No. 121453

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- ANTOINE HARDMAN Defendant-Appellant.	))))))))))	Appeal from the Appellate Court of Illinois, No. 1-14-0913. There on appeal from the Circuit Court of Cook County, Illinois, No. 13 CR 15697 (02). Honorable Vincent M. Gaughan, Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLANT

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POINTS AND AUTHORITIES

NATURE OF THE CASE

Antoine Hardman was convicted after a bench trial of possession of a controlled substance with intent to deliver within 1,000 feet of a school and was sentenced to eight years in prison.

This is a direct appeal from the judgment of the court below. No issue is raised challenging the charging instrument.

ISSUES PRESENTED FOR REVIEW

I. Did the State fail to prove Antione Hardman guilty beyond a reasonable doubt of possession of a controlled substance with intent to deliver within 1,000 feet of a school where the State produced insufficient evidence that the building was operating as a school at the time of the offense?

II. When the trial court improperly assessed a $500 reimbursement fee for the services of the public defender without complying with the requirements of section 113-3.1, should the fee be vacated without remand where no hearing on Hardman's ability to pay occurred and where judicial economy counsels against remand?

STATUTES AND RULES INVOLVED

720 ILCS 570/407(b)(1), (c) (2013). Delivery of controlled, counterfeit or look-alike substances; persons under 18; truck stops or safety rest areas; school property; places of religious worship.

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(b) Any person who violates:
(1) subsection (c) of Section 401 in any school, or any conveyance owned, leased or contracted by a school to transport students to or from school or a school related activity, or residential property owned, operated or managed by a public housing agency or leased by a public housing agency as part of a scattered site or mixed-income development, or public park, on the real property comprising any school or residential property owned, operated or managed by a public housing agency or leased by a public housing agency as part of a scattered site or mixed-income development, or public park or within 1,000 feet of the real property comprising any school or residential property owned, operated or managed by a public housing agency or leased by a public housing agency as part of a scattered site or mixed-income development, or public park, on the real property comprising any church, synagogue, or other building, structure, or place used primarily for religious worship, or within 1,000 feet of the real property comprising any church, synagogue, or other building, structure, or place used primarily for religious worship, on the real property comprising any of the following places, buildings, or structures used primarily for housing or providing space for activities for senior citizens: nursing homes, assisted-living centers, senior citizen housing complexes, or senior centers oriented toward daytime activities, or within 1,000 feet of the real property comprising any of the following places, buildings, or structures used primarily for housing or providing space for activities for senior citizens: nursing homes, assisted-living centers, senior citizen housing complexes, or senior centers oriented toward daytime activities is guilty of a Class X felony, the fine for which shall not exceed $500,000;
***
(c) Regarding penalties prescribed in subsection (b) for violations committed in a school or on or within 1,000 feet of school property, the time of day, time of year and whether classes were currently in session at the time of the offense is irrelevant.

720 ILCS 5/2-19.5 (2013). "School"

"School" means a public, private, or parochial elementary or secondary school, community college, college, or university and includes the grounds of a school.

725 ILCS 5/113-3.1(a) (2013). Payment for Court-Appointed Counsel.

(a) Whenever under either Section 113-3 of this Code or Rule 607 of the Illinois Supreme Court the court appoints counsel to represent a defendant,

the court may order the defendant to pay to the Clerk of the Circuit Court a reasonable sum to reimburse either the county or the State for such representation. In a hearing to determine the amount of the payment, the court shall consider the affidavit prepared by the defendant under Section 113-3 of this Code and any other information pertaining to the defendant's financial circumstances which may be submitted by the parties. 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.

STATEMENT OF FACTS

The State charged Antoine Hardman with one count of possessing between one and 15 grams of heroin with intent to deliver within 1,000 feet of "any school *** to wit: Ryerson Elementary School," a Class X offense. (C.19); see 720 ILCS 570/401(c)(1) (2013); 720 ILCS 570/407(b)(1) (2013). Hardman was convicted at a bench trial and sentenced to eight years in prison. (R. G60; C.86) The court also imposed a $500 fee for the service of the public defender. (R. H13)

On appeal, Hardman argued that the State failed to prove him guilty beyond a reasonable doubt of possession of a controlled substance with intent to deliver within 1,000 feet of a school because the evidence showed the building was in transition around the time of the offense, and the State produced no evidence that it was operating as a school on the day of the offense. *People v. Hardman*, 2016 IL App (1st) 140913-U, ¶ 9. Hardman also argued that the trial court erred in assessing the public defender reimbursement fee without considering Hardman's ability to pay and that since no hearing was held within the statutory time limit on his ability to pay, the fee should be vacated outright without remand. *Hardman*, 2016 IL App (1st) 140913-U at ¶¶ 19, 21. The appellate court affirmed Hardman's conviction. *Id.* at ¶ 18. It also agreed that the trial court erroneously assessed the fee without a sufficient hearing, but it remanded the matter for a proper reimbursement hearing. *Id.* at ¶¶ 20, 23.

Pre-Trial Proceedings

At Hardman's arraignment, on September 3, 2013, the following exchange occurred:

> [COURT]: All right, Mr. Hardman, how old are you, sir?
> [DEFENDANT]: 49.
> [COURT]: 49. And prior to being arrested what did you do for a living?
> [DEFENDANT]: I'm unemployed.
> [COURT]: All right. Do you have money to hire an attorney?
> [DEFENDANT]: No, not at this moment.

(R. A2) The court then appointed the public defender. (R. A3) The State also filed a motion for reimbursement for the cost of the public defender pursuant to 725 ILCS 5/113-3.1(a). (R. A3)

On January 31, 2014, the State moved to amend the information because the school in the information was "Ryerson Elementary School," but pictures taken in the winter of 2014 showed a sign out front that said "Laura Ward." (R. E5-6) The State did not take any pictures earlier. (R. E6) The prosecutor stated she believed that at the time of the offense the building was Ryerson. (R. E7) When the court asked for a specific date of the change, the prosecutor responded, "I believe this school year it changed to Laura Ward which should have started in September." (R. E6) The court denied the motion to amend the information, finding that the State could explain the facts at trial. (R. E7)

Trial

At Hardman's bench trial on February 3, 2014, Officer Ruggiero testified that on July 22, 2013, he observed Hardman and his co-defendant each make three hand-to-hand transactions in an alley behind the 600 block of North Ridgeway, in which a pedestrian handed Hardman money, and Hardman walked over to a nearby rock, retrieved a small item, and gave that item to the pedestrian. (R. F88-89) Officers Ruggiero and Harmon detained Hardman and his co-defendant and found 12 small baggies of white powder under the nearby rock. (R. F25-26,

F37, F96, F99) The substance tested positive for 1.2 grams of heroin. (R. F72)

Three witnesses testified about the location of the alleged transactions. Officer Ruggiero, who had worked in the 11th District area for seven years, testified:

> [WITNESS]: ***The area [of the 600 block of North Ridgeway] is residential, with buildings and also right next to a school called Ryerson Elementary School at that time.
> [STATE]: You say at that time. Does that school have a different name?
> [WITNESS]: Yes.
> [STATE]: What is that?
> [WITNESS]: Laura Ward.

(R. F79) On cross-examination, defense counsel elicited the following testimony from Ruggiero:

> [DEFENSE COUNSEL]: This is a residential area, a sunny day?
> [WITNESS]: Correct. Right across the street from Ryerson Elementary School.
> [DEFENSE COUNSEL]: People were coming and going, taking their kids to school, parents, is that right?
> [WITNESS]: Fairly active neighborhood. It is an active neighborhood.

(R. F136)

Officer Harmon testified that he worked in the area for nine years and was familiar with the area:

> [STATE]: Are you familiar with the schools near this address?
> [WITNESS]: I am.
> [STATE]: What school is there?
> [WITNESS]: Laura Ward School.
> [STATE]: Is that what it is currently called?
> [WITNESS]: Yes. It changed.
> [STATE]: What was the name of the school back on July 22, 2013?
> [WITNESS]: Ryerson.

