

2012 IL App (2d) 101246-U
No. 2-10-1246
Order filed June 21, 2012

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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. 08-CF-1861
GRANT GAMBAIANI,)	Honorable Daniel P. Guerin,
Defendant-Appellant.)	Judge, Presiding.

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

ORDER

Held: The trial court abused its discretion when it failed to grant a mistrial after defendant was surprised by the existence of exculpatory evidence during trial proceedings. Defendant is entitled to a new trial with prior knowledge of all evidence. We reversed and remanded.

¶ 1 In May 2010, a jury convicted defendant, Grant Gambaiani, of four counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1-(A)1 (West 2008)), one count of aggravated criminal sexual abuse (720 ILCS 5/12-16-(C)11 (West 2008)), and two counts of child pornography (720 ILCS 5/11-20.1-(A)7 (West 2008)). The trial court sentenced defendant to 43 years'

imprisonment. Defendant now appeals. He contends that he is entitled to a new trial because the State withheld exculpatory evidence. Defendant further contends that the trial court abused its discretion when it allowed into evidence inculpatory statements defendant made during an interrogation that he mistakenly believed was being audio-recorded; the trial court abused its discretion when it denied defendant's motion to sever 18 counts of child pornography from the sexual assault counts of the indictment; the trial court abused its discretion when it allowed the admission of other crimes evidence; the State improperly commented on defendant's failure to testify during closing arguments; the jury instructions were improper; and the State failed to prove defendant guilty of the convicted crimes beyond a reasonable doubt. We reverse and remand for a new trial.

¶ 2 On July 29, 2008, a grand jury indicted defendant. Defendant was charged with four counts of predatory criminal sexual assault of a child, one count aggravated criminal sexual abuse, and one count of child pornography. All of the counts in the grand jury's indictment concerned defendant's conduct toward D.G., the victim. Subsequently, the State charged defendant by information with 15 counts of possessing child pornography (depicted child is under 18 years) (720 ILCS 5/11-20.1-(A)7 (West 2008)) and 3 counts of aggravated child pornography (possessing photographs of children under the age of 13 years (720 ILCS 5/11-20.3-(A)6 (West 2008)).

¶ 3 Prior to trial, defendant filed a motion to suppress the statements he made during his interrogation. According to defendant, he mistakenly believed that a portion of his statements were both video and audio recorded. The audio feature, however, did not function properly. Defendant argued that, because the audio feature of the recording system failed, all statements he made during the interrogation should have been suppressed because they offered an incomplete picture of his

interrogation.

¶ 4 The State responded that the first portion of the statements were made without any mention of audio or video recording, and the second portion, made after the investigator asked to record defendant while they reviewed his initial statement, was never given in exchange for a promise that the statements would be recorded. Therefore, according to the State, neither portion should be suppressed.

¶ 5 The trial court conducted a hearing, and following the arguments of the parties, ruled as follows. The trial court found that the lack of audio occurred through no fault of the officers; defendant's initial decision to speak with the officers was made before a recording was contemplated; but the second statement, which was primarily a recitation of the first statement for the purposes of recording, was made after officers promised defendant that any further statements would be recorded. The trial court rejected defendant's argument that the recorded statement was meant to complete the overall statement. It ruled that the first nonrecorded statement was admissible, but the second statement would be barred because the promise of recording was not kept.

¶ 6 Also before trial, defendant moved to sever the 18 child pornography counts in the information from the original 6 counts of the indictment. The alleged pornographic images at issue were discovered on defendant's computer after his arrest for predatory criminal sexual assault, aggravated criminal sexual abuse, and child pornography based on defendant's act of photographing D.G.'s genitals. On March 17, 2010, the trial court conducted a hearing on the motion. In determining whether the charges should be severed, the trial court, relying on *People v. Boand* (362 Ill. App. 3d 106, 115-16 (2005)), considered whether: (1) the alleged offenses were close in time and location; (2) evidence linked the crimes sought to be severed; (3) the offenses were part of a

