NO. 4-09-0333 Filed 1/18/11

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DAVID WALKER, Defendant-Appellant.	)	Appeal from Circuit Court of Livingston County No. 08CF166
	)	Honorable Jennifer H. Bauknecht, Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Appleton and McCullough concurred in the judgment.

ORDER

Held: (1) The State presented sufficient evidence from which the trier of fact could conclude beyond a reasonable doubt defendant possessed the drugs with intent to deliver where the amount of drugs, the amount of cash recovered, the lack of drug paraphernalia for personal use combined with defendant's testimony cocaine was not his drug of choice support an intent-to-deliver finding.
(2) We remand for the reconsideration of defendant's sentence in light of his day-for-day credit ineligibility where the trial court relied on the State's mistaken belief defendant was eligible for such credit.
(3) The trial court had a concrete, evidentiary basis for the street-value fine it imposed.

In January 2009, a jury convicted defendant, David Walker, of unlawful possession with intent to deliver a controlled substance (cocaine) (720 ILCS 570/401(a)(2)(B) (West 2008)), a Class X felony. In March 2009, the trial court sentenced defendant to 35 years' imprisonment.

Defendant appeals, arguing (1) the State failed to prove him guilty beyond a reasonable doubt, (2) the case must be remanded for a new sentencing hearing because the trial court imposed a longer sentence than it intended based upon the State's misstatement regarding defendant's good-conduct credit, and (3) the trial court erred in imposing a $25,400 street-value fine. We affirm as modified and remand with directions.

I. BACKGROUND

Livingston County sheriff's deputy Jason Draper testified he was watching traffic from an interstate ramp with City of Fairbury police officer Samuel Fitzpatrick on July 9, 2009. They observed a vehicle with no front license plate.

After stopping the vehicle, Draper noticed what appeared to be loose cannabis on the center console and floorboard of the vehicle. The driver, Demarcus Triplett, did not have a valid driver's license. As a result, Draper ordered Triplett out of the vehicle. As Triplett was exiting the vehicle, Draper observed what appeared to be two small corners of a clear plastic bag lying on the floorboard, which in Draper's experience were associated with narcotics. As a result, Draper asked defendant to step out of the vehicle.

Draper asked defendant if he had anything illegal on him. Defendant became very animated and lifted his shirt up to show he did not. Draper asked defendant for his consent to

search his person, which defendant eventually gave. During Draper's search of defendant's front pockets, Draper felt a large, lumpy object. At that moment, Draper felt defendant "tense up," which according to Draper's testimony normally indicated to him a suspect was preparing to fight or run. As a result, Draper handcuffed defendant, lifted up defendant's pocket, and observed a bag containing a white chalky substance. Draper found two smaller clear plastic bags containing a similar white chalky substance. Draper testified the officers weighed and field-tested the substance. The substance tested positive for cocaine. The field-tested gross weight of the three packages was approximately 250 grams.

Officer Fitzpatrick testified he observed Draper remove two bags containing a white substance from defendant's right pants pocket. After defendant was arrested, Fitzpatrick testified to seeing three "baseball" sized bags containing a white powdery substance on the hood of the police car.

The State also introduced People's exhibit No. 2, a videotape of the traffic stop, into evidence and played it for the jury.

Denise Hanley, a forensic scientist with the Illinois State Police, testified she received, weighed, and tested the contents of the three bags seized from defendant. According to Hanley, the laboratory's policy is for the scientists to "work

cases to a weight limit." Once that limit is reached and the remaining items are "not going to go up to the next weight limit," the lab employees do not analyze the remaining sample. According to Hanley's testimony, the bag she tested contained cocaine and had a net weight of 124 grams. Hanley testified she weighed the other two bags without testing them. The gross weight of the other two bags was 129.7 grams.

During trial, Mike Willis, an inspector with the Pontiac police department assigned to the Livingston County Protective Unit, testified the cocaine seized had a local street value of $100 per gram. According to Willis's testimony, 254 grams of cocaine was seized from defendant. Willis testified the amount of cocaine seized exceeds the amount that could conceivably be possessed for personal use. Willis testified he has only seen that amount of cocaine when a person is selling it.

On July 10, 2008, the State charged defendant with unlawful possession with intent to deliver a controlled substance, alleging he possessed with intent to deliver 100 grams or more, but less than 400 grams of a substance containing cocaine.

On January 16, 2009, a jury convicted defendant of unlawful possession with intent to deliver cocaine.

On March 16, 2009, the trial court sentenced defendant as stated.

