2018 IL App (1st) 161669-U

THIRD DIVISION
November 7, 2018

No. 1-16-1669

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 12517
	)	
JAMES MALLETT,	)	The Honorable
	)	William H. Hooks,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court. Justices Ellis and Cobbs concurred in the judgment.

ORDER

HELD: Defendant's challenge asserting that narcotics evidence was insufficient to sustain his convictions for delivery of a controlled substance is really a challenge to chain of custody and is waived, as he failed to properly preserve it or to argue plain error; and, ultimately, waiver aside, there was no error on the part of the trial court in admitting the narcotics evidence. Additionally, the evidence presented demonstrates that the narcotics were properly tested. However, defendant's conviction and sentence for lesser included offense of simple delivery must be vacated under the one-act, one-crime doctrine, and his mittimus corrected accordingly.

¶ 1 Following a bench trial, defendant James Mallett (defendant) was convicted of delivery of

a controlled substance within 1,000 feet of a church and delivery of a controlled substance. He was sentenced to concurrent terms of six years in prison and three years of mandatory supervised release on the former, and six years in prison and two years of mandatory supervised release on the latter. Defendant appeals, contending that the evidence was insufficient to sustain his convictions where there was a difference in weight between the substance seized and the substance later tested, and that the evidence was insufficient to sustain his convictions where separate packages of the controlled substance were not individually test. He also contends that one of his convictions should be vacated under the one-act, one-crime doctrine. He asks, first, that we reverse his convictions and sentences, or, alternatively, that we reduce their classifications and remand for resentencing; he further asks that we vacate the lesser of his convictions. For the following reasons, we affirm his conviction and sentence for delivery of a controlled substance within 1,000 feet of a church, and we vacate his conviction and sentence for delivery of a controlled substance.

¶ 2 BACKGROUND

¶ 3 Defendant was initially charged with three counts of delivery of a controlled substance: delivery of more than 1 but less than 15 grams of heroin within 1,000 feet of a school (count I), delivery of more than 1 but less than 15 grams of heroin within 1,000 feet of a church (count II), and delivery of heroin (count III). Before trial, the State *nolle prossed* count I, and the cause proceeded to a bench trial on the latter two counts.

¶ 4 Officer Marcus Myles testified that on June 7, 2013, he and several other officers were conducting an undercover narcotics purchase at 4116 West Wilcox in Chicago. Officer Myles

was equipped with an audio and video-recording body device and was assigned to make the purchase, while the other officers conducted surveillance. When officer Myles arrived at the location, he saw an individual, whom he identified in court as defendant, standing near a vacant lot. He recounted that when he approached defendant, defendant asked him, "how many," to which officer Myles responded that he wanted to "try and get six for 50," and defendant replied that he only had three. Officer Myles stated that he then followed defendant six to eight feet off the sidewalk into the vacant lot, where he gave defendant $30 in police-recorded currency (a $20 bill and a $10 bill) and defendant gave him three purple-tinted clear plastic baggies containing a powder. Officer Myles immediately secured these in his pocket and did not remove them until he returned to the police station.

¶ 5 Officer Myles stated that after he made this exchange with defendant, he went back to his vehicle and notified his fellow officers about the purchase, describing the location and defendant. Some minutes later, officer Myles received a radio call that one of his partners had detained someone. Officer Myles drove back to the purchase location and saw defendant; he radioed those partners holding defendant and identified him as the man from whom he had just made the purchase.

¶ 6 Officer Myles further testified that, after defendant's arrest, he returned to the police station and inventoried the suspect narcotics, describing that process for the court. Officer Myles removed the three baggies from his pocket for the first time since receiving them from defendant. He then placed them together on a "regular little scale" and estimated their weight, which he recorded as .6 grams. Officer Myles averred that he did not perform any sort of inspection of the

scale to determine whether it was calibrated. He then inventoried the suspect narcotics using the ICLEAR system, assigned them inventory number 12924232, placed the three baggies into a heat-sealed bag and deposited the bag for delivery to the Illinois State Police Crime Lab for testing. During trial, officer Myles identified the same inventory bag containing the same inventory number. He also identified a video recording of his exchange with defendant taken from his body recording equipment, as well as still photographs from the video; these were submitted into evidence.

