

No. 1-13-0864

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. 10 CR 17867
)	
CHARLES McCOY,)	Honorable
)	Thaddeus L. Wilson,
Defendant-Appellant.)	Judge Presiding.

JUSTICE EPSTEIN delivered the judgment of the court.
Presiding Justice Howse and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* The evidence was sufficient to prove that defendant possessed heroin with the intent to distribute it. Mittimus corrected to reflect offense of which defendant was convicted.

¶ 2 Following a bench trial, defendant Charles McCoy was convicted of possession of a controlled substance with intent to deliver between 15 and 100 grams of heroin. 720 ILCS 570/401(a)(1)(A) (West 2010). Defendant argues that the evidence at trial was insufficient to prove beyond a reasonable doubt that he possessed the intent to deliver heroin because there was no evidence that he engaged in any drug transactions and the amount he possessed could be reasonably viewed as consistent with personal use. Alternatively, he argues that his mittimus should be corrected to reflect the offense of which he was convicted. We affirm defendant's

conviction because a rational trier of fact could have concluded that the amount and packaging of the narcotics he possessed proved beyond a reasonable doubt that he intended to deliver them. We correct defendant's mittimus.

¶ 3

I. BACKGROUND

¶ 4 Prior to trial, defendant filed a motion to quash his arrest and suppress evidence. At the hearing on the motion, Chicago police officers Doherty and Alvarez testified that, on September 1, 2010, they responded to a home invasion call at 4415 West Maypole Avenue, the home of Marquita Hoggan.¹ Hoggan told Alvarez that three men had broken into her home, robbed her, and escaped out of the back porch. Hoggan brought Alvarez to her back porch, where he saw defendant standing in an alley. Alvarez testified that Hoggan told him, "That's one of them." Alvarez testified that he said, "[P]olice," and defendant fled. Alvarez pursued defendant.

¶ 5 Doherty testified that he joined in the chase. As Doherty ran behind defendant, he saw defendant remove a "large bundle" from his pants and throw it over a fence surrounding a vacant lot. Doherty described the bundle as being clear plastic and shaped like an oval or egg. Doherty continued to chase defendant and eventually saw Alvarez arrest defendant.

¶ 6 Chicago Police Officer Dragojlovich recovered the item that defendant had thrown over the fence. Dragojlovich testified that the object was a "[s]oftball size [*sic*] bundle of narcotics," but could not recall if it was encased in clear plastic.

¶ 7 Hoggan testified that she did not tell Alvarez that defendant was one of the people who broke into her home. She said that the police showed her defendant after he was taken into

¹ Although the transcript of the report of proceedings recorded the street name as "Maple," the parties agree that the correct address is 4415 West Maypole Avenue.

No. 1-13-0864

custody and she told them that defendant was not one of the people who broke into her home. The trial court denied defendant's motion to quash arrest and suppress evidence.

¶ 8 At trial, the parties stipulated that Alvarez, Doherty, and Dragojlovich would testify in accord with their testimony at the hearing on the motion to quash arrest and suppress evidence. The parties further stipulated that Dragojlovich would testify that he recovered a clear plastic bag containing eight bags, each of which contained 15 smaller tinfoil packets.

¶ 9 The parties also stipulated to the testimony of Illinois State Police forensic chemist Peter Anzalone, who tested the chemical composition of the suspected narcotics recovered by Dragojlovich. Anzalone tested 35 of the 120 packets he received and each tested positive for the presence of heroin. Those 35 packets weighed 15.1 grams. Anzalone estimated that all 120 packets weighed 51.9 grams.

¶ 10 Defendant called Whitney Washington to testify on his behalf. Washington had known defendant for over 10 years at the time of trial. Washington lived at 4442 West Fulton Street in Chicago on September 1, 2010. On that date around 5:39 p.m., she saw defendant walk off of her porch and head down the street. Washington said that defendant walked with a limp because he had been shot in the leg. She saw the police pull up, frisk defendant, and arrest him. She did not see the police chase defendant.

¶ 11 Defendant testified that he was shot in his right leg in November 2009. On September 1, 2010, defendant still could not run because of his injury. He testified that he was arrested leaving Washington's house on that date and that he did not run from the police. Defendant testified that he had money and "some pills" on him when he was arrested, although he did not specify what kind of pills they were.

¶ 12 In rebuttal, the State tendered copies of defendant's prior convictions for aggravated driving under the influence and possession of a stolen motor vehicle as impeachment evidence.

