2014 IL App (2d) 130849-U
No. 2-13-0849
Order filed May 23, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,	)	
v.	)	No. 12-CM-4827
ARISTIDES TRONCOSO,	)	Honorable Brian J. Diamond,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices McLaren and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: Convictions of three counts of obscenity and one count of attempted disorderly conduct were reversed where the trial court erroneously admitted evidence of defendant's prior bad acts; cause was remanded for new trial on obscenity counts where the evidence was sufficient to support a finding of guilt; conviction of attempted disorderly conduct was reversed outright where the evidence was insufficient to show that defendant intended to alarm or disturb his son or to provoke a breach of the peace.

¶ 2 Defendant, Aristides Troncoso, was convicted of three counts of obscenity (720 ILCS 5/11-20(a)(1) (West 2012)) and one count of attempted disorderly conduct (720 ILCS 5/26-1(a)(1) (West 2012)). The convictions arose from three videos on a cellular phone that defendant

gave to his son, L.T., for his twelfth birthday. The videos depict, in explicit detail, defendant engaging in various sexual acts with an adult woman. Defendant challenges each of these convictions on appeal. For the reasons that follow, we reverse all four convictions and remand to the trial court for a new trial on the obscenity counts.

¶ 3 I. BACKGROUND

¶ 4 Defendant was initially charged by criminal complaint with one count of distributing harmful materials (720 ILCS 5/11-21 (West 2012)). The complaint alleged that on October 11, 2012, defendant distributed harmful materials to a 12-year-old child by giving him a cellular phone containing sexually explicit videos depicting defendant. The State subsequently charged defendant by information with four counts of obscenity and one count of attempted disorderly conduct. On April 2, 2013, the matter proceeded to a bench trial. Defendant made an oral motion *in limine* to exclude evidence of his prior conduct. The court denied the motion without prejudice to defendant's right to object to such testimony as it came up during trial.

¶ 5 The State introduced the four videos from the cellular phone into evidence without objection. Three of the videos, ranging from approximately 1½ to 14½ minutes in duration, depicted in graphic detail defendant engaging in various sexual acts with a woman. A fourth video, approximately 55 seconds in duration, briefly showed the exposed genitals of L.T., defendant's minor son, as he lay on a bed. L.T. testified for the State, as did defendant's ex-wife, Susan Potts.

¶ 6 Testimony of L.T.

¶ 7 L.T. testified that defendant and his mother were divorced and that he sometimes found himself torn between them. He admitted that his parents were very different people who had different ways of raising him and of viewing human reproduction. L.T. visited defendant every

other weekend from Friday through Sunday.

¶ 8 L.T. testified that defendant picked him up from school on October 11, 2012, so that they could go to a restaurant to celebrate his twelfth birthday. During the car ride to the restaurant, defendant gave L.T. an iPhone 3GS and said "happy birthday." According to L.T., defendant intended to give his son an iPhone 4 in the future. L.T. believed that it was during this car ride that defendant told him that he "had not finished cleaning" the iPhone that he gave to L.T. L.T. did not recall defendant saying anything about taking the phone back to finish cleaning it.

¶ 9 L.T. testified that his mother joined them at the restaurant for dinner. While L.T. was in the bathroom, his mother brought the iPhone from the table to her car. After L.T.'s mother had taken the iPhone and found "bad material" on it, defendant again stated that he had not finished cleaning the phone. L.T.'s mother never returned the phone to L.T., but defendant did give L.T. an iPhone 4 the next month.

¶ 10 L.T. additionally testified about his experiences using phones under defendant's supervision prior to October 11, 2012. It appears that at some point before October 2012, defendant owned a different iPhone 3GS that he allowed L.T. to use "to a limited degree" during their weekend visits together. Defendant had apparently given that phone to L.T., and L.T. lost it on an airplane. L.T. testified that he had once found two applications relating to sex on that phone. The applications were icons on the screen, and he remembered that one of them involved sex jokes and the other had a photograph of a woman's torso. L.T. told defendant that seeing the applications upset him and that defendant should not be using these applications. L.T. admitted on cross-examination that he had been exploring the pages on the phone when he found these applications and that it was he who brought them to defendant's attention. L.T. also said that defendant had placed certain limits on his use of that phone, instructing him not to go on

defendant's page. L.T. understood that to mean that there might be things that were inappropriate on the phone and that defendant wanted to supervise him while he played on it.

