2016 IL App (1st) 140913-U

THIRD DIVISION
September 14, 2016

No. 1-14-0913

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 13 CR 15697
	)	
ANTOINE HARDMAN,	)	Honorable
	)	Vincent M. Gaughan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE COBBS delivered the judgment of the court.
Justices Howse and Ellis concurred in the judgment.

O R D E R

¶ 1 *Held:* Defendant's conviction for possession of a controlled substance with intent to deliver within 1,000 feet of a school affirmed where the evidence sufficiently established that the building was operating as a school; public defender reimbursement fee vacated and case remanded for hearing on defendant's ability to pay; mittimus amended to correct name of offense.

¶ 2 Following a bench trial, held simultaneously with codefendant's jury trial, defendant Antoine Hardman and codefendant Andre Nesbitt[1] were convicted of possession of a controlled substance with intent to deliver within 1,000 feet of a school. The trial court sentenced defendant to a term of eight years' imprisonment. On appeal, defendant concedes that he was proven guilty of possession of a controlled substance with intent to deliver. He contends, however, that the State failed to prove that he committed that offense within 1,000 feet of a school because it failed to present any evidence that the building at issue was operating as a school on the date of the offense. Defendant also argues that the trial court erroneously assessed him a $500 reimbursement fee for the services of the public defender without conducting the requisite hearing to determine his ability to pay. In addition, defendant contends, and the State agrees, that his mittimus should be amended to reflect the correct name of the offense of which he was convicted.

¶ 3 In light of defendant's acknowledgement that he was proven guilty of possession of a controlled substance with intent to deliver, and that his only challenge to his conviction is whether the evidence established that the building at issue was a school, we confine our factual summary to the evidence presented about that school. The evidence at trial established that about 10 a.m. on July 22, 2013, Chicago police officer Salvatore Ruggiero was conducting surveillance of the alley at 634 North Ridgeway Avenue and observed defendant and codefendant each engage in three separate narcotics transactions with three different individuals. During each transaction, defendant accepted money from the individual in exchange for a small bag of heroin

[1] This court entered judgment on codefendant's appeal in *People v. Nesbitt*, 2016 IL App (1st) 140912-U. Codefendant is not a party to this appeal.

that he retrieved from underneath a rock. Following the arrest of defendant and codefendant, police recovered 12 small plastic bags of heroin from underneath the rock. A forensic chemist tested the contents of 7 of the 12 bags and found it positive for 1.2 grams of heroin.

¶ 4 Officer Ruggiero testified that he had been on the force for almost eight years, and at the time of the offense, had worked in the 11th District for seven years. When asked to describe the 600 block of North Ridgeway Avenue, Officer Ruggiero testified "[t]he area is residential, with buildings and also right next to a school called Ryerson Elementary School at that time." The prosecutor noted that the officer said "at that time," and asked if the school has a different name, and Officer Ruggiero replied that it is now called "Laura Ward." He also testified that the school was located "[r]ight across the street" from where the offense occurred.

¶ 5 Officer Ruggiero further testified that he was familiar with the area because he was a patrol officer in the 11th District and made "numerous arrests in that area," including at least 20 narcotics arrests "around that time of year." Officer Ruggiero testified that he conducted surveillance in that area "[a]t least twenty times in that part of the year," and that it is "an area that is known for narcotics sales."

¶ 6 On cross-examination, Officer Ruggiero acknowledged that as a patrol officer, it was his responsibility to try to keep the streets safe in the area of Ridgeway Avenue, and part of that responsibility included looking for the drug dealers in that area. When defense counsel asked if it was a residential area, he replied "[c]orrect. Right across the street from Ryerson Elementary School." Counsel then asked "[p]eople were coming and going, taking their kids to school,

parents, is that right?" and the officer replied that it was "an active neighborhood" and people were out in the area at the time of the offense.

¶ 7 Chicago police officer Joseph Harmon testified that he had been on the police force for 15 years, had worked in the 11th District for 9 years, and was familiar with the area where the offense occurred, including the schools near that location. Officer Harmon testified that the building located near the offense was "Laura Ward School." He further testified that the name of the school had changed, and that it was named "Ryerson" on July 22, 2013.

