

No. 1-10-2856

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).

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. 09 CR 7807
)	
RAYSCO ROBINSON,)	Honorable
)	Evelyn B. Clay,
Defendant-Appellant.)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Epstein and Justice Howse concurred in the judgment.

ORDER

- ¶ 1 *Held:* Where the evidence was sufficient to convict defendant of possession of a controlled substance with intent to deliver, we affirm; where the trial court improperly elevated defendant's convictions for unlawful use of a weapon by a felon to Class 2 felonies, we modify those convictions to reflect that they are Class 3 felonies; and we correct defendant's mittimus to accurately reflect that he was convicted of possession with intent to deliver more than 1 but less than 15 grams of heroin.
- ¶ 2 Following a bench trial, defendant Raysco Robinson was found guilty of possession of a controlled substance with intent to deliver and two counts of unlawful use of a weapon (UW) by a felon and sentenced to three concurrent terms of seven years' imprisonment. On appeal,

defendant contends that his conviction for possession of a controlled substance with intent to deliver should be reduced to simple possession because the State failed to prove the requisite intent to deliver. Defendant also maintains that his convictions for UUV by a felon should be reduced from Class 2 to Class 3 felonies because the underlying felony used to elevate his class, *i.e.*, aggravated criminal sexual abuse, was not a forcible felony. Alternatively, defendant maintains that his mittimus must be corrected to reflect that he was convicted of possession with intent to deliver more than 1 gram but less than 15 grams of heroin.

¶ 3 At trial, Officer Altamirano testified that he and several other officers were executing a search warrant at 749 South Keeler Avenue in Chicago at 6:30 p.m. on April 1, 2009. When Altamirano knocked on the door of the residence and did not receive an answer, he forced his way inside and saw defendant running towards the kitchen with a gun in his right hand. Defendant threw the gun to the ground as he entered the kitchen, and proceeded into a nearby bedroom where Altamirano arrested him. Altamirano searched defendant and recovered 12 ziploc bags containing suspect heroin. Altamirano also learned that Officer Ortiz recovered a loaded gun from the kitchen area. After being advised of his *Miranda* warnings, defendant told Altamirano that he purchased the gun for protection from a man called "ghost," and that he was "trying to make a couple dollars." Altamirano did not memorialize defendant's statements. Officer Brian Ortiz testified similarly to Altamirano.

¶ 4 The parties stipulated that Daniel Beerman, a forensic chemist, would testify that he performed tests on 9 of the 12 items recovered and that the contents of the tested items were positive for the presence of heroin. He would further testify that the actual weight of the tested items was 1.1 grams, and that the total approximate weight of all 12 items was 1.4 grams. The State also entered into evidence defendant's prior conviction for aggravated criminal sexual abuse.

¶ 5 Following argument, the trial court found defendant guilty of possession of a controlled substance with intent to deliver and two counts of UUW (gun and ammunition) by a felon. In doing so, the court found the police testimony credible where the officers recovered narcotics from defendant after observing him run and discard a loaded gun. The court further stated that notwithstanding defense counsel's belief that the officer should have reduced defendant's statement to writing, it "considered the Mirandized statement."

¶ 6 Defendant filed a motion for a new trial and asserted that he should have been convicted of simple possession. In denying the motion, the court held that the way the narcotics were packaged, coupled with defendant's statement that he was going to make money, established that defendant had the requisite intent to deliver. The trial court sentenced defendant to seven years' imprisonment and the mittimus indicated that his convictions for UUW by a felon were Class 2 felonies.

¶ 7 On appeal, defendant contends that his conviction for possession of a controlled substance with intent to deliver should be reduced to simple possession where there was insufficient proof that he had the intent to deliver. Defendant specifically maintains that the only evidence of his intent to deliver was a vague and unreliable oral statement he allegedly made to Officer Altamirano.

¶ 8 Where, as here, defendant challenges the sufficiency of the evidence to sustain his conviction, the question for the reviewing court is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Bush*, 214 Ill. 2d 318, 326 (2005). This standard recognizes the responsibility of the trier of fact to resolve conflicts in testimony, weigh the evidence, and draw reasonable inferences therefrom. *People v. Campbell*, 146 Ill. 2d 363, 375 (1992). A reviewing court will not set aside a criminal conviction unless the evidence is so

unreasonable or improbable as to raise a reasonable doubt of defendant's guilt. *People v. Hall*, 194 Ill. 2d 305, 330 (2000).

¶ 9 In order to prove defendant guilty of possession of a controlled substance with intent to deliver, the State must prove that the defendant had knowledge that the controlled substance was present, the controlled substance was in the defendant's immediate control or possession, and the defendant intended to deliver the controlled substance. *People v. Robinson*, 167 Ill. 2d 397, 407 (1995); 720 ILCS 570/401(c)(1) (West 2008). Defendant contends that the State failed to meet its burden to prove that he intended to deliver the controlled substance.