(R. F36) Harmon then circled the building on an aerial map. (R. F36-37)

Investigator Lappe testified that in September 2013, he measured the distance from the location of the alleged sales to the nearest piece of property at 646 North Lawndale:

> [STATE]: Did you receive a request to take a measurement from the area 634 North Ridgeway in Chicago, to another location?
> [WITNESS]: Yes.
> [STATE]: What location was that to?
> [WITNESS]: 646 North Lawndale. The Laura Ward Elementary School.
> [STATE]: Was that formerly called Ryerson Elementary School?
> [WITNESS]: Correct.

(R. F140) The distance measured 88 feet. (R. 142)

The court found Hardman guilty of possession of a controlled substance with intent to deliver within 1,000 feet of a school, a Class X felony. (R. G60)

Post-Trial Proceedings

After trial, a pre-sentence investigation report was prepared. It showed that Hardman was unemployed from 2006 until his arrest in 2013, supporting himself with odd jobs and financial assistance from his mother. (C. 55) At sentencing, after hearing arguments in aggravation and mitigation, the court sentenced Hardman to eight years in the Department of Corrections. (R. H12) After the court admonished Hardman of his right to appeal, the court asked the State whether it had any other motions, and the State reminded the court of its motion for reimbursement of public defender fees. (R. H13) Then the court questioned Assistant Public Defender Hull:

> [COURT]: Ms. Hull, how many times have you appeared on this case?
> [DEFENSE COUNSEL]: Eight times, Judge.
> [COURT]: How many?
> [DEFENSE COUNSEL]: Eight.
> [COURT]: Eight. All right. And you went to trial. All right. Attorney's fees would be appropriate of $500. Thank you.

(R. H13) Hardman remained in custody through the duration of the trial court proceedings and continued to be incarcerated within the 90-day period following

the final judgment in the trial court while serving his eight-year sentence. (R. H10; C. 86)

Direct Appeal

On direct appeal, Hardman contended that the State failed to prove him guilty beyond a reasonable doubt of possession of a controlled substance with intent to deliver within 1,000 feet of a school because the evidence showed that the building was in flux around the time of the offense, and the State produced no evidence that the building was in operation as a school at the time of the offense. The appellate court found that the officers' testimony was sufficient for the trier of fact to conclude that the building located near the offense was a school on the date the offense occurred. *People v. Hardman*, 2016 IL App (1st) 140913-U, ¶ 18.

Hardman also argued that the trial court erred in assessing the $500 public defender reimbursement fee without considering Hardman's ability to pay and that since no hearing was held within the statutory time limit on his ability to pay, the fee should be vacated outright without remand. The appellate court agreed that the trial court erroneously assessed Hardman the $500 fee. *Hardman*, 2016 IL App (1st) 140913-U at ¶ 20. However, as a remedy, the appellate court remanded the case to the trial court to hold a hearing to consider Hardman's ability to pay. *Id.* at ¶ 23.

This Court granted Hardman's petition for leave to appeal on January 25, 2017.

ARGUMENT

I. The State failed to prove Antione Hardman guilty beyond a reasonable doubt of possession of a controlled substance with intent to deliver within 1,000 feet of a school – a Class X felony – where it produced insufficient evidence that the building was operating as a school at the time of the offense.

Antione Hardman was convicted of the Class X offense of unlawful possession with intent to deliver more than one but less than 15 grams of heroin within 1,000 feet of a school, specifically "Ryerson Elementary School." (C.19); 720 ILCS 570/407(b)(1) (2013), 720 ILCS 570/401(c)(1) (2013). However, the State did not prove that the possession occurred within 1,000 feet of a school because it failed to present sufficient evidence that the building at 646 North Lawndale was a functioning school on July 22, 2013, the day of the offense. Instead, the State's evidence showed only that the building was "called Ryerson Elementary School" on July 22, 2013, but in September 2013 it was called "Laura Ward Elementary School." (R. F36, F79 F141) Because the State did not prove beyond a reasonable doubt that the offense occurred within 1,000 feet of a school, this Court should reverse Hardman's conviction and reduce it to simple possession with intent to deliver.

The due process clause requires the State to prove every element of a charge beyond a reasonable doubt, as well as every material and essential fact constituting that charge. U.S. Const., amends. V, XIV; Ill. Const. 1970, art. I, sec. 2; *In re Winship*, 397 U.S. 358, 364 (1970); *People v. Weinstein*, 35 Ill. 2d 467, 470 (1996).

If the evidence is not sufficient to remove all reasonable doubt of the defendant's guilt, the conviction must be reversed. *People v. Bartall*, 98 Ill. 2d 294, 306 (1983). Merely because the trier of fact made certain inferences based on the evidence does not guarantee the reasonableness of its decision. *People v. Ross*, 229 Ill. 2d 255, 272 (2008).

The standard of review for a challenge to the sufficiency of the evidence 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. Collins*, 106 Ill. 2d 237, 261 (1985). However, to the extent that this issue involves interpreting the statute, the standard of review is *de novo*. *People v. Ramirez*, 214 Ill. 2d 176, 179 (2005) (construction of a statute is reviewed *de novo*); *People v. Young*, 2011 IL 111886, ¶ 10 (whether a building is a "school" within the meaning of the relevant statute is a question of law reviewed *de novo*).

720 ILCS 570/407 – ENHANCEMENT PROVISION

Possession with intent to deliver one to 15 grams of heroin is ordinarily a Class 1 felony; however, if the State can prove that the transaction occurred within 1,000 feet of "any school," the offense is enhanced to a Class X felony. 720 ILCS 570/401(c)(1) (2013); 720 ILCS 570/407(b)(1) (2013). While section 407 does not define the phrase "any school," it applies at least to public or private elementary schools, colleges, and universities. *Young*, 2011 IL 111886 at ¶¶ 13-16; *People v. Goldstein*, 204 Ill. App. 3d 1041, 1047-49 (5th Dist. 1990) (discussing the legislative history of section 407 and Public Act 84-1075); 720 ILCS 5/2-19.5 (2013).

The State need not establish that classes were in session or that the defendant knew that the building was a school. *People v. Pacheco*, 281 Ill. App. 3d 179, 187-88 (2d Dist. 1996). However, because a substantive element of subsection (b) is that the transaction occurred within 1,000 feet of a school, the State must prove beyond a reasonable doubt that the building at issue was indeed a "school" under the statute at the time of the offense. 720 ILCS 570/407(b)(1).

PARTICULARIZED EVIDENCE OF AN OPERATING SCHOOL

This Court's decision in *People v. Young*, 2011 IL 111886, requires particularized evidence of the location's use to prove the enhancing location element. In *Young*, the defendant was charged with delivery of a controlled substance within 1,000 feet of the "High Mountain Church and Preschool." *Young*, 2011 IL 111886, at ¶¶ 4-5. This Court held that the term "school" has a settled meaning as "any public or private elementary or secondary school, community college, college or university." *Id.* at ¶¶ 13, 16. Thus this Court found that a "school," for purposes of the Controlled Substances Act, does not include a preschool. *Id.* at ¶¶ 13, 19. *Young* cited approvingly the concern of the *Goldstein* court that unless the State presented sufficient evidence that a school was actually a "school" as set forth in the statute, limitless possibilities existed that, for instance, a barber college or truck driving school, by name alone, would suffice for establishing an enhanced Class X offense. *See People v. Goldstein*, 204 Ill. App. 3d 1041, 1045 (5th Dist. 1990); *Young*, 2011 IL 111886 at ¶ 13. Given this Court's conclusion that not every school or school building constitutes a "school" under the enhancing statute, there must be additional evidence of what happens in the building, not just conclusory

testimony that the building is a school.

Critically, a defendant has no burden to present evidence to prove that a building labeled "school" is not actually a school. In *People v. Ross*, 229 Ill. 2d 255 (2008), this Court held that an inference to a legal conclusion must be supported by the evidence; it cannot be a presumption that the defendant is required to rebut because mandatory rebuttable presumptions are unconstitutional. *Ross*, 229 Ill. 2d at 273-74, citing *People v. Pomykala*, 203 Ill. 2d 198, 203 (2003). Thus, in Hardman's case, the law cannot presume that a building that is labeled a "school" is, in fact, a school until Hardman rebuts it by proof to the contrary, because that presumption would unconstitutionally shift the burden to the defendant to prove that the building was not a school. *Ross*, 229 Ill. 2d at 273-74, 275-76. Instead, the burden to present sufficient evidence that the building is operating as a school under the statute rests on the State.

