FIRST DIVISION
November 2, 2015

No. 1-13-3300

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. 11 CR 15256
	)	
HAROLD ENGLISH,	)	Honorable
	)	Stanley Sacks,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE LIU delivered the judgment of the court.
Justice Cunningham and Justice Connors concurred in the judgment.

O R D E R

¶ 1 ***Held:*** The State failed to present sufficient evidence to prove defendant delivered a controlled substance within 1,000 feet of a school where a State investigator testified that a building had a sign, reading "Carter Elementary School," but the investigator's observation of the sign occurred 14 months after defendant's crime; cause remanded for resentencing on defendant's remaining conviction for simple delivery of a controlled substance.

¶ 2 Following a bench trial, defendant Harold English was found guilty of delivery of a controlled substance within 1,000 feet of a school and simple delivery of a controlled substance. The trial court sentenced him to 10 years in prison for each conviction, to run concurrent to one

another. On appeal, defendant contends that: (1) the State failed to present sufficient evidence that he delivered narcotics within 1,000 feet of a school that was operating as a school on the date of his crime; and (2) alternatively, his conviction and sentence for simple delivery of a controlled substance must be vacated as violating the one-act, one-crime doctrine. For the reasons that follow, we reverse in part, affirm in part and remand in part.

¶ 3 The State charged defendant with four narcotics-related crimes: (1) delivery of a controlled substance within 1,000 feet of a school; (2) possession of a controlled substance with intent to deliver within 1,000 feet of a school; (3) delivery of a controlled substance; and (4) possession of a controlled substance with intent to deliver.

¶ 4 At trial, Officer Mitchum of the Chicago police department testified he was working as an undercover narcotics officer around noon on August 31, 2011. He drove an unmarked vehicle to an area about a block away from 16 East 57th Street, parked and walked to the sidewalk in front of 16 East 57th Street. There, Mitchum saw defendant talking with various individuals. Mitchum approached defendant, and defendant asked Mitchum what he needed. Mitchum told defendant he needed "some diesel," a street term for heroin. Defendant then walked north toward an alley and disappeared.

¶ 5 After a brief period of time, defendant re-appeared and returned to Mitchum's location. Defendant handed Mitchum two small, clear bags with a "white powder substance" inside, which Mitchum believed to be narcotics. Mitchum handed defendant a $20 bill of "1505 contingency funds," which meant the police had recorded the serial number on the $20 bill in order to keep track of it. Mitchum returned to his vehicle and drove away. A short time later, other officers

informed Mitchum that they arrested defendant at 5701 South State Street. Mitchum drove to the location and identified defendant as the individual who sold him the suspect narcotics. On cross-examination, Mitchum admitted the $20 bill he gave defendant was not recovered.

¶ 6 Officer Carter of the Chicago police department testified he was working as a surveillance officer around noon on August 31, 2011. He observed defendant "flagging down vehicles" near East 57th Street and South State Street. Carter requested an undercover officer attempt to buy narcotics from defendant. Shorty thereafter, Carter witnessed Mitchum approach defendant on the sidewalk at 16 East 57th Street and begin to have a conversation with defendant. Defendant then left the sidewalk and disappeared into an alley briefly. The alley ran north-south and was located just west of South Wabash Avenue. Defendant emerged from the alley, walked back to Mitchum and gave Mitchum "small items" in exchange for money. On cross-examination, Carter admitted he did not see defendant place the money from Mitchum anywhere or give the money to anyone else.

¶ 7 Officer Schmitz of the Chicago police department testified that he arrested defendant in front of a liquor store at the 5701 South State Street. Schmitz searched defendant and recovered "personal property," but not the recorded $20 bill. Based on information from a surveillance officer, Schmitz walked toward an alley. In the alley, he found seven distinct plastic bags containing suspect heroin near a garbage can. Later, after giving defendant his *Miranda* rights, Schmitz questioned defendant. Defendant told Schmitz that "he was just out there trying to make a little money." Defendant further stated that he bought a half a gram of heroin at a time, then "step[ped] on it to make money."

¶ 8 Paul Titus, a former employee of the Illinois State Police crime lab, testified as an expert in forensic science. He received two exhibits in connection with defendant's case. The first exhibit held the items Mitchum received from defendant. The exhibit contained two small plastic bags each with a powdery substance. Titus tested the substance from one of the bags. It weighed 0.2 grams and tested positive for heroin. The second exhibit held the items Schmitz found in the alley. The exhibit contained seven small plastic bags each with a powdery substance. Titus tested the substance from four of the bags. It weighed 1.1 grams and tested positive for heroin.

