2017 IL App (3d) 150089-U

Order filed July 17, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 21st Judicial Circuit, Kankakee County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-15-0089
v.	)	Circuit No. 14-CF-119
	)	
TERRANCE T. BUSH,	)	Honorable Clark E. Erickson,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justice McDade concurred in the judgment.
Justice Schmidt dissented.

ORDER

¶ 1 *Held*: The State failed to present sufficient evidence to prove defendant delivered a controlled substance within 1000 feet of a church.

¶ 2 Defendant, Terrance T. Bush, appeals his conviction. Defendant contends that the State failed to prove his guilt beyond a reasonable doubt. Alternatively, defendant argues that the trial court improperly imposed a $250 DNA analysis fee. We reverse and remand for resentencing.

¶ 3 FACTS

¶ 4 The State charged defendant with unlawful delivery of a controlled substance (less than one gram of heroin) within 1000 feet of a church (720 ILCS 570/407(b)(2) (West 2014)). The cause proceeded to a jury trial.

¶ 5 At trial, Officer Joshua Schneider testified that on March 20, 2014, he and another officer set up an undercover buy transaction with a confidential informant to purchase heroin from defendant. Both officers waited in an undercover vehicle and observed the transaction. Schneider planned to make a video recording of the transaction, but could not because the view had been obstructed when defendant parked his vehicle next to the undercover vehicle.

¶ 6 After the purchase was complete, defendant was allowed to drive away. The following exchange occurred between the State and Schneider:

"Q. Now, after the transaction occurred, what happened next?

A. After the transaction occurred, uh, the, uh, the target of the investigation drove off.

Q. All right. And, uh, was there further work that you did in respect to this particular investigation?

A. Yes. I took a mea—a thousand foot measurement.

Q. Now, when you say you took a measurement what's the purpose of taking the measurement, sir?

A. Uh, to—To find out if—if, uh, the transaction took place within a thousand feet of a—a church, school, or park.

* * *

Q. Now, in this particular case, you took a measurement. Where did you take a measurement from to?

A. I took a measurement from the—the spot of the—where the transaction, the deal, took place—to the front of—uh, which was 1200 N. Kennedy Drive—to, uh, the church, Our Savior Lutheran Church, on W. Brookmont Boulevard. Uh, 975, I believe.

Q. And, uh, in this particular case, you mentioned, uh, Our Savior Church.

A. Yes.

Q. Uh, is this a, uh, item—Or is this a location that is, uh, recognizable as a church?

A. Yes, it is.

Q. And, uh, how is it recognizable as such?

A. It has a—Uh, it has a cross. It has, uh, a sign referrin' to the church and also, uh, information regarding.

Q. And from the, uh, location of the trans—Uh, you said it had information with what?

A. Like regarding services.

Q. And did it show that there were, uh, ongoing services?

A. Yes."

¶ 7 According to Schneider, the measured distance between the transaction and the front of the church was 968 feet. The State did not specifically ask Schneider when he took the measurement or if the church was operational on the date of the offense. The State also did not introduce any photographs of the church into evidence.

¶ 8 After the State finished with its case-in-chief, the defense moved for a directed verdict. The defense argued that the State failed to offer sufficient evidence to prove the offense occurred

within 1000 feet of a building that operated as a church on the day of the offense. The trial court denied the motion.

¶ 9 During the defense's case-in-chief, defendant acknowledged that he admitted to the offense in a recorded statement taken immediately after his arrest. However, defendant testified that his fiancée delivered the narcotics, and not him.

¶ 10 Ultimately, the jury found defendant guilty of unlawful delivery of a controlled substance within 1000 feet of a church (720 ILCS 570/407(b)(2) (West 2014)). The trial court sentenced defendant to 10 years' imprisonment. The court also imposed several fines and fees, including a $250 DNA analysis fee.

¶ 11 ANALYSIS

¶ 12 At the outset, we note that defendant does not contend that the State presented insufficient evidence to prove him guilty of delivering a controlled substance. Rather, defendant only challenges the sufficiency of the evidence that he committed the offense within 1000 feet of an "active" church.

¶ 13 Section 401(d)(i) of the Illinois Controlled Substances Act (Act) (720 ILCS 570/401(d)(i) (West 2014)) makes it a crime to deliver less than one gram of any substance containing heroin. A violation of this section is a Class 2 felony. *Id.* Section 407(b)(2) of the Act enhances a section 401(d) offense to a Class 1 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)(2) (West 2014). This requires the State to prove the church in question was "active" on the date of the offense. *People v. Ortiz*, 2012 IL App (2d) 101261, ¶ 11.