¶ 7 Officer Wojceich Lacz testified that on the day in question, he was part of the team conducting the undercover purchase involved in this cause; he was assigned to surveillance. Briefly, he corroborated much of officer Myles' testimony, describing that he watched officer Myles have a conversation with defendant, who he identified in court, and observed the two of them walk over to the vacant lot. Officer Lacz stated that he next saw a hand-to-hand transaction between officer Myles and defendant and officer Myles then walk away. Officer Gerold Lee testified that he, too, was part of the undercover team; he was assigned to enforcement. He also corroborated much of officer Myles' testimony, averring that he received a radio call of a successful narcotics purchase on Wilcox and went to that location. He identified defendant in court as the person who matched the description given that day of the seller and who he detained on Wilcox. Officer Lee placed defendant into custody and brought him to the station, where he performed a custodial search yielding $92, which included the $30 of prerecorded police funds (the $20 and $10 bills) used by officer Myles for the purchase. Further testimony was presented to certify that the location of the narcotic purchase between defendant and officer Myles at 4116

Wilcox was within 626 feet of Olivet United Methodist Church.

¶ 8 Finally, Kimberly Blood, a forensic scientist who has worked at the Illinois State Police Forensic Science Center for some 20 years and has performed narcotics testing in over 37,000 cases, testified that she received the heat-sealed evidence bag with inventory number 12924232 from an evidence technician at the lab. She explained to the court how she tested the suspect narcotics enclosed. She averred that she first checked the seals, as well as the inventory number on the bag and accompanying log sheet, and wrote down a description of the contents, which included three purple ziploc baggies containing a powder. She next weighed the powder by performing a gross net weight analysis, describing that she sets the balance to 0, places the items on the balance, removes the powder one by one and replaces the empty packaging onto the balance, and records the gross weight minus the weight of the packaging, to arrive at the resulting net weight of the powder. Blood confirmed that the balance she was using that day was working properly by describing that she performed a function test on it every week. She further testified that after determining the weight, she conducted a Marquis color test on each of the three samples to preliminarily detect the presence of narcotics, and the test yielded a positive presence of an opiate. She also performed a confirmatory gas chromatography-mass spectrometry test on each of the three samples. Blood averred that after she completed her analysis, she repackaged the three samples into new ziploc bags and then sealed those into another new ziploc bag, sealed that evidence bag, placed her markings on it which she identified in court, and placed the bag into the evidence vault. Blood testified that each of three samples she tested were positive for heroin, and that the net weight of the three samples was 1.6 grams.

¶ 9 Following the close of evidence, the trial court found defendant guilty of delivery of more than 1 but less than 15 grams of heroin within 1,000 feet of a church (count II), and delivery of heroin (count III). The trial court sentenced him to concurrent terms of six years in prison with three years of mandatory supervised release on count II, and six years in prison with two years of mandatory supervised release on count III. During the sentencing hearing, the trial court clarified, and the parties agreed, that count III was to merge into count II, since only one crime had been committed.

¶ 10 ANALYSIS

¶ 11 Defendant first contends on appeal that the evidence was insufficient to sustain his conviction for delivery of a controlled substance because the weight of the substance seized by officer Myles did not match the weight of the substance later analyzed by forensic scientist Blood. He claims that, due to the "substantial weight variance" between these, the State failed to demonstrate a chain of custody of sufficient completeness, thereby casting reasonable doubt on whether the drugs tested were the same as those seized. Specifically, defendant challenges a lack of testimony from officer Myles describing whether and how he sent the drugs to the lab, creating what he terms a "gap" between when officer Myles inventoried them and when Blood received them for testing. We disagree, finding that reversal is not warranted here.