¶ 9 An investigator from the Cook County State's Attorney's Office testified that on November 2, 2012, he measured the distance from 16 East 57th Street to Carter Elementary School located at 5740 South Michigan Avenue. To the "northwest property line of the school," the distance was 568 feet. The State introduced an aerial "Google map" into evidence, and the investigator indicated on the map where he started and ended his measurement. On cross-examination, the investigator admitted he did not use a plat of survey to determine where the property for the school began. The court asked the investigator whether there was a name on the building that said "Carter School." The investigator answered, "[t]here's a marquis [*sic*] sign on the Michigan [Avenue] side that indicates it's Carter Elementary School."

¶ 10 Defendant moved for a directed verdict, and the court denied his motion.

¶ 11 Defendant testified that around noon on August 31, 2011, he was "[k]icking it with some of [his] friends" in a vacant lot on East 57th Street and South State Street. He was there for only 30 seconds when four "people out there [started] selling narcotics." Defendant admitted to buying narcotics from a man named James Smith for $10. After buying the narcotics, defendant

left and walked to a liquor store. Defendant denied that he sold the narcotics he bought from Smith. He also denied ever seeing Officer Mitchum or selling him narcotics. On cross-examination, he admitted to speaking with the police at the police station but said "they threatened [him]."

¶ 12 Defendant rested his case. In rebuttal, the State sought to admit three of defendant's previous narcotics convictions for impeachment purposes. The court admitted two of the convictions.

¶ 13 After argument, the court found defendant guilty of both delivery of a controlled substance within 1,000 feet of a school and simple delivery of a controlled substance. The court noted that although the recorded $20 bill was not found on defendant, there need not be a transfer of "money in a drug transaction" because the transfer could be for "free or whatever." The court also observed that defendant sold Mitchum the narcotics within 1,000 feet of a school, noting the evidence at trial indicated defendant sold the narcotics only 568 feet from the school. The court stated it was going to merge defendant's conviction for simple delivery a controlled substance into his conviction for delivery of a controlled substance within 1,000 feet of a school. The court acquitted defendant of both counts relating to possession of a controlled substance with intent to deliver because although the officers found narcotics in the alley, no one saw defendant "touch anything in the alley or pick it up or control it in any way whatsoever."

¶ 14 Defendant filed a motion for a new trial, which the court denied. Although the court previously stated it was going to "merge[]" defendant's guilty convictions, the court sentenced defendant, as a Class X offender based on criminal background, to 10 years in prison for each

conviction, to run concurrent to one another. Defendant's mittimus also reflects two concurrent 10-year sentences. This appeal followed.

¶ 15 On appeal, defendant contends that the State failed to present sufficient evidence to prove he delivered a controlled substance within 1,000 feet of a school, which was operating as a school on the date of his crime. Specifically, defendant argues that the school's name alone was not sufficient evidence to infer the building was operating as a school on the date of his crime. The State responds, arguing the undisputed testimony of both the undercover officer and the investigator was sufficient proof defendant delivered a controlled substance within 1,000 feet of a school.

¶ 16 Where a defendant challenges his conviction based upon the sufficiency of the evidence presented against him, we must ask whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could find all the elements of the crime proven beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48 citing *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979). All reasonable inferences must be allowed in favor of the State. *People v. Lloyd*, 2013 IL 113510, ¶ 42. We will not overturn a conviction unless the evidence is "so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt." *Brown*, 2013 IL 114196, ¶ 48. While we must carefully examine the evidence before us, we must give proper deference to the trial court who observed the witnesses testify (*id.*), because it was in the "superior position to assess the credibility of witnesses, resolve inconsistencies, determine the weight to assign the testimony, and draw reasonable inferences therefrom." *People v. Vaughn*, 2011 IL App (1st) 092834, ¶ 24.

¶ 17 Section 401(d) of the Illinois Controlled Substances Act (Act) makes it a crime to deliver less than one gram of a controlled substance. 720 ILCS 570/401(d) (West 2010). A violation of section 401(d) of the Act is a Class 2 felony. *Id.* Section 407(b)(2) of the Act enhances a crime under section 401(d) to a Class 1 felony if the crime occurs "within 1,000 feet of the real property comprising any school." 720 ILCS 570/407(b)(2) (West 2010). The time of day, the day of the week or whether classes were in session when the defendant delivered the controlled substance are irrelevant (720 ILCS 570/407(c) (West 2010)), but the property in question must be a school on the date of the defendant's crime. *People v. Boykin*, 2013 IL App (1st) 112696, ¶ 16. The defendant need not be aware that his delivery was within 1,000 feet of a school. *People v. Daniels*, 307 Ill. App. 3d 917, 927 (1999).

¶ 18 The parties do not dispute any issues with respect to the actual delivery of the controlled substance. Thus, the sole issue on appeal is whether the evidence produced at trial was sufficient to prove beyond a reasonable doubt the crime's enhancement based on the location of the delivery of the controlled substance, *i.e.* within 1,000 feet of a school.

