2016 IL App (4th) 140700-U

NO. 4-14-0700

FILED
December 6, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
AARON EATON,	)	No. 13CF830
Defendant-Appellant.	)	
	)	Honorable
	)	Paul G. Lawrence,
	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Steigmann and Pope concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Where a police officer testified that a controlled drug purchase occurred within 1,000 feet of an "ongoing and open" church, the evidence was sufficient to sustain defendant's conviction of unlawful delivery of a controlled substance within 1,000 feet of a church.

(2) The $250 DNA fee is vacated.

¶ 2 Following a jury trial, defendant, Aaron Eaton, was convicted of possession with intent to deliver 1 to 15 grams of cocaine within 1,000 feet of a church (count II) (720 ILCS 570/407(b)(1) (West 2012)) and unlawful possession with intent to deliver 1 to 15 grams of cocaine (count III) (720 ILCS 570/401(c)(2) (West 2012)). He was sentenced to eight years in prison.

¶ 3 On appeal, defendant asserts (1) the State failed to prove an unlawful delivery of cocaine occurred within 1,000 feet of an active church, and (2) his duplicate $250

deoxyribonucleic acid (DNA) fee must be vacated. We affirm in part and vacate in part.

¶ 4 I. BACKGROUND

¶ 5 In June 2013, defendant was indicted for possession with intent to deliver between 1 and 15 grams of cocaine within 1,000 feet of a park (count I) (720 ILCS 570/407(b)(1) (West 2012)); possession with intent to deliver between 1 and 15 grams of cocaine within 1,000 feet of a church (count II) *Id.*; and unlawful possession with intent to deliver between 1 and 15 grams of cocaine (count III) (720 ILCS 570/401(c)(2) (West 2012)). The allegations related to a single police-controlled purchase of cocaine on June 25, 2013, in Bloomington, Illinois. The following testimony relevant to this appeal was presented at defendant's jury trial.

¶ 6 Luke Scaglione, a Bloomington police detective involved in the June 2013 controlled purchase, testified the transaction giving rise to the charges occurred inside defendant's residence, located at 1319 West Mulberry Street in Bloomington. In October 2013, Scaglione returned to the site of the transaction to measure the distance from defendant's residence to St. Patrick's Church, located at 1209 West Locust Street in Bloomington. Using a measuring wheel, Scaglione measured the distance between the residence and the church and found it to be 719 feet. In addition to testifying about the circumstances of the drug purchase and his measurements, Scaglione testified regarding his knowledge of the church as follows:

> "Q. Now, that church, has it been there a long time?
>
> A. Yes, it has.
>
> Q. In fact, it's ongoing and open and was in fact ongoing and open on June twenty-fifth, 2013?
>
> A. Yes."

¶ 7 The jury found defendant guilty of counts II and III. The trial court sentenced defendant to eight years in prison. The trial court also imposed fines and fees, including a $250 DNA lab analysis fee.

¶ 8 This appeal followed.

¶ 9 II. ANALYSIS

¶ 10 On appeal, defendant argues the State failed to prove him guilty beyond a reasonable doubt of count II, as it presented insufficient evidence that St. Patrick's Church was used primarily as a church on the date of the offense. Defendant also argues the $250 DNA analysis fee was imposed in error, as the record shows his DNA was already collected and analyzed in connection with a previous conviction.

¶ 11 A. Status of St. Patrick's on the Date of the Offense

¶ 12 Defendant argues that Scaglione's testimony was insufficient to convict him of count II because Scaglione did not testify how he knew St. Patrick's Church was an active church. We disagree that Scaglione's testimony was insufficient to prove defendant guilty of the offense in count II.

¶ 13 When reviewing the sufficiency of the evidence in a criminal case, the relevant inquiry is whether, when "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." *People v. Ward*, 215 Ill. 2d 317, 322, 830 N.E.2d 556, 559 (2005). The trier of fact has the responsibility to determine the credibility of witnesses and the weight given to their testimony, to resolve conflicts in the evidence, and to draw reasonable inferences from the evidence. *People v. Jackson*, 232 Ill. 2d 246, 281, 903 N.E.2d 388, 406 (2009). "[A] reviewing court will not reverse a criminal conviction unless the evidence is so unreasonable, improbable[,]

or unsatisfactory as to create a reasonable doubt of the defendant's guilt." *People v. Rowell*, 229 Ill. 2d 82, 98, 890 N.E.2d 487, 496-97 (2008).

