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ARKANSAS COURT OF APPEALS

DIVISION II
No. CR-18-248

KYLE LEE HUNTER CHRISTIAN APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** December 5, 2018 APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, FIFTH DIVISION [NO. 60CV-17-1083] HONORABLE WENDELL GRIFFEN, JUDGE AFFIRMED

LARRY D. VAUGHT, Judge

Kyle Lee Hunter Christian appeals his conviction by the Pulaski County Circuit Court[1] of the Class D felony of possession of less than two grams of cocaine, a Schedule I controlled substance, pursuant to Arkansas Code Annotated section 5-64-419(b)(1(A) (Repl. 2016).[2] His only argument on appeal is that the State failed to prove that he possessed a usable amount of cocaine. We affirm.

Christian stood trial on November 9, 2017, and he concedes on appeal that the State proved beyond a reasonable doubt that he possessed four milligrams of cocaine powder. At

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[1]Christian waived his right to a trial by jury.

[2]Christian was also convicted of one count of possession of less than four ounces of marijuana, a Class A misdemeanor, pursuant to Arkansas Code Annotated section 5-64-419(b)(5)(A) (Repl. 2016). He has not appealed that conviction.

trial, the court heard testimony that Christian was stopped by the police on February 6, 2017, and was subsequently searched. During the search of his person, one of the officers observed Christian drop two plastic baggies from his hand. Brandon Davis, a chemist employed by the Arkansas State Crime Laboratory, testified that he tested the contents of the baggies and determined that the baggies contained four milligrams of cocaine. Davis further testified that the cocaine powder was "measurable" and that he "could weigh [it]." On cross-examination, Davis testified that the small amount of cocaine at issue in this case was "outside the recommended usage range of the scale" he used to weigh it but reiterated that even such a small amount of cocaine could be weighed. Christian's attorney moved for dismissal at the close of the State's case and again at the close of all the evidence, arguing that the State failed to prove that Christian possessed a usable amount of cocaine. The court denied both motions and ultimately convicted Christian of possession of less than two grams of cocaine. This timely appeal follows.

On appeal, Christian challenges the sufficiency of the evidence supporting his conviction for cocaine possession. *See Walker v. State*, 77 Ark. App. 122, 124, 72 S.W.3d 517, 519 (2002) (a motion to dismiss for lack of evidence in a bench trial is a challenge to the sufficiency of the State's proof). Our test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Jones v. State*, 357 Ark. 545, 182 S.W.3d 485 (2004). Evidence is substantial if it is of sufficient force and character to compel reasonable minds to reach a conclusion and pass beyond suspicion and conjecture. *Wells v. State*, 2017 Ark. App. 174, at 2, 518 S.W.3d 106, 108–09 (citing *Haynes v. State*, 346 Ark. 388, 58 S.W.3d 336 (2001)). On appeal, we view the evidence in the light most

favorable to the State, considering only that evidence that supports the verdict. *Id.* at 2, 518 S.W.3d at 108–09 (citing *Williams v. State*, 346 Ark. 304, 57 S.W.3d 706 (2001)).

Christian relies heavily on the Arkansas Supreme Court's decision in *Harbison v. State*, 302 Ark. 315, 790 S.W.2d 146 (1990), for the proposition that in order to prove that a person illegally possessed a controlled substance, the State must prove that the person possessed a "usable amount" of the controlled substance. Christian argues that the State failed to produce evidence establishing that the four milligrams of cocaine that he possessed was a usable amount pursuant to *Harbison*. He notes that no witness testified that the amount was a "usable amount" or that cocaine powder is commonly bought, sold, or ingested in four-milligram doses.

In *Harbison*, the appellant possessed a glass bottle that contained the residue of a controlled substance. The chemist who testified at Harbison's trial described the residue as a "trace amount" that could not be separated from its container and independently measured. The key language in *Harbison* is that the amount of the controlled substance must be "either (1) sufficient to permit knowledge of its presence without the need for scientific identification or (2) sufficient to be useable in the manner in which such a substance is ordinarily used." *Harbison*, 302 Ark. at 322, 790 S.W.2d at 150–51. In *Sinks v. State*, 44 Ark. App. 1, 864 S.W.2d 879 (1993), we explained that the *Harbison* holding requires proof that the controlled substance "must be of measurable or usable amount to constitute a violation." 44 Ark. App. at 4, 864 S.W.2d at 881. We affirmed the appellant's conviction because, unlike in *Harbison*, "there was clearly a measurable amount of cocaine present." *Id.* The testimony in *Sinks* demonstrated that the amount of cocaine possessed by the defendant was "capable of quantitative analysis, could

be seen with the naked eye, was tangible, and could be picked up." *Id.* We held that "this evidence [was] sufficient for the fact finder to determine that the substance was of a measurable amount." *Id.*

