SECOND DIVISION
June 30, 2015

No. 1-13-2378

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. 13 CR 8956
	)	
WILLIE JACKSON,	)	Honorable
	)	Vincent M. Gaughan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Justices Neville and Liu concurred in the judgment.

O R D E R

¶ 1 *Held:* Defendant forfeited claim that the circuit court improperly stated the reasonable doubt standard during *voir dire*; vacated number of improperly assessed fines and fees; credited $5 per day for time spent in presentence custody; public defender fee vacated and matter remanded for hearing on fee; judgment affirmed in all other respects.

¶ 2 Following a jury trial, defendant Willie Jackson was convicted of delivery of a controlled substance within 1000 feet of a school and sentenced as a Class X offender to seven years' imprisonment. On appeal, he contends that the circuit court violated his right to due process and committed reversible error when it improperly instructed the "jury" regarding the reasonable doubt standard. He also contests the propriety of certain fines and fees imposed against him, and asserts that this court should vacate the public defender reimbursement fee outright.

¶ 3 The record shows that defendant was charged with delivery of a controlled substance (heroin) within 1000 feet of a school after selling a bag of suspect heroin to an undercover buy officer. Defendant subsequently elected a jury trial and during *voir dire* the court attempted to explain the concept of the State's burden of proof and reasonable doubt to potential jurors. In doing so, the court stated:

> "[I] want to discuss some constitutional principles that apply to all criminal cases. *** The State has the burden of proving the guilt of the defendant beyond a reasonable doubt, and this burden remains on the State throughout the case. *** The next constitutional principle is somebody who may have served on civil juries, and there, if I use as a scale, all you have to do is tilt that scale and the burden of proof in a civil case is proof beyond a preponderance of the evidence. The defendant, is that it more likely than not that the events occurred.
>
> In a criminal case, especially in a criminal case in Illinois, the State has the burden of proof, and that burden of proof is proof beyond a reasonable doubt.

> Illinois does not define what reasonable doubt is. That is up for the trier of facts, if you're selected as jurors. But using the scale again as an analogy, this would be proof beyond a reasonable doubt."

The court also informed the potential jurors that after they had heard all of the evidence, arguments of the lawyers, and instructions on the law, they would receive written instructions and retire to the jury room to reach a verdict.

¶ 4 Following jury selection, a trial was held and evidence was introduced that at 6 p.m. on April 14, 2013, Chicago police officer Isaac Shavers was acting as an undercover narcotics officer in the 3900 block of West Jackson Boulevard. Officer Shavers saw defendant standing next to a bus stop at 3951 West Jackson Boulevard, which was 477 feet from Delano Elementary School. After engaging in a conversation with defendant, Officer Shavers handed him $10 in prerecorded funds in exchange for one bag of suspect heroin. Officer Shavers then left the area and radioed his surveillance team that he had made a positive narcotics buy with defendant. The enforcement officers then detained defendant, and recovered $156 dollars from him, including the prerecorded $10 bill. The forensic analyst testified that the recovered substance weighed .206 gram and tested positive for heroin.

¶ 5 During the close of evidence and arguments of opposing counsel, the court instructed the jury that defendant was presumed innocent and "[t]his presumption remains with him throughout every stage of the trial and during your deliberations on a verdict and it is not overcome unless from all the evidence in this case you are convinced beyond a reasonable doubt that he is guilty." The court further instructed the jury that the State has the burden of proving defendant guilty beyond a reasonable doubt, and this burden remains on the State throughout the case, and that the

elements of the offense must be proved beyond a reasonable doubt. The jury then deliberated and found defendant guilty of delivery of a controlled substance within 1000 feet of a school. The court subsequently denied defendant's motion for a new trial, sentenced him to seven years' imprisonment, and imposed a number of fines and fees.

¶ 6 At the close of this proceeding, the State filed a motion for reimbursement of the public defender fee in the amount of $250. The court noted that the matter went to a jury trial and has been up for some time, and imposed a public defender fee of $250.

¶ 7 On appeal, defendant first contends that he was denied his right to a fair trial when the court instructed the "jury" that it was up to them to define reasonable doubt and attempted to demonstrate the State's burden with hand gestures mimicking the tipping of scales. Defendant acknowledges that he waived this issue by failing to raise it below (*People v. Enoch*, 122 Ill. 2d 176, 186 (1988)), but he maintains that it may be analyzed under the second prong of the plain error rule.

¶ 8 The State responds that the issue here involves statements made by the trial court during *voir dire* pursuant to Supreme Court Rule 431(b) (eff. July 1, 2012), and not jury instructions. Therefore, any failure to follow the requirements of the Rule does not amount to structural error, and therefore cannot be plain error, citing *People v. Thompson*, 238 Ill. 2d 598, 611 (2010).

