

FOURTH DIVISION  
November 13, 2014

1-12-3570

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 17057
	)	
DEMARCO BELL,	)	Honorable
	)	Thomas V. Gainer,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE HOWSE delivered the judgment of the court.  
Presiding Justice Fitzgerald Smith and Justice Epstein concurred in the judgment.

**ORDER**

¶ 1 *Held:* Defendant's conviction for possession with intent to deliver on the real property of a church is affirmed because the evidence was sufficient to prove beyond a reasonable doubt that the location was the real property of a church, the State's remarks during closing argument did not deny defendant a fair trial, and because the Illinois Juvenile Court Act's jurisdictional provision does not violate defendant's constitutional rights.

¶ 2 In 2012, the circuit court of Cook County convicted defendant, Demarco Bell, of possession with intent to deliver of between 1 and 15 grams of heroin on the real property of a church and delivery of less than one gram of heroin, and sentenced him to 6 and 3 years in prison on the respective charges with the sentences to run concurrently. Defendant appeals, arguing (1) the State failed to prove beyond a reasonable doubt that the property on which defendant possessed the heroin was the real property of a church or was at the time being used primarily for religious worship, (2) the State's improper comments during closing argument deprived defendant of a fair trial, and (3) the exclusive jurisdiction provision of the Illinois Juvenile Court Act of 1987 (Juvenile Court Act) violates the constitutional prohibition on cruel and unusual punishment and defendant's rights to substantive and procedural due process.

¶ 3 For the following reasons, we affirm.

¶ 4 BACKGROUND

¶ 5 The evidence produced at trial against defendant is straightforward and uncontroverted. Three police officers testified for the State that on September 28, 2011, the officers engaged in a police operation involving the purchase of narcotics. The operation consisted of seven officers assigned different tasks. When conducting a narcotics purchase, one officer is designated the "undercover" officer. This officer actually makes the purchase, and the undercover officer wears civilian clothing and drives a civilian vehicle. Other officers are assigned to the "surveillance team" to observe the undercover officer and relay what they observe to other surveillance officers and to the "enforcement team." The enforcement team would affect any arrests and rescue the undercover officer if necessary.

¶ 6 David Pearson, one of the surveillance officers for this particular operation, testified that he observed the undercover officer pick up a female at one location and drive her to the 700 block of east 43rd street in Chicago. There, Pearson observed the female exit the undercover officer's vehicle and cross the street to where defendant was standing. Pearson testified that defendant stood to the east of "The Rain or Shine Missionary Baptist Church" located on the north side of 43rd street. The officer testified that the church was in operation in September 2011. The officer observed defendant engage in a "hand-to-hand" transaction with the woman. Pearson testified that he then observed defendant go to the doorway of the church, retrieve something from over the doorway of the church, and return to the woman and give her something. The woman then returned to the undercover officer's vehicle and got inside for a short period of time. Defendant walked away. Pearson remained in his surveillance position because he believed additional drugs were over the doorway and wanted to maintain sight of them. The undercover officer radioed Pearson that the woman had given him a substance suspected to be heroin. Pearson then radioed an enforcement officer to go to the doorway of the church. Pearson testified that an enforcement officer recovered a substance from the doorway of the church suspected to be heroin.

¶ 7 Tion Horton, the undercover officer on this date, testified that police previously recorded the serial numbers of the funds he used to make the narcotics purchase (1505 funds). Horton did not know the woman who took him to defendant before he picked her up that day but later learned her name was Catherine Ward. Horton testified that he gave Ward the recorded funds, and that he observed Ward give the funds to defendant and receive a small plastic bag from defendant. Horton could not see defendant when defendant left the woman

but when defendant returned, Horton testified he observed defendant give the woman a second small plastic bag. When Ward returned to Horton's vehicle she gave him two bags of a substance he suspected to be heroin.

¶ 8 Steve Loffredo, one of the enforcement officers, testified that he recovered 10 clear plastic bags containing a substance suspected to be heroin from the door frame of the church where Pearson had directed him. Police arrested defendant in a nearby grocery store. Police did not recover any contraband or the recorded funds from defendant after his arrest. The State elicited evidence that the suspect substance tested positive for heroin. The State also introduced into evidence photographs of the front of the building from which police recovered heroin from over the doorway. The photographs depict signs and an awning over the building that read "Rain or Shine Missionary Baptist Church."

¶ 9 The jury found defendant guilty of possession with intent to deliver of a controlled substance on the real property of a church and delivery of a controlled substance. The trial court sentenced defendant to 6 and 3 years' imprisonment, respectively, and ordered the sentences to run concurrently.

¶ 10 This appeal followed.

