2017 IL App (1st) 150621-U

No. 1-15-0621

Order filed June 27, 2017

SECOND DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 CR 20483
	)	
DAMON SEALS,	)	Honorable
	)	Brian K. Flaherty,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Hyman and Justice Neville concurred in the judgment.

ORDER

¶ 1 *Held*: The evidence was sufficient to prove defendant guilty beyond a reasonable doubt of the offense of possession of more than 500 grams but not more than 2,000 grams of cannabis.

¶ 2 Following a jury trial, defendant Damon Seals was convicted of possession of more than 500 grams but not more than 2,000 grams of cannabis (720 ILCS 550/4(e) (West 2010)) and sentenced to two years in prison. On appeal, defendant contends that the State did not prove him guilty of possessing more than 500 grams of cannabis beyond a reasonable doubt. He asserts that

the State's forensic scientist did not indicate that she separately tested samples taken from each of the three bags she used to determine the total weight. We affirm.

¶ 3 At trial, Illinois State Police Trooper Jose Alvarez testified that, on September 29, 2010, he was on patrol and pulled a vehicle over for changing lanes without using a turn signal. Defendant was driving and codefendant David McClure was in the front passenger seat.[1]

¶ 4 As Alvarez approached the vehicle, he identified, based on his training, a "strong odor of raw cannabis" coming from the open driver's side window. Defendant was unable to produce a driver's license. Alvarez conducted a patdown search of defendant, whose clothing smelled like burnt cannabis. Defendant denied having smoked marijuana while inside the vehicle. Alvarez handcuffed defendant and placed him in the back of his squad car. He then patted McClure down and placed him in the squad car with defendant. Alvarez then searched defendant's vehicle.

¶ 5 On the rear floorboard directly behind the center counsel, Alvarez saw two open transparent bags containing "what appeared to be cannabis, a green, leafy substance." He also recovered a digital scale from the vehicle and $1013 in U.S. currency from defendant. Alvarez subsequently inventoried the recovered items, placing them into sealed bags.

¶ 6 Alvarez identified People's Exhibit No. 1 as five vacuum-sealed packages containing cannabis and People's Exhibit No. 2 as a gallon-size bag of cannabis, all of which he had recovered from the floorboard of the vehicle.

¶ 7 Cotelia Fulcher, a forensic scientist with the Illinois State Police, was qualified as an expert in the area of forensic science. Fulcher testified that People's Exhibit No. 1 showed one sealed bag containing five individual bags with "plant material." Fulcher testified that she tested

[1] McClure is not a party to this appeal.

and weighed "three of the bags," that her results from the "chemical wet test" were "positive for the presence of cannabis," and that the total weight of the three bags was 124.5 grams. Fulcher also testified that the one bag of plant-like material in People's Exhibit No. 2 tested positive for cannabis and weighed 389 grams. The total combined weight of People's Exhibits No. 1 and No. 2 was 513.5 grams.

¶ 8 The jury found defendant not guilty of possession of cannabis with intent to deliver but guilty of knowingly possessing more than 500 grams but not more than 2,000 grams of cannabis. The trial court denied defendant's motion for a new trial and sentenced him to two years in prison.

¶ 9 Defendant contends on appeal that the State did not prove that he possessed more than 500 grams but not more than 2,000 grams of cannabis beyond a reasonable doubt. He argues that the State did not establish that its forensic scientist separately tested and analyzed the contents of each of three bags that she weighed in People's Exhibit No. 1. Defendant asserts that the tests performed on People's Exhibit No. 1, which showed the presence of cannabis, cannot be imputed to each individual bag. He argues that, therefore, the State did not prove the weight element of the offense and requests that we reduce his conviction to possession of more than 100 grams but not more than 500 grams of cannabis.

¶ 10 When we review the sufficiency of the evidence, the question 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." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). It is the jury's responsibility "to determine the credibility of the witnesses and draw reasonable inferences from the evidence." *People v. Robinson*, 167 Ill. 2d 397, 413

(1995). On appeal, all reasonable inferences from the record are drawn in favor of the prosecution (*People v. Saxon*, 374 Ill. App. 3d 409, 416 (2007)) and we will only reverse a conviction if the evidence is "so improbable or unsatisfactory that reasonable doubt of the defendant's guilt remains" (*People v. Fountain*, 2011 IL App (1st) 083459-B, ¶ 13).

