2015 IL App (1st) 131582-U

FIFTH DIVISION
April 24, 2015

No. 1-13-1582



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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. 12 DV 82472 |
| | ) | |
| TIMOTHY DAVIS, | ) | Honorable |
| | ) | Laura Bertucci-Smith, |
| Defendant-Appellant. | ) | Judge Presiding. |

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JUSTICE MCBRIDE delivered the judgment of the court.
Presiding Justice Palmer and Justice Reyes concurred in the judgment.

**O R D E R**

¶ 1 *Held*: The trial court's admission into evidence of a forwarded text message did not violate hearsay or best evidence rules and, accordingly, did not constitute plain error.

¶ 2 Following a bench trial in 2013, defendant Timothy Davis was found guilty of criminal damage to property (720 ILCS 5/21-1(a) (West 2012)) and was sentenced to three months of supervision. On appeal, defendant contends that the admission into evidence of a text message

that he sent to one of the complainants constituted hearsay and violated the best evidence rule. For the reasons set out below, we affirm.

¶ 3 Defendant was charged with two counts of domestic battery, one count of telephone harassment, and one count of criminal damage to property. The last count charged defendant with damaging the car of his sister, Cynthia Davis, at her residence at 12446 South Harvard in Chicago on December 18, 2012.

¶ 4 At trial, Kataka Davis, defendant's daughter, testified that she lived with him on December 13, 2012. On that day, Kataka and Cynthia were standing outside a store near 119th Street and Marshfield when defendant approached them and shouted derogatory names. Kataka testified defendant struck her repeatedly and kicked Cynthia in the leg. The women got into Cynthia's car and drove away. They reported the incident to police on December 17.

¶ 5 On December 19, Kataka and Cynthia met with a police detective. Kataka testified that during the meeting, she received a text message from defendant in which he disparaged her, Cynthia and other female family members and threatened to kill them. The State asked to introduce into evidence a printed copy of the text message Kataka received from defendant as People's Exhibit No. 1. When shown the printout, Kataka stated she received the message on her phone but forwarded them to Cynthia's phone when they were not able to print the message from Kataka's phone. The printout depicted multiple messages as they appeared on Cynthia's phone. Kataka noted that printout indicated the multiple messages were sent from her phone to Cynthia's phone. She stated the document fairly and accurately represented the text message she received on her phone on December 19.

¶ 6 The following colloquy then occurred:

"MS. PERRY [assistant State's Attorney]: The State would like to enter People's Exhibit 1 into evidence.

THE COURT: Any objection?

MS. COLLINS [assistant public defender]: Your Honor, I would object on the basis that that's not even the original texts. She's alleging that it was forwarded.

THE COURT: I don't understand that objection. She's saying that it's a copy of the text message, that she's forwarded it to her aunt's phone to print it.

MS. PERRY: Judge, that would go to the weight, not to the admissibility of the actual evidence.

THE COURT: Okay. Any other objection?

MS. COLLINS: No other objection, Judge.

THE COURT: All right. The objection will be overruled. People's Exhibit Number 1 will be accepted into evidence."

¶ 7 Kataka read the content of the exhibit verbatim. A portion of the message stated:

"yall some dumb bitches, you mrs. davis cynthia toya you mama all yall you can keep listening to them if you want but when I get you put out they not go have you back or give you a place to stay I tried to warn them the first time I will kill all you bitches one by one slow and painful keep f—ing with me and tell your auntie Cindy get her lies together now cause rent a center go be knocking."

¶ 8 On cross-examination, Kataka said she and Cynthia did not call police or seek help from anyone inside the store. Kataka said she showed the police the text message on her phone. She stated the texts were received from defendant at his phone number, which she recited in court.

¶ 9 On redirect examination, Kataka acknowledged a portion of the text message was omitted from the printouts. She stated that when she forwarded the text message to Cynthia, the single message was broken up and sent as multiple smaller messages.

¶ 10 The State entered into evidence as People's Exhibit Nos. 2 and 3 additional pages of the text message. Kataka testified that the portion of the message that was introduced as Exhibit No. 3 ended: "[A]nd hope Cindy ain't come get you cause she can't drive with her window looking like."

¶ 11 Cynthia offered testimony consistent with that of Kataka as to the December 13 incident. She further testified that at about 4 p.m. on December 18, she was inside her home and her car was parked on the street outside and was visible from her dining room window. Cynthia saw defendant get out of a white car and throw a rock-filled stocking against the back window of her car, breaking her rear window. She said defendant and his girlfriend drove a white car. A photo of Cynthia's car depicting damage to the back window was entered into evidence.

¶ 12 At the close of the State's case, defendant moved for a directed finding on all counts. The trial court granted defendant's motion for a directed finding on the domestic battery counts and the telephone harassment count. The court denied the motion as to the charge of criminal damage to property.

