2017 IL App (4th) 150002-U

NO. 4-15-0002

FILED
April 10, 2017
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
JESSE L. BURNETTE,	)	No. 13CF848
Defendant-Appellant.	)	
	)	Honorable
	)	Scott Daniel Drazewski,
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Holder White and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: The evidence presented was insufficient to prove defendant guilty beyond a reasonable doubt of delivery of a controlled substance within 1,000 feet of a school and possession of a controlled substance with intent to deliver within 1,000 feet of a school where no evidence was presented to show the school was in existence on the date of the offense.

¶ 2 Following a 2014 bench trial, defendant, Jesse L. Burnette, was convicted of (1) delivery of a controlled substance (count I), (2) delivery of a controlled substance within 1,000 feet of a school (count II), and (3) possession of a controlled substance with intent to deliver within 1,000 feet of a school (count IV) (720 ILCS 570/401(d)(i), 407(b)(1) (West 2012)). Thereafter, the trial court sentenced defendant to concurrent prison terms of 7 years (count I), 11 years (count II), and 11 years (count IV).

¶ 3 Defendant appeals, arguing the State failed to prove him guilty beyond a reasonable doubt of delivery and possession with intent to deliver a controlled substance within 1,000 feet of a school (counts II and IV) where it offered no evidence a school existed on the date of the offense. We affirm in part, reverse in part, and remand with directions.

¶ 4 I. BACKGROUND

¶ 5 On July 10, 2013, defendant was indicted on the following counts: (1) unlawful delivery of less than one gram of cocaine to a confidential source on April 10, 2013 (count 1) (720 ILCS 570/401(d)(i) (West 2012)); (2) unlawful delivery of more than 1 gram but less than 15 grams of cocaine within 1,000 feet of Chiddix Junior High School (Chiddix) to a confidential source on June 27, 2013 (count II) (720 ILCS 570/407(b)(1) (West 2012)); (3) unlawful delivery of more than 1 gram but less than 15 grams of cocaine to a confidential source on June 27, 2013 (count III) (720 ILCS 570/401(c)(2) (West 2012)); (4) unlawful possession with intent to deliver more than 1 gram but less than 15 grams of cocaine within 1,000 feet of Chiddix to a confidential source on June 27, 2013 (count IV) (720 ILCS 570/407(b)(1) (West 2012)); and (5) unlawful possession with intent to deliver more than 1 gram but less than 15 grams of cocaine (count V) (720 ILCS 570/401(c)(2) (West 2012)).

¶ 6 During defendant's 2014 bench trial, Lester Simmons, a confidential source for the Normal, Illinois, police department testified he met with police detective Evan Easter to carry out a controlled buy from defendant. Simmons contacted defendant, who recommended they meet at the Walmart on Market Street. Easter provided Simmons with $200 to conduct the controlled buy. Simmons then purchased cocaine from defendant in the bathroom of the Walmart for $100.

After the buy, Simmons provided Easter with the drugs, which the parties stipulated was 0.3 grams of cocaine, and the remaining $100.

¶ 7 Simmons also testified to a second controlled buy with defendant, which took place on June 27, 2013. This time, defendant asked Simmons to pick him up. Before doing so, Simmons met with Easter, who provided him with $300 in buy money. Simmons then picked up defendant and the two drove to an apartment, where Simmons purchased drugs for $300 from defendant. Thereafter, Simmons provided Easter with the purchased drugs, which the parties stipulated was 1.7 grams of cocaine.

¶ 8 Detective Easter testified he obtained a search warrant for the apartment, which police immediately executed. When Easter entered the apartment, he found defendant lying on the floor. Easter also observed money on the kitchen counter, which he was able to identify as the controlled buy money. During the search, police also recovered a scale, a Baggie, and drugs inside a kitchen cabinet. The parties stipulated police found 11.4 grams of cocaine.

¶ 9 The following colloquy then took place between the State and Easter regarding the distance between the apartment where police found defendant with the cocaine and Chiddix:

> "Q. The next thing I'd like to talk to you about is, did you do some measurements in this case?
>
> A. Yes.
>
> Q. That was at the request of the State's Attorney's office?
>
> A. Correct.
>
> Q. Where did you measure from?
>
> A. The door of [the apartment where the drugs were found]

to [Chiddix].

Q. How was that measurement accomplished?

A. With a traffic wheel.

Q. What do you mean by a traffic wheel?

* * *

A. It's a measuring wheel.

* * *

Q. And you said you measured from the [door of the apartment]. Where did you measure it to?

A. We went north across the parking lot. I believe it was Detective Rizzi that was with me that day. We wheeled across, all the way to—north of the defendant's apartment, and then we went through the grass and that, out to [Chiddix] , which is directly on the other side of the complex.

Q. [Chiddix], is that a public high school—or a public junior high school?

A. Yes, it is.

Q. In Normal?

A. Yes. Correct.

* * *

Q. Between that apartment residence and then where you stopped your measurement, on the track at [Chiddix], was 680 feet?

