2013 IL App (2d) 120046-U
No. 2-12-0046
Order filed June 28, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Boone County.
Plaintiff-Appellee,	)	
v.	)	No. 08-CF-386
THOMAS J. STROHMEYER,	)	Honorable Fernando L. Engelsma,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Schostok and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Defendant was not denied due process (a fair trial) when the trial court, in his absence, decided to allow the jury to view a recording of an interview of the victim, and any nonconstitutional error was harmless, as there was no reasonable probability that defendant's presence would have changed the result; (2) the trial court did not abuse its discretion in sentencing defendant to a total of 60 years' imprisonment (on a total range of 18 to 180) for three counts of predatory criminal sexual assault of a child, as the total was justified by defendant's criminal history and the seriousness of the offenses.

¶ 2 Following a jury trial in the circuit court of Boone County, defendant, Thomas J. Strohmeyer, was found guilty of three counts of predatory criminal sexual assault of a child (720 ILCS 5/12-

14.1(a)(1) (West 2008)). Defendant was sentenced to a 30-year prison term for one of the convictions and 15-year prison terms for the other two. The trial court ordered that the sentences be served consecutively and that defendant serve 85% of the sentences. Defendant contends on appeal that his convictions must be reversed because he was deprived of his right to be present at all critical stages of the trial. He alternatively contends that the trial court abused its discretion in sentencing him to consecutive prison terms totaling 60 years. We affirm.

¶ 3 The charges against defendant were based on allegations that he committed acts of sexual penetration with T.R. when T.R. was under the age of 13 and defendant was 17 years of age or older. The charging instrument alleged that defendant placed his penis in T.R.'s anus (count I), that he placed his penis in T.R.'s mouth (count II), and that he placed his mouth on T.R.'s penis (count III).

¶ 4 Evidence introduced at trial established that T.R.'s mother, S.R., met defendant in 2006 and that shortly thereafter, defendant moved into the Belvidere apartment that S.R. shared with her children. T.R. testified that, on several occasions following his seventh birthday in March 2008, defendant sexually assaulted him by placing his penis in T.R.'s "butt" or mouth, or by placing his mouth on T.R.'s penis. The assaults occurred in T.R.'s bedroom, in the bedroom that defendant shared with S.R., in the garage, and at defendant's workplace. T.R. testified about a specific incident of anal penetration that occurred in his bedroom on the morning of August 9, 2008. After defendant had removed his penis from T.R.'s anus, S.R. walked into the bedroom and defendant tried to pull his pants up. S.R. started yelling at defendant. Defendant walked out of the bedroom, but later returned and said to T.R., "Keep talking, you're going to get me in jail."

¶ 5 S.R. testified that, at about 6 a.m. on August 9, 2008, she walked into the bedroom that T.R. normally shared with his sister. T.R.'s sister had spent the night with her father, and when S.R.

entered the bedroom T.R. was in his sister's bed. S.R. observed defendant jumping up quickly from the bed. Defendant was breathing rapidly. S.R. touched defendant's chest and felt his heart racing. In addition, defendant's jeans were unzipped and his partially-erect penis was sticking out of his underwear. T.R.'s pajama bottoms and underwear had been pulled down to his knees. S.R. started yelling at defendant. Defendant went to the garage, in which the household's only motor vehicle—a Cadillac registered to S.R.—was kept. S.R. attempted to prevent defendant from getting into the vehicle, but she was unsuccessful and defendant drove off. In a written statement prepared a few days later, S.R. indicated that she observed defendant standing or crouching over the bed as if he were standing up quickly. S.R. did not mention that defendant's penis was partially erect. She indicated that T.R.'s pajamas and underwear were partially pulled down.

¶ 6 After defendant drove away from S.R.'s apartment, S.R. telephoned her mother and told her what occurred. S.R. tried to telephone a close friend, but was unable to reach her. Several hours later, S.R. called the police and reported that defendant had stolen her vehicle. S.R. did not report what she had observed in T.R.'s bedroom. T.R. seemed very frightened, and S.R. had not yet asked him what had happened. She was concerned that the police would take T.R. to the police station and interrogate him. That afternoon, S.R. spoke with T.R. about the incident. T.R. was reluctant to speak, but he pointed to his penis and to his "butt." S.R. asked whether defendant had touched T.R.'s "pee-pee." T.R. shook his head "no." When S.R. asked whether defendant had placed his "pee-pee" in T.R.'s butt, T.R. nodded affirmatively. S.R. testified that T.R. then "put his hands over his ears and he closed his eyes and he curled up in a ball and he wouldn't talk any more." S.R. spoke with T.R. later and T.R. indicated that defendant had abused him "a couple of times."

