

No. 1-11-2024

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 10 CR 20439(2)
)	
ZEDRICK CARTER,)	Honorable
)	Lawrence Edward Flood,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Lavin and Justice Fitzgerald Smith concurred in the judgment.

ORDER

HELD: Defendant's conviction and sentence for delivery of a controlled substance affirmed where the evidence was sufficient to establish the elements of the charged offense beyond a reasonable doubt and where the sentence imposed by the circuit court was not excessive. Court order imposing fines, fees, and costs modified to vacate and correct various inapplicable and improper monetary assessments.

¶ 1 Following a bench trial, defendant Zedrick Carter was convicted of delivery of a controlled substance.¹ He was sentenced as a Class X offender to eight years' imprisonment

¹ In his brief, defendant mistakenly asserts that he was convicted of possession of a

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followed by a three-year mandatory supervisory release term and assessed a number of fines, costs and fees. On appeal, defendant challenges his conviction and the sentence imposed thereon, arguing: (1) he was not proven guilty beyond a reasonable doubt and (2) his eight-year prison sentence is excessive. Defendant also challenges other components of his sentence, including the propriety of several fines and fees, the mandatory supervisory release period imposed, and the number of days of pre-sentencing incarceration credit to which he is entitled. For the reasons explained herein, we affirm defendant's conviction and sentence. However, we modify the court's order imposing various fines, fees, and costs to correct and vacate several inapplicable and improper monetary assessments.

¶ 2

I. BACKGROUND

¶ 3 Defendant and his friend Rodney Nance were arrested following a narcotics surveillance and controlled drug buy operation that Chicago police department (the Department) narcotics unit was conducting near the intersection of 63rd Street and Drexel Avenue in October 2010. Defendant was charged with delivery of a controlled substance, less than one gram of heroin, and elected to proceed by way of a bench trial. Nance entered a guilty plea and is not a party to this appeal.

¶ 4 At trial, Chicago police officer Sharmaun Freeman, testified that he was a member of the Department's narcotics unit. On October 1, 2010, Officer Freeman and other members of the unit formulated a plan to make undercover narcotics purchases and conduct surveillance in the area of _____ controlled substance; however, the record reveals that he was actually convicted of the offense of delivery of a controlled substance.

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63rd Street and Drexel Avenue, a locale known to be "a high narcotics crime area." At approximately 7:50 a.m. that morning, Officer Freeman was acting as an undercover buy officer. He was dressed in a gray hooded sweatshirt and blue jeans and was not wearing anything indicating his affiliation with the Chicago police department. As Officer Freeman approached the intersection on foot, he noticed that there was "a lot of drug sales activity going on that morning."

¶ 5 He observed defendant sitting on a crate behind a garbage dumpster and engaged defendant in conversation. Officer Freeman explained that he asked defendant for "some diesel, which is a street term for heroin." Defendant responded, asking Freeman how many he wanted and Freeman indicated that he wanted two capsules. Defendant then walked over to another man, who was later identified as co-defendant Rodney Nance, engaged in a brief conversation with him and then returned to Freeman with two white capsules containing suspect heroin. Officer Freeman provided defendant with \$20 of pre-recorded "CPD 1505 funds" in exchange for the capsules. After making the narcotics purchase, Officer Freeman left the area on foot and notified members of his team that he had made a "positive" narcotics purchase. He also provided his team members with a description of the clothing that defendant was wearing, which included a blue jacket, denim jeans and white gym shoes.

¶ 6 Later that morning, Officer Freeman received a radio transmission from his enforcement officers requesting him to make an identification. He met members of his team at the intersection of 63rd and Drexel and identified both defendant and Nance as the men that he had purchased narcotics from earlier that day. Officer Freeman's identification of defendant was

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made over an hour and a half after the narcotics buy had taken place. Officer Freeman testified that he was in his car and was over 50 feet away when he identified defendant. Later that day, after making the identification, Officer Freeman returned to the police station where he viewed a photo array. The photo array had been put together by Officer Freeman's sergeant and contained pictures of five people. After viewing the array, Officer Freeman circled defendant's picture, identifying him as the person who had sold narcotics to him at approximately 7:50 a.m. that morning.

¶ 7 At the police station, Officer Freeman also inventoried the two capsules containing suspect heroin in accordance with police protocol. Specifically, he placed the capsules in an evidence bag, which was then heat-sealed. The capsules were assigned a unique evidence inventory number: 12140363. Once the evidence was properly sealed and marked with the aforementioned inventory number, it was sent to the crime lab for testing. Officer Freeman confirmed that the capsules remained in his custody and control from the time that he made the purchase to the time he returned to the police station. Although he was able to see that the capsules contained a white powder, Officer Freeman denied that he pulled the capsules apart or otherwise disturbed the capsules. At the time the capsules left his possession, they were intact.

¶ 8 Chicago police officer Jonathan Shortall testified that he was also a member of the Department's narcotics unit and that he also participated in the undercover narcotics purchase and surveillance operation that took place on October 1, 2010, in the vicinity of 63rd Street and Drexel Avenue. Officer Shortall explained that he was a surveillance officer and was in charge of videotaping the transactions that occurred in that area. Sometime around 7:50 a.m., he

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observed Officer Freeman walk into the area and stop near a green dumpster. Officer Shortall explained that his view was partially blocked by the dumpster and that he was only able to see heads bobbing. He acknowledged that he was not able to see or accurately record the exchange that took place between Officer Freeman and defendant. Once Officer Freeman left the area, he made a radio transmission to other members of the team, informing them that the transaction had been "positive for narcotics." Officer Shortall remained at his surveillance location and continued videotaping until enforcement officers moved into to detain several individuals who were at that location.

