2015 IL App (4th) 130929-U

NO. 4-13-0929

FILED
September 2, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Adams County
CHIKWADO EMEKA,	)	No. 13CF186
Defendant-Appellant.	)	
	)	Honorable
	)	J. Frank McCartney,
	)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Justices Turner and Holder White concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed defendant's conviction, concluding that defendant failed to establish plain error regarding the trial court's admission of text messages and testimony from two police officers regarding statements made by a confidential informant.

¶ 2 In March 2013, the State charged defendant, Chikwado Emeka, with possession of methamphetamine precursors (720 ILCS 646/20(a)(1) (West 2012)), alleging that he possessed less than 15 grams of pseudoephedrine, a methamphetamine precursor, with the intent that it be used to manufacture methamphetamine. In July 2013, a jury convicted defendant of that offense. In September 2013, the trial court sentenced defendant to 30 months of probation.

¶ 3 Defendant appeals, arguing that the trial court erred by (1) admitting police officers' testimony about the substance of their conversation with a nontestifying confidential informant, which violated the hearsay rule and defendant's sixth-amendment right to confrontation; (2) admitting text messages that lacked a sufficient foundation; and (3) ordering defendant to pay

$750 for the cost of court-appointed counsel without notice or a hearing.

¶ 4 For the reasons that follow, we affirm defendant's conviction and sentence. However, we vacate the $750 assessment for the cost of court-appointed counsel and remand for the trial court to comply with section 113-3.1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/113-3.1 (West 2012)).

¶ 5 I. BACKGROUND

¶ 6 The State presented the following pertinent evidence at defendant's July 2013 jury trial.

¶ 7 A. Pseudoephedrine

¶ 8 Master sergeant Patrick Frazier of the Illinois State Police, a member of the West Central Illinois Drug Task Force (Task Force), testified that pseudoephedrine is an essential ingredient of methamphetamine. Pseudoephedrine is an over-the-counter decongestant that can be purchased legally at most pharmacies. However, because pseudoephedrine is often used as a methamphetamine precursor, Illinois law requires individuals purchasing pseudoephedrine to present identification and allow their name to be entered into the National Precursor Log Exchange (NPLEx). The NPLEx system is a computer database into which pharmacies in participating states log all over-the-counter pseudoephedrine sales, including the names of individual purchasers. The database allows law enforcement officers to identify individuals whose pseudoephedrine purchasing behavior is more consistent with making methamphetamine than treating a head cold. The NPLEx database also enables pharmacies to determine whether individuals seeking to buy pseudoephedrine have exceeded the statutorily designated limit that may be purchased in a given time period. (Illinois law requires pharmacies to deny pseudoephedrine to individuals who have purchased more than the statutorily designated limit in a given time pe-

riod. See 720 ILCS 648/25(i) (West 2012).)

¶ 9 Frazier explained that the NPLEx system has created a black market in which methamphetamine manufacturers obtain pseudoephedrine through straw buyers, who are willing and able to purchase pseudoephedrine from an NPLEx-linked pharmacy using their own name. According to Frazier, although a box of 48 pseudoephedrine pills at Walgreen's pharmacy costs approximately $7, a methamphetamine manufacturer will pay up to $50 for the same box of pseudoephedrine pills on the street.

¶ 10 B. Camilla Engles

¶ 11 Frazier testified that on March 26, 2013, Camilla Engles and Mark Harvey were arrested in Quincy for possession of methamphetamine. Shortly after Engles was arrested, she agreed to cooperate with law enforcement as a confidential informant. Frazier and Inspector Tom Pickett of the Adams County sheriff's office, who was also a Task Force member, met with Engles at the Adams County jail. The State elicited the following testimony from Frazier regarding Engles' role in the investigation:

> "[THE STATE]: And was there any determination made with regard to Inspector Pickett using Camilla Engles as a confidential source?
>
> [FRAZIER]: It was decided that she was not going to be free to leave. She was still under arrest, but she was going to cooperate from, basically, the county jail through her cell phone.
>
> [THE STATE]: And had her cell phone been seized?
>
> [FRAZIER]: We had the phone, yes.
>
> [THE STATE]: With regard to Miss Engles, were various

statements taken from her?

[FRAZIER]: She provided a statement.

[THE STATE]: As a result of her statement, did the Task Force create a target of an individual that might be involved in illegal activities?

[FRAZIER]: Yes.

[THE STATE]: Who was that individual?