¶ 11 ANALYSIS

¶ 12 The State charged defendant with violating section 407(b)(1) of the Illinois Controlled Substances Act (Act) (720 ILCS 570/407(b)(1) (West 2010)) in that he possessed with intent to deliver 1 gram or more but less than 15 grams of a substance containing heroin (720 ILCS 570/401(c)(1) (West 2010)). The presence on or within 1000 feet of a church or place used primarily for religious worship is an enhancing factor used to elevate the level of the felony of

possession with intent to deliver of a controlled substance. See *People v. Pacheco*, 281 Ill. App. 3d 179, 187 (1996); 720 ILCS 570/407(b)(1) (West 2010). “[S]tatutory sentencing provisions which enhance the punishment for an offense are essential elements of the offense which must be proved beyond a reasonable doubt.” *People v. Brooks*, 271 Ill. App. 3d 570, 573 (1995).

Defendant allegedly committed the offense when he was 17 years of age. “In Illinois the age of majority is 18 years old.” *Thornhill v. Midwest Physician Center of Orland Park*, 337 Ill. App. 3d 1034, 1052 (2003). Though defendant was a minor when he allegedly committed the offense, in 2011 the “exclusive jurisdiction” provision in the Juvenile Court Act of 1987 (Juvenile Court Act) (705 ILCS 405/5-120 (West 2010)) provided that a minor who committed a felony after his or her 17th birthday was excluded from the jurisdiction of the juvenile court. Section 5-120 of the Juvenile Court Act (hereinafter the exclusive jurisdiction provision) read, in pertinent part, as follows:

“Proceedings may be instituted under the provisions of this Article concerning any minor who prior to the minor’s 17th birthday has violated or attempted to violate, regardless of where the act occurred, any federal or State law \*\*\*.” 705 ILCS 405/5-120 (West 2010).

¶ 13 In this appeal, defendant argues the State failed to prove an element of the offense beyond a reasonable doubt (that the offense occurred on an enhancing locality), that the State committed reversible error during closing arguments, and that the exclusive jurisdiction provision violates constitutional prohibitions on cruel and unusual punishment and

defendant's rights to substantive and procedural due process. We address each contention in turn.

¶ 14 1. Sufficiency of the Evidence

¶ 15 Defendant does not dispute that he possessed with intent to deliver heroin at the location testified to by the State's witnesses. Defendant argues the State failed to prove that the location was a church or a place used primarily for religious worship on the date he committed the offense. Therefore, defendant argues, his sentence should be reduced to the minimum sentence for the unenhanced offense (since the trial court sentenced him to the minimum sentence for the enhanced offense)<sup>1</sup> or this court should remand for the trial court to sentence defendant based on the unenhanced offense.

“In reviewing the sufficiency of the evidence to sustain a verdict on appeal, the relevant inquiry is whether, after 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. [Citations.]” (Internal quotation marks omitted.) *People v. Sims*, 2014 IL App (4th) 130568, ¶ 137.

¶ 16 Defendant argues that Pearson's testimony that Rain or Shine Missionary Baptist Church was in operation in September 2011, and the photographs of the exterior of the

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<sup>1</sup> The minimum sentence for a Class X felony, to which possession with intent to deliver is enhanced based on commission on the real property of a church, is 6 years. 730 ILCS 5/5-4.5-25(a) (West 2010). Defendant asks this court to reduce his sentence to 4 years, the minimum sentence for a Class 1 felony. 730 ILCS 5/5-4.5-30(a) (West 2010).

building depicting signage on the building designating it a church, are insufficient to sustain the State's burden to prove the location was a church on the date of the offense. Defendant attacks Pearson's testimony both because Pearson failed to testify that the church was in operation on the exact date of the offense and because Pearson did not testify as to how he knew the church was in operation in September 2011.

¶ 17 The State responds defendant's attack on Pearson's testimony is actually directed to whether the State elicited sufficient foundational evidence for his testimony to the fact that the location was a church on the date of the offense. The State argues defendant forfeit an objection to Pearson's testimony on grounds of inadequate foundation by failing to object in the trial court and, nonetheless, Pearson's testimony regarding his familiarity with the area is sufficient to permit the jury to reasonably infer that he had the personal knowledge necessary to testify that the location was an active church. Regardless whether defendant's claim attacks the foundation for Pearson's testimony or the sufficiency of the evidence, the question for this court remains whether the testimony could persuade any rational trier of fact, beyond a reasonable doubt, that on September 28, 2011, the building was a church. *Sims*, 2014 IL App (4th) 130568, ¶ 137 (discussing foundational component of claim that evidence was insufficient to establish location was a church). "In answering that question, we should draw any inference in the prosecution's favor if it would be reasonably defensible to draw that inference from the evidence presented in the trial." *Sims*, 2014 IL App (4th) 130568, ¶ 137.

¶ 18 The State argues that Pearson's testimony, along with photographic evidence of the designation of the location as a church on the date of the offense, is sufficient evidence from which a reasonable trier of fact could infer that the location was a church on the date of the

offense. The State cites this court to the decision in *People v. Foster*, 354 Ill. App. 3d 564 (2004), in which this court held that “a rational trier of fact could have inferred [the location] was a church used primarily for religious worship based on its name.” *Foster*, 354 Ill. App. 3d at 568. In *Foster*, the only evidence of the use of the facility stated in the opinion was the facility’s name. See *Id.* at 565-66. Defendant relies on two more recent decisions by the Second District of this court: *People v. Ortiz*, 2012 IL App (2d) 101261, and *People v. Cadena*, 2013 IL App (2d) 120285, to argue that Pearson’s testimony and the mere presence of the signage on the building are inadequate to prove the enhancing element beyond a reasonable doubt.

