

No. 1-07-3384

**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).

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IN THE APPELLATE  
COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 06CR24771(01)
	)	
MARIO JOHNSON,	)	The Honorable
	)	Marcus R. Salone,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE FITZGERALD SMITH delivered the judgment of the court.  
Presiding Justice Lavin and Justice Sterba concur in the judgment.

*HELD:* Trial court is affirmed where trial court erred in admonishing jury under Rule 431(b), but error did not amount to plain error; any error resulting from the admission of uncharged offenses was harmless; mittimus corrected.

¶ 1

**ORDER**

¶ 2 After a jury trial, defendant Mario Johnson was convicted of delivery of a controlled substance and sentenced to six years' imprisonment. On appeal, defendant contends that: (1) the trial court's failure to strictly comply with Illinois Supreme Court Rule 431(b) (eff. May 1,

2007), requires reversal and remand for a new trial; and (2) he was denied a fair trial where the trial court allowed the State to introduce evidence of uncharged offenses. Defendant also contends, and the State properly concedes, that his mittimus should be modified to correctly reflect his conviction.

¶ 3 On September 29, 2009, we reversed the judgment of the circuit court of Cook County and remanded this cause for a new trial based on an error by the trial court regarding jury admonishments pursuant to Rule 431(b). *People v. Johnson*, No. 1-07-3384 (2009) (unpublished order under Supreme Court Rule 23). On January 26, 2011, the Illinois Supreme Court denied defendant leave to appeal, but entered a supervisory order directing this court to vacate its judgment and reconsider the appeal in light of *People v. Thompson*, 238 Ill. 2d 598 (2010). *People v. Johnson*, 239 Ill. 2d 570 (2011) (table). Accordingly, we vacate our prior judgment and reconsider defendant's appeal. For the following reasons, we affirm defendant's conviction and modify his mittimus.

¶ 4 BACKGROUND

¶ 5 Briefly stated, on October 14, 2006, Chicago police officers observed defendant selling heroin. Then, an undercover officer purchased heroin from defendant, and defendant and co-defendant<sup>1</sup> were subsequently arrested.

¶ 6 At trial, Chicago police officer Martin Howard testified that, on October 14, 2006, he was part of a surveillance team near the corner of Quincy Street and Lotus Avenue. During the surveillance, Officer Howard observed defendant standing on the northeast corner of the

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<sup>1</sup> Defendant and co-defendant were tried separately. Co-defendant is not a party to this appeal.

intersection, yelling "blows, park," which the officer recognized as a solicitation to the sale of heroin to vehicles that parked near defendant. Officer Howard observed this from a distance of approximately one quarter block from defendant. Officer Howard had an unobstructed view of defendant as defendant continued to yell at passing cars.

¶ 7 Officer Howard watched as a vehicle pulled over at the corner where defendant stood. Defendant and the driver spoke through the passenger side window, and then defendant reached inside the vehicle. Officer Howard could not see what, if anything, was exchanged between defendant and the driver. Defendant returned to the corner. The vehicle drove away. Officer Howard could not hear what was said between defendant and the driver. Based on his training and experience, Officer Howard believed he had observed defendant engage in a narcotics transaction. He informed the other surveillance team members via radio. Officer Howard identified defendant in court as the individual he had observed.

¶ 8 Officer Clark testified that he was the "buy officer" for the surveillance team. When he received Officer Howard's description of a person possibly selling narcotics near Quincy Street and Lotus Avenue, he drove to that intersection. Officer Clark arrived at the intersection in a covert vehicle and saw that defendant was standing on the corner wearing a black baseball hat, a black hat, and blue jeans. Officer Clark, in plain clothes, rolled down his driver's side window. Defendant approached. Officer Clark held up four fingers and asked defendant for four "blows," a street term for heroin, for \$40. Officer Clark testified that the customary price for a single blow is \$10. Defendant responded that he only had three blows left, then reached inside a yellow bag and removed three tinfoil packets of suspect heroin. Each packet was packaged in a separate clear ziplock bag with an alien logo on it. Defendant handed the items to Officer Clark, who

paid with two \$20 bills with pre-recorded serial numbers. Defendant then gave the officer \$10 change. Officer Clark drove away from the intersection and radioed the rest of his surveillance team that the undercover purchase was positive. He gave the officers a physical description of defendant, and informed them that defendant was walking northbound on Lotus, wearing a black hat and black jacket.