On March 17, 2009, defendant filed a motion to recon-

sider sentence, which the trial court denied.

This appeal followed.

II. ANALYSIS

On appeal, defendant argues (1) the State failed to prove him guilty beyond a reasonable doubt, (2) the case must be remanded for a new sentencing hearing because the trial court imposed a longer sentence than it intended based upon the State's misstatement regarding defendant's good-conduct credit, and (3) the trial court erred in imposing a $25,400 street-value-fine.

A. Sufficiency of the Evidence

Defendant argues the State failed to prove him guilty beyond a reasonable doubt of unlawful possession of a controlled substance with intent to deliver. Specifically, defendant contends the only evidence presented concerning intent to deliver was the weight of the cocaine. Defendant maintains the weight of the cocaine alone was insufficient to sustain his conviction. We disagree.

1. *Standard of Review*

When a defendant challenges the sufficiency of the evidence, the test is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Ward*, 215 Ill. 2d 317, 322, 830 N.E.2d 556, 559 (2005). The trier of fact has the responsibility

to determine the weight to be given witnesses' testimony, their credibility, and the reasonable inferences to be drawn from the evidence. *People v. Steidl*, 142 Ill. 2d 204, 226, 568 N.E.2d 837, 845 (1991). It is not the function of the appellate court to retry the defendant. *People v. Slinkard*, 362 Ill. App. 3d 855, 857, 841 N.E.2d 1, 3 (2005). A conviction will not be set aside unless 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).

2. *Elements of the Offense*

Under section 401 of the Controlled Substances Act (Act), it is unlawful for any person knowingly to possess with intent to deliver cocaine. 720 ILCS 570/401(a)(2)(B) (West 2008). The elements of possession of an illegal drug, with intent to deliver it, are as follows: (1) the defendant knew the drug was present, (2) the drug was within the defendant's immediate control or possession, and (3) the defendant intended to deliver the drug. *People v. Robinson*, 167 Ill. 2d 397, 407, 657 N.E.2d 1020, 1026 (1995).

We note defendant does not dispute he knowingly possessed the cocaine. Instead, defendant argues the weight of the cocaine alone was insufficient to sustain a conviction for possession with intent to deliver the cocaine. We disagree.

Direct evidence of the intent to deliver controlled substances is rare and the intent must usually be proved by circumstantial evidence. *Robinson*, 167 Ill. 2d at 408, 657 N.E.2d at 1026. However, our supreme court has made it clear the quantity of controlled substance alone can be sufficient to prove an intent to deliver beyond a reasonable doubt where the amount could not reasonably be viewed as designed for personal consumption. *Robinson*, 167 Ill. 2d at 410-11, 657 N.E.2d at 1028.

In this case, the quantity of cocaine was too large for personal consumption. According to Willis's testimony, 250 grams of cocaine exceeds the amount that could conceivably be possessed for personal use--thus indicating it was intended for sale. In addition, Willis testified that in his experience he has only seen this amount of cocaine when a person is engaged in selling it.

Defendant argues the State only proved defendant possessed 124 grams of cocaine because the police laboratory tested and weighed only a portion of the cocaine. While the quantity of a controlled substance alone can be sufficient to prove an intent to deliver, as the quantity decreases, the need for addition circumstantial evidence increases. See *Robinson*, 167 Ill. 2d at 413, 657 N.E.2d at 1029.

However, the following evidence also indicates an intent to deliver. Officer Fitzpatrick testified the backseat

passenger, Tavell Jackson, had approximately $2,800 in cash on him at the time of the arrest. Defendant testified his drug of choice was heroin and not cocaine. Moreover, police did not recover any paraphernalia associated with the personal use of cocaine. The amount of cash recovered and the lack of drug paraphernalia combined with defendant's testimony cocaine was not his drug of choice support an intent-to-deliver finding.

Viewing the above evidence in the light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt defendant had the intent to deliver the cocaine. This finding was not so unreasonable, improbable, or unsatisfactory as to cause a reasonable doubt of defendant's guilt.

B. Defendant's Sentence

Defendant argues the trial court abused its sentencing discretion. Specifically, defendant contends although the trial court sentenced him to 35 years' imprisonment, the court intended he only serve 17 years. Defendant maintains the court expressly adopted the State's sentencing recommendation, which incorrectly advised defendant would earn day-for-day credit. As a result, defendant argues the case should be remanded for a new sentencing hearing because the court imposed a longer sentence than it intended based upon its reliance on the prosecutor's representa-

tions.