¶ 8 Christopher Lappe, an investigator with the Cook County State's Attorney's Office, testified that he measured the distance from 634 North Ridgeway Avenue to "646 North Lawndale. The Laura Ward Elementary School," and found that it was 88 feet. The end point for his measurement was "[t]he parking lot for the Laura Ward school." The investigator also acknowledged that the school was "formerly called Ryerson Elementary School."

¶ 9 On appeal, defendant first challenges the sufficiency of the evidence to sustain his conviction, contending that the State failed to prove beyond a reasonable doubt that the building at issue was operating as a school on the date of the offense. Defendant acknowledges that a police officer's testimony may be sufficient to prove that a building is a school. He argues, however, that in this case, the officers' testimony was not sufficient because it showed that the building was in transition, and they did not testify that the school was operational on the date of the offense.

¶ 10 Initially, we note that in his reply brief, defendant included a footnote citing to a website for Chicago Public Schools purportedly discussing the closing of Ryerson Elementary School in

the summer of 2013, and the relocation of the Laura Ward Elementary School to that building. The record shows that this evidence was not presented to the trial court, and therefore, it is not properly before this court. *People v. Boykin*, 2013 IL App (1st) 112696, ¶ 9. Consequently, we decline to give any consideration to the information in this footnote.

¶ 11 When defendant claims that the evidence is insufficient to sustain his conviction, this court must determine whether any rational trier of fact, after viewing the evidence in the light most favorable to the State, could have found the elements of the offense proved beyond a reasonable doubt. *People v. Baskerville*, 2012 IL 111056, ¶ 31. This standard applies whether the evidence is direct or circumstantial, and does not allow this court to substitute its judgment for that of the fact finder on issues involving witness credibility and the weight of the evidence. *People v. Jackson*, 232 Ill. 2d 246, 280-81 (2009). "Under this standard, all reasonable inferences from the evidence must be allowed in favor of the State." *Baskerville*, 2012 IL 111056, ¶ 31.

¶ 12 In a bench trial, the trial court is responsible for determining the credibility of the witnesses, weighing the evidence, resolving conflicts in the evidence, and drawing reasonable inferences from therein. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). We will not reverse a criminal conviction based upon insufficient evidence unless the evidence is so improbable or unsatisfactory that there is reasonable doubt as to defendant's guilt (*People v. Givens*, 237 Ill. 2d 311, 334 (2010)), nor simply because defendant claims that a witness was not credible or that the evidence was contradictory (*Siguenza-Brito*, 235 Ill. 2d at 228).

¶ 13 To prove defendant guilty of possession of a controlled substance with intent to deliver as charged in this case, the State was required to show that he knowingly possessed between 1 and

15 grams of a substance containing heroin, he intended to deliver the drugs, and he did so within 1,000 feet of Ryerson Elementary School. 720 ILCS 570/401(c)(1) (West 2012); 720 ILCS 570/407(b)(1) (West 2012). The statute expressly provides that for offenses occurring within 1,000 feet of a school, the time of day, the time of year, and whether classes were in session at the time of the offense are irrelevant. 720 ILCS 570/407(c) (West 2012).

¶ 14 Our supreme court has found that the term "school," as used in the statute, includes "any public or private elementary or secondary school, community college, college or university." (Internal quotation marks omitted.) *People v. Young*, 2011 IL 111886, ¶¶ 13-16. The testimony of a layperson, including a police officer, can be sufficient to prove that a building is a school where the layperson has personal knowledge of the operation of that building. *People v. Morgan*, 301 Ill. App. 3d 1026, 1032 (1998) (police officer's testimony that location was a public park was sufficient where he testified that he was familiar with the area and had made over 100 arrests there). "It is generally understood that persons living and working in the community are familiar with various public places in the neighborhood." *Id*. Moreover, "[h]ow or whether buildings are used would seem to be of particular interest to a police officer." *People v. Sims*, 2014 IL App (4th) 130568, ¶ 138 (it was reasonable for the court to infer that in the officer's line of work, he was familiar with the area, such that he could testify whether a particular church was active).