¶ 9 Officer Howard testified that he was able to see this transaction from his surveillance point. He also watched defendant walk northbound on Lotus Avenue. When an unknown individual approached and handed defendant an unknown amount of money, defendant accepted the money and then removed an item from the yellow bag. He gave this item to the unknown individual. Defense counsel objected to this testimony, and the trial court overruled the objection. Defendant then continued walking northbound until he reached a small store. He entered this store with co-defendant. Officer Howard radioed the enforcement officers, Officer Moriarty and Sergeant Williams, who proceeded to the store.

¶ 10 Officer Moriarty testified that, upon entering the store, he observed defendant, who matched the description he had been given, and co-defendant standing in line at the cash register. Defendant and co-defendant were facing one another and both had their hands outstretched. Co-defendant then put his hand in his pocket. Officer Moriarty placed defendant in handcuffs and detained co-defendant.

¶ 11 Officer Moriarty asked co-defendant if he had any money. Co-defendant gave the officer two \$20 bills from the pocket he had put his hand in when he interacted with defendant in line. The serial numbers of the two \$20 bills matched the serial numbers of the two pre-recorded \$20 dollar bills that Officer Clark had used for the undercover drug purchase.

¶ 12 Then, Officer Moriarty searched defendant, recovering \$60 but no drugs or pre-recorded funds. After Officer Clark positively identified defendant as the seller, defendant was transported to the police station. Officer Clark also identified defendant in court.

¶ 13 During cross-examination, Officer Moriarty admitted that he had testified at the grand jury that Officer McCann was the buy officer rather than Officer Clark. When asked about this discrepancy, Officer Moriarty described it as a "misstatement." Officer McCann then testified that she was part of the surveillance team that observed defendant's drug transaction, but she was not the buy officer. She explained that she was the buy officer during a second transaction later that same morning.

¶ 14 Illinois State Police Crime Lab forensic scientist Moses Boyd Jr. testified that he tested the contents of one of the three tinfoil packets defendant sold to Officer Clark and found it positive for heroin.

¶ 15 Defendant rested without presenting any evidence on his behalf. The jury found defendant guilty of delivery of a controlled substance, and the court sentenced defendant to six years' imprisonment. Defendant now appeals.

¶ 16 ANALYSIS

¶ 17 I. Rule 431(b)

¶ 18 Defendant maintains that the trial court failed to comply with Rule 431(b) and that this error requires reversal. The State does not dispute that the trial court failed to strictly comply with Rule 431(b), but responds that the court's substantial compliance with the rule does not warrant automatic reversal.

¶ 19 This issue is controlled by our supreme court's decision in *People v. Thompson*, 238 Ill.

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2d 598 (2010). We begin by noting that defendant forfeited review of this issue by failing to object to it at trial or raise it in a timely filed posttrial motion. *Thompson*, 238 Ill. 2d at 611-12 (failure to properly preserve an alleged error by both an objection at trial and a written posttrial motion constitutes a procedural default of that error on review (citing *People v. Enoch*, 122 Ill. 2d 176, 186 (1988))). Defendant admits that he failed to properly preserve this issue for appeal, but urges us to review the error under both the first prong of the plain error exception because the evidence was closely balanced, as well as the second prong of the plain error exception because the error itself was so serious that he was denied a substantial right and thus a fair trial, requiring automatic reversal. Ill. S. Ct. R. 615; *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005) (plain error rule permits consideration of errors even though technically waived for review where the evidence is closely balanced or where the claimed error is of such magnitude that there is a substantial risk that the defendant was denied a fair and impartial trial).

