2015 IL App (3d) 130177-U

Order filed July 2, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 14th Judicial Circuit, Henry County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-13-0177 Circuit No. 11-CF-386
BENJAMIN K. SANGRAAL,	)	Honorable Ted J. Hamer,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justice Lytton concurred in the judgment.
Justice Holdridge dissented.

ORDER

¶ 1 *Held*: No evidence was presented that the victims were 13 years of age or older, and therefore, defendant's four attempted child pornography and three child pornography convictions are reversed.

¶ 2 After a bench trial, defendant, Benjamin K. Sangraal, was convicted of four counts of attempted child pornography (720 ILCS 5/8-4, 11-20.1(a)(1)(vii) (West 2010)) and three counts of child pornography (720 ILCS 5/11-20.1(a)(6), (a)(1)(vii) (West 2010)). The trial court sentenced defendant to concurrent terms of five years' imprisonment on the attempted child

pornography convictions and concurrent terms of four years' imprisonment for the child pornography convictions. On appeal, defendant argues that: (1) he was not proved guilty beyond a reasonable doubt of the attempted child pornography and child pornography charges because there was no evidence from which the court could conclude that any of the victims were or appeared to be at least 13 years of age; (2) the images of normal urination did not fall within the statutory definition of child pornography; and (3) the $2,000 fines on the attempted child pornography convictions were erroneously imposed. We reverse.

¶ 3 FACTS

¶ 4 Defendant was charged by information with four counts of attempted child pornography and three counts of child pornography. The attempted child pornography counts alleged that defendant:

> "with the intent to commit the crime of Child Pornography, in violation of 720 ILCS 5/11-20.1(a)(1)(vii), took a substantial step toward the commission of that offense in that he photographed [the victim], a person under the age of 18, urinating in a bathroom."

The child pornography charges alleged that defendant:

> "with the knowledge of the nature thereof, possessed a depiction by computer of an unknown child which the defendant knew or reasonably should have known to be under the age of 18, which showed the unknown child urinating in a bathroom."

The case proceeded to a bench trial.

¶ 5 At trial, S.G. testified that he was 12 years old and was in seventh grade at Orion Middle School (Orion). S.G. identified defendant as the photographer who took his sixth grade school

picture. After taking S.G.'s picture, S.G. saw defendant in the bathroom near the sixth grade hall. Defendant was standing at one urinal when S.G. approached the adjacent urinal. While his penis was exposed, S.G. heard one or two snaps, like "a camera making a clicking noise." After hearing the noise, S.G. zipped up his pants and left the bathroom. S.G. identified the State's exhibits 6, 7, and 8 as photographs of S.G. using the urinal. S.G. also identified the State's exhibit 9 as his school photograph. Exhibit 9 shows S.G. wearing the same shirt he was wearing in exhibits 6, 7, and 8.

¶ 6 D.Z. testified that he was 12 years old and was in seventh grade at Orion. On picture day the prior year, D.Z. saw defendant in the sixth grade bathroom. Inside the bathroom, D.Z. used the left urinal stall and defendant used the right. While D.Z. was urinating, defendant held a camera over the stall divider and D.Z. heard a click. In study hall, D.Z. discussed the incident with S.G. D.Z. identified the State's exhibit 13 as a photograph of him at the urinal.

¶ 7 Orion principal Tiffany Springer testified that on August 25, 2011, defendant was taking student photographs for school identification cards and yearbooks. Around the lunch period, defendant asked which bathroom he should use. Springer directed defendant to the bathroom near the cafeteria. After the lunch period, Springer learned that defendant had appeared to take photographs in the sixth grade bathroom. Springer notified the school administrators and called the police.

¶ 8 Henry County Sheriff's Deputy Joseph Femali arrived at Orion around 12:30 p.m. Femali directed defendant to the school conference room where he and defendant awaited an investigator. During the wait, defendant asked to use the bathroom. Femali directed defendant to empty his pockets, and Femali confiscated defendant's cell phone and zip drive and escorted defendant to the bathroom.

¶ 9 Detective Jim Kessinger interviewed defendant at the school. Defendant stated that he had attempted to send a text message to his girlfriend, and he was holding the phone in the air to improve its signal. Kessinger did not find the text message or any pictures on defendant's cell phone. Kessinger later secured a search warrant for the contents of the cell phone.

¶ 10 Forensic computer examiner Ted Teshak examined defendant's cell phone. Forensic software recovered several deleted pictures of boys urinating. The data associated with the pictures indicated that four of the pictures were created on August 25, 2011, and three of the pictures were taken on a prior date. All of the pictures were taken using defendant's cell phone. The State admitted the seven photographs into evidence.

¶ 11 The trial court concluded that the boys depicted in the pictures were under the age of 18 and found defendant guilty of each of the charged offenses. The trial court sentenced defendant to concurrent terms of five years' imprisonment on each of the attempted child pornography convictions and four years' imprisonment on each of the child pornography convictions. The court imposed a $2,000 fine on each of the four attempted child pornography convictions and a $1,000 fine on each of the three child pornography convictions. Defendant appeals.

¶ 12 ANALYSIS

¶ 13 I. Sufficiency of the Evidence

¶ 14 Defendant argues that he was not proved guilty beyond a reasonable doubt of the attempted child pornography and child pornography charges because there was no evidence from which to conclude that any of the victims were or appeared to be at least 13 years of age. The State concedes that the attempted child pornography convictions should be reversed, but argues that the basis for reversal is because the charging instrument failed to charge an offense. Under the State's theory, defendant would be subject to a possible retrial following reversal. See *People*

v. Benitez, 169 Ill. 2d 245, 259-60 (1996).

