

FIRST DIVISION
June 20, 2016

No. 1-14-2779

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. 13 CR 13580
)	
REGINALD MALONE,)	Honorable
)	Rickey Jones,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Cunningham and Justice Connors concurred in the judgment.

ORDER

Held: We find that the State failed to prove defendant guilty beyond a reasonable doubt of delivering more than 1 gram but less than 15 grams of heroin. Pursuant to Supreme Court Rule 615(b)(3) we reduce defendant's conviction to delivery of less than 1 gram of heroin. Accordingly, we remand these proceedings for resentencing for this lesser offense.

¶ 1 After a jury trial, the circuit court sentenced defendant Reginald Malone to 12 years' imprisonment for delivery of 1 but less than 15 grams of heroin (720 ILCS 570/401(c)(1) (West

2012). On the morning of his arrest, defendant was standing in front of 3720 West Lexington with another unidentified male when an undercover officer parked in front of them. Defendant approached the vehicle and inquired "how many" the officer needed. The undercover officer showed defendant 2 fingers but made no verbal response. Defendant departed and quickly returned, handing over two bags containing a white powder in exchange for \$20 from the undercover officer. The officer departed, and the defendant was apprehended by other officers shortly thereafter. At trial, only the State presented evidence. The State called the undercover officer, the surveillance officer, the arresting officer, and the drug chemist in support of its case. During deliberations, the jury sent out several notes including one asking for a definition of reasonable doubt.

¶ 2 Before this court, defendant raises several issues for our review: (1) the State failed to prove him guilty beyond a reasonable doubt of delivering heroin to an undercover officer; (2) the State failed to prove him guilty beyond a reasonable doubt of delivery of 1 or more, but less than 15 grams of heroin; (3) whether the trial judge failed to comply with Illinois Supreme Court Rule 431(b); (4) whether the trial judge denied defendant a fair trial when he refused to answer the jury's question regarding the definition of reasonable doubt; (5) whether the defendant was denied a fair trial based on alleged improper remarks made by the State during rebuttal argument; (6) whether the defendant's sentence is excessive; and (7) whether defendant's mittimus should be corrected.

¶ 3 For the following reasons, we reduce defendant's conviction to delivery of less than 1 gram of heroin and remand for resentencing.

¶ 4

JURISDICTION

¶ 5 Defendant, Reginald Malone, appeals from a final judgment of conviction in a criminal case. He was sentenced on February 21, 2014. Malone filed a motion for late notice of appeal on September 9, 2014, which this court allowed on September 24, 2014. Accordingly, this court has jurisdiction pursuant to article VI, section 6, of the Illinois Constitution and Illinois Supreme Court Rules 603 and 606, governing appeals from a final judgment of conviction in a criminal case entered below. Ill. Const. 1970, art. VI, § 6; Ill. S. Ct. R. 603 (eff. Feb. 6, 2013); R. 606 (eff. Dec. 11, 2014).

¶ 6

BACKGROUND

¶ 7 Defendant, Reginald Malone, was charged under Indictment No. 13 CR 13580 with one count of delivery of a controlled substance within 1000 feet of a church (count 1) and one count of delivery of a controlled substance (count 2). Defendant was tried by a jury before the Honorable Rickey Jones and found guilty of delivery of a controlled substance of more than 1 gram but less than 15 grams of heroin. Subsequently, defendant was sentenced to 12 years in Illinois Department of Corrections.

¶ 8 On June 27, 2013, officer Shannon Grubbs was working undercover for the narcotics division of the Chicago Police Department on a team with officers Babette Hatzis, Lonnie Johnson, and Sergeant Vince Avery. Officer Hatzis was part of the surveillance team and officers Johnson and Avery were part of the enforcement team.

¶ 9 Officer Grubbs testified that at approximately 8:39 a.m., she drove to 3720 West Lexington and parked her car in front of a house there. Officer Grubbs was in plainclothes and in a covert police vehicle. The narcotics team was responding to complaints of drug activity in the area. When she parked her car, officer Grubbs noticed two men on the sidewalk talking.

One of the individuals was a black man with slightly grey facial hair, wearing a black tee shirt, dark blue jeans and white gym shoes. Officer Grubbs later positively identified this person in-court as defendant.

