

NOTICE

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FILED

January 31, 2017
Carla Bender
4th District Appellate
Court, IL

2017 IL App (4th) 150143-U

NO. 4-15-0143

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
NASIN LEE BORDEAU,)	No. 14CM1314
Defendant-Appellant.)	
)	Honorable
)	William A. Yoder,
)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Harris and Appleton concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court reversed, concluding the evidence was insufficient to sustain defendant’s conviction for unlawful contact with street gang members.

¶ 2 In January 2015, a jury convicted defendant, Nasin Lee Bordeau, of unlawful contact with street gang members (720 ILCS 5/25-5(a)(4) (West 2012)). In February 2015, the trial court sentenced defendant to 24 months’ conditional discharge.

¶ 3 Defendant appeals, arguing the (1) State failed to prove him guilty beyond a reasonable doubt; (2) trial court erred by admitting street gang contact cards under the business records exception to the hearsay rule; (3) offense of unlawful contact with street gang members is unconstitutional as it is impermissibly vague by leaving the term “contact” undefined; and (4)

trial court erred in assessing a public defender fee without providing him with notice and a hearing to determine his ability to pay. We reverse.

¶ 4

I. BACKGROUND

¶ 5

A. Information

¶ 6

In July 2014, the State charged defendant by information with two counts of unlawful contact with street gang members (720 ILCS 5/25-5(a)(4) (West 2012)). The State alleged, on or about February 24, 2014, defendant knowingly associated with street gang members, Eric Clark-Phifer and Dartaveon Miles, while a condition of his mandatory supervised release (MSR) was not to associate with street gang members. The State later dismissed one count, and defendant elected to proceed to a jury trial on the other count.

¶ 7

B. Jury Trial

¶ 8

In January 2015, the trial court held a jury trial. The following is a summary of the testimony elicited and evidence presented.

¶ 9

On February 24, 2014, Officer Curtis Squires conducted a traffic stop in a Circle K parking lot in Bloomington, Illinois. The vehicle contained the driver, defendant, and two other passengers, Miles and Clark-Phifer. Upon further investigation, Officer Squires determined defendant was on MSR.

¶ 10

Ivan Hernandez-Salazar, a parole agent with the Illinois Department of Corrections, supervised individuals on MSR, including defendant. On February 24, 2014, Hernandez-Salazar was an active supervisor for the McLean County area and in the process of training defendant's direct parole officer. Hernandez-Salazar testified a condition of MSR is the parolee cannot have contact with a known gang member.

¶ 11 Jack McQueen, a qualified gang expert, opined Miles was an active Mickey Cobra gang member, and Clark-Phifer was an active Gangster Disciple gang member. McQueen based his opinion upon street gang contact cards, which police officers used to label gang membership. The State introduced into evidence contact cards indicating Miles admitted to being a Mickey Cobra member to Officer Elias Mendiola in 2009, and Clark-Phifer admitted to being a Gangster Disciple member to Officers Brad Fisek and Elias Mendiola in 2007. Over defendant's hearsay objection, the trial court admitted the contact cards under the business records exception to the hearsay rule.

¶ 12 McQueen further testified gang statuses were reviewed every five years. McQueen concluded Miles was an active Mickey Cobra member based on a 2012 police report, and Clark-Phifer was an active Gangster Disciple member based on a 2012 interview and police report. McQueen indicated Miles and Clark-Phifer's names were present in the statewide gang database. McQueen testified a name is removed from the gang database only if the individual dies, removes a tattoo indicative of gang membership, or convinces the police department, on their own initiative, of their withdrawal from the gang.

¶ 13 On this evidence, the State rested. Defendant moved for a directed verdict, which the trial court denied. Defendant elected not to present any evidence. Following closing arguments, the matter was sent to the jury.

¶ 14 During deliberations, the jury sent a note asking whether defendant had a duty or obligation to ascertain whether those he had direct or indirect contact with were street gang members. Over no objection, the trial court instructed the jury with the definition of

“knowledge” as provided in Illinois Pattern Jury Instructions, Criminal, No. 5.01B (4th ed. 2000).

¶ 15 The jury returned a verdict finding defendant guilty.