¶ 19 In *Ortiz*, the State elicited testimony of the distance between the location of the drug transaction involving the defendant and “the location of the Emmanuel Baptist Church.” *Ortiz*, 2012 IL App (2d) 101261, ¶ 5. In *Ortiz*, much like this case, the State also entered into evidence photographs of the purported church. *Id.* One of those photographs depicted a sign in front of the building which read “Emmanuel Baptist Church” and listed worship and Sunday school times. *Id.* The State had a police officer identify the photographs of the church. *Id.* The State also had the officer identify a photograph of the location of the drug transaction and elicited testimony that the photograph of the location of the *drug transaction* accurately depicted the intersection on the date of the offense. *Id.*

¶ 20 The defendant in *Ortiz* argued that the State failed to prove beyond a reasonable doubt that there was a church within 1000 feet of the site of the offense. *Ortiz*, 2012 IL App (2d) 101261, ¶ 9. The court found that the issue was not simply whether the evidence established that the building was a church. *Id.* ¶ 11. Rather, the issue was whether the evidence

established beyond a reasonable doubt that the building was a church on the date of the offense. *Id.* The court held the evidence did not so establish. The court noted that the officer did not testify to the date on which he conducted the measurement. *Id.* The court also noted that there was no testimony presented to establish when the photographs of the building were taken and no witness testified that the photographs accurately represented the building as it appeared on the date of the offense. *Id.* The court concluded it had no way of knowing whether the Emmanuel Baptist Church existed on the date of the offense. *Id.* The *Ortiz* court distinguished *Foster* on the grounds there was no question raised in *Foster* concerning whether the building operated as a church on the date of the offense. *Id.* ¶ 12.

¶ 21 In *Cadena*, 2013 IL App (2d) 120285, ¶ 4, the defendant also challenged the determination that he committed the offense of possession with intent to deliver of a controlled substance within 1000 feet of a church. There, police conducted controlled purchases of cocaine on 4 separate dates. *Id.* ¶ 3. The testimony “about the ‘enhancing locality’ identified by the State as a church (*id.* ¶ 4) included a police officer’s testimony that the parking lot of the Evangelical Covenant Church was 860 feet or less from the parking lot where the controlled purchases had occurred. *Id.* ¶ 5. The State asked another police officer involved in the operation whether the location of the narcotics purchases was near the Evangelical Covenant Church, to which the officer responded “Yes.” The State then asked whether that church was an active church to which the officer responded “Yes.” *Id.* ¶ 6.

¶ 22 The defendant in *Cadena* argued that the State failed to present sufficient evidence to prove that the Evangelical Covenant Church was an active church “on the dates of the offenses.” *Cadena*, 2013 IL App (2d) 120285, ¶ 10. The *Cadena* court recounted its holding in

*Ortiz* and agreed with the defendant in *Cadena* that the evidence in *Cadena* was similarly “insufficient to prove that [Evangelical Covenant Church] was operating as a church on the dates of the offenses.” *Id.* ¶ 13. The court found that the single question to a police officer asking whether the church was an active church “was stated in the present tense and without temporal context.” *Id.* ¶ 16. The question “could, just as reasonably, suggest that [the officer] was, in fact, referring to the time of the trial, that is, two years after the dates of the offenses.” *Id.* The court held that “the testimony was insufficient to prove that the church was active *on the dates of the offenses.*” (Emphasis in original.) *Id.*

¶ 23 The *Cadena* court also discussed the fact that the location “was, by name, a ‘church.’ ” *Cadena*, 2013 IL App (2d) 120285, ¶ 15. The *Cadena* court conceded that “its name supports the inference that the building in question was a church.” *Id.* However, the court also noted that in *People v. Sparks*, 335 Ill. App. 3d 249, 256 (2002), the court had held that “the appropriate focus in determining whether a place falls within the definition of a “church” for purposes of the statute is its “primary” use. *Sparks*, 335 Ill. App. 3d at 256. To make that determination, “the appropriate focus must be on the manner in which the place is used, *i.e.*, whether its primary use is for religious worship.” *Sparks*, 335 Ill. App. 3d at 256. The *Cadena* court interpreted this language in *Sparks* to mean that to prove the enhancing location was a church “requires proof regarding how the building was used.” (Emphasis omitted.) *Cadena*, 2013 IL App (2d) 120285, ¶ 15. The *Cadena* court recognized that its reading of *Sparks* created an “apparent discrepancy between *Sparks* and *Foster*, with *Sparks* requiring at least some information as to church activities and *Foster* holding that nomenclature alone is sufficient.” *Id.* ¶ 15.