¶ 11 L.T. also testified without objection about an incident that occurred the month after his twelfth birthday party. Defendant gave L.T. an iPhone 4 in November 2012. During a weekend visit that November, defendant approached L.T. and showed him two applications on that phone. One of the applications was about sex mistakes—"things that you should not do in a sexual relationship"—and the other was sex facts, which dealt with the science of human sexual reproduction.

¶ 12 The State also attempted to introduce evidence of defendant's interactions with L.T. during a particular weekend visit in the summer of 2012. Defendant objected, revisiting his argument from the motion *in limine* that this was inadmissible evidence of prior bad acts. The State responded that defendant exhibited odd behavior, sexual in nature, during this particular weekend visit, which supported the State's theory on the harmful material charge and showed that the October 11, 2012, incident was not an accident. The court interjected that, presumably, the State was going to introduce evidence of another incident involving "something to do with sex on the phone" to establish that this was a pattern rather than an accident. The State informed the court that the proposed testimony did not pertain to the phone, but insisted that the evidence nevertheless was admissible because defendant's conduct during this visit was "sexual in nature" and demonstrated a continued pattern of behavior. The court overruled defendant's objection and allowed L.T. to testify regarding the events of the weekend in the summer of 2012.

¶ 13 L.T. recounted several events that had transpired during one particular visit with defendant that made him feel "uncomfortable" or "offended." L.T. recalled that he and defendant did yoga stretches on the deck of the house. During one of the stretches, L.T. bent

down toward his toes and experienced some difficulty. Defendant told L.T. that he "had no idea that [L.T.] was so stiff," and L.T. testified that he was offended by that.

¶ 14 Another incident that day made L.T. feel uncomfortable. There were ordinarily two curtains in the shower—a transparent curtain and another one for privacy—but on this occasion, the privacy curtain had been removed. L.T. stated that he was naked and defendant had him get in the shower and turn the water to a comfortable temperature. Defendant told L.T. to twist his left side as much as he could, close his eyes, and imagine that he was in a very quiet forest. Defendant told him to imagine that he was a rubber band that was the most flexible of all the rubber bands in the forest. Defendant then had L.T. try the twist again, and L.T. noticed that he in fact twisted better than he had previously. According to L.T., defendant was right at the edge of the bathtub during this conversation. L.T. clarified on cross-examination that defendant did not touch him during this incident and did not remove the shower curtain. He also testified that defendant had walked in on other occasions when L.T. was in the shower.

¶ 15 L.T. explained that after the shower, defendant took warm towels and picked him up and carried him to the bed. This was something that defendant used to do when L.T. was younger, and he felt uncomfortable because defendant had not done this in a long time. On cross-examination, L.T. added that it felt a little awkward when defendant had done this when he was little, but that he had still kind of liked the comfort of it and how it felt. He also clarified that defendant did not make any inappropriate contact with him while he was in the towels.

¶ 16 Finally, L.T. testified that sometime after the incident with the shower and the towels, defendant told him to pull his underwear down. After he did so, defendant said that the boy's "penis was really big and mentioned that [he] was no longer a little boy." L.T. did not respond to defendant, and he testified that this incident made him feel uncomfortable. On cross-

examination, L.T. admitted that he and his father liked to roughhouse and wrestle and that sometimes he would playfully pull down his own pants in an effort to get his father to back away from him. He said that defendant would tend to be "scared" and run away if he did that. L.T. also admitted that defendant was not the only person who ever asked him to pull down his pants. He recalled an incident two years prior when he was at his mother's house and his friend asked him to pull down his pants. He told his mother about this after the friend left, but his mother did not call the police. He admitted that his mother let him play with this child again after a period of time.

¶ 17 Testimony of Susan Potts

¶ 18 Potts testified that she was L.T.'s mother and that she had been divorced from defendant since June 2004. On October 11, 2012, she received a text message from defendant asking her to meet at a restaurant for L.T.'s birthday party. L.T. and defendant were already sitting at a table when she arrived, and L.T. was playing on his iPhone. L.T. set the phone on the table when he started opening gifts. After they finished eating, L.T. went to the restroom and Potts packed all of the gifts, including the phone, into her car.

