

and seeks reduction to PCS. Alternatively, he contends that the mittimus must be corrected to properly reflect his offenses. He also contends that he must be resentenced on the PCS convictions as their six-year sentences exceed the statutory maximum. The State agrees with defendant on the latter two points: that he is entitled to a mittimus correction and resentencing for PCS. For the reasons stated below, we correct the mittimus to reflect one count of PCSI and two counts of PCS, modify the sentences for PCS to the statutory maximum, and otherwise affirm the judgment.

¶ 3 Defendant was charged with three counts of PCSI allegedly committed on or about November 27, 2010. The State alleged that he knowingly possessed heroin with the intent to deliver: 15 grams or more but less than 100 grams in count I, one gram or more but less than 15 grams in count II, and less than one gram in count III. Defendant's trial was severed from, but simultaneous with, the bench trial of codefendant Shomari Yarbrough in case 11CR7485.¹

¶ 4 At trial, police officer G. Dailey testified that, on the afternoon in question, he and other officers were executing a search warrant for a basement apartment at 37 North Austin Avenue in Chicago. Upon entering the apartment, Officer Dailey saw defendant in the living room. Defendant fled and Officer Dailey pursued, catching him in the rear bedroom. As he entered the bedroom, defendant threw a small plastic object. (Officer Dailey had not seen the object in defendant's hand until he dropped it.) Officer Dailey saw the object land on "a TV tray next to the bed," recovered it, and found it to be a plastic bag containing 13 foil packets in turn containing suspect heroin. Officer William Lepine detained defendant. Officer Dailey kept the

¹ As codefendant was charged separately, the record in the instant case does not include the charges against him.

bag (and its contents) from the tray and, later at the police station, gave it to Officer Michael Key to be inventoried.

¶ 5 Officer William Lepine testified to seeing defendant flee from the living room, followed by Officer Dailey; Officer Lepine also pursued defendant and detained him in the rear bedroom. Officer Lepine saw defendant throw an object that he believed to be a plastic bag but did not see what was in the bag or where it landed, nor did he see defendant holding it until he threw it. Officer Lepine did not find any contraband on defendant's person, nor did defendant admit to owning anything in the apartment. Officer Lepine did not recall any other adults in the apartment and "possibly" one child. As the apartment was searched, he found and opened a safe in the rear bedroom. Inside were four plastic sandwich bags containing 247 foil packets of suspect heroin, along with empty sandwich bags, a pistol and bullets, prescription medication bearing codefendant's name but an address other than 37 N. Austin, and a letter addressed to codefendant at 37 N. Austin. Officer Lepine kept the contents of the safe and, later at the police station, gave them to Officer L. Goff to be inventoried. Based on the results of the search, codefendant was arrested by other officers in April 2011.

¶ 6 Officer Bernard Veleta testified to searching the apartment pursuant to the warrant and finding on the living room television stand, behind the television, a small plastic bag containing suspect heroin. He kept the bag and, later at the police station, gave it to Officer Key to be inventoried.

¶ 7 Officer S. Fleming testified to searching the apartment pursuant to the warrant and finding in the front closet a gym bag containing what he believed to be narcotics paraphernalia: a spoon, scale, coffee grinder, sifter, "doorman" (which he explained is a substance "often" mixed with heroin), plastic bags, and foil. The coffee grinder had white powdery residue on it that he

suspected to be heroin. However, Officer Fleming did not submit the residue for testing, nor any of the materials for fingerprinting. He believed these materials to be drug paraphernalia based on nearly seven years of police experience participating in over a hundred narcotics investigations. Defendant objected to further examination of Officer Fleming's opinion or belief, arguing that such testimony constituted undisclosed expert opinion testimony. The State argued that Officer Fleming was offering a lay opinion. The court sustained the objection, noting that the State's failure to disclose Officer Fleming's expert opinion deprived defendant of the opportunity to seek its own opinion.

¶ 8 Officer Michael Key testified to searching the apartment pursuant to the warrant. In the front bedroom, he found a plastic bag containing three bags of a substance he suspected to be heroin, and a lease agreement in defendant's name for the basement apartment at 37 N. Austin. (The parties stipulated that defendant was the leaseholder or tenant of said apartment.) On a desk in the rear bedroom, he found a letter addressed to defendant at 37 N. Austin. Later, at the police station, he inventoried the bag he personally recovered as well as the bags given to him by Officers Dailey and Veleta. Officer L. Goff testified to inventorying the bags of suspected heroin and the gun and ammunition he received from Officer Lepine. Officer Lori Ramirez testified to inventorying the gym bag and contents she received from Officer Fleming.

