2011 IL App (2d) 090950-U
No. 2—09—0950
Order filed August 1, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MAYRA AVILA, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 08—CF—186 Honorable Allen M. Anderson, Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Bowman concurred in the judgment.

ORDER

Held: (1) The State proved beyond a reasonable doubt that defendant was guilty of the offense of intimidation, as a rational trier of fact could have found that text message constituted a threat and that defendant sent the text and possessed the requisite intent to coerce; (2) defense counsel was not ineffective for failing to object to hearsay and allegedly irrelevant testimony.

¶ 1 Defendant, Mayra Avila, was charged by indictment with one count of intimidation (720 ILCS 5/12—6(a)(1) (West 2006)) , in that she:

> "with the intent to cause Gerando [*sic*] Huerta to perform an act, pick up his children, twin girls with a date of birth of August 25, 2007, communicated to Gerando [*sic*] Huerta a threat by telephone through text messages, to inflict, without lawful authority, physical harm to the children, in that she would throw them in the garbage."

Following a bench trial, defendant was convicted of the offense and sentenced to a term of probation and public service. She now appeals from her conviction, contending that: (1) she was not proved guilty beyond a reasonable doubt; and (2) she received ineffective assistance of counsel. We affirm.

¶ 2 At trial, Gerardo Huerta testified that he and defendant began a dating relationship in 2002 or 2003. Defendant was working as a receptionist at Huerta's doctor's office and was planning to go to college for some additional courses. During the course of this relationship, which often stopped and restarted, defendant claimed to be pregnant several times. Defendant told him that two of the pregnancies, in 2004 and 2006, resulted in the births of two girls, but the babies died and were buried in California. He never saw the children, any birth or death certificates, or where the children were buried. Defendant asked him to sell his house to help pay for medical bills after the purported death of the baby in 2006, but she never gave him actual hospital bills. Defendant often called to remind him to pray for the babies, especially on the anniversaries of their deaths. Huerta also paid for defendant to have an abortion in 2005.

¶ 3 Huerta and defendant broke up in the summer of 2006, following the purported death of the second child. They resumed dating in December, but were not intimate again until April or May, 2007. In June or July, defendant told Huerta that she was four or five months pregnant. On August 25, defendant notified him that she had delivered twin girls, Samantha and Sophia, and that the babies were fine. Later that day, defendant called him and told him that she had delivered the babies

in her living room and that there were complications. Huerta, who was living in Wisconsin, told her that he could not come down and that she should call 911.

¶ 4 Huerta did come to Illinois, however, and found defendant at her house in North Aurora. While defendant's sons were there,[1] Huerta saw no sign of the girls. Defendant told him that the babies were in Rush-Copley Hospital but that he would need the permission of her other boyfriend to see the children. Huerta was angry, because he did not think that he should be required to ask permission from "a second person" to see the babies. Huerta stayed in Illinois for about a week, but never saw the babies. However, he did see pictures of the babies. He spoke to defendant on the telephone and argued that defendant should change the babies' last names from Avila to Huerta "because she told me that they are my babies, and I have to pay like [*sic*] child support."

¶ 5 Huerta described his relationship with defendant after his return to Wisconsin as "friends" and stated that they still had sexual relations when he visited her once a week during the period of September through December 2007. He never saw the girls in defendant's house; defendant told him that the girls were at her sister's house in Glendale Heights. In October, Huerta contacted an attorney in an effort to establish paternity, change the babies' last names, and get partial custody. Defendant also sent him photos of the babies on his telephone; at trial, Huerta had three photos saved on his cell phone, including one saved on November 20, 2007.

¶ 6 In early January, 2008, Huerta's attorney had arranged a court date on his paternity case. In a phone conversation, defendant told him that she would not attend. They then exchanged texts during the next few weeks. Defendant told Huerta via text that she was in Albuquerque. She also

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[1]Huerta "believed" that defendant was married but separated and planning a divorce when they met.

threatened that, if he did not cancel the legal proceedings, she was going to stay there, and he would never see the babies again.