¶ 12 As a threshold matter, the State insists that defendant has waived this argument for our review. Citing *People v. Banks*, 2016 IL App (1st) 131009, ¶ 68 (citing *People v. Woods*, 214 Ill. 2d 455, 471 (2005)), it points out that a claim that the State presented an incomplete chain of custody is not a challenge to the sufficiency of the evidence but, rather, to its foundation and is

subject to forfeiture. The State then explains that, because defendant in the instant cause neither objected to the drug evidence presented at trial nor alleged error in a written posttrial motion with respect to a break in the chain of custody as he now claims, he forfeited the argument. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (to preserve alleged error for review, the defendant must both object at trial and include alleged error in posttrial motion). And, it further notes that defendant does not even argue plain error review to save his claim on appeal. See *People v. Hillier*, 237 Ill. 2d 539, 545 (2010) (a defendant's failure to argue for plain error review forfeits such review). Defendant, meanwhile, counters that his challenge is not to the chain of custody or the admissibility of the drugs analyzed but, rather, that the State presented insufficient evidence that the drugs Blood analyzed were in fact the drugs that he allegedly delivered to officer Myles. Citing *People v. Lashley*, 2016 IL App (1st) 133401, ¶ 23, he insists that his claim attacks solely the sufficiency of the evidence and, thus, is not subject to forfeiture.

¶ 13 The State is wholly correct that a defendant's challenge to chain of custody is a challenge to the foundation of the evidence and not to its sufficiency and, thus, is subject to forfeiture. See *People v. Trice*, 2017 IL App (1st) 152090, ¶ 52 (citing *Banks*, 2016 IL App (1st) 131009, ¶ 68 (citing *Woods*, 214 Ill. 2d at 471)) (application of forfeiture is particularly applicable to such a claim because the defendant's failure to object to foundation deprives the State of its opportunity to cure any deficiency in the evidence's foundation); see also *People v. Wilson*, 2017 IL App (1st) 143183, ¶ 22. It is also correct that defendant here neither preserved his claim for our review, nor argued plain error on appeal to save it. In our view, then, it is waived.

¶ 14 We fail to understand defendant's insistence that forfeiture is not applicable here.

Throughout his brief on appeal, although he labels his claim as one concerning the sufficiency of the evidence, the bulk of his argument consistently attacks the chain of custody of the drugs presented at trial. That is, after initially setting forth the standard of review with respect to sufficiency of the evidence claims, he immediately begins to recite law concerning the requirements for adequate foundation for the admission of evidence, then discusses at length the State's requirement that it must prove chain of custody, and finally devotes the remainder of his argument to his repeated contention that the "State did not show a chain of custody of sufficient completeness to render it improbable that the [drugs] had been tampered with, exchanged, or contaminated." Clearly, defendant is challenging the foundation of the drug evidence presented at trial.

¶ 15 Interestingly, it is not until his reply brief, after the State cites the applicability of waiver, that defendant attempts to recharacterize his argument as one not challenging admissibility but, rather, that the drugs recovered and those analyzed were the same. His citation to *Lashley*, however, is unavailing, as that cause is entirely distinguishable. In *Lashley,* which involved a stipulation to the weight of drugs recovered, our court found that the defendant was not challenging the admissibility of that stipulation on the basis that it lacked proper foundation but, instead, he was claiming that the State failed to prove he had possessed more than the statutorily required amount of the drugs to support his conviction for a greater statutory offense an essential element of the crime which the State must prove beyond a reasonable doubt and to which the defendant had not stipulated. See *Lashley*, 2016 IL App (1st) 133401, ¶ 22. That is simply not the case here. Again, the essence of defendant's challenge is his repeated references to chain of

custody, and more specifically, his arguments attacking alleged "failures" in officer Myles' transport of the drugs to the crime lab and Blood's reception of the drugs before testing. Such arguments clearly comprise a foundational challenge which, upon the record before us, defendant waived.