¶ 7 After T.R. went to bed, S.R. spoke with her mother about what had happened. Her mother's neighbor, a retired police officer, was present for the conversation. On his advice, S.R. took T.R. to Swedish American Hospital in Rockford the following day. At the hospital, S.R. spoke with a detective from the Belvidere police department. On August 14, 2008, S.R. took T.R. to the Carrie Lynn Children's Center in Rockford. When they arrived, T.R. was taken to an interview room. When T.R. returned, he said to S.R., "I'm sorry, mommy, I lied to you. It happened more than just a couple times."

¶ 8 Marisol Tischman testified that she is the lead forensic interviewer at Carrie Lynn Children's Center, which, according to Tischman, "assist[s] in the coordination and with services for child abuse investigations" in Boone County and Winnebago County. Tischman interviewed T.R. on August 14, 2008. A DVD containing an audiovisual recording of the interview was admitted into evidence and played for the jury. During the interview T.R. indicated that defendant had sexually assaulted him a total of 30 times. Raymond Davis, a pediatrician, examined T.R. on August 20, 2008. Davis observed healed anal lesions. The lesions could have resulted from sexual abuse, but also could have had a different cause.

¶ 9 Following the close of the State's evidence, the following colloquy occurred outside the presence of the jury:

> "THE COURT: *** Now all exhibits will go to the jury. As far as a device for them to watch the video—
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> MR. JAZWIEC [defense attorney]: Judge, if I may be heard on the video.
>
> THE COURT: Sure.

MR. JAZWIEC: I would state that if the jury requests to see the video, that you put the video in to allow them to use it, it's kind of like transcripts. You're not sending back the transcripts of all the testimony, so if you send back the videotape with it, I think you are accenting some testimony over other testimony and you are giving them more of an opportunity to view one piece of testimony as opposed to giving them transcripts or other for [*sic*] the testimony of the live testimony, so I think it does therein see the video. They had the opportunity to view it, if they have any requests or they would like to see it, we can address that issue but to give it back to the jury at this time I think you'd be, in fact, using evidence and accenting evidence to the detriment of other evidence that was given on the witness stand.

THE COURT: State?

MR. LoPICCOLO [assistant State's Attorney]: Judge, we're asking that it go back, that they have the opportunity to view it. I think—

THE COURT: It's a question of when they are given the opportunity and there are two ways to do it. Either the video is going back, it's worthless without a device to watch it obviously, so it's a question of, as Mr. Jazwiec indicates, whether or not we send the video back and then wait for a question like, 'Can we have a transcript or can we see the video?'

Your request is to send it back to the jury with a device that would allow them—

MR. LoPICCOLO: No, I don't have an objection to the procedure that Mr. Jazwiec suggested.

THE COURT: Very good.

MR. LoPICCOLO: That would be—

THE COURT: If you are on the same page, that is fine. So its going back to the jury."

¶ 10 After the jury began its deliberations, one of the jurors advised the bailiff that the jurors wanted to view the DVD of T.R.'s interview with Tischman. The bailiff informed the trial court and, at the court's direction, the bailiff provided the jury with equipment with which to view the DVD. In his posttrial motion, defendant argued, *inter alia*, that the trial court erred both in permitting the jurors to view the DVD during their deliberations and in failing to inform defendant of the jury's request to view the DVD. The trial court denied the motion.

¶ 11 Defendant first contends that he is entitled to a new trial because the trial court engaged in an *ex parte* contact with the jurors when it provided them with the audiovisual equipment needed to view the recording of T.R.'s interview. Defendant insists that the *ex parte* contact violated his constitutional right to be present at all critical stages of trial. According to defendant, the violation of this constitutional right mandates reversal unless the State meets the burden of establishing that the error was harmless beyond a reasonable doubt (see, *e.g.*, *People v. Childs*, 159 Ill. 2d 217, 228 (1994) ("Where it is established that an error of constitutional magnitude has occurred, the burden is on the one gaining advantage from the error, rather than the one claiming prejudice, to prove that the error did not contribute to the verdict but, rather, that it was harmless beyond a reasonable doubt.")), and the State cannot meet that burden under the circumstances of this case.