comprehensive transaction or a common design; and (4) the same or similar evidence would establish the elements of the offenses. The trial court found that the 18 images were shown to D.G. close in time and location to the sexual acts and the photo-taking charged in the indictment. The trial court further found that defendant showed the 18 images at issue to D.G. as part of the scheme he used to convince the victim to take part in the alleged sex acts. Thus, the trial court reasoned that there was evidence linking the two sets of charges and all of the charged offenses were a part of a larger, comprehensive scheme. The trial court determined that 10 of the 18 images of alleged child pornography portrayed similar acts as those charged in the indictment. The trial court further found that the other 8 images of alleged child pornography in the information were depictions of children's genitals, involving conduct similar to that charged in the indictment in that the indictment alleged that defendant photographed D.G.'s genitals. The trial court opined that the two sets of offenses would be established by similar evidence and that it was likely that the charges of child pornography would come in as evidence of other crimes. On March 26, 2010, the trial court denied defendant's motion to sever.

¶ 7 The State also filed a motion to admit other crimes and bad acts to show propensity pursuant to section 115-7.3 of the Illinois Criminal Code (the Code) (725 ILCS 5/115-7.3 (West 2008)), to show a course of conduct and to corroborate D.G.'s testimony. The specific acts included defendant showing D.G. images of children engaged in sexual acts; defendant talking to the victim about sexual acts he had participated in when he was the victim's age; defendant and the victim pulling down their pants and underwear at defendant's suggestion; defendant "tickling" the victim's penis in a car; defendant masturbating in front of the victim and defendant masturbating while the victim also masturbated; defendant putting his mouth on the victim's penis; and defendant making a list of

sexual acts he would like to engage in with the victim. All of the alleged acts, as well as all of the charged offenses, were alleged to have taken place between March 1, 2008, and June 8, 2008.

¶ 8 The trial court decided to allow evidence of other crimes or bad acts allegedly committed by defendant during that time period but specified that details of the bad acts must be limited. The trial court granted the State's motion to admit acts where defendant showed the victim pornography and also allowed evidence of defendant's list of hoped-for sexual conduct. The trial court limited the State from referencing more than 100 of the images recovered from defendant's computer.

¶ 9 On April 27, 2010, defendant's jury trial began. Before the victim testified, the defense asked the trial court to instruct the jurors to limit other crimes evidence to the intent and motive of defendant; the trial court declined. D.G. testified that he was born on June 17, 1997, and was currently 12 years of age. He testified that, in late March or early April of 2008, he stayed at a Florida condominium with his aunt, uncle, and defendant, his 24-year-old cousin. D.G. testified that, during the trip, defendant showed him images of naked people dancing. D.G. identified the images as among those later recovered from defendant's computer.

¶ 10 D.G. testified that approximately two weeks later, he traveled to Ohio with his family, including defendant, to attend the funeral of defendant's mother. D.G. testified that defendant took him into the woods and told him to pull down his pants. Defendant tickled D.G.'s penis and told D.G. that he had engaged in similar foreplay when he was the victim's age. D.G. further testified that once back in Illinois, defendant invited him to his apartment, where defendant showed him computer images of what appeared to be "naked teenagers" engaged in sexual acts.

¶ 11 D.G. testified that defendant visited him and his family at their home on several occasions. According to the victim, defendant came into D.G.'s bedroom approximately 10 times between the

Ohio funeral and June 8, 2008. D.G. testified that, while in his bedroom, defendant would lick and tickle his penis, have D.G. rub his penis, and rub his own penis in front of D.G. D.G. further testified that on approximately five occasions while they were in D.G.'s bedroom, he observed a yellowish-white, thick substance come out of defendant's penis.

¶ 12 D.G. testified that during that same time period, defendant placed his mouth on D.G.'s penis approximately four times. D.G. further testified that defendant instructed D.G. to lick his penis "maybe two times." D.G. complied with the request but defendant did not ejaculate.