[FRAZIER]: [Defendant].

[THE STATE]: And we'll get into the identification here in a minute, but what was decided to do regarding the information that she had given you? I don't—again, I don't want you to say what information she gave to you, but what decision did you make regarding that information?

[FRAZIER]: It was decided that we were going to make pseudoephedrine available to that individual."

¶ 12 The State conducted a similar line of inquiry during Pickett's direct testimony:

"[THE STATE]: Did you talk to—and, again, I don't want to know what she said, but did you talk to [Engles] after her arrest?

[PICKETT]: Yes. I did.

[THE STATE]: What was your purpose in talking with her after her arrest?

[PICKETT]: Just to see what kind of information she had.

[THE STATE]: What do you mean by information?

[PICKETT]: In regards to other drug offenses or people that she knows.

[THE STATE]: And why did you ask her about that?

[PICKETT]: To see if she could possibly help herself out.

[THE STATE]: What do you mean by that?

[PICKETT]: If she had any information or anything that she could do at that time to possibly be a [confidential informant] for us.

[THE STATE]: And is that something that you do on an everyday basis when you're dealing with somebody that's been arrested for illegal drug activity?

[PICKETT]: Yes.

[THE STATE]: And why do you do that?

[PICKETT]: Because we're always trying to get the next person up or the other person that's involved with the methamphetamine.

* * *

[THE STATE]: And I don't want you to say what was said, but as a result of talking with her, did you develop a target for further investigation?

[PICKETT]: Yes.

[THE STATE]: Who was that target?

[PICKETT]: [Defendant]."

Although Engles did not testify at trial, defendant did not object to this testimony from Frazier or Pickett.

¶ 13 C. The Pseudoephedrine Pick Up

¶ 14 After Engles made statements that caused defendant to become a target in the Task Force's methamphetamine investigation, Pickett devised a plan to catch defendant in an illegal act. Pickett directed Engles to inform defendant through text messages that two boxes of pseudoephedrine pills would be available for him to retrieve from the glove compartment of Engles' car, which would be parked on the street in front of Engles' home in Quincy.

¶ 15 Without objection, the trial court admitted a printout of text messages exchanged between Engles' cell phone and a cell phone corresponding to the phone number 217-316-2083. When the State asked Pickett whether he "had knowledge of that phone number," Pickett replied, "That's who [Engles] stated was [defendant]."

¶ 16 The first text message, which Engles sent from her cell phone late at night on March 26, 2013, read as follows: "Hey dude, I have two more of those I really need to get rid of." Approximately 10 minutes later, Engles received the following response from 217-316-2083: "I got ur cigs still." The text message exchange unfolded over the next several hours, under Pickett's supervision, as follows:

> "[ENGLES' CELL PHONE]: R u in town[?] Do u want these[?]
>
> [217-316-2083]: What side of town r u on[?]
>
> [ENGLES' CELL PHONE]: Almost back to Quincy.
>
> [217-316-2083]: K let me know what u want to do. I still have ur cigs tho.

[ENGLES' CELL PHONE]: K.

[ENGLES' CELL PHONE]: In Quincy dropping off car in front of house[.] I leave those things in glove box[.] Leave my cigs.

[ENGLES' CELL PHONE]: Did u get my message[?]

[ENGLES CELL PHONE:] Did u leave my cigs yet[?] [W]as going to go get my car."

¶ 17 Engles' last few text messages went unanswered that night. At 10 a.m. the next morning, Engles' cell phone received the following text messages:

"[217-316-2083]: Man sorry fell asleep[.] U still here?

[217-316-2083]: Still got cigs if u need them[.] Fell out super hard[.] Drank a little too much."

Pickett was at Task Force headquarters and in possession of Engles' cell phone when those text messages came in. Engles was in the Adams County jail. Pickett, posing as Engles, replied to the text messages and continued the exchange, as follows:

"[ENGLES' CELL PHONE]: U up still[?] [I] have those u want[.] I can leave them in my car in a bit.

[217-316-2083]: U still in town[?]

[ENGLES' CELL PHONE]: Yeah but I'm with someone right now[.] I can drop them off in my car in a bit and let u know when [they're] in there.

[217-316-2083]: Just let me know whenever.

[ENGLES' CELL PHONE]: K."