¶ 12 In *People v. Bean*, 137 Ill. 2d 65, 80 (1990), our supreme court observed that, although a criminal defendant has a general right to be present at every stage of trial, courts "have limited the situations in which the denial of this broad right of presence constitutes a violation of the Illinois and United States Constitutions." The *Bean* court observed:

> "In the past we have declared that the broad 'right to be present at trial' is not itself a substantial right under the Illinois Constitution. [Citation.] Instead, it is a lesser right the observance of which is a means to securing the substantial rights of a defendant. *Thus a defendant is not denied a constitutional right every time he is not present during his trial, but only when his absence results in a denial of an underlying substantial right, in other words, a constitutional right*; and it is only in such a case that plain error is committed. [Citations.] Some of these substantial rights are the right to confront witnesses, the right to present a defense, and the right to an impartial jury. ***
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> Under the United States Constitution, criminal defendants also have a general right to be present at their trials; significantly, though, this Federal right of presence is not an express constitutional right but arises from the due process clause of the fourteenth amendment. [Citations.] Because it originates in the due process clause, the Federal right of presence is not an absolute, inviolable right; instead, its scope is contained within the scope of due process. [Citations.] *Thus, as long as a defendant's absence from a portion of his trial does not deprive him of due process, there is no violation of a defendant's derivative due process right of presence under the United States Constitution*." (Emphases added.) *Id.* at 80-83.

In *People v. McLaurin*, 235 Ill. 2d 478, 490-93 (2009), our supreme court reaffirmed these principles.

¶ 13 Whether absence from a portion of trial deprives a defendant of due process depends on whether the defendant was denied a fair and just trial. *Bean*, 137 Ill. 2d at 83. The determination

is made on a case-by-case basis and requires consideration of the entire record. *Id.* at 84. "If it does not appear that an unfair trial resulted, the defendant's constitutional rights were not violated *** even if a defendant's absence in similar circumstances is usually considered to be improper." *Id.* at 83.

¶ 14 Application of these principles leads us to conclude that any error committed by the trial court in providing audiovisual equipment to the jury was not of constitutional magnitude. The trial court's *ex parte* decision to permit to jury to view the DVD did not compromise any substantial right. Defendant was not prevented from confronting witnesses or presenting a defense. Enabling the jury to watch the DVD did not otherwise deprive defendant of a fair trial. Leaving aside the *ex parte* aspect of the trial court's decision, defendant acknowledges that allowing the jury to view the DVD was not error in itself. Thus, the trial court's *ex parte* contact with the jury was, at most, ordinary trial error subject to the standard of harmlessness applicable to nonconstitutional errors; the State was not required to establish that the *ex parte* contact was harmless *beyond a reasonable doubt*. Ordinary (*i.e.* nonconstitutional) errors are harmless where there is no reasonable probability that the jury would have acquitted the defendant if the errors had not occurred. *People v. Nevitt*, 135 Ill. 2d 423, 447 (1990). Applying that standard, any error that occurred here was harmless.

¶ 15 Our decision in *People v. Blalock*, 239 Ill. App. 3d 830 (1993), supports our conclusion that defendant suffered no prejudice as a result of the trial court's *ex parte* decision. In *Blalock*, the defendant contended he and his attorney were not present when the trial court formulated its response to the jurors' requests for a " 'transcript of Tuesday,' " an explanation of legal terms, and a dictionary with which to look up the word " ' "abet." ' " *Id.* at 840. Although the record was unclear as to whether the defendant and his attorney were or were not present, we concluded that, even if the trial

court had acted *ex parte*, no reversible error occurred. We observed that "[t]he key question in determining prejudice is whether defense counsel's presence could have had any effect on the communication [citation] or the deliberative process [citation]." *Id.* at 841. In holding that no prejudice occurred, we focused exclusively on the question of whether the trial court had abused its discretion in responding to the jury's requests. We stated, "The trial court's response to the jury's requests was within its sound discretion. Thus, the alleged *ex parte* communication did not result in reversible error." *Id.* at 842-43.

¶ 16 As noted, there is no dispute that the trial court's decision to provide audiovisual equipment to the jury during its deliberations was within the court's sound discretion. More significantly, our review of the record does not reveal any realistic basis for thinking that defendant's presence would have had any effect on the trial court's exercise of its discretion. Defendant had the opportunity prior the jury's deliberations to address the question of whether the jury should be able to view the video recording of T.R.'s interview. Unfortunately, the pertinent exchange between the parties and the court can be read to indicate either that the court decided that the jurors would be permitted to view the recording if they asked to do so, or, alternatively, that the trial court opted not to decide the question unless and until the jury actually asked to view the recording. Although it appears that defense counsel believed—reasonably—that the trial court had left the matter open, the court's remarks at the hearing on defendant's posttrial motion indicate that the court had reached its decision before the jury began its deliberations. Furthermore, at the hearing on the posttrial motion defendant had an ample opportunity to argue that the jurors should not have been permitted to view the recording during their deliberations. The trial court did not find the argument persuasive, however, and it is fairly clear that the trial court harbored no reservations about its decision. Thus, there is

only an abstract possibility, not a *reasonable probability*, that the trial court would have ruled differently if defendant had had an additional opportunity, while the jury was deliberating, to oppose allowing the jury to view the recording.