¶ 13 D.G. testified that defendant dared him to allow defendant to stick his penis "up [D.G.'s] butt." Defendant had D.G. sit on his naked, erect penis. D.G. testified that he sat on defendant but it hurt so he stood up. He testified that defendant's penis went into his "butt crack but not his butt hole."

¶ 14 D.G. testified that at the beginning of June 2008, defendant showed him a list of "dares," including sexual conduct defendant wanted to engage in with D.G. According to D.G., defendant had written that he wanted to lick D.G.'s penis in a particular manner and have D.G. reciprocate, he wanted to stick his penis in D.G.'s anus and he wanted to lie on the floor naked with D.G. in a hotel at an upcoming family reunion.

¶ 15 D.G. identified a photograph of his penis and testified that the photograph was taken by defendant. D.G. testified that he also took a photograph of defendant's penis and identified the photograph.

¶ 16 At the close of D.G.'s testimony on direct examination, the trial court instructed the jurors that evidence had been received that defendant was involved in conduct other than that charged. The trial court instructed the jury that this evidence was to be received to show defendant's course of

conduct with the victim and defendant's intent and motive. The trial court further stated that the evidence was to be considered only for this limited purpose and that it was for the jury to assign the evidence an appropriate weight. Defense counsel objected, reiterating his preference that the instruction should have been given before the victim's testimony.

¶ 17 D.G.'s mother, N.G. also testified. N.G. testified regarding her family's relationship with defendant, how she learned of defendant's alleged abuse of D.G., and her recollection of the police investigation. During cross-examination of N.G., she admitted that the police had asked her permission to search her home and that she complied. She acknowledged that the police went into the D.G.'s room and that she believed that the police were looking for DNA evidence.

¶ 18 Both sides claimed surprise by N.G.'s testimony regarding the police search of D.G.'s bedroom. The trial court called a recess so that the State could look into whether there was a report of the search. During the recess, the State told the trial court that it had received police reports from the Wheaton police department regarding the search and it was waiting for a lab report, which it was told was negative. Trial resumed and two more witnesses testified. Then, the State reported that the results of the lab report showed that swabs were taken and that no semen was found in defendant's bedroom. At defense counsel's request, the trial court allowed defendant to think overnight about how his counsel wanted to approach the issue of the late discovery and the negative lab results.

¶ 19 The next day, defense counsel informed the trial court that, having told the jurors in opening argument that the police had not conducted a search, this new discovery prejudiced them. Defendant moved for a mistrial. The trial court expressed its concern over the State's nondisclosure but determined that a remedy existed that was less drastic than a mistrial and ruled that the defense would be allowed to belatedly examine the officer regarding the circumstances surrounding the

investigation of the victim's bedroom and the failure to provide a report to the defense. The police reports, which concluded that a laboratory analysis of samples from the victim's bedroom tested negative for fluids relating to sexual activities, were entered into evidence. The trial court denied defendant's motion for a mistrial.

¶ 20 Naperville police officer Daniel Ragusa testified that he was a computer forensic examiner; his job was to process computers to obtain data. He identified defendant's computer and testified that he found images in the computer's thumb cache, which was a folder created by the computer operating system and stored pictures or documents. According to Ragusa, for the images to have become preserved in the thumb cache, some user of the computer would have needed to save the images and then opened them through Windows Explorer.

¶ 21 Ragusa identified the images recovered from defendant's computer thumb cache, including male nudes, and images of children appearing to engage in oral sex. According to Ragusa, there were approximately 100 such images. Ragusa also testified that he recovered an image of the penis that D.G.'s mother had previously identified as the victim's penis.

¶ 22 Will County police officer Joseph Fazio testified that he was a forensic examiner and that he had investigated defendant's cell phone. Through testing, he recovered two images of penises that had been previously deleted. The two deleted images were those identified as the victim's penis and defendant's penis.