A. Yes."

¶ 10 Easter also identified photographs of the measuring wheel at a distance of 0 as well as 680 feet. Easter testified a photograph of the zero measurement was taken at the door of the apartment where the drugs were recovered. Easter identified another photograph of a counter which he testified showed "the measurement was 680 feet from the apartment." Easter described another photograph as depicting the traffic wheel "in the middle of the track at Chiddix." In the background of that picture appears a building. However, Easter never identified that building as Chiddix. According to Easter, the picture was taken after he completed his measurements. When the State asked Easter whether the photographs were "fair and accurate representations of those locations and that wheel as you observed them on that date, he responded, "Yes, they are." However, Easter did not testify as to the date he conducted the measurement. A short time later, the State rested. Defendant did not present any evidence.

¶ 11 Thereafter, the trial court found defendant guilty of all five counts. However, because counts III and V merged into counts II and IV, the court only entered guilty findings on counts I, II, and IV.

¶ 12 On July 23, 2014, defendant filed a motion for a new trial, arguing, *inter alia*, the State failed to prove him guilty beyond a reasonable doubt.

¶ 13 Following a November 4, 2014, hearing, the trial court denied defendant's motion. The court then sentenced defendant to concurrent prison terms of 7 years, 11 years, and 11 years on counts I, II, and IV, respectively.

¶ 14 On November 17, 2014, defendant filed a motion to reconsider the sentence, which the trial court denied.

¶ 15 This appeal followed.

¶ 16 II. ANALYSIS

¶ 17 On appeal, defendant argues the evidence was insufficient to convict him of delivery and possession with intent to deliver a controlled substance within 1,000 feet of a school (counts II and IV). Specifically, defendant contends the State failed to offer any evidence Chiddix existed on June 27, 2013, *i.e.*, the date of the offense. Defendant maintains, as a result, the State failed to prove all the elements of those offenses beyond a reasonable doubt. We note defendant does not dispute his possession or intent to deliver the drugs. Instead, defendant requests we reduce his enhanced convictions on counts II and IV to simple delivery and possession with intent to deliver, respectively, and remand for a new sentencing hearing.

¶ 18 In its brief, the State acknowledges "the evidence in this case regarding the school was not particularly strong," and "specific questions regarding the school's existence would have been beneficial." Nevertheless, the State maintains a rational trier of fact could have made a reasonable inference Chiddix existed on the date of the offenses in question.

¶ 19 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).

¶ 20 In *People v. Ortiz*, an officer testified he measured the distance between the Emmanuel Baptist Church and the location of the drug transaction and found that it was 705 feet. *People v. Ortiz*, 2012 IL App (2d) 101261, ¶ 5, 971 N.E.2d 1159. However, he did not testify to the date he conducted the measurement. *Ortiz*, 2012 IL App (2d) 101261, ¶ 11, 971 N.E.2d 1159. While photographs of the building were presented, no testimony was given on whether the photographs "accurately represented the building as it appeared on the date of the offense." *Ortiz*, 2012 IL App (2d) 101261, ¶ 11, 971 N.E.2d 1159. In reversing the defendant's conviction, the appellate court found there was no way of knowing whether Emmanuel Baptist Church existed on the date of the offense and the State failed to prove, beyond a reasonable doubt, defendant delivered the controlled substance within 1,000 feet of the enhancing locality. *Ortiz*, 2012 IL App (2d) 101261, ¶¶ 11, 13, 971 N.E.2d 1159.

¶ 21 In this case, the record is similarly devoid of any evidence connecting the date of the measurement with the date of offense. See *Ortiz*, 2012 IL App (2d) 101261, ¶ 13, 971 N.E.2d 1159. While Easter testified he measured the distance from the apartment where the drugs were located to the running track at Chiddix, Easter never testified to the date he conducted that measurement. See *Ortiz*, 2012 IL App (2d) 101261, ¶ 11, 971 N.E.2d 1159. Indeed, the State presented no evidence connecting the date of the offenses to the date of Easter's measurement. Although the State presented a photograph containing a building, no testimony was presented to establish when that photograph was taken, whether it accurately represented the building as it appeared on the date of the offenses, or whether the building was in fact Chiddix.

We note these are facts the State could have easily established by eliciting such testimony from Easter or someone affiliated with Chiddix. It did not. Absent such evidence, we have no way of knowing whether Chiddix existed on the date of the offenses. As a result, we cannot say a rational trier of fact could have found beyond a reasonable doubt defendant committed the offenses within 1,000 feet of a school.

¶ 22 In accordance with defendant's requested remedy, and pursuant to our authority under Illinois Supreme Court Rule 366(a) (eff. Feb 1, 1994)), we reduce defendant's convictions for delivery of a controlled substance within 1,000 feet of a school (count II), and possession of a controlled substance with intent to deliver within 1,000 feet of a school (count IV) to the unenhanced offenses of delivery of a controlled substance (720 ILCS 570/401(d)(i) (West 2012)) and possession of a controlled substance with intent to deliver (720 ILCS 570/401(c)(2) (West 2012)), respectively, and remand for resentencing on those convictions. (See *People v. Bardo*, 2016 IL App (5th) 140031-U, ¶ 36; *People v. Peacock*, 2015 IL App (5th) 130057-U, ¶ 24; *People v. Sipp*, 2016 IL App (1st) 140898-U, ¶ 22; *People v. Forest*, 2015 IL App (1st) 132678-U, ¶ 22.).

¶ 23 III. CONCLUSION

¶ 24 For the foregoing reasons, we reduce defendant's convictions for counts II and IV and remand for resentencing on those offenses. We otherwise affirm defendant's conviction and sentence.

¶ 25 Affirmed in part and reversed in part; cause remanded with directions.