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2014 IL App (3d) 120120-U

Order filed May 22, 2014

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from the Circuit Court
	) of the 12th Judicial Circuit,
	) Will County, Illinois,
Plaintiff-Appellee,	)
	) Appeal No. 3-12-0120
v.	) Circuit No. 10-CF-1451
	)
JON FILIPKOWSKI,	) Honorable
	) Daniel J. Rozak,
Defendant-Appellant.	) Judge, Presiding.

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JUSTICE McDADE delivered the judgment of the court.  
Justices Schmidt and Holdridge specially concur.

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**ORDER**

¶ 1 *Held:* (1) The trial court did not err in allowing testimony of a witness regarding a conversation she overheard while listening on a telephone receiver, because the witness's use of the mute function did not convert the telephone into an eavesdropping device; and (2) the trial court did not abuse its discretion in sentencing defendant.

¶ 2 Following a jury trial, defendant, Jon Filipkowski, was convicted of four counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(d) (West 2010)), and one count of traveling to meet a minor (720 ILCS 5/11-26 (West 2010)). In the aggregate, defendant was sentenced to

20 years of imprisonment. He was given terms of imprisonment of three, seven, five, and three years for each of the four counts of aggravated criminal sexual abuse and two years of imprisonment for traveling to meet a minor, with all of the terms to be consecutive. Defendant filed a motion to reconsider the sentence, which the trial court denied. Defendant appealed, arguing: (1) the testimony of the victim's sister regarding a telephone conversation she overheard between defendant and the victim was inadmissible because her use of the mute function to eliminate sound converted the telephone extension into an eavesdropping device, and therefore the conversation was heard in violation of the eavesdropping statute (720 ILCS 5/14-2 (West 2010)); and (2) the court abused its discretion in sentencing defendant. We affirm.

¶ 3 FACTS

¶ 4 The alleged offenses took place between June 21, 2010, and June 26, 2010, when the victim, A.T., was 13 years old. Prior to trial, defendant attempted to contact the victim while he was released on bond. The trial court doubled defendant's bond.

¶ 5 At trial, A.T. testified that on April 25, 2010, she and defendant began conversing through an internet chat room dubbed "teenvideochat.com." Both A.T. and defendant used "a random made-up name" in the chat room. They engaged in conversation about "[v]ideo games, books, movies, music, [and] life." Defendant lied about his name and his age, introducing himself as 13-year-old "Robbie Justin Bennett." He also sent her a picture of a 13-year-old boy claiming that it was him.

¶ 6 Subsequently, defendant sent text messages to A.T.'s cellular telephone, and they began a friendship via text message, sending "[h]undreds and hundreds of messages a day sometimes." They also spoke to one another via telephone. Soon after initially conversing in the chat room, A.T. was "falling in love" with "Robbie Justin Bennett."

¶ 7 On May 11, 2010, defendant initiated conversations regarding A.T.'s vagina, indicating, "Now, if I only knew what it looks like, tastes like, and feels like, I could really be in charge of it." He also discussed A.T. losing "her virginity." Over the course of the next few days, the conversations continually evolved becoming more sexually explicit.

¶ 8 On May 17, 2010, defendant revealed his real identity and true age being 32 years old. A.T. told defendant to find someone his own age. Defendant told A.T. she was more mature than most of his friends, he never meant to hurt her, and he lied about his age because he knew she would not have spoken with him if she knew his real age. A.T. told defendant that she felt "so violated." He indicated, "please don't" and "what we have is good and normal no matter what you have been led to believe." A.T. testified that although she felt "[s]ick, violated, lied to, disgusted, [and] disturbed," she continued conversing with defendant. Defendant sent a picture of himself. A.T.'s reaction to the picture was "Ewww." Defendant responded, "[S]orry, I'm not hot enough for you, but since you are like all the other girls that only care about looks, I guess it's no big loss."

¶ 9 A.T. continued an online relationship with defendant because he was her only friend. Defendant continued to have sexually explicit conversations with A.T. Defendant asked A.T. to marry him. She replied, "yes." They regularly indicated that they loved each other and discussed their sexual fantasies. They developed codes to refer to specific sexual acts: Tuesday meant oral sex performed on defendant; Wednesday meant mutual oral sex; Thursday meant oral sex performed on A.T.; and Friday meant anal sex.