1. *Forfeiture*

We initially note defendant's trial counsel did not object at sentencing or preserve the issue in a posttrial motion. Accordingly, defendant's claim of error is forfeited. Defendant initially argues his trial counsel was ineffective for failing to object to the error. In his reply brief, however, defendant urges this court to consider his forfeited claim under the plain-error doctrine. See *People v. Williams*, 193 Ill. 2d 306, 348, 739 N.E.2d 455, 477 (2000) (permitting a defendant to raise a plain-error claim in a reply brief). A reviewing court may disregard a defendant's forfeiture and review an issue under the plain-error doctrine. *People v. Lewis*, 234 Ill. 2d 32, 42, 912 N.E.2d 1220, 1226 (2009).

The plain-error doctrine allows a reviewing court to consider forfeited error when (1) the evidence is closely balanced 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. *People v. Walker*, 232 Ill. 2d 113, 124, 902 N.E.2d 691, 697 (2009). However, before reviewing the issue for plain-error or ineffective assistance of counsel, we must first determine whether any error occurred. *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 411 (2007).

2. *Defendant's Day-for-Day Eligibility*

During defendant's sentencing hearing, the prosecutor recommended the trial court impose the following sentence:

> "[B]ased on the criminal offense in this case, [defendant's] history, and I think the strong necessity of deterrence in this case, I'm going to recommend to the Court that [defendant] be sentenced to 35 years in the Illinois Department of Corrections [(DOC)]. *He is eligible for day for day so what we're really looking at is 17 years*. That is within the range of penalties. Nine to 40 is also within the extended range which he has earned him eligibility." (Emphasis added.)

The trial court stated it considered the factors in mitigation and aggravation and defendant's presentence investigation report and stated the following:

> "You are extended term eligible because of your prior record which includes prior deliveries of a controlled substance with the intent to deliver, robbery[,] and aggravated battery of a person over 60 years of age. You are not the kind of person that we want on our streets, especially in Livingston

County.

I think that because of that *the sentence that was suggested by the State is actually reasonable*. It is within the range. It is at the *** lower end of the extended term which I think is appropriate given all of the circumstances of this case.

And so for those reasons I am going to sentence [defendant] to a term of 35 years in [DOC]." (Emphasis added.)

Regarding day-for-day credit, the trial court stated the following:

"I am required by law then in addition to the 35 years there's a mandatory supervisory release period of up to three years I believe on Class X. *[Defendant] will serve 50 percent of his time so that is approximately 17 years if he receives any good[-]time credit*.

Plus in addition to that he may be eligible for an additional six months in credit, and he gets credit for that time he has served. *So it's possible that the earliest release date will be somewhere around 16 years or a little over 16 years*." (Emphases

added.)

However, the State's representations and the trial court's statements concerning defendant's eligibility for day-for-day credit were incorrect. Pursuant to section 3-6-3(a)(2)(v) of the Unified Code of Corrections (Unified Code):

> "[A] person serving a sentence for *** a Class X felony conviction for *** possession of a controlled substance with intent to manufacture or deliver *** shall receive no more than 7.5 days[']good[-]conduct credit for each month of his or her sentence of imprisonment[.]" 730 ILCS 5/3-6-3(a)(2)(v) (West 2008).

In this case, defendant was convicted of possession with intent to deliver a controlled substance. As a result, defendant was ineligible for day-for-day good-conduct credit. Thus, the question becomes whether the trial court relied on the State's representation defendant would receive the credit in fashioning its sentence.

3. *Reliance*

In considering whether a mistake or misunderstanding of the law by the trial court influenced its sentencing decision, reviewing courts look to whether the trial judge "relied on the mistaken belief or used the mistaken belief as a reference point

in fashioning the sentence." *People v. Hill*, 294 Ill. App. 3d 962, 970, 691 N.E.2d 797, 803 (1998).

According to the trial court, the sentence suggested by the State was at "the lower end of the *extended* term." (Emphasis added.) The base term for a violation of section 401(a)(2), which is a Class X felony, is 9 to 40 years' imprisonment. 720 ILCS 570/401(a)(2)(B) (West 2008). However, because of defendant's prior conviction for a violation of the Act, defendant was eligible for a maximum extended term of 80 years' imprisonment. See 720 ILCS 570/408(a) (West 2008) ("[a]ny person convicted of a second or subsequent offense under this Act may be sentenced to imprisonment for a term up to twice the maximum term otherwise authorized").