¶ 18 Following that exchange, the Task Force parked Engles' car in front of her home and Pickett placed two marked boxes of pseudoephedrine in the glove compartment. Before the boxes were placed in the glove compartment, Officer James Brown marked the WAL-ACT brand pseudoephedrine by using a pen to fill in part of the "W" on the box label. That unique marking was intended to enable the Task Force to later determine whether defendant possessed the same box of pseudoephedrine that had been placed in Engles' glove compartment. Pickett also set up a video camera, which he hid inside a purse on the backseat, to record the front passenger area of the car.

¶ 19 After the setup of Engles' car was completed, Pickett resumed the text message exchange, as follows:

> "[ENGLES' CELL PHONE]: I just put them in my car[.] Pass[enger] door opened[.] Lock it when done.
>
> [ENGLES' CELL PHONE]: U around[?] U get my mess[age?]
>
> [ENGLES' CELL PHONE]: Let me know if u still want those[.] If you don't I take them to [Missouri].
>
> [217-316-2083]: Where r u at[?]
>
> [ENGLES' CELL PHONE]: I'm with Mark.
>
> [217-316-2083]: K that's cool[.] Where's ur car[?]
>
> [ENGLES' CELL PHONE]: My house on 14th.
>
> [217-316-2083]: I don't know where that's at.
>
> [ENGLES' CELL PHONE]: [(This text message set forth Engles' exact address, which we have redacted from this order.)]

In front[.] Pass[enger] door unlocked[.] In glove box[.] Lock my door when done please.

[217-316-2083]: K sounds good.

[ENGLES' CELL PHONE]: How long u going to be so I can get my cigs lol[?]

[217-316-2083]: Lol leaving now.

[ENGLES' CELL PHONE]: Cool."

(We note that no purchase price was mentioned in any of the text messages.)

¶ 20 Pickett, Frazier, and several other members of the Task Force set up surveillance in the area surrounding Engles' car. Pickett, Brown, and Officer Doug Zulauf testified that approximately 45 minutes after they set up surveillance, a gold Oldsmobile sedan stopped across the street from Engles' car. A black man exited the Oldsmobile, walked up to the passenger side of Engles' car, got inside, and returned to the Oldsmobile shortly thereafter. All three officers noted that the man was wearing a blue and grey baseball cap.

¶ 21 After the Oldsmobile left the scene, Frazier went to Engles' car and discovered that the passenger door had been locked. After unlocking the door, Frazier found $50 cash and a pack of cigarettes inside the glove compartment. A marked box of WAL-ACT pseudoephedrine had been removed, although the other box of pseudoephedrine remained.

¶ 22 Several blocks away, members of the Task Force conducted a traffic stop of the gold Oldsmobile. The driver was defendant. He was wearing a gray Old Navy sweatshirt and a blue and gray New York Yankees baseball cap. Zulauf located the marked box of WAL-ACT pseudoephedrine inside the trunk of the Oldsmobile, which was accessible from the passenger compartment.

¶ 23 Frazier testified that he examined the NPLEx database and learned that defendant was authorized to purchase pseudoephedrine from a pharmacy at the time. Frazier also noted that on a previous occasion, defendant had exceeded his pseudoephedrine purchase limit and the database had "blocked" him from making an additional purchase.

¶ 24 Task Force officers arrested defendant and brought him to the police station. Although defendant's cell phone was seized, Pickett testified that Vahle, the evidence technician, was unable to download any text messages from the phone. (The evidence presented at trial did not reveal whether the Task Force took additional steps—such as placing a call to 217-316-2083 and seeing whether the phone seized from defendant would ring—to identify the phone associated with 217-316-2083.)

¶ 25 At the police station, after being read his *Miranda* rights (*Miranda v. Arizona*, 384 U.S. 436 (1966)), defendant stated that (1) he did not trust the police, (2) he never entered Engles' vehicle, and (3) the police planted the box of pseudoephedrine in his car. Defendant made these statements before learning about the video recorded from inside Engles' car. That video, which was admitted into evidence and published to the jury, showed a black man, whom Frazier and Pickett identified as defendant, wearing a blue and gray baseball cap and a gray Old Navy sweatshirt. The man opened the passenger door of Engles' car, reached toward the glove compartment (which was just out of view of the hidden camera), and removed a box of WAL-ACT pseudoephedrine pills. The box was clearly visible in the man's hand. After briefly sitting down in the passenger seat and reaching toward the glove compartment a few more times, the man exited the vehicle and walked away.

¶ 26 Defendant did not present evidence.

¶ 27 The jury found defendant guilty of possession of methamphetamine precursors.

