2016 IL App (3d) 140113-U

Order filed February 1, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2016

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 13th Judicial Circuit, Grundy County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-14-0113 Circuit No. 12-CF-2
STEFFEN BALEGNO,	)	Honorable Robert C. Marsaglia,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Presiding Justice O'Brien and Justice McDade concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err when it allowed evidence of defendant's other acts with another minor, D.W. However, defendant's convictions, which are based on the same physical act, violate the one-act, one-crime principle.

¶ 2 Defendant, Steffen Balegno, appeals his convictions of unlawful grooming and indecent solicitation of a child arguing he is entitled to a new trial because the trial court improperly allowed evidence of his other acts with another minor, D.W. In the alternative, defendant argues that his conviction of the less serious offense of unlawful grooming violates the one-act, one-

crime principle and should be vacated because it is based on the same physical act as his indecent solicitation of a child conviction.

¶ 3 FACTS

¶ 4 The State charged defendant by indictment with unlawful grooming (720 ILCS 5/11-25 (West 2010)) and indecent solicitation of a child (720 ILCS 5/11-6 (West 2010). The charges arise from defendant's conduct with the minor, A.K., while defendant acted as A.K.'s assistant high school baseball coach.

¶ 5 Count I of the indictment alleged that "on or about June 17, 2010-October 22, 2010" defendant committed the offense of unlawful grooming in that he:

> "knowingly used a cell phone, a device capable of electronic data storage or transmission to entice A.K., a child, to commit the offense of Aggravated Criminal Sexual Abuse *** in that the defendant, by texting A.K., indicated to A.K. that the defendant would pay A.K. United States Currency if A.K. would allow the defendant to place his mouth on the penis of A.K."

¶ 6 Count II of the indictment alleged that "on or about October 5, 2010," defendant "knowingly solicited A.K., a child under the age of 17 years, to perform an act of sexual penetration" with "the intent that the offense of aggravated criminal sexual abuse be committed."

¶ 7 Prior to trial, the State filed a motion *in limine* seeking the introduction of evidence of other acts pursuant to Illinois Rules of Evidence 404(b) (eff. Jan. 1, 2011). The motion sought to introduce evidence from another minor, D.W., regarding his relationship with defendant. The motion alleged that in the beginning of D.W.'s sophomore year at Morris Community High School, D.W. had frequent contact with defendant through text messages which continued through D.W.'s senior year. One message from defendant was sexual in nature. In the message,

defendant stated, "if a certain team did not win he, D.W., would have to suck the defendant's dick." During the same period of time, defendant gave D.W. a brand new PlayStation 3. In addition, D.W. accompanied defendant to a comedy show in Bloomington, Illinois, for which defendant was supposed to arrange two hotel rooms. However, upon arrival, the reservation was only for one hotel room. The motion argued that the evidence was being sought to be introduced as evidence of defendant's intent, absence of mistake, and *modus operandi*.

¶ 8 At the hearing on the motion, the State explained that D.W. would testify regarding the communications with defendant conducted primarily through text messages. D.W. would state that he ceased communicating with defendant after defendant texted him that if a certain team did not win a sporting event; D.W. would have to perform oral sex on defendant. These communications occurred while D.W. was in high school and the game referenced in the text message was the 2009 Super Bowl. The State also noted that, while no promises were made, defendant gave D.W. a PlayStation 3 for no reason while at a restaurant. The prosecutor asserted that this showed defendant's actions "socializing outside the school context." The prosecutor then stated,

> "There were text messages and communications that became sexual in nature that the State would argue are extremely relevant here and more probative than they are prejudicial; that the—again, anticipating that the defendant's defense [was] going to be that this [was] all a misunderstanding of the State, this would prove extremely relevant to showing that this wasn't a mistake, that this [was] something that was—had occurred previously."

¶ 9 The trial court entered a written order on the motion indicating that the State's motion was granted provided the State made an adequate offer of proof before D.W. testified.

Defendant waived his right to a trial by jury and the case proceeded to a bench trial where the following evidence was adduced.

¶ 10 First, the parties entered a written stipulation that defendant's date of birth was October 25, 1977, and A.K.'s date of birth was June 6, 1994. The parties stipulated that text messages between A.K. and defendant were recorded on A.K.'s phone. The parties stipulated to the authenticity of and the foundation for the State's exhibits listing the content and the sender of deleted text messages recovered from A.K.'s cell phone. However, the parties stipulated that there were some errors in the State's exhibits representing the deleted messages and they reserved the right to "interpret and argue the data contained in" the exhibits.