¶ 19 Potts stated that she drove L.T. home and went through the bag of presents later that evening. She decided to screen the phone for inappropriate content because L.T. had in the past received a phone for the weekend from defendant that contained applications that she felt were very inappropriate. The phone was password protected, so she had to get the password from L.T. She went through the photographs on the phone and came across still shots of a naked woman lying on a bed in various positions. She recognized a woman in some of the pictures as defendant's ex-girlfriend from three years before. Potts additionally came across three or four videos of sex acts between defendant and one of his girlfriends. She also found a brief video

depicting L.T. putting on his pajamas when he was 9 or 10 years old. The video began kind of dark, but then scanned over L.T. lying on his back on a bed. L.T. did not have any underwear on in the video, and his genitals were clearly visible.

¶ 20 Potts testified that there were many photographs on the phone from vacations and other events and occasions, and the problematic photographs were scattered among the other photographs. The videos, however, may have been located in a separate application. She admitted on cross-examination that she spent quite a while reviewing the photographs and that there were many photographs on the phone that were several years old. She attempted to delete the photographs and videos, but was unable to do so. She filed a police report the next day.

¶ 21 Potts testified on cross-examination that it had been a "hard divorce" and that she had contacted police about defendant on four or five occasions. She had also lodged a complaint with the Department of Children and Family Services about defendant and had sought more than one order of protection. She had pursued an order of protection against defendant after the shower incident with L.T. in the summer of 2012. She admitted that L.T. had told her about that incident in the car after that weekend visit, but she did not seek an order of protection until the following Friday, which happened to be defendant's birthday.

¶ 22 Potts also acknowledged on cross-examination that in the past L.T. had made an allegation against his friend that was similar to the allegation against defendant. She did not think that it was necessary to follow up with the police about that incident, and the boys played together again four or five months later after she spoke with the friend's mother.

¶ 23 Finally, Potts testified that she allowed L.T. to use a computer at her home. She admitted that while parents may try to monitor what their children do on the computer, sometimes children come across images that one would not expect. To that end, she recounted one time when L.T.

had inadvertently viewed pornography in her home and in her presence.

¶ 24 Defendant's Case

¶ 25 Following the State's evidence, defendant moved for directed findings on all counts. The trial court granted a directed finding on the harmful material count, but denied the motion as to all other counts. Defendant then introduced into evidence an approximately 1½ minute video clip of a police interview with L.T. from October 24, 2012. L.T. told the police that the iPhone was right next to him at the restaurant and that his mother picked it up and went to her car. He stated that when they got home, he gave his mother the password to the phone. The next time he asked for his phone, she said that he could not have it, which aggravated him. He admitted that he had looked for something bad on this phone but that he never found anything on it. Defendant presented no other evidence, and the State did not offer any rebuttal evidence.

¶ 26 Trial Court's Findings

¶ 27 The court found defendant guilty of the three counts of obscenity relating to the videos depicting him engaging in sexual acts with the woman. The court also found him guilty of attempted disorderly conduct. However, the court found him not guilty of the obscenity count related to the video depicting L.T.'s genitals. The court assessed fines against defendant and sentenced him to concurrent one year terms of probation on each count.

¶ 28 The court stated that L.T.'s testimony was credible and concluded that L.T. was the intended audience for the dissemination of the sexually explicit videos. The court stated: "The Court believes that the comments made in anticipation of the birthday gift about their [*sic*] being materials that hadn't been cleaned off was tough to prove that the defendant knew or should have known that those items were in fact on the phone when he tendered it to his son, and that it was intended or that it was reckless in that regard." The court did not offer its reasoning for its

findings on the attempted disorderly conduct count or the obscenity count related to the video depicting L.T. The court then proceeded to sentencing.

¶ 29 On May 2, 2013, within 30 days of the trial and sentencing, defendant filed a motion for a new trial. The court denied that motion on July 17, 2013, and Defendant timely filed a notice of appeal on August 15, 2013.

¶ 30 II. ANALYSIS

¶ 31 Defendant argues that the trial court erred in allowing the State to introduce prejudicial evidence of his prior bad acts that he contends were not generally similar to the charged conduct. He also argues that the guilty findings on the three obscenity counts were legally inconsistent with the directed finding in his favor on the harmful material count. Additionally, he argues that the obscenity statute criminalizes only the commercial dissemination of obscene materials. Finally, he challenges the sufficiency of the State's evidence to support each of the convictions.

