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2012 IL App (3d) 100690-U

Order filed October 11, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 12th Judicial Circuit Will County, Illinois
Plaintiff-Appellee,)	
v.)	Appeal No. 3-10-0690 Circuit No. 08-CF-539
JOHN W. BYER,)	Honorable Daniel J. Rozak Judge Presiding
Defendant-Appellant.)	

JUSTICE LYTTON delivered the judgment of the court.
Justice Wright concurred in the judgment.
Justice McDade specially concurred.

ORDER

- ¶ 1 *Held:* Defendant, who was convicted of child pornography, (1) was not denied due process by inaccurate testimony before the grand jury since there was sufficient accurate testimony to support the indictment, (2) was not prejudiced by other crimes evidence offered at trial where there was sufficient evidence to sustain his conviction, (3) was proven guilty of child pornography beyond a reasonable doubt, and (4) was not denied due process by "cumulative errors" where errors asserted by defendant were not errors at all or were harmless.
- ¶ 2 Defendant, John W. Byer, was convicted of child pornography and sentenced to 24 months

probation. On appeal, he argues that (1) the trial court should have dismissed the indictment against him because false and misleading testimony was presented to the grand jury, (2) the trial court erred in allowing certain testimony after granting his motion to reopen proofs, (3) he was not proven guilty of child pornography beyond a reasonable doubt, and (4) cumulative errors deprived him of due process. We affirm.

¶ 3 In March 2008, defendant was charged with two counts of child pornography. 720 ILCS 5/11-20.1(a)(6) (West 2008). A grand jury hearing was held on May 7, 2008. At that hearing, Officer Paul Tuuk of the Romeoville Police Department testified that he executed a search warrant at defendant's address on May 31, 2007. Pursuant to the search, officers located "torn up pages containing child pornography and three floppy disks containing child pornography." Officers also recovered a computer file, which was a 25-second digital video of a nude female child engaged in an act of sexual conduct with another person, and "a large collection of child pornography." Tuuk also testified that defendant was getting images of child pornography off the internet and "then distributing them out."

¶ 4 On May 8, 2008, the grand jury returned an indictment against defendant for two counts of child pornography. The first count alleged that defendant possessed a computer printout depicting nude female children touching other nude individuals. The second count alleged that defendant possessed an MPEG computer file that was a 25-second digital video of an adult fondling the breast of a female child. On July 20, 2009, defendant filed a motion to dismiss the indictment, arguing that Tuuk's testimony before the grand jury was misleading, inaccurate and false and, thus, violated his due process rights.

¶ 5 A hearing on defendant's motion to dismiss was held on July 27, 2009. Tuuk testified that

he did not knowingly mislead or provide false testimony to the grand jury on May 7, 2008. He testified that he believed there were three floppy disks containing child pornography found at the residence based on the investigating officer's report. The report indicated that three floppy disks were found. It was later determined that the disks did not contain child pornography. Tuuk did not personally find any computer files depicting child pornography on defendant's computer, but it was his understanding that the investigating officer or Attorney General's Office found those images on defendant's computer. He considered defendant to have a "large collection of child pornography" based on the torn-up pages he found at defendant's residence. The pages contained 25 to 30 images of children engaged in sexual acts.

¶ 6 The State explained that it was dismissing count II of the indictment but planned to proceed on count I. The trial court denied defendant's motion to dismiss the indictment. Thereafter, a bench trial was held.

¶ 7 At trial, Tuuk testified that he searched defendant's residence on May 31, 2007, pursuant to a search warrant. He found torn up pieces of paper on a computer desk in between some mail. The pieces of paper consisted of numerous images of nude young girls in sexual positions. The torn up pieces of paper were admitted into evidence.

¶ 8 Matthew Bejgrowicz, a police officer with the Romeoville Police Department, testified that he helped execute the search warrant at defendant's residence on May 31, 2007. While other officers were searching the house, Bejgrowicz spoke to defendant. Defendant told Bejgrowicz that he was the primary user of the computer and that anything found on the hard drive belonged to him. Defendant told Bejgrowicz that he had the hard drive replaced about two months earlier. Defendant admitted to Bejgrowicz that he looked at pictures of girls attempting to look younger and said he

received pop-up ads for underage pornography. He also admitted that he used Limeware, a file sharing program, to access and download child pornography at least six months earlier but said he did so by accident and deleted it right away.

¶ 9 When Bejgrowicz asked defendant about the torn up pictures, defendant initially denied any knowledge of them. After Bejgrowicz showed the pictures to defendant, defendant said that he meant to throw them away but forgot. He said that he got the pictures off the internet. They were sent to him by someone he didn't know and "just printed themselves out."