¶ 11 The State then called A.K. as its first witness. A.K. testified that he attended Morris Community High School from 2008 to 2012, and played baseball on the school team. He met defendant because he was an assistant coach for the team. According to A.K., the relationship initially started as a normal player-coach relationship. During the summer of 2010, some older members of the baseball team were giving A.K. a difficult time. A.K. was 16 years old at the time. A.K. found defendant's cell phone number on a directory that was distributed to the members of the team, and sent defendant a message asking for help with the situation. Defendant responded that he would take care of the problem. Defendant spoke with the older players and solved the problem for A.K.

¶ 12 Defendant and A.K. continued to text back and forth from June 2010 to October 2010. Defendant sent text messages to A.K. almost every day, and exchanges often occurred late at night or early in the morning, as late at 3 a.m. and as early as 8 a.m. The two discussed baseball, how the other team members were treating A.K., what A.K. was doing after school, and the fact that A.K. was quiet and reserved. The messages eventually became sexual in nature. A.K.

deleted the text messages between him and defendant after almost every conversation. A.K. did not tell anyone about his communications with defendant.

¶ 13 A.K. identified the State's exhibit consisting of printouts of the content of some of the text messages between A.K. and defendant. A.K. acknowledged that some of the text messages he exchanged with defendant were not in the exhibit. A.K. found it believable that he exchanged between 5,600 and 5,700 text messages with defendant during the relevant period. The State then questioned A.K. about various messages that A.K. said were sexual or flirtatious in nature.

¶ 14 A.K. testified defendant wanted A.K. to start calling him nicknames shortly after A.K. had asked for help regarding his problems with the older players on the baseball team. Defendant called A.K. "sweetheart" in one message. Defendant eventually developed the nickname "[l]ittle guy" which referred to A.K.'s penis.

¶ 15 A.K. was asked about a message in which defendant texted: "Ok. We need to make a pact here. What we say to each other can't leave you and I. I mean, I called you sweetheart." A.K. believed that message meant defendant knew what he was doing was wrong and that if A.K. told anyone, defendant would get into trouble.

¶ 16 In late June or early July 2010, A.K. planned to go paintballing with a group of friends when defendant told A.K. he had some paintballs and old equipment that A.K. could use. A.K. told defendant he would do anything in exchange for the paintballs. Defendant asked A.K. to give him a backrub in exchange for those items. A.K. declined, and then defendant asked A.K. to kiss him for it. A.K. declined again.

¶ 17 A.K. was asked about a text message conversation in which defendant texted: "Liking the girl idea?" A.K. understood that message to mean defendant was initiating a discussion about which one of them would "be the girl" during sex.

¶ 18 A.K. then testified that, in another message exchange, A.K. texted defendant, "then we can make our video" with a smiley face. According to A.K., defendant had talked about making a sex videotape on a prior occasion, and this text message exchange involved further discussion on that topic. During the same exchange, defendant asked A.K. for a picture of A.K.'s penis. A.K. responded with a message to defendant that defendant could be fired or go to jail for child pornography if he sent defendant the requested picture. Defendant told A.K. that it would only happen if A.K. told someone about it. Defendant then dared A.K. to send the picture and that he would give A.K. paintballs if he did. A.K. did not send defendant the requested picture.

¶ 19 The next day, defendant sent A.K. a message asking, "So are we still making our video Thursday?" A.K. said that this message was referring to the sex videotape that came up earlier in the text exchanges.

¶ 20 A.K. did explain that he eventually blackmailed defendant into giving him some paintballs by threatening to show someone the messages where defendant referenced the backrub and kissing (although A.K. testified that he deleted the messages, he indicated that he had saved this exchange). In response, defendant gave A.K. the paintballs and then A.K. deleted the messages.

¶ 21 On October 5, 2010, defendant began another exchange by saying "Okay. One time, no more, and I'll double it," and A.K. responded "[p]robably not." A.K. explained that this message referred to defendant's previous offer of $500 for defendant to give A.K. oral sex. According to A.K., defendant made the previous offer through a text message a day or two earlier. Defendant then texted, "What if I say 1500?" Defendant then texted, "I'm sorry. I just love messing with you. I don't know why" and A.K. responded, "Ha ha ha. It's okay." Defendant responded, "Ha ha. Did you think about doing it when I said 1,000?" A.K. answered, "I didn't even think about

it, no," and defendant replied, "Not even for 1500 bucks?" A.K. answered, "No. Ha ha ha" and defendant replied, "Good, 'cause I would have been screwed had you said yes."