¶ 32 Prior Bad Acts

¶ 33 Defendant contends that the trial court erred in admitting evidence of his prior bad acts involving L.T. We review the trial court's evidentiary rulings for an abuse of discretion. *People v. Pikes*, 2013 IL 115171, ¶ 12. A trial court abuses its discretion only where its decision is "arbitrary, capricious, or unreasonable or where no reasonable person would take the view of the trial court." *People v. Davis*, 248 Ill. App. 3d 886, 891-92 (1993).

¶ 34 Evidence of a defendant's prior crimes or bad acts generally is not admissible as character evidence to prove that the defendant committed the charged crime. Ill. R. Evid. 404(b) (eff. Jan. 1, 2011). Nevertheless, such evidence may be admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Ill. R. Evid. 404(b) (eff. Jan. 1, 2011). When the evidence is offered to prove *modus operandi* or to show that

a crime was part of a common design, " 'there must be a high degree of identity between the facts of the crime charged and the other offense.' " *People v. Johnson*, 239 Ill. App. 3d 1064, 1074 (1992) (quoting *People v. Illgen*, 145 Ill. 2d 353, 372-73 (1991)). However, when the evidence is offered to prove intent or lack of an innocent frame of mind, "general similarities will suffice to justify admission." *Johnson*, 239 Ill. App. 3d at 1074.

¶ 35 The prior bad acts evidence at issue was L.T.'s testimony about events that transpired during a weekend visit with defendant several months before defendant provided his son with the cell phone containing explicit sexual images. Specifically, L.T. testified that he and defendant first did yoga together and that he was offended when defendant told him that he had no idea that his son was so stiff. Later that day, defendant stood at the edge of the bathtub while L.T. showered. The privacy curtain that was ordinarily there was gone and only a transparent curtain remained. Defendant told L.T. to twist to his side, close his eyes, and imagine that he was a flexible rubber band in a quiet forest. After the shower, defendant got warm towels and picked L.T. up and carried him to the bed as defendant had done when L.T. was younger. Finally, after the incident with the shower and the towels, defendant told L.T. to pull his underwear down, commenting that his "penis was really big and mention[ing] that [he] was no longer a little boy."

¶ 36 Defendant argues that the trial court erred in allowing this evidence because his conduct, even if unorthodox or outside of the conventional, was not inherently sexual in nature and thus not similar to the charged conduct. He emphasizes that there was no evidence that he ever made inappropriate sexual contact with L.T. and argues that L.T.'s subjective feelings about these events do not change the nature of the acts such that they should constitute prior bad acts that were admissible. Additionally, he argues that, even assuming that this conduct was sexual in

nature, the evidence did not satisfy the general similarity test so as to be admissible and probative of his intent to provide obscene materials to L.T.

¶ 37 We agree that the trial court abused its discretion in admitting this evidence. In responding to defendant's objection to this evidence at trial, the State argued that the prior conduct was "sexual in nature, odd behavior that involves directly [defendant] and his son in that time frame . . . relevant to [the] harmful materials count." After informing the court that the prior bad acts did not have to do with the phone, the State asserted: "It would be the State's position it does go towards the continued pattern of behavior that is related to content that is on the phone that is not unlike what you have heard and is not going to be related to something contained on the phone." The State [then] once again represented that the prior bad acts would somehow be used to rebut defendant's affirmative defense on the harmful material count that he was L.T.'s father, but it did not explain how, exactly, the evidence would do so. However, after the evidence was admitted and in response to defendant's motion for directed findings, the State did not attempt to link the prior bad acts to the harmful material count. Instead, it argued that the prior conduct was indicative of defendant's intent to provide his son with obscenity. Indeed, during closing arguments, after the court already had granted defendant's motion for a directed finding on the harmful material count, the State again referenced defendant's prior bad conduct.

¶ 38 When the State argued that the prior conduct was "sexual in nature," it strongly insinuated that defendant had inappropriately directed his own sexuality toward his son. Indeed, on cross-examination of L.T., defense counsel had to elicit testimony clarifying that defendant had not touched L.T. in a sexually inappropriate manner. The charged conduct, on the other hand, did not involve defendant directing his sexuality toward his son. We fail to see how a reasonable person could view defendant's prior conduct—standing next to L.T. while he

showered, picking him up in warm towels, or asking him to pull down his underwear before commenting on his genitals—as even remotely similar to the charged conduct of providing L.T. with videos depicting defendant engaging in consensual sex with an adult woman. The prior conduct certainly was not part of any relevant pattern of behavior, which was the basis upon which the State convinced the trial court to allow the testimony.