¶ 11 "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. Jones*, 174 Ill. 2d 427, 428-29 (1996). Here, defendant was convicted of knowingly possessing more than 500 grams but not more than 2,000 grams of cannabis, which is a Class 3 felony. 720 ILCS 550/4(e) (West 2010). Defendant argues that we should reduce his conviction to the lesser offense of possession of more than 100 grams but not more than 500 grams, which is a Class 4 felony and is defined in section 550/4(d) of the Code of Criminal Conduct. 720 ILCS 550/4(d) (West 2016). However, at the time of defendant's offense, September 29, 2010, there was no such offense as possession of more than 100 but not more than 500 grams of cannabis. Rather, the offense in section 550/4(d) was defined as the possession of more than 30 but not more than 500 grams of cannabis, which is a Class 4 felony if it was not a subsequent offense. 720 ILCS 550/4(d) (West 2010).[2] Thus, here, the relevant lesser included offense is for possession of more than 30 but not more than 500 grams of cannabis. *Id.* Because there is a lesser included offense of possession of a smaller amount of cannabis, the weight of the substance recovered from defendant is an essential element of the offense. *Jones*, 174 Ill. 2d at 428-29; See *People v. Harden*, 2011 IL App (1st) 092309, ¶ 40.

[2] Effective July 29, 2016, section 550/4(d) was amended such that the minimum amount of cannabis for the offense was changed from 30 grams to 100 grams. 720 ILCS 550/4(d) (West 2016).

¶ 12 To determine the weight, a chemist need not test every sample that was recovered to form an opinion as to the makeup of the seized substance as a whole. *Jones*, 174 Ill. 2d at 429. Instead, "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." *Id.* When the contents of the packages are commingled before testing, the test results cannot support the weight element of the offense beyond a reasonable doubt. *Harden*, 2011 IL App (1st) 092309, ¶ 40.

¶ 13 Viewing the evidence in the light most favorable to the State, we conclude that the evidence was sufficient to support the weight element of the offense. The jury could reasonably conclude from Fulcher's testimony that she separately tested and weighed the contents from each of the three bags that she used to determine the weight in People's Exhibit No. 1.

¶ 14 Throughout Fulcher's testimony, she consistently referred to the three bags in the plural form, which implies that she considered the three bags as three separate items rather than one bag, one exhibit, or one commingled sample. The State asked Fulcher, "How many out of the five did you test and weigh?" and Fulcher responded, "Three of the bags." With respect to the "chemical wet test," the State asked her, "When you conducted this test on *those three bags*, what were your results?" and Fulcher responded, "Positive for the presence of cannabis." (Emphasis added.) Fulcher also testified that she only analyzed three of the five bags in People's Exhibit No. 1 because she "met the weight gram requirement, therefore, only needed to *test three of the five bags* along with the one bag and the other exhibit." (Emphasis added.) From this testimony as a whole and the references to the "three bags" in the plural form rather than as one

item, the jury could reasonably infer that Fulcher treated the bags as three separate items and separately weighed and tested the contents of each of the three bags.

¶ 15 We recognize that Fulcher explained her testing process for the first bag but did not expressly testify about her procedures for the other two bags. However, her testimony was sufficient for the jury to conclude that she repeated the same testing process on each bag individually. The State asked Fulcher, "What's the first test that you completed on the plant material?" She responded, "First I took a small portion of the *first* bag," from which the jury reasonably could infer that the three bags were separate from each other during the testing process and that she repeated this same process with the two other bags. See *Harden*, 2011 IL App (1st) 092309, ¶ 43 ("Where the evidence presented is susceptible to conflicting inferences, 'it is best left to the trier of fact for proper resolution.' ") (quoting *People v. McDonald*, 168 Ill. 2d 420, 447 (1995)).

