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IN THE COURT OF APPEALS OF INDIANA

EMILY R. MEYER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 35A02-1001-CR-69
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HUNTINGTON SUPERIOR COURT
The Honorable Jeffrey R. Heffelfinger, Judge
Cause No. 35D01-0901-FA-13

August 31, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Emily Meyer appeals her convictions for two counts of Class A felony dealing in a schedule I, II, or III controlled substance. We affirm.

Issues

Meyer raises two issues, which we restate as:

I. whether the trial court properly denied her motion for a continuance; and

II. whether there is sufficient evidence to support her convictions as Class A felonies.

Facts

On April 3, 2008, Meyer sold two pills containing oxycodone to a confidential informant ("CI") during a controlled buy arranged by the Huntington Police Department. This transaction occurred in a grocery store parking lot within 1000 feet of a public park. On April 30, 2008, Meyer sold five pills containing oxycodone to the same CI in another controlled buy. This transaction occurred in a public park.

The State eventually charged Meyer with two counts of Class A felony dealing in a schedule I, II, or III controlled substance. On November 6, 2009, Meyer moved to continue the trial scheduled for November 19, 2009. On November 10, 2009, following a hearing, the trial court denied Meyer's motion. A jury found Meyer guilty as charged. Meyer now appeals.

Analysis

I. Continuance

Meyer argues that because she had received some of the State's discovery materials belatedly—approximately a week before trial—the trial court should have granted her motion for a continuance. When a motion is not based upon statutory grounds, the determination of whether to grant a continuance lies within the sound discretion of the trial court. Williams v. State, 891 N.E.2d 621, 628 (Ind. Ct. App. 2008). "There is a strong presumption that the trial court properly exercised its discretion." Id.

Meyer compares her case to Barber v. State, 911 N.E.2d 641 (Ind. Ct. App. 2009), in which the defendant sought a continuance on the morning of the bench trial because defense counsel had just located key witnesses and needed time to secure their presence for trial. In that case, we concluded:

> In light of Barber's right to present a defense, the strong presumption in favor of allowing the testimony of even late-disclosed witnesses, the lack of substantial prejudice to the State, and the resultant prejudice to Barber, we conclude that the trial court abused its discretion in denying Barber's motion to continue and therefore remand for a new trial.

Barber, 911 N.E.2d at 647.

Meyer contends that the continuance should have been granted to allow her to investigate the discovery materials that were belatedly disclosed. Although she describes the materials that were belatedly disclosed as "important information" about the CI, the only evidence she specifically identifies in her brief as being belatedly disclosed is the terms of the CI's agreement with law enforcement. Appellant's Br. p. 8. Meyer offers no explanation as to how any of the belatedly disclosed information would have aided in her

defense or how additional time to review this information would have benefited her at trial.

Moreover, even if Meyer was acting in good faith when she moved for a continuance and the State would not have been prejudiced by a continuance, a continuance was not warranted under these facts. It appears that the State disclosed the information to Meyer's first attorney and that some of that information was not relayed to Meyer's second attorney. Meyer even acknowledges that she "may have had some blame to share in the delayed disclosure . . . ." Id. Further, regarding the alleged lack of information about the CI, it appears that Meyer was also charged with conspiring to kill the CI. Specifically, the trial court stated, "I just want the record to be clear. Considering the fact that you represent the Defendant in her Conspiracy to Commit Murder against the same person who was the confidential informant I find your allegations that you did not know who the confidential informant was to be implausible." Tr. p. 81. Given the circumstances, the trial court did not abuse its discretion in denying Meyer's motion for a continuance.

II. Sufficiency of the Evidence

Meyer also argues there is insufficient evidence to support the enhancement of her convictions to Class A felonies. She claims the State did not prove that she selected the meeting places that were within 1000 feet of a park.

The offense of dealing in a schedule I, II, or III controlled substances is a Class B felony, which is enhanced to a Class A felony if it is committed within 1000 feet of a

public park.[1] Ind. Code § 35-48-4-2. It is a defense for a person charged under this chapter that a person was in, on, or within 1000 feet of a public park "at the request or suggestion of a law enforcement officer or an agent of a law enforcement officer." I.C. § 35-48-4-16(c). As our supreme court has acknowledged, Indiana Code Section 35-48-4-16 enumerates mitigating factors that reduce culpability. Griffin v. State, 925 N.E.2d 344, 347 (Ind. 2010). The defendant does not have the burden of proof, only the burden of placing the issue in question where the State's evidence has not done so. Id. Once the defendant raises this defense and supporting evidence is presented, the burden passes to the State to disprove beyond a reasonable doubt at least one element of the defense. Gallagher v. State, 925 N.E.2d 350, 353 (Ind. 2010).[2] In our review of a claim of insufficient evidence to rebut this defense, we consider the evidence and reasonable inferences favorable to the judgment, without reweighing or assessing credibility, to evaluate whether there is sufficient probative evidence from which a reasonable jury could have found that the State rebutted the defense beyond a reasonable doubt. Id. at 355.