¶ 20 We first examine whether the trial court complied with Rule 431(b) to determine whether there was error here. *Thompson*, 238 Ill. 2d at 613. In *People v. Zehr*, 103 Ill. 2d 472, 477 (1984), our supreme court held that a trial court erred during *voir dire* where it refused defense counsel's request to ask questions regarding the State's burden of proof, defendant's right not to testify, and the presumption of innocence. Specifically, the court held:

“We are of the opinion that essential to the qualification of jurors in a criminal case is that they know that a defendant is presumed innocent, that he is not required to offer any evidence in his own behalf, that he must be proved guilty beyond a reasonable

doubt, and that his failure to testify in his own behalf cannot be held against him. If a juror has a prejudice against any of these basic guarantees, an instruction given at the end of trial will have little curative effect.” *Zehr*, 103 Ill. 2d at 477.

¶ 21 In 1997, our supreme court amended Rule 431(b) to ensure compliance with the *Zehr* requirements. Ill. S. Ct. R. 431, Committee Comments (eff. May 1, 1997). Under that amendment, the court was required, if requested by the defendant, to ask the potential jurors, individually or as a group, whether they understand the *Zehr* principles. Ill. S. Ct. R. 431(b) (eff. May 1, 1997). Effective May 1, 2007, our supreme court again amended Rule 431(b), omitting the language “[i]f requested by the defendant,” and leaving the remainder of the rule unchanged. Rule 431(b) now provides, *inter alia*:

“The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that the defendant’s failure to testify cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant’s failure to testify when the defendant objects.

The court's method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section." Ill. S. Ct. R. 431(b) (eff. May 1, 2007).

¶ 22 This rule, which was in effect at the time of defendant's trial, imposes a *sua sponte* duty on the trial court to question potential jurors as to whether they understand and accept the enumerated principles integral to a fair trial. *People v. Yarbor*, 383 Ill. App. 3d 676, 683 (2008). A trial court's compliance with supreme court rules is reviewed *de novo*. *Robidoux v. Oliphant*, 201 Ill. 2d 324, 332 (2002).

¶ 23 Here, the court conducted *voir dire* and empaneled the jury. The court first told the entire group of prospective jurors:

"THE COURT: Under the law a defendant is presumed to be innocent of the charge against him. This presumption remains with him throughout every stage of the trial and during your deliberations on a verdict and is not overcome from all the evidence in the case until you are convinced beyond a reasonable doubt that the defendant is guilty. The State has the burden of proving the guilt of the defendant beyond a reasonable doubt and this burden remains on the State throughout the case. The defendant is not required to prove his innocence nor is he required to present any evidence on his own behalf. He may rely on the presumption of innocence."

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¶ 24 The court did not ask individuals or the group as a whole whether they understood or accepted these principles, nor did the court inquire as to whether the prospective jurors would hold it against defendant if he failed to testify. During *voir dire*, the court and attorneys asked general questions of the jurors, such as whether any past events they had experienced would prevent them from being fair and whether there was anything they would like to share with the attorneys. The jury was selected following *voir dire*. The court did not further admonish nor question the jury.

¶ 25 Trial proceeded. At the close of trial, the defense rested without presenting any evidence. Defendant did not testify. Following closing arguments by both parties, the court advised the jurors:

"THE COURT: The defendant is presumed to be innocent of the charge against him. This presumption remains with him throughout every stage of the trial and during your deliberations on the verdict and is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that he is guilty. The State has the burden of proving the guilt of the Defendant beyond a reasonable doubt, and this burden remains on the State throughout the case. The Defendant is not required to prove his innocence. The fact that the Defendant did not testify must not be considered by you in any way in arriving at your verdict."

¶ 26 The *voir dire* here was inadequate, where the court both failed to inform the venire of all

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of the *Zehr* principles and failed to inquire whether the venire understood and accepted the principles. See *Zehr*, 103 Ill. 2d at 477; *Thompson*, 238 Ill. 2d at 607. In *Thompson*, our supreme court advised:

"Rule 431(b), therefore, mandates a specific question and response process. The trial court must ask each potential juror whether he or she understands and accepts each of the principles in the rule. The questioning may be performed either individually or in a group, but the rule requires an opportunity for a response from each prospective juror on his or her understanding and acceptance of those principles." *Thompson*, 238 Ill. 2d at 607.