¶ 22 A.K.'s communication with defendant stopped when A.K.'s mother overheard A.K. talking on the phone with defendant at 11:30 p.m. one evening in October. A.K.'s mother had become suspicious about what was happening between A.K. and defendant. A.K.'s mother called the school principal and requested a meeting. At the meeting, A.K. told the principal and a Department of Children and Family Services investigator that nothing inappropriate was happening between him and defendant.

¶ 23 Later on, A.K. learned that it was possible to recover data deleted from a cell phone. Upon learning this, A.K. believed that the details of his communications with defendant would come to light. At that time, A.K. reported the communications between him and defendant. A.K. then told investigators that defendant offered him $500 in exchange for oral sex, increased the offer to $1,000 and then $1,500. Ultimately, no physical contact occurred.

¶ 24 When A.K. finished testifying, the State identified D.W. as its next witness. At this point, the trial court revisited the State's motion *in limine.* Following the State's offer of proof, the trial court ruled that the State had satisfied the trial court's previous ruling requiring the State to provide an adequate offer of proof and allowed D.W.'s testimony.

¶ 25 D.W. testified that he attended Morris Community High School from 2005 to 2009. His date of birth was June 27, 1991. Defendant was his teacher in a wood working class. The two exchanged cell phone numbers and developed a friendship and began texting after the class had ended. The two had dinner together several times when D.W. was either 15, 16, or 17 years old. At one of those dinners, defendant gave D.W. a PlayStation 3 as a gift—D.W. did not do anything in exchange.

¶ 26 Around January or February of 2009, when D.W. was 17 years old, defendant told D.W. that he had tickets to a comedy show in Bloomington, and offered D.W. the chance to come along with him. D.W. got permission to go from his father, who knew D.W. was going with defendant. D.W. believed that they would each have their own hotel room, but when they arrived, D.W. discovered it was just one room with two beds. They spent the night in separate beds, and there was no physical contact.

¶ 27 D.W. and defendant exchanged messages periodically, sometimes every day during the week. The text messages centered on sports, D.W.'s personal life, and things that were happening at school. They both had a sense of humor, and some of their humor was sarcastic. It was not unusual for them to be texting late in the evening or early the next morning. D.W. recalled receiving texts from defendant as late as 1 a.m.

¶ 28 D.W. ceased communicating with defendant his senior year after defendant sent him a text message that D.W. said, "didn't feel right." The text D.W. referred to was defendant's message that if a certain sports team did not win the Super Bowl, D.W. would have to "suck [defendant's] dick." D.W. thought that, in sending this message, defendant was looking for some type of reaction. D.W. never mentioned the text to anyone.

¶ 29 None of the other communications between D.W. and defendant involved inappropriate content or foul language. But, D.W. testified that there were "little things" before the sexual reference that made him feel that "some other things made sense" after that message. D.W. was unable to explain more specifically what those things were or how they led him to the conclusion that something was not right.

¶ 30 Defendant testified that he worked for Morris Community High School as an industrial arts teacher and assistant baseball coach and also worked as a paramedic for the Coal City Fire

Protection District during the period he communicated with A.K. Defendant believed he probably exchanged 5,700 text messages with A.K. during the relevant period, and that only about 10 percent of those messages were in the State's exhibit. Defendant admitted that he sent most of the messages attributed to him in the exhibit, including messages that discussed oral sex in exchange for money. Defendant admitted many of his text messages were inappropriate, but he never intended to actually engage in any sexual act with A.K., or to groom or solicit A.K. to perform such an act. When asked if, in retrospect, he thought the exchange with A.K. was appropriate, he stated, "probably not."

¶ 31 According to defendant, some of the messages were not to be taken seriously, describing them as either "off the cuff" crude remarks just "messing around," or just "some male talk." Defendant also believed that most of the messages were sent in response to A.K. being bullied. Defendant believed A.K.'s problem was that he was having trouble speaking or standing up for himself. In sending many of the messages, including the messages appearing to offer oral sex for money and appearing to request a picture of A.K.'s penis, defendant said that he was attempting to help A.K. by pushing A.K. to stand up for himself and say no, or to "open up" or "come out of [his] shell." Defendant acknowledged that he never told the school principal that his purpose in sending the messages was to get A.K. to stand up for himself and say no.