¶ 19 We find instructive *People v. Cadena*, 2013 IL App (2d) 120285 and *People v. Ortiz*, 2012 IL App (2d) 101261, where defendants were convicted of delivering a controlled substance within 1,000 feet of a church, and on appeal, they challenged the sufficiency of the evidence relating to the 1,000 foot-location enhancement.

¶ 20 In *Ortiz*, the defendant sold narcotics to an undercover police officer in Elgin. *Ortiz*, 2012 IL App (2d) 101261, ¶ 4. At trial, an officer who assisted the undercover officer on the case, testified that he measured the distance from the location of the narcotics transaction to the

Emmanuel Baptist Church. *Id.* ¶ 5. The distance was 705 feet. *Id.* The State presented a photograph into evidence of the front of the church, which had a sign that read "Emmanuel Baptist Church, Sunday worship 11:00 a.m. and Sunday school 9:30." *Id.*

¶ 21 On appeal, the Second District framed the issue as whether the building was a church used primarily for religious worship "*on the date of the offense*." (Emphasis in original.) *Id.* ¶ 11. In finding the State failed to meet its burden, the court found:

> "[The officer] did not testify to the date on which he conducted the measurement. In addition, there was no testimony presented to establish when the photographs of the building were taken. No witness testified that the photographs accurately represented the building as it appeared on the date of the offense. We have no way of knowing whether the Emmanuel Baptist Church existed on [the date the defendant committed his crime]. This is a fact that the State could have easily established by eliciting testimony from someone affiliated with the church. It failed to do so." *Id.*

¶ 22 Similarly, in *Cadena*, the police made "controlled purchases" of narcotics from the defendant on multiple dates in Belvidere. *Cadena*, 2013 IL App (2d) 120285, ¶ 3. At trial, a police officer testified that the Evangelical Covenant Church was "860 feet or less" from where the defendant sold the narcotics. *Id.* ¶ 5. Another officer, who performed surveillance for the controlled purchases, testified that the defendant sold narcotics near the church. *Id.* ¶ 6. The State asked the second officer, "is that a church that is an active church?" *Id.* The officer simply responded "[y]es." *Id.* On appeal, the State conceded that although the church was named

Evangelical Covenant Church, its "nomenclature alone" was insufficient evidence to prove the church was active as a church on the dates defendant committed his crimes. *Id.* ¶ 15.

¶ 23 The Second District held that the State presented insufficient evidence to prove defendant delivered narcotics within 1,000 feet of a church for two key reasons. *Id.* ¶¶ 16-18. First, because the State asked the officer whether the church was active in the present tense, it did not prove the church was active when the defendant committed his crimes. *Id.* ¶ 16. Second, even if the court assumed the officer meant the church was active on the date the defendant committed his crimes, the court further reasoned "there was no evidence of *how* [the officer] knew this information." (Emphasis in original.) *Id.* ¶ 17. The court held that case law requires "the demonstration and explanation of how the witness is familiar with the enhancing location (park, school, church, or the like)" not simply an officer's testimony that he has been an officer for a certain period of time. *Id.* The court opined that the State " 'easily' " could have presented testimony from someone with personal knowledge that the church was active on the dates the defendant committed his crimes, such as someone affiliated with the church, a neighbor or an officer familiar with the neighborhood. *Id.* ¶ 18 quoting *Ortiz*, 2012 IL App (2d) 101261, ¶ 11. Without presenting such evidence, "*no* rational trier of fact could have found the enhancement beyond a reasonable doubt." (Emphasis in original.) *Id.* ¶ 18.

¶ 24 The instant case is nearly identical to *Ortiz* and *Cadena*. The State's investigator testified that defendant's transactions occurred 568 feet from the northwest property line of Carter Elementary School. The court then inquired whether there was a name on the building. The investigator answered, "[t]here's a marquis [*sic*] sign on the Michigan [Avenue] side that

indicates it's Carter Elementary School." However, the key fact presented during the investigator's testimony was that his measurement occurred on November 2, 2012, whereas defendant's crime occurred on August 31, 2011. All we know is that on November 2, 2012, the building was identified as Carter Elementary School. We have no evidence in the record to establish what the purpose of the building was on August 31, 2011 or for that matter, whether it even existed. See *Cadena*, 2013 IL App (2d) 120285, ¶ 16; *Ortiz*, 2012 IL App (2d) 101261, ¶ 11; see also *People v. Rodriguez*, 2014 IL App (2d) 130148, ¶¶ 65-68 (finding sufficient evidence to convict a defendant of aggravated discharge of firearm at an occupied building within 1,000 feet of a school where the evidence at trial gave a "temporal context" that the school existed on the date of the defendant's shooting, which was "absent from *Ortiz* and *Cadena*").