¶ 9 Sergeant Don Markham, a supervisor in the Department's narcotics unit, testified that he was supervising the controlled buys that his unit was conducting in the area of 63rd Street and Drexel Avenue on October 1, 2010, and was acting as an enforcement officer. At approximately 7:50 a.m., he was notified that a member of the team had made a successful undercover drug purchase. He explained that he and his partner, Officer DeVilla, did not witness the transaction because they were in position several blocks away at the time that the controlled buy occurred. Once they received Officer Freeman's radio transmission, Sergeant Markham and his partner drove over to the corner of 63rd Street and Drexel Avenue to conduct field interviews with several of the subjects who were standing around that intersection. Officer Freeman then drove by the intersection twice to see if he could identify the persons from whom he purchased the narcotics. The first time, Officer Freeman identified co-defendant Nance. He subsequently identified defendant the second time he drove through the intersection.

¶ 10 At that time, defendant was wearing a blue jacket and matched the description provided

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by Officer Freeman. During the field interview, defendant provided the officers with his name and birth date and he was subjected to a protective pat-down search for weapons. Sergeant Markham testified that defendant did not have any weapons on his person and that he was not arrested at the time. He explained that his unit was "working on an ongoing investigation" and that defendant was simply detained and identified before he was released so that their undercover investigation could continue without being compromised.

¶ 11 After recording defendant's information, Sergeant Markham returned to the police station and put together a photo array in which he included a photograph of defendant. He explained that he obtained a photograph of defendant when he ran defendant's name and birth date through the Department's computer system. Sergeant Markham subsequently showed the photo array to Officer Freeman and Officer Freeman positively identified defendant as the person who had sold him heroin that morning. Defendant was arrested at a later date.

¶ 12 Sergeant Markham acknowledged that he never personally saw defendant conduct a narcotics transaction with Officer Freeman. He further acknowledged that when he stopped defendant for identification purposes and conducted a protective pat down of defendant's person, he did not find defendant in possession of any marked bills or drugs. Moreover, when he obtained defendant's information, he did not view a photo ID; rather, he simply recorded the information that defendant provided.

¶ 13 Jason George, a forensic scientist with the Illinois State Police Forensic Sciences Command, testified that on October 29, 2010, he received an evidence bag marked with inventory number 12140363. The bag was properly sealed and labeled in accordance with police

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protocol. George locked the evidence bag in his work station until November 1, 2010, when he was ready to begin his analysis. At that time, George testified that he opened the bag and compared the contents in the bag to the description on the bag's corresponding inventory sheet. The inventory sheet described the contents as follows: "two clear capsules containing a white powdery substance, suspect heroin." Inside the sealed bag, George observed "two clear capsules that were open and loose powder." Based on this discrepancy, George sent a letter to the Chicago police department indicating that the description on the inventory sheet did not precisely match the contents that he observed in the evidence bag.

¶ 14 George then commenced his analysis by weighing the loose powder. He calibrated his scale and determined that the total weight of the substance was 0.167 grams. George then "completed a series of color tests," which are "preliminary tests that are used to distinguish between different types and classes of drugs." He testified that the color test "results indicated the possible presence of heroin." George then tested the powder using a gas chromatograph mass spectrometer, an instrument that is utilized to obtain "distinctive and unique structural information of an unknown substance," which allows him to conclusively identify the substance. Based on the results of the test, George testified that the loose powder was 0.1 grams of heroin.

¶ 15 After presenting the aforementioned testimony, the State rested its case. Defendant moved for a directed finding, but the motion was denied. Defendant elected not to testify and the defense called no witnesses. The parties then proceeded with closing arguments. Defense counsel challenged the sufficiency of the identification testimony and the reliability of the chain of custody of the two heroin capsules because "[t]here [wa]s a discrepancy between what the

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officer said he placed in a heat-sealed bag and what the lab actually received."

¶ 16 After hearing the parties' arguments and reviewing the evidence, the court found defendant guilty of the charged offense. The court explained its verdict as follows:

"The testimony that I considered most reliable was that of Officer Freeman, who testified that on October 10th of this year, he was assigned to do an undercover buy or buys in the area of 63rd and Drexel. He testified to his arrival at that location. He testified to his observations of the defendant at 63rd and Drexel. He talked about engaging the defendant in conversation, at which time the defendant asked him what he wanted. He said he wanted diesel. He wanted two diesels.

He said the defendant then went over to a person who was later identified as Mr. Nance, got these two capsules, which he tendered to the officer. The officer then gave him cash for the two capsules. He then said that he left the scene. He said that he inventoried these two capsules that he received from [defendant].

* * *

So if we are talking about the issue of identification, first of all, we have Officer Freeman testifying to what occurred. He testified that he had an opportunity to observe the defendant for at least two to three minutes during the course of this narcotics investigation.

Officer Freeman is a police officer, [a] trained police officer. He then directed the officers to 63rd and Drexel for the, as Officer Markham said, the second time. At which time he indicated [defendant] was there. And he was identified by Officer Markham as

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being one of the persons that was detained.

And again we have the photo array. Again, if there was any question as to the one person identification that Officer Freeman made, here we have a photo array with four other individuals, including [defendant]. And he makes the identification. So I believe the identification was proper. I believe the identification was solid and unimpeached by the—the officer's testimony rather was unimpeached.

Now the question then becomes, well, what about the two capsules. And counsel argues, and he said, Well, Judge, the fact that these capsules at the time they are received by the lab were open and the powder was outside of the capsules in the packaging itself, the plastic container that the officer had placed it in. And that's correct.