The *voir dire* conducted by the court in this case failed to comply with the dictates of Rule 431(b) and, therefore, constitutes error.

¶ 27

#### Plain Error

¶ 28 Having concluded that the trial court erred, we address the issue of whether the error falls into either category of plain error. *Thompson*, 238 Ill. 2d at 613 (the first prong of the plain error doctrine operates when “ ‘a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error;’ ” the second prong operates when “ ‘a clear or obvious error occurred and that error is so serious that it affected the \* \* \* integrity of the judicial process, regardless of the closeness of the evidence’ ” (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007))). Under both prongs of the plain error doctrine, the burden of persuasion rests

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with the defendant. *Piatkowski*, 225 Ill. 2d at 565. If that burden is not met, defendant's conviction will stand. *Herron*, 215 Ill. 2d at 181-82.

¶ 29 Defendant argues that his conviction should be reversed under both prongs of the plain error analysis. In our original decision, we held that the court's failure to comply with Rule 431(b) denied defendant a fair trial, and we therefore reversed under the second prong of the plain error analysis. Accordingly, we did not address defendant's arguments regarding the first prong. *People v. Johnson*, No. 1-07-3384 (2009) (unpublished order under Supreme Court Rule 23).

¶ 30 In *Thompson*, our supreme court held that a trial court's failure to comply with Rule 431(b) does not necessarily render a trial fundamentally unfair or unreliable and, therefore, does not require automatic reversal. *Thompson*, 238 Ill. 2d at 614-15 (in order to establish second-prong plain error, a defendant must establish that the error was structural, *i.e.* that the jury was biased). Only where the defendant presents evidence that the jury was biased would his fundamental right to a fair trial be questioned. *Thompson*, 238 Ill. 2d at 614. The court observed: "We cannot presume the jury was biased simply because the trial court erred in conducting the Rule 431(b) questioning." *Thompson*, 238 Ill. 2d at 614.

¶ 31 Defendant in the case at bar has not offered evidence of bias. He claims only that the jury may have been biased because "a complete failure to comply with the [Rule 431(b)] in the instant case constituted a serious error, which affected the fairness of [defendant's] trial and challenged the integrity of the judicial process." Such speculation is insufficient under *Thompson* to reach second-prong plain error review. *Thompson*, 238 Ill. 2d at 614.

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¶ 32 We next consider whether the first prong of plain error has been satisfied. In doing so, we must consider whether the outcome of defendant's trial may have been affected by the trial court's failure to comply with Rule 431(b). Defendant contends that, because the evidence here was so closely balanced, he was prejudiced by the trial court's failure to inquire as to whether the jury members would consider defendant's failure to testify on his own behalf in reaching its verdict.

¶ 33 Defendant must establish that the error alone could have led to his conviction. *Herron*, 215 Ill. 2d at 186-87. Defendant has not met this burden. Here, the State established that Officer Howard observed defendant calling out that he had heroin available for purchase. Officer Howard then watched defendant make what he believed was a hand-to-hand "[sale] of suspect narcotics." In response, Officer Clark drove his undercover vehicle to the street corner where defendant was located. Defendant sold Officer Clark three packets of heroin for \$30. Officer Clark paid for the heroin with two \$20 bills with pre-recorded serial numbers. These bills were recovered from defendant's companion moments later. Officer Clark positively identified defendant as the seller soon after defendant's arrest, and did so again at trial. Officer Howard also identified defendant in court. In sum, defendant was observed by police officers selling narcotics, then sold the narcotics to police officers in exchange for pre-recorded bills, was arrested with his companion who had the pre-recorded bills on his person, and defendant was positively identified as the seller both on-site and in open court. The jury exercised its judgment and our review of the record supports the jury's finding. We conclude that the evidence against defendant was overwhelming.

