FIRST DIVISION
October 16, 2017

No. 1-15-1598

**IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT**

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 CR 4948
	)	
ALLEN JONES,	)	Honorable
	)	William G. Lacy,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Simon and Mikva concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction and sentences are affirmed where the trial court properly admitted the audio recording made of conversations between defendant and C.B. into evidence, and even if the admission was error, it was harmless error given C.B.'s credible testimony about the conversations at trial.

¶ 2 Defendant, Allen Jones, appeals his conviction after a bench trial of three counts of aggravated child pornography for which he was sentenced to an aggregate term of 20 years' imprisonment. On appeal, defendant contends that the trial court erred when it considered as

substantive evidence an audio recording of a conversation between him and C.B., but no foundation had been set showing that the recording was produced by an accurate and reliable process. For the following reasons, we affirm.

¶ 3 JURISDICTION

¶ 4 The trial court sentenced defendant on May 8, 2015. Defendant filed his appeal that same day. Accordingly, this court has jurisdiction pursuant to Article VI, section 6, of the Illinois Constitution (Ill. Const. 1970, art. VI, §6) and Rule 603 (eff. Oct. 1, 2010) and Rule 606 (eff. Mar. 20, 2009), governing appeals from a final judgment of conviction in a criminal case entered below.

¶ 5 BACKGROUND

¶ 6 Defendant was charged by indictment with four counts of aggravated child pornography stemming from his contact with C.B., who was under 13 years of age at the time. Prior to trial, defense counsel filed a motion *in limine* to bar admission of an audio recording made of defendant's conversations with C.B. on January 5, 2012. The trial court noted that when the recording was made, a crime may have already been committed. It stated that if the State laid a proper foundation at trial, the court would admit the evidence. If not, defense counsel could object and the court would "have to rule on what I've heard during the course of the trial." The trial court denied the motion without prejudice.

¶ 7 Also prior to trial, the State filed a motion to admit C.B.'s out-of-court statements pursuant to section 115-10 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-10 (West 2016)). The parties stipulated that on January 11, 2012, C.B. was interviewed at the Chicago Children's Advocacy Center by Lynn Aladeen, and a video recording was made of the interview. Aladeen would identify the video as an accurate depiction of her interview with

C.B. on January 11, 2012. The trial court, finding C.B.'s recorded statements sufficiently reliable, admitted the video into evidence and ruled that the State could use the statements if C.B. testified at trial.

¶ 8 At defendant's bench trial, C.B. testified that she was born on July 8, 1999. She lived with her mother, R.B., and her brother J.B. Defendant, who was R.B.'s boyfriend and J.B.'s biological father, resided with the family until 2009. Sometime in May, 2011, defendant visited C.B. at her apartment. C.B. was in her bedroom playing with a doll when defendant touched her breasts, telling her that her "breasts were getting bigger." When C.B. pushed his hand away, defendant said, "I'm your daddy. I can't touch you?" C.B. responded, "No."

¶ 9 In November 2011, C.B., R.B., and J.B. were living in a shelter in Iowa. On November 23, 2011, defendant picked up C.B. and J.B. and drove to his mother's house in Chicago. On the way, while J.B. slept, defendant told C.B. he would give her $20 if she took pictures of her breasts. C.B. agreed to take the pictures because she wanted money to get her nails done. Defendant stopped at a Walgreens and C.B. went into the restroom with defendant's cell phone. C.B. stated that she lifted her shirt past her breasts and took pictures, some with her bra on and some with her breasts exposed. C.B. then returned to the car and gave defendant his cell phone. Defendant drove to a CVS and when he returned to the car, he gave C.B. $20. He told her that if she was asked about the money, to tell R.B. that she got it from her grandmother and if her grandmother asked, C.B. should say she got the money from R.B. After she returned to the shelter, C.B. spoke with R.B.'s friend Octavia Evans. C.B. was afraid to talk to R.B. because she was afraid of how R.B. would feel about the incident, and C.B. did not want J.B. to be without a father if defendant went to jail. C.B. stated that her biological father died before she was born and she saw defendant as a father.