¶ 10 Officer Grubbs testified that within a minute of parking her car, defendant walked up to her passenger window and asked "how many." Officer Grubbs displayed two fingers but said nothing.

¶ 11 Officer Grubbs then watched as defendant and the other man walked east on Lexington Avenue and then went out of her view. A minute later defendant walked back to the passenger side of officer Grubbs' car and gave her two clear plastic bags containing white powder. There were green dollar signs on the side of the bags. Based on her experience, officer Grubbs believed the substance to be narcotics and consequently, gave defendant a \$20 bill, which was Chicago Police Department 1505 prerecorded police money. Defendant then walked away from the car and Officer Grubbs drove away from the scene. After she was out of sight, Officer Grubbs used her police radio to notify the rest of her team that the drug buy was positive and gave them a description of defendant. Specifically, defendant's race, height, weight, and that he was wearing a black tee shirt, dark blue jeans, and white shoes.

¶ 12 Fifteen to twenty minutes later officer Grubbs went back to the location and made an on the scene identification of defendant, who was now in custody. Officer Grubbs then went to the Homan police station, put the drugs she had received from defendant into an evidence bag and gave it to officer Lonnie Johnson to inventory. Officer Grubbs positively identified People's Exhibit #1, in-court, as the evidence bag containing the drugs she received from defendant.

¶ 13 Officer Babette Hatzis testified that she was the surveillance on the team and from her surveillance vantage point she had an unobstructed view of the entire drug transaction. Officer

Hatzis saw defendant, whom she positively identified in-court, walk to Officer Grubbs' car, lean into the passenger side window and then walk away out of sight. A minute later defendant walked back to the car, leaned again into the passenger side window for a few seconds and then walked away. Officer Hatzis did not see anything in defendant's hands. Officer Hatzis watched defendant walk into an alley where she lost sight of him. Officer Hatzis then heard officer Grubbs confirm that it was a positive buy and the enforcement team moved in to make the arrest.

¶ 14 Officer Lonnie Johnson testified that he was given a description by officer Grubbs of a black male with a black tee shirt, dark blue jeans, white gym shoes, bald headed, and a salt/pepper grayish beard. Consequently, officer Johnson and his partner went to the location, and saw a man, whom he identified in-court as defendant, who matched the description and detained him. Later, officer Grubbs drove by and while remaining in her car, positively identified defendant at the scene as the person who had sold her drugs. At the time, defendant was standing next to officer Johnson and his partner, Sergeant Vince Avery. As testified to by Officer Grubbs, no one else at the scene looked like defendant. After receiving the positive identification from officer Grubbs, officer Johnson placed defendant under arrest and took him to the Homan Square police station. A search of defendant's person revealed money but not the 1505 prerecorded \$20 bill handed over by officer Grubb. Officer Johnson further testified that at the station he inventoried the drugs defendant had given to officer Grubbs under Inventory No. 13939789. Officer Johnson positively identified People's Exhibit #1, in-court, as the drugs that he received from officer Grubbs and the ones he inventoried.

¶ 15 Illinois State Police Forensic Scientist Naeemah Powell, an expert in drug forensic chemistry, testified she received People's Exhibit #1 on July 9, 2013, in a heat sealed condition from evidence technician Allen Caliendo. It was given Illinois State Lab case number

C13025574 and chemist Powell put her initials and the date on it. Chemist Powell positively identified People's Exhibit #1 in-court and the markings she made on it. People's Exhibit #1 consisted of two bags containing powder which was consistent with the inventory description. Chemist Powell testified she had two items then weighed the items and performed two different tests on the powdery substance to determine its composition. Based on these tests, Chemist Powell opined that the substance was 1.3 grams which contained the presence of heroin.

¶ 16 The State rested after their Exhibits #1, #4, and #5 were entered into evidence. The defense then entered into evidence a stipulation of Correctional Officer Angela Louis who would testify that she did the intake of defendant on June 28, 2013, and that defendant had \$73.30 on his person at that time. The defense then rested.

¶ 17 The jury was sent out to deliberate at 11:28 a.m. At approximately, 12:55 p.m., they sent out a note asking for the transcript of officer Hatzis' testimony. The defense took the position the transcript should be given to the jury and the State asked that the court instruct the jury "they should rely on their collective memory from what she said on the stand." Over the State's objection, the transcript was sent back to the jury. At approximately 2:08 p.m., the jury sent out another note which read, "we the jury cannot come to a unanimous decision at this time. It is very hot in the room." Both the parties agreed that the court would tell the jury to continue to deliberate. Consequently, at 2:55 p.m., the court informed the jury "we will try to provide fans for the room. Please continue to deliberate."

