NOTICE
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2015 IL App (5th) 130057-U

NO. 5-13-0057

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Saline County. |
| | ) | |
| v. | ) | No. 09-CF-333 |
| | ) | |
| RAJAH H. PEACOCK, | ) | Honorable |
| | ) | Walden E. Morris, |
| Defendant-Appellant. | ) | Judge, presiding. |

JUSTICE CHAPMAN delivered the judgment of the court.
Presiding Justice Cates specially concurred.
Justice Welch dissented.

**ORDER**

¶ 1 *Held*: Evidence was not sufficient to prove beyond a reasonable doubt that the defendant sold cocaine within 1,000 feet of a church where there was no testimony regarding the use of the building on the date of the offense.

¶ 2 The defendant, Rajah H. Peacock, appeals his conviction for unlawful delivery of cocaine within 1,000 feet of a church (720 ILCS 570/407(b)(2) (West 2008)). He argues that the evidence was insufficient to prove beyond a reasonable doubt that the offense took place within 1,000 feet of a church where the distance between his home (where the offense took place) and the Apostolic Church of God was measured subsequent to the date of the offense and there was no testimony regarding the use of the building on the

date of the offense. We reverse and remand with directions.

¶ 3 This appeal involves a provision of the Illinois Controlled Substances Act (Controlled Substances Act) that enhances the sentence available for a drug offense if the offense occurs within 1,000 feet of certain locations, including schools, public parks, or any "real property comprising any church, synagogue, or other building *** or place used primarily for religious worship." 720 ILCS 570/407(b)(2) (West 2008). This enhancing provision is applicable only if the State can prove beyond a reasonable doubt that the enhancing location was used for that purpose on the date in question. *People v. Sims*, 2014 IL App (4th) 130568, ¶ 106.

¶ 4 The charge involved in this appeal stems from a June 2008 investigation involving a controlled drug buy. At that time, Officer Glen Rountree was employed by the Illinois State Police and was a member of a drug task force. The task force investigated both state and federal drug cases throughout southern Illinois, including all areas south of Effingham. Julie Shotts, the informant involved in the investigation, was paid by police to make controlled drug buys.

¶ 5 On June 3, 2008, Shotts informed Rountree that she had arranged to buy cocaine from a dealer named Matthew Wagner, who would be passing through Harrisburg later that day. However, Wagner later told Shotts that he would not be in Harrisburg at the arranged time. He suggested that she instead buy cocaine from the defendant or a dealer known as "Turtle." Shotts, Rountree, and other officers set up a controlled buy from the defendant. That transaction took place at the defendant's home later that afternoon.

¶ 6 In September 2009, the defendant was indicted on one count of unlawful delivery

of cocaine within 1,000 feet of a church. See 720 ILCS 570/407(b)(2) (West 2008). In this appeal, the defendant does not contend that the evidence was insufficient to prove him guilty of unlawful delivery; he challenges only the sufficiency of the evidence to prove that the offense occurred within 1,000 feet of a church for purposes of the enhancement. As such, we will discuss only the evidence related to that question.

¶ 7 At trial, Officer Rountree testified that he had been an inspector with the Illinois State Police for approximately six years. He further testified that he had been a task force agent for approximately two years. After Officer Rountree testified about the controlled buy, the prosecutor asked, "Now, did you have the chance later on during this investigation to do some measurements here in Harrisburg?" Officer Rountree replied, "Yes, sir, I did." He then testified that he measured the distance "from the corner of Mr. Peacock's residence, the actual corner of the building, to the Apostolic Church of God, which is located to the southeast of his residence." Rountree explained that he made this measurement using a measuring wheel, a tool used by surveyors and police to measure distances. He further explained that the reason for taking this measurement was "to determine if the church was within 1,000 feet of the residence." Asked what the distance was "on this particular day when you made the measurement," he stated that the distance was 786 feet. Officer Rountree was not asked when he measured this distance. However, the presentence investigation report indicates that he took the measurement on August 19, 2009.