¶ 10 In December of 2011, C.B. was in Chicago staying with R.B.'s best friend Sylvia. R.B. came to Sylvia's house around the third week of December. She asked C.B. if she had anything to tell her, and C.B. initially responded, "No." R.B. then said she had spoken to Octavia and wanted to talk to C.B. about defendant. C.B. told R.B. that defendant put his hand down her shirt when R.B. was not present, and asked C.B. to take pictures of herself. R.B. cried after C.B. told her what defendant had done.

¶ 11 On December 24, 2011, C.B. was at her Aunt Ivy's house. Defendant visited and gave C.B. and J.B. money for Christmas. Defendant told C.B. that he had showed her pictures to some of his friends in exchange for money, and he wanted C.B. to take more pictures without her bra. C.B. stated that she went inside and called R.B., telling her that defendant was in his car in front of the house and wanted C.B. to take more pictures. Defendant drove away 20 minutes later.

¶ 12 On January 5, 2012, C.B. was at Sylvia's house when she called defendant to wish him a happy birthday. C.B. decided to record their conversation so that R.B. would believe C.B. and C.B. "would have him on tape." C.B. put defendant "on speaker" and used a tape recorder from her grandmother's house to tape their conversation. R.B. was present for the conversation. C.B. asked defendant if he had her money and defendant offered C.B. $25 if she would take more pictures. Later that day, C.B. saw defendant outside Sylvia's house. She spoke to defendant, standing outside the driver's side window while defendant sat in his car. C.B. had the tape recorder in her pocket. Defendant spoke about the pictures and offered C.B. $25 if she would take more pictures. Defendant gave his cell phone to C.B. and she went back inside the house. C.B. looked through the phone, found the pictures she had taken on November 23, 2011, and forwarded the pictures to R.B.'s phone. C.B. then returned the phone to defendant, telling him that she did not take any pictures because "it was crowded in the house."

¶ 13 At trial, C.B. identified People's Exhibit 1 as defendant's phone which she used to take the pictures in the Walgreens restroom on November 23, 2011, and the phone defendant gave her to use on January 5, 2012. She identified Exhibit 2 as R.B.'s phone, which she used to call defendant on January 5, 2012, and the phone she forwarded the pictures to from defendant's phone. C.B. viewed the CD (Exhibit 3) that contained the photos she took on defendant's phone at Walgreens, and stated that the CD truly and accurately depicted the photos as they appeared when she took them on November 23, 2011. Exhibit 4, another CD, contained the audio recordings of her phone and in-person conversations with defendant on January 5, 2012. C.B. listened to the recordings and stated that they fairly and accurately depicted her conversations with defendant on January 5, 2012.

¶ 14 When the State requested to admit both CDs into evidence, defense counsel objected arguing that no proper foundation had been laid for either CD. The trial court admitted the CDs over defendant's objection and the audio recording was played for the court. C.B. was questioned about the conversation, and she described the recorded discussion she had with defendant.

¶ 15 R.B. testified that she and defendant had dated from 2000 to 2009 or 2010. Defendant was the biological father of J.B. Although he was not C.B.'s biological father, C.B. called him her father. After they separated, defendant continued to provide financial support to the family and they maintained a physical relationship. In 2011, R.B. lived in a shelter in Iowa with C.B. and J.B. On November 23, 2011, defendant picked up C.B. and J.B. and they drove to Chicago for Thanksgiving.

¶ 16 In 2011, between Thanksgiving and Christmas, R.B. was in Chicago and she spoke by phone to her friend at the shelter, Octavia Evans. After speaking with her, R.B. went to see C.B.

at Sylvia's house. R.B. asked C.B. twice if she had anything to tell her and C.B. said she did not. When she asked a third time and referenced defendant, C.B.'s "whole demeanor changed, like she turned kind of pale." C.B. told her that during Thanksgiving, defendant offered her money to take pictures of her breasts. R.B. started to cry and asked C.B. why she did not tell her about the incident. C.B. responded that she did not want J.B. to be without a father. R.B. did not see any pictures that day, nor did she confront defendant about the incident. On December 24, 2011, C.B. called R.B. to tell her that defendant again offered money if C.B. would take more pictures. C.B. said that she did not take more pictures and R.B. again did not ask defendant about what she had heard from C.B.