¶ 16 Waiver aside, even were we to accept defendant's insistence of review based upon a sufficiency of the evidence standard, or even were we to somehow consider his contention saved by plain error even though he has never argued as much, the merits of his claim here would ultimately fail. Briefly, in assessing the sufficiency of 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. See *People v. Davison*, 233 Ill. 2d 30, 43 (2009). We will not substitute our judgment for that of the trier of fact when it comes to the credibility of witnesses or to the reasonable inferences to be drawn from the evidence presented, and we will not set aside a conviction unless that evidence is so improbable or unsatisfactory so as to create reasonable doubt as to the defendant's guilt. See *Lashley*, 2016 IL App (1st) 133401, ¶ 26 (citing See *People v. Siguenza-Brito*, 235 Ill. 2d 213, 225 (2009), and *People v. Ross*, 229 Ill. 2d 255, 272 (2008)). At the same time, we also note that a chain of custody challenge may be reviewed under plain error only in the "rare case" of a complete breakdown in the chain. *Trice*, 2017 IL App (1st) 152090, ¶ 52 (this may be done in only limited circumstances, namely, such a breakdown occurs only when " ' "there is no link between the substance tested by the chemist and the substance recovered at the time of the defendant's arrest" ' " (quoting *Banks*, 2016 IL App (1st) 131009, ¶ 68 (quoting *Woods*, 214 Ill. 2d at 471-

72))); accord *Wilson*, 2017 IL App (1st) 143183, ¶ 24. However, even in such circumstances, there can be no plain error unless it is first determined that error occurred and, ultimately, the burden of persuasion demonstrating the existence of such error rests entirely upon defendant. See *Wilson*, 2017 IL App (1st) 143183, ¶¶ 23, 25.

¶ 17 It is axiomatic that when the State seeks to introduce an item into evidence during trial, it must lay a proper foundation for that item, either via a witness' identification of the item or via the establishment of its chain of custody. See *Banks*, 2016 IL App (1st) 131009, ¶ 69. The characteristics of the item at issue determines the method the State must employ. See *Banks*, 2016 IL App (1st) 131009, ¶ 69. Where, as here, the item is " 'not readily identifiable or may be susceptible to tampering, contamination or exchange' " (*Banks,* 2016 IL App (1st) 131009, ¶ 69 (quoting *Woods*, 214 Ill. 2d at 466)), the State must establish a chain of custody that is " 'sufficiently complete to make it improbable that the evidence has been subject to tampering or accidental substitution' " (*Banks*, 2016 IL App (1st) 131009, ¶ 69 (quoting *People v. Alsup*, 241 Ill. 2d 266, 274 (2011)); see *Trice*, 2017 IL App (1st) 152090, ¶ 61; accord *Wilson*, 2017 IL App (1st) 143183, ¶ 26 (such fungible items include drug evidence)). Once the State has established its *prima facie* case, the burden shifts and defendant is tasked with providing actual evidence to the court of tampering or substitution. See *Banks*, 2016 IL App (1st) 131009, ¶ 69; accord *Trice*, *Trice*, 2017 IL App (1st) 152090, ¶ 61.

¶ 18 Most significant to the instant cause is the following dictate of our supreme court:

> "In the absence of such evidence [of tampering or substitution] from [the] defendant, a sufficiently complete chain of custody does not require that every

> person in the chain testify, nor must the State exclude every possibility of tampering or contamination. It is not erroneous to admit evidence even where the chain of custody has a missing link if there was testimony which sufficiently described the condition of the evidence when delivered which matched the description of the evidence when examined. At this point, deficiencies in the chain of custody go to the weight, not admissibility, of the evidence." (Internal citations omitted.) *Alsup*, 241 Ill. 2d at 274.

In turn, the admission of evidence at trial lies solely within the discretion of the trial court, and we will not overturn its decision on that point absent an abuse of that discretion. See *Banks*, 2016 IL App (1st) 131009, ¶ 70. Such an abuse occurs only when the court's ruling with respect to admissibility is arbitrary, fanciful or unreasonable such that no reasonable person would adopt the court's view. See *Banks*, 2016 IL App (1st) 131009, ¶ 70.