¶ 8 The jury returned a verdict of guilty, and the court subsequently sentenced the defendant to 12 years in prison and ordered him to pay various fines, including a drug

assessment fine and a street value fine. The defendant filed an appeal, arguing that (1) the court erred in failing to conduct an inquiry into *pro se* claims of ineffective assistance of counsel, which he raised in letters that he sent to the court between trial and sentencing; and (2) the mittimus needed to be amended to reflect a $5-per-day credit against his fines for time spent in custody prior to sentencing. This court remanded the matter to the trial court to allow the court to conduct an inquiry into the defendant's allegations of ineffective assistance (see *People v. Krankel*, 102 Ill. 2d 181 (1984)) and amend the mittimus to reflect the $5-per-day credit (see 725 ILCS 5/110-14 (West 2008)). See *People v. Peacock*, 2012 IL App (5th) 100055-U, ¶ 29.

¶ 9 On remand, the trial court held a hearing to consider the defendant's claims of ineffective assistance, and found them to be without merit. The defendant then filed the instant appeal. He does not challenge the court's findings related to his claims of ineffective assistance of counsel; he contends only that the evidence was not sufficient to prove that he delivered cocaine within 1,000 feet of a church. The defendant acknowledges that he has not previously raised this contention in these proceedings. However, as he correctly points out, a challenge to the sufficiency of the evidence is an exception to the forfeiture rule. *People v. Hall*, 194 Ill. App. 3d 532, 535 (1990). We will therefore turn now to the merits of this contention.

¶ 10 In considering a challenge to the sufficiency of the evidence, it is not this court's function to retry the defendant or reweigh the evidence. Rather, we view the evidence in the light most favorable to the prosecution and determine whether any reasonable trier of fact could have found all of the essential elements of the offense beyond a reasonable

doubt. *People v. Boykin*, 2013 IL App (1st) 112696, ¶ 6. In order to prove a defendant guilty of unlawful delivery of a controlled substance within 1,000 feet of a church or other enhancing location under section 407(b)(2) of the Controlled Substances Act, the State must prove beyond a reasonable doubt that the offense was committed within 1,000 feet of a church, park, school, or other location. To meet its burden in this case, the State was required to prove that the building was used primarily for religious worship on the date the offense occurred. *Sims*, 2014 IL App (4th) 130568, ¶ 106; *People v. Ortiz*, 2012 IL App (2d) 101261, ¶ 11. The defendant argues that the State failed to meet this burden because it offered no evidence at all regarding use of the building on the date of the offense–June 3, 2008. We agree.

¶ 11 In making this argument, the defendant relies heavily on *People v. Ortiz*, 2012 IL App (2d) 101261. There, as here, the defendant was charged with unlawful delivery of a controlled substance within 1,000 feet of a church. *Ortiz*, 2012 IL App (2d) 101261, ¶ 3. The investigating officer testified that he measured the distance between the drug transaction at issue and a building known as the Emmanuel Baptist Church. He further testified that the distance was 705 feet. *Ortiz*, 2012 IL App (2d) 101261, ¶ 5. However, the officer did not testify to the date on which he measured this distance. *Ortiz*, 2012 IL App (2d) 101261, ¶ 11. In addition, although the State offered into evidence photographs showing the Emmanuel Baptist Church, the State offered no testimony as to when the photographs were taken or whether they "accurately represented the building as it appeared on the date of the offense." *Ortiz*, 2012 IL App (2d) 101261, ¶ 11.

¶ 12 In finding this evidence insufficient, the Second District emphasized that the issue

before it was "not simply whether the evidence established beyond a reasonable doubt that the building *** was a 'church *** or other building *** used primarily for religious worship.' " *Ortiz*, 2012 IL App (2d) 101261, ¶ 11 (quoting 720 ILCS 570/407(b)(1) (West 2008)). Rather, the court explained, the question was "whether the evidence established beyond a reasonable doubt that the building was such a building *on the date of the offense*." (Emphasis in original.) *Ortiz*, 2012 IL App (2d) 101261, ¶ 11. Without any such evidence, the court found, there was "no way of knowing whether the Emmanuel Baptist Church existed on [the date of the offense]." *Ortiz*, 2012 IL App (2d) 101261, ¶ 11. Here, likewise, there was no evidence whatsoever related to the existence or use of the building known in August 2009 as the Apostolic Church of God on the date of the offense, June 3, 2008.