¶ 14 To prove defendant guilty of unlawful delivery as alleged in count II, the State was required to prove he knowingly possessed between 1 and 15 grams of cocaine, he intended to deliver the cocaine, and he did so "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 570/401(c)(2), 407(b)(2) (West 2012).

¶ 15 In his brief, defendant argues "[t]his court should follow [*People v.*] *Cadena*, [2013 IL App (2d) 120285, ¶ 17, 994 N.E.2d 219,] in holding a police officer must testify as to *how* he or she knows a church was active on the date of the offense." Although defendant concedes the State proved St. Patrick's Church was a church, he argues Scaglione "never explained how he knew the church was active on the date of the offense."

¶ 16 In *Cadena*, the defendant acknowledged he unlawfully delivered a controlled substance but challenged the jury's finding that he committed the offense within 1,000 feet of a church. *Id.* ¶ 4. At trial, a police officer testified that the drug purchase took place near "the Evangelical Covenant Church" and the church was an "active church." *Id.* ¶ 6. On appeal, the defendant argued the State had failed to present sufficient evidence that the "Evangelical Covenant Church" was a "church" as set forth in 720 ILCS 570/407(b)(1) (West 2008). *Cadena*, 2013 IL App (2d) 120285, ¶ 9. The court in *Cadena* agreed, finding that simply having the word "church" in the name of the building did not establish the building was being operated as a church. *Id.* ¶ 13. The court further found the police officer's testimony was insufficient to establish the building was being used as a church on the dates of the offenses when he responded in the affirmative to the question, "[I]s that a church that is an active church?" *Id.* ¶ 16. The

court found that since the question was posed in the present tense and without temporal context, the police officer's response was insufficient to establish the church was active on the dates of the offenses. *Id.*

¶ 17 We find *Cadena* is distinguishable on these two points. Here, unlike in *Cadena*, defendant does not dispute that the building at issue was indeed a church. Further, the detective in the present case testified that the church was "ongoing and open" *on the date of the offense*, whereas the police officer's testimony in *Cadena* did not establish a similar temporal context. Thus, we are not faced with either of the two evidentiary deficiencies found by the court in *Cadena*.

¶ 18 However, the court in *Cadena* went on to find that even if the police officer's testimony could be interpreted to mean that the church was active on the dates of the offenses, "there was no evidence of *how* [the officer] knew this information." (Emphasis in original.) *Id.* ¶ 17. It determined the State was required to present evidence from someone "demonstrating personal knowledge" that the church was active on the dates in question. *Id.* ¶ 18.

¶ 19 This court had occasion to consider the *Cadena* decision in *People v. Sims*, 2014 IL App (4th) 130568, 9 N.E.3d 621. In *Sims*, the defendant was convicted of several drug-related offenses, including unlawful delivery within 1,000 feet of a church. *Id.* ¶ 1. The defendant in *Sims* argued, in part, that the State failed to prove that the building it claimed was a church was used primarily for religious purposes at the time of the drug sales. *Id.* ¶ 4. He asserted that, based on *Cadena*, simply because the word "church" appears in the name does not establish the building is being used as a church. *Id.* ¶ 132. This court rejected the defendant's argument and declined to follow *Cadena*, instead opting to follow the First District's decision in *People v. Foster*, 354 Ill. App. 3d 564, 568, 821 N.E.2d 733, 737 (2004), which held a rational

trier of fact could have inferred that the building at issue was a church for purposes of establishing an unlawful delivery of a controlled substance within 1,000 feet of a church based simply on the fact that the word "church" appeared in its name. *Sims*, 2014 IL App (4th) 130568, ¶ 133, 9 N.E.3d 621.