¶ 19 In the instant cause, the chain of custody presented by the State at trial regarding the drug evidence was sufficiently complete. Officer Myles testified that, in exchange for $30, defendant gave him three purple-tinted clear plastic baggies containing a white powder. Immediately upon their receipt, he put them in his pocket and secured them there until he returned to the police station about 20 minutes later. He then described for the court how he inventoried the suspect narcotics: he removed the baggies for the first time from his pocket, he weighed them, he used the ICLEAR system which assigned random inventory number 12924232, he placed the baggies into a larger bag which he heat-sealed, and he deposited that bag for delivery to the crime lab. Officer Myles identified in open court the same inventory bag containing the same inventory

number.

¶ 20 Forensic scientist Blood testified that she received this evidence bag for testing from an evidence technician at the lab. She confirmed that it was the same inventory number, 12924232, and that it was heat-sealed when she received it. Blood likewise described for the court how she tested the suspect narcotic contained therein. She testified that she first checked the seals, the inventory number, and the accompanying log sheet, and she wrote down a description of the bag's contents which she confirmed included three purple ziploc baggies containing a powder. She weighed the powder using a gross net weight analysis, and conducted both a preliminary test on each of the three samples and then a confirmatory test on each of them, with both tests resulting in positive results for heroin. Blood also testified that, after completing her analysis, she repackaged the narcotics into new ziploc bags, sealed a new evidence bag, placed her markings on it and placed the bag into the lab's evidence vault. She, too, identified this evidence in open court.

¶ 21 Any argument by defendant with respect to a "breakdown" in the chain of custody is unavailing where, through the above testimony, the State presented more than a sufficient foundation and chain of custody to show that the narcotics received by officer Myles from defendant were the same narcotics tested by forensic scientist Blood. Again, officer Myles and forensic scientist Blood clearly corroborated key details in the securing, inventorying and testing of the narcotics: their appearance and packaging (three purple baggies containing powder), their random inventory number (12924232), the evidence bag itself (with the inventory list officer Myles generated and Blood confirmed upon receipt according the contents) and the heat seal on

the evidence bag (officer Myles when he sealed it at the station and Blood when she opened the sealed bag at the lab). Additionally, officer Myles described for the court that he deposited the evidence bag for delivery to the lab, and Blood described for the court that she received the evidence bag for testing from a technician at the lab. And, both identified this same narcotics evidence in open court.

¶ 22 Because the State clearly presented a *prima facie* case that the chain of custody was sufficiently complete to make it improbable that the narcotics had been subject to tampering or substitution, the burden shifts to defendant to show actual evidence of this. See *Alsup*, 241 Ill. 2d at 274. But defendant wholly fails to do so. First, he provided no evidence at trial that there was any tampering, exchange or contamination of the narcotics. He never objected to the foundation of this evidence at trial. Moreover, he actually concedes on appeal both officer Myles' and forensic scientist Blood's testimony with respect to their inventory and testing. He merely argues that, because officer Myles did not testify how he sent the narcotics to the lab and because Blood did not testify that she received them directly from officer Myles but from a lab technician, this "gap," combined with the discrepancy in the narcotics' weight, created a breakdown in the evidence against him.