¶ 32 Defendant noted that "ha ha" and "lmao" (referring to "laughing my ass off") and smiley faces appeared often in the text messages. He said he used those terms either to show that he was joking or to show that the intent of the message was not what the text was saying but rather to help A.K. learn to say no. Defendant understood A.K.'s use of those terms as indicating that A.K. understood what defendant was trying to do. Defendant testified that some of the text messages that would demonstrate his true purposes were not in the State's exhibit. However,

defendant did not tender any additional text message exchanges with A.K. during his case in chief.

¶ 33 The defense also called witnesses including former students of defendant's, a paramedic who worked with defendant and whose son was helped by defendant's work as a paramedic, a firefighter who worked with defendant, and several Morris Community High School teachers who worked with defendant. These witnesses testified that they had observed defendant working with young people and they had never seen any inappropriate conduct, or heard inappropriate language used, by defendant. They testified that defendant was an excellent teacher, that he went out of his way to help others, that he had an excellent reputation in the community, and that they never heard anyone say anything bad about him prior to the allegations in this case. The teachers testified that it was not uncommon to spend some money on students, to text students, or to have additional contact with a troubled student to provide support or guidance. But they affirmed the prosecutor's suggestion that it was unusual and inappropriate to text students between midnight and 3 a.m., to give gifts worth $250 or $300, to develop a nickname for a student's "sex organ," or to request a photograph of a student's "sex organ."

¶ 34 In the State's closing argument, it argued the elements of unlawful grooming were proven by defendant's admission of "the offer for the oral sex for money" that "was transmitted through that electronic communication." When arguing the elements of indecent solicitation of a child, the State noted that "the text messages themselves, specifically the October 5th, 2010 messages" provided "clear evidence that [A.K.] was solicited and that [defendant] offered $500, $1,000, and $1500 to [A.K.] to allow the defendant to provide oral sex to him." The State also referenced D.W.'s testimony and argued that there was a similarity between defendant's conduct with D.W. and A.K. Finally, the prosecutor detailed the message exchanges occurring prior to October 5,

2010, and argued those messages prove defendant intended to send sexually explicit communications to A.K., that were not simply innocent in nature.

¶ 35 In response, the defense argued that the text messages simply constituted crude "male banter" without any real sexual intent.

¶ 36 Ultimately, the trial court found defendant guilty of both charges (unlawful grooming and indecent solicitation of a child). The trial court found defendant's explanation for the messages incredible and that "[t]here's no possible inference to be drawn from the texts other than the intent that the State needs to prove beyond a reasonable doubt." Defendant filed a motion for a new trial, arguing the trial court erred in granting the State's motion *in limine* to allow D.W.'s testimony. The trial court denied the motion.

¶ 37 The trial court sentenced defendant to 30 months' of sex offender probation (including a sentence of 180 days in jail, 120 days of which was suspended and subject to being vacated upon successful completion of probation) and 10 years of sex offender registration.

¶ 38 ANALYSIS

¶ 39 Defendant argues that the trial court abused its discretion by allowing D.W. to testify to his relationship with defendant and the sexually charged text message he received from defendant. Generally, evidence of a defendant's other offenses, crimes or bad acts is inadmissible to show a defendant's disposition or propensity to commit crimes. *People v. Illgen*, 145 Ill. 2d 353, 365 (1991). However, such evidence may be admitted, where relevant, to prove *modus operandi*, intent, identity, motive or absence of mistake. *Id.* Ill. R. Evid. 404(b) (eff. Jan. 1, 2011). Evidence of other acts is relevant if it bears " 'some threshold similarity to the crime charged.' " *People v. Donoho*, 204 Ill. 2d 159, 184 (2003) (quoting *People v. Bartall*, 98 Ill. 2d 294, 310 (1983)).

¶ 40 Defendant's conduct with D.W. is sufficiently similar to the charged offense. Where the evidence is offered to prove intent, "mere general areas of similarity will suffice." *Illgen*, 145 Ill. 2d at 373. Both D.W. and A.K. were in high school and were of similar age at the time they began communicating with defendant. Defendant's relationship with each minor began as a normal student-teacher and coach-athlete relationship, but defendant began texting both A.K. and D.W. at questionable hours: including late at night and into the early morning. As the relationships developed, defendant offered both minors unsolicited gifts (paintballs and a PlayStation 3). Then, defendant sent both minors sexually explicit text messages. Significantly, defendant was unable to expand on the sexual conversation with D.W. because D.W. ceased communicating with defendant after defendant told D.W. he would have to perform oral sex on defendant depending on the outcome of the Super Bowl. Considering the similarity in defendant's actions with D.W. and A.K., it can be inferred that defendant's sexually based messages were an intentional effort to groom each minor.