¶ 24 We are not convinced of an actual conflict between *Sparks* and *Foster*. The issue in *Sparks* was whether a chapel inside a Salvation Army building qualified as a location that would enhance the penalty for unlawful delivery of a controlled substance pursuant to section 407(b)(2) of the Criminal Code. *Sparks*, 335 Ill. App. 3d at 255-56. The building at issue also housed a boardroom, a soup kitchen, and a dining room. *Id.* at 251. Photographs of the building gave “no hint of the religious activity held therein.” *Id.* at 259 (Bowman, J., dissenting). “Even the large sign located above the separate entrance to the chapel, which reads ‘The Salvation Army Corps Community Center,’ is not indicative of a church.” *Id.*

¶ 25 The *Sparks* court merely held that the definition of church for purposes of the statute was not *limited* to locations with traditional physical characteristics of a church or locations whose official titles have church in their name. *Sparks*, 335 Ill. App. 3d at 256. In so holding, the *Sparks* court expanded the type of evidence that should be examined to determine if a location is a “church” beyond looking at its physical characteristics and nomenclature. In other words, traditional characteristics and nomenclature are not *necessary* conditions for a location to be a church. This does not mean that traditional characteristics and nomenclature are not *sufficient* conditions for a location to be a church. The *Sparks* court wrote that although such traditional physical characteristics “may help a fact finder identify a place as a church, the presence of such characteristics is not required under the statute.” *Id.* at 256. The *Sparks* court also wrote that it did not believe “that the legislature intended to *limit* the meaning of the term ‘church’ to a ‘building, structure, or place’ possessing certain specific physical characteristics and nomenclature.” (Emphasis added.) *Id.* Thus, it stands to reason

that the *Sparks* court would agree that certain nomenclature would be sufficient evidence of a church.

¶ 26 The majority in *Sparks* never held that nomenclature alone was insufficient to establish that a location was a church and the *Cadena* court did not give consideration to or attempt to resolve its perceived discrepancy between *Sparks* and *Foster*. *Cadena*, 2013 IL App (2d) 120285, ¶ 15 fn 1. The *Ortiz* court specifically recognized and did not dispute the *Foster* court's holding that a rational trier of fact could have inferred the location in that case was a church based on its name. Rather, the reason the *Ortiz* court reversed the defendant's conviction was because the evidence (an officer's testimony and signage describing the location as a church) was not particularized to the date of the offense. We find defendant in this case has not pointed to any authority which would lead us to depart from this court's holding in *Foster*. See *Sims*, 2014 IL App (4th) 130568, ¶ 133 (holding "we do not consider *Cadena* to be reliable authority that nomenclature is insufficient" and following *Foster*). In this case, the State produced evidence that the location where defendant possessed heroin was Rain or Shine Missionary Baptist Church. That evidence came in the form of the police officers' testimony and from photographs of the location depicting signage designating the location as Rain or Shine Missionary Baptist church. Here, "a rational trier of fact could have inferred [the location] was a church used primarily for religious worship based on its name." *Foster*, 354 Ill. App. 3d at 568.

¶ 27 Moreover, we find that the evidence was sufficient to prove beyond a reasonable doubt that the location was being used as a church on the date of the offense. In this case, unlike in *Ortiz*, the State did elicit testimony that the photographs depicting the signage designating the

location as a church accurately represented the building as it appeared on the date of the offense. *Ortiz*, 2012 IL App (2d) 101261, ¶ 11. Thus, the trier of fact did have some way of knowing whether the church existed on September 28, 2011. *Id.* Pearson testified the church was an active church in September 2011. We believe that a reasonable trier of fact could infer that Pearson specifically meant that the church was active on September 28, 2011. The *Cadena* court complained that in the context of the officer's questioning in that case it was not "patently obvious" that the State's question about the status of the church referred to the date of the offenses. *Cadena*, 2013 IL App (2d) 120285, ¶ 16. This was due to the fact that the question about the church was interjected in testimony about executing search warrants that were framed in the past tense and referred to specific dates. The *Cadena* court found that the juxtaposition of asking questions in the past tense, about specific dates, and asking (in the present tense) "is that a church that is an active church?" could have suggested that the officer's answer was referring to the time of the trial. *Cadena*, 2012 IL App (2d) 120285, ¶ 16.

¶ 28 The *Cadena* court did not hold that the trier of fact could never reasonably infer that the testimony referred to the dates of the offenses despite the fact the State did not frame the question that way. See *Id.* ¶ 17 ("Even if [the officer's] response could be taken to mean that the church was also active on the dates of the offenses \*\*\* there was no evidence of how [the officer] knew this information.") (Emphasis omitted.). Further, the testimony in this case does not engender the same potential for confusion as to date to which the testimony refers. Pearson testified about the police operation and its planning on the date of the offense. He described the undercover officer picking up the female and testified they drove to the 700

block of east 43rd street. Then the following exchange occurred between the assistant state's attorney and Pearson:

“Q. Are you familiar with the area of 713 East 43rd Street?

A. Yes.

Q. What is in that area?

A. There are some two story apartments. There is a church just east of Langley on the north side of the street, and there is also a senior citizen building east of the church, and it's on the north side of the street. There is also a community center on the east--south side of the street west of Langley, as well as some other business.