¶ 13 The State calls our attention to *People v. Foster*, 354 Ill. App. 3d 564 (2004). There, a police officer testified at the defendant's bench trial that he observed the defendant selling a white, rock-like substance. *Foster*, 354 Ill. App. 3d at 565-66. The substance was later tested and found to contain cocaine. *Foster*, 354 Ill. App. 3d at 566. The parties stipulated that another officer, if called as a witness, would testify that he measured the distance between the site of the offense and the New Hope Church and found that distance to be 580 feet. *Foster*, 354 Ill. App. 3d at 566. The court found the defendant guilty of unlawful delivery of a controlled substance within 1,000 feet of a church. *Foster*, 354 Ill. App. 3d at 567.

¶ 14 On appeal, the defendant argued that the State's evidence was insufficient to prove beyond a reasonable doubt that the transaction took place with 1,000 feet of a church

because the State provided no evidence to show that the New Hope Church was used primarily for worship. *Foster*, 354 Ill. App. 3d at 567. In so arguing, the defendant in *Foster* relied on *People v. Sparks*, a case in which the question before the court was whether a Salvation Army building was a "church" within the meaning of the statute. *Foster*, 354 Ill. App. 3d at 567-68 (citing *People v. Sparks*, 335 Ill. App. 3d 249, 256 (2002)). In answering that question in the affirmative, the *Sparks* court found that the legislature intended the statute to apply to a building used primarily for worship, regardless of whether the name of the building contained the word "church." *Foster*, 354 Ill. App. 3d at 568 (citing *Sparks*, 335 Ill. App. 3d at 256). Instead, the *Sparks* court emphasized, the " 'focus must be on the manner in which the place is used.' " *Foster*, 354 Ill. App. 3d at 568 (quoting *Sparks*, 335 Ill. App. 3d at 256).

¶ 15 The *Sparks* court then went on to consider whether the evidence established that the Salvation Army building was used primarily for religious purposes despite not being called a church. See *Sparks*, 335 Ill. App. 3d at 256-57. By contrast, the *Foster* court found such an analysis unnecessary, explaining, "Unlike *Sparks*, the structure here was by name a 'church.' " *Foster*, 354 Ill. App. 3d at 568. As such, the court explained, "a rational trier of fact could have inferred [that] New Hope Church was a church used primarily for religious worship based on its name." *Foster*, 354 Ill. App. 3d at 568.

¶ 16 The State urges us to follow *Foster*. However, we find *Foster* inapposite because it does not answer what we consider to be the crucial question in this case–that is, whether the building at issue was a church on the date of the offense. The *Foster* court was not called upon to resolve this question. For this reason, we find the State's

argument unpersuasive.

¶ 17 There is a split of authority among the districts of the Illinois Appellate Court concerning whether the name alone is sufficient to support an inference that the building in question was used as a church. See *Sims*, 2014 IL App (4th) 130568, ¶¶ 130-132 (setting forth the parties' arguments addressing this question); *People v. Cadena*, 2013 IL App (2d) 120285, ¶ 15 & n.1 (noting an "apparent discrepancy" between *Sparks* and *Foster* on this question, and declining to resolve that discrepancy in light of the State's concession in that case that the name alone was not sufficient). We need not resolve that question. For purposes of this appeal, we may assume the name "Apostolic Church of God" is sufficient to allow the jury to reasonably infer that the building was used primarily for religious purposes on the date Officer Rountree measured the distance. However, Officer Rountree did *not* testify that the building was called that on the date of the offense, nor did the State present any other evidence regarding the building's use on that date.

¶ 18 The State also points to *People v. Sims*. We find *Sims* distinguishable. There, one of the investigating officers testified that he was familiar with the neighborhood in which the defendant lived, where the drug transaction at issue occurred. *Sims*, 2014 IL App (4th) 130568, ¶ 66. He testified that a church called Joyful Gospel Church had been in the defendant's neighborhood for as long as the officer could remember. He further testified that he had been a police officer in Bloomington for 10 years. *Sims*, 2014 IL App (4th) 130568, ¶ 66. The officer also specifically testified that the building was a church on the date the offense took place. *Sims*, 2014 IL App (4th) 130568, ¶ 66. In

addition, the State offered into evidence a photograph of the church, and the officer testified that the photograph accurately represented the way the church appeared on the date of the offense. *Sims*, 2014 IL App (4th) 130568, ¶¶ 66-67. On appeal, the defendant argued that this evidence was insufficient because the officer did not explain how he knew that the building was a church on the date of the offense. *Sims*, 2014 IL App (4th) 130568, ¶ 132.