¶ 14 Upon review, we find the State failed to present sufficient evidence to establish that the transaction occurred within 1000 feet of an active church for two reasons. First, Schneider failed to specifically testify as to the date in which he measured the distance between the transaction and Our Savior Lutheran Church. Second, Schneider failed to testify that Our Savior Lutheran Church was active on the date of the offense. In other words, the State failed to establish the temporal context connecting the date of the measurement and the church's active status to the date of the offense.

¶ 15 As to the date of the measurement, we find *People v. Ortiz*, 2012 IL App (2d) 101261, dispositive. In *Ortiz*, an officer testified that the distance between the drug transaction and "Emmanuel Baptist Church" was less than 1000 feet. *Ortiz*, 2012 IL App (2d) 101261, ¶ 11. However, the officer failed to testify when he measured the distance. *Id.* Additionally, the State in *Ortiz* presented photographs of the church, but failed to present testimony as to when the photographs were taken or whether the photographs accurately depicted the building as it appeared on the date of the offense. *Id.* 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 because the State failed to present evidence as to when the officer took the measurement or when the photographs were taken. *Id.*

¶ 16 Like the officer in *Ortiz*, Schneider testified that he measured the distance between the transaction and Our Savior Lutheran Church. Critically, however, Schneider failed to testify as to the specific time he took the measurement (just as the officer in *Ortiz* failed to do). Although Schneider said that he measured the distance to the church in response to the State's inquiry if he performed any "further" investigation after the transaction, the question had no temporal context. In other words, Schneider failed to offer any testimony to explain when the measurement took

place. Thus, under *Ortiz*, the State failed to establish that a church existed within 1000 feet of the transaction on the date of the offense.

¶ 17 As to the issue of whether the church was active on the date of the offense, we find *People v. Cadena*, 2013 IL App (2d) 120285, instructive. 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. However, the officer failed to specify the dates in which the church was active. *Id.* *Cadena* concluded that the State's leading question had no "temporal context" and could have referred to the time of trial, rather than to the dates of the offenses. *Id.* Thus, the court in *Cadena* concluded that the State failed to establish that the church in question was active on the date of the offense.

¶ 18 Likewise, the temporal context absent from *Cadena* is absent in this case. When Schneider testified to his belief that the church was active, he failed to explain when the church was active. Schneider's response lacked a temporal context and could have referred to the time of trial, not the time of the offense. There is no evidence to establish that the church was active on the date of the offense. Thus, under *Cadena*, we find the evidence is insufficient to establish that the offense occurred within 1000 feet of an active church.

¶ 19 In reaching this conclusion, we reject the State's reliance on *People v. Toliver*, 2016 IL App (1st) 141064, to argue that the State was not required to prove that the church was operational or active on the date of the offense. Unlike the present case, defendant in *Toliver* was charged under the statutory subsection that enhances an offense if it occurs within 1000 feet of a school. Critically, the statutory subsection at issue in *Toliver* specifically stated: "for

violations committed in a school or on or within 1,000 feet of school property, the time of day, time of year and whether classes were currently in session at the time of the offense is *irrelevant*." *Id.* ¶ 18 (quoting 720 ILCS 570/407(c) (West 2014)). In other words, a violation of that subsection occurs so long as the school exists, but does not require the school to be in active session. By contrast, the statutory subsection here has no such savings clause for churches or houses of worship.

¶ 20 We also reject the State's reliance on *People v. Rodriguez*, 2014 IL App (2d) 130148. At the outset, we note that the issue in *Rodriguez* was whether the building in question was a school, not an active church. As discussed above, whether the school is "active" is not relevant. Stated another way, the question before us here on appeal is whether the church in question was active on the date of the offense, not whether the building simply existed on the date of the offense. As discussed above (*supra* ¶ 18), the State failed to present evidence to establish the dates the church in question was active. The State could have asked Schneider to specify the date he observed the church as being active, but did not. The State also could have easily called an additional witness to testify to the status of the building on the date of the offense, but the State did not. The State's contention that a jury could infer from the context of Schneider's testimony that he was referring to the date of the offense when he described the active status of the church is merely speculation, not evidence.