Consistent with this Court's decision in *Young*, many appellate court panels have properly required the State to produce particularized evidence, based on a witness's demonstrated personal knowledge of an alleged enhancing location's actual use on the date in question. For example, in *People v. Boykin*, 2013 IL App (1st) 112696,¶ 17, the court reversed a conviction for possession of a controlled substance within 1,000 feet of "Our Lady of Peace school," because the State failed to prove that the building was still operating as a school at the time of the offense. Although police officers testified that the offense took place within 1,000 feet from a "school," the court found "there was no evidence presented to show how those officers had personal knowledge of the operation of that building." *Boykin*, 2013 IL App (1st) 112696, at ¶ 15. There were also no questions asked at trial about

whether Our Lady of Peace was an "active school" at the time of the offense. *Id.*

Similarly, in *People v. Morgan*, to prove the public-park enhancement under section 407(b), the court required particularized proof based on the witness's personal knowledge that at the time of the offense, the area known as "Bedrosian Park" was open to the public as "a piece of ground in a city or village set apart for ornament or to afford the benefit of air, exercise or amusement." *People v. Morgan*, 301 Ill. App. 3d 1026, 1031 (2d Dist. 1998); 720 ILCS 570/407(b). In *Morgan*, the officer testified that at the relevant time, the park grounds and its adjacent parking lot were open to and used by the public, and that the grounds encompassed several enclosed spaces with recreational facilities such as a playground and basketball courts. *Id.* In addition, the defendant himself testified that he played basketball there on the day of the offense. *Id.* at 1032. This particularized testimony, based on personal knowledge and observations of the area on the day in question, established that Bedrosian Park was a public park in fact and not merely in name. *Id.* at 1031-32; *see also* ILL. R. EVID. 602 (a witness must have personal knowledge of any matter he or she testifies to).

Likewise, *People v. Fickes*, 2017 IL App (5th) 140300, ¶ 24, required particularized evidence of the location's use to prove the enhancing location element. In *Fickes*, there was no direct testimony that St. James Lutheran Church was functioning primarily as a place of worship on the day of the offense. The court also found that no reasonable jury could have *inferred* the building was functioning as a church on that day, stating: "As a matter of both logic and common sense, there is no inherent rational connection between a witness's mere use of the term 'church' at trial and the fact that the 'church' was or was not functioning primarily

as a place of worship on a particular date prior to trial." *Id.*

Similarly, in *People v. Sparks*, 335 Ill. App. 3d 249, 256 (2nd Dist. 2002), the court stressed that, in determining whether a building was a "church" for purposes of section 407 statutory enhancements, the focus should be on its use, rather than its name or appearance. In *People v. Cadena,* 2013 IL App (2d) 120285, ¶ 15, evidence was insufficient to prove the enhancing location because although the word "church" was contained within the name of the "Evangelical Covenant Church," the court held that the State was required to offer proof regarding *"how* the building was used." *See also People v. Ortiz*, 2012 IL App (2d) 101261, ¶ 11 (the State failed to prove the enhancing location was primarily used for worship on the date of the offense). Thus, consistent with *Young*, the State must present particularized evidence of a location's use to prove the enhancing location element under section 407.

INSUFFICIENT EVIDENCE THAT 646 NORTH LAWNDALE WAS OPERATING AS A SCHOOL AT THE TIME OF THE OFFENSE

In Hardman's case, there was no testimony from anyone with personal knowledge of the actual operation of the building at 646 North Lawndale on July 22, 2013. (R. F79, F136) Although the witnesses said the offense took place in the vicinity of a "school," no one testified about what happened in the building. (R. F36, F79, F140-43) Officer Ruggiero testified that the offense occurred in a residential area "right next to a school called Ryerson Elemenary School at that time." (R. F79) But when asked on cross-examination if there were people coming and going, taking their kids to school, Ruggiero responded merely that "[i]t is an

active neighborhood." (R. F136)

Similarly, Officer Harmon and Investigator Lappe testified about the name and location of the building but not about any personal knowledge of the operation of that building. Harmon testified that "Laura Ward School" was near the address of the offense, but the name on July 22, 2013, was "Ryerson." (R. F36) Investigator Lappe testified that he measured the distance from 643 North Ridgeway to the nearest piece of property for "646 North Lawndale[,] [t]he Laura Ward Elementary School," which he agreed was "formerly called Ryerson Elementary School." (R. F140) Yet the State never presented evidence about whether the building was operational as a school on July 22, 2013. (R. F36, F79-80)

At best, the State's evidence showed that the building was undergoing changes that summer, as indicated by the different names – the building was called "Ryerson Elementary School" at the time of the offense on July 22, 2013, and called "Laura Ward Elementary School" in September 2013 when Investigator Lappe measured the distance to the Laura Ward property. (R. F36, F79, F140-41) There was no particularized testimony about the functioning of the building on July 22, 2013, thus the State did not prove beyond a reasonable doubt that the building was operating as a school at the time of the offense.

The appellate court in Hardman's case correctly acknowledged that "personal knowledge of the operation of that building" was key. *People v. Hardman*, 2016 IL App (1st) 140913-U, ¶ 14. However, it wrongly found that the personal knowledge of the operation of the building could be inferred from the testimony of two officers that they worked in the area for a number of years and that the offense occurred in the area of a building called Ryerson Elementary School at the time. *Hardman*,

2016 IL App (1st) 140913-U, at ¶¶ 16-18.

Contrary to the appellate court's finding below, an officer's bare testimony that he or she has worked in the area for many years is not sufficient to show that the building is a functioning school at the time of the offense. As illustrated by *Young*, the fact that a building is called a school is not sufficient to show it is a "school" under the statute. *See Young*, 2011 IL 111886, at ¶¶ 13, 19; *see also Fickes*, 2017 IL App (5th) 140300, at ¶ 24 ("there is no inherent rational connection between a witness's mere use of the term 'church' [or 'school'] at trial" and the actual operation of the building as a church or school at the time of the offense).

Here, none of the testimony offered by the officers confirmed that the building was operating as a "school" on the day of the offense. Defense counsel actually asked Officer Ruggiero whether there were "[p]eople coming and going, taking their kids to school," but Ruggiero only responded that it was "an active neighborhood," never that it was an operational school. (R. F136) Without more, on the day of the offense, the building could have housed a day camp, a senior adult community program, or been wholly inoperational. Because there was insufficient testimony about the functioning of the building on July 22, 2013, the State did not prove beyond a reasonable doubt that the building was a "school" as required by the statute in order to enhance the offense from a Class 1 felony to a Class X felony.

PUBLIC POLICY COUNSELS AGAINST FINDING CONCLUSORY EVIDENCE SUFFICIENT

Policy considerations also demand particularized evidence of a location's

actual use at the time of the offense. Sufficient evidence that a building is a functioning school under the statute should be required because what may appear to be a school building may not, in fact, house a school. For instance, in Chicago, 47 public elementary schools closed in 2013. MARISA DE LA TORRE, ET AL., UNIV. CHICAGO CONSORTIUM ON CHICAGO SCH. RESEARCH, SCHOOL CLOSINGS IN CHICAGO: UNDERSTANDING FAMILIES' CHOICES AND CONSTRAINTS FOR NEW SCHOOL ENROLLMENT 5 (Jan. 2015) (available at consortium.uchicago.edu under "Publications"; last accessed 4/20/2017); *People v. Crawford*, 2013 IL App (1st) 100310, fn. 9 ("This Court may take judicial notice of information on a public website even though the information was not in the record on appeal."). In Hardman's case, the record shows "Ryerson Elementary School" was closed at some point, and in September 2013, the building began operating as Laura Ward. (R. E5-7, F140)

Given widespread school closings, to not require evidence that a particular building is operating as a school would be inconsistent with *Young's* holding that not every possible school is a "school" under the statute. Indeed, if "school" is interpreted too broadly under the statute, "the term could include an endless number of possible educational facilities," allowing that, for instance, a barber college or truck driving school or preschool, by name alone, would suffice for establishing an enhanced Class X offense. *See Young*, 2011 IL 111886 at ¶ 13; *Goldstein*, 204 Ill. App. 3d at 1045.