¶ 17 Defendant argues that this case is similar to *People v. Tansil*, 137 Ill. App. 3d 498 (1985). In *Tansil*, the trial court's *ex parte* decision to deny the jurors' request to see a "write-up" of the opinions of certain medical experts was based on the court's mistaken belief that it lacked discretion to grant the request. Because there is no indication that the trial court in this case either failed to exercise its discretion, or abused its discretion, defendant's reliance on *Tansil* is misplaced. See *Blalock*, 239 Ill. App. 3d at 841-42.

¶ 18 We next consider defendant's challenge to the cumulative length of his sentences. The following general principles govern our review of the trial court's sentencing decision:

> "The Illinois Constitution requires that '[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship.' [Citation.] A sentence within the statutory limits for the offense will not be disturbed unless the trial court has abused its discretion. [Citation.] An abuse of discretion occurs if the trial court imposes a sentence that 'is greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense.' [Citation.]" *People v. Flores*, 404 Ill. App. 3d 155, 157 (2010).

¶ 19 In imposing sentence, "the court must consider 'the nature and circumstances of the crime, the defendant's conduct in the commission of the crime, and the defendant's personal history, including his age, demeanor, habits, mentality, credibility, criminal history, general moral character, social environment, and education.' " *People v. Martin*, 2012 IL App (1st) 093506, ¶ 48 (quoting

People v. Maldonado, 240 Ill. App. 3d 470, 485-86 (1992)). Moreover, "[t]he weight to be accorded each factor in aggravation and mitigation in setting a sentence of imprisonment depends on the circumstances of each case" and "[a]s long as the court does not consider incompetent evidence, improper aggravating factors, or ignore pertinent mitigating factors, it has wide latitude in sentencing a defendant to any term within the statutory range prescribed for the offense." *People v. Hernandez*, 204 Ill. App. 3d 732, 740 (1990).

¶ 20 Defendant contends, in essence, that a cumulative sentence that will keep him in prison until he is an octogenarian, followed by an indeterminate period of mandatory supervised release (see 730 ILCS 5/5-8-1(d)(4) (West 2008)), does not serve the objective of restoring him to useful citizenship, imposes a heavy financial burden on the State, and is not necessary to protect the public. As to the final point, defendant notes that, if he were given a shorter sentence and remained a danger to the public, his confinement could be extended through civil proceedings under the Sexually Violent Persons Commitment Act (725 ILCS 207/1 *et seq.* (West 2008)).

¶ 21 The trial court noted defendant's substantial criminal history, including numerous convictions of driving under the influence of alcohol or drugs. Despite defendant's argument that treatment for substance abuse and counseling for sexual abuse that defendant had himself suffered as a child might prevent recidivism, we cannot say that the trial court erred in concluding that defendant was unwilling or unable to conform his behavior to the requirements of the law. Lengthy sentences are also appropriate given the seriousness of the offenses (see *Flores*, 404 Ill. App. 3d at 159 (2010) ("The most important sentencing factor is the seriousness of the offense")) which involved the abuse of a position of trust with a child of seven. Accordingly, even assuming, *arguendo*, that it might have been proper for the trial court to exercise lenity on the theory that future civil commitment

proceedings would ensure the public safety, it was by no means an abuse of discretion for the trial court to refrain from doing so.

¶ 22 The offenses defendant committed were Class X felonies punishable by prison terms ranging from 6 to 30 years. See 730 ILCS 5/5-8-1(a)(3) (West 2008). In addition, defendant was eligible for extended-term sentences ranging from 30 to 60 years. See 730 ILCS 5/5-5-3.2(c), 5-8-2(a)(2) (West 2008). Moreover, consecutive sentences for the three offenses were mandatory. See 730 ILCS 5/5-8-4(a)(ii) (West 2008). Thus, the minimum aggregate prison term defendant could have received was 18 years and the maximum was 180 years. The cumulative sentence of 60 years, which is in the lower half of the sentencing range, was not an abuse of discretion.

¶ 23 For the foregoing reasons, we affirm the judgment of the circuit court of Boone County.

¶ 24 Affirmed.