¶ 23 Dr. Thomas Rizzo, a psychologist, was told by the victim's mother that D.G. may have been sexually assaulted by an older cousin. Rizzo subsequently met with the victim. Rizzo testified that when the victim related that he and defendant had touched one another's penises and defendant had ejaculated, as well as that the victim felt pain when defendant placed his penis into the victim's

“butt,” he reported the matter to the Department of Children and Family Services. On cross-examination, Rizzo admitted that some children make up allegations. Rizzo also testified that he did not believe that the victim was lying.

¶ 24 Investigator Carmen Easton testified that her job duties included turning over all reports so that the State could share them with the defense, but in this case, after the police found nothing of evidentiary value in the victim’s bedroom, she forgot to mention that information in her report. Easton testified that she failed to ask for a lab report although she admitted that doing so would have been proper. Easton further testified that, when the State asked for a complete set of reports, she believed she had given it everything, but that she was mistaken and had not offered all of the reports. Easton testified that the defense had first learned that a search was conducted and that all stains came up negative for semen during defendant’s trial.

¶ 25 Investigator Robert Holguin testified that on July 2, 2008, he and Easton conducted an interview (the interrogation) with defendant. Holguin testified that defendant was given Miranda warnings and signed a waiver form. According to Holguin, defendant told the officers that he and the victim were like brothers, but that the relationship changed in June of 2008. Holguin testified that defendant told the officers that he was aware his actions toward the victim were wrong, that the victim was truthful, and that he began touching the victim after his mother died when they were together in Ohio for her funeral. Defendant claimed that he did not recall whether he touched the victim while on vacation in Florida but stated that, while in Florida, he showed the victim pornographic images on his laptop.

¶ 26 Holguin testified that defendant told the officers that his memory was hazy due to excessive alcohol use but that he did not believe that the victim was lying and admitted that he may have done

some real bad things to the victim. Defendant stated that he did not recall ever anally penetrating the victim but later recalled that on one occasion the victim jumped on his erect penis and his penis may have gone into the victim's anus for 10 to 15 seconds. Holguin testified that defendant told the officers that he had ejaculated two or three times in the victim's bedroom and that he had engaged in oral sex with the victim two or three times. Defendant admitted taking a photograph of the victim's penis. Holguin testified that defendant was cooperative and attentive throughout the interview.

¶ 27 After the close of the testimony, closing arguments were made, and the trial court instructed the jury. Following deliberations, the jury found defendant guilty of the charged offenses, and the trial court entered its judgment on the verdict. The trial court later sentenced defendant to 43 years' imprisonment, and defendant filed a timely notice of appeal.

¶ 28 Defendant contends that the trial court abused its discretion when it failed to grant a mistrial. Specifically, defendant argues that he is entitled to a new trial because the State withheld exculpatory evidence and he suffered prejudice. Defendant argues that the discovery of the new exculpatory evidence interfered with his ability to prepare an appropriate trial strategy. We reverse and remand on this issue.

¶ 29 In June 2008, the Wheaton police department conducted an investigation of the allegations against defendant. During the course of the investigation, the police inspected D.G.'s home and bedroom. According to the officers' testimony, the police were looking for evidence of defendant's semen in the victim's bedroom to corroborate the victim's allegations. On July 24, 2008, according to the written reports prepared by the police department, laboratory analyses of samples from the victim's bedroom tested negative for fluids relating to sexual activities.

¶ 30 The investigation of the D.G.'s bedroom and the exculpatory nature of the evidence found within the room was not disclosed to the defense before trial. These reports came to light during the trial, when the victim's mother, on cross-examination, testified that the police came to her home and searched D.G.'s bedroom.

¶ 31 After this came to light, the defense moved for a mistrial. The trial court expressed its concern over the nondisclosure but determined that a remedy existed that was less drastic than a mistrial, namely that the defense would be allowed to belatedly examine the officer regarding the circumstances surrounding the investigation of the victim's bedroom and the failure to provide a report to the defense.

