereof" multiplied by \$10 equals \$310). See *People v. Vlahon*, 2012 IL App (4th) 110229, ¶ 38, 2012 WL 4830257, at *7.

¶ 51 Likewise, accounting for defendant's adjusted drug treatment assessment, defendant's VCVA fine is \$124 (\$1,225 divided by 40 equals 30 plus a "fraction thereof" multiplied by \$4 equals \$124). *Vlahon*, 2012 IL App (4th) 110229, ¶ 38, 2012 WL 4830257, at *7. We note the trial court did not impose a VCVA penalty. However, because prior court decisions have held VCVA fines are mandatory, we remand the cause to the trial court to expressly impose the amount of the fine. See *People v. Isaacson*, 409 Ill. App. 3d 1079, 1086, 950 N.E.2d 1183, 1190 (2011) (remanding the defendant's case where court did not impose the proper VCVA fine amount).

¶ 52 III. CONCLUSION

¶ 53 For the reasons stated, we affirm the trial court's judgment but vacate the court's \$3,000 drug treatment fine and remand with directions to impose a \$1,000 drug treatment fine and the VCVA and lump-sum surcharge fines as directed.

¶ 54 Affirmed in part and vacated in part; cause remanded with directions.