¶ 10 On June 21, 2010, defendant drove from his home in Florida, where he lived with his mother, to Illinois to meet A.T. so they could be together for their two-month anniversary. On June 22, 2010, defendant removed A.T.'s shirt and kissed her breasts while they were in his

motel room. She became angry and asked to be taken home. On June 23, 2010, defendant performed oral sex on A.T. while she cried. On June 25, 2010, defendant gave A.T. and one of her friends alcohol while they visited him in his motel room. A.T. became intoxicated. Defendant undressed A.T. He put her hand on his penis and placed his penis inside her vagina. After A.T. and her friend sobered up, defendant drove A.T. and her friend home. A.T. sent defendant a text message indicating:

"[B]aby, I loved it, I really, really truly did. Don't feel bad or ashamed, you have absolutely no reason to. You didn't hurt me, I promise. I love you. It was the best first time in the history of the universe[.]"

On June 26, 2010, defendant drove back to Florida.

¶ 11 A.T.'s friend who was in the motel room testified that she saw A.T. stroking defendant's penis on June 24, 2010. On June 25, 2010, A.T.'s friend saw A.T. and defendant on the bed. A.T. was on top of defendant. Ten minutes later A.T. told her friend that she had just lost her virginity.

¶ 12 On July 7, 2010, the father of A.T.'s friend informed A.T.'s parents about the incident in the motel room. A.T. was interviewed by police, and she indicated that she had sex with defendant while her friend was on the other bed.

¶ 13 On July 8, 2010, A.T. had a telephone conversation with defendant. He indicated that she looked sad when he was "Thursdaying" her, which referred to defendant performing oral sex on her. A.T.'s 23-year-old sister testified that she overheard the conversation of July 8, 2010, during which she heard defendant and A.T. speaking about their sexual encounter. Defendant indicated that he could tell that A.T. "wasn't into it" but he had "so much fun." Defendant indicated that he could have done it for three hours but A.T. "kept making that face" and he

knew she was not enjoying it. A.T. admitted she did not enjoy "Thursday." A.T. indicated that she wanted defendant to return so she could "Tuesday him."

¶ 14 A.T.'s sister testified that she intentionally listened to the conversation between A.T. and defendant the day after the allegations of sexual misconduct had been made. She did so by picking up a telephone extension and using the mute button so they could not hear her.

Defendant's attorney moved to strike the testimony of A.T.'s sister on the basis that the telephone extension had been converted into an eavesdropping device.

¶ 15 Evidence indicated that on July 13, 2010, A.T. spoke with Denise Payton of the Will County Child Advocacy Center. A.T. denied drinking alcohol or having any sexual contact with defendant. A.T. testified that she denied the sexual encounter in an effort to protect defendant.

¶ 16 On May 27, 2011, the jury found defendant guilty of four counts of aggravated criminal sexual abuse, with the underlying acts of fondling the breast, penis to hand contact, oral penetration of the vagina, and penile penetration of the vagina. Defendant filed a motion for new trial in which he argued the trial court erred in allowing A.T.'s sister to testify regarding the overheard telephone conversation. The trial court denied defendant's motion for a new trial.

¶ 17 On August 10, 2011, at the sentencing hearing, victim impact statements were read by A.T., her sister, and her parents. In her statement, A.T. indicated that she was extremely upset by defendant contacting her during the Christmas holiday to indicate that it was their eighth month anniversary from their initial meeting on April 25, 2010. The defendant's brother and father testified as to defendant's good character.

¶ 18 On January 17, 2011, at the continued sentencing hearing, the State presented a psychosexual evaluation performed on defendant by Dr. Patricia Grosskopf on August 31 and October 6, 2011. Defendant did not exhibit any regret, shame, or guilt and indicated that he and

the victim were in love and would eventually be together. The Grosskopf evaluation concluded that defendant was in the high risk category of reoffending.

¶ 19 A subsequent psychosexual evaluation of defendant was also performed by Dr. Richard Travis on November 29, 2011, at the request of defendant's attorney. The Travis report indicated that defendant wanted the court to know that he regretted the situation and acknowledged causing the victim and her family many "problems." Travis concluded that defendant was at a moderate risk to reoffend.

¶ 20 On January 25, 2012, the trial court considered factors in aggravation and mitigation. The trial court noted that defendant: (1) "sought out the situation and deliberately put himself into it"; (2) "spent about two months pursuing the 13-year-old-girl"; (3) "preyed on her immaturity"; and (4) "preyed on her developmental disabilities [of Aspergers Syndrome] to break her down and literally groom her." The court noted that when the victim discovered defendant's age and wanted to cease communications defendant "pressed on and on and on and changed her mind." The trial court found that defendant knowingly entered a teen chat-room and "knew exactly who he was going to find on the other end of that computer."