A closed building that once operated as a school cannot constitute a "school" under section 407 for a similar reason – if "any school" is allowed to include closed schools, the possibilities would be nearly endless. For example, as pointed out

by the dissent in *Toliver*, "any drug sale on or near Navy Pier, the most popular tourist attraction in the Midwest, [would fall] within this school sentencing enhancement because it was the home of the University of Illinois-Chicago until the mid-1960's but is now closed." *People v. Toliver*, 2016 IL App (1st) 141064, ¶ 52 (Pierce, J., dissenting). Any contrary position that a building once built as a school remains a school in perpetuity, must be rejected. Excusing insufficient evidence based upon the name of the building alone or the building's past usage is inconsistent with the legislature's rationale for promulgating the enhanced Class X offense and sentence. *See Goldstein*, 204 Ill. App. 3d at 1047 (discussing the purpose of Public Act 84-1075 to deal with gang-related problems). The State must establish that the building was operating as an actual school, as required by the statute, on the date and time of the offense.

Moreover, particularized evidence that the building is functioning as a school must be required because of the significant added penalty for the enhancing location, which elevates the offense from a Class 1 felony to a Class X felony. 720 ILCS 570/401(c)(1); 720 ILCS 570/407(b)(1). This concern was expressed by the court in *People v. Ortiz*, 2012 IL App (2d) 101261, ¶ 11, which said that because several additional years of imprisonment could be riding on that issue, it is reasonable to expect the State to call a witness affiliated with the school to testify about it. *See also Toliver*, 2016 IL App (1st) 141064, at ¶¶ 44, 45 (Pierce, J., dissenting), *quoting Ortiz*, 2012 IL App (2d) 101261, at ¶ 11.

Nor would it be excessively burdensome for the State to present particularized evidence that a building is functioning as a school on the day in question. The State can prove that a particular building was operating as a school by testimony

from a qualified witness, such as a teacher or student, who could attest to activity at the building that day. For example, in *People v. Howard*, 2017 IL 120443, ¶¶ 5, 8-9, this Court upheld the defendant's conviction for loitering outside a school where the evidence of a school at trial consisted of testimony that there were 80 to 100 children playing in the school yard, and that defendant's friend went into the school to deliver lunches to her grandchildren who were students there. If an offense occurred during the summer when no students were present, the State could call a qualified witness who was familiar with the building's operational status as a school, such as a principal or superintendent. For instance, in *People v. Carter*, 297 Ill. App. 3d 1028, 1031 (1st Dist. 1998), the State called the principal of the school who testified that the school was operational on the day of the offense. Similarly, in *People v. Lipscomb*, 173 Ill. App. 3d 416, 417 (4th Dist. 1988), the State called the superintendent, who testified that the building was owned by the city school district, and the principal, who testified that the building was being used as an elementary school on the date of the drug sale.

In order for the State to prove the enhancing element of "within 1,000 feet of a school," the State must be required to produce sufficient particularized evidence, based on a witness's demonstrated personal knowledge of an alleged enhancing location's actual use at the time of the offense. In Hardman's case, there was insufficient evidence to establish the building at 646 North Lawndale was a school at the time of the offense, and therefore, this Court should reverse Hardman's conviction and reduce it to Class 1 possession with intent to deliver.

II. Where the trial court improperly assessed a $500 reimbursement fee for the services of the public defender without complying with the requirements of section 113-3.1, the fee must be vacated without remand where no hearing on Hardman's ability to pay occurred and where judicial economy counsels against remand.

The trial court erred when it ordered Antoine Hardman to pay $500 to reimburse the county for the use of the public defender where the court did not provide him his due process right of notice and opportunity to be heard or follow the requirements of the statute, 725 ILCS 5/113-3.1 (2013). The proper remedy for this error is to vacate the fee without remand where:

- the court conducted no hearing on Hardman's ability to pay the fee and considered no affidavit or any other information about his financial circumstances, and
- remanding for a hearing would violate principles of judicial economy while serving no practical purpose because the record reflects that Hardman in fact has no ability to pay.

This Court should thus vacate the public defender reimbursement fee, without remand.

725 ILCS 113-3.1 - REIMBURSEMENT FEE

Section 113-3.1 of the Code of Criminal Procedure provides discretionary authority to the trial court to order a defendant in a criminal case to reimburse the county for a portion of the cost of court-appointed counsel. 725 ILCS 5/113–3.1(a)

(2013). Before any such assessment is ordered, the court must obtain an affidavit of the defendant's assets and liabilities, ascertain the defendant's financial circumstances, and conduct a hearing within a specified time period into the defendant's ability to pay. 725 ILCS 5/113-3(b) (2013); 725 ILCS 5/113–3.1(a). Specifically, the statute reads:

> Whenever under either Section 113-3 of this Code or Rule 607 of the Illinois Supreme Court the court appoints counsel to represent a defendant, the court may order the defendant to pay to the Clerk of the Circuit Court a reasonable sum to reimburse either the county or the State for such representation. In a hearing to determine the amount of the payment, the court shall consider the affidavit prepared by the defendant under Section 113-3 of this Code and any other information pertaining to the defendant's financial circumstances which may be submitted by the parties. 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). Whether a trial court fails to comply with section 113-3.1 is purely a question of law, so the standard of review is *de novo*. *People v. Gutierrez,* 2012 IL 111590, ¶ 16.

DUE PROCESS REQUIREMENTS

The legislature's intent in creating section 113-3.1 was to satisfy due process by requiring a hearing on the defendant's ability to pay. This Court, in *People v. Love*, 177 Ill. 2d 550 (1997), recognized:

> Section 113-3.1 was clearly intended to correct the due process violation identified in *Cook* by requiring that, prior to ordering reimbursement, the trial court conduct a hearing which considers the defendant's financial ability to pay reimbursement.

Id. at 558-59, *citing* 82d Ill. Gen. Assem., House Proceedings, May 6, 1981, at 103-04 (statements of Representative Stearney); U.S. Const. amends. V, XIV; Ill.

Const. 1970, art. 1, § 2.

This Court has held that in order to satisfy due process, prior to any section 113-3.1 hearing, the defendant must be given notice that he will have an opportunity to present evidence on his ability to pay the fee and other relevant circumstances. *People v. Cook*, 81 Ill. 2d 176, 185-86 (1980). Notice includes "informing the defendant of the court's intention to hold such a hearing, the action the court may take as a result of the hearing, and the opportunity the defendant will have to present evidence and be heard." *People v. Spotts*, 305 Ill. App. 3d 702, 704 (2d Dist. 1999).

The opportunity to present evidence and be heard is key to the hearing. In *Cook*, this Court affirmed that "a summary decision which orders reimbursement without affording a hearing with opportunity to present evidence and be heard acts to violate an indigent defendant's right to procedural due process." *Cook*, 81 Ill. 2d at 186. This is consistent with long-standing precedent that a "hearing" necessarily provides the opportunity to present evidence. *See Morgan v. United States*, 304 U.S. 1, 18 (1938) ("The right to a hearing embraces *** the right to present evidence."); *see also People v. Dodds,* 344 Ill. App. 3d 513, 520-23 (1st Dist. 2003) (recognizing that the Post-Conviction Hearing Act precludes factual findings before an evidentiary hearing because the hearing provides the parties with an opportunity to present evidence).

In addition to notice and an opportunity to be heard, due process requires the subject of the hearing to include the foreseeable ability of the defendant to pay the reimbursement fee. *Love*, 177 Ill. 2d at 563. This Court in *Love* found that "[t]he language of section 113-3.1(a) clearly requires the trial court to conduct

a hearing into the defendant's financial resources as a precondition to ordering reimbursement." *Love*, 177 Ill. 2d at 555. In *Love*, this Court looked to the United States Supreme Court's decision in *Fuller v. Oregon*, 417 U.S. 40, 43 n. 5 (1974), which found the Oregon reimbursement statute constitutional because it "imposed a duty on the trial court to consider the defendant's financial resources and the nature of the burden that payment will impose on the defendant." *Love*, 177 Ill. 2d at 557.