¶ 19 In rejecting the defendant's contention, the Fourth District first noted that in an appeal challenging the sufficiency of the evidence, courts "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 (citing *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004)). The court cautioned that "[t]he line between a reasonable inference and speculation can be difficult to locate." *Sims*, 2014 IL App (4th) 130568, ¶ 138.

¶ 20 In determining whether the evidence in the record supported an inference that the testifying officer had sufficient personal knowledge to testify that the building was used as a church on the relevant date, the *Sims* court emphasized the fact that he had been a police officer in Bloomington for 10 years and the fact that he had been assigned to the narcotics unit for the past 5½ years. *Sims*, 2014 IL App (4th) 130568, ¶ 134. The court noted that a narcotics officer's work necessarily entailed "spending a lot of time on the streets, doing controlled purchases and surveillance and keeping an eye on neighborhoods." *Sims*, 2014 IL App (4th) 130568, ¶ 138. As such, the court explained, "[h]ow or whether buildings are used would seem to be of particular interest" to a

narcotics officer. *Sims*, 2014 IL App (4th) 130568, ¶ 138. Thus, under the facts presented, the court found that it was reasonable to infer that the testifying officer had sufficient knowledge to be able to state that the building was an active church on the date in question. *Sims*, 2014 IL App (4th) 130568, ¶ 138.

¶ 21 Similarly, in *People v. Morgan*, 301 Ill. App. 3d 1026 (1998), a Waukegan police officer testified that he was conducting surveillance in the vicinity of Bedrosian Park when he witnessed the offense approximately 15 to 18 feet from the park. *Morgan*, 301 Ill. App. 3d at 1028. The officer testified that Bedrosian Park was open to the public and contained playground equipment and at least one basketball court. He further testified that he had participated in over 100 arrests in the park for drug-related offenses. *Morgan*, 301 Ill. App. 3d at 1028. On appeal, the defendant argued that this testimony was not sufficient to prove beyond a reasonable doubt that Bedrosian Park was a public park. *Morgan*, 301 Ill. App. 3d at 1031. In rejecting this contention, the Second District noted that the officer was a 10-year veteran of the local police department who testified that he was familiar with the park. *Morgan*, 301 Ill. App. 3d at 1031-32. In addition, the court explained that "[i]t is generally understood that persons living and working in the community are familiar with various public places in the neighborhood." *Morgan*, 301 Ill. App. 3d at 1032.

¶ 22 Here, by contrast, Officer Rountree was a State Police officer and a member of a federal drug task force. He was not a local police officer, and he did not testify that he lived or regularly patrolled in Harrisburg. It is reasonable to infer that an officer who has worked for many years in a local community is familiar enough with that community to

know that a building in the community was used as a church on a specific date, particularly when that officer specifically testifies that he is familiar with the neighborhood as the officers testified in *Sims* and *Morgan*. It is far less reasonable to make the same type of inference from the evidence before us in this case. Proof beyond a reasonable doubt requires at least *some* evidence that the officer has personal knowledge regarding the use of the building on the date of the offense. See *Boykin*, 2013 IL App (1st) 112696, ¶ 15 (finding the evidence insufficient where officers "did not testify that they lived in the area or that they regularly patrolled the neighborhood, so as to allow an inference that they had personal knowledge as to whether the school was in operation on the date of the offense"); *Cadena*, 2013 IL App (2d) 120285, ¶ 18 (noting that "[e]ven a neighbor, or a police officer who testified to being familiar with the church from having regularly patrolled the neighborhood, would have sufficient personal knowledge").

¶ 23 Moreover, unlike the officers in *Sims* and *Morgan*, Officer Rountree offered no testimony regarding the use of the building on the date in question. As such, even assuming Officer Rountree was sufficiently familiar with the defendant's neighborhood to know whether the Apostolic Church of God was in existence and operating as a church on the relevant date, there was simply no evidence from which the jury could draw any reasonable inferences regarding the use of the building on the date of the offense. See *Cadena*, 2013 IL App (2d) 120285, ¶16 (finding the evidence insufficient where an officer's testimony was "without temporal context"). We thus conclude that the State failed to prove this critical element beyond a reasonable doubt.

¶ 24 For the foregoing reasons, we reduce the defendant's conviction to unlawful

delivery pursuant to our authority under Illinois Supreme Court Rule 366(a) (eff. Feb. 1, 1994), and we remand for resentencing.

¶ 25 Reversed and remanded.