¶ 39 Moreover, any probative value of this evidence was clearly outweighed by the danger of unfair prejudice to defendant. See Ill. R. Evid. 403 (eff. Jan. 1, 2011). Even if it was offered as evidence of defendant's intent to provide the obscene materials to L.T., the State does not explain exactly how defendant's conduct in the summer of 2012 had any bearing on his intent or absence of mistake in providing the phone with the videos to L.T. We are left with the distinct impression that the State impermissibly used defendant's prior bad acts as propensity evidence—*i.e.*, that he was the type of person who would be likely to commit the crime at issue. See Ill. R. Evid. 404 (eff. Jan. 1, 2011). Accordingly, we hold that the trial court abused its discretion in admitting the evidence of defendant's prior bad acts.

¶ 40 We now address whether this amounted to reversible error or was merely harmless error. When the error is evidentiary rather than constitutional, the error is harmless "where there is no *reasonable probability* that the jury would have acquitted the defendant absent the error." (Emphasis in original.) *In re E.H.*, 224 Ill. 2d 172, 180 (2006) (internal quotation marks omitted).

¶ 41 Defendant was convicted after a bench trial. Ordinarily, we would presume that "the trial court considered only admissible evidence and disregarded inadmissible evidence in reaching its conclusion." *People v. Burton*, 2012 IL App (2d) 110769, ¶ 15 (quoting *People v. Naylor*, 229 Ill. 2d 584, 603 (2008)). However, that presumption is negated in the present case because the

trial court improperly admitted the prior bad acts evidence over defendant's objection. *People v. Robinson*, 368 Ill. App. 3d 963, 976 (2006).

¶ 42 Moreover, the prior bad acts evidence was not a minor part of the State's case, and the State was permitted to introduce detailed evidence of the events. Further, the State referred to this evidence in responding to defendant's motion for directed findings and even in its closing arguments. The record is not clear as to exactly for what purpose the evidence was actually admitted or considered. The risk of prejudice to defendant was substantial due to the nature of the testimony—the repeated insinuation that defendant had acted sexually toward his own son. Additionally, there was testimony which tended to call into doubt that defendant knowingly or recklessly provided obscenity to his son—notably, L.T.'s testimony that defendant had in the past placed certain limitations on his use of the phone and Potts' admission that she perused the phone for quite a while before finding sexual images. We therefore hold that the admission of the prior bad acts evidence was reversible error.

¶ 43 We may remand for a new trial only if the evidence was sufficient in this first trial to support defendant's convictions. *People v. Taylor*, 76 Ill. 2d 289, 309 (1979) (noting potential double jeopardy concerns). There was sufficient evidence to support the obscenity convictions in that defendant knowingly or recklessly gave his son a cellular phone containing sexually explicit videos. L.T. testified that defendant gave him the phone for his birthday and told him that he "had not finished cleaning" it. Nor did L.T. recall defendant expressing any intent to take the phone back to finish cleaning it. Additionally, after Potts found sexually explicit material on the phone, according to L.T., defendant again asserted that he had not finished cleaning it. We find that the evidence was sufficient to prove the essential elements of obscenity beyond a reasonable doubt. Accordingly, double jeopardy does not prohibit remand on those counts.

However, as we explain below, the evidence was insufficient to support defendant's conviction for attempted disorderly conduct. We therefore remand for a new trial only on the three obscenity counts.

¶ 44 Obscenity

¶ 45 Defendant further challenges his obscenity convictions on additional grounds.[1] He argues that the findings of guilt on the obscenity counts were legally inconsistent with the court's directed finding in his favor on the harmful material count. Defendant notes that the harmful material statute provides an affirmative defense when "the defendant was in a parental or guardianship relationship with the minor" (720 ILCS 5/11-21(c)(2) (West 2012)), while the obscenity statute contains no similar affirmative defense.

¶ 46 Defendant has forfeited this issue by failing to provide a cohesive legal argument or cite legal authority to support it in violation of Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013). See *Vancura v. Katris*, 238 Ill. 2d 352, 369 (2010). Defendant explains that he was subject to prosecution under the obscenity statute but not the harmful material statute. He cites no authority to support his position that this result was not intended or contemplated by the legislature. "Although defendant's argument might have merit, an appellant must present clearly defined issues to the court, supported by relevant authority: this court is 'not simply a repository in which appellants may dump the burden of argument and research.' " *People v. Robinson*, 2013 IL App (2d) 120087, ¶ 15 (quoting *People v. Chatman*, 357 Ill. App. 3d 695, 703 (2005)).