¶ 16 To the extent that Fulcher's testimony may be considered ambiguous because she did not expressly testify about her testing and weighing process for each of the three bags, we are not required to draw only inferences that favor the defendant. See *Fountain*, 2011 IL App (1st) 083459-B, ¶¶ 28. Rather, it is the jury's responsibility to draw inferences from ambiguous testimony. *Fountain*, 2011 IL App (1st) 083459-B, ¶¶ 25-26 ("we allow the jury to decide on the inferences to be drawn from ambiguous testimony.***Thus, it falls to the defendant to challenge ambiguous testimony during the course of the trial or else risk the application of this rule on appeal."). The record indicates that during cross-examination, defense counsel never addressed Fulcher's testing procedures on the three bags that she included in the total weight, nor was her testimony disputed at closing argument. See *Harden*, 2011 IL App (1st) 092309, ¶ 43.

¶ 17 We also note that there is no evidence in the record to support that Fulcher commingled the contents of the three bags before she tested them. We will not presume that Fulcher performed an improper procedure. See *Harden*, 2011 IL App (1st) 092309, ¶ 43 ("The record may not expressly state whether [the forensic scientist] tested all 20 bags of 'the chunky substance' or whether he commingled the contents before testing. Where the record is ambiguous, however, 'we will not presume that an improper procedure was performed.' ") (quoting *People v. Miller*, 218 Ill App. 3d 668, 673 (1991)).

¶ 18 Accordingly, from Fulcher's testimony, the jury could reasonably conclude that she tested all three bags individually for the presence of cannabis and that the combined weight of three of the five bags in People's Exhibit No. 1 was 124.5 grams. See *Harden*, 2011 IL App (1st) 092309, ¶ 43. We note that defendant does not take issue with Fulcher's testimony about the gallon-size bag in People's Exhibit No. 2, which she testified tested positive for cannabis in the amount of 389 grams.

¶ 19 To support his argument, defendant cites *People v. Clinton,* 397 Ill. App. 3d 215 (2009), *People v. Ayala*, 96 Ill. App. 3d 880, 881 (1981), and *People v. Games*, 94 Ill. App. 3d 130, (1981), in which the appellate court reduced the defendants' convictions. These cases are distinguishable as, in all three cases, the evidence showed that the forensic chemists failed to test each packet of a controlled substance individually.

¶ 20 In *Clinton*, the forensic chemist testified that, during the weighing process, he combined 6 of the 13 packets of suspect heroin and then performed two tests from the commingled mixture to determine whether each packet actually contained heroin. *Clinton*, 397 Ill. App. 3d at 219, 222-23. In *Ayala*, the weight of two bags of suspect heroin was used to convict the defendant, but

the chemist only conducted the conclusive test for the presence of heroin on one of the bags. *Ayala*, 96 Ill. App. 3d at 881. In *Games*, two bags of cannabis were recovered from the defendant, but the forensic scientist testified that she only tested the contents of one of the two bags that she included in the total weight. *Games*, 94 Ill. App. 3d at 130-31.

¶ 21 Unlike in *Clinton*, *Ayala*, and *Games*, here there was no such direct evidence that the three bags included in the total weight were not tested individually. Accordingly, we are not persuaded by *Clinton*, *Ayala*, or *Games*.

¶ 22 In sum, viewing Fulcher's testimony in the light most favorable to the State, we conclude that the evidence was sufficient for the jury to conclude that Fulcher separately tested the three bags that were used to determine the weight in People's Exhibit No. 1 and that the total amount of cannabis contained in these three bags was 124.5 grams. Because the total amount of cannabis in People's Exhibit No. 2 was 389 grams, the evidence was sufficient to support that the total amount of cannabis recovered from defendant was 513.5 grams. Thus, any rational trier of fact could have found defendant guilty of possession of more than 500 grams but not more than 2,000 grams of cannabis, and the evidence was not "so improbable or unsatisfactory" that there is reasonable doubt of defendant's guilt. See *Fountain*, 2011 IL App (1st) 083459-B, ¶¶ 13, 32.

¶ 23 For the reasons explained above, we affirm defendant's conviction.

¶ 24 Affirmed.