2015 IL App (2d) 140839-U
No. 2-14-0839
Order filed July 22, 2015



---

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

---

| | | |
|---|---|---|
| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the Circuit Court of Kane County. |
| Plaintiff-Appellee, | ) | |
| v. | ) | No. 10-CF-1852 |
| OSCAR MENDEZ, | ) | Honorable James C. Hallock, |
| Defendant-Appellant. | ) | Judge, Presiding. |

---

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice Schostok and Justice Hutchinson concurred in the judgment.

**ORDER**

¶ 1 *Held*: (1) The State proved defendant guilty beyond a reasonable doubt of aggravated child pornography, specifically his knowing possession, as the images at issue, among many others, which had been downloaded over the course of three years, were found in a folder linked to defendant's user name, on defendant's computer, in his bedroom; (2) defendant showed no error, and thus no plain error, in the trial court's admission of uncharged images, as they were probative on the issues of intent and absence of mistake and the court avoided any undue prejudice by limiting the evidence to the mere fact of the images' existence; (3) defense counsel was not ineffective for failing to request a bill of particulars, as defendant was not prejudiced: given the evidence, defendant likely would have been convicted even had the State provided that the offense occurred while he was at work, and in any event, given that the indictment allowed for a range of dates, the State would not necessarily have provided such a limited time frame.

¶ 2 Defendant, Oscar Mendez, appeals his conviction of nine counts of aggravated child pornography (720 ILCS 5/11-20.3(a)(6) (West 2010)). He contends that the State failed to prove him guilty beyond a reasonable doubt, that the court abused its discretion in allowing evidence of uncharged conduct, and that his counsel was ineffective for failing to request a bill of particulars. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was indicted in October 2010 in connection with numerous videos portraying child pornography that were found on his home computer. The indictment alleged that the conduct occurred on or about May 5, 2010. In May 2014, a jury trial was held.

¶ 5 Before trial, the State moved *in limine* to admit evidence of uncharged videos of child pornography that were found on the computer and to admit search terms associated with child pornography that were also discovered. Defendant objected. The court discussed the probative value and prejudicial effect of the evidence at length, determining that it was probative to show intent and absence of mistake. The court concluded that allowing specific details of the evidence would be overly prejudicial but allowed the State to provide evidence that a total of 50 videos containing subject matter and titles similar to the charged videos were found and that those videos were created or accessed between 2007 and 2010. The court also allowed evidence that there were numerous search terms used that were similar to the content of the charged videos.

¶ 6 Evidence at trial showed that, on July 23, 2010, a search warrant was executed at defendant's home, where defendant lived with his parents and younger sister. The warrant was obtained after an investigating officer detected a user of defendant's Internet Protocol address offering to trade a child pornography file through a shared folder on Limewire, a peer-to-peer file-sharing service. The officer detected the activity on May 5, 2010, at 5:53 p.m. Officers

were unable to tell who was using the computer at that time. The defense presented evidence that defendant was at work on that day from 4:15 p.m. to 9:40 p.m. However, there was also evidence that downloads from Limewire could take a long time and that a person could set up Limewire to allow access to files and download files while he was away from the computer.

¶ 7 When officers entered the home, defendant informed them that the family had only one computer, which was located in his bedroom. The family's Internet account was in his father's name. Defendant told investigators that he used Limewire to download music, but denied that he ever downloaded child pornography. Defendant admitted that he occasionally viewed pornography and that he searched for pornography of teenage boys beyond the age of consent, but he said that any child pornography he might have seen would have been accidental. He also said that he would not be interested in child pornography featuring girls, because he was gay.

¶ 8 When the computer's hard drive was analyzed, numerous videos of child pornography featuring young girls were found, as were search terms related to child pornography. A user account with the name Gargola was found on the computer and was connected to accounts that defendant used for social media and e-mail. It also was connected to a shared folder for Limewire. Fifty videos containing child pornography were found on the computer, having been downloaded between 2007 and 2010. The videos that were the subject of the charges were all in the Limewire shared folder. They were not files that had been accessed and then deleted. Each video had a descriptive title that used terms and acronyms associated with child pornography. The search terms found on the computer reflected that the user Gargola was signed into the computer when the searches were performed.