[1] Defendant does not dispute on appeal that the three videos on the phone constituted obscenity. Therefore, we assume, without deciding, that the sexually explicit videos at issue were obscene.

¶ 47 Moreover, defendant has mischaracterized as a "legal inconsistency" what he considers to be an anomalous result—the fact that he was convicted under the obscenity statute while being specifically exempted from prosecution under the harmful material statute. " 'Legally inconsistent verdicts occur when an essential element of each crime must, by the very nature of the verdicts, have been found to exist and to not exist even though the offenses arise out of the same set of facts.' " *People v. Price*, 221 Ill. 2d 182, 188 (2006) (quoting *People v. Frieberg*, 147 Ill. 2d 326, 343 (1992)). Defendant does not argue that such is the case here.

¶ 48 In conjunction with his legal inconsistency argument, defendant urges that the obscenity statute criminalizes only the commercial dissemination of obscene materials. Because this issue is likely to arise on remand, we briefly address defendant's argument. In support of his contention, he cites only the 1972 revisions to the committee comments of the obscenity statute, which state that "in agreement with the drafters of the Model Penal Code, the Committee aimed primarily at the commercial dissemination of obscenity." 720 ILCS Ann. 5/11-20, Committee Comments-1961, at 499 (Smith-Hurd 2002). The committee comments also provide that the affirmative defenses in the obscenity statute "have the effect of reserving criminal punishment for those situations in which the obscenity is disseminated to strangers for gain[;] [t]hus, private noncommercial dissemination between adults is no longer an offense." 720 ILCS Ann. 5/11-20, Committee Comments-1961, at 499 (Smith-Hurd 2002).

¶ 49 We reject any suggestion that the statute criminalizes only the commercial dissemination of obscenity. The statute subjects a person to prosecution when he or she "[s]ells, delivers or provides, or offers or agrees to sell, deliver or provide" obscene materials. 720 ILCS 5/11-20(a)(1) (West 2012). As our supreme court has recognized: "Acts of sale and of delivery are alternate and disparate acts. It is not necessary that a delivery be a sale; material can be

delivered without having been sold. A sale may not involve delivery of what is sold. The proof of one may not be proof of the other." *People v. Capitol News, Inc.*, 137 Ill. 2d 162, 175 (1990). Additionally, even if the legislature *primarily* sought to target the commercial distribution of obscenity, that does not mean that the statute criminalizes *only* commercial distribution. The Supreme Court of the United States has held that states may not constitutionally criminalize the mere possession of obscene content (*Stanley v. Georgia*, 394 U.S. 557, 568 (1969)), but has never limited states to prosecuting only commercial transactions of obscene material. In fact, the Supreme Court has indicated that "the protected right to possess obscene material in the privacy of one's home does not give rise to a correlative right to have someone sell *or give* it to others." (Emphasis added.) *United States v. 12 200-ft. Reels of Super 8mm. Film*, 413 U.S. 123, 128 (1973). Because Illinois's obscenity statute criminalizes the sale, delivery, or provision of obscene materials, the plain language compels us to reject defendant's argument that it is limited to situations involving the commercial dissemination of obscenity.

¶ 50 Attempted Disorderly Conduct

¶ 51 Finally, defendant challenges the sufficiency of the evidence supporting his conviction for attempted disorderly conduct. "Where a defendant challenges on appeal the sufficiency of the evidence, we ask whether, after viewing all the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the elements of the offense beyond a reasonable doubt." *People v. Dereadt*, 2013 IL App (2d) 120323, ¶ 22. Defendant argues that the State did not prove the requisite *mens rea* to support attempted disorderly conduct. Specifically, he contends that the evidence was insufficient to show that he intended to alarm and disturb his son or to provoke a breach of the peace. We agree.

¶ 52 The information alleged that defendant, "with the intent to commit the offense of Disorderly Conduct, in violation of 720 ILCS 5/26-1(a)(1), took a substantial step toward the commission of that offense in that he knowingly acted in such an unreasonable manner as to provide minor child L.T. with a cellular telephone containing sexually explicit videos that would alarm and disturb minor child L.T. and provoke a breach of the peace."

