2016 IL App (3d) 140790-U

Order filed November 29, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2016

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 21st Judicial Circuit,
	)	Iroquois County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-14-0790
v.	)	Circuit No. 12-CF-158
	)	
JUAN ARIAN ALDANA,	)	Honorable
	)	Gordon L. Lustfeldt,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Justice Wright concurred in the judgment.
Presiding Justice O'Brien concurred in part and dissented in part.

ORDER

¶ 1 *Held*: The State presented sufficient evidence to prove defendant's guilt beyond a reasonable doubt. However, the trial court erred in allowing the State to amend the indictment.

¶ 2 Defendant, Juan Arian Aldana, appeals his conviction arguing: (1) the State failed to present sufficient evidence to prove him guilty beyond a reasonable doubt; and (2) the trial court erred in allowing the State to amend the indictment. We affirm in part, vacate in part, and remand with directions.

¶ 3 FACTS

¶ 4 A grand jury returned an indictment charging defendant with unlawful delivery of a controlled substance, less than one gram of cocaine, within 1000 feet of a church, a Class 2 felony (720 ILCS 570/401(e), 407(b)(3) (West 2012)). The charge was based on the allegation that defendant sold cocaine to a confidential informant.

¶ 5 At a scheduled pretrial hearing, the State sought to amend the indictment to increase the quantity of controlled substance defendant was alleged to have delivered from less than 1 gram of a controlled substance to 1 gram but less than 15 grams within 1000 feet of a church, a Class X felony (720 ILCS 570/401(c)(2), 407(b)(1) (West 2012)). The State acknowledged that it had told the grand jury that the amount recovered was less than 1 gram, however, the State noted that the laboratory report showed that the substance in question weighed 1.07 grams. Defendant objected, arguing that the indictment could only be amended by the grand jury. The State responded that it could amend the charge any time.

¶ 6 On the day of defendant's bench trial, the court allowed the amendment of the indictment by interlineation to charge the greater offense of delivery of between 1 and 15 grams of a substance containing cocaine within 1000 feet of a church. Defendant objected again. The court denied defendant's objection and stated that the grand jury would have indicted defendant on the greater amount. The cause proceeded to a bench trial.

¶ 7 Officer Clint Perzee, an investigator with the Iroquois County sheriff's office, testified for the State. Perzee had been an investigator for Iroquois County since 2005. Perzee had participated in approximately 80 controlled drug transactions. According to Perzee, he had been contacted by a confidential informant, Terry Koschnick, who indicated that he could purchase cocaine from defendant.

¶ 8 Perzee testified that on August 31, 2012, Koschnick called defendant to purchase cocaine. Perzee gave Koschnick $50, fitted Koschnick with a video camera, and drove Koschnick to 250 South Hickory in Onarga to purchase cocaine from defendant. When asked if the location of the transaction had any notable landmarks nearby, Perzee responded "There's a church directly west of the property located at 250 South Hickory. The United Christian church, I believe." Perzee stated the church adjoined the property where the drug transaction occurred. When asked if the properties were "definitely within a thousand feet," Perzee answered in the affirmative.

¶ 9 The video recording by the camera worn by Koschnick during the transaction was presented during Perzee's testimony. Perzee identified a building seen in the background of the video as the "Onarga Christian Church." Only the side of the building can be seen and the building does not have any signs identifying it as a church.

¶ 10 Deborah Maglan, a forensic scientist with the Illinois State Police, testified that the substance Koschnick purchased from defendant contained cocaine and weighed 1.07 grams.

¶ 11 Ultimately, the trial court found defendant guilty. In coming to its conclusion, the trial court stated that the transaction occurred within 1000 feet of a church, the church could be seen in the video recording, and the evidence was not disputed on this point.

¶ 12 Prior to sentencing, defendant filed two *pro se* motions for a new trial. The motions raised several issues including claims of ineffective assistance of counsel. The *pro se* motions did not contain any allegation that the trial court erred in allowing the State to amend the indictment to increase the amount of the substance defendant was alleged to have delivered. The trial court conducted a hearing to consider defendant's claims of ineffective assistance of counsel. Following the hearing, the trial court denied the claims of ineffective assistance and

rejected the remaining issues raised in defendant's *pro se* motions. Defense counsel did not file any posttrial motions.