¶ 18 At approximately 2:58 p.m., the jury sent out a note which read, "we need police reports for all three officers. We also need the transcript from officer Johnson's testimony. Thank you." In discussing a response with the parties, the trial court indicated the police reports would not be sent back and then asked the State if they were objecting to the transcript being given. The State

noted that since one transcript had already been given they had no further objection. Subsequently, the transcript of officer Johnson's testimony was sent back to the jury with the trial court informing them, "you have received all of the evidence, please continue to deliberate."

¶ 19 At approximately 3:20 p.m., the jury sent out a note which read, "is reasonable doubt means [sic] no doubt. What is reasonable doubt? Can you give us a definition of reasonable doubt? Thank you." Both parties agreed that the trial court would inform the jury that "you received all the instructions on the law, please continue to deliberate." Around 4:30 p.m., the jury reached a verdict. The jury found defendant guilty of delivery of more than 1 gram but less than 15 grams of heroin. Then, after denying defendant's motion for a new trial, the trial court sentenced defendant to 12 years in Illinois Department of Corrections with three years mandatory supervised release. Based on his background, defendant was sentenced as a Class X offender. In addition, defendant was given drug treatment, 247 days credit for pre-sentence incarceration and assessed fines and fees. Defendant's subsequent oral motion to reconsider sentence was denied and on September 24, 2014, this Court allowed defendant's motion to file a late notice of appeal. This appeal followed.

¶ 20

ANALYSIS

¶ 21 Defendant raises the following issues for our review: (1) the State failed to prove him guilty beyond a reasonable doubt of delivering heroin to an undercover officer; (2) the State failed to prove him guilty beyond a reasonable doubt of delivery of 1 or more, but less than 15, grams of heroin; (3) whether the trial judge failed to comply with Illinois Supreme Court Rule 431(b); (4) whether the trial judge denied him a fair trial when he refused to answer the jury's question regarding the definition of reasonable doubt; (5) whether the defendant was denied a fair trial based on alleged improper remarks made by the State during rebuttal argument; (6)

whether the defendant's sentence is excessive; and (7) whether defendant's mittimus should be corrected.

¶ 22 First, defendant argues that the State failed to prove him guilty beyond a reasonable doubt of delivery of heroin to an undercover police officer. In support of this argument, defendant alleges undercover officer Grubbs's testimony is inherently unbelievable because no other officer witnessed defendant hand any drugs to officer Grubbs, the prerecorded funds were not recovered, no other drugs were recovered and the alleged value of the drug was at least three times more than what the officer is alleged to have paid. Additionally, defendant alleges the testimony of the forensic chemist raises questions about the chain of custody of the drugs, requiring reversal of his conviction.

¶ 23 Defendant's second issue is substantially related to the first. In defendant's second issue, he alleges the State failed to prove him guilty beyond a reasonable doubt of delivery of more than 1 gram but less than 15 grams of heroin. The same standard of review applies to both issues.

¶ 24 When a defendant challenges the sufficiency of the evidence, the standard of review 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. Campbell*, 146 Ill. 2d 363, 374-75 (1982). The reviewing court may not substitute its judgment for the trier of fact. *People v. Jones*, 219 Ill. 2d 1, 33 (2006). "The weight to be given the witnesses' testimony, the credibility of the witnesses, resolution of inconsistencies and conflicts in the evidence, and reasonable inferences to be drawn from the testimony are the responsibility of the trier of fact." *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). We will reverse a conviction only where the evidence is so unreasonable, improbable, or unsatisfactory as

to justify a reasonable doubt of the defendant's guilt. *People v. Smith*, 185 Ill. 2d 532, 542 (1999).

¶ 25 Defendant was found guilty of manufacture or delivery of more than 1 gram but less than 15 grams of heroin. 720 ILCS 570/401(c)(1) (West 2012). In order to sustain a conviction for delivery of a controlled substance, the State must prove that the defendant knowingly delivered a controlled substance. 720 ILCS 570/401(d) (West 2012); *People v. Brown*, 388 Ill. App. 3d 104, 108 (2009). Delivery means "actual, constructive or attempted transfer of possession of a controlled substance, with or without consideration, whether or not there is an agency relationship." 720 ILCS 570/102(h); *Brown*, 388 Ill. App. 3d at 108.