Q. Approximately what time of day was it when Officer Horton had arrived to that area?

A. It was almost noon

\* \* \*

Q. And you mentioned that there was a church across the street from where Officer Horton had parked. Do you know the name of that church?

A. Yes.

Q. What is that?

A. Rain or Shine Missionary Baptist Church.

Q. Now, during--you testified that you're familiar with the area. Are you aware whether or not that church was in operation in September of 2011?

A. Yes.

Q. Was it in operation?

A. Yes.”

¶ 29 Despite the way the assistant state’s attorney phrased the question, resulting in Pearson not explicitly saying the Rain or Shine Baptist Church was in operation on September 28, 2011, we find nothing in the testimony to suggest that Pearson was referring to anything other than the date of the offense when he testified the church was active. Based on his testimony, the only reasonable inference that may be drawn from his omission of the date of the offense from the description of the church as “active” is that church services were not in progress at the time of the offense but the location was being used as a church on the day of the offense. This conclusion is supported by the fact that police recovered 10 bags of heroin from the door frame of the church on the date of the offense. “[T]his court has previously held that, for purposes of section 407(b)(2), religious services need not be in session at the time the unlawful delivery occurred.” *Sparks*, 335 Ill. App. 3d at 257.

¶ 30 We also find that Pearson’s testimony included sufficient evidence of how Pearson knew this information. In *Cadena*, the court held that testimony that the witness is a police officer with a certain number of years of service is not enough. *Cadena*, 2013 IL App (2d) 120285, ¶ 17. Rather, sufficient proof that a location is what the State purports it to be requires testimony demonstrating and explaining how the witness is familiar with the location. *Id.* A police officer is not required to testify to specific knowledge of the operation of the church to testify that a location is in active use as a church. The *Cadena* court held that a police officer “who testified to being familiar with the church from having regularly patrolled the neighborhood, would have had sufficient personal knowledge to testify as to the church’s active status.” *Id.* ¶ 18.

¶ 31 In this case, Pearson did not expressly attribute a familiarity with the church to having regularly patrolled the neighborhood. He did testify, however, that he had been assigned to the Narcotics Division for at least 13 years and that he was familiar with the area of the church. Pearson described the buildings in the area and although he could have observed the buildings on the day of the offense, he also testified as to their function (a senior citizen building and a community center) which is also evidence of his familiarity with the area. On cross-examination, Pearson testified that the church is in the second police district of the Chicago Police Department and that after the arrest the police team relocated to the second district. He also testified that the church was in police “beat” (an area of “a number of blocks” within a police district) 213 in the second district. Pearson’s testimony on cross-examination provides further direct evidence and evidence from which the trier of fact could reasonably infer this area was Pearson’s regular assignment as a narcotics officer, and thus Pearson’s familiarity with the area and his knowledge of whether the church was active on the date of the arrest. See *Sims*, 2014 IL App (4th) 130568, ¶ 138 (“How or whether buildings are used would seem to be of particular interest to a police officer on the lookout for crack houses and methamphetamine laboratories”).

¶ 32 The testimony was sufficient to establish Pearson’s personal knowledge of the area. Based on the testimony and the photographic evidence a reasonable trier of fact could find beyond a reasonable doubt that the location was in operation as a church on the date of the offense. Accordingly, we hold that the State proved the enhancement element of the offense. Defendant’s conviction under section 407(b)(2) is affirmed.

¶ 33

## 2. Closing Arguments

¶ 34 Next, defendant argues the State denied him a fair trial when it made inappropriate remarks during closing arguments. Defendant argues that during closing argument the State improperly told the jury to “send a message” by convicting defendant and during rebuttal closing argument the State sought to create an “us-versus-them” mentality by aligning the jury’s role with the role of police.

“In reviewing comments made by the prosecution in closing argument, the reviewing court asks whether or not the comments engender substantial prejudice against a defendant such that it is impossible to say whether a verdict of guilt resulted from the comments. [Citation.] Improper comments made in closing argument are substantial and warrant reversal and a new trial if the improper comments are a material factor in a defendant’s conviction. [Citation.] The question is whether the jury could have reached a contrary verdict had the improper comments not been made. [Citation.] If a reviewing court cannot find that the improper comments did not contribute to the defendant’s conviction, a new trial should be granted.

[Citation.]” *People v. McCoy*, 378 Ill. App. 3d 954, 964-65 (2008).

¶ 35 A defendant must object both at the time of trial and in a posttrial motion to preserve potential errors for review. *People v. Marshall*, 2013 IL App (5th) 110430, ¶ 12. Here,

defendant concedes the issue was not properly preserved for review but asserts the alleged error by the State is reviewable under either prong of the plain error rule.

“[U]nder the plain error doctrine, a reviewing court may consider an unpreserved error if either (1) the evidence is so closely balanced that the jury’s verdict may have resulted from the error rather than the evidence or (2) the error was so fundamental and of such a magnitude that it affected the fairness of the trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.” *Marshall*, 2013 IL App (5th) 110430, ¶ 12.