¶ 9 "The plain-error rule bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved claims of error in specific circumstances." *Id*. at 613 (2010). The first step in plain error review is to determine whether a clear or obvious error occurred. *In re M.W.*, 232 Ill.2d 408, 431 (2009). If a clear or obvious error occurred, a reviewing court will grant relief if either: (1) " 'the evidence is so closely balanced that the error alone threatened to tip the

scales of justice against the defendant,' " or (2) "the 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.' " *Id*. (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)).

¶10 We find that the court's statements during *voir dire* concerning the State's burden and standard of proof were not erroneous and therefore plain error analysis is unnecessary. In a similar case, *Johnson*, 2013 IL App (1st) 111317, ¶¶ 52-54, the trial court advised the potential jurors during *voir dire* that:

> "The State has the burden of proof beyond a reasonable doubt. In Illinois we do not – it is not defined by the Supreme Court or by the State legislature. *That's something for you to decide*. But if any of you have served on a civil jury, if you *use the analogy of a scale*, all you have to do is tilt it.
>
> And that's proof beyond a preponderance of the evidence.
>
> In a criminal case, if you use the same scale, it's a balance like this. (Indicating.)
>
> Proof beyond a reasonable doubt is the highest burden that there is at law in Illinois and the United States." (Emphasis added.) *Johnson*, 2013 IL App (1st) 111317, ¶ 52.

¶ 11 Here, as in *Johnson*, the court used the scale analogy of reasonable doubt versus preponderance of the evidence, and further stated that the standard of reasonable doubt was for the jurors to decide. Although, as in *Johnson*, 2013 IL App (1st) 111317, ¶ 54, we do not condone the reference and comparison to the civil standard, we cannot say that the court's comments constitute error where it is evident that the court demonstrated that the reasonable doubt standard was higher than the preponderance standard, and that they would be charged with

deciding what it meant. Accordingly, we would find no error even if we were to review this issue under the plain error doctrine. *Johnson*, 2013 IL App (1st) 111317, ¶ 54.

¶ 12 In reaching that conclusion, we find defendant's reliance on *U.S. v. Hernandez*, 176 F. 3d 719 (3d Cir. 1999) misplaced since federal district cases have no precedential value in this court. *People v. High Tower*, 172 Ill. App. 3d 678, 691 (1988). We also find defendant's reliance on *People v. Turman*, 2011 IL App (1st) 091019, ¶¶ 19-25, misplaced, where the jury, during deliberations, sent the circuit court a note requesting a definition for reasonable doubt, and the court *instructed* the jury that it is for them to collectively determine. Here, there was no instruction at issue; rather, the contested statement was made during *voir dire* as the court attempted to comply with Rule 431(b).

¶ 13 We are also not persuaded by defendant's further claim that his case is similar to *People v. Franklin*, 2012 IL App (3d) 100618, ¶ 4, where the court advised the potential jurors during *voir dire* that, "[b]eyond a reasonable doubt means beyond a reasonable doubt. It's what each of you individually and collectively, as 12 of you, believe is beyond a reasonable doubt." Then, during closing argument, the State reminded the jurors of this statement. *Franklin*, 2012 IL App (3d) 100618, ¶ 20. The reviewing court observed that in Illinois, courts are prohibited from defining the reasonable doubt standard, and no instruction should be given defining it. *Franklin*, 2012 IL App (3d) 100618, ¶ 24. The reviewing court then concluded that the court's "instruction" was constitutionally deficient because, by telling the jurors that it was for them to collectively determine what reasonable doubt meant, there is a reasonable likelihood that the jurors understood the "instruction" to allow a conviction based on proof less than reasonable doubt. *Franklin*, 2012 IL App (3d) 100618, ¶ 28.

¶ 14 Unlike the court in *Franklin*, we do not consider the complained of comments made during *voir dire*, prior to the jury being empaneled, to be jury instructions. At the point the trial court began discussing reasonable doubt with the venire, it is clear from the record that the court was merely fulfilling its requirements under Illinois Supreme Court Rule 431(b). Rule 431(b) requires the trial court to inquire of the venire as to whether the potential jurors understand and could accept that before a defendant can be convicted, the State must prove the defendant guilty beyond a reasonable doubt. The record shows that the court was explaining this concept to the potential jurors and ascertaining their understanding and acceptance of this principle. Jury instructions, on the other hand, involve the constitutional right to have the jury adequately appraised of the appropriate law. *People v. Flowers*, 138 Ill. 2d 218, 236 (1990). Here, after hearing all of the evidence and closing arguments, the jury was properly instructed on the reasonable doubt standard of proof.