¶ 26 When a defendant is charged with possession of a specific amount of an illegal drug with intent to deliver and there is a lesser included offense of possession of a smaller amount, then the weight of the seized drug is an essential element of the crime and must be proved beyond a reasonable doubt. *People v. Williams*, 267 Ill. App. 3d 870, 879 (1994). A chemist, however, generally need not test every sample seized in order to render an opinion as to the makeup of the substance of the whole. *People v. Maiden*, 210 Ill. App. 3d 390, 398 (1991). Rather, random testing is permissible when the seized samples are sufficiently homogenous so that one may infer beyond a reasonable doubt that the untested samples contain the same substance as those that are conclusively tested. *People v. Hill*, 169 Ill. App. 3d 901, 912 (1998).

¶ 27 "However, when such samples are not sufficiently homogenous, a portion from each container or sample must be tested in order to determine the contents of each container or sample." *People v. Jones*, 174 Ill. 2d 427, 429 (1996). Illinois courts have found that white powder is not of sufficient homogeneity and each packet or sample should be tested in order to determine the contents of each packet or sample. *Jones*, 147 Ill. 2d at 429-30; *People v.*

Coleman, 391 Ill. App. 3d 963, 972 (2009); *People v. Clinton*, 397 Ill. App. 3d 215, 222-23 (2009). In this case, defendant is accused of delivering two packets, each containing a white rocky substance. While the chemist looked at the packets, she weighed them collectively. She discussed how she placed the two items on the scale then removed the white powder from the two packets. Then the record only indicates that she tested the "sample" and the sample tested positive for the presence of heroin. Based on this testimony it cannot be said whether or not both packages tested positive for heroin or not. It is the State's responsibility to produce evidence to demonstrate beyond a reasonable doubt that defendant delivered more than 1 gram of heroin to the undercover officer. As the supreme court noted in *Jones*, we cannot speculate that each of the packets contained heroin. *Jones*, 174 Ill. 2d at 430. Rather, the evidence must show the presence of heroin in each packet. *Id.* ("[w]hile it is not difficult to speculate, as did the trial judge, that the remaining three packets may have contained cocaine, such a finding must be based on evidence and not upon guess, speculation, or conjecture."). Accordingly, the State failed to prove defendant guilty beyond a reasonable doubt of possession with intent to deliver more than 1 gram of heroin.

¶ 28 However, the sample did test positive for the presence heroin, and while we have no accurate measure of how much heroin was in the weighed substance, the Controlled Substances Act does punish possession with intent to deliver less than one gram. "Although an accused cannot be convicted of a crime with which he has not been charged, he 'may be convicted of an offense not expressly included in the charging instrument if that offense is a "lesser included offense" of the offense expressly charged.' " *People v. Williams*, 267 Ill. App. 3d 870, 880 (1994), quoting *People v. Jones*, 149 Ill. 2d 288, 292 (1992). Furthermore, pursuant to Supreme Court Rule 615(b)(3) (134 Ill. 2d R. 615(b)(3)), the reviewing court may reduce the degree of the

offense for which the defendant was convicted. Possession with intent to deliver of more than 1 but less than 15 grams of heroin is a Class 1 felony (720 ILCS 570/401 (c)(1) (West 2012), but possession with intent to deliver any amount less than one gram is Class 2 felony (720 ILCS 570/401(d) (West 2012)).

¶ 29 While the state failed to prove possession with intent to deliver more than one gram, it did sufficiently established that defendant did possess some amount of heroin. Thus, defendant's conviction should be reduced to possession with intent to deliver an amount less than one gram, a Class 2 felony. 720 ILCS 570/401(d) (West 2012)

¶ 30

CONCLUSION

¶ 31 Pursuant to Supreme Court Rule 615(b)(3) (134 Ill. 2d R. 615(b)(3)) we reduce defendant's conviction to unlawful possession with intent to deliver an amount of less than 1 gram, a Class 2 felony (720 ILCS 570/401(d) (West 2012)). Accordingly, we remand for a new sentence.

¶ 32 Reversed and remanded.