As stated, in September 2013, the trial court sentenced defendant to 30 months of probation. At the conclusion of the sentencing hearing, without providing defendant with notice or a hearing, the court ordered defendant to pay a $750 fee for the cost of court-appointed counsel.

¶ 28 Defendant did not file posttrial motions of any kind.

¶ 29 This appeal followed.

¶ 30 II. ANALYSIS

¶ 31 Defendant argues that the trial court erred by (1) admitting Frazier's and Pickett's testimony about the substance of their conversation with Engles, which violated the hearsay rule and defendant's sixth-amendment right to confrontation; (2) admitting text messages that lacked a sufficient foundation; and (3) ordering defendant to pay $750 for the cost of court-appointed counsel without notice or a hearing. We address defendant's contentions in turn.

¶ 32 A. Engles' Statements

¶ 33 Defendant contends that Frazier's and Pickett's testimony revealed the substance of their conversation with Engles, which violated the hearsay rule and defendant's sixth-amendment right to confrontation. In response, the State argues that defendant's claim (1) is forfeited and (2) fails on the merits because Frazier's and Pickett's testimony about Engles' statements was offered to explain how their investigation unfolded, not for the truth of Engles' statements.

¶ 34 Defendant concedes that he forfeited this claim by failing to object at trial or raise the claim in a posttrial motion. He asserts that his forfeiture should be excused because (1) the plain-error doctrine applies and (2) his counsel was ineffective for failing to object or raise the issue in a posttrial motion.

¶ 35 1. *Plain Error*

¶ 36 "To preserve a claim for review, a defendant must both object at trial and include the alleged error in a written posttrial motion." *People v. Thompson*, 238 Ill. 2d 598, 611, 939 N.E.2d 403, 412 (2010). Failure to do so results in the forfeiture of that claim on appeal. *Id.* at 612, 939 N.E.2d at 412. A defendant can avoid the harsh consequences of forfeiture under the plain-error doctrine. *Id.* at 613, 939 N.E.2d at 413.

¶ 37 The plain-error doctrine permits a reviewing court to reach a forfeited error affecting substantial rights in the following two circumstances: "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 410-11 (2007).

¶ 38 As a matter of convention, reviewing courts *typically* undertake plain-error analysis by first determining whether error occurred at all. *People v. Sargent*, 239 Ill. 2d 166, 189, 940 N.E.2d 1045, 1059 (2010). In this case, however, because we conclude that defendant has not met his burden under either prong of the plain-error analysis, we reject his plain-error claim without deciding whether Frazier's and Pickett's testimony was inadmissible.

¶ 39 Defendant cannot meet his burden under the first prong of the plain-error analysis—the "closely-balanced-evidence" prong—because the State's evidence against him was overwhelming. In arguing that the evidence was closely balanced, defendant focuses exclusively on the intent element of the offense. He asserts in his brief that "the only direct connection between [defendant] and methamphetamine came from [Engles'] statement to police" and "[a]ny other evidence suggesting that [defendant] possessed the pseudoephedrine with the intent that it

be used to manufacture methamphetamine was circumstantial."

¶ 40 Although we agree with defendant that the evidence of his intent was circumstantial in nature, we note that "a criminal conviction may be based solely on circumstantial evidence." *People v. Brown*, 2013 IL 114196, ¶ 49, 1 N.E.3d 888. Indeed, in criminal cases, mental state is *usually* proved through circumstantial evidence. For example, in drug cases in which the defendant's intent to deliver is at issue, the supreme court has stated that "[b]ecause direct evidence of intent to deliver is rare, such intent must usually be proven by circumstantial evidence." *People v. Robinson*, 167 Ill. 2d 397, 408, 657 N.E.2d 1020, 1026 (1995). The supreme court's observation in *Robinson* fully applies to the type of drug offense at issue in this case. Just as a defendant's intent to deliver a controlled substance must usually be proved by circumstantial evidence (as in *Robinson*), a defendant's intent that pseudoephedrine be used to manufacture methamphetamine must usually be proved by circumstantial evidence as well. In this case, although the evidence that defendant intended the pseudoephedrine to be used in the manufacture of methamphetamine was circumstantial, it was overwhelming nonetheless.