¶ 13 Ultimately, the trial court sentenced defendant to six years' imprisonment for the Class X offense of unlawful delivery of 1 to 15 grams of a substance containing cocaine within 1000 feet of a church (720 ILCS 570/401(c)(2), 407(b)(1) (West 2012)).

¶ 14 ANALYSIS

¶ 15 I. Sufficiency of the Evidence

¶ 16 Section 401(c)(2) of the Illinois Controlled Substances Act (Act) (720 ILCS 570/401(c)(2) (West 2012)) provides that any person who knowingly delivers or possesses with intent to deliver "1 gram or more but less than 15 grams of any substance containing cocaine" is guilty of a Class 1 felony. Section 407(b)(1) of the Act enhances the classification of a section 401(c) offense to a Class X felony if the violation occurs "within 1,000 feet of *** the real property comprising any church, synagogue, or other building, structure, or place used primarily for religious worship." 720 ILCS 570/407(b)(1) (West 2012).

¶ 17 Initially, we note that defendant does not contend that the State presented insufficient evidence to prove him guilty of delivering a controlled substance. Rather, defendant challenges the sufficiency of the evidence that he committed the offense within 1000 feet of a church. Viewing the evidence in the light most favorable to the State, we find that a rational trier of fact could have found the trial evidence established that defendant delivered the cocaine within 1000 feet of a church.

¶ 18 The question before us is whether the record contains evidence that could allow a rational trier of fact to conclude, beyond a reasonable doubt, that on August 31, 2012, the building adjacent to the location of the offense was a church on the day of the offense. See *People v. Sims*,

2014 IL App (4th) 130568, ¶ 137 (noting that the lack of a foundational objection results in the testimony becoming part of the evidence and is to be given its natural probative effect). We allow all reasonable inferences from the record in favor of the prosecution if "it would be reasonably defensible to draw that inference from the evidence presented in the trial." *Id.* We will not overturn a conviction unless the evidence is so unreasonable, improbable, or unsatisfactory that it creates a reasonable doubt of defendant's guilt. *People v. Wheeler,* 226 Ill. 2d 92, 115 (2007).

¶ 19 Defendant argues that the State did not present sufficient evidence to allow the trier of fact to conclude that the building Perzee identified in his testimony as the "Onarga Christian Church" and "United Christian Church" was actually an active church on the date of the offense. Put another way, defendant contends that the State failed to prove beyond a reasonable doubt that the building Perzee referred to was a "church *** or other building *** used primarily for religious worship" *on the date of the offense*. 720 ILCS 570/407(b)(1) (West 2012).

¶ 20 In considering defendant's contention, we find *Sims*, 2014 IL App (4th) 130568, instructive. In *Sims*, the appellate court upheld the defendant's conviction on two counts of unlawful delivery of a controlled substance within 1000 feet of a church. At trial, a police officer with 10 years of experience in Bloomington, more than half of which was spent in the narcotics unit, testified that defendant committed the drug offense near a location called "Joyful Gospel Church," and that the location had been a church for as long as he could remember. *Id.* ¶ 134. The court found that a rational trier of fact could have inferred that the location " 'was a church used primarily for religious worship based on its name,' " and further, that given the officer's experience, a rational trier of fact could have believed that he was familiar with the

neighborhood and accepted his testimony that the building in question was a church on the date of the offenses. *Id*. ¶¶ 133-38 (quoting *People v. Foster*, 354 Ill. App. 3d 564, 568 (2004)).

¶ 21 Likewise, in this case, when Perzee described the August 31, 2012, controlled drug purchase, he explained that he drove the confidential informant to the location of the drug transaction and a church was adjacent to the property. Perzee answered in the affirmative that the church was within 1000 feet of the drug purchase. Further, when the video recording of the drug transaction was presented during Perzee's testimony, he identified a building seen in the background of the video as a church. While Perzee was never asked to explain how he knew the building was a church, we note that Perzee testified that he had been doing investigations and controlled drug purchases in Iroquois County since 2005. In addition, Perzee testified that he had participated in 80 controlled drug buys. Thus, given Perzee's experience in the community, one can reasonably infer that he was familiar with the area and had knowledge of whether the building was in fact operating as a church on the day of the offense. See *Sims*, 2014 IL App (4th) 130568, ¶ 138. While we acknowledge that Perzee referred to the building by two different names ("Onarga Christian Church" and "United Christian Church"), we note that he identified the building as a Christian church in both instances. See *Foster*, 354 Ill. App. 3d at 567 (nomenclature alone is enough to prove, beyond a reasonable doubt, that a building is a " 'place used primarily for religious worship.' " (quoting 720 ILCS 570/407(b)(2) (West 2002)).