¶ 36 Defendant asserts the evidence is both closely balanced and that the alleged misconduct by the State is reviewable under the second prong of the plain error test. “Under either prong, the first step in determining whether the plain-error doctrine applies is to determine whether any reversible error occurred.” *People v. Miller*, 2014 IL App (2d) 120873, ¶ 17. To determine whether reversible error has occurred in this context, we consider the challenged comments in the context of the entire closing argument of both parties. *People v. Wilson*, 2014 IL App (1st) 113570, ¶ 47. “Even if a prosecutor’s closing remarks are improper, they do not constitute reversible error unless they result in substantial prejudice to the defendant such that absent those remarks the verdict would have been different.” *People v. Alvidrez*, 2014 IL App (1st) 121740, ¶ 26. “A new trial should be granted if the jury could have reached a contrary verdict had the improper remarks not been made, or the reviewing court cannot say that the prosecutor's improper remarks did not contribute to the defendant's conviction.

[Citation.]” (Internal quotation marks omitted.) *People v. Luna*, 2013 IL App (1st) 072253, ¶ 138.

¶ 37 We need not answer the question raised by the parties as to whether the appropriate standard of review is *de novo* or abuse of discretion because our holding in this case would be the same under either standard. *Alvidrez*, 2014 IL App (1st) 121740, ¶ 26. We find that no reversible error occurred in this case. Accordingly, the plain error rule does not apply and, therefore, defendant’s forfeiture of his complaint about the State’s closing argument will be honored.

¶ 38 Defendant complains of only two comments by the State. First, at the conclusion of its closing argument, the State argued as follows:

“We have proven the defendant guilty of possession of a controlled substance with intent to deliver on the property of a church.

On September 28, 2011, the Chicago Police Department did their job. And they shut down the defendant. And they sent him the message that you can’t sell drugs in the doorway of The Rain or Shine Baptist Church. Now it is your job to send the defendant that same message. Find him guilty of possession of a controlled substance with intent to deliver on the grounds of a church, as well as delivery of a controlled substance.”

¶ 39 Then, in rebuttal the State argued:

“Ladies and gentlemen, you have absolutely everything you need to find this defendant guilty. The evidence is there. The testimony is there. Chicago police did their job on September 28, 2011. And now it is time for you to do yours. We ask that you follow the evidence. We ask that you follow the law.

And what you have now is a unique opportunity. You are in a powerful position. You can finish the job that the police department started. You, in signing a guilty verdict, can shut his business down. We ask that you find him guilty of delivery of a controlled substance. And we ask you find him guilty of possession with intent to deliver on the property of a church.”

¶ 40 In this case no reasonable jury could have reached a contrary verdict if the complained-of remarks had not been made. Therefore, we have no need to and do not reach the question of whether the foregoing remarks were improper. We reject defendant’s argument that the evidence in this case is closely balanced because the State’s evidence was primarily testimonial and because the jury asked two questions during deliberations. Defendant argues on appeal that the State *lacked* physical evidence of his guilt or a self-incriminating statement, but he points to no countervailing evidence the jury had to consider to determine whether he was guilty of the offenses charged. The State’s witnesses’ testimony was consistent, defendant has pointed to no concerns with the officers’ credibility, and their testimony was sufficient to establish defendant committed every element of the offense. See generally *People v. Burrows*,

148 Ill. 2d 196, 229-30 (1992) (finding evidence not closely balanced, despite lack of physical evidence linking defendant to crime scene, where two witnesses testified to witnessing defendant commit the crime).

¶ 41 Nor do the jurors' questions indicate that the evidence was "less than overwhelming" of defendant's guilt. The jury asked: "Were any attempts made to recover the 1505 funds from anywhere else in the neighborhood or in the store?" and "Is there any difference between the charge of delivery of a controlled substance versus sale of a controlled substance?" The court answered the first question by informing the jury "You have heard all the evidence. Continue to deliberate." The court answered the second question "You have received all the instructions. Continue to deliberate." We do not find that either question reveals any closeness in the evidence of defendant's guilt of the offenses charged. See, e.g., 720 ILCS 570/102(h) (West 2010) (" 'Deliver' or 'delivery' means the actual, constructive or attempted transfer of possession of a controlled substance, with or without consideration, whether or not there is an agency relationship").

¶ 42 We can say confidently that absent the foregoing remarks by the State, the verdict would have been the same. Accordingly, we find that no reversible error resulted from the State's closing argument. Because no error occurred at trial, there can be no plain error. *Alvidrez*, 2014 IL App (1st) 121740, ¶ 25 ("There can be no plain error if there was no error at all \*\*\*. [Citation.]") (Internal quotation marks omitted).

