NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2012 IL App (4th) 110237-U

Filed 7/27/12

NO. 4-11-0237

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Livingston County
ALAN V. SWEETWOOD,	)	No. 09DT141
Defendant-Appellant.	)	
	)	Honorable
	)	Mark A. Fellheimer,
	)	Judge Presiding.

JUSTICE McCULLOUGH delivered the judgment of the court.
Justices Steigmann and Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court (1) held the State presented sufficient evidence to prove defendant guilty beyond a reasonable doubt of driving under the influence, and (2) vacated public defender reimbursement order and remanded for section 113-3.1(a) hearing (725 ILCS 5/113.3.1(a) (West 2008)).

¶ 2 In November 2009, the State charged defendant, Alan V. Sweetwood, with one count driving under the influence (625 ILCS 5/11-501(a)(2) (West 2008)). In December 2009, the State added the charges of driving with a breath alcohol concentration of 0.08 or more (625 ILCS 5/11-501(a)(1) (West 2008)) and failure to comply with a duty upon damaging unattended property (625 ILCS 5/11-404 (West 2008)). In January 2011, after a bench trial, defendant was found guilty of driving under the influence (625 ILCS 5/11-501(a)(2) (West 2008)) and driving with a breath alcohol concentration of 0.08 or more (625 ILCS 5/11-501(a)(1) (West 2008)), both Class A misdemeanors. In March 2011, the trial court sentenced defendant to two years'

conditional discharge, with conditions including 90 days in the Livingston County jail, and ordered him to pay $100 public defender reimbursement pursuant to section 113-3.1(a) of the Code of Criminal Procedure of 1963 (Procedure Code) (725 ILCS 5/113-3.1(a) (West 2008)).

¶ 3 On appeal, defendant contends (1) the State failed to prove he drove a vehicle while under the influence (he does not appeal the trial court's finding he was under the influence, or had a breath alcohol concentration of 0.08 or more), and (2) the $100 public defender reimbursement order must be vacated for failure to conduct a hearing pursuant to section 113-3.1 of the Procedure Code. We affirm in part, vacate in part, and remand with directions.

¶ 4 Defendant first contends the State failed to prove beyond a reasonable doubt he drove a vehicle on the night in question. Defendant does not challenge the trial court's finding he was under the influence of alcohol with a breath alcohol concentration of 0.08 or more. Specifically, defendant asserts "the case was essentially a swearing match" between defendant and a witness, and that the trier of fact "had to have a reasonable doubt" as to whether defendant was driving. As defendant's argument is unpersuasive we disagree.

¶ 5 When this court reviews a conviction for sufficiency of the evidence, it must determine 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. Beauchamp*, 241 Ill. 2d 1, 8, 944 N.E.2d 319, 322-23 (2011). "This means that we 'must allow all reasonable inferences from the record in favor of the prosecution.' " *Beauchamp*, 241 Ill. 2d at 8, 944 N.E.2d at 323 (quoting *People v. Cunningham*, 212 Ill. 2d 274, 280, 818 N.E.2d 304, 308 (2004)). This court "will not reverse a criminal conviction unless the evidence is so unreasonable, improbable, or so unsatisfactory as to justify a reasonable doubt of

the defendant's guilt." *People v. Campbell*, 146 Ill. 2d 363, 375, 586 N.E.2d 1261, 1266 (1992).

¶ 6 A reviewing court will not retry a defendant when considering a sufficiency of the evidence challenge. *People v. Wheeler*, 226 Ill. 2d 92, 114, 871 N.E.2d 728, 740 (2007). The trier of fact has the responsibility to determine the credibility of witnesses and the weight given to their testimony, to resolve conflicts in evidence, and to draw reasonable inferences from that evidence. *People v. Burney*, 2011 IL App (4th) 100343, ¶ 25, 963 N.E.2d 430 (citing *People v. Jackson*, 232 Ill. 2d 246, 281, 903 N.E.2d 388, 406 (2009)).

¶ 7 At trial, officer Mark Scott of the Dwight, Illinois, police department testified he responded to a hit-and-run call at the Creek Ridge trailer court shortly after 11 p.m. on November 27, 2009. There, he located a silver 1998 Pontiac Bonneville parked partially in the road, partially in the grass, and partially in the driveway at lot 27. Scott observed a large rock in the middle of the road at the corner of Pawnee and Cherokee streets. From that corner, muddy tire tracks continued for a half a block to the Pontiac. The muddy tire tracks went up into the corner lot, hit landscaping items, and then led back out of the yard to the Pontiac. Scott observed fresh, wet mud on the Pontiac's tires. Underneath the Pontiac's fuel tank was a white cement flower pot approximately 2 1/2 feet wide and 2 feet tall.