In *Somers*, this Court outlined what the trial court must do to comply with section 113-3.1(a):

> give the defendant notice that it is considering imposing the fee, and the defendant must be given the opportunity to present evidence regarding his or her ability to pay and any other relevant circumstances. [Citation]. The hearing must focus on the costs of representation, the defendant's financial circumstances, and the foreseeable ability of the defendant to pay.

People v. Somers, 2013 IL 114054, ¶ 14. The *Somers* Court stressed that any hearing must not be merely perfunctory. *Id*. As reaffirmed in *Love*, *Somers*, and *Cook*, the defendant's foreseeable ability to pay must be the main focus. *Love*, 177 Ill. 2d at 563; *Cook*, 81 Ill. 2d at 185; *Somers*, 2013 IL 114054, at ¶ 14.

NO COMPLIANCE WITH EITHER DUE PROCESS OR SECTION 113-3.1(a)

Hardman's right to due process of law was violated when the court failed to notify him that it was considering imposing the fee and did not give him an opportunity to present evidence regarding his ability to pay. (R. H13) The State filed a request for the public defender reimbursement fee on September 3, 2013. (R. A1) Then, on March 6, 2014, after the court sentenced Hardman and admonished

him of his right to appeal, the court asked the State whether it had any other motions, and the State reminded the court of its motion for reimbursement. (R. H1, H13) Then, the following exchange occurred:

> [COURT]: Ms. Hull, how many times have you appeared on this case?
> [DEFENSE COUNSEL]: Eight times, Judge.
> [COURT]: How many?
> [DEFENSE COUNSEL]: Eight.
> [COURT]: Eight. All right. And you went to trial. All right. Attorney's fees would be appropriate of $500. Thank you.

(R. H13)

Hardman had no advance knowledge that the State's motion would be ruled on at that point, nor did he have any opportunity to respond to or counter the State's request. Moreover, the court did not obtain an affidavit from Hardman as required and did not inquire into his financial circumstances. (R. H13) As the appellate court appropriately concluded, the trial court erred by assessing the discretionary fee without complying with the statute. *Hardman*, 2016 IL App (1st) 140913-U at ¶ 19.

NO REMAND IS REQUIRED

Although the appellate court recognized the trial court failed to comply with the statute, its conclusion that the fee "was erroneously assessed without a *sufficient* hearing" is refuted by the record. *Hardman*, 2016 IL App (1st) 140913-U at ¶ 20, emphasis added. In fact, Hardman received *no hearing,* and thus the appellate court erred by ordering a remand.

When the trial court fails to comply with section 113–3.1(a)'s hearing requirement, the remedy depends on what the trial court did the first time. If no hearing on the defendant's ability to pay and financial circumstances took place

within 90 days, this Court has held that the proper result is to vacate the fee outright. *People v. Gutierrez*, 2012 IL 111590, ¶ 28 (where no hearing was held because the circuit clerk imposed the fee, the cause should not be remanded for a hearing on defendant's ability to pay); 725 ILCS 5/113–3.1(a). On the other hand, if the trial court *did* conduct a hearing on the defendant's ability to pay but that hearing was insufficient under the statute, a remand is ordered for a new and proper hearing. *People v. Somers*, 2013 IL 114054, ¶ 15.

In Hardman's case, the court did not conduct a hearing, so the fee must be vacated. (R. H13) A section 113-3.1(a) hearing requires consideration of "an affidavit" and "other information pertaining to the defendant's financial circumstances." 725 ILCS 5/113-3.1(a). Here, before imposing the fee, the trial court did not consider any information pertaining to Hardman's financial circumstances and did not obtain the required financial affidavit. 725 ILCS 5/113-3.1(a). Nor was Hardman given notice or the opportunity to present any evidence as required by due process. In light of these facts, under no circumstances could it be concluded that any hearing was held.

In *Somers*, this Court remanded the case for a new section 113-3.1(a) hearing because – unlike in Hardman's case – the trial court held a hearing on the defendant's ability to pay, but it was ultimately insufficient under the statute. *People v. Somers*, 2013 IL 114054, ¶¶ 14-15. Specifically, before imposing the fee, the court in *Somers* asked the defendant: 1) whether there were any physical issues that would keep him from working; 2) whether he thought he could get a job after he was released from jail; and 3) whether he would use his wages to pay his fines and costs. *Somers*, 2013 IL 114054, at ¶ 4. After considering the defendant's answers,

the trial court found that $200 would be appropriate. *Id.* This Court concluded that the inquiry was not enough to satisfy section 113-3.1(a)'s hearing requirements. It then remanded the case for a new hearing because "the trial court did have some sort of a hearing within the statutory time period." *Id.* at ¶¶ 14-15. Unlike Hardman's case, the abbreviated hearing in *Somers* considered the defendant's financial circumstances and foreseeable ability to pay, and the defendant had an opportunity to present some evidence on the issue.

In contrast, remand is not appropriate in Hardman's case because the proceedings did not meet the threshold requirement to be considered "some sort of a hearing" under *Somers*. The trial court asked no questions about Hardman's financial circumstances and gave him no opportunity to present evidence. Nor did it inquire into his ability to work, his prospects for employment, or whether he would be able to use his future wages to pay the fee. Instead, the court asked a single question to defense counsel regarding how many times she appeared on the case. (R. H13) The only information gained by this exchange – how many times defense counsel appeared – was information the court could have discovered itself merely by looking at the half-sheet. Therefore, no hearing here occurred.

The appellate court below was incorrect in interpreting the "some sort of a hearing" standard in *Somers* to be any "judicial session open to the public, held to resolve defendant's representation by the public defender." *Hardman*, 2016 IL App (1st) 140913-U at ¶ 23. Rather, the defining characteristic of a section 113-3.1(a) hearing, as set forth by this Court in *Love* and *Cook* and the United States Supreme Court in *Fuller,* is that the focus of the hearing be the defendant's foreseeable ability to pay the fee. *Love* at 557-60; *Cook*, 81 Ill. 2d at 186; *Fuller*,

417 U.S. at 53. This Court, in fact, stressed in *Love* that the legislature's intent in creating this statute was to satisfy due process by requiring a hearing on the defendant's ability to pay. *Love* at 558-59 citing 82d Ill. Gen. Assem., House Proceedings, May 6, 1981, at 103-04 (statements of Representative Stearney). Thus, "some sort of a hearing" cannot merely be a generic "session open to the public;" there must be an inquiry into *the defendant's ability to pay*, which did not occur in this case.

Hardman did not receive even the minimal "some sort of a hearing" that the *Somers* Court found was sufficient to merit a remand. *See People v. Moore*, 2015 IL App (1st) 141451, ¶ 40 (no remand where trial court's only inquiry before imposing fee was to ask defense counsel how many times counsel appeared because "some sort of hearing" at minimum requires compliance with the directive in *Somers* that the hearing "must focus on the costs of representation, the defendant's financial circumstances, and the foreseeable ability of the defendant to pay."). Since no hearing on Hardman's ability to pay was held within 90 days of the final order disposing of the case at the trial level, as required under section 113-3.1(a), the fee must be vacated without remand.

JUDICIAL ECONOMY AND PUBLIC POLICY COUNSEL AGAINST REMAND IN ANY CASE WHERE THE DISCRETIONARY PUBLIC DEFENDER FEE WAS NOT PROPERLY ASSESSED

Not only should Hardman's fee be vacated without remand because he had no hearing, as a matter of public policy, *no* case should be remanded for the imposition of the discretionary fee where the defendant did not receive a proper

hearing the first time. In connection with this statute, the legislature has provided that this Court "may provide by rule for procedures of the enforcement of orders entered under this section." 725 ILCS 113-3.1(d). Based on public policy and judicial economy, even where there is a hearing but it is deemed insufficient, no remand should be ordered, for the reasons set out below.

