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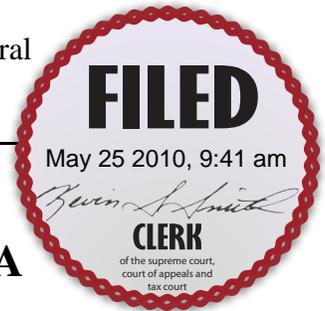
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**IN THE
COURT OF APPEALS OF INDIANA**

RICHARD SAUNDERS,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 54A01-0911-CR-554

APPEAL FROM THE MONTGOMERY CIRCUIT COURT
The Honorable Thomas K. Milligan, Judge
Cause No. 54C01-0905-FA-68

May 25, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant Richard Saunders appeals his conviction for Dealing in a Schedule II Controlled Substance, as a Class A felony.¹ We affirm.

Issues

Saunders raises two issues on appeal:

- I. Whether the State rebutted his statutory defense concerning the enhancement element based on the location of the offense; and
- II. Whether there was sufficient evidence to support his conviction in light of his claimed alibi.

Facts and Procedural History

In March of 2009, T.T. was working as a confidential informant for police in Montgomery County. T.T. arranged to buy OxyContin pills from Saunders. The two agreed to four forty-milligram pills in exchange for \$210. Prior to the time he was to meet Saunders, T.T. met with Detective Mike Norman, who searched T.T. and his car for contraband. Detective Norman then set up a recording device for T.T. to wear and provided T.T. with \$200. While driving to the location selected by Saunders, T.T. received instructions from Saunders changing the location to a particular apartment complex in Crawfordsville.

With Detective Norman maintaining visual contact, T.T. pulled his truck into the apartment complex parking lot at approximately 2:17 p.m., and Saunders walked out of an apartment. At the time, Saunders was talking on a cell phone, commenting that he was taking care of his babies that were sick and that they were crying and fussing. Saunders

¹ Ind. Code § 35-48-4-2(b)(2).

climbed into T.T.'s truck and took out a cellophane wrapper that contained four OxyContin pills. T.T. gave him \$200 but Saunders said that he needed \$210 as they had agreed. T.T. told Saunders that he would go to the bank to obtain the ten dollars and return. T.T. actually met with Detective Norman to obtain ten dollars and then returned to the apartment complex. When T.T. returned to the apartment complex, Saunders again exited the same apartment and entered his truck. They then exchanged the money and OxyContin.

On May 21, 2009, the State charged Saunders with Dealing in a Schedule II Controlled Substance, as a Class A felony. After a jury trial, Saunders was found guilty as charged. Saunders filed a Motion to Correct Error, contending that the State did not rebut his defense that he was only briefly within 1000 feet of the apartment complex and that no children were within the vicinity at the time of the offense. The trial court denied the motion and sentenced Saunders to twenty-five years imprisonment with five years suspended to community corrections.

Saunders now appeals.

Discussion and Decision

I. Statutory Defense

On appeal, Saunders asserts that the State did not sufficiently rebut the evidence supporting his defense pursuant to Indiana Code Section 35-48-4-16(b). The offense of Dealing in a Schedule II Controlled Substance is classified as a Class B felony but is elevated to a Class A felony if it is committed in certain locations, including within one thousand feet of a family housing complex. See Ind. Code 35-48-4-2. Indiana Code Section 35-48-4-16(b)

provides in relevant part:

It is a defense for a person charged under this chapter . . . that:

(1) a person was briefly in, on, or within one thousand (1,000) feet of school property, a public park, a family housing complex, or a youth program center; and

(2) no person under eighteen (18) years of age at least three (3) years junior to the person was in, on, or within one thousand (1,000) feet of the school property, public park, family housing complex, or youth program center at the time of the offense.

If a defendant presents evidence supporting both prongs of this defense, the burden shifts to the State to disprove at least one of the elements of the defense beyond a reasonable doubt.

Gallagher v. State, 925 N.E.2d 350, 353 (Ind. 2010).

When a defendant contends on appeal that the State failed to present sufficient evidence to rebut a defense, we review the challenge using the same standard of review as applied to challenges to sufficiency of the evidence. Id. Thus, we will affirm a conviction “if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt.” Id. (quoting Tobar v. State, 740 N.E.2d 109, 112 (Ind. 2000)). As this defense contains two components, “briefly” and absence of children, the State need only disprove one of the components to defeat the defense under Section 16(b). Id.

Here, the State clearly rebutted the defense on the first component of whether the defendant was “briefly” in the designated zone. The Indiana Supreme Court recently provided clarity in interpreting the term “briefly”:

The criminal offenses to which the defense applies enhance a defendant’s

penal consequences for illegal drug activity committed near areas where children are likely to be present. The statutory defense operates to excuse a defendant from the required enhancement when his presence in the proscribed zone only minimally increases the risk to children. The “briefly” requirement should be interpreted in a manner consistent with this purpose. Thus, when a defendant’s presence in the proscribed zone is primarily for a purpose other than illicit drug activity, the risk to children is smaller and the word “briefly” could encompass a greater duration of time. One example of this would be the traversing within a proscribed area without tarrying but while in concealed, illegal possession of drugs. *On the other hand, when the principal purpose of a defendant’s presence in the zone is to actively engage in criminal drug activity, especially if such activity is visible to any children, even a relatively short intrusion into the proscribed zone would be more than “brief” and thus should not excuse the defendant from the enhancement.*

Griffin v. State, 925 N.E.2d 344, 349 (Ind. 2010) (emphasis added). The facts presented at trial were that Saunders instructed T.T. to meet him at a particular apartment complex to complete the drug transaction, which occurred in the parking lot and lasted approximately eleven minutes. The purpose of Saunders’s presence at the apartment complex was to actively engage in criminal drug activity. Furthermore, he chose to complete the transaction in a car in the parking lot of the complex in the middle of the afternoon, which increased the likelihood of the activity being visible to others.

II. Sufficiency of the Evidence

Second, Saunders alleges that there is insufficient evidence to support his conviction because he presented evidence that he was at another location when the crime occurred. In reviewing a sufficiency of the evidence claim, we neither reweigh the evidence nor assess the credibility of the witnesses. Love v. State, 761 N.E.2d 806, 810 (Ind. 2002). We consider the evidence most favorable to the verdict and the reasonable inferences drawn therefrom and

will affirm the conviction if there is probative evidence from which a reasonable jury could have found the defendant guilty beyond a reasonable doubt. Id.

Essentially, Saunders's argument is a request that we reweigh the evidence in favor of the testimony of his alibi witness. Nevertheless, the evidence he presented does not make his guilt impossible. Saunders agrees that the transaction was concluded by 2:28 p.m. in Crawfordsville and that it takes approximately forty-five minutes to drive from Crawfordsville to Rockville. Appellant's Br. at 12-13. For his alibi, the grandmother of two of Saunders's children testified that on the date of the offense she went to Saunders's home in Rockville at 3:30 p.m. and Saunders was present. However, this testimony does not negate the possibility that Saunders was in Crawfordsville until 2:28 p.m. and drove approximately forty-five minutes to his home in Rockville to arrive before 3:30 p.m. The evidence is sufficient to support the conviction.

Affirmed.

MAY, J., and BARNES, J., concur.