Officer Freeman said that when he recovered the two capsules, he took those two capsules, put them into a heat-sealed envelope and acquired the inventory number. This heat-sealed envelope was then ultimately received by the crime lab. The analyst Mr. George testified that he received the heat-sealed envelope. It was heat-sealed when he received it. He didn't indicate in his testimony any indication at all of any tampering with the particular inventoried item. He did note, however, that when he removed the—opened up this heat-sealed wrapping and took the capsules out, the capsules were open and the powder was inside of the plastic container in which it was contained. He wrote a letter to the police about it which to me is prudent to let them know that.

But again there has been no evidence at all of any tampering in that regard. And there is no reason to conclude that there was any change by anyone, either the addition of

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powder or different capsules or any other items except for the items that Officer Freeman said he put into the envelope, and that was received by the analyst and analyzed by that analyst. And his analysis concluded that there was .1 gram of heroin inside those capsules. And I think that the State has established that those capsules were recovered by Officer Freeman that he did receive from [defendant].

So taking all that evidence into consideration, I believe that the State has proven the case beyond a reasonable doubt, and there will be a finding of guilty."

¶ 17 Defendant filed a motion for a new trial, which the trial court denied, and the parties proceeded to a sentencing hearing. After hearing the arguments advanced in aggravation and mitigation, the court concluded that defendant was "Class X by background" and imposed a sentence of eight years' imprisonment with "a three year period of mandatory supervised release." The court also imposed various fines and fees in the amount of \$2,680. This appeal followed.

¶ 18

II. ANALYSIS

¶ 19

A. Sufficiency of the Evidence

¶ 20 On appeal, defendant first challenges the sufficiency of the evidence. He argues that the State failed to present sufficient identification testimony to establish that he was the individual who sold heroin to Officer Freeman during the course of an undercover narcotics buy operation. Moreover, in addition to the "doubtful and unreliable identification" testimony presented at trial, defendant further argues that the State failed to prove that an adequate chain of custody was maintained over the two capsules containing suspect heroin that were recovered by Officer

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Freeman.² Given the insufficient identification testimony as well as the "complete breakdown in the chain of custody," defendant argues that his conviction must be reversed.

¶ 21 The State, in turn, argues that defendant's challenge to the sufficiency of the evidence is without merit. The State observes that the identification testimony of Officer Freeman was sufficient to prove defendant's guilt beyond a reasonable doubt. Specifically, the State emphasizes that Officer Freeman testified that defendant engaged in a hand-to-hand drug transaction with him and that he identified defendant as the individual who had sold him heroin

² We note that although defendant categorizes his argument pertaining to the chain of custody as a challenge to the sufficiency of the evidence, the substance of his argument appears to be more accurately described as a challenge to foundation and admissibility rather than one of sufficiency. See, e.g., *People v. Alsup*, 241 Ill. 2d 266, 275 (2011) ("The chain of custody establishes a foundation for such evidence as reliable and admissible; it does not function as proof of the existence of an element of the crime of possession of a controlled substance. *** A challenge to the chain of custody does not serve as a challenge to the sufficiency of the evidence to support a conviction ***"); *People v. Woods*, 214 Ill. 2d 455, 471-72 (2005) (recognizing that most chain of custody arguments are merely technical challenges to the adequacy of the foundation laid for the admission of evidence rather than challenges to the sufficiency of the evidence); *People v. DeLuna*, 334 Ill. App. 3d 1, 20 (2002) (recognizing that where a defendant does not challenge the identity of a controlled substance, but rather challenges the State's failure to lay a proper foundation for admitting the controlled substance into evidence, the issue is one of admissibility rather than sufficiency).

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both in person and from a photo array the same day that the transaction occurred. In addition, the State maintains that the evidence presented at trial was sufficient to show that reasonable protective measures were employed to preserve the chain of custody over the two heroin capsules and that there was little likelihood that the narcotics recovered by Officer Freeman were altered or tampered with in any way.

¶ 22

1. Identification

¶ 23 Due process requires proof beyond a reasonable doubt to convict a criminal defendant. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). In reviewing a challenge to the sufficiency of the evidence, it is not a reviewing court's role to retry the defendant; rather, we must view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found each of the essential elements of the crime beyond a reasonable doubt. *People v. Ward*, 215 Ill. 2d 317, 322 (2005); *People v. Hayashi*, 386 Ill. App. 3d 113, 122 (2008). The trier of fact is responsible for evaluating the credibility of the witnesses, drawing reasonable inferences from the evidence, and resolving any inconsistencies in the evidence (*People v. Bannister*, 378 Ill. App. 3d 19, 39 (2007)), and a reviewing court should not substitute its judgment for that of the trier of fact (*People v. Sutherland*, 223 Ill. 2d 187, 242 (2006)). Ultimately, a reviewing court will not reverse a defendant's conviction unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to his guilt. *People v. Carodine*, 374 Ill. App. 3d 16, 24 (2007).