First, remanding a case where the trial court failed to follow the statutory procedure in the first place violates one of the legislature's goals in enacting the statute – "to reduce the cost to the taxpayers and return some money into the county." 82d Ill. Gen. Assem., House Proceedings, May 6, 1981, at 102 (statements of Representative Wikoff); *see also Love* at 558-59, *citing* 82d Ill. Gen. Assem., House Proceedings, May 6, 1981, at 103-04 (statements of Representative Stearney). As many lower courts have recognized – even those that remanded for new hearings – remanding for a proper reimbursement hearing when the first "hearing" did not follow the basic requirements of due process wastes judicial resources and taxpayer money. *See, e.g., People v. Glass*, 2017 IL App (1st) 143551, ¶ 19 (remanding, but stating, "we agree wholeheartedly *** that the remanding of cases for hearings in compliance with this section is a significant waste of resources, for both the parties and for the court"); *People v. Moore*, 2015 IL App (1st) 141451, ¶ 42 (vacating outright and holding, "The monetary costs incurred by the taxpayers of the county and the state, during a period of severe budgetary stress, coupled with the usually stressed court docket simply does not justify an order of remand as a reasonable remedy for the failure to conduct the required hearing relating to the assessment [of] the public defender fee."); *People v. Williams*, 2013 IL App (2d) 120094, ¶ 54-55 (Jorgensen, J., dissenting in part) (remand unduly burdens

both defendant and taxpayers); *People v. Morrison*, 111 Ill. App. 3d 997, 1001 (3d Dist. 1983) (Heiple, J., dissenting) (remand is "an affront to the taxpayers and to the judicial process. This additional hearing will consume the time and effort of the public defender, the State's Attorney, the circuit clerk, the court bailiff, the sheriff, and the court reporter. The cost and wasted time of court personnel will exceed the amount of the fine even if collected.")

Second, in most cases, a remand would be especially wasteful because a defendant who was represented by appointed counsel at trial and is still represented by appointed counsel on appeal, is presumed indigent. Significantly, the United States Supreme Court presumes that once a defendant is found indigent, he remains indigent. In fact, as of 2013, the United States Supreme Court no longer requires an affidavit of indigency before allowing *in forma pauperis* pleadings:

> If the court below appointed counsel for an indigent party, no affidavit or declaration is required, but the motion shall cite the provision of law under which counsel was appointed, or a copy of the order of appointment shall be appended to the motion.

USSCT Rule 39, section 1 (2013). Thus, any remand for a defendant who has been appointed counsel on appeal, like Hardman who has been judicially determined to be indigent, would be fruitless.

In fact, the record establishes that within 90 days of his sentencing hearing, Hardman had no foreseeable ability to pay the fee. When the State filed its motion at Hardman's arraignment, Hardman told the court that he had no money to pay for an attorney, and on that basis, the court appointed the public defender. (R. A2-3) The pre-sentence investigation report similarly confirmed that Hardman was unemployed from 2006 until his arrest in 2013, supporting himself with odd jobs and financial assistance from his mother. (C. 55) Hardman remained in custody

throughout the duration of the trial court proceedings and had no ability to obtain income. (R. H10) Hardman continued to be incarcerated within the 90-day period following the final judgment in the trial court after his conviction. *See* 725 ILCS 5/113-3.1(a). Thus, the record shows that even a proper hearing held within the statutory time period would not have found a foreseeable ability for Hardman to pay this fee.

Notably, any remand on the question of foreseeability must relate back to within 90 days of sentencing, when the hearing needed to be held, as the legislature clearly articulated a specific time period in which defendant's ability to pay and financial circumstances were to be evaluated. 725 ILCS 5/113-3.1(a). The legal system desires finality of judgments, and the legislature expressed its intent of finality by including a specific time period in the statute. Moreover, a retrospective section 113-3.1(a) hearing would be additionally burdensome. *See, e.g., People v. Neal*, 179 Ill. 2d 541, 553 (1997) (recognizing inherent difficulties in retrospective fitness hearings). Thus, the record demonstrates that a remand now for a retrospective ability-to-pay hearing for Hardman, as for other indigent appellants, would undoubtably produce little yield while using vastly more resources.

Third, prohibiting such remands would encourage courts and the State to follow the correct procedure the first time. This Court has repeatedly reprimanded trial courts and circuit clerks for routinely denying defendants the hearings required by section 113-3.1(a) before imposing public defender fees, but without effect. *See Gutierrez*, 2012 IL 111590, at ¶¶ 25-26 ("We again remind the trial courts of their duty to hold [a hearing on the defendant's ability to pay], and we trust that we will not have to speak on this issue again."); *Somers*, 2013 IL 114054, at ¶ 18 ("As

we did in *Gutierrez*, 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."). The perfunctory manner in which the trial court ordered Hardman to pay the $500 reimbursement fee is exactly the type of order this Court denounced in *Gutierrez* and *Somers*.

In sum, the reimbursement fee should be vacated without remand because:

- the trial court held no hearing on Hardman's ability to pay the reimbursement fee, and
- remanding for a hearing would violate principles of judicial economy while serving no practical purpose.

Therefore, this Court should vacate the $500 reimbursement fee without remand.

CONCLUSION

For the foregoing reasons, Antoine Hardman, Defendant-Appellant, respectfully requests that this Court reverse the decision of the appellate court, reduce Hardman's conviction to Class 1 possession with intent to deliver, and reverse the $500 public defender fee without remand.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Tonya Joy Reedy, certify that this brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this brief, excluding pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 32 pages.

/s/Tonya Joy Reedy
TONYA JOY REEDY
Assistant Appellate Defender

No. 121453

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- ANTOINE HARDMAN Defendant-Appellant	)))))))))))	Appeal from the Appellate Court of Illinois, No. 1-14-0913. There on appeal from the Circuit Court of Cook County, Illinois , No. 13 CR 15697 (02). Honorable Vincent M. Gaughan, Judge Presiding.

NOTICE AND PROOF OF SERVICE

TO: Lisa Madigan, Attorney General, 100 W. Randolph St., Chicago, IL 60601, mglick@atg.state.il.us cc: twhatley-conner@atg.state.il.us, jescobar@atg.state.il.us, lbendik@atg.state.il.us, chulfachor@atg.state.il.us

Ms. Kimberly M. Foxx, State's Attorney, Cook County State's Attorney Office, 300 Daley Center, Chicago, IL 60602;

Mr. Antoine Hardman, Register No. B67096, Sheridan Correctional Center, 4017 E. 2603 Road, Sheridan, IL 60551

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. An electronic copy of the Brief and Argument in the above-entitled cause was submitted to the Clerk of the above Court for filing on June 15, 2017. On that same date, we electronically served the Attorney General of Illinois, personally delivered three copies to opposing counsel, and mailed one copy to the defendant-appellant in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. The original and twelve copies of the Brief and Argument will be sent to the Clerk of the above Court upon receipt of the electronically submitted filed stamped motion.

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APPENDIX TO THE BRIEF

Antoine Hardman No. 121453

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Common Law Record ("C")

Report of Proceedings ("R")

2016 IL App (1st) 140913-U

THIRD DIVISION
September 14, 2016

No. 1-14-0913

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 15697
	)	
ANTOINE HARDMAN,	)	Honorable
	)	Vincent M. Gaughan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE COBBS delivered the judgment of the court.
Justices Howse and Ellis concurred in the judgment.

O R D E R

¶ 1 *Held:* Defendant's conviction for possession of a controlled substance with intent to deliver within 1,000 feet of a school affirmed where the evidence sufficiently established that the building was operating as a school; public defender reimbursement fee vacated and case remanded for hearing on defendant's ability to pay; mittimus amended to correct name of offense.

A-4

¶ 2 Following a bench trial, held simultaneously with codefendant's jury trial, defendant Antoine Hardman and codefendant Andre Nesbitt[1] were convicted of possession of a controlled substance with intent to deliver within 1,000 feet of a school. The trial court sentenced defendant to a term of eight years' imprisonment. On appeal, defendant concedes that he was proven guilty of possession of a controlled substance with intent to deliver. He contends, however, that the State failed to prove that he committed that offense within 1,000 feet of a school because it failed to present any evidence that the building at issue was operating as a school on the date of the offense. Defendant also argues that the trial court erroneously assessed him a $500 reimbursement fee for the services of the public defender without conducting the requisite hearing to determine his ability to pay. In addition, defendant contends, and the State agrees, that his mittimus should be amended to reflect the correct name of the offense of which he was convicted.