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¶ 34 Although under the plain error rule, defendant may bypass normal forfeiture principles, he has failed to show the evidence is so closely balanced that the error threatens to tip the scales of justice against him or the error has affected the fairness of his trial and challenged the integrity of the judicial process. See *Thompson*, 238 Ill. 2d at 613-14. We conclude, again, that the plain error doctrine does not provide a basis for relaxing defendant's forfeiture of this issue.

¶ 35 II. Other-Crimes Evidence

¶ 36 Next, defendant contends that the trial court abused its discretion by allowing the State to present evidence of uncharged offenses. Specifically, defendant argues that the trial court erred in allowing Officer Howard to testify that defendant was involved in what appeared to be drug transactions before and after he sold the heroin to Officer Clark. Defendant argues that these transactions were not connected to the undercover narcotics transaction, were unnecessary to explain the actions of the officers leading up to defendant's arrest, and that they only served to show his propensity to commit the charged offense.

¶ 37 Initially, the State argues that defendant waived this issue for purposes of appeal. Relying on *People v. Caffey*, 205 Ill. 2d 52, 113 (2001), the State argues that defendant cannot now complain where, although defendant objected to the testimony on direct examination, he raised the issue anew on cross-examination through questioning the witness as to the same allegedly inadmissible testimony. Generally, a party cannot object on appeal to evidence that the party introduced. *People v. Williams*, 161 Ill. 2d 1, 34 (1994). However, this waiver rule does not apply where, as here, a motion to exclude the evidence was presented to the court and denied. *Williams*, 161 Ill. 2d at 34. Here, defense counsel filed a motion prior to trial to bar evidence of

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prior bad acts, those acts being the alleged drug transactions in question here. Upon consideration of the motion, the court determined that the other drug transactions occurred "almost contemporaneous with" the transaction in question, and denied defendant's motion. At trial, Officer Howard testified regarding the charged transaction as well as that which he observed immediately before and immediately afterward. Defense counsel objected. On cross-examination, then, defense counsel questioned Officer Howard regarding those same transactions. Accordingly, defendant did not waive this issue.

¶ 38 Other-crimes evidence encompasses misconduct or criminal acts that occurred either before or after the allegedly criminal conduct for which the defendant is standing trial. *People v. Spyles*, 359 Ill. App. 3d 1108, 1112 (2005). Other-crimes evidence is admissible to prove any material fact relevant to the case (*People v. Donoho*, 204 Ill. 2d 159, 170 (2003)), but is inadmissible if it is relevant only to demonstrate a defendant's propensity to engage in criminal activity. *People v. Hendricks*, 137 Ill. 2d 31, 52 (1990). Evidence of another crime is also admissible if it is part of a continuing narrative of the event giving rise to the offense or intertwined with the events charged. *People v. Thompson*, 359 Ill. App. 3d 947, 951 (2005). "When facts concerning uncharged criminal conduct are all part of a continuing narrative which concerns the circumstances attending the entire transaction, they do not concern separate, distinct, and unconnected crimes." *People v. Collette*, 217 Ill. App. 3d 465, 472 (1991); see also *People v. Young*, 118 Ill. App. 3d 803, 808 (1983) ("Reference to another crime is also admissible if it explains the circumstances surrounding defendant's arrest and is part of a continuing narrative"). A statement detailing the course of a police investigation is admissible to

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fully explain the State's case to the trier of fact under the "explanatory exception" to relate the investigatory procedures leading up to the defendant's arrest. *People v. Simms*, 143 Ill. 2d 154, 174 (1991). Nonetheless, even when relevant for a permissible purpose, other-crimes evidence may be excluded by the trial court if its prejudicial effect substantially outweighs its probative value. *People v. Illgen*, 145 Ill. 2d 353, 365 (1991).

¶ 39 The admissibility of other-crimes evidence is left to the trial court's sound discretion, and we will not disturb that decision absent a clear abuse of discretion. *People v. Wilson*, 214 Ill. 2d 127, 136 (2005). A trial court's determination constitutes an abuse of discretion if it is arbitrary, fanciful or unreasonable, or if no reasonable person would take the view adopted by the trial court. *Illgen*, 145 Ill. 2d at 364.