¶ 22 Viewing the above evidence and the reasonable inferences drawn from it in the light most favorable to the State, we find that a rational tier of fact could infer that the drug transaction occurred within 1000 of an active church on the day of the offense.

¶ 23 In coming to this conclusion, we reject defendant's contention that *Sims* should not be followed because it improperly relied on *Foster*, for the proposition that "all a police officer has

to do is refer to the building by a proper name with the term 'church' in it—'New Hope Church,' for example—and that proves, beyond a reasonable doubt, that the building was used primarily for religious worship on the date of the offense." *Sims*, 2014 IL App (4th) 130568, ¶ 107 (citing *Foster*, 354 Ill. App. 3d at 568). Defendant contends that the question in *Foster* was whether the State failed to show New Hope Church was a place used primarily for religious worship. Defendant notes, by contrast, that the issue in *Sims* (and in this case) was whether the building in question was used primarily for religious worship *on the date of the offense.* Thus, defendant argues that *Foster* is inapposite, and *Sims* incorrectly relied on *Foster* for the proposition that the title of a building is sufficient to establish that it was functioning as a church on the date of the offense. Defendant's interpretation is misguided.

¶ 24 The *Sims* court did not rely solely upon the holding in *Foster*. Rather, *Sims* relied on *Foster* for the proposition that the nomenclature "church" established the building was operating primarily as a place of worship. However, *Sims* did not end there. It went further and held that the nomenclature, in addition to the officer's experience with the surrounding area, was sufficient to support an inference that the church identified by the officer actually functioned as a church on the date of the offense. In short, the holding in *Sims* is not as narrow as defendant suggests.

¶ 25 Defendant contends, nonetheless, that *Sims* can be distinguished on the facts because the officer there specifically stated that the church was active on the date of the offense whereas the officer in this case failed to do so. However, *Sims* did not turn on the officer's affirmative response to the prosecutor's question of whether the church was active on the date in question. Instead, as we noted above, *Sims* relied on the officer's testimony that the church existed on the

date in question, and that he was familiar with the area. Perzee's testimony in this case is no different.

¶ 26 We also reject defendant's reliance on the decisions in *People v. Ortiz*, 2012 IL App (2d) 101261 and *People v. Cadena*, 2013 IL App (2d) 120285, where the appellate court found that the State failed to prove that the offense occurred within 1000 feet of a church that was active on the day of the offense. We find *Ortiz* and *Cadena* factually distinguishable because there was no evidence presented in those cases that the churches existed on the date of the offense, and this lack of temporal evidence was a determinative factor in both cases. See *Ortiz*, 2012 IL App (2d) 101261, ¶¶ 5, 11-13 (holding that the State presented insufficient evidence to prove that the "Emmanuel Baptist Church" existed on the date of the offense); *Cadena*, 2013 IL App (2d) 120285, ¶ 16 (holding that testimony presented without temporal context was insufficient to prove that the "Evangelical Covenant Church" was active on the dates of the offenses). By contrast, in this case Perzee's testimony, considered with the video recording of the transaction, established the existence of a church on the date of the offense.

¶ 27 II. Amending the Indictment

¶ 28 Next, defendant argues that the trial court erred in allowing the State to amend the indictment prior to trial to increase the quantity of controlled substance charged. Specifically, defendant asserts the State should not have been allowed to amend the indictment to increase the original charge of delivery of less than 1 gram of a controlled substance to the greater charge of between 1 and 15 grams without first formally presenting the amendment to the grand jury.

¶ 29 At the outset, we must first address the State's argument that defendant forfeited this issue because he failed to raise the issue again in a posttrial motion. The State notes that while defendant objected to the State's request to amend the indictment, he failed to raise the issue

again in a posttrial motion. We agree with the State. See *People v. Woods*, 214 Ill. 2d 455, 470 (2005) (to preserve a claim of error for review a defendant must both object at trial and raise the issue again in a posttrial motion).