¶ 7 On January 18, 2008, Huerta received two text messages on his cell phone. The State introduced photographs of these messages on Huerta's phone. The first photo showed a message from "Pancha" at 7:00 pm, which stated "Come for babys or im going to throw to garbig" [*sic*]. The second photograph showed another message from "Pancha" at 7:01p.m. that read the same as the other message but included the word "mayra" at the end of the message. Huerta explained that "Pancha" was his nickname for defendant. He had recorded defendant's various telephone numbers in the cell phone that he had used at that time, and had used both Mayra (for her home, office, and cellular numbers) and Pancha (for her cellular number) to record the numbers. The name that appeared on the screen when a call was received depended on which phone defendant used to make the call. (At trial, when Huerta retrieved the messages still saved on his cell phone, the messages were shown to have been Sent by "Mayra A" instead of "Pancha"; Huerta explained that he had since deleted the name "Pancha" from his phone.)

¶ 8 Huerta went to the Elkhorn, Wisconsin (where he was living), police department and showed the messages to an officer. At around 11:30 p.m., he received a call from "some kind of agency to the family" that they could not find the babies, and he drove to the North Aurora police department. Huerta testified that he was "all stressed out" and "concerned about the babies" at that time. At 5:30 in the morning, Huerta was informed that the babies did not exist. When asked how that made him feel, he responded, "So bad, I can't explain the feeling that I had, in the time [*sic*]; I just cry, and I don't know —." About five days later, Huerta's face became numb and his arm hurt; he went to the hospital and was diagnosed with anxiety, for which he was prescribed the medication Lexapro.

¶ 9 Elizabeth Berrones-Rotchford, an attorney, testified that Huerta came to her office on December 26, 2007, for an initial consultation on a paternity issue. Huerta said that he had twin daughters named Samantha and Sophia Avila, born August 25, 2007, at Rush-Copley Hospital and that defendant was the mother. Huerta paid for Berrones-Rotchford's services and returned to sign the petition in January. After the petition was filed, she met with Huerta on January 20, when Huerta told her that the girls did not exist. She described Huerta as "very distraught," "crying, sobbing, at one point uncontrollably." She recommended that he seek some mental health help, and he sometime later called to tell her that he was seeking professional help.

¶ 10 Daniel Croak of the Elkhorn, Wisconsin, police department testified that he met with Huerta on January 18, 2008, at the police station. Huerta appeared "emotionally distraught" as he told Croak about the texts that he had received. Huerta was "extremely concerned" and became "more and more emotional" as he talked to Croak, sometimes even losing his voice. Croak did not form a belief that the situation was a hoax made up by Huerta; he believed that "it was an incident that needed to be investigated."

¶ 11 Detective Matthew Malvitz of the Elkhorn police department testified that he interviewed Huerta on January 18. He described Huerta as "visibly shaking, distraught, having trouble speaking at times, because he was just shaking so much, his voice was shaking, very upset." He did not think that Huerta was making a false report.

¶ 12 After speaking to Huerta and viewing his cell phone, Malvitz called defendant's phone number, but did not speak to anyone. He spoke to the North Aurora police department, which sent an officer to defendant's house. Malvitz spoke to defendant when a North Aurora officer called him

from defendant's house. Defendant denied sending the texts, but the phone number that she gave to Malvitz matched the phone number for "Pancha" contained in Huerta's cell phone.

¶ 13 Officer Brown of the North Aurora police department testified that he and Officer Paul Ivanya performed a "well-being check" at 202 Linn Court, unit D, on January 18, 2008. Defendant answered the door after the officers knocked on the door for about five minutes. When told that the officers were there to check on the welfare of her twin girls, defendant said that she had taken them to her sister's house in Glendale Heights. The officers talked to defendant about the text message that Huerta had received, and defendant denied sending any text message. Defendant could not remember her sister's address, so they instructed her to meet up with a police officer from Glendale Heights, with whom they had spoken, to lead the officer to her sister's apartment to verify the children's well-being. Defendant gave the names of the girls as Samantha and Sophia.

¶ 14 Brown also spoke to defendant's two sons, whose ages he estimated as around eight years old. The boys denied sending a text message but both replied that they had two sisters who had been dropped off that morning at their aunt's house in Glendale Heights.

¶ 15 Brown subsequently called Rush-Copley Hospital. He confirmed that no children named Samantha and Sophia Avila were born there on August 25, 2007.