¶ 10 Intent to deliver must usually be established by circumstantial evidence because direct evidence of intent to deliver is rare. *Robinson*, 167 Ill. 2d at 408. In *Robinson*, the Illinois Supreme Court listed several factors as probative of a defendant's intent to deliver. These factors include the quantity, purity, and packaging of the controlled substance, as well as the defendant's possession of weapons, police scanners, beepers, drug paraphernalia and large amounts of cash. *Robinson*, 167 Ill. 2d at 408. The *Robinson* factors are not exclusive. *Bush*, 214 Ill. 2d at 327. No one rule may be applied to each case because the number of potential fact scenarios in controlled substance cases are infinite. *Bush*, 214 Ill. 2d at 327. The court must determine on a case-by-case basis whether evidence of the defendant's intent to deliver is sufficient. *Robinson*, 167 Ill. 2d at 412-13.

¶ 11 Here, when police executed the search warrant and entered the residence in question, Officer Altamirano saw defendant throw a gun to the ground, which was later recovered by Officer Ortiz. After defendant was detained, Altamirano searched him and recovered 12 ziploc bags containing suspect heroin. The nine tested packets were positive for heroin and weighed 1.1 grams. After being advised of his *Miranda* warnings, defendant told Altamirano that he purchased the gun for protection and "was just trying to make a couple dollars." Finding that the

State had proved defendant's intent to deliver beyond a reasonable doubt, the trial court held that the police testimony was credible. Moreover, in denying defendant's motion for a new trial, the trial court indicated that the evidence showed defendant had an intent to deliver due to the way the narcotics were packaged and his statement to police that he wanted to make money. Viewing the record in the light most favorable to the State, we conclude that a rational trier of fact could find the State proved defendant's intent to deliver beyond a reasonable doubt.

¶ 12 Defendant's argument that the evidence was consistent with personal use rather than an intent to deliver rests largely on the small weight of the controlled substance and that most of the *Robinson* factors were not present. This court has held that no matter how insignificant, the small quantity of a controlled substance recovered is not dispositive of intent, but rather is one factor of many to consider in light of circumstances. *People v. Harris*, 352 Ill. App. 3d 63, 71 (2004). However, as the quantity of the substance decreases, the need for further circumstantial evidence of the defendant's intent to deliver increases. *Robinson*, 167 Ill. 2d at 413.

¶ 13 We agree that the weight of the recovered narcotics in this case and the lack of several of the *Robinson* factors could be viewed as consistent with personal use. However, despite defendant's contentions to the contrary, there was evidence that he intended to deliver the narcotics. Police observed defendant carrying a gun, and the packaging of heroin into 12 ziploc bags was conducive of defendant's intent to deliver. See *People v. Clark*, 406 Ill. App. 3d 622, 631 (2010) (stating that carrying 24 packets of heroin is an amount and packaging technique highly indicative of one's intent to deliver rather than to personally consume). Moreover, Officer Altamirano testified that defendant stated he was trying to make money.

¶ 14 In so finding, we reject defendant's contention that his alleged statement that he was trying to make money could have been about anything. The following conversation occurred at trial:

"MR. SORICH [Assistant State's Attorney]: And what, if anything, did the defendant say to you with respect to the suspect heroin that was found on his person?"

MR. PITLUK [Assistant Public Defender]: Objection.

THE COURT: Basis?

MR. PITLUK: Foundation.

THE COURT: What is missing from the foundation?

MR. PITLUK: Is this part of the same conversation or not.

THE COURT: Overruled.

OFFICER ALTAMIRANO: Yes. He stated that he was just trying to make a couple dollars."

The record thus shows that defendant's statement that he was "trying to make a couple dollars" clearly refers to the recovered heroin. Moreover, the fact that Officer Altamirano did not memorialize defendant's statement does not change the result. It is the trial court's responsibility to weigh the evidence (*Campbell*, 146 Ill. 2d at 375), and, in making its findings, the trial court noted that the police testimony was credible. The trial court thus believed that defendant made this statement, and we see no reason to find otherwise.

¶ 15 Defendant next contends that his convictions for UUC by a felon should be reduced from Class 2 to Class 3 felonies because aggravated criminal sexual abuse, the felony of which he was previously convicted and upon the basis of which his current conviction was enhanced, was not a "forcible felony" as defined by statute. The interpretation of a statute presents a question of law that we review *de novo*. *People v. Martin*, 2012 IL App (1st) 093506, ¶61.

¶ 16 The State initially contends that defendant waived review of this issue by failing to raise it at trial or in a posttrial motion. However, the doctrine of waiver does not apply to sentencing

issues when they affect a defendant's substantial rights. *People v. Brians*, 315 Ill. App. 3d 162, 170 (2000). Here, we find defendant's contention that the offense of which he was convicted was improperly enhanced implicates substantial rights justifying review of the issue. See *People v. Carmichael*, 343 Ill. App. 3d 855, 859 (2003) (addressing as an issue affecting the defendant's substantial rights his claim that the trial court erroneously enhanced his UUW by a felon conviction from a Class 3 to Class 2 felony).