¶ 30 Nevertheless, defendant alternatively argues that trial counsel provided ineffective assistance of counsel for failing to preserve the issue. To succeed on a claim of ineffective assistance of counsel, a defendant must show that: (1) counsel's performance was objectively unreasonable; and (2) the defendant suffered prejudice as a result. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¶ 31 Before examining the first prong of the *Strickland* standard (deficient performance), we must first discuss the substantive law concerning the State's request to amend the indictment. Any amendment to an indictment must originate with the grand jury unless such amendment corrects only a formal defect in the charge. 725 ILCS 5/111-5 (West 2012); *People v. Betts*, 78 Ill. App. 3d 200 (1979). A formal defect is one which does not alter the nature and elements of the offense charged. *People v. Shipp*, 2011 IL App (2d) 100197, ¶ 21.

¶ 32 In the instant context, we find *People v. Patterson*, 267 Ill. App. 3d 933 (1994), to be dispositive on the issue. In *Patterson*, a grand jury returned an indicted against defendant for possession with intent to deliver more than 15 grams but less than 100 grams of a controlled substance. The State was allowed to amend the indictment by interlineation to increase the amount of controlled substance charged to greater than 400 but less than 900 grams. *Id.* at 938. The evidence at trial established that defendant was arrested with 517 grams of cocaine. *Id.* Defendant was convicted and subsequently appealed, arguing that the trial court erred in allowing the State to amend the indictment to increase the amount of controlled substance charged.

¶ 33 On appeal, the *Patterson* court agreed with defendant. It noted that in drug cases, the quantity of controlled substance charged was an essential element because the amount of controlled substance possessed defines the crime and the punishment. *Id.* at 939. The court held that the trial court erred in allowing the State amend the charge by interlineation, because such an alteration was material. *Id.*

¶ 34 Here, trial counsel should have challenged the amendment because the State materially altered the indictment to increase the quantity of the controlled substance defendant was alleged to have delivered. The amendment changed an element of the offense (the quantity delivered) and increased the classification of the offense (Class 2 to Class X). Defendant therefore had a reasonable ground to challenge the amendment because the substantive change should not have been allowed without first being presented to the grand jury—regardless of the fact that the grand jury, if presented with the amended indictment, likely would have indicted defendant on the greater offense. Trial counsel's failure to renew his objection to the amendment in a posttrial motion was objectively unreasonable.

¶ 35 We now turn to the second prong of the *Strickland* standard (prejudice). To satisfy this prong, a defendant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *People v. Evans*, 186 Ill. 2d 83, 93 (1999). As noted above, the *Patterson* decision makes clear that the trial court erroneously allowed the State to amend the indictment. Had counsel included the error in a posttrial motion, the trial court would have been required by *Patterson* to grant the motion and enter a conviction on the Class 2 felony originally charged, rather than the Class X felony. *Patterson*, 267 Ill. App. 3d at 939.

¶ 36 Accordingly, we find there is a reasonable probability that the result of the proceeding would have been different had defense counsel renewed an objection to the trial court's decision to allow the State to amend the indictment in a posttrial motion. We note that the proper remedy under *Patterson* is to vacate defendant's conviction and sentence for the Class X offense of delivery of more than 1 but less than 15 grams of a controlled substance within 1000 feet of a church. See *id*. We therefore remand the cause to the trial court with directions to enter judgment on the lesser Class 2 offense originally charged (delivery of less than 1 gram of a substance containing cocaine within 1000 feet of a church (720 ILCS 570/401(e), 407(b)(3) (West 2012))) and hold a sentencing hearing on that charge. See *id*.[1]

¶ 37 CONCLUSION

¶ 38 The judgment of the circuit court of Iroquois County is affirmed in part, vacated in part, and remanded for resentencing.

¶ 39 Affirmed in part, vacated in part, and remanded with directions.

¶ 40 PRESIDING JUSTICE O'BRIEN, concurring in part and dissenting in part.

¶ 41 On the basis that defense counsel provided ineffective assistance, the majority vacates defendant's conviction and sentence for the Class X offense of delivery of more than 1 but less than 15 grams of a controlled substance within 1000 feet of a church. The majority remands the cause to the trial court with directions to enter judgment on the lesser Class 2 offense originally charged (delivery of less than one gram of a substance containing cocaine within 1000 feet of a church (720 ILCS 570/401(e), 407(b)(3) (West 2012))). *Supra* ¶ 36. In doing so, the majority finds that the evidence is sufficient to prove defendant committed the offense within 1000 feet of a church. *Supra* ¶ 22. Although I concur with the majority's finding that defense counsel

[1]We note that defendant refers to this conviction as a Class 1 felony offense in his brief. However, the indictment and the statute both define the offense as a Class 2 felony.

provided ineffective assistance, I dissent from the majority's holding that the State proved the enhancing element (the offense occurred within 1000 feet of a church) beyond a reasonable doubt.