¶ 9 The titles of the videos were read to the jury, after which one of the attorneys noted that a juror in the back row needed "a moment to collect herself." Portions of the videos were shown

to the jury. The attorneys and the court discussed the availability of a computer for the jurors to view the full videos if needed, and the court stated, "[b]ased on the looks I saw on the jury's faces, I don't think they're going to request that."

¶ 10 The defense presented evidence that defendant's parents, sister, brother, and friends used the computer. Defendant's sister said that she and her parents did not know much about computers and that she had a friend set up an e-mail account for her. She used the computer to look at clothes and shoes on the Internet, to look at MySpace, and to listen to music. She did not know the name of the program she used to listen to music. Anyone could use the computer without entering a password. Three friends of defendant testified that they previously used the computer to look at MySpace or send e-mail. Two of those testified that they also used Limewire on it to listen to music. One friend indicated that all of their friends used the computer. There was no evidence that defendant's family or friends used the computer to view child pornography.

¶ 11 During the instruction conference, defense counsel objected to an instruction that stated that the "indictment states that the offense charged was committed on or about May 5, 2010. If you find the offense charged was committed, the State is not required to prove that it was committed on the particular date charged." The State noted that there was a range of dates in which defendant possessed child pornography and that, because defendant had not sought a bill of particulars, and there was a variance between the indictment and the evidence, the instruction was proper. The court gave the instruction.

¶ 12 The jury found defendant guilty. He was sentenced to 48 months of sex-offender probation and ordered to register as a sex offender. Defendant moved for a new trial, but did not include allegations concerning the motion *in limine*. The motion was denied, and he appeals.

¶ 13 II. ANALYSIS

¶ 14 Defendant first contends that the State failed to prove him guilty beyond a reasonable doubt. A reviewing court will not set aside a criminal conviction unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). In reviewing a challenge to the sufficiency of the evidence, " 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). This standard applies regardless of whether the evidence is direct or circumstantial, and circumstantial evidence meeting this standard is sufficient to sustain a criminal conviction. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009).

¶ 15 "A person commits the offense of aggravated child pornography who *** with knowledge of the nature or content thereof, possesses any film, videotape, photograph or other similar visual reproduction or depiction by computer of any child whom the person knows or reasonably should know to be under the age of 13 engaged in any activity described in subparagraphs (i) through (vii) of this subsection[.]" 720 ILCS 11-20.3(a)(6) (West 2010). Subsections (i) through (vii) include actual or simulated acts of sexual penetration or sexual conduct with any person involving the mouth, anus, or sexual organs of the child. 720 ILCS 5/11-20.3(a)(1) (West 2010).

¶ 16 A charge of child pornography does not apply to a person who does not voluntarily possess the material. 720 ILCS 5/11-20.1(b)(4) (West 2010). "Possession is voluntary if the defendant knowingly procures or receives a film, videotape, or visual reproduction or depiction for a sufficient time to be able to terminate his or her possession." *Id.*

¶ 17 Defendant does not dispute that the videos contained child pornography. Instead, he argues that the State failed to prove that he knowingly possessed the videos, because there was evidence that other people used the computer and that he was at work on May 5, 2010, at 5:53 p.m.

¶ 18 "Possession of child pornography may be established by proof of either actual and knowing physical possession or constructive possession. [Citation.] Constructive possession has received extensive coverage in narcotics cases, and courts have found those cases helpful in understanding cases involving possession of electronic images such as child pornography. [Citation.] Knowledge is rarely shown by direct proof, and is usually established by circumstantial evidence. [Citation.] It may be established by evidence of the acts, statements, or conduct of the defendant, as well as the surrounding circumstances, which support an inference that the defendant knew that there was contraband in the place where it was found. [Citation.] When contraband is found on premises under the defendant's control, the fact finder may infer that the defendant knew it was there, so long as there are not other circumstances that create a reasonable doubt as to guilt. [Citation] A fact finder may infer control over premises if the defendant lived there." *People v. Jaynes*, 2014 IL App (5th) 120048, ¶ 46.