¶ 24 The State bears the burden of proving beyond a reasonable doubt the identity of the person who committed a crime. 720 ILCS 5/3-1 (West 2006); *People v. Slim*, 127 Ill. 2d 302,

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307 (1989). Vague and doubtful identification testimony is insufficient to sustain a criminal conviction; however, the identification testimony of a single witness is sufficient to sustain a conviction if the witness viewed the accused under circumstances that allowed for a positive identification. *People v. Lewis*, 165 Ill. 2d 305, 356 (1995); *Slim*, 127 Ill. 2d at 307; *People v. Grady*, 398 Ill. App. 3d 332, 341 (2010). Ultimately, the reliability of a witness's identification testimony is a question for the trier of fact. *In re Keith C.*, 378 Ill. App. 3d 252, 258 (2007). In assessing a witness's identification testimony, courts employ the factors set forth by the Supreme Court in *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972), and adopted by our supreme court in *Slim*, which include: (1) the opportunity the witness had to view the perpetrator at the time of the offense; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the offender; (4) the certainty of the witness' identification; and (5) the length of time between the offense and the witness' identification. *Lewis*, 165 Ill. 2d at 356; *Slim*, 127 Ill. 2d at 307-08. No one single factor is dispositive; rather, the fact finder should consider all five factors in assessing the reliability of identification testimony. *People v. Smith*, 2012 IL App (4th) 100901, ¶ 87.

¶ 25 Here, Officer Freeman was the primary source of the identification testimony in this case. Although defendant asserts that "[n]one of the *Biggers* factors support Freeman's identification in this case," we do not agree. Officer Freeman testified that he approached defendant at approximately 7:50 a.m. on October 10, 2010, and purchased two capsules of "diesel" from him. The transaction occurred within a two to three minute time period, and during that time, Officer Freeman testified that he was "right next" to defendant and that they conversed with each other

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face-to-face. Although Officer Shortall, the surveillance officer who attempted to record the narcotics transaction on video, testified that his view of defendant during the covert narcotics purchase was obstructed by a large garbage dumpster, there was no evidence that Officer Freeman's view of defendant was ever impeded.

¶ 26 Officer Freeman further testified that he made a radio transmission to other members of the team immediately after his undercover buy and informed them that he had made a "positive" heroin purchase. Although Officer Freeman did not provide the other members of his team with a physical description of defendant at that time, he did describe the clothing that defendant was wearing, which included a blue jacket, jeans and white gym shoes. This description was corroborated by Sergeant Markham, who confirmed that defendant was wearing a blue jacket at the time he was stopped for a field interview, which was approximately 90 minutes after his transaction with Officer Freeman occurred.

¶ 27 Once defendant was detained, Officer Freeman identified defendant as he drove through the intersection where defendant had been stopped by Sergeant Markham. He made the identification from a distance of approximately 50 feet. Later that day, when Officer Freeman returned to the police station, he viewed a photo array containing five images, and identified defendant from the array as the individual who had sold him heroin earlier that morning. Although defendant suggests that a photo array was put together by Sergeant Markham because Officer "Freeman was so uncertain as to [defendant's] involvement," there is no evidence that Officer Freeman ever expressed any hesitancy or uncertainty during either of the two identifications or that the police department's use of the photo array was anything other than a

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routine investigatory strategy. Similarly, the fact that defendant was not arrested immediately following Officer Freeman's positive identification was not because of any perceived shortcomings regarding Officer Freeman's in-person identification; rather, Sergeant Markham explained that defendant was permitted to leave once the officers obtained his information because their undercover narcotics investigation was ongoing and that an arrest at that time would compromise the integrity of their future efforts.

¶ 28 Ultimately, we reiterate that the reliability of a witness' identification testimony is a matter for the trier of fact (*In re Keith C.*, 378 Ill. App. 3d at 258) and that the identification testimony of a single eyewitness is sufficient to sustain a criminal conviction if the witness viewed the accused under circumstances permitting a positive identification (*Lewis*, 165 Ill. 2d 305 at 356; *Grady*, 398 Ill. App. 3d at 341). Based on our review of the relevant factors, we are unable to agree with defendant that the identification testimony presented at trial was insufficient to establish his guilt beyond a reasonable doubt; rather, the fact-finder could have reasonably concluded that the evidence was sufficient to prove defendant's identity as the offender. Having rejected defendant's challenge to the sufficiency of the State's identification testimony, we now address his challenge to the State's chain of custody.

¶ 29 2. Chain of Custody

¶ 30 To sustain a criminal conviction for unlawful possession or delivery of a controlled substance, it "is axiomatic that the State must prove that the material recovered from the defendant and which forms the basis of the charge is, in fact, a controlled substance." *People v. Woods*, 214 Ill. 2d 455, 466 (2005); see also *People v. Britton*, 2012 IL App (1st) 102322, ¶ 18.

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Because narcotics charges involve physical evidence that is often not readily identifiable and is susceptible to tampering, contamination or exchange, the State is required to establish a sufficient chain of custody and show that the substance recovered from the defendant was the same substance that was later tested and identified as contraband by a forensic chemist. *Woods*, 214 Ill. 2d at 467; *People v. Carodine*, 374 Ill. App. 3d 16, 26-27 (2007). To meet its burden, the State must establish that police took reasonable protective measures to ensure that the chain of custody was sufficiently complete and that it is improbable that the recovered evidence has been subjected to tampering or accidental substitution from the time it was collected to the time it was tested. *People v. Alsup*, 241 Ill. 2d 266, 274 (2011); *Woods*, 214 Ill. 2d at 467; *People v. Paige*, 378 Ill. App. 3d at 95, 98 (2007). Once the State meets this threshold burden and establishes a *prima facie* case, a defendant may only challenge the chain of custody by producing evidence of *actual* tampering, substitution, or contamination. *Alsup*, 241 Ill. 2d at 274-75; *Woods*, 214 Ill. 2d at 467. Absent such evidence, any deficiencies in the chain of custody go to the weight, not the admissibility, of such evidence. *Woods*, 214 Ill. 2d at 467; *Paige*, 378 Ill. App. 3d at 98.

