

probation by a preponderance of the evidence, that his sentence was excessive and did not account for his rehabilitative potential, that he is entitled to an additional 37 days of sentencing credit, that his mittimus should be corrected to reflect the offenses of which he was convicted, and that he was erroneously assessed a \$25 court services fee.

¶ 3 The record shows, in relevant part, that on January 23, 2009, defendant pleaded guilty to delivery of a controlled substance in two separate cases (09-CR-791 and 09-CR-792) in exchange for concurrent terms of two years' probation subject to the condition that he, *inter alia*, "[r]efrain from possessing a firearm or other dangerous weapons." He was also assessed fines and fees of \$1,635.

¶ 4 On March 30, 2009, the State filed a "Petition for Violation of Probation and Warrant" alleging, *inter alia*, that defendant had been arrested on a charge of unlawful use of a weapon (UUW) and thereby violated his probation. At the hearing on that petition, Chicago police officer Jeffery Zwit testified that about 7:10 p.m. on March 4, 2009, he was conducting a surveillance at the Dearborn Home projects in the area between 26th and 31st of South State Street, in Chicago, when he observed defendant enter a project home for a short time, then exit and get into a mini-van. Officer Zwit subsequently curbed the vehicle on the overpass of the Dan Ryan Expressway at 31st and LaSalle Streets, where there was good artificial lighting, for the minor traffic violation of "[n]o seat belts."

¶ 5 As Officer Zwit approached the mini-van, he saw defendant make a movement from his seat on the middle bench of the vehicle towards the rear of the driver's seat. Officer Zwit then approached the passenger side of the vehicle and instructed its occupants (a driver, passenger, and defendant) to put their hands up, at which point defendant turned to face the passenger side door of the mini-van where Officer Zwit was standing. Officer Zwit radioed for assistance, and

when backup arrived a few seconds later, the officers ordered everyone out of the mini-van and to the rear of the vehicle.

¶ 6 After defendant exited the rear sliding door on the passenger side of the mini-van, Officer Zwit observed the handle of a RG 23 .22 caliber handgun on the floorboard at the rear of the driver's seat and found one .22 caliber casing about an inch away, both of which he recovered and inventoried. Officer Zwit testified that there was a drawer underneath the driver's seat and a metal piece at its rear, and that he did not see anyone other than defendant make a movement towards that area. On cross-examination, he acknowledged that he never saw defendant touch the weapon or the casing, and that the mini-van was not registered to defendant.

¶ 7 The State entered into evidence certified copies of defendant's convictions for delivery of a controlled substance, and the court took judicial notice that defendant's probation in those cases was subject to the condition that he refrain from possessing a firearm. The defense rested without presenting any evidence, and the court found that the State proved defendant's constructive possession of the gun by a preponderance of the evidence, thereby showing that he was in violation of his probation.

¶ 8 At the commencement of the sentencing hearing, defendant's counsel noted certain corrections to the presentence investigation report (PSI). The State then argued in aggravation that defendant violated his probation only a few months after being sentenced to it and was "laughing in the Court's face, quite honestly, when he is out committing crimes while he is on probation." As a result, the State requested that he receive the maximum sentence. In mitigation, counsel pointed out that "the violations of probation were Class 2's," that defendant has a history of employment, and that he had pursued his education while incarcerated in the Cook County Department of Corrections. After noting that it had read defendant's PSI and heard

the arguments in aggravation and mitigation, the court sentenced defendant to concurrent terms of seven years' imprisonment.

¶ 9 In this appeal from that judgment, defendant first contends that the State failed to prove that he constructively possessed a firearm by a preponderance of the evidence. He claims that the State could not meet its burden where it relied solely on the testimony of Officer Zwit who did not see defendant touch or hold the gun, and where the vehicle in which the gun was recovered did not belong to defendant.

¶ 10 The State initially responds that defendant has forfeited review of this argument because, in his brief, he fails to cite to the pages of the record relied upon in violation of Illinois Supreme Court Rule 341(h)(7) (eff. Jul. 1, 2008). In reply, defendant acknowledges that he has failed to comply with the supreme court rules, but requests that we overlook that failure and review his claim nonetheless.

¶ 11 We observe that defendant is required under Rule 341(h)(7) to support his argument with citation to the pages of the record relied upon, and that his failure to do so is a violation of that rule and results in waiver of his argument. *Johnson v. Johnson*, 386 Ill. App. 3d 522, 533 (2008). Nonetheless, the doctrine of waiver acts as a limitation on the parties, not on the reviewing court (*Johnson*, 386 Ill. App. 3d at 533), and because we are able to locate the material necessary to the determination of defendant's claim in the modest record before us, we will address his claim.