¶ 3 In light of defendant's acknowledgement that he was proven guilty of possession of a controlled substance with intent to deliver, and that his only challenge to his conviction is whether the evidence established that the building at issue was a school, we confine our factual summary to the evidence presented about that school. The evidence at trial established that about 10 a.m. on July 22, 2013, Chicago police officer Salvatore Ruggiero was conducting surveillance of the alley at 634 North Ridgeway Avenue and observed defendant and codefendant each engage in three separate narcotics transactions with three different individuals. During each transaction, defendant accepted money from the individual in exchange for a small bag of heroin

[1] This court entered judgment on codefendant's appeal in *People v. Nesbitt*, 2016 IL App (1st) 140912-U. Codefendant is not a party to this appeal.

that he retrieved from underneath a rock. Following the arrest of defendant and codefendant, police recovered 12 small plastic bags of heroin from underneath the rock. A forensic chemist tested the contents of 7 of the 12 bags and found it positive for 1.2 grams of heroin.

¶ 4 Officer Ruggiero testified that he had been on the force for almost eight years, and at the time of the offense, had worked in the 11th District for seven years. When asked to describe the 600 block of North Ridgeway Avenue, Officer Ruggiero testified "[t]he area is residential, with buildings and also right next to a school called Ryerson Elementary School at that time." The prosecutor noted that the officer said "at that time," and asked if the school has a different name, and Officer Ruggiero replied that it is now called "Laura Ward." He also testified that the school was located "[r]ight across the street" from where the offense occurred.

¶ 5 Officer Ruggiero further testified that he was familiar with the area because he was a patrol officer in the 11th District and made "numerous arrests in that area," including at least 20 narcotics arrests "around that time of year." Officer Ruggiero testified that he conducted surveillance in that area "[a]t least twenty times in that part of the year," and that it is "an area that is known for narcotics sales."

¶ 6 On cross-examination, Officer Ruggiero acknowledged that as a patrol officer, it was his responsibility to try to keep the streets safe in the area of Ridgeway Avenue, and part of that responsibility included looking for the drug dealers in that area. When defense counsel asked if it was a residential area, he replied "[c]orrect. Right across the street from Ryerson Elementary School." Counsel then asked "[p]eople were coming and going, taking their kids to school,

parents, is that right?" and the officer replied that it was "an active neighborhood" and people were out in the area at the time of the offense.

¶ 7 Chicago police officer Joseph Harmon testified that he had been on the police force for 15 years, had worked in the 11th District for 9 years, and was familiar with the area where the offense occurred, including the schools near that location. Officer Harmon testified that the building located near the offense was "Laura Ward School." He further testified that the name of the school had changed, and that it was named "Ryerson" on July 22, 2013.

¶ 8 Christopher Lappe, an investigator with the Cook County State's Attorney's Office, testified that he measured the distance from 634 North Ridgeway Avenue to "646 North Lawndale. The Laura Ward Elementary School," and found that it was 88 feet. The end point for his measurement was "[t]he parking lot for the Laura Ward school." The investigator also acknowledged that the school was "formerly called Ryerson Elementary School."

¶ 9 On appeal, defendant first challenges the sufficiency of the evidence to sustain his conviction, contending that the State failed to prove beyond a reasonable doubt that the building at issue was operating as a school on the date of the offense. Defendant acknowledges that a police officer's testimony may be sufficient to prove that a building is a school. He argues, however, that in this case, the officers' testimony was not sufficient because it showed that the building was in transition, and they did not testify that the school was operational on the date of the offense.

¶ 10 Initially, we note that in his reply brief, defendant included a footnote citing to a website for Chicago Public Schools purportedly discussing the closing of Ryerson Elementary School in

the summer of 2013, and the relocation of the Laura Ward Elementary School to that building. The record shows that this evidence was not presented to the trial court, and therefore, it is not properly before this court. *People v. Boykin*, 2013 IL App (1st) 112696, ¶ 9. Consequently, we decline to give any consideration to the information in this footnote.

¶ 11 When defendant claims that the evidence is insufficient to sustain his conviction, this court must determine whether any rational trier of fact, after viewing the evidence in the light most favorable to the State, could have found the elements of the offense proved beyond a reasonable doubt. *People v. Baskerville*, 2012 IL 111056, ¶ 31. This standard applies whether the evidence is direct or circumstantial, and does not allow this court to substitute its judgment for that of the fact finder on issues involving witness credibility and the weight of the evidence. *People v. Jackson*, 232 Ill. 2d 246, 280-81 (2009). "Under this standard, all reasonable inferences from the evidence must be allowed in favor of the State." *Baskerville*, 2012 IL 111056, ¶ 31.

¶ 12 In a bench trial, the trial court is responsible for determining the credibility of the witnesses, weighing the evidence, resolving conflicts in the evidence, and drawing reasonable inferences from therein. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). We will not reverse a criminal conviction based upon insufficient evidence unless the evidence is so improbable or unsatisfactory that there is reasonable doubt as to defendant's guilt (*People v. Givens*, 237 Ill. 2d 311, 334 (2010)), nor simply because defendant claims that a witness was not credible or that the evidence was contradictory (*Siguenza-Brito*, 235 Ill. 2d at 228).

¶ 13 To prove defendant guilty of possession of a controlled substance with intent to deliver as charged in this case, the State was required to show that he knowingly possessed between 1 and

15 grams of a substance containing heroin, he intended to deliver the drugs, and he did so within 1,000 feet of Ryerson Elementary School. 720 ILCS 570/401(c)(1) (West 2012); 720 ILCS 570/407(b)(1) (West 2012). The statute expressly provides that for offenses occurring within 1,000 feet of a school, the time of day, the time of year, and whether classes were in session at the time of the offense are irrelevant. 720 ILCS 570/407(c) (West 2012).

¶ 14 Our supreme court has found that the term "school," as used in the statute, includes "any public or private elementary or secondary school, community college, college or university." (Internal quotation marks omitted.) *People v. Young*, 2011 IL 111886, ¶¶ 13-16. The testimony of a layperson, including a police officer, can be sufficient to prove that a building is a school where the layperson has personal knowledge of the operation of that building. *People v. Morgan*, 301 Ill. App. 3d 1026, 1032 (1998) (police officer's testimony that location was a public park was sufficient where he testified that he was familiar with the area and had made over 100 arrests there). "It is generally understood that persons living and working in the community are familiar with various public places in the neighborhood." *Id.* Moreover, "[h]ow or whether buildings are used would seem to be of particular interest to a police officer." *People v. Sims*, 2014 IL App (4th) 130568, ¶ 138 (it was reasonable for the court to infer that in the officer's line of work, he was familiar with the area, such that he could testify whether a particular church was active).

¶ 15 In the case at bar, defendant primarily relies on the holding in *Boykin* in support of his argument that the police officers' testimony was not sufficient to prove that the building at issue was operating as a school on the date of the offense. In *Boykin*, the defendant argued that the State failed to establish that "Our Lady of Peace" was operating as a school on the date of the

offense, and that the officers' characterization of the building as a "school" was insufficient. *Boykin*, 2013 IL App (1st) 112696, ¶ 5. The court found that, although the officers testified that the building was a "school," the State failed to present evidence showing how the officers had personal knowledge of the operation of the building. *Id.* at ¶ 15. The court reasoned that the officers did not testify that they lived in the area or that they regularly patrolled the neighborhood, which would have allowed an inference that they had personal knowledge about whether the school was operating on the date of the offense. *Id.*

¶ 16 Here, unlike *Boykin*, the record shows that the officers' testimony established that they were familiar with the area, and specifically, with the elementary school at issue. Officer Ruggiero testified that he had worked in the 11th District for seven years, that he was a patrol officer in the district, and that he had made "numerous arrests in that area." He expressly testified that the area where the offense occurred was residential "and also right next to a school called Ryerson Elementary School at that time." Officer Ruggiero further testified that the offense occurred "[r]ight across the street from Ryerson Elementary School."

¶ 17 In addition to Officer Ruggiero's testimony, Officer Harmon testified that he had worked in the 11th District for nine years and was familiar with the area where the offense occurred, including the schools near that location. Significantly, Officer Harmon specifically testified that the school was named Ryerson on July 22, 2013, the date of the offense.