¶ 17 The offense of UUW by a felon is enhanced from a Class 3, with a 2 to 10 year sentencing range, to a Class 2, with a 3 to 14 year sentencing range, felony when the defendant was previously convicted of a forcible felony. 720 ILCS 5/24-1.1(e) (West 2008). Section 2-8 of the Criminal Code of 1961 lists the offenses that are considered forcible felonies, and also indicates that a forcible felony includes "any other felony which involves the use or threat of physical force or violence against any individual." 720 ILCS 5/2-8 (West 2008). The parties correctly agree that the underlying felony used to elevate defendant's UUW by a felon convictions from Class 3 to Class 2 felonies, *i.e.*, aggravated criminal sexual abuse, was not one of the enumerated forcible felonies. See 720 ILCS 5/2-8 (West 2008).

¶ 18 The State maintains, however, that the trial court had the authority to elevate defendant's UUW by a felon convictions to Class 2 offenses because his prior conviction for aggravated criminal sexual abuse involved the use or threat of physical force or violence. In support of its argument, the State contends that because defendant was *charged* with predatory criminal sexual assault and criminal sexual assault, which are forcible felonies, the trial court could have reasonably concluded that defendant contemplated or used force in committing aggravated criminal sexual abuse.

¶ 19 The State's argument, however, is without merit because a charge against a defendant is not evidence, and it would be unreasonable to consider the mere fact that an offense was charged

as evidence that force was contemplated. See *People v. Stewart*, 343 Ill. App. 3d 963, 977 (2003) (finding that no prejudice occurred when the trial court read dismissed charges to the venire because it instructed the venire that the indictment was not evidence). Moreover, the record is silent as to the circumstances surrounding defendant's conviction for aggravated criminal sexual abuse. Accordingly, we agree with defendant that the trial court erred in enhancing his UUW by a felon convictions to Class 2 felonies where his underlying conviction was not an enumerated forcible felony, and we cannot deduce from the record whether it involved the use or threat of physical force or violence. In so finding, we must vacate defendant's sentences for UUW by a felon and remand for resentencing.

¶ 20 In reaching this conclusion, we reject the State's assertion that we need not vacate his seven-year sentences for UUW by a felon and remand for resentencing. The State notes that the seven-year sentences imposed still fall within the range for the Class 3 felony of UUW by a felon, which carries a possible sentence of no less than 2 and no more than 10 years' imprisonment (720 ILCS 5/24-1.1 (West 2008)). However, "[i]t is well-settled that remand for resentencing is necessary when a reviewing court is unable to determine the effect of the trial court's consideration of an improper sentencing factor." *Carmichael*, 343 Ill. App. 3d at 862. Similarly, here, where we are unable to determine whether the trial court's mistaken belief that the Class 2 sentencing range of 3 to 14 years, rather than the Class 3 sentencing range of 2 to 10 years, applied affected the sentence imposed, the proper course of action is to vacate defendant's sentences for UUW by a felon and remand for resentencing.

¶ 21 Due to the fact that we are vacating defendant's sentences for his UUW by a felon convictions and remanding the cause for resentencing, we need not address defendant's alternative argument regarding whether the trial court properly admonished him in accordance with Illinois Supreme Court Rule 605(a) (eff. Oct. 1, 2001).

¶ 22 Defendant finally contends, and the State agrees, that defendant's mittimus should be corrected to reflect the actual offense of which he was convicted. The trial court found defendant guilty of possession of 1 or more grams but less than 15 grams of heroin with the intent to deliver under section 401(c)(1) of the Illinois Controlled Substances Act. 720 ILCS 570/401(c)(1) (West 2008). The mittimus reflects the correct statute, but incorrectly shows that defendant was convicted of "MFG/DEL 1<15 GR HEROIN/ANALOG." Pursuant to Illinois Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we amend the mittimus to reflect defendant's conviction for possession of 1 or more but less than 15 grams of heroin with the intent to deliver. *People v. Brown*, 255 Ill. App. 3d 425, 438-39 (1993).

¶ 23 For the foregoing reasons, we affirm defendant's conviction for possession of a controlled substance with intent to deliver; affirm defendant's convictions of UUI by a felon, modifying the convictions to reflect that they are Class 3 felonies, rather than Class 2 felonies; vacate defendant's seven-year sentences for UUI by a felon; remand for resentencing; and correct defendant's mittimus to reflect possession of 1 or more but less than 15 grams of heroin with the intent to deliver.

¶ 24 Affirmed in part as modified; vacated in part; and cause remanded.