¶ 9 The parties stipulated that the forensic chemist who weighed and tested the bags of suspected heroin in this case would testify that: (a) 108 of the 247 packets recovered by Officer Lepine contained 15.9 grams of heroin, (b) a bag also recovered by Officer Lepine contained 84.3 grams of heroin, (c) 8 of the 13 packets recovered by Officer Dailey contained 1.2 grams of heroin, (d) the bag recovered by Officer Veleta contained 42.7 grams of heroin, and (e) one of

the three small bags recovered by Officer Key contained less than 0.1 grams of heroin and another contained less than 0.2 grams of heroin.

¶ 10 Defendant sought a directed finding, which the court denied after arguments.

¶ 11 Defendant called Officer Lepine, who reiterated that defendant was detained in the rear bedroom where drugs were found but clarifying that he was detained in the bedroom doorway. Officer Lepine acknowledged his testimony at defendant's preliminary hearing that defendant was detained in the hallway and "never made it into the bedroom" and that, while describing what was recovered in the apartment search, Officer Lepine did not mention the drugs or gun found in the safe. However, his case report did mention the contents of the safe.

¶ 12 The parties stipulated that Sophia Clark, the informant for the search warrant in this case, would testify that she did not name defendant to the police or the judge who issued the warrant.

¶ 13 During closing arguments, the State clarified that defendant's count I was based on the bag behind the television in the living room, count II upon the bag tossed onto the tray in the rear bedroom, and count III upon the bag found in the front bedroom where defendant's lease was also found. Following closing arguments, the court found defendant guilty of PCSI on count I and PCS on counts II and III. The court found the evidence against defendant overwhelming: he was the lessee of the apartment, it was credible that he threw the bag as he fled and it landed on the tray, the bag behind the living room television was "not so concealed" that defendant as tenant would not know it was there, and that bag contained an amount of heroin larger than that for personal use. The court found codefendant not guilty, noting that he was not in the apartment when the warrant was executed and finding the evidence of his residency to be insufficient.

¶ 14 Defendant filed a post-trial motion challenging the sufficiency of the evidence. Following arguments, the court denied the motion and expressly found the State's witnesses credible.

¶ 15 The pre-sentencing investigation reflected prior drug convictions and defendant's admission to using heroin daily for over two decades. Following arguments in aggravation and mitigation where defendant argued drug addiction as a mitigating factor, the court sentenced defendant to six years' imprisonment on each count, to be served concurrently. The mittimus reflects three counts of PCSI, with counts I and II described as "MFG/DEL" of heroin.

¶ 16 On appeal, defendant contends that that the evidence was insufficient to convict him of PCSI because the State failed to prove his intent to deliver, so that we must reduce count I to PCS. In particular, he argues that the State presented no expert or police testimony on what constitutes an amount of heroin for personal use, nor any other evidence from which his intent to deliver could be inferred.

¶ 17 A person commits the offense of PCSI under the Controlled Substances Act (Act) (720 ILCS 570/100 *et seq.* (West 2014)) when he knowingly possesses a controlled substance (including heroin) with the intent to deliver, while PCS is the knowing possession of a controlled substance absent such intent to deliver. 720 ILCS 570/401, 402 (West 2014). "Because direct evidence of intent to deliver is rare, such intent must usually be proven by circumstantial evidence." *People v. Robinson*, 167 Ill. 2d 397, 408 (1995).

¶ 18 In *Robinson*, our supreme court noted that this court has deemed various factors probative of intent to deliver, including whether the quantity of drugs in the defendant's possession was too large to be for personal consumption, the high purity of the drugs, the possession of weapons, the possession of large amounts of cash, the possession of police scanners, pagers or cellular telephones, the possession of drug paraphernalia, and the manner in which the drugs were packaged. *Id.* (and cases cited therein). When the amount of drugs seized may be considered consistent with personal use, reviewing courts require additional evidence of intent to deliver. *Id.*

at 411. The *Robinson* court noted that "[t]here are numerous circumstances from which a jury might infer an intent to deliver" and "[t]he question of whether the evidence is sufficient to prove intent to deliver must be determined on a case-by-case basis." *Id.* at 411, 413. "In light of the numerous types of controlled substances and the infinite number of potential factual scenarios in these cases, there is no hard and fast rule to be applied in every case. Our appellate court has established rational guidelines and general parameters in its consideration of the circumstantial evidence necessary to prove intent to deliver controlled substances." *Id.* at 414-15.