In *Jones v. State*, 357 Ark. 545, 182 S.W.3d 485 (2004), the Arkansas Supreme Court held that 883.9 milligrams of methamphetamine compound possessed by the appellant was a usable amount. In *Jones*, the supreme court explained that "[u]nlike the circumstances in *Harbison*, *supra*, there was enough substance in the plastic bags to weigh and to test." The supreme court further explained in a footnote that,

> We note that the usable-amount term, as promulgated by *Harbison*, *supra*, does not stand for the proposition that there must be a usable amount sufficient to produce a chemically-induced behavioral, hallucinogenic, or otherwise altered state. Additionally, other jurisdictions, as well as the Arkansas Court of Appeals, have interpreted the usable-amount standard to include weight-based standards. *See Sinks v. State*, 44 Ark. App. 1, 864 S.W.2d 879 (1993) (holding that 0.024 grams of cocaine was usable because the cocaine was capable of quantitative analysis, could be seen with a naked eye, was tangible and could be picked up, and was a clearly measurable amount that satisfied the requirements of *Harbison*); *Kent v. State*, 562 S.W.2d 855 (Tex. Ct. App. 1978) (citing *Tomlin v. State*, 170 Tex. Crim. 108, 338 S.W.2d 735 (1960), which overruled the determination of insufficiency in two cases cited in *Harbison*, *supra*, and holding that the drug was quantitatively measurable).

Jones, 357 Ark. at 554 n.2, 182 S.W.3d at 490 n.2.

Christian argues in his reply brief that *Sinks* was wrongly decided and should be overturned. We decline to do so for two reasons. First, we will not consider arguments raised for the first time in appellant's reply brief because the appellee is not given a chance to rebut the argument. *Lenard v. State*, 2014 Ark. 478, at 7, 522 S.W.3d 118, 123. Second, because the Arkansas Supreme Court adopted the "usable or measurable amount" standard articulated in *Sinks*, as evidenced by its footnote in *Jones*, we have no authority as an intermediate appellate court to overrule that standard. "[I]t is well established that this court is without authority to

overrule a decision of the supreme court." *Brown v. State*, 63 Ark. App. 38, 44, 972 S.W.2d 956, 959 (1998).

Christian also argues that the State failed to present sufficient evidence that he possessed a measurable amount of cocaine pursuant to *Sinks* because Brandon Davis testified that four milligrams is below the recommended usage range for the scale used to measure the cocaine.[3] We disagree. Davis, the forensic chemist who testified for the State, described the substance as "white powder," meaning that it was visible to the naked eye pursuant to *Sinks*. He testified that he "put that amount in a weigh boat and weighed it," indicating that the cocaine was tangible and could be picked up or separated from its container, which is another factor we articulated in *Sinks*. Davis was able to clearly identify the substance as cocaine, and finally, Davis testified that "it was measurable. I could weigh it." Davis distinguished the amount of cocaine at issue in the case at bar with smaller amounts, incapable of measurement, which he stated would be classified as "residue."

Here, the State's expert witness testified that Christian possessed four milligrams of cocaine powder and testified as to the specific process used to measure the cocaine. Davis's description of his process revealed that the cocaine was "capable of quantitative analysis, could be seen with a naked eye, was tangible and could be picked up, and was a clearly measurable amount," which is the standard we outlined in *Sinks* and that the supreme court adopted in *Jones*. We therefore see no error in the circuit court's denial of Christian's motion to dismiss, and we affirm his conviction.

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[3]We also note that Christian has, at least arguably, conceded this point by stating in his opening brief that "[a]ppellant Christian concedes that at trial the State proved that he possessed four milligrams of cocaine powder."

Affirmed.

WHITEAKER and MURPHY, JJ., agree.

William R. Simpson, Jr., Public Defender, by: *Clint Miller*, Deputy Public Defender, for appellant.

Leslie Rutledge, Att'y Gen., by: *Brad Newman*, Ass't Att'y Gen., for appellee.