¶ 17 On January 5, 2012, while at Sylvia's house, C.B. approached R.B. with the idea of recording her conversation with defendant. C.B. called from R.B.'s phone and R.B. was present during C.B.'s conversation with defendant as it was being recorded. After the conversation, defendant came to the house and C.B. spoke with him outside. When C.B. returned, R.B. listened to the recorded conversations C.B. had with defendant over the phone and in person. R.B. recognized the voices on the recording as belonging to C.B. and defendant. R.B. also identified her own voice on the recording where she stated the date prior to the conversations. R.B. did not confront defendant about the conversations.

¶ 18 On January 6, 2012, R.B. and C.B. went to the police station with the recordings. Later, R.B. gave her phone to Detective Hollender because it contained the pictures C.B. had forwarded from defendant's phone. R.B. identified her phone and defendant's phone in court. On January 11, 2012, R.B. saw defendant outside of Sylvia's house. They spoke and then R.B. went into the house to call the police because defendant was "trying to get [C.B.] again." Before the police arrived, R.B. and defendant argued and R.B. "threw acid" on defendant's face, neck, and hand.

Defendant drove away before the police arrived. R.B. provided a description of defendant for police and she was subsequently taken into custody for throwing a chemical in defendant's face. The charges were eventually dropped.

¶ 19 Officer William McKendrick testified that on January 11, 2012, he and his partner, Sean Popow, received a flash message about a possible offender driving a gold Chevy Bonneville. Officer McKendrick spotted and stopped the vehicle. Defendant, the driver, exited the vehicle and told the officers he needed an ambulance because something was thrown in his face. Officer McKendrick smelled ammonia and noticed that defendant's left eye was red. As they waited for the ambulance, Officer McKendrick searched defendant as he was considered a possible offender. He recovered and inventoried defendant's cell phone.

¶ 20 Detective Charles Hollendoner testified that in January 2012, he was assigned to the Special Investigations Unit. Detective Hollendoner investigated cases of sexually abused or exploited children and child pornography, and he was trained to recover digital media. On January 7, 2012, he was assigned to C.B.'s case. He interviewed R.B. and R.B. gave him her phone. Detective Hollendoner took the phone to the Regional Computer Forensic Lab which had software and programs to recover data from a phone. Using a tool called a ZRT, he looked for photos sent to R.B.'s phone via text message. He found nine images and he burned the images onto a CD. Detective Hollendoner identified People's Exhibit 2 as R.B.'s phone, and Exhibit 3 as the CD containing the images he found on R.B.'s phone. He identified Exhibit 7 as his report which contained the photos of C.B. found on R.B.'s phone. Detective Hollendoner also examined Exhibit 1, defendant's phone, but did not find any photos of C.B. He explained that it was possible to delete a photo from a cell phone and not be able to recover it using the tools available at the lab. The phone also would not have a record of the deletion.

¶ 21 The State requested the admission of R.B.'s phone, defendant's phone, a photo of C.B. taken at the Children's Advocacy Center, and the CD with a recording of C.B.'s interview with Aladeen at the Children's Advocacy Center into evidence. Defendant objected to the admission of the phones, arguing that no proper foundation had been laid for their admission. The trial court admitted the exhibits into evidence. After the State rested, defendant moved for a directed verdict and renewed his objection to "the voice recordings and other crimes evidence." The court denied defendant's motion.