¶ 12 In this case, the State filed a petition alleging that defendant was arrested for unlawful use of a weapon, and thereby violated his probation which was subject to the condition that he refrain from possessing a firearm. The State was required to prove the violation by a preponderance of the evidence (730 ILCS 5/5-6-4(c) (West 2008)); and where, as here, the trial court found that a violation of probation was proved, defendant's challenge to the sufficiency of

the evidence will succeed only if that finding was against the manifest weight of the evidence (*People v. Colon*, 225 Ill. 2d 125, 158 (2007)). The trial court's ruling is against the manifest weight of the evidence only if a contrary result is clearly evident. *People v. Keller*, 399 Ill. App. 3d 654, 662 (2010).

¶ 13 When establishing the element of possession, the State need not prove that defendant actually physically possessed the firearm because criminal possession may be constructive. *People v. Grant*, 339 Ill. App. 3d 792, 798 (2003). To establish constructive possession, the State must prove that defendant had knowledge of the presence of the firearm, and exercised immediate and exclusive control over the area where it was found. *Grant*, 339 Ill. App. 3d at 798. Because constructive possession is often proved entirely by circumstantial evidence (*People v. McCarter*, 339 Ill. App. 3d 876, 879 (2003)), the trier of fact may infer defendant's knowledge from several factors, including the visibility of the gun from his location in the vehicle, the amount of time he had to observe the gun, and any gestures or movements by him suggesting an effort to retrieve or conceal the gun (*Grant*, 339 Ill. App. 3d at 798).

¶ 14 Here, the record shows that as Officer Zwit approached the mini-van in which defendant was a passenger, he saw him move from his seat on the middle bench of the vehicle towards the rear of the driver's seat. After defendant exited the vehicle, he observed the handle of a .22 caliber handgun on the floorboard at that spot. Defendant was the only passenger in the rear of the vehicle, and no one else made any movement towards that area. From this evidence, the trial court could reasonably infer that defendant moved towards the rear of the driver's seat in order to conceal the gun, thereby exercising immediate and exclusive control over the area where it was found. *Grant*, 339 Ill. App. 3d at 798-99. Consequently, the trial court's finding that defendant violated his probation by constructively possessing the gun was not against the manifest weight of the evidence. *Colon*, 225 Ill. 2d at 158.

¶ 15 Defendant, nonetheless, takes issue with this conclusion, claiming that it was "likely" he moved towards the front seat to speak to the passengers in front, that the gun was "not likely" visible to him, and that the State failed to present fingerprint evidence connecting the gun to him. We observe that the positive and credible testimony of a single witness is sufficient to convict a defendant (*People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009)), and with respect to defendant's first two claims, it was the responsibility of the trial court, as the trier of fact, to draw reasonable inferences from Officer Zwit's testimony (*People v. Sutherland*, 223 Ill. 2d 187, 242 (2006)). Having determined that the findings of the trial court were not against the manifest weight of the evidence, we have no basis for questioning them here.

¶ 16 As to fingerprint evidence, this court has found sufficient evidence of constructive possession of a gun under a reasonable doubt standard where the State did not introduce fingerprint evidence. See *e.g.*, *People v. Ingram*, 389 Ill. App. 3d 897, 899-901 (2009); *Grant*, 339 Ill. App. 3d at 798-99. It therefore follows that a finding that defendant possessed a gun in violation of his probation may be sustained under a preponderance of the evidence standard in the absence of such evidence as well. We thus conclude that defendant's claims are without merit, and that the State proved defendant's violation of probation by a preponderance of the evidence.

¶ 17 Defendant next contends that the sentence imposed by the trial court was excessive in light of his rehabilitative potential. He also claims that it is unclear whether the trial court considered the proper offense and class of offense at sentencing where both are incorrect on his mittimus.

¶ 18 The State responds that defendant has forfeited this claim where he only filed a motion to reconsider sentence in one case (09-CR-792) and not in the other (09-CR-791), and where in the motion to reconsider that he did file, he did not allege that the court failed to consider his

rehabilitative potential, or that it may have considered the incorrect offense and class of offense when imposing sentence. The State further claims that defendant should be held to the forfeiture of his claim because he fails to acknowledge it or invoke the plain error doctrine.

¶ 19 In reply, defendant maintains that his motion to reconsider was intended to challenge both of the concurrent sentences imposed and was sufficient to preserve the issue. In the alternative, he requests that we review his claim for plain error and sets forth the plain error standard without any analysis of how it applies in this case.