¶ 32 Defendant asserts that, during his opening statement, instead of incorrectly maintaining that the police investigation was merely "sloppy," counsel would have focused on the absence of physical evidence corroborating the victim's testimony despite a thorough police investigation, which, in turn, would have led to a different strategy. Defendant also asserts that he may have called his own expert witness. Moreover, defendant argues that the discovery prejudiced him, in that he was denied meaningful representation of counsel. See *People v. Preatty*, 256 Ill. App. 3d 579, 589-90 (1994) ("The right to meaningful representation of counsel extends to the ability to prepare for trial and develop a strategy consistent with the evidence, rather than bootstrap theories necessitated by surprise developments during [trial]"). The State responds that the trial court offered a corrective remedy and that defendant failed to demonstrate any resulting prejudice.

¶ 33 The trial court's denial of a mistrial will not be disturbed on review absent a clear abuse of discretion. *People v. Nelson*, 218 Ill. 2d 232, 251 (2006). A mistrial should be granted when an error of such gravity has occurred that the defendant has been denied fundamental fairness and a

continuance of the proceedings would defeat the ends of justice. *Id.*

¶ 34 The prosecutor must disclose to the defense any material or information which tends to negate the guilt of defendant. *Brady v. Maryland*, 373 U.S. 83 (1963). Evidence is material if there is a reasonable probability that, had the evidence been disclosed, the result of the proceedings would have been different. *People v. Vasquez*, 313 Ill. App. 3d 82, 98 (2000). To establish a violation of rule requiring the State to disclose to a defendant any material or information within its possession or control that tends to negate the guilt of the defendant as to the offense charged, the evidence not disclosed to the defendant must be both favorable to the defendant and material; the question is not whether the accused more likely than not would have received a different verdict had the evidence been disclosed but, whether, in the absence of the evidence, he received a fair trial resulting in a verdict worthy of confidence. *People v. Collins*, 333 Ill. App. 3d 20, 21 (2002). A violation of this nature is reversible error. *Id.* at 27-28.

¶ 35 Here, the evidence withheld from defendant was material. The withheld evidence could have discredited the testimony of the victim and tended to show that the State could not corroborate its theory. Moreover, the nondisclosure prejudiced defendant in that it affected his right to meaningful representation by counsel because it prevented his counsel from developing a strategy consistent with the evidence. See *Preatty*, 256 Ill. App. 3d at 589-90.

¶ 36 The nondisclosure, whether purposeful or not, could not be remedied by granting the defense additional preparation time. D.G. had already testified and had been cross-examined. Defense counsel could have used the withheld evidence in preparing for its cross-examination of the victim. Because the defense had prepared and initiated its strategy before the error came to light, harm had already occurred. The timely disclosure of this exculpatory evidence could have undermined the

credibility of a testifying party, which, in turn, could have negated defendant's guilt. See *People v. Walls*, 323 Ill. App. 3d 436, 443-44 (2001).

¶ 37 Moreover, as the defense explained during oral argument, part of its strategy included an intention to avoid bringing the sympathetic, 12-year-old D.G. to the stand multiple times. The defense, by its own account, wished to limit the jury's exposure to the victim beyond what was required. Here, the trial court's remedy required that the defense go against its chosen strategy and left the defense ill-prepared to reform its strategy, thus violating defendant's right to meaningful representation of counsel. See *Preatty*, 256 Ill. App. 3d at 589-90. Because material evidence was withheld and its nondisclosure was prejudicial to defendant, defendant failed to receive a fair trial. See *Collins*, 333 Ill. App. 3d at 21. Because a continuance of the trial after the nondisclosure came to light denied defendant a fair trial, we determine the trial court abused its discretion when it failed to grant a mistrial. Defendant's conviction must be reversed and remanded for a new trial.