¶ 16 C. Posttrial Proceedings

¶ 17 Following the jury’s verdict, defendant filed a motion for acquittal or, in the alternative, a motion for a new trial. In the motion, defendant argued the (1) State presented no evidence from which a jury could conclude beyond a reasonable doubt he had knowledge Miles and Clark-Phifer were street gang members; (2) trial court erred in overruling his objection to the offering of hearsay evidence through the State’s expert of alleged self-admissions to street gang membership; and (3) jury’s verdict was against the manifest weight of the evidence.

¶ 18 On February 17, 2015, the trial court held a hearing on defendant’s posttrial motion and sentencing. The court denied defendant’s motion and then sentenced him to 24 months’ conditional discharge. In a supplemental sentencing order, the court imposed a \$100 public defender fee (725 ILCS 5/113-3.1(a) (West 2012)).

¶ 19 This appeal followed.

¶ 20 II. ANALYSIS

¶ 21 On appeal, defendant argues the (1) State failed to prove him guilty beyond a reasonable doubt; (2) trial court erred by admitting street gang contact cards under the business records exception to the hearsay rule; (3) offense of unlawful contact with street gang members is unconstitutional as it is impermissibly vague by leaving the term “contact” undefined; and (4) trial court erred in assessing a public defender fee without providing him with notice and a hearing to determine his ability to pay.

¶ 22 Defendant asserts the State failed to prove him guilty beyond a reasonable doubt. Specifically, defendant asserts the State failed to prove (1) his MSR contained a condition that he refrain from contact with street gang members, (2) Miles and Clark-Phifer were street gang members at the time of the offense, or (3) he had knowledge Miles and Clark-Phifer were street gang members. While the State maintains it presented sufficient evidence for us to reject the first two bases of defendant's argument, it concedes the evidence is insufficient to prove beyond a reasonable doubt defendant had knowledge Miles and Clark-Phifer were street gang members.

¶ 23 When presented with a challenge to the sufficiency of the evidence, our inquiry is whether, in viewing the evidence in the light most favorable to the State, any rational trier of fact could have found all of the essential elements of the crime beyond a reasonable doubt. *People v. Davison*, 233 Ill. 2d 30, 43, 906 N.E.2d 545, 553 (2009). We “will not set aside a criminal conviction on grounds of insufficient evidence unless the proof is so improbable or unsatisfactory that there exists a reasonable doubt of the defendant's guilt.” *People v. Maggette*, 195 Ill. 2d 336, 353, 747 N.E.2d 339, 349 (2001).

¶ 24 To sustain a conviction for the offense of unlawful contact with street gang members, the State must prove (1) a condition of defendant's MSR was to refrain from direct or indirect contact with street gang members, and (2) defendant thereafter knowingly had direct or indirect contact with a street gang member. 720 ILCS 5/25-5(a)(4) (West 2012); see also *People v. Jamesson*, 329 Ill. App. 3d 446, 459, 768 N.E.2d 817, 829 (2002). Section 4-5(a) of the Criminal Code of 2012 (720 ILCS 5/4-5(a) (West 2012)) defines knowledge as:

“A person knows, or acts knowingly or with knowledge of ***

[t]he nature or attendant circumstances of his or her

conduct *** when he or she is consciously aware that his or her conduct is of that nature or that those circumstances exist. Knowledge of a material fact includes awareness of the substantial probability that the fact exists.”

See also Illinois Pattern Jury Instructions, Criminal, No. 5.01B (4th ed. 2000).

¶ 25 In closing argument, defense counsel argued the State failed to present any evidence indicating defendant had knowledge Miles and Clark-Phifer were street gang members. In response, the State asked the jury to apply “common sense,” and “ask yourself, why would [Miles and Clark-Phifer] self-admit to be gang members to a police officer, but then not hold themselves out as gang members otherwise?” The State may not, however, leave essential elements of an offense to conjecture or assumption. *People v. Laubscher*, 183 Ill. 2d 330, 336, 701 N.E.2d 489, 491 (1998). As the State concedes on appeal, no evidence was presented to show Miles and Clark-Phifer held themselves out to defendant as being gang members, either by a verbal admission audible to defendant or through clothing, tattoos, or hand signs visible to defendant. We accept the State’s concession and find the evidence was insufficient to prove defendant guilty of the charged offense.

¶ 26 III. CONCLUSION

¶ 27 We reverse defendant's conviction and sentence, and we vacate the public defender fee.

¶ 28 Reversed.