¶ 22 After closing argument, the trial court stated that although it considered "the testimony and the exhibits and the recordings that were taken of the conversations between defendant and [C.B.], it found that "this is not really a complex case." The court found C.B. "to be a credible witness standing alone" and "[c]learly from that testimony the phone was used to take these photos." The recordings and exhibits corroborated C.B.'s testimony. The court found defendant guilty of two counts of soliciting C.B., who was under 13 years of age at the time, to take lewd photos of herself, and also guilty of possessing child pornography. However, it found defendant not guilty of exhibiting images of child pornography. Defendant filed a motion for a new trial which the trial court denied. The trial court then sentenced defendant to two consecutive ten-year terms for aggravated child pornography based on solicitation, and 7 years' imprisonment for aggravated child pornography based on possession, to run concurrent with the consecutive ten-year sentences. Defendant filed this timely appeal.

¶ 23 ANALYSIS

¶ 24 On appeal, defendant challenges only the admission of the audio recordings. Defendant contends that the trial court erred in considering as substantive evidence the recordings of the conversations between him and C.B., where no proper foundation had been laid for their

admission as evidence. Defendant failed to raise this issue in his motion for a new trial. To preserve an issue for review, defendant must both object at trial and raise the issue in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). This court may consider a forfeited claim as plain error if a clear or obvious error occurred and the evidence is closely balanced, or if the error is so serious that it affected defendant's right to a fair trial. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). However, first we must determine whether any error occurred. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

¶ 25 "The admissibility of evidence at trial is a matter within the sound discretion of the trial court, and its ruling may not be reversed absent a clear abuse of discretion." *People v. Criss*, 307 Ill. App. 3d 888, 900 (1999). Defendant argues that the trial court erred in admitting the recordings as substantive evidence without additional proof showing that the recordings are accurate and reliable. Defendant cites primarily to *People v. Flores*, 406 Ill. App. 3d 566 (2010), and *People v. Taylor*, 2011 IL 110067, as support.

¶ 26 In *Flores*, the defendant was convicted of driving with a revoked or suspended license. *Id*. at 567. Evidence submitted included a videotape produced by a neighbor, Salvatore Morici. By all accounts, the defendant and Morici "did not like each other," and Morici admitted at trial "to a history of bad blood between himself and defendant." *Id*. at 567-68. Morici testified that on September 22, 2006, he was driving when a white van swerved into his lane and headed toward him, forcing Morici onto the unpaved shoulder. The driver, whom Morici recognized as defendant, "flipped the finger" at him. *Id*. at 567. Morici had a video recorder in his vehicle and he followed the white van. When the van came toward him again, Morici started his recorder and taped defendant as he pulled to the side of the road and got out of the van. Morici testified that he reviewed the tape and it accurately depicted what he had seen when he started video recording.

Id. Morici acknowledged that he showed the videotape to police, but did not give it to them at the time because part of the tape had "personal information." *Id*. Morici testified that the tape shown in court, a copy he made of the original recording, did not have his grandmother's "personal information" but offered no clear explanation as to why that footage was missing. *Id*.

¶ 27 The appellate court expressed concern about Morici's testimony that the copy "was altered by omitting portions of the original." *Id*. at 576. Therefore, it concluded that "the foundation for admitting the tape as substantive evidence required something more rigorous than Morici's testimony that the video in evidence truly and accurately depicted that which it purported to depict." *Id*. Since the trial court treated the videotape as "independent, substantive evidence of the events of September 22, 2006," without additional evidence to establish that the tape was "without change, addition, or deletion," the court abused its discretion in admitting the tape as evidence. *Id*. at 577.

¶ 28 In *Taylor*, the challenged evidence was a video recording made by a motion-activated surveillance camera. The system was set up in the office of a high school dean who noticed money missing from his desk on several occasions. *Taylor*, 2011 IL 110067, ¶¶ 3-4. The recording showed a man in the office crouching by a desk, opening a desk drawer, and taking out a bank pouch. *Id*. ¶ 15. The recording consisted of two successive segments with a 29-second skip in between segments. *Id*. ¶¶ 15-16. The detective who set up the system testified that the skip occurred because the camera did not sense motion, and the recording stopped when it sensed no motion. The recording began again when the camera sensed motion. *Id*. ¶ 16.