¶ 21 The trial court found the initial evaluation of defendant to be more credible because he was evaluated without the benefit of a prior evaluation, whereas in the second evaluation he knew what to anticipate and how he would be scored. The trial court noted defendant's lack of regret or guilt in the initial evaluation and that he "actually appeared to place the blame on the victim." The trial court further noted that after defendant was aware of the investigation into this case and while this case was pending against him he repeatedly attempted to contact the victim, despite bond conditions ordering him to have no contact with the victim. As a result, the trial court found that defendant was not likely to comply with conditions of probation. The trial court

also noted that this case:

"[I]nvolved repeated conduct by the defendant over a period of days, where he pushed the contact between them farther and farther each time every day, and continued on a daily basis to prey on [the victim's] weaknesses. He went farther and farther each time until, with the added use of alcohol, it resulted in intercourse, with the defendant then leaving the State."

The trial court found that consecutive sentences were necessary to protect the public and sentenced defendant to an aggregate sentence of 20 years of imprisonment, consisting of consecutive sentences for the five counts for which defendant was convicted. Defendant appealed.

¶ 22

## ANALYSIS

¶ 23

### I. Eavesdropping Device

¶ 24 On appeal, defendant first argues that the testimony of A.T.'s sister regarding the telephone conversation of July 8, 2010, between defendant and A.T. was inadmissible because the use of the mute button converted the telephone receiver into an unlawful eavesdropping device. Whether an object can be defined as an eavesdropping device under the eavesdropping statute is a question of law subject to a *de novo* review. *People v. Armbrust*, 2011 IL App (2d) 100955.

¶ 25 The eavesdropping statute provides that a person commits eavesdropping when he "[k]nowingly and intentionally uses an eavesdropping device for the purpose of hearing or recording all or any part of any conversation or intercepts, retains, or transcribes electronic communication" (720 ILCS 5/14-2(a)(1) (West 2010)). An eavesdropping device is:

"[A]ny device capable of being used to hear or record oral conversation or intercept,

retain, or transcribe electronic communications whether such conversation or electronic communication is conducted in person, by telephone, or by any other means[.]" 720 ILCS 5/14-1(a) (West 2010).

Any evidence obtained in violation of the eavesdropping statute is inadmissible in civil or criminal proceedings. 720 ILCS 5/14-5 (West 2010).

¶ 26 A telephone does not constitute an eavesdropping device under the eavesdropping statute. *People v. Gervasi*, 89 Ill. 2d 522 (1982). The eavesdropping statute is not directed at telephones that have not been functionally altered. *People v. Gaines*, 88 Ill. 2d 342 (1981). An unaltered telephone is not an eavesdropping device, even if the receiver is tilted for another party to listen or where a person listens in on an extension. *People v. Shinkle*, 128 Ill. 2d 480 (1989) (telephone was not transformed into an eavesdropping device where the officer listened with his hand covering the mouthpiece because the officer's hand did nothing to alter the telephone's ability to transmit sound); *Gaines*, 88 Ill. 2d 342. On the other hand, the addition of a separate device to a phone to allow others to hear converts a phone into an eavesdropping device. *People v. Perez*, 92 Ill. App. 2d 366 (1968).

¶ 27 Here, the use of the mute button by A.T.'s sister did not transform the telephone into an eavesdropping device because the feature did not functionally alter the telephone's ability to transmit and receive sound. See *Armbrust*, 2011 IL App (2d) 100955 (use of the speakerphone function so that another person could hear the conversation did not change the cellular telephone into an eavesdropping device because the use of the function did not alter the telephone's ability to transmit and receive sounds). Because the mute feature did not alter the telephone into an eavesdropping device, the trial court did not err in denying defendant's request to exclude testimony of A.T.'s sister regarding the conversation she heard after muting the telephone.



Nothing was taken from or attached to the telephone, and the telephone was not altered. The mute button was a feature of the phone. Therefore, the testimony of A.T.'s sister regarding the telephone conversation was admissible.

¶ 28 Additionally, any error in admitting the testimony was harmless. Both A.T. and her friend testified in support of the allegations contained in the charges. A.T.'s statement to police indicates that defendant had a sexual relationship with A.T. Moreover, the content of the text messages sent between A.T. and defendant is indicative of defendant's guilt. The evidence of defendant's guilt was overwhelming, and it is unlikely the outcome of the trial would have been different had the jury not heard the testimony of A.T.'s sister.

¶ 29 II. Sentencing

¶ 30 Defendant additionally argues that the trial court abused its discretion by sentencing him to consecutive sentences. The trial court is in the best position to consider a defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age; therefore, the trial court's sentencing decisions are entitled to great deference. *People v. Alexander*, 239 Ill. 2d 205 (2010). A trial court's imposition of discretionary consecutive sentences will not be reversed on appeal absent an abuse of discretion. *People v. King*, 384 Ill. App. 3d 601 (2008).