¶ 41 Further, admission of D.W.'s testimony did not unduly prejudice defendant. Admission of evidence will have a "[p]rejudicial effect" if "the evidence in question will somehow cast a negative light upon a defendant for reasons that have nothing to do with the case on trial." *People v. Pelo*, 404 Ill. App. 3d 839, 867 (2010). As detailed above, the evidence was relevant to the only issue at trial: defendant's intent. Moreover, as defendant admits on appeal, "if anything, D.W.'s testimony suggested that [defendant] lacked the intent to actually engage in a sexual act with a student." Defendant cannot say the evidence is highly prejudicial when he himself claims it assisted his defense.

¶ 42 In reaching this conclusion, we reject defendant's argument that in order to admit defendant's prior conduct with D.W., the State was required to show that the conduct was

actually a crime. We are not persuaded, as several other courts have recognized that " 'other crimes evidence may include acts which may not be a criminal offense.' " *People v. McSwain*, 2012 IL App (4th) 100619, ¶ 35 (quoting *People v. Davis*, 260 Ill. App. 3d 176, 190 (1994)); *People v. Bobo*, 375 Ill. App. 3d 966, 971 (2007); *People v. Reeves*, 385 Ill. App. 3d 716, 731-32 (2008). Moreover, the language of Illinois Rule of Evidence 404(b) in effect at the time of defendant's trial explicitly includes noncriminal wrongs or bad acts along with other-crimes evidence. Ill. R. Evid. 404(b) (eff. Jan. 1, 2011) ("Evidence of other crimes, wrongs, or acts" may be admissible to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.").

¶ 43 Lastly, even if we were to accept defendant's argument that the trial court abused its discretion, we find the error harmless beyond a reasonable doubt. "[I]mproper introduction of other-crimes evidence is harmless error when a defendant is neither prejudiced nor denied a fair trial based on its admission. *People v. Nieves*, 193 Ill. 2d 513, 530 (2000). A.K.'s testimony, the significant quantity of inappropriate messages defendant sent to A.K., and defendant's incredible explanation of those messages overwhelmingly support defendant's convictions. While defendant claims he did not intend to groom or solicit A.K., the trial court found defendant's testimony incredible without reference to D.W.'s testimony. We will not reweigh defendant's credibility. *People v. Collins*, 106 Ill. 2d 237, 261 (1985) (noting that it is not a function of a reviewing court to reweigh the credibility of the witnesses' testimony).

¶ 44 Alternatively, defendant argues that his unlawful grooming conviction should be vacated based on one-act, one-crime principles. He contends that the act of text messaging A.K. to offer A.K. money in exchange for oral sex also gave rise to the more serious conviction of indecent solicitation of a child. At the outset, we note that defendant did not preserve this issue for review

by failing to object in the trial court or raise the issue in a posttrial motion. However, we may excuse defendant's procedural default under the second prong of the plain error doctrine because a violation of the one-act, one-crime doctrine affects the integrity of the judicial process. See *People v. Harvey*, 211 Ill. 2d 368, 389 (2004) (one-act, one-crime violation satisfies the second prong of the plain error rule).

¶ 45 Under the one-act, one-crime rule, a defendant may not be convicted of multiple offenses based on the same physical act. *People v. Almond*, 2015 IL 113817, ¶ 47. The one-act, one-crime rule is violated when a defendant is convicted of more than one offense and the offenses are carved from the same physical act. *People v. King*, 66 Ill. 2d 551, 566 (1977). Here, both counts of the indictment reference the October 5, 2010, text message exchange in which defendant offered A.K. money in exchange for oral sex. The unlawful grooming charge explicitly references defendant messaging A.K. and offering money in exchange for oral sex on October 5, 2010. The same act is the basis for defendant's indecent solicitation of a child charge, which alleged defendant committed indecent solicitation of a child on the basis that on October 5, 2010, defendant offered to engage in oral sex with A.K. At trial, there was no evidence of any other occasion on which defendant offered A.K. money for oral sex, except on October 5, 2010. Further, the State did not present a theory at trial that defendant was guilty of either offense based on acts other than the text message exchange offering oral sex for money. Thus, the October 5, 2010, message served as the basis for both convictions. Consequently, we find defendant's convictions violate the one-act, one-crime principles.

¶ 46 CONCLUSION

¶ 47 The judgment of the circuit court of Grundy County is affirmed in part and vacated in part.

¶ 48 Affirmed in part and vacated in part.