¶ 41 At trial, Frazier provided uncontested testimony describing the underground market in which individuals engaged in methamphetamine production are willing to pay up to $50 for a box of pseudoephedrine pills that costs only $7 at a pharmacy. In his brief to this court, defendant does not dispute that he took a box of pseudoephedrine pills from the glove compartment of Engles' car and left $50 in cash in its place, even though he was authorized to purchase pseudoephedrine from a pharmacy at the time. Simply put, no reasonable explanation exists for someone in defendant's position to pay $50 for a $7 box of over-the-counter decongestant. It is clear that defendant was willing to pay Engles $50 for a box of pseudoephedrine because he wanted to avoid being detected by law enforcement through the NPLEx database. Defendant's

efforts to avoid detection provided overwhelming evidence that he possessed the pseudoephedrine for an illegal purpose—namely, to manufacture methamphetamine. Additionally, defendant demonstrated knowledge of his guilt by initially claiming that (1) he was never in Engles car and (2) the Task Force planted the box of pseudoephedrine in his trunk. Those two assertions were clearly disproved by the hidden-camera video, which showed defendant entering Engles' car and removing a box of WAL-ACT pseudoephedrine from the glove compartment. Accordingly, defendant's claim fails under the first prong of the plain-error analysis because the admission of Frazier's and Pickett's testimony about Engles' statements could not have threatened to tip the scales of justice against defendant.

¶ 42 Defendant also fails to meet his burden under the second plain-error prong. In this brief to this court, defendant's entire second-prong argument reads, as follows:

> "[Defendant] also maintains that the erroneous admission of hearsay evidence was '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.' *Piatkowski*, [225 Ill. 2d 551, 565, 870 N.E.2d 403, 410-11 (2007)]; see *People v. Thomas*, [220 Ill. App. 3d 110, 123, 580 N.E.2d 1353, 1363 (1991)] (reviewing evidentiary issue under plain error because substantial right to be tried by competent evidence was implicated); *People v. Furby*, [228 Ill. App. 3d 1, 9, 591 N.E.2d 533, 539 (1992)] (reviewing hearsay violation as plain error)."

This quote from *Piatkowski*, which merely states the second-prong standard, is not an argument. Failure to support an appellate claim with argument and relevant legal authority results in forfei-

ture of that claim. *People v. Urdiales*, 225 Ill. 2d 354, 420, 871 N.E.2d 669, 707 (2007). Defendant has forfeited his second-prong plain-error claim by failing to support the claim with argument.

¶ 43 Further, the cases that defendant cites provide no support for his claim. In *Thomas*, the Second District applied the plain-error second prong in a perfunctory manner without providing any legal reasoning. The *Thomas* court simply stated that the defendant's evidentiary claim in that case was reviewable under the plain-error doctrine because "a substantial right is affected, *i.e.*, defendant's due process right to be tried only by competent evidence duly admitted at trial." *People v. Thomas*, 220 Ill. App. 3d 110, 123, 580 N.E.2d 1353, 1363 (1991). The Second District's decision in *Furby* is even less instructive because the appellate court in that case reviewed the defendant's hearsay claim under the *first prong* of the plain-error analysis, not the second prong. *People v. Furby*, 228 Ill. App. 3d 1, 9, 591 N.E.2d 533, 539 (1992). Because defendant has failed to support his second-prong plain-error claim with argument or legal authority, we decline to address that claim.

¶ 44 2. *Ineffective Assistance of Counsel*

¶ 45 Defendant claims that his counsel was ineffective for failing to (1) object to Frazier's and Pickett's testimony about Engles' statements and (2) raise the issue in a posttrial motion.

¶ 46 "To show ineffective assistance of counsel, a defendant must demonstrate that 'his attorney's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.' " *People v. Simpson*, 2015 IL 116512, ¶ 35, 25 N.E.3d 601 (quoting *People v. Patterson*, 192 Ill. 2d 93, 107, 735 N.E.2d 616, 626 (2000), citing *Strickland v. Washington*, 466 U.S.

668, 687, 695 (1984)). "Further, in order to establish deficient performance, the defendant must overcome the strong presumption that the challenged action or inaction may have been the product of sound trial strategy." *People v. Smith*, 195 Ill. 2d 179, 188, 745 N.E.2d 1194, 1200 (2000).