¶ 31 Section 5-8-4(c) of the Unified Code of Corrections provides that, other than where consecutive sentences are mandated, the court may impose consecutive sentences if, having regard to the nature and circumstances of the offense and the history and character of the defendant, the court opines that consecutive sentences are required to protect the public from further criminal conduct by the defendant, the basis of which the court shall set forth in the record. 730 ILCS 5/5-8-4(c)(1) (West 2010). The trial court need not recite the language of

section 5-8-4 provided the record shows it believed consecutive sentences were necessary to protect the public. *People v. Allen*, 268 Ill. App. 3d 947 (1994).

¶ 32 Here, the trial court did not abuse its discretion in sentencing defendant. The trial judge found that defendant intentionally entered a teen chat room where he was likely to encounter minors. He preyed on the victim's immaturity and pressured her into continued communication with her after she found out his true age, manipulating her into ignoring her instinct to terminate their so-called friendship. Defendant drove halfway across the country in pursuit of physical contact with a 13-year-old girl and was able to have sexual intercourse with the victim after illegally providing alcohol to her, an underage minor. Even after the investigation into this case began and against the court's orders, defendant continued his attempts at contacting the victim. Over a year after the incident, defendant displayed no regret in his evaluation with Grosskopf and vowed to eventually be with the victim. In light of the all the circumstances of this case, the trial court found defendant's initial evaluation with Grosskopf to be more accurate and his subsequent evaluation with Travis somewhat disingenuous.

¶ 33 We conclude that after considering that nature and circumstances of the offense, and the history and character of defendant, the trial court did not abuse its discretion in finding that consecutive sentences were required to protect the public from further criminal conduct by the defendant.

¶ 34 We affirm defendant's conviction and sentence.

¶ 35 CONCLUSION

¶ 36 For the foregoing reasons, we affirm the judgment of the circuit court of Will County.

¶ 37 Affirmed.

¶ 38 JUSTICE SCHMIDT, specially concurring.

¶ 39 I disagree with that part of the majority's analysis which holds that the use of the mute button on the extension phone used by A.T.'s sister did not transform the telephone into an eavesdropping device "because the feature did not functionally alter the telephone's ability to transmit and receive sound." *Supra* ¶ 27. That is exactly what it did. The purpose of a mute button is to functionally alter the telephone's ability to transmit sound. In *Gervasi*, 89 Ill. 2d 522 (1982), the supreme court found that removal of the microphone from the mouthpiece of an extension telephone transformed that extension into an eavesdropping device proscribed by statute. *Id.* at 527. The use of the mute button electronically disables that microphone. This is quite different from holding one's hand over the mouthpiece which does not functionally alter the phone. Therefore, I find that A.T.'s sister's use of the mute button on the extension phone violated the eavesdropping statute rendering her testimony regarding that conversation inadmissible.

¶ 40 That being said, I agree that the other evidence was overwhelming; the error was harmless. I concur in the judgment.

¶ 41 JUSTICE HOLDRIDGE, specially concurring.

¶ 42 I disagree with the analysis which holds that the use of a mute button on the extension phone used by A.T.'s sister did not transform the telephone into an eavesdropping device "because the feature did not functionally alter the telephone's ability to transmit and receive sound." *Supra* ¶ 27; ¶39. My disagreement with this holding goes further than my colleague, Justice Schmidt. It seems that the question has been made unnecessarily complicated by reference to *People v. Armbrust*, 2011 IL App (2d) 100955 where the appellate court held that the use of a speakerphone did not functionally change a phone into an eavesdropping device. I

find this analysis to be illogical. A clear test as to whether a telephone had been "functionally altered" so as to render it an eavesdropping device would be to ask simply whether the telephone can still transmit sound. If it can still transmit sound it has not been functionally altered. If, as a result of any modification, the telephone can no longer transmit sound then it has been functionally altered and has become an eavesdropping device. Thus, whether one removes the mouthpiece, places ones hand over the speaker, or activates a "mute button" the telephone has been functionally altered in each case so as to disable its ability to transmit sound. Any attempt to distinguish between these methods of disabling the telephone's ability to transmit sound would be illogical. I would find, therefore, that A.T.'s sister's use of the mute button on the extension phone violated the eavesdropping statute rendering her testimony regarding that conversation inadmissible.

¶ 43 I agree with Justice Schmidt's conclusion that this evidentiary error was harmless beyond a reasonable doubt since the properly admitted evidence was overwhelming. I concur in the judgment affirming the defendant's conviction and sentence.