¶ 13 Defendant testified he and Cynthia had "no relationship" because "she sent a letter to the court trying to get me to lose my son," and they had had no contact since July 2012. Defendant denied knowing Cynthia's address or damaging her car. Defendant said his girlfriend owns a white car.

¶ 14 At the close of evidence, the trial court noted the evidence of damage to Cynthia's car and found the text message indicated defendant had "some knowledge of the damage to her window in her car." The court found the text message corroborated the damage to Cynthia's car. The court noted the estrangement between defendant and Cynthia could weigh either in favor of or against a finding that defendant committed the offense; however, the court found defendant "gave himself a motive for being mad" at Cynthia based on the situation involving his son. The court found the remainder of defendant's testimony was not credible. The court concluded that based on defendant's testimony and the evidence of the text message, the State met its burden of proof as to the charge of criminal damage to property, and the court found defendant guilty of that offense. Defense counsel filed a motion for a new trial, which was denied.

¶ 15 On appeal, defendant argues that the trial court erred in admitting the text message into evidence. Defendant acknowledges our review is governed by the plain error rule because he did not raise any argument regarding the admission of the text message in his post-trial motion. He also contends by that omission, his trial counsel was ineffective for failing to preserve the issue on appeal. The State responds that no evidentiary rule was violated by the admission of the text message and that defendant did not suffer prejudice in light of Cynthia's testimony that she saw defendant damage her window.

¶ 16 The plain error doctrine allows relief for a forfeited claim if the defendant can show that a clear or obvious error occurred. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). Such claims are reviewable when such an error occurs and when one of two circumstances also is in effect: (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) the error was so serious

that if affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *People v. Belknap*, 2014 IL 117094, ¶ 48. Here, defendant argues the admission of the text message can be reviewed under either prong of plain error because the evidence in this case was closely balanced and he has established prejudice due to his counsel's failure to preserve the issue.

¶ 17 The first step of a plain-error analysis is determining whether any error occurred at all. *People v. Eppinger*, 2013 IL 114121, ¶ 19; see also *People v. Naylor*, 229 Ill. 2d 584, 593 (2008) (noting this analysis requires a "substantive look" at the issue). Evidentiary rulings are within the sound discretion of the trial court and will not be disturbed absent a clear abuse of discretion. *People v. Wheeler*, 226 Ill. 2d 92, 132 (2007). Defendant contends a *de novo* standard of review should be applied to the legal question of the admissibility of the text messages, citing *People v. Crowe*, 327 Ill. App. 3d 930, 936-37 (2002). However, as was noted by the court in *Crowe*, we reach the same conclusion under either an abuse of discretion or a *de novo* standard. *Id*. at 937.

¶ 18 Specifically, defendant first contends the text message that Cynthia "can't drive with her window looking like" was inadmissible hearsay. Hearsay is a statement other than one made by the declarant testifying at trial that is offered in evidence to prove the truth of the matter asserted. Ill. R. Evid. 801(c) (eff. Jan. 1, 2011). Using an example set out by our supreme court, if witness A testifies that B told him that event X occurred, A's testimony is admissible if offered to establish B said that. However, A's testimony would not be admissible to prove that event X occurred. *People v. Carpenter*, 28 Ill. 2d 116, 121 (1963). Here, defendant's text message was introduced to show that he sent a message with those contents, not as to the truth of the contents.

¶ 19 Furthermore, defendant concedes that his own statement, as a statement or admission made by a party-opponent, does not fall under the definition of hearsay. Ill. R. Evid. 801(d)(2) (eff. Jan. 1, 2011). Under that definition, a statement is not hearsay if it is offered against a party and it is the party's own statement. *Id*. Although defendant attempts to circumvent this rule by contending his text message referring to Cynthia's car window did not constitute an "admission," *i.e.*, a confession that he caused the damage and instead was merely a statement that the window was broken, a statement by a party-opponent that is offered under Rule 801(d)(2) need not be incriminating. See *People v. Aguilar*, 265 Ill. App. 3d 105, 109 (1994) (there is "no requirement that an admission be inculpatory or against interest when made or when offered"); see also M. Graham, Cleary and Graham's Handbook of the Law of Evidence § 801.14, at 812-814 (10th ed. 2011) (citing to the discussion in *Aguilar*). Accordingly, the admission into evidence of the contents of defendant's text message referring to the damage to Cynthia's car was a statement by a party-opponent and did not violate the rule against hearsay.

¶ 20 Defendant next contends the best evidence rule required the admission into evidence of the text message as received by Kataka on her phone, as opposed to the forwarded message she sent to Cynthia's phone. He asserts the State did not adequately account for the absence of the original message as received by Kataka.