¶ 15 This appeal presents the unusual situation where the State is alleging that a defect in the charging instrument necessitates reversal. A posttrial challenge to the sufficiency of the charging instrument is subject to a prejudice standard. *Benitez*, 169 Ill. 2d at 257. The charging instrument is sufficient if it " 'apprised the accused of the precise offense charged with sufficient specificity to prepare his defense and allow pleading a resulting conviction as a bar to future prosecutions arising out of the same conduct.' " *Id.* (quoting *People v. Gilmore*, 63 Ill. 2d 23, 29 (1976)).

¶ 16 Here both the attempted child pornography and child pornography charges omitted the statutory element that the victims were over the age of 13. However, the charges cited the relevant statutory section and the date of the offense, which allowed defendant to prepare his defense. Therefore, the State did not demonstrate that the defect in the charging instrument prejudiced defendant in the presentation of his defense, and we do not accept the State's concession. *People v. Nunez*, 236 Ill. 2d 488, 493 (2010) (reviewing court is not bound by a party's concession). We now turn to the merits of defendant's sufficiency of the evidence argument.

¶ 17 A. Attempted Child Pornography

¶ 18 Defendant contends that reversal is warranted because the evidence was insufficient to sustain his four attempted child pornography convictions.

¶ 19 In a challenge to the sufficiency of the evidence, we must determine, after viewing the evidence in the light most favorable to the prosecution, whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Beauchamp*, 241 Ill. 2d 1 (2011). We will not reverse a defendant's conviction unless the

evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of guilt. *Id*.

¶ 20 To sustain an attempted child pornography conviction, the State must prove that defendant took a substantial step toward photographing a child whom he knew or should have known to be "under the age of 18 and at least 13 years of age" depicted in any pose, posture or setting involving a lewd exhibition of the unclothed genitals. 720 ILCS 5/8-4, 11-20.1(a)(1)(vii) (West 2010). The language at issue, *i.e.*, the requirement to prove that the victim was "at least 13 years of age," was added by Public Act 96-1551 and took effect on July 1, 2011.

¶ 21 At trial, the State elicited testimony that S.G. and D.Z. were 12 years old and the attempted child pornography charges were committed during the prior school year. As a result, the State failed to prove the minimum age element of the attempted child pornography charges. Thus, the evidence was insufficient to convict defendant of attempted child pornography and these convictions are reversed.

¶ 22 B. Child Pornography

¶ 23 Defendant also contends that the evidence was insufficient to sustain his three child pornography convictions.

¶ 24 To sustain a charge of child pornography, the State must prove that defendant knowingly possessed photographs of children whom he knew or reasonably should have known to be "under the age of 18 and at least 13 years of age" depicted in any pose, posture or setting involving a lewd exhibition of unclothed genitals. 720 ILCS 5/11-20.1(a)(1)(vii) (West 2010). As noted *supra*, defendant contends that the State failed to prove the minimum age element that was added by Public Act 96-1551 and took effect on July 1, 2011.

¶ 25 In the instant case, evidence was presented that three images on defendant's cell phone were taken before August 25, 2011. The photographs were introduced into evidence and depicted a young, prepubescent male urinating in a urinal. No testimony was presented as to the age of the unknown victim. The photographs, without testimonial, documentary, or medical evidence of the unknown victim's age, were insufficient to prove beyond a reasonable doubt that the unknown victim was at least 13 years old. Therefore, we reverse defendant's three child pornography convictions.

¶ 26 CONCLUSION

¶ 27 The judgment of the circuit court of Henry County is reversed.

¶ 28 Reversed.

¶ 29 JUSTICE HOLDRIDGE dissenting:

¶ 30 I would remand the matter for the State to amend the indictment and proceed with a new trial. I therefore respectfully dissent from the decision to reverse the convictions outright. As the majority points out, the evidence adduced at trial clearly established that the victims were 12 years old at the time of the offense. *Supra*, ¶ 5, 6. For some unknown reason, the indictment charged the defendant with an offense that required the prosecution to establish that the victims were at least 13 years of age. The fact that the State charged the defendant with the wrong offense cannot protect him from retrial under a proper indictment.

¶ 31 In the instant matter, the defendant can be retried for aggravated child pornography (720 ILCS 5/11-20/1(a)(6), (a)(1)(vii) (West 2010)) and attempted aggravated child pornography (729 ILCS 5/8-4, 11.20.1(a)(1)(vii) (West 2010)) without infringing on his constitutional right not to be subjected to double jeopardy. The test used to determine whether a defendant can be prosecuted in successive prosecutions for the same allegedly criminal acts depends upon whether

the originally charged offense and the successively charged offense are comprised of the same elements. *People v. Sienkiewicz,* 208 Ill. 2d 1, 10 (2003). If each crime requires proof of a fact not required by the other, no double jeopardy occurs notwithstanding a significant overlap in the proof offered to establish the original and successively charged offenses. *Id.*

¶ 32 Here, the defendant was charged with an offense that required the State to prove beyond a reasonable doubt that a victim was at least 13 years of age. No evidence was presented to establish that element. Thus, the evidence was insufficient to convict the defendant on those offenses. Evidence was presented, however, that victims were, in fact, 12 years of age. The defendant was not charged with the offenses of aggravated child pornography and attempted aggravated child pornography. Proof that a victim is under the age of 13 is an element of those offenses.

¶ 33 The defendant should be required to stand trial for offenses allegedly involving victims under the age of 13, and the State's failure to prove that the victims were over 13 should not prevent him from being tried on remand for the more serious offense. I would, therefore, remand the matter to the trial court and allow the State to retry the defendant. I therefore respectfully dissent.