¶ 15 Where no error occurs, plain error analysis in unnecessary.

¶ 16 Defendant next contends, the State concedes and we agree that a number of fees, fines and costs were improperly imposed. Defendant first contends that the $100 Methamphetamine Law Enforcement Fund Fine and the $25 Methamphetamine Drug Traffic Prevention Fund fine (730 ILCS 5/5-9-1.1-5 (West 2012)) should be vacated because his offense did not involve methamphetamine. We agree, and accordingly vacate these fines.

¶ 17 Defendant contends that the $250 DNA analysis fee is void and should be vacated because his DNA is already on file in the State's database. Pursuant to *People v. Marshall*, 242 Ill. 2d 285, 303 (2011), the imposition of the DNA fee can only be imposed if defendant's DNA has not already been collected and stored in the State's database. To vacate the fee under

Marshall, defendant need only show that he was convicted of a felony after the DNA requirement went into effect on January 1, 1998. *People v. Leach*, 2011 IL App (1st) 090339, ¶ 38. Here, defendant was convicted of felonies after that date and accordingly should not be subject to the $250 DNA fee, and we vacate it.

¶ 18 Defendant also contends that the $5 Electronic Citation Fee should be vacated because it does not apply to felony convictions. *People v. Moore*, 2014 IL App (1st) 112592-B, ¶ 46. We agree and vacate it.

¶ 19 Defendant next contends that he is entitled to the $5 per day credit against his fines for the 87 days he spent in presentence custody. 725 ILCS 5/110-14 (West 2012). We agree, and reduce the monetary assessment by $435.

¶ 20 Finally, defendant contends that we should vacate outright the $250 Public Defender Reimbursement fee imposed against him without notice or a hearing. The State responds that the fee should be vacated, but maintains that we should remand the matter for a hearing.

¶ 21 Section 113-3.1(a) of the Code of Criminal Procedure (Code) (725 ILCS 5/113-3.1(a) (West 2012)) provides that the court may order defendant, who is appointed counsel, to pay the clerk of the circuit court a reasonable sum to reimburse either the county or the State for such representation. At a hearing to determine the amount of payment, the court shall consider the affidavit prepared by defendant and any other information pertaining to his financial circumstances. Such hearing shall be conducted on the court's own motion or on motion of the State's Attorney at any time after the appointment of counsel but no later than 90 days after the entry of a final order disposing of the case at the trial level. 725 ILCS 5/113-3.1(a) (West 2012).

¶ 22 Both parties agree that the trial court did not comply with the requirements of section 113-3.1(a) in assessing the public defender fee. Although the matter was addressed within 90 days, the trial court never inquired into defendant's financial status or ability to pay.

¶ 23 In this respect, we find the case similar to *People v. Somers*, 2013 IL 114054, ¶ 15, where the trial court addressed the issue within the 90-day statutory time period, but failed to conduct an adequate hearing under section 113-3.1(a). The supreme court thus found that the remedy was to remand for a proper hearing under section 113-3.1(a). *Somers*, 2013 IL 114054, ¶ 18.

¶ 24 We reach the same conclusion here where the court did not conduct an adequate hearing in conformity with section 113-3.1(a). 725 ILCS 5/113-3.1(a) (West 2012). Accordingly, we remand the matter to the trial court for an adequate hearing on the State's motion to reimburse the public defender's office. *Somers*, 2013 IL 114054, ¶ 20.

¶ 25 In so holding, we reject defendant's claim that the fee should be vacated outright because there was no hearing. The fact that the court did not inquire into defendant's ability to pay the fee does not demonstrate that a hearing did not take place. See *People v. Guajardo*, 262 Ill. App. 3d 747, 757 (1994) (the term "hearing" is generally understood to mean a judicial examination of the issues between the parties, whether of law or of fact). The court's failure to comply with section 113-3.1(a) only shows that the hearing held was inadequate. We therefore vacate the fee and remand for an adequate hearing. *Somers*, 2013 IL 114054, ¶ 20.

¶ 26 In sum, we find no plain error to excuse defendant's forfeiture of his claim that the court violated his due process rights when it discussed reasonable doubt during *voir dire*. We vacate the $125 methamphetamine fine, the $250 DNA analysis fee, the $5 Electronic Citation Fee, and credit defendant $435 for time spent in presentence custody. We also vacate the $250 public

defender reimbursement fee and remand for a hearing on that issue, and affirm the judgment of the circuit court of Cook County in all other respects.

¶ 27 Affirmed in part; vacated in part; remanded with directions.