¶ 19 Since *Robinson*, our supreme court has explained the limitations of the *Robinson* factors in evaluating whether trial evidence was sufficient to show intent to deliver. See *People v. Bush*, 214 Ill. 2d 318, 327 (noting that list of factors enumerated in *Robinson* is not "exhaustive and inflexible," but rather serves as examples of "the many factors that 'have been considered by Illinois courts as probative of intent to deliver' "). Similarly noting the factors and provisos in *Robinson*, this court recently stated:

Defendant goes through these factors to argue each factor is 'inconclusive' of his intent to deliver. This is largely a request for this court to reweigh the evidence. We will not.

Defendant seems to understand *Robinson* as an exhaustive list of what must be shown to prove intent to deliver. *Robinson* was decided nearly 20 years ago and, as [a detective] testified, drug dealers have changed their methods and tactics in response to criminal investigations and prosecutions. *People v. Davis*, 2014 IL App (4th) 121040, ¶ 28.

¶ 20 On a claim of insufficiency of the evidence, we must determine whether, taking 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. *In re Q.P.*, 2015 IL 118569, ¶ 24. It is the responsibility of the trier of fact to weigh, resolve conflicts in, and draw reasonable

inferences from the testimony and other evidence, and it is better equipped than this court to do so as it heard the evidence. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 59. We do not retry the defendant – we do not substitute our judgment for that of the trier of fact on the weight of the evidence or credibility of witnesses – and we accept all reasonable inferences from the record in favor of the State. *Q.P.*, 2015 IL 118569, ¶ 24. The trier of fact need not be satisfied beyond a reasonable doubt as to each link in the chain of circumstances; instead, it is sufficient if all the evidence taken together satisfies the trier of fact beyond a reasonable doubt of the defendant's guilt. *Jonathon C.B.*, 2011 IL 107750, ¶ 60. The trier of fact is not required to disregard inferences that flow normally from the evidence, nor to seek all possible explanations consistent with innocence and elevate them to reasonable doubt, nor to find a witness was not credible merely because the defendant says so. *Id.* A conviction will be reversed only where the evidence is so unreasonable, improbable, or unsatisfactory that a reasonable doubt of the defendant's guilt remains. *Q.P.*, 2015 IL 118569, ¶ 24.

¶ 21 Here, taking the evidence in the light most favorable to the State as we must, we find that the State proved that defendant intended to deliver the 42.7 grams of heroin found behind the television in his apartment. Defendant argues that the court heard no expert testimony on whether the contents of the gym bag were drug paraphernalia. However, we do not consider expert testimony necessary for a finder of fact to reasonably infer the use of a spoon, scale, coffee grinder – bearing not coffee grounds but white powder residue – and a sifter in processing white powder heroin, nor of plastic bags and foil in packaging it, when white powder heroin packaged in plastic bags and foil was found in the apartment. While there are innocent uses for these objects and materials, it is not a leap of logic nor an incursion into esoteric expert knowledge to link the powder heroin in the apartment to the usefulness of a coffee grinder and

sifter – kept not in the kitchen where food is handled but with the other aforesaid materials in a hall closet in a gym bag, in the manner of a kit – in processing powder. We also note that a gun and ammunition were found in the apartment; while the court did not expressly attribute them to defendant, it was not required to because defendant was not charged with their possession.

¶ 22 Defendant also contends, and the State agrees, that his mittimus should be corrected. The parties are correct. The trial court convicted defendant under count I for PCSI, while the mittimus describes the offense as "MFG/DEL;" that is, manufacture or delivery of a controlled substance. See *People v. Wade*, 2013 IL App (1st) 112547, ¶ 40. The court found defendant guilty of PCS under section 402 of the Act on the counts II and III but the mittimus describes the offenses as PCSI under section 401. The mittimus shall be corrected accordingly.

¶ 23 Lastly, defendant contends, and the State agrees, that he should be resentenced on the two counts of PCS. The parties are correct; the court erred in sentencing him to six-year prison terms on said counts when possession of less than 15 grams of heroin is a Class 4 felony punishable by one to three years' imprisonment. 720 ILCS 570/402(c); 730 ILCS 5/5-4.5-45(a) (West 2014). We note that the count I conviction is for PCSI with a Class X sentence of at least six years' imprisonment (720 ILCS 570/401(a)(1)(A) (West 2014)), so that the sentence on count I is not erroneous.

¶ 24 Accordingly, we vacate the sentences on counts II and III and remand for resentencing. Pursuant to Supreme Court Rule 615(b)(2) (eff. Aug. 27, 1999), we direct the clerk of the circuit court to correct the mittimus to reflect that defendant was convicted under count I for possession of a controlled substance with intent to deliver and under counts II and III for possession of a controlled substance. The judgment of the circuit court is otherwise affirmed.

¶ 25 Affirmed in part, vacated in part, mittimus corrected, and remanded.