¶ 21 The purpose of the best evidence rule is to prevent inaccuracy and fraud when attempting to prove the contents of a writing. *United States v. Yamin*, 868 F.2d 130, 134 (5th Cir. 1989). An original writing is required to prove the content of that writing. Ill. R. Evid. 1002 (eff. Jan. 1, 2011). The Illinois Rules of Evidence address the situation of data stored on a computer or similar device by providing that a printout of such data that is shown to reflect the data

accurately constitutes an "original" version of a writing. Ill. R. Evid. 1001(3) (eff. Jan. 1, 2011). Therefore, under the definition of an "original" writing, the printouts constituted an original writing of the text messages as they appeared on Cynthia's phone.

¶ 22 As to whether the State was required to provide evidence of the original text message as received on Kataka's phone, the best evidence rule "states a preference for the production of the original of documentary evidence when the contents of the documentary evidence are sought to be proved." *People v. Tharpe-Williams*, 286 Ill. App. 3d 605, 610 (1997). However, there is no general rule that a party must produce the best evidence that the nature of the case permits. *Id.*

¶ 23 The existence of a writing may be proven by testimony or other indirect evidence when it is shown that the original was lost, destroyed, or, as applicable in this case, "otherwise unavailable." See *People v. Barber*, 116 Ill. App. 3d 767, 778 (1983). In such a case, the proponent must prove the prior existence of the original writing, its unavailability, and the proponent's own diligence in attempting to procure the original. *People v. Baptist*, 76 Ill. 2d 19, 26 (1979). The sufficiency of the evidence showing that it is not within the offering party's power to produce the original depends on the circumstances of each case. *Id.* at 26-27.

¶ 24 In the instant case, Kataka testified she received the subject text message from defendant while she and Cynthia were meeting with police on December 19, 2012. When the State sought to introduce the printout of the text message, Kataka stated she forwarded the message to Cynthia's phone because the message could not be printed from her phone. The printout of the multiple smaller text messages as they appeared on Cynthia's phone indicates they were received from "Katacka" [*sic*] at 10:45 a.m. on December 19, 2012. Kataka testified the printout accurately represented the message that she received from defendant on her phone on December

19, 2012. The trial court considered and overruled the defense's objection to the admission of the printout as evidence that Kataka had received the message on her phone.

¶ 25 Based upon the facts at bar, the trial court did not err in allowing the printout of the forwarded messages from Cynthia's phone into evidence. Kataka accounted for the inability to present the original message by testifying that the message from her phone could not be presented in printed form. The date of receipt shown on the forwarded messages correlated with Kataka's testimony that she received and forwarded the message on December 19, 2012. Although defendant contends the forwarded message as shown on Cynthia's phone did not contain his name or phone number, Kataka testified that the texts were received from defendant's phone number.

¶ 26 Moreover, we disagree with defendant's additional contention that the forwarded text message on Cynthia's phone could not be considered an admissible duplicate as defined by the Illinois Rules of Evidence. Rule 1001(4) defines a "duplicate" as a:

> "counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original." Ill. R. Evid. 1001(4) (eff. Jan. 1, 2011).

¶ 27 Although defendant argues that the forwarded text messages on Cynthia's phone did not "accurately reproduce[] the original message" because the original message was broken up into smaller messages, a forwarded text message can be considered an admissible duplicate of the original message. A forwarded text message is a copy of the original message that is being

forwarded, or sent on, to a second person and thus is an accurate reproduction of the original. See Ill. R. Evid. 1001(4). Thus, the forwarded message on Cynthia's phone met the best evidence requirement. In summary, because we have found that no error occurred in admitting the text messages into evidence under either the hearsay rule or the best evidence rule, there can be no plain error.

¶ 28 Moreover, even if defendant had established that the court erred in allowing the forwarded text message into evidence, defendant would not be able to show that his conviction for criminal damage to property resulted from that error. Here, the State introduced evidence of a text message from defendant referring to Cynthia's car window to corroborate Cynthia's testimony that defendant damaged her car window by throwing a rock through it. Defendant's own testimony confirmed that he was upset with Cynthia because of her involvement in his custody proceedings. In addition, defendant confirmed that his girlfriend drove a white car, thus corroborating Cynthia's testimony that she saw defendant get out of a vehicle of that color. Even if the text message regarding Cynthia's car had not been introduced into evidence, Cynthia's firsthand testimony of defendant's actions outside her home supported defendant's conviction. More importantly, when defendant testified at trial, he did not deny sending the text message. See *People v. Chromik*, 408 Ill. App. 3d 1028, 1048 (2011).

¶ 29 Accordingly, the judgment of the trial court is affirmed.

¶ 30 Affirmed.