¶ 19 Here, there was ample evidence for the jury to find defendant guilty. The videos were found on defendant's computer, located in his bedroom. They were among many other videos that had been there for some time, having been downloaded between 2007 and 2010. Further, they were found in a shared file connected to a Limewire account under an alias commonly used by defendant. Search terms related to the videos were also conducted under an account using that alias. The videos themselves had descriptive file-names consistent with child pornography.

¶ 20 While defendant provided evidence that others used the computer while logged into his account, there was no evidence that they used it for anything other than innocent purposes. Defendant's family evidently lacked knowledge of computers, and his friends never suggested that they used the computer to obtain child pornography. "Where the defendant relies upon circumstantial evidence to argue that someone else committed the crime, the trier of fact may reject the argument if it is mere surmise or possibility." *Id.* ¶ 48. " 'The trier of fact is not required to disregard inferences which flow normally from the evidence or to accept any possible explanation consistent with innocence.' " *Id.* (quoting *People v. Fleming*, 2013 IL App (1st) 120386, ¶ 80). Here, the jury was free to discount defendant's implication that someone else put the videos on his computer. Finally, that defendant was at work on May 5, 2010, at 5:53 p.m. was not dispositive. There was evidence that the Limewire program could be set to share files while defendant was away from the computer. After viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found defendant guilty beyond a reasonable doubt.

¶ 21 Defendant next argues that the court abused its discretion in allowing evidence of uncharged videos and search terms. He argues that the evidence was used solely to show propensity and was unduly prejudicial. He points to indications that the jurors were emotionally affected by the videos as an indication of the prejudicial effect. The State contends that the matter is forfeited because, while defendant addressed the matter on a pretrial motion and objected at trial, he failed to raise it in a posttrial motion. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) ("failure to raise an issue in a written motion for a new trial results in a waiver of that issue on appeal"). Defendant responds that we may address the matter for plain error. The plain-error doctrine permits this court to excuse a procedural default and consider unpreserved

error where: (1) the evidence is so closely balanced that the error threatened to tip the scales of justice against the defendant; or (2) the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *People v. Naylor*, 229 Ill. 2d 584, 602-03 (2008). Before applying the plain-error rule, we must determine whether an error occurred. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

¶ 22 "Generally, evidence of other crimes is inadmissible to show the defendant's propensity to commit a crime." *People v. Johnson*, 2014 IL App (2d) 121004, ¶ 46 (citing *People v. Donoho*, 204 Ill. 2d 159, 170 (2003)). Evidence of other crimes is generally admissible only if it is relevant for any purpose other than to show the defendant's propensity to commit a crime, such as *modus operandi*, intent, motive, identity, or absence of mistake. *Id*.; see Ill. R. Evid. 404(b) (eff. Jan.1, 2011). "The Illinois General Assembly, however, has created a limited exception to this general rule of inadmissibility for other-crimes evidence intended to show the defendant's propensity to commit crimes." *Johnson*, 2014 IL App (2d) 121004, ¶ 47. If a defendant is tried on one of the sex offenses in section 115-7.3(b) of the Code of Criminal Procedure of 1963 (the Code) (725 ILCS 5/115-7.3(b) (West 2010)), the State may introduce evidence that the defendant also committed another of the specified sex offenses. Aggravated child pornography is included in that list. 725 ILCS 5/115-7.3(1)(a) (West 2010). The Code thus expressly permits such other-crimes evidence to be admitted for any relevant purpose. 725 ILCS 5/115-7.3(b) (West 2010). "[P]ropensity evidence is often highly relevant, making other-crimes evidence admissible under section 115-7.3(b) to show a defendant's propensity to commit sex crimes." *Johnson*, 2014 IL App (2d) 121004, ¶ 47. Before the other-crimes evidence may be admitted, however, the Code requires the trial court to apply a balancing test, weighing the probative value of the evidence against the undue prejudice it might cause to the defendant. 725

ILCS 5/115-7.3(c) (West 2010). "Whether to admit other-acts evidence lies within the sound discretion of the trial court." *People v. Gumila*, 2012 IL App (2d) 110761, ¶ 37. "An abuse of discretion occurs only when the ruling is arbitrary, fanciful, or unreasonable." *Id*.