¶ 16 Officer Ivanyi testified that defendant told him that her cell phone number was 630-340-7802, which matched the number from the text message sent to Huerta. She denied sending the text. Ivanya spoke to defendant's sons, Nathan (born August 25, 1997) and Jason (born December 21, 1999) Guerrero. Both said that they did not know how to send a text message.

¶ 17 Ivanyi went through the house with defendant and her sons to look for the twins. The boys pointed to the rear of the house when Ivanyi asked where the girls slept. He shone his flashlight in

that area but saw no children. He saw no cribs, baby clothes, or other baby-related items in the house.

¶ 18 Ivanyi spoke with officers from Glendale Heights about meeting defendant and going to her sister's house. The officers did go to a house in Glendale Heights but found no children. Defendant then headed to another sister's house in West Chicago, where Ivanyi met with West Chicago officers. Defendant was taken into custody at that time.

¶ 19 Officer Edward Berg of the West Chicago police department testified that he performed a well-being check at 903 Lorilyn, No. 2A in West Chicago on the night of January 18. He looked through the house and saw five children; two were defendant's and three, including a young girl, were defendant's sister's children. Berg examined defendant's cell phone and noticed that there was only one outgoing text message and 50 incoming messages. He also made a cursory check of the dumpster outside the house but found no babies.

¶ 20 Defendant told him that she had been pregnant with twins about three years earlier and that she had had an abortion. She also said that she was recently pregnant but had miscarried. She believed that Huerta thought that she had had another recent abortion and that there might have been some miscommunication due to Huerta's "poor English." There was no text message regarding throwing babies in the garbage in the outbox on defendant's cell phone, and defendant denied sending such a message.

¶ 21 Detective Joseph Gorski of North Aurora testified that he and another detective spoke to defendant at the police station after she was taken into custody. Defendant denied telling officers that she had two children that she had left with her sister, and she said that her sons were mistaken if they told officers such information. She also denied sending any text messages to Huerta. Gorski

described defendant's emotional demeanor as "void of any type of reaction" and that "it appeared as if she wasn't in the room with us."

¶ 22 After obtaining a search warrant, Gorski searched defendant's cell phone for text messages between defendant and Huerta. The phone contained deleted messages that could not be retrieved. Another search by a detective from the Kane County sheriff's office "relocated" some messages but could not relocate all of the messages.

¶ 23 After the State rested, defendant presented no evidence.

¶ 24 ANALYSIS

¶ 25 Defendant contends that she was not proved guilty beyond a reasonable doubt. When considering a challenge to the sufficiency of the evidence, this court must determine 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 proved beyond a reasonable doubt. *People v. Peterson*, 306 Ill. App. 3d 1091, 1099 (1999). A trier of fact is entitled to draw reasonable inferences that flow from the evidence. *People v. Kirkpatrick*, 365 Ill. App. 3d 927, 929-30 (2006). This court will not substitute its judgment for that of the fact finder on questions involving the weight of the evidence or the credibility of witnesses. *People v. Lofton*, 303 Ill. App. 3d 501, 505 (1999). We will not overturn a conviction on appeal unless the evidence is so improbable, unreasonable, or unsatisfactory so as to justify a reasonable doubt of the defendant's guilt. *Lofton*, 303 Ill. App. 3d at 505.

¶ 26 As charged in this case, the offense of intimidation is defined as:

> "(a) A person commits intimidation when, with intent to cause another to perform or to omit the performance of any act, he communicates to another, whether in person, by telephone or by mail, a threat to perform without lawful authority any of the following acts:
>
> (1) Inflict physical harm on the person threatened or any other person or on property[.]" 720 ILCS 5/12—6(a)(1) (West 2006).

The purpose of the intimidation statute is to prohibit the making of threats that are intended to compel a person to act against his will. *Peterson*, 306 Ill. App. 3d at 1099. "[T]he gist of the offense is the exercise of improper influence—the making of a threat with the intent to coerce another." *Peterson*, 306 Ill. App. 3d at 1099-1100. As used in this statute, the term "threat" implicitly requires "that the expression, in its context, has a reasonable tendency to create apprehension that its originator will act according to its tenor." *Peterson*, 306 Ill. App. 3d at 1100. Put another way, a threat is an expression of an intent to act that has a reasonable tendency to coerce. *Peterson*, 306 Ill. App. 3d at 1103. While the issue of whether particular words have a tendency to coerce or cause apprehension is essentially an objective determination, the subjective reaction of the recipient of the words is a proper consideration. *Peterson*, 306 Ill. App. 3d at 1103. The fact that the particular words created apprehension is highly indicative of their tendency to create that state. *Peterson*, 306 Ill. App. 3d at 1103.