¶ 15 In the case at bar, defendant primarily relies on the holding in *Boykin* in support of his argument that the police officers' testimony was not sufficient to prove that the building at issue was operating as a school on the date of the offense. In *Boykin*, the defendant argued that the State failed to establish that "Our Lady of Peace" was operating as a school on the date of the

offense, and that the officers' characterization of the building as a "school" was insufficient. *Boykin*, 2013 IL App (1st) 112696, ¶ 5. The court found that, although the officers testified that the building was a "school," the State failed to present evidence showing how the officers had personal knowledge of the operation of the building. *Id.* at ¶ 15. The court reasoned that the officers did not testify that they lived in the area or that they regularly patrolled the neighborhood, which would have allowed an inference that they had personal knowledge about whether the school was operating on the date of the offense. *Id.*

¶ 16 Here, unlike *Boykin*, the record shows that the officers' testimony established that they were familiar with the area, and specifically, with the elementary school at issue. Officer Ruggiero testified that he had worked in the 11th District for seven years, that he was a patrol officer in the district, and that he had made "numerous arrests in that area." He expressly testified that the area where the offense occurred was residential "and also right next to a school called Ryerson Elementary School at that time." Officer Ruggiero further testified that the offense occurred "[r]ight across the street from Ryerson Elementary School."

¶ 17 In addition to Officer Ruggiero's testimony, Officer Harmon testified that he had worked in the 11th District for nine years and was familiar with the area where the offense occurred, including the schools near that location. Significantly, Officer Harmon specifically testified that the school was named Ryerson on July 22, 2013, the date of the offense.

¶ 18 Viewed in the light most favorable to the State, we find that the officers' testimony was sufficient to allow the trial court, sitting as the trier of fact, to conclude that both officers were familiar with the area and had personal knowledge that the building located near the offense was

operating as Ryerson Elementary School on the date the offense occurred. Accordingly, we find that the evidence sufficiently established that defendant committed the offense of possession of a controlled substance with intent to deliver within 1,000 feet of a school.

¶ 19 Defendant next contends, the State concedes, and we concur that that the trial court erroneously assessed him a $500 reimbursement fee for the services of the public defender without conducting the requisite hearing to determine his ability to pay. Pursuant to section 5/113-3.1(a) of the Illinois Code of Criminal Procedure, the circuit court may order a defendant to pay a reasonable sum to reimburse the county or State for representation by appointed counsel, the amount of which is to be determined at a hearing where the court shall consider the defendant's financial circumstances. 725 ILCS 5/113-3.1(a) (West 2012). To comply with the statute, the trial court must give defendant notice that it is considering imposing the fee, and the opportunity to present evidence regarding his ability to pay. *People v. Somers*, 2013 IL 114054, ¶ 14. Our supreme court has repeatedly reminded the trial courts of their obligation to conduct such hearings in compliance with the statute. *Somers*, 2013 IL 114054, ¶ 18; *People v. Gutierrez*, 2012 IL 111590, ¶¶ 25-26.

¶ 20 Here, the record shows that after defendant was sentenced and admonished of his right to appeal, the prosecutor stated that she had filed a motion for reimbursement of attorney's fees. The trial court then asked the public defender how many times she had appeared in court, noted that there had been a trial, and stated "[a]ttorney's fees would be appropriate of $500." The court did not inquire into defendant's financial status or give defendant an opportunity to present

evidence regarding his ability to pay. Consequently, the fee was erroneously assessed without a sufficient hearing.