¶ 23 Here, as the trial court found, the evidence of other videos was particularly probative to show intent and absence of mistake, especially in light of defendant's theory that either he accidentally downloaded the videos or someone else put them on his computer. Likewise, the evidence of search terms was relevant to show intent and absence of mistake. In addressing the prejudicial effect, the court discussed the matter at length, ultimately limiting the manner in which the evidence could be presented. Instead of allowing the State to present a detailed list of the other videos and search terms, the court limited the evidence to the mere fact that 50 similar videos and related search terms were found. Thus, the court limited the evidence so as to avoid undue prejudice. This ruling clearly was not an abuse of discretion. As there was no error, there can be no plain error. *People v. Bannister*, 232 Ill. 2d 52, 79 (2008).

¶ 24 Finally, defendant argues that his counsel was ineffective for failing to request a bill of particulars, allowing the jury to be instructed that the State was not required to prove that the crime was committed on the particular date charged. Defendant contends that, because he was not at home on May 5, 2010, at 5:53 p.m., his counsel should have requested a bill of particulars to limit the charges to that date.

¶ 25 In determining whether a defendant was denied effective assistance of counsel, we apply the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance resulted in prejudice to the defendant. *Id*. at 687; *People v. Patterson*, 217 Ill. 2d 407, 438 (2005). To establish deficient performance, the

defendant must show that his attorney's performance fell below an objective standard of reasonableness. *People v. Evans*, 209 Ill. 2d 194, 219 (2004). Prejudice is established when a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. at 219-20. The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *People v. Brown*, 236 Ill. 2d 175, 185 (2010).

¶ 26 "The only object of the bill of particulars is to give the defendant notice of the charge against him and to inform him of the particular transactions brought in question so that he may be prepared to make his defense." *People v. Westrup*, 372 Ill. 517, 518 (1939). "Its effect, therefore, is to limit the evidence to the transactions set out in the bill of particulars." *Id*. at 519. Generally, the date of the offense is not an essential element of a child-sex offense. *People v. Cregar*, 172 Ill. App. 3d 807, 821 (1988). "The date alleged in a charging instrument need not ordinarily be proved precisely," and if "upon trial the proof establishes that the offense was committed on a date other than the precise date alleged, that irregularity will not constitute a fatal variance." *People v. Alexander*, 93 Ill. 2d 73, 77 (1982). "A variance between allegations in an indictment and proof at trial is fatal to a conviction if the variance is material and could mislead the accused in making his defense." *People v. Winford*, 383 Ill. App. 3d 1, 4 (2008).

¶ 27 While the failure to object to a vague charge or request a bill of particulars can be a basis for ineffective assistance of counsel (see, *e.g.*, *People v. Meier*, 223 Ill. App. 3d 490, 492 (1992)), that was not the case here. Given the evidence, as noted above that Limewire could take some time to download files and it could be set to share files while defendant was away from his computer, defendant likely would have been convicted even if a bill of particulars had specified that the offense occurred while he was at work. In any event, given that the indictment alleged

that the offense occurred "on or about" May 5, 2010, defendant has not shown that the State would not have been able to expand the range of dates had a bill of particulars been sought. Thus, defendant cannot show prejudice based on the lack of a bill of particulars.

¶ 28 III. CONCLUSION

¶ 29 Defendant was proved guilty beyond a reasonable doubt. Further, the trial court did not err in allowing evidence of other videos and search terms, and defendant has not shown that his counsel was ineffective. Accordingly, the judgment of the circuit court of Kane County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 30 Affirmed.