¶ 20 The *Sims* court went on to address the defendant's argument that the evidence was insufficient to convict him of the offense because the testifying officer did not disclose the basis for his assertion that the building in question was in use as a church on the dates of the drug offenses. *Id.* ¶ 136. It considered whether the police officer's testimony that the building had been a church as long as he could remember and that it was open on the date of the alleged offense "could persuade *any* rational trier of fact, beyond a reasonable doubt," that on the dates of the offenses, the building was used as a church. (Emphasis in original.) *Id.* ¶ 137. In finding the officer's testimony was sufficient, we found "it seems reasonable to infer that, in [the officer's] particular line of work, one would become familiar with Bloomington, such that one could say whether a given church was active. Bloomington is not so large that such knowledge would be unattainable or implausible." *Id.* ¶ 138. We concluded in *Sims* that a rational trier of fact could have found the officer was familiar with the neighborhood and therefore knew that the building was being used as a church on the dates of the offenses. *Id.*

¶ 21 Here, we find the police officer's testimony was sufficient to establish St. Patrick's Church was being used as a church on the date of the offense. Although the State did not present foundational evidence directly establishing *how* Scaglione knew it was being used as a church at the time, we think his work as a detective in Bloomington was sufficient evidence from which the jury could infer he was familiar with Bloomington and whether St. Patrick's Church was active on the date of the offense.

¶ 22 Further, we note that, as in *Sims*, no objection based on a lack of foundation was made at trial to the police officer's testimony. Any challenge to evidence premised on a lack of foundation is procedurally forfeited on appeal when defense counsel made no such objection at trial. *Id.* ¶ 136. We noted in *Sims* that in certain situations, the failure to object based on a lack of foundation may not result in procedural forfeiture when the testimony is so conclusory that no rational trier of fact would consider it to be proof beyond a reasonable doubt. *Id.* However, this is not one of those situations. Here, Scaglione testified St. Patrick's Church had been in existence for a "long time" and was "ongoing and open" on the date of the offense. This testimony by a local police detective was not so conclusory as to excuse defense counsel's failure to object based on a lack of foundation. Therefore, we find defendant has forfeited the issue.

¶ 23 In summary, we find the State presented sufficient evidence from which a rational trier of fact could have found St. Patrick's Church was an active church on the date of the offense. We also find that even if an insufficient foundation existed for Scaglione's testimony, defendant has forfeited the issue on appeal. Thus, the evidence was sufficient to convict defendant of count II.

¶ 24 B. DNA Lab Analysis Fee

¶ 25 Defendant also argues the trial court erred by assessing a $250 DNA lab analysis fee when he had previously been assessed a DNA lab analysis fee in an unrelated case in 2006. The State suggests the record is not sufficiently clear on the issue and asks that we remand to the trial court to determine whether a DNA lab analysis fee had, in fact, been previously assessed.

¶ 26 Section 5-4-3(a) of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-4-3(a) (West 2012)) requires any person convicted of a felony in Illinois to submit specimens of blood, saliva, or tissue to the Illinois State Police to be analyzed and catalogued in a database.

Under section 5-4-3(j) of the Unified Code (730 ILCS 5/5-4-3(j) (West 2012)), the person providing the specimen is required to pay an analysis fee of $250. Our supreme court has held the fee can be assessed only once against an individual and cannot be assessed against a defendant whose genetic specimen is already in the database as a result of a prior conviction. *People v. Marshall*, 242 Ill. 2d 285, 303, 950 N.E.2d 668, 679 (2011).

¶ 27 Here, we find the record does not sufficiently establish whether defendant's DNA was submitted, analyzed, and catalogued in the State's database prior to this case. While the presentence investigation report states "DNA was previously completed on September 26, 2006," the record includes a report of the DNA database search results, which show no DNA information for defendant. While defendant challenges the accuracy of the database search and has supplemented the record with a report from the Illinois State Police Division of Forensic Services reflecting he was in prison for a 2006 conviction and submitted to swab testing in July 2006, the supplement does not indicate whether the swab was taken for a DNA test.

¶ 28 Accordingly, based on our review, we find it is not sufficiently clear that defendant previously provided a DNA sample. Thus, we remand for the purpose of holding a hearing to determine whether defendant had done so.

¶ 29 III. CONCLUSION

¶ 30 Based on the foregoing, we vacate the portion of the trial court's order directing defendant to submit to DNA testing and pay the $250 DNA lab analysis fee and remand for further proceedings. We affirm defendant's conviction and sentence in all other respects. We award the State $50 in costs against defendant. 55 ILCS 5/4-2002 (West 2014).

¶ 31 Affirmed in part and vacated in part; cause remanded.