¶ 23 Yet, again, the burden is on defendant at this point. And, again, he fails to show any actual tampering or substitution. While we cannot say, as defendant would have us, that it was somehow officer Myles' responsibility to hand-deliver the narcotics to Blood or that it was Blood's responsibility to test items only received from an inventorying officer, we can say, as our supreme court has, that the State is not required to show every link in the chain of custody. See

Alsup, 241 Ill. 2d at 274. Suffice to say, based on the record, officer Myles deposited the narcotics (after inventorying them according to procedure) for delivery to the lab, and Blood tested them after receiving them from a technician in her lab with confirmation from both witnesses that the evidence bag was marked, the items logged, its number confirmed and its contents heat-sealed. Furthermore, any discrepancy in weight, which we find minimal here, was also explained. Officer Myles testified that he used a "regular little scale" when he initially weighed the three baggies to be inventoried; he described that it was one located and used by officers at the station, and that it was not tested on a regular basis and certainly not calibrated the day he used it. Blood, meanwhile, testified that when she weighed the powder at the lab, she obviously used a different scale and method the gross net weight analysis, wherein she uses a balance set to 0, removes the powder and replaces the packaging to record the gross weight, then subtracts the weight of the packaging. Blood confirmed that the balance she used on the day she tested the narcotics was working properly, describing that she performs a function test on it every week.

¶ 24 Accordingly, our review of the record does not show inconsistency in the description of the narcotics at issue, and any alleged discrepancy argued by defendant here does not amount to a "complete breakdown" in the chain of custody. Once the State establishes the probability that the evidence was not compromised, and the defendant fails to show actual evidence of tampering or substitution, deficiencies in the chain of custody go to the weight, not the admissibility, of the evidence. See *Alsup*, 241 Ill. 2d at 275. We find no abuse of discretion in the trial court's determination to allow the narcotics evidence at trial here. There was no plain error and,

ultimately, defendant failed to carry his burden to show actual evidence of anything he alleges.

¶ 25 Next, defendant contends that the evidence was insufficient to sustain his convictions where the State did not establish that he possessed the necessary weight of more than 1 but less than 15 grams of heroin. He asserts that Blood's method of weighing the narcotics, combined with her failure to testify that she tested each of the three samples separately, "would have likely resulted in the drug samples becoming comingled [*sic*]." He insists that either his convictions should be reversed outright or, alternatively, that the classifications of his convictions should be reduced. We disagree.

¶ 26 We have already touched upon the appropriate standard of review when a defendant challenges the sufficiency of the evidence against him. As we described, we will not retry the defendant. See *People v. Evans*, 209 Ill. 2d 194, 209 (2004). Rather, we must draw all reasonable inferences from the record in favor of the State. See *Davison*, 233 Ill. 2d at 43. This standard gives full play to the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. See *People v. Howery*, 178 Ill. 2d 1, 38 (1997). Accordingly, we, as a reviewing court, will not substitute our judgment for that of the trier of fact on issues involving the weight of the evidence or the credibility of the witnesses. See *People v. Cooper*, 194 Ill. 2d 419, 430-31 (2000). A criminal conviction will not be set aside unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. See *People v. Collins*, 106 Ill. 2d 237, 261 (1985).

¶ 27 Defendant here is correct that, when someone is charged with delivery of a certain

amount of a controlled substance, the weight of that substance becomes an essential element of the crime and one which the State must prove beyond a reasonable doubt. See *People v. Jones*, 174 Ill. 2d 427, 428-29 (1996). He goes on to insist that Blood's gross weight method of weighing the narcotics was problematic because, in weighing the empty packaging, she "would necessarily have" placed the narcotics somewhere else, a fact from which it could be "deduce[d] *** that the drugs were com[m]ingled to some extent and that each sample was not separately tested." However, defendant's argument is belied by the record.

¶ 28 Blood, a forensic scientist with over 20 years of professional experience in testing over 37,000 narcotics samples, testified explicitly for the court the method she used to weigh and test the evidence she received in the heat-sealed inventoried evidence bag in this cause. First, she used the gross net weight analysis method to weigh the powder in the three purple plastic baggies. She described that she set her calibrated balance to 0, placed the baggies with the powder on the balance, removed the powder from each baggie one by one and replaced the empty packaging onto the balance; she recorded the gross weight minus the weight of the packaging to arrive at the resulting net weight of the powder. Next, she testified that she tested "each of the three items" to confirm their chemical composition. She described that she performed a Marquis color test on each of the three samples of powder to preliminarily detect the presence of opiates, and the test yielded positive results on all three samples. She also conducted a gas chromatography-mass spectrometry test on each of the three samples of powder to confirm the presence of heroin, and this test also yielded positive results on all three samples. Blood concluded her testimony by stating that, upon weighing the three samples together, and testing

each of the samples individually, each one of the three samples contained heroin and their net weight was 1.6 grams.