¶ 38 Because we determine that the trial court abused its discretion when it failed to grant a mistrial upon learning that the State had withheld the existence of exculpatory evidence, we need to determine whether a new trial would subject defendant to double jeopardy. In doing so, we must address whether the evidence admitted at trial was sufficient to conclude that defendant was guilty beyond a reasonable doubt. See *People v. Olivera*, 164 Ill. 2d 382, 393 (1995). When we consider all of the evidence presented at trial, we find the State presented sufficient evidence of defendant's guilt to protect defendant's constitutional right against double jeopardy. See *People v. Taylor*, 76 Ill. 2d 289, 309-10 (1979). We emphasize, however, that this determination is not binding on retrial and does not express an opinion concerning defendant's guilt or innocence.

¶ 39 Because we reverse on the issue of the State's failure to disclose exculpatory evidence, the

convictions and sentence will be vacated. As such, the specific challenges to each of defendant's convictions are moot. We will, however, address any of the remaining issues that could recur on retrial or otherwise provide guidance in future proceedings.

¶ 40 Defendant challenges some of the trial court's rulings, which may impact a new trial; therefore, we will address them. Specifically, defendant argues two pretrial errors. First, defendant argues that the trial court abused its discretion when it ruled that the first statement defendant gave to interrogators was admissible. Defendant argues that the completeness doctrine precluded the trial court from choosing to admit one statement while excluding the other. According to defendant, this would have left the jury unable to receive an accurate and complete picture of his statement.

¶ 41 We review this issue under the abuse-of-discretion standard. See *People v. Tenney*, 205 Ill. 2d 411, 436 (2002). Defendant argues that the completeness doctrine permits introductions of the remainder of a conversation as is necessary to shed light on the segments of the conversation already received into evidence. *People v. Patterson*, 154 Ill. 2d 414, 453 (1993). The purpose of this rule is to place the fragmented version already introduced into evidence into proper context to prevent the trier of fact from being misled and to ensure that the true meaning of the conversations is conveyed. *People v. Wright*, 261 Ill. App. 3d 772,775 (1994).

¶ 42 In the current matter, defendant gave a complete statement to interrogators, and therefore, the completeness doctrine does not apply. That defendant later attempted to reiterate his statement on camera is immaterial to his initial statement because his initial statement was complete. Although the trial court determined that the second statement was inadmissible because officers promised it would be recorded, this fact does not impact defendant's initial statement, which he gave knowingly after being read the *Miranda* warnings. Defendant's initial statement was admissible. Thus, we

determine that the trial court did not abuse its discretion.

¶ 43 Defendant next contends that the trial court abused its discretion when it denied his motion to sever the 18 child pornography counts in the information from the original 6 counts of the indictment. In determining whether the charges should be severed, the trial court considered the following factors: (1) whether the offenses were close in time and location; (2) whether evidence linked the crimes sought to be severed; (3) whether the offenses were part of a comprehensive transaction or common design; and (4) whether the same or similar evidence would establish the elements of the offenses. See *Boand*, 362 Ill. App. 3d at 115-16. The trial court found that the offenses were close in time and location, evidence linked the crimes, the offenses were part of a common design, and similar evidence established the elements of the each offense. The trial court ruled that the offenses need not be severed.

¶ 44 We determine that the trial court did not abuse its discretion when it determined that the offenses need not be severed. In the current matter, the evidence adduced at the hearing demonstrated that during the time period alleged, defendant showed the images and video at issue to the victim to entice him to engage in similar sexual activities as demonstrated in the computer images. Thus, we determine that the offenses were close in time and location, and the evidence linked the offenses. Moreover, the evidence reflected that the images used to charge the offenses were part of defendant's common design to encourage the victim to engage in sexual acts with defendant. Furthermore, similar evidence would establish each offense, namely D.G.'s testimony. Thus, we determine the trial court did not abuse its discretion.

¶ 45 Because we order a new trial, we do not address the other issues on appeal as they would be advisory. See *People ex rel. Partee v. Murphy*, 133 Ill. 2d 402, 407 (1990).

¶ 46 For the foregoing reasons, we reverse the judgment of the circuit court of Du Page County and remand for a new trial.

¶ 47 Reversed and remanded.