¶ 27 Defendant first argues that the text messages did not constitute a threat because it was not reasonable for Huerta to believe that the babies actually existed. Defendant provides a litany of reasons as to why Huerta should not have believed that the babies ever existed: the implausibility of the timeline of the babies' birth (when they were conceived *vis-a-vis* when Huerta and defendant resumed sexual relations); the short gestational period given this timeline; the "unusual

circumstances" of the babies' birth (being born at home and then taken to the hospital because of complications); the fact that Huerta never saw the babies or any baby items while visiting defendant's house every week; defendant's excuses as to why Huerta could not see the babies; and "the history of pregnancies without babies." This argument is without merit. Defendant fails to address the fact that she created the five-to-six year-long web of deceit, including all the "facts" that she argues should have led Huerta to know that there were no babies. She even enlisted the aid of her young sons to try to convince police officers that the babies existed, had a room in her house, and were currently staying at an aunt's house. A defendant must take the victim as she finds him. *People v. Derr*, 316 Ill. App. 3d 272, 276 (2000). Huerta evidently believed defendant's charade to the extent that he instituted a paternity suit involving the girls. Defendant cannot repeatedly, almost continuously, lie to her victim over six years and then defend herself by claiming that she was not a good enough liar to make her victim believe her.

¶ 28 Defendant next argues that the State failed to prove beyond a reasonable doubt that she sent the text messages. We disagree.

¶ 29 Defendant consistently denied sending the text messages, and no text message regarding throwing babies in the garbage was found on defendant's cell phone. However, photographs of the text messages on Huerta's cell phone, taken on the night of the incident, showed that the messages were sent from "Pancha", Huerta's nickname for defendant. Detective Malvitz of the Elkhorn police department testified that the phone number that defendant gave to him when he spoke to her on the phone matched the phone number for "Pancha" contained in Huerta's cell phone. Officer Ivanyi of North Aurora testified that defendant told him that her cell phone number was 630-340-7802, which matched the number from the text message sent to Huerta.

¶ 30 Defendant argues that the poor spelling and grammar of the messages ("Come for babys or im going to throw to garbig") are at odds with her work experience and college education. We first note that text messaging is not known for its adherence to the King's English. We also note that the specific listing of educational achievement listed in defendant's brief is not contained in the report of proceedings of the trial and was not in evidence at the trial. Defendant's other arguments regarding the suspicious nature of two messages being sent within one minute, various witnesses' misstatements of defendant's phone numbers during trial, and the fact that Huerta's cell phone had been changed by the time of trial such that "Pancha" was no longer displayed when the text messages were displayed simply do not make a finding that defendant sent the texts against the manifest weight of the evidence. A rational trier of fact could logically infer that the texts were sent from defendant's cell phone and that defendant sent the texts. We find no error here.

¶ 31 Defendant argues that, assuming that she sent the text messages, the State failed to prove beyond a reasonable doubt that she had the requisite intent to coerce Huerta to perform some action. According to defendant, since the babies never existed, it was impossible for Huerta to come for the babies and pick them up, and a person cannot specifically intend to coerce a person to do an impossible act. However, by sending the message, defendant coerced Huerta to "Come for babys [*sic*]" all the way from Elkhorn, Wisconsin, to North Aurora, Illinois. The coerced action was driving from Huerta's home to defendant's home, not the proposed taking of the non-existent children.

¶ 32 We conclude that, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime proved beyond a

reasonable doubt. Therefore, the evidence was sufficient to sustain defendant's conviction of intimidation.

¶ 33 Defendant next contends that she received ineffective assistance of counsel. In analyzing such a claim, we apply the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687-89 (1984), and adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504 (1984). A defendant must show that: (1) counsel's representation fell below a reasonable standard; and (2) the deficient representation resulted in prejudice. *People v. Weathersby*, 383 Ill. App. 3d 226, 232 (2008). The first prong is established by showing that counsel made errors so serious that she did not function as the counsel guaranteed the defendant by the Sixth Amendment. *People v. Morgan*, 187 Ill. 2d 500, 529 (1999). The second prong is established by showing a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Harris*, 206 Ill. 2d 1, 16 (2002). Both prongs of the test must be satisfied to establish ineffective assistance of counsel. *Weathersby*, 383 Ill. App. 3d at 232. This court may review either prong first, and we need not consider both prongs if the defendant fails to show one prong. *Weathersby,* 383 Ill. App. 3d at 232-33.