¶ 40 We first address the admission of testimony regarding the drug transaction that took place prior to the charged offense. The complained-of testimony provided a factual basis to explain why Officer Clark arrived on the scene and engaged in the undercover narcotics transaction with defendant. Officer Howard suspected that defendant was soliciting narcotics buyers when he heard defendant yelling "blows, park." In response, Officer Howard established surveillance nearby to determine whether defendant was in fact selling drugs. During this surveillance, Officer Howard observed what appeared to be a hand-to-hand transaction between defendant and an unknown individual in a car. He then radioed his surveillance team, confirming that defendant was involved in selling drugs. Thereafter, Officer Clark arrived and completed the undercover narcotics purchase with defendant.

¶ 41 This evidence was not offered to prove that defendant sold heroin to the unknown

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individual, but rather to explain the police officers' course of action and to provide a continuing narrative of relevant events. See *Young*, 118 Ill. App. 3d at 808; *Thompson*, 359 Ill. App. 3d at 951. It explained why Officer Howard radioed his team as well as why Officer Clark proceeded to the scene and soon thereafter purchased heroin from defendant. Officer Howard's observation of defendant's first transaction with the unknown individual in the car led to the transaction between Officer Clark and defendant, which is the charged offense. We find that the trial court did not abuse its discretion when allowing the jury to hear evidence of this first transaction.

¶ 42 Next we turn to the transaction subsequent to the charged offense. Defendant argues that this transaction was "entirely separate" from the undercover transaction, and that there was no evidence to suggest "any meaningful connection" between the two transactions. Defendant takes issue with Officer Howard's testimony that, after Officer Clark left the scene, Officer Howard maintained surveillance on defendant as he walked northbound along a sidewalk. He watched defendant encounter another unknown individual, reach into his bag, and give an item to the individual in exchange for an unknown amount of money.

¶ 43 The State argues that this testimony was properly admitted as a continuing narrative exception to the rule against other-crimes evidence because it was Officer Howard's surveillance position that enabled the officers to know that, after the undercover transaction, defendant proceeded northbound and entered a store where he was subsequently arrested. We do not think the complained-of testimony was necessary in this case. While a continuing narrative explaining police conduct may be admissible, it must be limited to only that testimony which is necessary. *People v. Cameron*, 189 Ill. App. 3d 998, 1003-04 (1989) (the trial court must carefully assess

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testimony that is offered for the purpose of explaining police conduct but would otherwise be inadmissible to ensure that it does not include more than is required to explain police conduct).

Here, the testimony regarding the third alleged transaction was unnecessary to explain that defendant was involved in the undercover buy and then walked to a store where he was subsequently arrested. The trial court erred in allowing this testimony.

¶ 44 Nonetheless, we find this error harmless, as the evidence against defendant, as discussed above, was overwhelming. See *People v. Hunley*, 313 Ill. App. 3d 16, 32 (2000) ("The erroneous admission of evidence will not be held reversible if there is no reasonable probability the jury would have acquitted the defendant had the evidence been excluded"). The jury heard the evidence, determined the credibility of witnesses and the weight to be given their testimony, resolved any conflicts in the evidence, and drew reasonable inferences from the evidence. See *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001). Given the overwhelming evidence against defendant, including a hand-to-hand sale of heroin to an undercover police officer, a rational jury could have found defendant guilty beyond a reasonable doubt of delivery of a controlled substance even without the testimony regarding the third transaction.

¶ 45 III. Mittimus

¶ 46 Lastly, defendant contends and the State properly agrees that the mittimus should be modified to correctly reflect the offense of which defendant was convicted. We agree and, pursuant to our authority under Supreme Court Rule 615(b)(1), order the clerk of the circuit court to correct the mittimus. 134 Ill. 2d R. 615(b)(1); *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995). Specifically, the mittimus should be corrected to reflect defendant's single conviction of

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delivery of a controlled substance.

¶ 47

CONCLUSION

¶ 48 For the aforementioned reasons, we affirm the judgment of the circuit court of Cook County and correct the mittimus.

¶ 49 Affirmed; mittimus corrected.