Meyer argues that she should not have been convicted of the Class A felony enhancements because the CI, an agent of the police, established the locations of the transactions. Regarding the April 3, 2008 transaction, the CI, referring to Meyer, testified, "she had told me to meet her [sic] Owens South and uh, that's where we were

[1] In her brief, she states, "Meyer never has genuinely disputed that these transactions both took place either at or within 1000 feet of a public park." Appellant's Br. p. 10.

[2] Gallagher was originally published at Gallagher v. State, 922 N.E.2d 588 (Ind. 2010). It was withdrawn and republished at Gallagher v. State, 925 N.E.2d 350 (Ind. 2010).

going to meet . . . ." Tr. p. 526. Meyer testified that the CI instructed her to meet him at Owens South in Huntington. See id. at 586. As for the April 30, 2008 transaction, according to Meyer's own testimony, Meyer was at the park with her boyfriend and her boyfriend's son when the CI contacted her and met her there. See id. at 587. This is consistent with the CI's testimony that, when he contacted Meyer, she told him to go to the park. Meyer did not argue that the statutory defense applied during her closing argument or request that the jury be instructed on the statutory defense.

The State argues that because Meyer never raised this issue at trial, she did not give the State an opportunity to present evidence to rebut the defense. In her reply brief, Meyer asserts that this issue is not waived because, "[t]he Gallagher case makes clear that Meyer's only prerequisite for raising her statutory defense is that she point to some supporting evidence in the record; she need not argue the defense in closing or raise it via a jury instruction." Appellant's Reply Br. p. 4. She contends that because the State's own evidence placed the statutory mitigator in issue, she had no obligation to present additional evidence.

In Gallagher, the defendant argued that there was "'some uncertainty about who selected' the location for the drug deal, which was within 1,000 feet of the school." Gallagher, 925 N.E.2d at 355. From this uncertainty, Gallagher asserted that he established, and the State failed to rebut, that he was within the proscribed zone only at the request or suggestion of a law enforcement agent. Id. Our supreme court concluded, "[t]he defense acknowledges that the evidence on this point was uncertain, impliedly conceding the existence of evidence supporting the jury's rejection of his claim to the

defense." Id. The court declined to find that the State's rebuttal was insufficient. Id. The Gallagher court did not specifically address the minimum necessary to raise this statutory defense.

Here, neither party elicited extensive testimony regarding who selected the locations of the transactions, Meyer did not argue that the CI chose the locations or that the defense was applicable in her closing argument, and the jury was not instructed regarding the defense. We do not agree with Meyer that the mere ability to point to conflicting evidence on appeal is sufficient to show that she raised the issue during trial. Under these circumstances we cannot conclude that Meyer raised the issue of the statutory defense so as to pass the burden to the State to disprove it beyond a reasonable doubt. See Covey v. State, 929 N.E.2d 813, 819 (Ind. Ct. App. 2010) (addressing another statutory defense in Ind. Code § 35-48-4-16 and concluding that, where defendant did not mention the defense during closing or seek an instruction on the defense, he did not place the defense at issue).

Even if Meyer is considered to have raised the issue, there is sufficient evidence to show that Meyer chose the location of the transactions. Regarding the April 3, 2008 transaction, the CI testified that Meyer told him to meet her at the Owens South parking lot. As for the April 30, 2008 transaction, it is undisputed that Meyer was at the park playing with a child when the CI contacted her. Meyer testified, "[the CI] contacted me and met me there." Tr. p. 587. Although the CI clearly initiated the transactions, the evidence is sufficient to rebut Meyer's argument that she was at the near or at the park at

the request or suggestion of the CI. There is sufficient evidence to support the Class A felony convictions.

Conclusion

The trial court did not abuse its discretion when it denied Meyer's motion for a continuance. There is sufficient evidence to support Meyer's convictions for Class A felony dealing in a schedule I, II, or III controlled substance. We affirm.

Affirmed.

FRIEDLANDER, J., and CRONE, J., concur.