¶ 21 Because the State failed to prove the enhancing locality beyond a reasonable doubt, we reverse defendant's conviction and sentence for the offense of unlawful delivery of a controlled substance within 1000 feet of a church (720 ILCS 570/407(b)(2) (West 2014)). Therefore, we remand the matter to the trial court with directions to reduce defendant's conviction to the offense of unlawful delivery of a controlled substance (720 ILCS 570/401(d)(i) (West 2014)) and

resentence defendant. Because we remand for resentencing, we need not reach defendant's alternative argument regarding the imposition of the DNA analysis fee.

¶ 22 CONCLUSION

¶ 23 The judgment of the trial court of Kankakee County is reversed and remanded for resentencing.

¶ 24 Reversed and remanded with directions.

¶ 25 JUSTICE SCHMIDT, dissenting.

¶ 26 I would affirm the trial court and, therefore, respectfully dissent.

¶ 27 First of all, the majority fails to even discuss our standard of review.

¶ 28 Our task is to look at the evidence introduced at trial in the light most favorable to the State and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Collins*, 106 Ill. 2d 237 (1985). A defendant's conviction should not be disturbed unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to the defendant's guilt. *Id.* It is not the function of the reviewing court to retry a defendant when considering a challenge to the sufficiency of the evidence of his guilt, rather, determinations of the credibility of witnesses, the weight to be given to their testimony, and the reasonable inferences to be drawn from the evidence are responsibilities of the trier of fact. *Id.* at 261.

¶ 29 The relevant testimony is set forth above by the majority. *Supra* ¶ 6. It is reasonable for one to infer from the testimony that the officer took the measurement before charging the defendant with this crime.

¶ 30 The majority finds two reasons to reverse, one of which is never raised by the defendant, either below or on appeal. The majority argues that the officer did not testify as to when he took

the measurement and that alone is enough to reverse defendant's conviction. I suspect that defendant is well aware that the building did not move between the time of the crime and the time of the officer's measurement, no doubt explaining why he does not raise this argument.

¶ 31 It is also important that the prosecutor asked the question, "And did it show that there *were*, uh, ongoing services?" He did not ask whether there "are" ongoing services. It seems reasonable for a trier of fact to infer from this testimony that this testimony was regarding the time of the offense and not the time of trial.

¶ 32 It is also noteworthy that the majority hangs its hat on *Cadena*, 2013 IL App (2d) 120285. In *Cadena*, the State conceded that nomenclature alone was insufficient to prove that a building was used primarily as a place for religious worship. *Id.* ¶ 15. In the present case, there is no such concession.

¶ 33 Rather than repeat that which was well written before, I believe that the Fourth District's opinion in *People v. Sims*, 2014 IL App (4th) 130568, is the better reasoned view. *Sims* concludes, as did the appellate court in *People v. Foster*, 354 Ill. App. 3d 564 (2004), that referring to a building by its proper name with the term "church" in it proves beyond a reasonable doubt that the building was used primarily for religious worship on the date of the offense. The *Sims* court analyzed *Cadena* and pointed out, "Because the State 'concede[d]', however, in *Cadena*, that 'nomenclature alone [was] insufficient to prove that the 'enhancing locality,' *** a church, [was] being used as its name implie[d],' we do not consider *Cadena* to be reliable authority that nomenclature is insufficient. [Citation.] Consequently, we decline to follow the decision of the Second District in *Cadena*, and we likewise decline to follow the decision of the First District in *Boykin*, which relied on *Cadena*." *Sims*, 2014 IL App (4th) 130568, ¶ 133 (quoting *Foster*, 354 Ill. App. 3d at 568).

¶ 34 Here, we have not only nomenclature testimony that this was Our Savior Lutheran Church, but also testimony that there "were" ongoing services. A reasonable jury could infer from the testimony, taken as a whole, that Our Savior Lutheran Church was a building used primarily for religious worship at the time of the offense. Therefore, looking at the evidence in the light most favorable to the prosecution, as we must, the State sufficiently proved the enhancing factor.

¶ 35 Because I would affirm, I must address the DNA issue. The defendant agrees that the issue was forfeited by failing to raise it below. He argues that it is second prong plain error. I am at a loss to make any sense out of the State's response. Since this is a fee, I would remand with instructions for the circuit clerk of Kankakee County to amend the cost sheet consistent with this order.