¶ 13 The trial court found defendant guilty and sentenced him to 11 years' incarceration. Defendant appeals.

¶ 14

II. ANALYSIS

¶ 15 Defendant's primary contention on appeal is that the evidence at trial failed to prove beyond a reasonable doubt that he intended to deliver the heroin he possessed. He argues that the amount of heroin he was found in possession of was consistent with his personal use and that there was no evidence that he engaged in any drug transactions or possessed paraphernalia for selling narcotics. The State contends that the amount of heroin defendant possessed was inconsistent with personal use and that the individual packaging of the drugs was sufficient to prove his intent.

¶ 16 As an initial matter, we must address three pieces of evidence referenced by the parties that were not before the trial court. First, the parties both state that defendant was arrested in possession of \$640 in cash. Second, defendant indicates that he was in possession of seven pills with unknown contents.² Third, the State contends that defendant was arrested in possession of a cell phone. In support of these facts, the parties cite an arrest report and police property inventory reports included in the common law record. None of these documents were admitted as evidence defendant's bench trial. On appeal, both parties use these facts to support their respective arguments regarding defendant's intent.

² In its brief, the State points out that it never attempted to use the pills as evidence at defendant's trial. In his reply brief, defendant states that the State "rightly note[d]" that the pills "are irrelevant to this appeal."

¶ 17 When reviewing the sufficiency of the evidence presented at trial, "we will not *** take judicial notice of critical evidentiary material that was not presented to and not considered by the fact finder during its deliberations." *People v. Boykin*, 2013 IL App (1st) 112696, ¶ 9; *People v. Barham*, 337 Ill. App. 3d 1121, 1130 (2003). In this case, neither the arrest report nor the property inventory reports were admitted as evidence at trial. While defendant testified that he had money and "some pills" in his possession when he was arrested, he never testified as to the amount of money or pills he had. There was also no evidence that defendant possessed a cell phone when he was arrested. The trial judge's findings at the close of trial do not indicate that he was presented with or considered any of these facts in finding defendant guilty. As the parties both recognize, this evidence bears on a critical question of fact: whether defendant had the requisite intent to deliver narcotics. Although defendant has conceded his possession of \$640 and seven pills on appeal, we decline to consider any evidence on appeal that the trial court, as trier of fact, did not have an opportunity to consider. See *Koulogeorge v. Campbell*, 2012 IL App (1st) 112812, ¶ 21 (this court is not bound by a party's concession). We now turn to the question of whether the evidence presented at trial was sufficient to prove defendant's intent to deliver heroin.

¶ 18 In reviewing the sufficiency of the evidence, we determine whether a rational trier of fact, viewing the evidence in the light most favorable to the State, could have found the essential elements of the crime beyond a reasonable doubt. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). We will not substitute our judgment for that of the trier of fact with regard to the credibility of witnesses, the weight to be given to each witness's testimony, or the reasonable inferences to be drawn from the evidence. *Id.* A defendant's conviction will not be set aside unless the evidence is

No. 1-13-0864

so improbable or unsatisfactory that it creates a reasonable doubt as to his guilt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 225 (2009).

¶ 19 To establish possession of a controlled substance with intent to deliver, the State must prove three elements beyond a reasonable doubt: that the defendant knew of the narcotics, that the narcotics were in the defendant's immediate possession or control, and that the defendant intended to deliver them. 720 ILCS 570/401 (West 2010); *People v. Robinson*, 167 Ill. 2d 397, 407 (1995). In this case, defendant only challenges the State's evidence as to the third element: intent to deliver.

¶ 20 Intent to deliver is most often proven by circumstantial evidence. *Robinson*, 167 Ill. 2d at 407. We must look to whether the nature and quantity of circumstantial evidence supports an inference of intent to deliver. *Id.* at 408. Factors relevant in this inquiry include: (1) whether the quantity of drugs possessed is too large to be reasonably viewed as being for personal consumption, (2) the high degree of drug purity, (3) the possession of any weapons, (4) possession and amount of cash, (5) possession of police scanners, beepers or cellular telephones,³ (6) possession of drug paraphernalia commonly associated with narcotics transactions, and (7) the manner in which the drug is packaged. *Id.* This list of factors is not "exhaustive" or "inflexible." *People v. Bush*, 214 Ill. 2d 318, 328 (2005).