¶ 18 Viewed in the light most favorable to the State, we find that the officers' testimony was sufficient to allow the trial court, sitting as the trier of fact, to conclude that both officers were familiar with the area and had personal knowledge that the building located near the offense was

operating as Ryerson Elementary School on the date the offense occurred. Accordingly, we find that the evidence sufficiently established that defendant committed the offense of possession of a controlled substance with intent to deliver within 1,000 feet of a school.

¶ 19 Defendant next contends, the State concedes, and we concur that that the trial court erroneously assessed him a $500 reimbursement fee for the services of the public defender without conducting the requisite hearing to determine his ability to pay. Pursuant to section 5/113-3.1(a) of the Illinois Code of Criminal Procedure, the circuit court may order a defendant to pay a reasonable sum to reimburse the county or State for representation by appointed counsel, the amount of which is to be determined at a hearing where the court shall consider the defendant's financial circumstances. 725 ILCS 5/113-3.1(a) (West 2012). To comply with the statute, the trial court must give defendant notice that it is considering imposing the fee, and the opportunity to present evidence regarding his ability to pay. *People v. Somers*, 2013 IL 114054, ¶ 14. Our supreme court has repeatedly reminded the trial courts of their obligation to conduct such hearings in compliance with the statute. *Somers*, 2013 IL 114054, ¶ 18; *People v. Gutierrez*, 2012 IL 111590, ¶¶ 25-26.

¶ 20 Here, the record shows that after defendant was sentenced and admonished of his right to appeal, the prosecutor stated that she had filed a motion for reimbursement of attorney's fees. The trial court then asked the public defender how many times she had appeared in court, noted that there had been a trial, and stated "[a]ttorney's fees would be appropriate of $500." The court did not inquire into defendant's financial status or give defendant an opportunity to present

evidence regarding his ability to pay. Consequently, the fee was erroneously assessed without a sufficient hearing.

¶ 21 In his opening brief, defendant argued that his case should be remanded for a proper hearing to determine his ability to pay the reimbursement fee, and in response, the State agreed that remand was the appropriate remedy. In his reply brief, however, defendant pointed out that after he filed his opening brief, another division of this court held that where the trial court fails to consider the defendant's ability to pay, the required hearing did not occur, and the proper remedy is to vacate the fee. *People v. Moore*, 2015 IL App (1st) 141451. In *Moore*, after the defendant was sentenced, the court asked the public defender the number of times he had appeared and, without questioning the defendant, imposed a $150 fee. *Id.* ¶ 30. The court concluded that completely failing to inquire into the defendant's financial circumstances necessitated a finding that no hearing occurred for the purposes of section 113-3.1(a) *Id.* ¶ 41. Consequently, because section 113-3.1(a) provides that the hearing shall be conducted no later than 90 days after entry of the final order of the trial court, remand for a proper hearing was not the appropriate remedy, but rather, the fee was vacated outright. *Id.* Relying on the holding in *Moore*, defendant now argues that the reimbursement fee should be vacated outright, and that remand for a hearing is not necessary.

¶ 22 We respectfully disagree with the court's determination in *Moore* and its progeny that no hearing whatsoever occurred in cases where, as here, after sentencing a defendant the trial court asks the public defender the number of times she appeared in court but does not question the defendant on his ability to pay. We note that in this case it is undisputed that the hearing below

was insufficient to satisfy the requirements of section 113-3.1(a) and the only question at issue is the appropriate remedy. Our supreme court in *People v. Somers*, 2013 IL 114054, explained that where the hearing below was insufficient but "some sort of a hearing" occurred, the case must be remanded to the trial court. *Somers*, 2013 IL 114054, ¶ 15. In contrast, where there was no hearing, as in *People v. Gutierrez*, 2012 IL 111590 (public defender fee imposed by circuit court clerk), and *People v. Daniels*, 2015 IL App (2d) 130517 (no hearing where the trial court made no reference to the public defender or its intent to impose a fee), the fee must be vacated outright. *Gutierrez*, 2012 IL 111590, ¶ 28; *Daniels*, 2015 IL App (2d) 130517, ¶ 30.

¶ 23 In analyzing the "some sort of a hearing" standard set forth in *Somers*, this court in *People v. Williams*, concluded that questioning the public defender regarding his involvement but failing to inquire into the defendant's financial circumstances constituted a hearing because "it was a judicial session open to the public, held to resolve defendant's representation by the public defender." *People v. Williams*, 2013 IL App (2d) 120094, ¶ 20. The reasoning in *Williams* was followed by this court in *People v. Rankin*, 2015 IL App (1st) 133409, and *People v. Adams*, 2016 IL App (1st) 141135. Similar to our case, in both *Rankin* and *Adams*, after sentencing the defendant the trial court merely asked the public defender the number of times he appeared and did not question the defendant on his ability to pay. *People v. Rankin*, 2015 IL App (1st) 133409, ¶ 21, and *People v. Adams*, 2016 IL App (1st) 141135, ¶ 26. In both cases, this court determined that, although insufficient, the court's inquiry regarding the number of times the public defender appeared in court constituted an abbreviated hearing, for which the appropriate remedy was remand to the trial court. *People v. Rankin*, 2015 IL App (1st) 133409, ¶ 21; *People v. Adams*,

2016 IL App (1st) 141135, ¶ 26. Therefore, following *Williams*, *Rankin*, and *Adams*, we conclude that the court's questioning below was an abbreviated, but insufficient, hearing. Accordingly, the appropriate remedy is to remand the matter to the trial court for a hearing on defendant's ability to pay the $500 fee.

¶ 24 Finally, defendant contends, and the State agrees, that his mittimus should be amended to reflect the correct offense of which he was convicted. The mittimus incorrectly indicates that defendant's conviction was for manufacture or delivery of a controlled substance when, in fact, he was convicted of possession of a controlled substance with intent to deliver. Pursuant to our authority (Ill. S. Ct. R. 615(b)(1) (eff. Aug. 27, 1999); *People v. McCray*, 273 Ill. App. 3d 396, 406 (1995)), we direct the clerk of the circuit court to amend the mittimus to reflect that defendant was convicted of the offense of possession of a controlled substance with intent to deliver.

¶ 25 CONCLUSION

¶ 26 For the foregoing reasons, we affirm defendant's conviction and sentence, vacate the public defender reimbursement fee and remand the case for a hearing to determine defendant's ability to pay, and amend the mittimus.

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

TO THE APPELLATE COURT OF ILLINOIS
IN THE CIRCUIT COURT OF COOK COUNTY
CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS	)		
	)	Case No.	13 CR 15697-02
vs.	)	Trial Judge:	Vincent Gaughn
ANTOINE HARDMAN,	)	Attorney:	Julie A. Hull

NOTICE OF APPEAL

An Appeal is taken from the order or judgment described below:

APPELLANT'S NAME: Antoine Hardman
I.R. NUMBER: 830604 **DOB:** September 27, 1963
APPELLANT'S ADDRESS: I.D.O.C.
APPELLANT'S ATTORNEY: State Appellate Defender
ADDRESS: 100 West Randolph, Chicago, IL 60601
OFFENSE: Possession with Intent to Intent to Deliver
JUDGMENT: Guilty
DATE: February 4, 2014
SENTENCE: 8 years IDOC
DATE: March 6, 2014 ✓

Julie A. Hull
APPELLANT'S ATTORNEY

VERIFIED PETITION FOR REPORT OF PROCEEDINGS COMMON LAW RECORD AND FOR APPOINTMENT OF COUNSEL ON APPEAL

Under Supreme Court Rules 605-608, appellant asks the court to order the Official Court Reporter to transcribe an original and copy of the proceedings, file the original with the Clerk and deliver a copy to the Appellant; order the Clerk to prepare the Record on Appeal and to Appoint Counsel on Appeal. Appellant, being duly sworn, says that at the time of his conviction he was and is now unable to pay for the Record or an appeal lawyer.

Julie A Hull #57677
APPELLANT'S ATTORNEY

Subscribed and Sworn to this 6th day of March 2014

Notary Public

ORDER

IT IS ORDERED that the State Appellate Defender be appointed as counsel on appeal and the Record and Report of Proceedings be furnished to appellant without cost. Dates to be Transcribed: 1/31/2014; 2/3/2014; 2/4/2014; 2/5/2014 and 3/6/2014.

DATE: _____ ENTER: Vincent M Gaughn 1553
JUDGE

C: 00098