¶ 31 Here, defendant asserts that this case involves the rare situation where a "complete breakdown" in the chain of custody occurred. We do not agree. Officer Freeman testified that he maintained exclusive control over the two heroin capsules that he obtained from defendant from the time that he made the purchase to the time that he returned to the police station. He further testified that once he arrived at the station, he inventoried the evidence in accordance with police protocol. Specifically, Officer Freeman explained that he placed the two capsules, which had remained intact during their transport to the police station, in an evidence bag that was

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subsequently heat-sealed. The capsules were then assigned a unique identifying inventory number. Officer Freeman further testified that once the evidence was properly sealed and marked with inventory number 12140363, the capsules were sent directly to the state crime lab for testing.

¶ 32 Forensic scientist Jason George provided additional testimony pertaining to the chain of custody in this case. George testified that he received an evidence bag marked with inventory number 12140363 on October 29, 2010. He confirmed that the bag was heat-sealed at the time the evidence came into his possession. Upon opening the bag, George compared the contents of the bag to the description of the bag's content contained on its inventory sheet. He observed that although the inventory sheet described the contents as "two clear capsules containing a white powdery substance, suspect heroin," the bag actually contained "two clear capsules that were open and loose powder."

¶ 33 Based on the aforementioned testimony, we find that the State satisfied its burden of establishing a *prima facie* showing that a sufficient chain of custody was maintained over narcotics that defendant sold to Officer Freeman. The only difference between the items Officer Freeman inventoried and the items received and tested by forensic scientist Jason George was that the capsules were no longer intact and that the powdery substance, which was later found to be heroin, was loose within the sealed evidence bag. This minor disparity does not warrant a finding that there has been a complete breakdown in the chain of custody. See, e.g., *Britton*, 2012 IL App (1st) 102322, ¶¶ 19-20 (finding that the State made a *prima facie* showing of a sufficient chain of custody even though there was a minor disparity in the number of bags

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containing suspect narcotics that police recovered and the number of bags that were subsequently tested); *DeLuna*, 334 Ill. App. 3d at 23-24 (concluding that the different descriptions of the appearance of the narcotics package seized from the defendant were "minor" and did not result in a complete breakdown in the chain of custody or create reasonable doubt as to the defendant's guilt). Here, although the capsules containing the powdery substance had broken open, there was no evidence of tampering, since the evidence was in a sealed condition when George received the items. See *People v. Johnson*, 361 Ill. App. 3d 430, 442-43 (2005) ("Showing that evidence remained in official hands in a sealed container and was tracked under a consistent identifying number or code effectively excludes the possibility of anything but deliberate tampering"). Ultimately, because the testimony presented at trial established that the evidence was received in a sealed condition with a matching inventory number, the minor difference in the descriptions of the substance provided by Officer Freeman and George does not warrant a finding that the integrity of the evidence had been compromised. *Paige*, 378 Ill. App. 3d at 99. Accordingly, given that the State established its *prima facie* case, the burden shifted to defendant to show evidence of actual tampering. *Alsup*, 241 Ill. 2d at 279. This, however, defendant failed to do. Given the lack of evidence of actual tampering, we find that the evidence that the State did present regarding the chain of custody of the two heroin capsules raises no significant possibility that the integrity of the capsules had been compromised or that defendant had not been proven guilty of delivering the controlled substance beyond a reasonable doubt.

¶ 34 In so finding, we are unpersuaded by defendant's reliance on this court's earlier decisions *People v. Terry*, 211 Ill. App. 3d 968 (1991) and *People v. Gibson*, 287 Ill. App. 3d 878 (1997).

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In *Terry*, we concluded that the State failed to meet its burden of establishing a reasonable probability that the controlled substance evidence had not been subjected to any alteration or substitution where an officer testified that he inventoried 32 packets of suspect cocaine weighing approximately 8 grams and the forensic scientist testified that he received 42 packets containing a yellow substance that weighed approximately 12 grams. *Id.* at 973. We found that "[t]his disparity, in itself, cast[ed] more than a reasonable doubt that the evidence recovered from [the defendant's] apartment was not the same evidence analyzed by [the scientist]." Later, in *Gibson*, we reversed a defendant's controlled substance conviction where the "State's attempt at establishing a chain of custody was even more deficient than that found in *Terry*." *Gibson*, 287 Ill. App. 3d at 882. In that case, an officer testified that he weighed suspect cocaine recovered from the defendant on a scale and recorded the weight as 2 grams before sending the evidence for forensic testing. The officer did not provide any testimony detailing the procedures he employed to ensure the integrity of the evidence had been preserved. Later during the trial, the parties stipulated that the forensic scientist determined the weight of the evidence to be 9.3 grams, which was "almost a five-fold increase." *Id.* Ultimately, based on the break in the chain of custody as well as the "substantial" discrepancies regarding the weight of the evidence, we concluded that the State failed to demonstrate a reasonable probability that the drug evidence used to convict the defendant was not altered or substituted. *Id.*

¶ 35 Here, in contrast, based on our review of the record, we do not find that there are any major deficiencies in the chain of custody evidence that are comparable to those found in *Terry* and *Gibson*. Notably, there was no break in the chain of custody as Officer Freeman testified that

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the two heroin capsules remained in possession and control from the time of the purchase to the time he put them in a heat-sealed envelope. In addition, as we set forth above, there was no major discrepancy between the evidence described by Officer Freeman and the evidence received by George. Ultimately, we find that the State established that a sufficient chain of custody had been maintained over the narcotics recovered from defendant and that it laid an adequate foundation for the introduction of the heroin into evidence. Accordingly, we affirm defendant's conviction for delivery of a controlled substance.