¶ 34 Defendant first argues that counsel was ineffective because she failed to object to hearsay evidence. Officer Brown testified that defendant's sons denied sending a text message; Officer Ivanyi testified that the boys told him that they did not know how to send a text message. Clearly, the boys' out-of-court statements to the officers were hearsay and should not have been allowed. However, we cannot conclude that, but for counsel's failure to object to this testimony, the outcome of the trial would have been different. The credibility of the boys, aged eight and ten years old, was already severely compromised by their (hearsay) statement to Brown that they had two sisters that

had been dropped off with an aunt in Glendale Heights and their actions in pointing out to Ivanyi where the girls supposedly slept in their house. The admission of these hearsay statements was not of such magnitude as to undermine confidence in the outcome of the trial. See *Harris*, 206 Ill. 2d at 16. Because defendant has failed to demonstrate that she suffered prejudice, we do not find ineffective assistance of counsel here.

¶ 35 Defendant next argues that counsel was ineffective for failing to object to several pieces of irrelevant evidence. Defendant first points to the testimony of Huerta and his paternity attorney regarding how Huerta felt and acted when he learned that the girls did not exist and Huerta's subsequent mental health treatment. However, we conclude that this testimony was not irrelevant. Both in the trial court and here on appeal, defendant attacked Huerta's belief that the babies actually existed. His reaction to the information that his daughters were fictitious certainly is relevant to show that he truly believed that these children existed.

¶ 36 Even if we found this testimony to be irrelevant, we would find no error here. When a trial court is the trier of fact, a reviewing court presumes that the trial court considered only admissible evidence and disregarded inadmissible evidence in reaching its conclusion. *People v. Naylor*, 229 Ill. 2d 584, 603 (2008). This presumption may be rebutted where the record affirmatively shows the contrary. *Naylor*, 229 Ill. 2d at 603-04. Defendant argues that this presumption was overcome by the court's statement at sentencing that, "I made the finding of guilty based on the evidence that I hear [*sic*], that you did certain acts that caused emotional pain to someone else." From this, defendant concludes that the court considered all the evidence of Huerta's emotional state and that this evidence made "the court feel sympathy for Huerta and consider Mayra a bad person."

¶ 37 This argument is not well-founded. First, defendant would do well to quote the trial court in full:

> "I made the finding of guilty based on the evidence that I hear [*sic*], that you did certain acts that caused emotional pain to someone else and consumed the resources of at least two police departments on an emergency basis."

This does not affirmatively show that the trial court was speaking about anything other than defendant's actions in sending the intimidating text messages on January 18, 2008. Officer Croak and Detective Malvitz testified to the pain that Huerta suffered that night; they described him as "emotionally distraught", "visibly shaking" and "very upset." It was also only because of the text messages, not Huerta's later mental health issues, that various police departments had to expend their resources trying to check on the well-being of the nonexistent children. Thus, even if we found this evidence to be irrelevant, defendant has not overcome the presumption that the trial court did not consider it.

¶ 38 Similarly, defendant argues that the testimonies of Officer Croak and Detective Malvitz, that they did not believe that Huerta created a hoax or made a false report, were irrelevant. According to defendant, the officers were "testifying as to whether or not they perceived the text messages as real threats to the children" and "commenting on the 'ultimate question of fact,' whether the text messages had a reasonable tendency to create apprehension and qualified as a threat." We disagree. The officers did not testify about the reality of the children, whether whoever sent the text really planned to throw the children in the garbage, or the tendency of the messages to create apprehension. They testified that they did not believe that Huerta made up the text messages and filed a false police

report; thus, their investigation, reaching across state line, continued. Defendant does not explain why such testimony would be irrelevant. We find no error here.

¶ 39 CONCLUSION

¶ 40 For these reasons, the judgment of circuit court of Kane County is affirmed.

¶ 41 Affirmed.