¶ 25 The State was required to present more evidence to prove Carter Elementary School was a school on the date of defendant's crime. The State could have elicited testimony from someone affiliated with the school, such as the principal, another administrator, a teacher, or even a neighbor or police officer familiar with the neighborhood. See *Cadena*, 2013 IL App (2d) 120285, ¶ 18; *Ortiz*, 2012 IL App (2d) 101261, ¶ 11. Without specific evidence of the building's use on the date defendant committed his crime, we cannot say, even when viewing the evidence in the light most favorable to the State, that any rational trier of fact could have inferred Carter Elementary School was an active school on the date of defendant's crime beyond a reasonable doubt.

¶ 26 Nevertheless, the State relies on *People v. Sims*, 2014 IL App (4th) 130568 and *People v. Foster*, 354 Ill. App. 3d 564 (2004), to support its position that the marquee sign indicating the property as "Carter Elementary School" was sufficient to prove defendant delivered a controlled substance within 1,000 feet of a school.

¶ 27 In *Foster*, an officer observed the defendant selling narcotics at 4310 West Crystal Street in Chicago. *Foster*, 354 Ill. App. 3d at 565-66. The parties stipulated that if a man was called as a witness, he would have testified that he measured the distance from 4310 West Crystal Street to 4255 West Division Street where the New Hope Church was located, and the distance was 580 feet. *Id.* at 566. The First District found that because the structure "was by name a 'church,' " a rational trier of fact could have inferred the New Hope Church was used primarily for religious purposes solely because of its proper name, thus providing sufficient evidence that the defendant delivered narcotics within 1,000 feet of a church. *Id.* at 568.

¶ 28 However, in *Foster*, the stipulation did not indicate when the distance was measured. *Id.* at 566. Here, the investigator measured the distance and saw the school's name on the marquee approximately 14 months after defendant's crime. Although under *Foster*, there may have been sufficient evidence to prove Carter Elementary School was a school on the date the investigator observed the school's name on the marquee, this observation tells us nothing about the building's use 14 months prior. This lapse in time is critical. Accordingly, the State's reliance on *Foster* is inapt.

¶ 29 *Sims* likewise does not help the State's case. There, the Fourth District found sufficient evidence to prove that a defendant delivered narcotics within 1,000 feet of a church in

Bloomington based upon an officer's testimony. *Sims*, 2014 IL App (4th) 130568, ¶ 138. The officer testified that there was an active church only 696 feet away from the location the defendant sold narcotics on the date he committed his crime. *Id.* ¶¶ 66, 70. The officer also testified that he had worked as a police officer in Bloomington for the past 10 years, including the last 5 ½ years as a narcotics officer. *Id.* ¶¶ 51, 66. Additionally, the officer indicated he was familiar with the neighborhood where the church was located. *Id.* ¶ 66. Unlike *Sims*, in the instant case, there was no testimony from anyone that the school was active on the day defendant committed his crime or testimony from anyone familiar with the neighborhood where Carter Elementary School was located.

¶ 30 Accordingly, we reverse defendant's conviction for delivery of a controlled substance within 1,000 feet of a school. However, because defendant does not challenge any element of his conviction for simple delivery of a controlled substance, we affirm that conviction. Although the court indicated it was merging defendant's two convictions, it sentenced him to concurrent 10-year prison terms for both convictions as a Class X offender based on his criminal background. See 730 ILCS 5/5-4.5-95(b) (West 2010). In fact, either of defendant's convictions for delivery of a controlled substance alone, whether simple delivery (720 ILCS 570/401(d) (West 2010)), or within 1,000 feet of a school (720 ILCS 570/407(b)(2) (West 2010)), would have mandated his sentencing as a Class X offender because they were both Class 2 felonies or greater. Therefore, defendant's 10-year sentence for simple delivery of a controlled substance was within the statutory sentencing range. See 730 ILCS 5/5-4.5-25(a) (West 2010); *People v. Willis*, 409 Ill. App. 3d 804, 814-15 (2011) (stating a defendant sentenced as a Class X offender based on

criminal background shall be sentenced to between 6 and 30 years in prison). However, because we are reversing defendant's more serious conviction and the record is unclear how the more serious conviction impacted defendant's sentence on the less serious conviction, defendant is entitled to a new sentencing hearing on the less serious conviction. See *People v. Durdin*, 312 Ill. App. 3d 4, 9-10 (2000). Accordingly, we remand for resentencing on his remaining conviction.

¶ 31 Because we have reversed defendant's conviction for delivery of a controlled substance within 1,000 feet of a school, we need not address defendant's remaining contention concerning the trial court's violation of the one-act, one-crime doctrine.

¶ 32 For the foregoing reasons, we reverse defendant's conviction for delivery of a controlled substance within 1,000 feet of a school. We affirm the judgment of the circuit court of Cook County finding defendant guilty of simple delivery of a controlled substance and remand for resentencing on that conviction alone.

¶ 33 Reversed in part; affirmed in part; remanded in part.