¶ 36 B. Sentencing Issues

¶ 37 1. Prison Term

¶ 38 Defendant next challenges the 8-year sentence imposed by the circuit court. He argues that the court failed to properly consider relevant mitigating evidence and that his sentence is excessive. Defendant urges this court to reduce his sentence to the statutory minimum of 6 years' imprisonment.

¶ 39 The State responds that the 8-year sentence that the trial court imposed on defendant was not an abuse of discretion. Because the record reflects that the trial court carefully considered statutory factors in aggravation and mitigation and imposed a sentence that fell well-within the prescribed statutory range for Class X offenders, the State argues that there is no basis to disturb defendant's sentence on appeal.

¶ 40 The Illinois Constitution requires a trial court to impose a sentence that achieves a balance between the seriousness of the offense and the defendant's rehabilitative potential. Ill. Const. 1970, art. I, §11 ("All penalties shall be determined both according to the seriousness of

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the offense and with the objective of restoring the offender to useful citizenship"); *People v. Lee*, 379 Ill. App. 3d 533, 539 (2008). To find the proper balance, the trial court must consider: "the nature and circumstances of the crime, the defendant's conduct in the commission of the crime, and the defendant's personal history, including his age, demeanor, habits, mentality, credibility, criminal history, general moral character, social environment and education." *People v. Maldonado*, 240 Ill. App. 3d 470, 485-86 (1992). Because the trial court is in the best position to weigh these factors, the sentence that the trial court imposes is entitled to great deference and will not be altered absent an abuse of discretion. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000); *Lee*, 379 Ill. App. 3d at 539. A sentence that is within the statutory limits may be an abuse of discretion if it is greatly at variance with the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense. *Stacey*, 193 Ill. 2d at 210. Ultimately, while a reviewing court's authority to reduce a criminal sentence is recognized to be an "important and valuable tool in the appellate court's choice of remedies when reviewing sentences imposed by the circuit court," our supreme court has reiterated that the power should be "exercised 'cautiously and sparingly.'" *People v. Jones*, 168 Ill. 2d 367, 378 (1995), quoting *People v. O'Neal*, 125 Ill. 2d 291, 300 (1988).

¶ 41 Defendant concedes that his eight-year sentence falls within the permissible statutory range for Class X offenders, which calls for a sentence of 6 to 30 years' imprisonment. See 730 ILCS 5/5-4.5-25 (West 2008) ("The sentence of imprisonment shall be a determinate sentence of not less than 6 years and not less than 30 years"). However, he contends that his sentence is excessive in light of the fact that he was 42-years-old at the time of the offense and was working

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and supporting his family. In addition, defendant suggests that his sentence was excessive in light of the fact that it was his co-defendant Nance who was the "primary offender."

¶ 42 The record reflects that at defendant's sentencing hearing, the court heard evidence advanced by the parties in aggravation and mitigation. In aggravation, the court was informed of defendant's extensive criminal history, which spanned from 1994 to 2008, and included convictions for robbery, theft, aggravated robbery, four separate convictions for retail theft and one conviction for driving under the influence of alcohol. The State argued, in pertinent part, that defendant's criminal background demonstrated that he "has not learned to live a life free of crime," and urged the court to impose a sentence severe enough to potentially deter defendant from engaging in additional criminal wrongdoing. Specifically, the State urged the court to "sentence him to a period of incarceration which if he does get out and decides to turn around his life, that he looks at this sentence and realizes that's not where he wants to be anymore." In mitigation, defense counsel informed the court that defendant was married and had three children, and that his wife was pregnant with the couple's fourth child. Defense counsel further informed the court that defendant's parents had both recently passed away and that he had been steadily employed by Catholic Charities. The court also heard from defendant, who elected to deliver a statement in allocution. In his statement, defendant argued that the case against him was "fabricated" and that he had been "set up." Given that the case against him was fabricated, and the fact that he financially supported his family, defendant asked the court to be lenient and allow him to "get back to [his] family as soon as possible" so that they could avoid homelessness.

¶ 43 After hearing the aforementioned arguments, the court elected to sentence defendant to 8

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years' imprisonment, and explained its rationale behind the sentencing as follows:

"I have looked at the Presentence Investigation. I have heard the arguments in aggravation, the arguments in mitigation, and allocution by the defendant.

You're Class X by background, which means that your background has put you in the place that you are today as far as sentencing by this Court is concerned. It's a minimum of six years incarceration.

Unfortunately, you were doing well, but you got yourself involved in a situation where you wind up before me. I heard the evidence in the case. I made my finding of guilty regarding that.

I'm going to sentence you on the Class X felony to eight years in the Illinois Department of Corrections. There's a three year period of mandatory supervised release. I'll give you credit for the time of incarceration."

¶ 44 The record thus reveals that the court gave careful consideration to all of the relevant factors in imposing defendant's sentence. Although the court could have sentenced defendant to the 6-year statutory minimum, it elected not to do so. The mere fact that defendant's co-defendant received a 6-year sentence following a guilty plea, does not render defendant's sentence unreasonable or excessive. See, *e.g.*, *People v. Scott*, 2012 IL App (4th) 100304, ¶¶ 24-25 (recognizing that circumstances may warrant co-defendants receiving different sentences and that the sentence imposed on a co-defendant following a plea agreement does not provide a valid basis of comparison to a sentence entered after a trial). We reiterate that the trial court is in the best position to determine the appropriate sentence and, conclude that based on our review of the

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acts, such defendant shall be sentenced as a Class X offender." 730 ILCS 5/5-5-3(c)(8) (West 2008).