¶ 43 Regardless, defendant is unable to satisfy his burden of persuasion as to either prong of the plain-error rule. As to the first prong, as discussed above, the evidence in this case is not closely balanced. The jury's verdict could not have resulted from the prosecutor's remarks

rather than the evidence, which was uncontroverted. *Marshall*, 2013 IL App (5th) 110430, ¶ 12. As to the second prong, our supreme court has “equated the second prong of plain-error review with structural error.” *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). A structural error for purposes of plain-error review is “a systemic error which serves to erode the integrity of the judicial process and undermine the fairness of the defendant’s trial. [Citations.]” (Internal quotation marks omitted.) *Id.* at 613-14. “In other words, an error is typically designated as structural only if it necessarily renders a criminal trial fundamentally unfair or an unreliable means of determining guilt or innocence. [Citation.]” (Internal quotation marks omitted.) *People v. Cosmano*, 2011 IL App (1st) 101196, ¶ 78 (citing *Thompson*, 238 Ill. 2d at 609).

¶ 44 Defendant cannot meet his burden of persuasion that the prosecutor’s remarks were a structural error.

“Structural errors have been recognized in only a limited class of cases including: a complete denial of counsel; trial before a biased judge; racial discrimination in the selection of a grand jury; denial of self-representation at trial; denial of a public trial; and a defective reasonable doubt instruction. [Citation.] Error in closing argument does not fall into the type of error recognized as structural.” *Cosmano*, 2011 IL App (1st) 101196, ¶ 78.

¶ 45 Even if we were to find error in the State’s closing argument, which we do not because the complained-of comments did not result in substantial prejudice (*Supra* ¶ 36), defendant

would not be able to establish plain error under the second prong of the plain-error rule. For all of the foregoing reasons, defendant's argument he is entitled to a new trial based on the State's comments during closing argument must fail.

¶ 46

### 3. Exclusive Juvenile Jurisdiction

¶ 47 Finally, defendant argues that section 5-120 of the Juvenile Court Act (705 ILCS 405/5-120 (West 2010)) (the exclusive jurisdiction provision) violates the prohibition on cruel and unusual punishment in the United States and Illinois constitutions and his right to substantive and procedural due process because it treats all 17-year-old accused felons as adults without consideration of their individual youthfulness and attendant circumstances. Defendant relies on recent decisions by the United States Supreme Court in *Miller v. Alabama*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 2455 (2012), *J.D.B. v. North Carolina*, \_\_\_ U.S. \_\_\_, 131 S. Ct. 2394 (2011), *Graham v. Florida*, 560 U.S. 48 (2010), and *Roper v. Simmons*, 543 U.S. 551 (2005). The holding in the most recent decision, *Miller*, was that a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders violates the eighth amendment (*Miller*, 132 S. Ct. at 2469) because the Court has made clear "a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles" (*id.* at 2475). The broader rationale underlying these decisions (and it is this rationale, not the express holdings of the decisions, on which defendant relies) is that "[a]n offender's age \*\*\* is relevant to the Eighth Amendment, and so criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed. [Citation.]" (Internal quotation marks omitted.) *Miller*, 132 S. Ct. at 2466 (citing *Graham*, 130 S. Ct. at 2031).

¶ 48 The State responds defendant’s argument is simply a repackaging of previous constitutional attacks on the automatic transfer provision of the Juvenile Court Act (705 ILCS 405/5-130 (West 2010)) and that the court has consistently, repeatedly, and unequivocally rejected those claims both under the eighth amendment and as a matter of substantive and procedural due process. Defendant does not contest the State’s assertion that whether talking about the automatic transfer provision or the exclusive jurisdiction provision the question is the same: does a statutory scheme that automatically treats some juveniles as adults for certain offenses pass constitutional muster. Thus, we accept that as the question raised for purposes of resolving defendant’s appeal.

¶ 49 On that question, defendant “acknowledges that multiple districts of the Appellate Court have held that the transfer provisions are not penal statutes” subject to eighth amendment analysis but “respectfully contends that these cases were wrongly decided” because they did not give full consideration to the practical punitive effect of transferring a juvenile to adult court. Defendant argues the effect is to subject the juvenile to a substantially harsher sentencing range with the purpose of doing so being to punish the juvenile. On the question of whether automatically subjecting certain minors to adult sentencing violates substantive or procedural due process, defendant argues that since previous decisions held to the contrary, the United States Supreme Court has held that juveniles have a substantive and procedural due process right to be sentenced based on their individual, youthful culpability.

¶ 50 Recently our supreme court addressed a claim that the mandatory transfer provision of the Juvenile Court Act (705 ILCS 405/5-130 (West 2008)) violates the federal and state due process clauses (U.S. Const., amends. V, XIV; Ill. Const. 1970, art. I, § 2), the cruel and

unusual punishment clause of the eight amendment (U.S. Const., amend. VIII) and the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11) because those “provisions purportedly do not take into account the inherent differences between juveniles and adults, including juveniles’ reduced culpability and greater ability to change.” *People v. Patterson*, 2014 IL 115102, ¶ 89.