¶ 53 "A person commits disorderly conduct when he or she knowingly *** [d]oes any act in such unreasonable manner as to alarm or disturb another and to provoke a breach of the peace." 720 ILCS 5/26-1(a)(1) (West 2012). The supreme court has stated that "the gist of the offense [of disorderly conduct] is not so much that a certain overt type of behavior was accomplished, as it is that the offender knowingly engaged in some activity in an unreasonable manner which he knew or should have known would tend to emphasis [*sic*] alarm or provoke others." *People v. Raby*, 40 Ill. 2d 392, 397 (1968). "A person commits the offense of attempt when, with intent to commit a specific offense, he or she does any act that constitutes a substantial step toward the commission of that offense." 720 ILCS 5/8-4(a) (West 2012). Accordingly, the State was required to prove that defendant took a substantial step toward the commission of the offense of disorderly conduct and intended to act in an unreasonable manner, to alarm or disturb another, and to provoke a breach of the peace.

¶ 54 We hold that the State did not meet its burden to prove the *mens rea* of intent. Even assuming that defendant intended to provide L.T. with sexually explicit, obscene videos, there was no evidence that defendant did so with the intent to alarm or disturb his son. The State emphasizes that L.T. once told defendant that he was upset when he discovered applications of a sexual nature on defendant's phone. The State suggests that "it is simply not reasonable for [defendant] to give his minor son a phone which contains these videos . . . after being told by that

twelve (12) year old son that those sorts of images 'upset [him] and [defendant] shouldn't be using that.' " The State then concludes that defendant "knew that this unreasonable act would alarm or disturb another, namely his minor son[,] and provoke a breach of peace[] because his son had told him so." Even if the State is correct that defendant knew or should have known that L.T. would be upset had he seen the videos, proof of knowledge is different than proof of intent. It was the State's burden to prove that defendant intended to alarm or disturb his son.

¶ 55 Nor does the evidence reasonably support that defendant intended to provoke a breach of the peace. As the court explained in *People v. Allen*:

> " 'The term 'breach of the peace' has never had a precise meaning in relation to specific conduct. *** The term connotes conduct that creates consternation and alarm. *It is an indecorum that incites public turbulence*; yet violent conduct is not a necessary element. The proscribed conduct must be voluntary, unnecessary, and contrary to ordinary human conduct. On the other hand, the commonly held understanding of a breach of the peace has always exempted eccentric or unconventional conduct, no matter how irritable to others. It seems unnecessary to add that whether a given act provokes a breach of the peace depends upon the accompanying circumstances, that is, it is essential that the setting be considered in deciding whether the act offends the mores of the community.' " (Emphasis added.) *People v. Allen*, 288 Ill. App. 3d 502, 506 (1997) (quoting *United States v. Woodard*, 376 F.2d 136, 141 (7th Cir. 1967)).

Courts have recognized that an act need not be performed in public view or even in a public place to provoke a breach of the peace. For example, the supreme court in *People v. Davis*, 82 Ill. 2d 534, 536 (1980), upheld a disorderly conduct conviction where the defendant entered a

private residence and threatened an 81-year-old woman who had lodged a criminal complaint against his brother.

¶ 56 Here there was simply no evidence in the record that defendant's conduct threatened to " 'incite[] public turbulence' " or " 'offend[] the mores of the community,' " nor is there evidence that defendant intended to do so. *Allen*, 288 Ill. App. 3d at 506 (quoting *Woodard*, 376 F.2d at 141). Unlike *Davis* and the cases cited by the parties, the conduct at issue involved only the private, non-confrontational interaction between parent and child. As this court has recognized, it is important to consider the context surrounding the defendant's conduct. See *McLennon*, 2011 IL App (2d) 091299, ¶ 30 (" '[S]houting, waving and drinking beer may be permissible at the ball park, but not at a funeral.' " (quoting 720 ILCS Ann. 5/26–1, Committee Comments–1961, at 200 (Smith–Hurd 2010))). We conclude that the evidence was insufficient for the trial court to have concluded that defendant intended to provoke a breach of the peace.

¶ 57 Because the State produced insufficient evidence to prove beyond a reasonable doubt that defendant intended to alarm or disturb L.T. or to provoke a breach of the peace, we reverse outright defendant's conviction of attempted disorderly conduct.

¶ 58 III. CONCLUSION

¶ 59 For the reasons stated, we reverse all of defendant's convictions and remand to the trial court for a new trial on the three counts of obscenity only.

¶ 60 Reversed and remanded.