¶ 49 The applicable sentencing range for persons sentenced as Class X offenders is "not less than 6 years and not more than 30 years." 730 ILCS 5/5-8-1(a)(3) (West 2008). In addition, persons sentenced as Class X offenders are subject to a three-year MSR term at the conclusion of their prison term. See 730 ILCS 5/5-8-1(d)(1) (West 2008). The applicable MSR term applicable to persons sentenced for Class 2 felonies, in contrast, is 2 years. 730 ILCS 5/5-8-1(d)(2) (West 2008).

¶ 50 There is no dispute that defendant was convicted of a Class 2 felony offense, but was subject to sentencing as a Class X offender based on his criminal history. Although defendant suggests that the length of the MSR term imposed should be based on the classification of the underlying felony conviction rather than the classification of the requisite sentencing range, this argument has been repeatedly rejected by reviewing courts. See, e.g., *People v. Wade*, 2013 IL App (1st) 112547, ¶¶ 36-38 (recognizing that defendant's subject to Class X sentences are subject to the Class X three-year MSR term); *People v. Brisco*, 2012 IL App (1st) 101612, ¶¶ 59-62 (same); *People v. Rutledge*, 409 Ill. App. 3d 22, 26 (2011) (same); *People v. Lee*, 397 Ill. App. 3d 1067, 1072-73 (2010) (same); *People v. McKinney*, 399 Ill. App. 3d 77, 82-83 (2010) (same); *People v. Anderson*, 272 Ill. App. 3d 537, 541 (1995) (same). Courts have reasoned that "the gravity of the conduct offensive to the public safety and welfare authorizing Class X sentencing, justifiably requires lengthier watchfulness after prison release than violations of a less serious nature." *Anderson*, 272 Ill. App. 3d at 541.

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¶ 51 Although defendant acknowledges the authority to the contrary, he suggests that a different result should be obtained in light of the supreme court's decision in *People v. Pullen*, 192 Ill. 2d 226 (2000). In that case, the defendant pled guilty to multiple counts of burglary and was sentenced as a Class X offender. The issue before the court was the effect of the consecutive sentencing provision on offenders who are Class X eligible by background.

¶ 52 This court, however, has repeatedly rejected claims that *Pullen* requires the imposition of a lower-MSR term when the defendant is convicted of a lower class offense but is sentenced as a Class X offender, noting that the consecutive sentencing statute discussed in *Pullen* did not specify the sentence Class X offenders receive; rather, the discussion was limited to the extent to which separate sentences for separate offenses may be served consecutively. Reviewing courts have consistently held that *Pullen* does not disturb the conclusion that individuals subject to Class X sentencing are subject to the 3-year Class X MSR period. See, e.g., *Wade*, 2013 IL App (1st) 1164874, ¶¶ 36-38; *Brisco*, 2012 IL App (1st) 101612, ¶ 62; *Rutledge*, 409 Ill. App. 3d at 26; *Lee*, 397 Ill. App. 3d at 1072; *McKinney*, 399 Ill. App. 3d at 88. We decline defendant's invitation to depart from these well-reasoned decisions. Accordingly, based on the aforementioned authority, we conclude that defendant, who was convicted of a Class 2 felony and sentenced as a Class X offender because of his criminal history, is subject to the 3-year MSR period required by the Class X sentencing statute.

¶ 53 3. Pre-Sentencing Credit

¶ 54 Next, defendant argues, and the State agrees, that his mittimus should be corrected to reflect 199 days of pre-sentencing custodial credit rather than the 170 days currently delineated

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on his mittimus.

¶ 55 Here, the record reflects that when defendant appeared in court on December 6, 2010, after receiving notice of his indictment in the mail, he was unable to pay his bond and was taken into custody that same day. Defendant remained in custody until he was sentenced on June 23, 2011. Accordingly, defendant is entitled to 199 days of pre-sentencing custody credit. Pursuant to Supreme Court Rule 615(b), a reviewing court has the authority to correct an offender's mittimus without remanding the cause to the circuit court. Ill. S. Ct. R. 615(b) (eff. Aug 27, 1999); *People v. Pryor*, 372 Ill. App. 3d 422, 438 (2007). Accordingly, we order that the mittimus be corrected to accurately reflect 199 days of pre-sentencing custody credit. *People v. Harper*, 387 Ill. App. 3d 240, 244 (2008).

¶ 56 In addition, pursuant to section 110-14(a) of the Code of Criminal Procedure, defendant is entitled to a \$5 credit for each day that he was incarcerated prior to sentencing, which he may use to offset his fines. 725 ILCS 5/110-14(a) (West 2008) ("Any person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on a conviction of such offense shall be allowed a credit of \$5 for each day so incarcerated upon application of the defendant. However, in no case shall the amount so allowed or credited exceed the amount of the fine"). Given that defendant spent 199 days in pre-sentencing custody, he is eligible for a \$995 monetary credit to be used to offset his fines.

¶ 57 **4. Controlled Substance Fine**

¶ 58 Defendant next contends that the court erred in imposing a \$2,000 controlled substance assessment fine. He argues that the \$2,000 controlled substance assessment is only applicable to

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Class 1 felony narcotic offenses. Because he was convicted of delivery of a controlled substance (less than 1 gram of heroin) which is a Class 2 offense, defendant maintains that the court should have only imposed \$1,000 fine. The State agrees that the \$2,000 controlled substance assessment should be corrected and decreased to \$1,000, the proper assessment applicable to Class 2 drug felonies.