¶ 8 Officer Scott stopped behind the Pontiac in the lot 27 driveway. Thereafter, three people walked past Scott; he requested them to stop. Two stopped immediately and were identified as Joshua Jones and Holly Lucas. The third person continued walking. Scott approached the person and identified him as defendant. Defendant told Scott he owned the Pontiac. Scott smelled a strong odor of alcohol on defendant's breath and observed defendant having difficulty standing. Defendant denied driving the Pontiac that night. Defendant told

Scott (1) the vehicle had been parked there for two weeks, (2) some unknown people had pushed it there, and (3) they must have put the mud on the tires. Defendant explained the people must have put the flowerpot underneath the Pontiac to keep the vehicle from rolling backward. Defendant told Scott that Jones had been driving. After speaking with Jones, Scott returned to further question defendant on who drove that night. Defendant explained he could not have driven because he did not have his wallet or keys. However, defendant previously showed Scott his driver's license and had his wallet in his pocket. A later search of defendant's person did not reveal any keys.

¶ 9 Scott testified defendant told Scott he was going to have to "take the rap for this," and Scott should place him under arrest. Scott placed defendant under arrest and transported him to the police station where he administered a walk-and-turn field sobriety test. Defendant failed the test. Scott read defendant the statutory "Warning to Motorists." On November 28, 2009, at 12:27 a.m., Scott performed a Breathalyzer test, which revealed a breath alcohol content of 0.165.

¶ 10 Joshua Jones testified the night of November 27 he and defendant were at his brother-in-law, Kenny Wallace's, residence in Dwight. Jones and defendant left together in defendant's Pontiac and went to Casey's General Store to purchase cigarettes. Defendant drove because Jones did not have a driver's license. When they returned to the trailer court, defendant drove the Pontiac over some landscaping items on the corner lot. Defendant continued driving to Wallace's driveway at lot 27. There, Jones exited the vehicle and noticed it smoking. Jones continued into the trailer and defendant walked in after him. During the next 15 to 20 minutes, before the police arrived, defendant consumed one or two mixed drinks. Officer Scott came

inside the residence and asked Jones if he had been driving, and Jones told him no. Jones was convicted in 2009 for a felony and was on probation at time of defendant's trial.

¶ 11 Defendant testified he and Joshua Jones drove to JT's bar in Dwight from Kenny Wallace's residence. Defendant lived in South Chicago Heights, Illinois, and it was his first time in Dwight on November 27, 2009. While at JT's bar, defendant and Jones consumed five to six alcoholic drinks over an hour-and-a-half period. After an incident with another bar patron, Jones ran out of the bar and started defendant's Pontiac. Defendant entered the passenger's side and Jones drove the vehicle back to Wallace's residence at the trailer court. As they returned, the Pontiac went airborne and landed in the lot 27 driveway. Jones exited the vehicle and ran into Wallace's residence where he hid underneath a bed. The Pontiac's front end was smoking and defendant inspected his car for about 10 minutes before entering the trailer. Defendant did not notice a flowerpot underneath the vehicle.

¶ 12 Defendant testified when police arrived, defendant, Holly Lucas, and Kenny Wallace walked out of the trailer. Defendant told Officer Scott the Pontiac was his, and Joshua Jones was driving. On cross-examination, defendant stated Jones drove to JT's bar because defendant did not know how to get there and that he did not drive back from the bar because he "had been drinking." Defendant admitted he told police the Pontiac had not been moved for two weeks. Defendant admitted he had a Class 4 felony conviction in 2009.