¶ 26 PRESIDING JUSTICE CATES, specially concurring.

¶ 27 I feel compelled to write this special concurrence because my distinguished colleague, in his dissent, maintains that merely placing into evidence the name on the front of a building, such as a church, is sufficient proof, beyond a reasonable doubt, that the building was a church and was used "primarily as a place of worship" on the date of the offense. I cannot agree with that premise and concur with Justice Chapman.

¶ 28 The dissent relies on *People v. Sims*, 2014 IL App (4th) 130568, ¶¶ 130-32. According to the dissent, the *Sims* court determined that the evidence, when viewed in the light most favorable to the State, was sufficient to allow the jury to conclude that the name on the building alone, "New Hope Church", was a church used primarily for religious worship at the time of the offense. The *Sims* opinion cannot, however, be read so narrowly. The court did not really stop there. *Sims* went on to say that the witness who testified regarding the use of the building had been a police officer in the city where the church was located for 10 years, that the building had been a church for as long as he could remember, and the State even introduced a photo of the building taken on the date of the offense. The officer related that he was aware when the church changed its name and was able to state, affirmatively, that the church was open on the date of the offense.

Thus, the *Sims* court went well beyond just a name, and discussed, extensively, the facts upon which the jury could infer that the building was used primarily as a place of worship on the date of the offense. *Sims*, 2014 IL App (4th) 130568, ¶¶ 130-38.

¶ 29 In the case before us, on some date later than the commission of the offense, an officer measured the distance from the defendant's residence to the corner of a building that had a sign indicating it was the "Apostolic Church of God," and then testified the building was located within 1,000 feet of the defendant's residence. This was the only proof offered. The prosecution did not offer any evidence from the State Police officer that he lived or worked regularly in the community, or was familiar with the various places in the neighborhood. The officer did not go into the building to determine if, within the walls of that structure, there existed a place used primarily for worship, as the statute requires. In my view, nomenclature, alone, is not enough. After all, what's in a name? It has no meaning without the presence of a heart and soul which gives it life. For a church, the building must be full of people who join together in fellowship and worship, with hope and faith. This joining of community is what gives life inside the walls of a church. It is the people who fill that structure that remind us that a name, alone, is meaningless. As Juliet argued with Romeo, "[w]hat's in a name? [T]hat which we call a rose by any other name would smell as sweet." In other words, we must look inside to see the real meaning of what is behind those four walls. The life of the church is inside with the passionate souls who worship there, not hanging on a sign outside. The State failed to prove beyond a reasonable doubt that the offense took place within 1,000 feet of a church. For these reasons and those stated in Justice Chapman's decision, I concur.

¶ 30 JUSTICE WELCH, dissenting.

¶ 31 I respectfully dissent from the opinion of my distinguished colleagues.

¶ 32 The majority states that Illinois State Police Officer Rountree did not testify that the building was called the Apostolic Church of God on the date of the offense, nor did the State present any evidence regarding the building's use on that date. I disagree.

¶ 33 First, on September 9, 2009, Officer Rountree testified that the place of worship, the Apostolic Church of God, was within 1,000 feet from the defendant's residence when discussing the events of June 3, 2008, the date of the offense.

¶ 34 Specifically, Officer Rountree testified on direct examination to the following:

"ATTORNEY: I'd like to then direct your attention to June 3rd of 2008.

* * *

ATTORNEY: And the residence of 322 McIlrath, is that within 1,000 feet of a place of worship?

OFFICER ROUNTREE: Yes, sir, it is.

ATTORNEY: And is that the Apostolic Church of God?

OFFICER ROUNTREE: Yes, sir. That's correct."

¶ 35 Second, I believe nomenclature, alone, is enough to prove, beyond a reasonable doubt, that the Apostolic Church of God was a building used primarily as a place of worship. See *People v. Sims*, 2014 IL App (4th) 130568, ¶¶ 130-32. Therefore, it is not necessary, as the majority asserts, that the State provide other evidence regarding the building's use on the date of the offense.

¶ 36 In interpreting the vagueness of section 407(b)(2) of the Controlled Substances

Act, I believe, in this circumstance, it is only necessary to prove, first, that the building was in fact a church, and second, that the offense occurred within 1,000 feet of the church. Here, both have been met.

¶ 37 For the foregoing reasons, I would affirm the judgment of the circuit court.