¶ 20 It is well settled that in order to preserve a sentencing issue for appeal, defendant must raise the issue in a written post-sentencing motion in the trial court. *People v. Reed*, 177 Ill. 2d 389, 390 (1997). Here, notwithstanding defendant's failure to include both case numbers in the caption of his motion to reconsider, the record shows that in the motion he did file, he failed to specifically allege that his sentence was excessive in light of his rehabilitative potential, or that the trial court may have improperly considered the wrong offense and class of offense at sentencing. Therefore, both issues are forfeited.

¶ 21 That said, a forfeited sentencing issue may be reviewed for plain error where the evidence at the sentencing hearing was closely balanced, or the error was so egregious as to deny defendant a fair sentencing hearing. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010)). Under both prongs, defendant bears the burden of persuasion, and must first show that a clear or obvious error occurred. *Hillier*, 237 Ill. 2d at 545. Here, however, where defendant has not made any argument under either prong of the plain error doctrine, he cannot meet his burden of persuasion, and thereby forfeited plain error review. *Hillier*, 237 Ill. 2d at 545-46; *People v. Freeman*, 404 Ill. App. 3d 978, 994 (2010).

¶ 22 Defendant also contends that he is entitled to 37 days of sentencing credit for time spent in custody prior to entering his guilty plea, which, in addition to the 323 days of sentencing

credit he received for his time in custody after being arrested for UUW, amounts to a total of 360 days credit. The State concedes that defendant was entitled to 37 days of additional credit, but claims that he was only entitled to 322 days of credit for the time spent in custody after his UUW arrest for a total of 359 days credit. In reply, defendant agrees with the State's calculation.

¶ 23 The record shows that after sentencing defendant to probation on his pleas of guilty to delivery of a controlled substance, the court noted that he was entitled to 37 days of credit for time served. Defendant was subsequently arrested for the weapons offense on March 4, 2009, and sentenced on the violation of his probation on January 20, 2010. Under the relevant statute, defendant was entitled to credit for each day that he spent in custody as a result of the offense for which he was sentenced (730 ILCS 5/5-4.5-100(b) (West 2008)), but not for the day on which he was sentenced (*People v. Williams*, 239 Ill. 2d 503, 510 (2011)). Thus, excluding the day of sentencing, he was entitled to 322 days of credit for time in custody following his arrest. We therefore agree with the State that defendant was entitled to an aggregate sentencing credit of 359 days, and pursuant to our authority under Illinois Supreme Court Rule 615(b) (eff. Aug. 27, 1999)), we direct the clerk to modify his mittimuses to reflect that credit.

¶ 24 Defendant further requests that his mittimuses be corrected to reflect his Class 2 convictions for delivery of a controlled substance, rather than Class 1 convictions for delivery of a controlled substance within 1000 feet of a school. The State agrees that the correction is warranted, and, pursuant to our authority under Rule 615(b), we direct the clerk to modify defendant's mittimuses to reflect his Class 2 convictions of delivery of a controlled substance (720 ILCS 570/401(d) (West 2008)).

¶ 25 Defendant finally contends that he was improperly assessed a \$25 court services fee. He claims that the statute only authorizes assessment of the fee for certain qualifying offenses which do not include delivery of a controlled substance, and that because the fee was not authorized, it

is therefore void. The State responds that defendant has forfeited this claim by failing to cite to the record in accordance with Rule 341(h)(7). We observe, however, that a sentence that does not conform to a statutory requirement is void and may be attacked at any time. *People v. Jackson*, 2011 IL 110615, ¶ 10.

¶ 26 The propriety of court-ordered fines and fees raises a question of statutory interpretation, which we review *de novo*. *People v. Price*, 375 Ill. App. 3d 684, 697 (2007). Under the Counties Code (55 ILCS 5/5-1103 (West 2008)), the court may assess a \$25 court services fee against a defendant upon a plea of guilty resulting in a judgment of conviction, or for an order of supervision or probation made without entry of judgment under specific enumerated criminal provisions. *People v. Williams*, 405 Ill. App. 3d 958, 965 (2010). In this case, a judgment of conviction was entered against defendant, which, alone, made him eligible for the court services fee. *Williams*, 405 Ill. App. 3d at 965. We thus find that the assessment of the \$25 court services fee was authorized by statute, and we reject defendant's argument to the contrary.

¶ 27 For the reasons stated, we order the clerk to modify defendant's mittimuses to reflect his convictions of delivery of a controlled substance (720 ILCS 570/401(d) (West 2008)) and sentencing credit of 359 days, and affirm the judgment in all other respects.

¶ 28 Affirmed, as modified.