¶ 42 In this case, the State failed to offer any evidence that related to the existence or use of the building claimed to be a church on the date of the offense. The only evidence presented on this issue was the testimony of Officer Perzee and the video recording of the transaction. Relying on *Sims*, 2014 IL App (4th) 130568, the majority finds the record supports the inference that Perzee had sufficient knowledge to testify that the building was used as a church on the date of the offense. *Supra* ¶ 20-21. In reaching this conclusion, the majority rejects defendant's reliance on *Ortiz*, 2012 IL App (2d) 101261, and *Cadena*, 2013 IL App (2d) 120285. *Supra* ¶ 26. I disagree, because I find the instant case is factually aligned with *Ortiz* and *Cadena*—not *Sims*.

¶ 43 In *Sims*, an officer testified that he was familiar with the neighborhood where the drug transaction occurred. *Sims*, 2014 IL App (4th) 130568, ¶ 66. He testified that a church called Joyful Gospel Church had been in the neighborhood for as long as he could remember. *Id.* He further testified that he had been a police officer in the area for 10 years. *Id.* In addition, the officer testified that the building in question was a church on the date the offense occurred. *Id.* The State also offered into evidence a photograph of the church, and the officer testified that the photograph accurately represented the way the church appeared on the date of the offense. *Id.* ¶ 66-67.

¶ 44 Here, by contrast, Perzee's testimony did not contain the same detailed familiarity with the church's operation or the neighborhood where the drug transaction took place. Perzee inconsistently identified the church's denomination. Initially, Perzee testified that the location of the drug transaction was adjacent to "United Christian Church." *Supra* ¶ 8. However, Perzee

went on to identify the building seen in the video recording of the transaction as the "Onarga Christian Church." Further, there was nothing in Perzee's testimony to suggest that the building was operating as a church at the time of the offense. *Supra* ¶ 9. Moreover, the building identified by Perzee in the video lacks any identifying characteristics. Notably, the building does not show a sign identifying the building's name. In addition, the building lacks any physical characteristics that would support the inference that it was a church. There is nothing in the video evidence that suggests that the building was a church, or that it operated as such on the date of the offense. Thus, I find *Sims* factually distinct.

¶ 45 Unlike the majority, I find the above evidence is factually aligned *Ortiz*, 2012 IL App (2d) 101261, and *Cadena*, 2013 IL App (2d) 120285, two cases where the State failed to establish the enhancing locality. In *Ortiz*, the officer testified that the distance between a drug transaction and "Emmanuel Baptist Church" was less than 1000 feet, but failed to testify when he measured the distance. *Ortiz*, 2012 IL App (2d) 101261, ¶ 11. The State in *Ortiz* presented photographs of the church, but failed to present testimony as to when the photographs were taken. The *Ortiz* court found the evidence insufficient to establish the enhancing element reasoning that there was "no way of knowing whether the Emmanuel Baptist Church existed" on the date of the offense. *Id.*

¶ 46 Similarly, in *Cadena* the only evidence indicating that the "Evangelical Covenant Church" was being used as a church on the dates of the three undercover drug transactions was a police officer's "affirmative response to the leading question, '[I]s that a church that is an active church?' " *Cadena*, 2013 IL App (2d) 120285, ¶ 16. *Cadena* concluded that the question had no "temporal context" and could have referred to the time of trial, rather than to the dates of the offenses. *Id.*

¶ 47 The temporal context absent from *Ortiz* and *Cadena* is also absent in this case. As noted above, Perzee's testimony established that he was not familiar with the area. Further, Perzee failed to testify that the church was active on the day of the drug transaction. Thus, under *Ortiz* and *Cadena* I would find that the evidence is insufficient to establish that the offense occurred within 1000 feet of a church.

¶ 48 Because I would find that the State failed to prove the enhancing element beyond a reasonable doubt, I would vacate defendant's conviction and sentence and remand the matter to the trial court with directions to enter judgment on the lesser Class 3 offense of delivery of less than one gram of a substance containing cocaine (720 ILCS 570/401(e) (West 2012)).