¶ 51 The *Patterson* court rejected the defendant’s due process claim. *Patterson*, 2014 IL 115102, ¶ 93. The court specifically addressed the defendant’s argument that the court’s earlier decisions in this area were no longer valid in light of *Roper*, *Graham*, and *Miller*. *Id.* ¶ 96. The court rejected the defendant’s argument for two reasons. First, the court rejected the defendant’s reliance on the Supreme Court’s eighth amendment case law to support his procedural and substantive due process claims. *Id.* ¶ 97. Second, the court found that it had recently examined the effects of the Supreme Court’s analyses in *Roper*, *Graham*, and *Miller* in *People v. Davis*, 2014 IL 115595, ¶ 30. *Id.* ¶ 98. The *Davis* court previously held that *res judicata* precluded reconsideration of whether imposing a sentence of natural life imprisonment on a 14-year-old violated due process (*id.* ¶ 98), and with regard to the due process claim in *Patterson*, the court held it found “no more persuasive basis here to reconsider our decision to uphold the transfer statute in the face of a due process challenge.” *Patterson*, 2014 IL 115102, ¶ 98. The court also reiterated that “access to juvenile courts is not a constitutional right because the Illinois juvenile justice system is a creature of legislation.” *Patterson*, 2014 IL 115102, ¶ 104.

¶ 52 Regarding the cruel and unusual punishment claim, in *Patterson*, similar to this case but relying on “*ex post facto* cases,” the defendant argued that the transfer statute was punitive

rather than procedural “because [it] ultimately resulted in the imposition of harsher sentences on juveniles.” *Patterson*, 2014 IL 115102, ¶ 102. Our supreme court rejected the defendant’s reliance on *ex post facto* law but also held that “[e]ven if we accept the assertion that a juvenile who is convicted in criminal court is always subject to a lengthier sentencing range and harsher prison conditions than if he had been adjudicated in juvenile court, defendant cites nothing that can covert a purely procedural statute into a punitive one.” *Id.* ¶ 104. The court held that because the transfer statute had a legitimate procedural purpose it would not now be construed as punitive. *Id.* ¶ 105 (quoting *People v. M.A.*, 124 Ill. 2d 135, 146 (1988) (“The differences in treatment created by the statute in question is not in the penalty provided for different offenses.”) (Internal quotation marks omitted.)). Rather, with the transfer statute, “the legislature has reasonably deemed criminal court to be the proper trial setting for a limited group of older juveniles charged with at least one of five serious named felonies.” *Id.* ¶ 105.

“The mere possibility that a defendant may receive a potentially harsher sentence if he is convicted in criminal court logically cannot change the underlying nature of a statute delineating the legislature’s determination that criminal court is the most appropriate trial setting in his case.” *Id.*

¶ 53 Our supreme court held that “in the absence of actual punishment imposed by the transfer statute, defendant’s eighth amendment challenge cannot stand. [Citations.]” *Id.* ¶ 106. This case demands the same outcome. This case differs slightly from *Patterson* only in that under the transfer provision the legislature deemed “five serious named felonies” worthy

of adjudication in criminal court when committed by a minor, whereas under the exclusive jurisdiction provision, the legislature determined that “the proper trial setting” for any felony committed by a minor who has reached his or her 17th birthday is the criminal court. The legislature could reasonably determine that doing so was necessary to protect the public from the most dangerous juvenile offenders. We will follow the recent lead of our supreme court and will not “second-guess the validity of the legislature’s judgment” with regard to the exclusive jurisdiction provision even in light of *Miller and Graham*. See *Patterson*, 2014 IL 115102, ¶ 105.

¶ 54 Like the transfer statute, the provision at issue here “does not impose any punishment on the juvenile defendant, but rather it only provides a mechanism for determining where defendant's case is to be tried, *i.e.*, it provides for the forum in which his guilt may be adjudicated.” *People v. Salas*, 2011 IL App (1st) 091880, ¶ 66. The statute is reasonably designed to achieve that goal. “The eighth amendment principles and analysis utilized in *Roper* and *Graham* have no application where the statute at issue imposes no punishment and is not subject to the eighth amendment.” *Salas*, 2011 IL App (1st) 091880, ¶ 67. “Because the Illinois proportionate penalties clause is co-extensive with the eighth amendment’s cruel and unusual punishment clause [citation], we also reject defendant’s challenge under our state constitution.” *Patterson*, 2014 IL 115102, ¶ 106. Under existing law defendant’s claim must fail. But see *Patterson*, 2014 IL 115102, ¶ 111.<sup>2</sup>

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<sup>2</sup> “We do, however, share the concern expressed in both the Supreme Court’s recent case law and the dissent in this case over the absence of any judicial discretion in Illinois’s automatic transfer provision. While modern research has recognized the

¶ 55

CONCLUSION

¶ 56 For the foregoing reasons, defendant's convictions and sentences are affirmed.

¶ 57 Affirmed.

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effect that the unique qualities and characteristics of youth may have on juveniles' judgment and actions (see, *e.g.*, *Roper*, 543 U.S. at 569-70), the automatic transfer provision does not. Indeed, the mandatory nature of that statute denies this reality. Accordingly, we strongly urge the General Assembly to review the automatic transfer provision based on the current scientific and sociological evidence indicating a need for the exercise of judicial discretion in determining the appropriate setting for the proceedings in these juvenile cases."