¶ 29 In viewing this testimony as a whole, and considering it along with the other evidence presented at trial, we fail to see how defendant's argument is anything more than mere conjecture. He never points to any solid evidence that the narcotics were commingled by Blood during the time she either weighed the samples or tested them, or that she somehow used an improper method to do so. There is simply nothing even remotely indicative that this occurred. To the contrary, Blood, testifying as an expert at trial, specifically stated that the procedures she used here are "commonly accepted in the scientific community in the area of forensic drug chemistry." She tested all the samples presented to her individually and weighed them collectively. Indeed, defendant himself admits that he is only speculating, but that from his argument one may potentially "deduce" that commingling occurred. Yet, this is not the standard required for the reversal of his convictions nor reduction in classification he seeks. Again, we are to view the evidence in the light most favorable to the State to determine whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, which requires us to draw all reasonable inferences from the record in favor of the State. See *Davison*, 233 Ill. 2d at 43. Without any testimony or evidence that Blood commingled the narcotics evidence here, we will not reverse defendant's convictions, nor will we reduce their classifications.

¶ 30 However, defendant makes one last argument on appeal with which we do agree. He contends that his conviction for delivery of a controlled substance (count III) should be vacated under the one-act, one-crime doctrine where it is a lesser included offense of delivery of a

controlled substance within 1,000 of a church (count II). Whether a conviction should be vacated under the one-act, one-crime doctrine is a question of law which we review *de novo*. See *People v. Coats*, 2018 IL 121926, ¶ 12. Under this rule, a defendant cannot be convicted of multiple offenses that are based on precisely the same single physical act. See *Coats*, 2018 IL 121926, ¶ 11 (citing *People v. King*, 66 Ill. 2d 551, 566 (1977)). Where a defendant is convicted of two such offenses, the conviction for the less serious offense must be vacated. See *People v. Johnson*, 237 Ill. 2d 81, 97 (2010).

¶ 31 In the instant cause, the parties agree, and we concur, that the record shows that defendant was charged with two counts[1] of delivery of a controlled substance, specifically, 1 to 15 grams of heroin. One count charged him with simple delivery, and the other count charged him with committing this same offense within 1,000 feet of a church. Following trial, and his guilty verdicts, defendant's mittimus shows two convictions and two sentences. Yet, it is clear, and the State concedes, that the separate counts, and thus, the resulting convictions, were not based on separate acts of delivery. Indeed, the State points in its brief on appeal to a colloquy with the trial court during defendant's sentencing hearing, during which the court clarified, and the parties agreed, that the lesser count III was to "merge[]" into the greater count II under the one-act, one-crime doctrine, since there had been only "one delivery." Accordingly, we correct defendant's mittimus to vacate his conviction for delivery of a controlled substance under count III and its accompanying sentence. See *People v. Rush*, 2014 IL App (1st) 123462, ¶ 36 (pursuant to Illinois Supreme Court Rule 615(b)(1) (Ill. S. Ct. R. 615) (eff. Jan. 1, 1967), a reviewing court on

[1]We again note that a third count of delivery was *nolle prossed* before trial.

appeal may correct the mittimus at any time, without remanding the cause to the trial court).

¶ 32 CONCLUSION

¶ 33 For all the foregoing reasons, we affirm defendant's conviction and sentence for delivery of more than 1 but less than 15 grams of a controlled substance within 1,000 feet of a church, and we vacate his conviction and sentence for delivery of a controlled substance pursuant to the one-act, one crime doctrine.

¶ 34 Affirmed in part, vacated in part.