¶ 21 In *Robinson*, the Illinois Supreme Court stated that, in cases where the amount of the controlled substance cannot reasonably be viewed as designed for personal consumption, the quantity of the controlled substance alone can be sufficient to prove intent to deliver beyond a

³ "Since our supreme court's opinion in *Robinson*, delivered nearly 20 years ago, this court has questioned whether possession of a cellular phone alone is probative of anything other than the popularity of mobile communication devices." *People v. Ellison*, 2013 IL App (1st) 101261, ¶ 24.

reasonable doubt. *Robinson*, 167 Ill. 2d at 410-11. "As the quantity of controlled substance in the defendant's possession decreases, the need for additional circumstantial evidence of intent to deliver to support a conviction increases." *Id.* at 413. In cases where the amount seized "may be considered consistent with personal use, our courts have properly required additional evidence of intent to deliver to support a conviction." *Id.* at 411. "This court has held that when a defendant possesses narcotics within the range of personal use, 'the minimum evidence a reviewing court needs to affirm a conviction is that the drugs were packaged for sale, and at least one additional factor tending to show intent to deliver.'" *Ellison*, 2013 IL App (1st) 101261, ¶ 16 (quoting *People v. Blakney*, 375 Ill. App. 3d 554, 558 (2007)).

¶ 22 In this case, aside from the amount and packaging of the narcotics, there was no circumstantial evidence proving defendant's intent to deliver. The police did not see defendant engage in any narcotics transactions, and there was no evidence of the purity of the heroin he possessed. The police did not recover any weapons or narcotics sales paraphernalia from defendant. There was no evidence that defendant possessed a large amount of cash, police scanners, or beepers. We must assess, therefore, whether the amount and packaging of the heroin defendant possessed was sufficient evidence of his intent to deliver.

¶ 23 Defendant possessed a softball-sized "bundle" containing 120 individually wrapped tinfoil packets of suspected heroin that weighed a total of 51.9 grams. Thirty-five of those packets, weighing 15.1 grams, tested positive for heroin. Defendant argues that, since only 35 packets out of 120 were tested for heroin and those 35 packets weighed 15.1 grams, the State only proved that he possessed 15.1 grams of heroin. According to defendant, the State presented no evidence that 15.1 grams of heroin was inconsistent with personal use.

¶ 24 Defendant is correct "that where the defendant could be charged with the lesser included offense of possession of a smaller amount [of narcotics], a sample from each separate bag or container must be tested to prove that it contains a controlled substance." *Robinson*, 167 Ill. 2d at 409; see also *People v. Jones*, 174 Ill. 2d 427, 429 (1996). Here, however, it is undisputed that the State established that defendant possessed 15.1 grams of heroin, proving the essential quantity element of the offense of possession with intent to deliver between 15 and 100 grams of heroin. 720 ILCS 570/401(a)(1)(A) (West 2010). Instead, defendant challenges only the proof of the element of intent to deliver. In *Robinson*, our supreme court rejected the contention that a reviewing court may only look to the portion of a controlled substance actually tested when evaluating the sufficiency of the State's evidence of intent to deliver:

"[T]he quantity of the controlled substance possessed in excess of the statutory minimum quantity of the controlled substance for the crime charged is not an element of the crime to be proven beyond a reasonable doubt, but is only one of many factors to be taken into account in considering the element of intent to deliver." *Robinson*, 167 Ill. 2d at 410.

When evaluating the intent to deliver, the fact that only a portion of the bags were tested merely affects the weight of that evidence. *Id.*; see also *People v. Hendricks*, 325 Ill. App. 3d 1097, 1110 (2001) (in reviewing the sufficiency of the evidence, "it is not [this] court's role to reweigh the evidence."). Pursuant to *Robinson*, the 85 untested packets are relevant in assessing defendant's intent to deliver.

¶ 25 Defendant cites *People v. Clinton*, 397 Ill. App. 3d 215 (2009), in support of his contention that the evidence was insufficient to prove his intent to deliver. In *Clinton*, the defendant was arrested in possession of 13 tinfoil packets containing 2.8 grams of heroin and \$40 in cash. *Id.* at 218-19. The court found that this evidence was insufficient to prove defendant's

intent to deliver, where there was no testimony that the amount of heroin recovered was inconsistent with personal use, there was no evidence that the defendant engaged in drug transactions, and defendant did not possess any weapons or paraphernalia. *Id.* at 226.