¶ 29 The issue before our supreme court was whether the videotape recording was properly admitted under the "silent witness" theory. *Id*. ¶ 1. The court found that in order to lay a proper foundation for admission of the video recording, several factors should be considered including

"(1) the device's capability for recording and general reliability; (2) competency of the operator; (3) proper operation of the device; (4) showing the manner in which the recording was preserved (chain of custody); (5) identification of the persons, locale, or objects depicted; and (6) explanation of any copying or duplication process." *Id*. ¶ 35. Considering those factors, the court found that the State had laid a proper foundation for admission of the videotape. *Id*. ¶ 36.

¶ 30 *Flores* and *Taylor* are distinguishable. In *Flores*, information had been erased or altered so that the videotape was not the same as the original recording. The videotape in *Taylor* contained a skip and was made by a motion-activated camera with no witness present during the recording. These anomalies raised the question of whether the videotapes reliably depicted what actually occurred. Unlike *Flores* and *Taylor*, there is no claim here that the audio recordings were altered or parts were erased, or that they contained unexplained skips or gaps. Rather, C.B. listened to the recordings on the CD and testified that they fairly and accurately depicted her recorded conversations with defendant on January 5, 2012.

¶ 31 Furthermore, *Flores* and *Taylor* involved video recordings whereas here, the challenged evidence is an audio recording. A proper foundation for an audio recording is laid when one who is a party to the recorded conversation identifies the voices in the recording and testifies that the recording accurately depicts the conversation. *People v. Viramontes*, 2017 IL App (1st) 142085, ¶ 68. See also *People v. Melchor*, 136 Ill. App. 3d 708,711-712 (1985) (finding that a technician who listened to the conversation as it occurred, but was not a party to the conversation, could competently testify to the accuracy of the tapes and establish a proper foundation for admission of the tapes). C.B., who was a party to the conversations in the recordings, identified the persons heard on the tape and testified to its accuracy, thereby establishing a proper foundation for its admission. We find that the trial court did not err in admitting the audio recordings as evidence.

¶ 32 Even if admission of the recordings was error, the error was harmless where other competent evidence in the record established defendant's guilt beyond a reasonable doubt, and the verdict would have been the same even if the evidence had not been admitted. *People v. McKown*, 226 Ill. 2d 245, 276 (2007). In the recording, defendant asks C.B. to take pictures of herself in exchange for money. C.B. also testified about these conversations in court. The trial court found C.B. "to be a credible witness standing alone" and "[c]learly from that testimony [defendant's] phone was used to take these photos." "[T]he testimony of a single witness, if positive and credible, is sufficient to convict, even though it is contradicted by the defendant." *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). Additionally, as the State points out, C.B.'s interview with Aladeen at the Children's Advocacy Center corroborated C.B.'s trial testimony and a recording of that interview was admitted into evidence. Thus, even without the challenged recordings, the trial court's verdict would have been the same.

¶ 33 Defendant argues that C.B.'s testimony alone was insufficient, since both R.B. and C.B. "had a complicated relationship with him that was not entirely positive." Defendant questions the motivation behind the recordings and R.B.'s possibly coercive influence on C.B. He points to the "strange delays" that occurred before R.B. took C.B.'s claims to the police, as well as "the lack of any physical evidence connecting [defendant] to the photos, and consequent risk that [R.B.] and C.B. fabricated the allegations against [defendant]," and concludes that "a factfinder would long for some sort of independent evidence."

¶ 34 In a challenge to the sufficiency of the evidence, it is not the function of a reviewing court to retry defendant. *People v. Collins*, 214 Ill. 2d 206, 217 (2005). "Rather, in a bench trial, it is for the trial judge, sitting as the trier of fact, to determine the credibility of witnesses, to weigh evidence and draw reasonable inferences therefrom, and to resolve any conflicts in the

evidence." *Siguenza-Brito*, 235 Ill. 2d at 228. Furthermore, "a fact finder need not accept the defendant's version of events as among competing versions." *People v. Ortiz*, 196 Ill. 2d 236, 267 (2001). Here, the trial court evaluated the evidence and the witnesses' credibility, and found C.B. to be a credible witness. We see no reason to overturn that determination.

¶ 35 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 36 Affirmed.