¶ 21 In his opening brief, defendant argued that his case should be remanded for a proper hearing to determine his ability to pay the reimbursement fee, and in response, the State agreed that remand was the appropriate remedy. In his reply brief, however, defendant pointed out that after he filed his opening brief, another division of this court held that where the trial court fails to consider the defendant's ability to pay, the required hearing did not occur, and the proper remedy is to vacate the fee. *People v. Moore*, 2015 IL App (1st) 141451. In *Moore*, after the defendant was sentenced, the court asked the public defender the number of times he had appeared and, without questioning the defendant, imposed a $150 fee. *Id.* ¶ 30. The court concluded that completely failing to inquire into the defendant's financial circumstances necessitated a finding that no hearing occurred for the purposes of section 113-3.1(a) *Id.* ¶ 41. Consequently, because section 113-3.1(a) provides that the hearing shall be conducted no later than 90 days after entry of the final order of the trial court, remand for a proper hearing was not the appropriate remedy, but rather, the fee was vacated outright. *Id*. Relying on the holding in *Moore*, defendant now argues that the reimbursement fee should be vacated outright, and that remand for a hearing is not necessary.

¶ 22 We respectfully disagree with the court's determination in *Moore* and its progeny that no hearing whatsoever occurred in cases where, as here, after sentencing a defendant the trial court asks the public defender the number of times she appeared in court but does not question the defendant on his ability to pay. We note that in this case it is undisputed that the hearing below

was insufficient to satisfy the requirements of section 113-3.1(a) and the only question at issue is the appropriate remedy. Our supreme court in *People v. Somers*, 2013 IL 114054, explained that where the hearing below was insufficient but "some sort of a hearing" occurred, the case must be remanded to the trial court. *Somers*, 2013 IL 114054, ¶ 15. In contrast, where there was no hearing, as in *People v. Gutierrez*, 2012 IL 111590 (public defender fee imposed by circuit court clerk), and *People v. Daniels*, 2015 IL App (2d) 130517 (no hearing where the trial court made no reference to the public defender or its intent to impose a fee), the fee must be vacated outright. *Gutierrez*, 2012 IL 111590, ¶ 28; *Daniels*, 2015 IL App (2d) 130517, ¶ 30.

¶ 23 In analyzing the "some sort of a hearing" standard set forth in *Somers*, this court in *People v. Williams*, concluded that questioning the public defender regarding his involvement but failing to inquire into the defendant's financial circumstances constituted a hearing because "it was a judicial session open to the public, held to resolve defendant's representation by the public defender." *People v. Williams*, 2013 IL App (2d) 120094, ¶ 20. The reasoning in *Williams* was followed by this court in *People v. Rankin*, 2015 IL App (1st) 133409, and *People v. Adams*, 2016 IL App (1st) 141135. Similar to our case, in both *Rankin* and *Adams*, after sentencing the defendant the trial court merely asked the public defender the number of times he appeared and did not question the defendant on his ability to pay. *People v. Rankin*, 2015 IL App (1st) 133409, ¶ 21, and *People v. Adams*, 2016 IL App (1st) 141135, ¶ 26. In both cases, this court determined that, although insufficient, the court's inquiry regarding the number of times the public defender appeared in court constituted an abbreviated hearing, for which the appropriate remedy was remand to the trial court. *People v. Rankin*, 2015 IL App (1st) 133409, ¶ 21; *People v. Adams*,

2016 IL App (1st) 141135, ¶ 26. Therefore, following *Williams*, *Rankin*, and *Adams*, we conclude that the court's questioning below was an abbreviated, but insufficient, hearing. Accordingly, the appropriate remedy is to remand the matter to the trial court for a hearing on defendant's ability to pay the $500 fee.

¶ 24 Finally, defendant contends, and the State agrees, that his mittimus should be amended to reflect the correct offense of which he was convicted. The mittimus incorrectly indicates that defendant's conviction was for manufacture or delivery of a controlled substance when, in fact, he was convicted of possession of a controlled substance with intent to deliver. Pursuant to our authority (Ill. S. Ct. R. 615(b)(1) (eff. Aug. 27, 1999); *People v. McCray*, 273 Ill. App. 3d 396, 406 (1995)), we direct the clerk of the circuit court to amend the mittimus to reflect that defendant was convicted of the offense of possession of a controlled substance with intent to deliver.

¶ 25 CONCLUSION

¶ 26 For the foregoing reasons, we affirm defendant's conviction and sentence, vacate the public defender reimbursement fee and remand the case for a hearing to determine defendant's ability to pay, and amend the mittimus.

¶ 27 Affirmed in part; vacated in part; remanded with directions; mittimus amended.