¶ 47 This court has held that "[c]laims of ineffective assistance of counsel are usually reserved for postconviction proceedings where a trial court can conduct an evidentiary hearing, hear defense counsel's reasons for any allegations of inadequate representation, and develop a complete record regarding the claim and where attorney-client privilege no longer applies." *People v. Weeks*, 393 Ill. App. 3d 1004, 1011, 914 N.E.2d 1175, 1182 (2009) (citing *People v. Kunze*, 193 Ill. App. 3d 708, 725-26, 550 N.E.2d 284, 296 (1990)). Based upon these considerations, we decline to reach the merits of defendant's ineffective-assistance-of-counsel claim in this direct appeal. (We note that although defendant was sentenced to a term of probation—not imprisonment—he may nonetheless file a petition under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2014)) before his term of probation expires. *People v. West*, 145 Ill. 2d 517, 519, 584 N.E.2d 124, 125 (1991).)

¶ 48 B. Admission of the Text Messages

¶ 49 Defendant next contends that the trial court erred by admitting the text messages exchanged between Engles' cell phone and 217-316-2083. Specifically, defendant argues that the text messages lacked a foundation because (1) the State did not present any evidence connecting defendant to the phone number, 217-316-2083; (2) Engles did not testify that that phone number belonged to defendant; (3) nothing in the substance of the text messages confirmed that defendant was the person exchanging text messages with Engles' cell phone; and (4) the Task Force was unable to download any of the text messages from defendant's cell phone.

¶ 50 Defendant concedes that he forfeited this claim by failing to object at trial or raise the issue in a posttrial motion. As with his previous claim, defendant urges this court to address this claim on the merits based upon the plain-error doctrine and ineffective assistance of counsel.

¶ 51 1. *Plain Error*

¶ 52 As stated, the typical first step of the plain-error analysis is to determine whether any error occurred. *Sargent*, 239 Ill. 2d at 189, 940 N.E.2d at 1059. In this case, we conclude that no error occurred regarding admission of the text messages.

¶ 53 "For the purpose of establishing a proper foundation for admissibility, text messages are treated like any other form of documentary evidence." *People v. Watkins*, 2015 IL App (3d) 120882, ¶ 36, 25 N.E.3d 1189. "An adequate foundation is laid when a document is identified and authenticated." *People v. Chromik*, 408 Ill. App. 3d 1028, 1046, 946 N.E.2d 1039, 1055 (2011). "To 'authenticate a document, evidence must be presented to demonstrate that the document is what its proponent claims.' " *Id.* (quoting *Gardner v. Navistar International Transportation Corp.*, 213 Ill. App. 3d 242, 247-48, 571 N.E.2d 1107, 1110 (1991)). However, even if a document has been authenticated, "[t]he ultimate issue of authorship is for the trier of fact to determine." *People v. Downin*, 357 Ill. App. 3d 193, 203, 828 N.E.2d 341, 350 (2005).

¶ 54 Defendant focuses his argument on the lack of direct evidence establishing that he was the person sending text messages from 217-316-2083. However, in laying a foundation for admission of the text messages downloaded from Engles' cell phone, the State was not required to prove that defendant authored the text messages sent from 217-316-2083. Indeed, the identity of the author of the text messages sent from 217-316-2083 had very little bearing on the pertinent issues at trial. What mattered was that (1) specific instructions for the exchange of pseudoephedrine were sent from Engles' cell phone to *someone* and (2) defendant ended up following those

instructions. Although Frazier and Pickett assumed that defendant was the person sending and receiving text messages from 217-316-2083, the text messages were admissible regardless of whether defendant was actually the other party to the text-message exchange.

¶ 55 The text messages in this case served a narrow probative purpose: to explain the circumstances that led defendant to take a box of pseudoephedrine from the glove compartment of Engles' car. Specifically, the text messages showed that specific instructions had been sent from Engles' cell phone to 217-316-2083, directing the recipient of the text messages to (1) go to Engles' car at a specific location in Quincy, (2) take "those things" (being boxes of pseudoephedrine pills) from the glove compartment, (3) leave Engles' cigarettes in the glove compartment, and (4) lock the passenger side door when finished. Defendant followed each of those precise instructions, which proved that he was at least privy to the text messages. He fails to explain why the State should have been required to establish that he actually operated the cell phone associated with 217-316-2083. None of the text messages sent from 217-316-2083 revealed anything about the sender's *intent* regarding the pseudoephedrine. The messages did not mention money or anything related to methamphetamine. Accordingly, for purposes of admitting the text messages into evidence, it simply did not matter whether defendant actually operated the cell phone associated with 217-316-2083.