While the trial court recited many factors which supported a lengthy sentence, the record reflects the court and counsel were all operating under the mistaken belief defendant was eligible for day-for-day good-conduct credit. We are unable to discern what, if any, weight the court accorded to the good-conduct-credit issue in fashioning its sentence. Accordingly, the trial court should be afforded an opportunity upon remand to reconsider the sentence knowing day-for-day credit does not apply. See *People v. Myrieckes*, 315 Ill. App. 3d 478, 484, 734 N.E.2d 188, 194 (2000) (remanding for resentencing because the record suggested the trial court erroneously believed the defen-

dant was extended-term eligible).

C. Street-Value Fine

Defendant argues the trial court erred in imposing a $25,400 street-value fine. Specifically, defendant contends the fine violates the eighth amendment's prohibition against excessive fines. See U.S. Const., amend. VIII (excessive fines shall not be imposed). Defendant also maintains the trial court erred when it imposed a $25,400 street-value fine, based on its belief the cocaine weighed 254 grams. Defendant contends only 124 grams of cocaine were admitted into evidence.

We note "[t]his court will not consider a constitutional question if the case can be decided on other grounds because constitutional issues are only reached as a last resort." *People v. Stroud*, 392 Ill. App. 3d 776, 790, 911 N.E.2d 1152, 1165 (2009)(citing *People v. Brown*, 225 Ill. 2d 188, 200, 866 N.E.2d 1163, 1170 (2007)(citing *People v. Lee*, 214 Ill. 2d 476, 482, 828 N.E.2d 237, 243 (2005))).

Section 5-9-1.1(a) of the Unified Code, provides when a person has been found guilty of a drug-related offense involving delivery of a controlled substance, a trial court must impose, in addition to other penalties, a fine not less than the full street value of the controlled substance seized. 730 ILCS 5/5-9-1.1(a) (West 2008). Street value is determined by the trial 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 2008). "Although the amount of evidence necessary to adequately establish the street value of a given drug varies from case to case, the trial court must have a concrete, evidentiary basis for the fine imposed." *People v. Reed*, 376 Ill. App. 3d 121, 129, 875 N.E.2d 167, 175 (2007).

In this case, Deputy Draper testified the field-tested gross weight of the three packages of cocaine was approximately 250 grams. Denise Hanley testified the bag she tested at the lab contained cocaine and had a net weight of 124 grams. Hanley testified the gross weight of the other two bags was 129.7 grams. The State asked Mike Willis, an inspector with the Pontiac police department assigned to the Livingston County Protective Unit, if he knew how much cocaine was found. Willis replied that he believe it was 254 grams. Willis also testified the cocaine seized had a local street value of $100 per gram.

During defendant's sentencing hearing, the trial court found defendant in fact possessed 254 grams of cocaine and imposed a $25,400 street-value fine. Specifically, the court found the following:

> "You were found with 254 grams of cocaine that was measured. There were three

bags all found in your pocket. I understand the testimony from the forensic science lab that they only test what they need to get to the next level. That is due to the resources of which we are very short at this time in the State so I understand why the Morton Crime Lab did not test all 254 grams.

The [c]ourt finds for purposes of this sentencing hearing that, in fact, [defendant] had 254 grams of cocaine on him. The jury's verdict was supported by the evidence and I believe the correct verdict and that [defendant] was participating in delivery of 254 grams which [the State] points out is 254 people if that is typically sold as a one gram unit which I think we typically find to be the case.

So there is 254 grams, and *I do find the street value as set forth by *** Inspector Willis at a hundred dollars per gram is the appropriate figure*." (Emphasis added.)

Trial testimony indicated the police seized 254 grams of cocaine from defendant. Testimony at trial further established a street value of $100 per gram. Thus, the trial court

had a concrete, evidentiary basis for the street-value fine it imposed.

III. CONCLUSION

For the reasons stated, we remand for the reconsideration of defendant's sentence in light of his day-for-day credit ineligibility. We note the court is free to impose any sentence so long as it does not exceed 35 years. We otherwise affirm the trial court's judgment. Because the State successfully defended a portion of the criminal judgment, we grant the State its $50 statutory assessment against defendant as costs of this appeal. See *People v. Smith*, 133 Ill. App. 3d 613, 620, 479 N.E.2d 328, 333 (1985)(citing *People v. Nicholls*, 71 Ill. 2d 166, 178, 374 N.E.2d 194, 199 (1978)).

Affirmed as modified; cause remanded with directions.