¶ 26 Defendant contends that *Clinton* is analogous to this case because, here, there was also no testimony that the amount of heroin defendant possessed was inconsistent with personal use, the police did not see defendant engage in any suspected drug transactions, and defendant did not possess any weapons or paraphernalia. Yet, in this case, defendant possessed almost 19 times as much suspected heroin divided into nearly 10 times as many individual tinfoil packets, all bound together in a softball-sized "bundle." Even taking into account only the amount of heroin that was tested, defendant still possessed more than five times as much heroin as the defendant in *Clinton*. We thus find that *Clinton* is inapposite.

¶ 27 The State's reliance on *People v. Berry*, 198 Ill. App. 3d 24 (1990), and *People v. Johnson*, 334 Ill. App. 3d 666 (2002), is similarly misplaced. In *Berry*, the defendant was arrested with a plastic bag of 3.9 grams of cocaine and two sealed envelopes containing \$3,100 in cash in various denominations. *Berry*, 198 Ill. App. 3d at 26. A police officer testified that a typical cocaine user in his jurisdiction was usually in possession of one-quarter to one-half a gram of cocaine. *Id.* at 30. In *Johnson*, the defendant was arrested with 8.8 grams of cocaine, with each rock of cocaine individually wrapped in small plastic bags. *Johnson*, 334 Ill. App. 3d at 670-71. An officer testified that this type of packaging was indicative of cocaine sales. *Id.* at 670, 677. Unlike *Berry* and *Johnson*, in this case, the State failed to present any evidence regarding whether 51.9 grams of heroin was inconsistent with personal use or whether the packaging in which they found the heroin was indicative of distribution. We thus find that *Berry* and *Johnson* are distinguishable.

¶ 28 We find that *People v. Contreras*, 327 Ill. App. 3d 405 (2002), is instructive. There, the defendant was arrested with 458.9 grams of cocaine in one large bag. *Id.* at 407. Other than the quantity of the cocaine, there were no other recognized indicia of intent to deliver. *Id.* at 409. The State failed to present evidence regarding whether 458.9 grams of cocaine was inconsistent with personal use. *Id.* The court, noting that its "analysis [was] constrained by the standard of review *** in sufficiency of the evidence cases," found that a rational trier of fact could have concluded that the amount of cocaine alone proved beyond a reasonable doubt the defendant's intent to deliver. *Id.* at 411.

¶ 29 Like the *Contreras* court, we conclude that a rational trier of fact could have found that the evidence was sufficient to prove defendant's intent to deliver heroin. Defendant was arrested with 51.9 grams of suspected heroin, 15.1 grams of which was conclusively proved to be heroin. Like *Contreras*, the State here presented no evidence that this amount of heroin was inconsistent with personal use. Although this case involves a much smaller amount of narcotics than *Contreras*, the packaging of the heroin in this case acts as additional indicia of intent to deliver. The heroin seized from defendant had been divided into 120 individually wrapped tinfoil packets. Those 120 packets were evenly separated into eight bags and bound together in a softball-sized "bundle." A rational trier of fact could conclude that the division of this amount of heroin into so many individual packets and bags showed that the defendant intended to sell it. Viewing this evidence in a light most favorable to the State, we conclude that a rational trier of fact could have found that defendant possessed an amount of heroin inconsistent with personal use that was packaged for distribution. We thus affirm defendant's conviction for possession of a controlled substance with intent to deliver between 15 and 100 grams of heroin.

¶ 30 Defendant also contends, and the State agrees, that his mittimus should be corrected to reflect the offense of which he was convicted. Defendant was convicted of possession of a controlled substance with intent to deliver. 720 ILCS 570/401(a)(1)(A) (West 2010). Defendant's mittimus reflects a conviction for "MFG/DEL 15<100 GR HEROIN/ANLG," indicating that he was convicted of the manufacture or delivery of 15 to 100 grams of heroin. 720 ILCS 570/401(a)(1)(A) (West 2010). We direct the clerk of the circuit court to correct the mittimus to reflect the correct offense: possession of a controlled substance with intent to deliver.

¶ 31

III. CONCLUSION

¶ 32 For the reasons stated, we order the clerk of the circuit court to correct the mittimus to reflect the correct offense of possession of a controlled substance with intent to deliver, and we affirm the judgment in all other respects.

¶ 33 Affirmed; mittimus corrected.