¶ 56 Even if Frazier and Pickett had testified that they had no idea who was operating the cell phone associated with 217-316-2083, the text messages would have still been admissible to show that defendant participated in a choreographed pseudoephedrine exchange. Frazier's and Pickett's testimony, in which they described their personal observations of the text-message exchange taking place over Engles' cell phone, provided a sufficient foundation for the admission of the text messages for the purpose of showing the details of the prearranged transaction.

Whether defendant *planned* the transaction in addition to *carrying out* the transaction had no bearing on his guilt under the charged offense. As already noted, the State presented ample circumstantial evidence to establish that defendant possessed the pseudoephedrine with the intent that it be used in the manufacture of methamphetamine.

¶ 57 Because we conclude that the admission of the text messages was not error, we need not proceed further with the plain-error analysis.

¶ 58 2. *Ineffective Assistance of Counsel*

¶ 59 Defendant also claims that his trial counsel was ineffective for failing to (1) object to the admission of the text messages and (2) raise the issue in a posttrial motion. For the same reasons that we declined to rule on the merits of defendant's ineffective-assistance-of-counsel claim regarding Engles' statements, we also decline to rule on the merits of defendant's ineffective-assistance-of-counsel claim regarding the text messages.

¶ 60 C. Court-Appointed-Counsel Fee

¶ 61 Last, defendant contends that the trial court erred by assessing a $750 fee for the cost of court-appointed counsel without providing defendant with notice or a hearing. The State concedes that the fee should be vacated and the cause remanded because the court erred by assessing the fee without providing defendant with notice or a hearing, as required under section 113-3.1 of the Code. See 725 ILCS 5/113-3.1 (West 2012). We accept the State's concession, vacate the $750 fee, and remand for the court to comply with the statute.

¶ 62 Nearly 18 years ago, in *People v. Love*, 177 Ill. 2d 550, 563, 687 N.E.2d 32, 38 (1997), the supreme court held that "section 113-3.1 requires that the trial court conduct a hearing into a defendant's financial circumstances and find an ability to pay before it may order the defendant to pay reimbursement for appointed counsel."

¶ 63 Over three years ago, the supreme court noted the pervasive failure of trial courts to comply with the notice and hearing requirements of section 113-3.1 of the Code. See *People v. Gutierrez*, 2012 IL 111590, ¶ 25, 962 N.E.2d 437 ("Before closing, we must express our disappointment that, 14 years after this court's decision in *Love*, defendants are still routinely being denied proper hearings before public defender fees are imposed.").

¶ 64 A year after *Gutierrez*, the supreme court again observed that trial courts routinely fail to provide defendants with their rights to notice and a hearing. *People v. Somers*, 2013 IL 114054, ¶ 18, 984 N.E.2d 471 ("As we did in *Gutierrez*, 2012 IL 111590, ¶¶ 25, 26[, 962 N.E.2d 437], we again express our disappointment that defendants continue to be denied proper hearings on public defender fees, we remind the trial courts of their obligation to comply with the statute, and we trust that we will not have to speak on this issue again.").

¶ 65 More than six months after the supreme court published its decision in *Somers*, the trial court in this case ordered defendant to pay $750 for the cost of court-appointed counsel without providing defendant notice or the opportunity for a hearing. Compliance with section 113-3.1 of the Code should not be difficult. As this court has explained in several published opinions, "the statutorily required hearing need only (1) provide the defendant with notice that the trial court is considering imposing a payment order, pursuant to section 113-3.1 of the Code, and (2) give the defendant an opportunity to present evidence regarding his ability to pay and other relevant circumstances, and otherwise to be heard regarding whether the court should impose such an order." *People v. Johnson*, 297 Ill. App. 3d 163, 164-65, 696 N.E.2d 1269, 1270 (1998); see also *People v. Barbosa*, 365 Ill. App. 3d 297, 302, 849 N.E.2d 152, 155 (2006); *People v. Hubner*, 2013 IL App (4th) 120137, ¶ 39, 986 N.E.2d 246.

¶ 66 We vacate the trial court's $750 fee for the cost of court-appointed counsel and

remand for the court to comply with the notice and hearing requirements of section 113-3.1 of the Code.

¶ 67 III. CONCLUSION

¶ 68 For the reasons stated, we affirm defendant's conviction and sentence. We vacate the trial court's $750 fee for the cost of court-appointed counsel and remand for the court to comply with section 113-3.1 of the Code. As part of our judgment, we award the State its statutory $75 fee against defendant as costs of this appeal.

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