¶ 13 A review of the evidence shows that (1) defendant owned the Pontiac; (2) fresh muddy tire tracks led from the vehicle; (3) a concrete flowerpot was underneath the Pontiac; (4) defendant told police (a) the car had not been driven for two weeks, (b) someone must have put mud on the tires, (c) someone must have placed the flowerpot under the vehicle, (d) he did not

drive because he did not have his wallet and keys, and (e) he was going to have to take the "rap for this"; (5) defendant had his wallet; and (6) his breath alcohol concentration was 0.165. Moreover, evidence was presented defendant drove his vehicle and his statement to Officer Scott is tantamount to an admission. Based on the evidence presented, we cannot say the evidence is so unreasonable, improbable, or so unsatisfactory to justify a reasonable doubt of defendant's guilt. Indeed, the quantum of evidence supports the conclusion defendant drove his Pontiac while under the influence of alcohol.

¶ 14 We next turn to defendant's contention the trial court erred when it entered a public defender's reimbursement order pursuant to section 113-3.3.1 of the Procedure Code (725 ILCS 5/113-3.1(a) (West 2008)) without providing defendant with notice or an opportunity to present evidence of ability to pay. The State concedes the trial court failed to give defendant notice and an opportunity to present evidence on his ability to pay. Our review of the March 2011 sentencing hearing bystander's report does not reveal compliance with section 113-3.1(a).

¶ 15 Defendant requests we vacate the reimbursement order and not remand for a hearing. Defendant contends the 90-day time limit set by section 113-3.1(a) for imposing the reimbursement order has passed and there can be no remand for another reimbursement order. For support, defendant argues the supreme court's decision recent in *People v. Gutierrez*, 2012 IL 111590, 962 N.E.2d 437, stands for the proposition that where the mandatory 90-day time limit set forth in section 113-3.1(a) has passed there should be no remand for another reimbursement order. We disagree.

¶ 16 Section 113-3.1(a) of the Procedure Code provides in part, as follows:

"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) (West 2008).

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. Such a hearing is required even where a cash bail bond has been posted on the defendant's behalf. The hearing must focus on the foreseeable ability of the defendant to pay reimbursement as well as the costs of the representation provided."

There, the supreme court vacated the reimbursement order and remanded to the trial court for a hearing pursuant to section 133-3.1. *Love*, 177 Ill. 2d at 565, 687 N.E.2d at 39.

¶ 17 Since *Love* and *People v. Grayson*, 321 Ill. App. 3d 397, 410, 747 N.E.2d 460, 471 (2001), in cases where the trial court failed to comply with section 113-3.1, this court has remanded the cause for a proper *Love* hearing. Recent appellate cases continue to remand for a *Love* hearing on defendant's ability to pay. See *People v. Burney*, 2011 IL App (4th) 100343, 963 N.E.2d 430 (remanding for adequate *Love* hearing); *People v. Fitzpatrick*, 2011 IL App (2nd) 100463, 960 N.E.2d 709 (remanding for *Love* hearing even though more than 90 days had passed since the disposition of the case in the trial court); *People v. Carter*, 2011 IL App (3rd) 090238, 957 N.E.2d 576 (remanding for *Love* hearing on whether defendant could afford $100 public defender fee pursuant to section 113-3.1).

¶ 18 Defendant asserts *Gutierrez* indicated the 90-day limit is mandatory and "appellate court decisions remanding cases for [*Love*] hearings are incorrect." In *Gutierrez*, the supreme court vacated the public defender reimbursement order outright because the circuit clerk imposed the fee on its own, and "neither the State nor the circuit court was seeking a public defender fee." *Gutierrez*, 2012 IL 111590, ¶ 24, 962 N.E.2d at 443. Additionally, the court expressly stated "it is not necessary to resolve whether section 113-3.1(a)'s time limit is mandatory or directory, " but it noted "the statute clearly does not contemplate the State asking for a public defender fee for the first time when the case is on appeal." *Gutierrez*, 2012 IL 111590, ¶ ¶ 21, 23, 962 N.E.2d at 442-43. Defendant concedes the trial court and not the circuit clerk imposed the reimbursement order. *Gutierrez* is factually distinguishable on this point, and we are not persuaded *Gutierrez* abrogated *Love* and its progeny to prevent remand.

¶ 19 Therefore, in accord with long-standing precedent, we vacate the public defender's reimbursement order and remand for a hearing in compliance with section 113-3.1.

¶ 20 For the foregoing reasons, we affirm in part and vacate the public defender reimbursement order and remand for a hearing; we affirm the remainder of the judgment order. As the State successfully defended a portion of the appeal, we award it its $50 statutory assessment against defendant as costs of this appeal.

¶ 21 Affirmed in part, vacated in part, and cause remanded with directions.