¶ 59 Section 411.2(a) of the Illinois Controlled Substance Act calls for the assessment of various sums against persons convicted of narcotics offenses. 720 ILCS 570/411.2(a) (West 2006). The amount of the assessment depends on the nature of the crime committed.

Specifically, this statutory provision provides as follows:

"(a) Every person convicted of a violation of [the Illinois Controlled Substance] Act, and every person placed on probation, conditional discharge, supervision or probation under Section 410 of this Act, shall be assessed for each offense a sum fixed at:

* * *

(2) \$2,000 for a Class 1 felony;

(3) \$1,000 for a Class 2 felony" 720 ILCS 570/411.2(2), (3) (West 2008).

¶ 60 It is undisputed that defendant was convicted of delivery of less than 1 gram of heroin, which is a Class 2 felony offense. Accordingly, we agree with the parties that defendant should have only been assessed a \$1,000 controlled substance fine and correct the mittimus to reflect the proper amount. In addition, because the controlled substance assessment is a fine, it is subject to offset by pre-sentencing incarceration credit. *People v. Jones*, 223 Ill. 2d 569, 592 (2006); *People v. Gorosteata*, 374 Ill. App. 3d 203, 228 (2007). Accordingly, defendant is entitled to

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apply his \$995 pre-sentencing incarceration credit against his \$1,000 controlled substance assessment.

¶ 61

5. DNA Analysis Fee

¶ 62 Defendant also challenges the \$200 DNA analysis fee assessed by the trial court pursuant to 730 ILCS 5/5-4-3(j) (West 2008). Because he had already submitted a DNA sample and paid the \$200 assessment in connection with a prior felony conviction, defendant argues that the circuit court erred in ordering him to pay a second DNA analysis fee. The State agrees that the fee was assessed in error and that it should be vacated from defendant's sentencing order.

¶ 63 Section 5-4-3 is a sentencing provision in the Unified Code of Corrections and provides that any person "convicted or found guilty of any offense classified as a felony under Illinois law *** shall, regardless of the sentence or disposition imposed, be required to submit specimens of blood, saliva, or tissue to the Illinois Department of State Police in accordance with the provisions of this Section." 730 ILCS 5/5-4-3(a) (West 2008). Subsection (j) of that provision mandates that "Any person required *** to submit specimens of blood, saliva, or tissue to the Illinois Department of State Police for analysis and categorization into genetic marker grouping, in addition to any other disposition, penalty, or fine imposed, shall pay an analysis fee of \$200." 730 ILCS 5/5-4-3(j) (West 2008).

¶ 64 In *People v. Marshall*, 242 Ill. 2d 285 (2011), our supreme court concluded that based on the plain language of the statute, "section 5-4-3 authorizes a trial court to order the taking, analysis and indexing of a qualifying offender's DNA and the payment of the analysis fee *only* where that defendant is not currently registered in the DNA database." (Emphasis added.)

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Marshall, 242 Ill. 2d at 303. Accordingly, repeat offenders are not required to pay a \$200 DNA analysis fee each time they are convicted of another felony offense; rather, they are only required to pay the fee the first time that they are convicted of a qualifying offense. *Id.*

¶ 65 In this case, the record reflects that defendant has prior felony convictions, and there is an Illinois State Police DNA submission and analysis report attached as an appendix to defendant's brief indicating that defendant's DNA was collected on June 30, 2006, and entered into the CODIS database on March 23, 2004. Although the report does not specifically indicate that the \$200 DNA fee was assessed at that time, the DNA analysis and fee requirement was added to the Unified Code of Corrections in 1997 (Pub. Act 90-130 (eff. Jan. 1, 1998) (amending 730 ILCS 5/5-4-3 (West 2008))), and we may presume that the circuit court assessed the fee when it imposed the DNA analysis requirement as part of defendant's prior sentence. See *People v. Leach*, 2011 IL App (1st) 090339, ¶ 38. Accordingly, because defendant had previously submitted a DNA sample, the assessment of the \$200 DNA analysis fee as part of his sentence for the instant offense was improper. We thus vacate the portion of the circuit court's sentencing order imposing the \$200 DNA analysis fee. *Marshall*, 242 Ill. 2d at 303; *Leach*, 2011 IL App (1st) 090339, ¶ 38.

¶ 66

6. Electronic Citation Fee

¶ 67 Lastly, defendant argues that the trial court erred in assessing a \$5 electronic citation fee pursuant to section 27.3e of the Clerks of Court Act (705 ILCS 105/27.3e (West 2008)). He argues that the fee is not applicable because he was convicted of a narcotics offense. The State agrees that this fee was assessed in error and should be vacated from the sentencing order.

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¶ 68 We agree with the parties. Section 27.3e of the Clerks of Court Act calls for the payment of \$5 electronic citation fee by defendants "in any traffic, misdemeanor, municipal ordinance, or conservation case." 705 ILCS 105/27.3e (West 2008). Defendant's felony conviction for delivery of a controlled substance is not one of the offenses enumerated in section 27.3e of the Clerks of Court Act. Accordingly, we vacate the \$5 electronic citation fee.

¶ 69

III. CONCLUSION

¶ 70 For the aforementioned reasons, we affirm defendant's conviction and 8-year prison sentence. We correct the mittimus to reflect 199 days of pre-sentencing custody credit and a \$1,000 controlled substance assessment. Defendant is entitled to a \$995 credit against the controlled substance assessment. Finally, we vacate the \$200 DNA analysis fee and the \$5 electronic citation fee.

¶ 71 Affirmed in part; modified in part; and vacated in part.