¶ 10 Defendant testified that at the time the search warrant was executed, he was living with his mother and stepfather at their home. His grandmother was also living there at the time. Defendant testified that while looking at legal pornography sites on the internet, pop-up images of child pornography appeared on the screen. On one occasion, he tried to click the "X" in the corner to close the pop-up but accidentally hit the "print" button, which was right next to the "X." When he realized that he accidentally printed the page, he grabbed it, tore it into pieces, threw it to the side and forgot about it. He never looked at the page and did not know what was on it. He said he did not throw it in the garbage because it was late at night and he was not wearing any pants. He also did not want his mom to find it in the garbage can.

¶ 11 He denied ever downloading child pornography and denied telling Bejgrowicz that he did so. He denied ever searching for child pornography on the internet or file sharing pornography.

¶ 12 At the conclusion of the evidence, the trial court found defendant's testimony incredible. The court believed that defendant's statements to Bejgrowicz indicated that defendant knew what he had and did not want to get rid of it. The court thought that the absence of pictures on the hard drive could be explained by defendant replacing his hard drive around the time the pictures were printed.

The trial court concluded that there was "sufficient proof beyond a reasonable doubt" to find defendant guilty of count I.

¶ 13 Defendant then filed a motion to reconsider his motion to dismiss the indictment and a motion to reopen proofs so that he could present evidence regarding the installation date of his new hard drive and "exculpatory evidence related to his character," particularly his military experience. The trial court denied the motion to reconsider but granted defendant's motion to reopen proofs.

¶ 14 On March 2, 2010, Amber Haqqani, the senior computer evidence recovery technician for the Illinois Attorney General's Office, testified that she examined the hard drive of defendant's computer. She determined that the operating system was installed on the hard drive on March 29, 2007.

¶ 15 Thereafter, the State presented testimony from Michael Sullivan, the Chief of Investigations for the Illinois Attorney General's Office. Sullivan testified that on February 13, 2007, he conducted a search for computers that had child pornography images on them. He found an IP address located at defendant's residence that contained a list of files for distribution that contained child pornography. Sullivan selected certain files from the list to download. The files started from defendant's IP address, and other IP addresses built on them. The entire files existed at defendant's IP address, but Sullivan did not obtain the entire files from defendant. At least the first five seconds of a 15 to 20 minute child pornography film came from defendant's IP address. Other later segments came from defendant's IP address. There were two other videos found at defendant's IP address, as well as two still images containing child pornography. The videos and images were shown to the court.

¶ 16 Defendant testified that in early 2007, his brother, Mark, and Mark's girlfriend also lived in

his parents' home. Mark used the computer "quite extensively." Mark's son stayed at the house every other weekend and used the computer as well. Defendant testified that he printed the torn up pictures after he replaced the hard drive and after Mark moved out of the house.

¶ 17 On April 13, 2010, defense counsel presented the court with evidence he had recently received from the State that the torn up images consisted of four pages from a commercial website. The website contained the following disclaimer: "All models were at least 18 y.o. at the time of the photography. Our site is not responsible for it." Defense counsel presented evidence that the pages from the website were printed from defendant's computer on April 29, 2007.

¶ 18 During closing argument, the prosecutor argued:

"Also, your Honor looked at the images that were torn up, not – they were pages that were torn up, but the tearing was around certain images, around certain pictures. Some of them were even taped onto a white piece of paper as if to form some kind of collage."

The prosecutor argued that such behavior was inconsistent with defendant trying to destroy the images. At a court proceeding one month later, the prosecutor corrected his statement and stipulated that defendant did not tape the pictures to a piece of paper to form a collage, as he had earlier indicated. Rather, a police officer had done that to try to restore the pages to their original form.

¶ 19 On May 21, 2010, the trial court stated: "I have reviewed the case ad nauseam, over and over, and I am going to stick with my original decision, finding of guilty." The trial court sentenced defendant to 24 months probation.

¶ 20 I. MOTION TO DISMISS INDICTMENT

¶ 21 Defendant argues that the trial court should have dismissed the indictment against him

because Officer Tuuk presented false and misleading testimony to the grand jury that (1) disks containing child pornography were found at his residence, (2) a video depicting child pornography was found on his computer, (3) defendant had "a large collection of child pornography," and (4) defendant was distributing child pornography.

¶ 22 An indictment based on incompetent testimony may be dismissed if a due process violation is established with certainty. *People v. Hruza*, 312 Ill. App. 3d 319, 323 (2000). A court should not dismiss an indictment unless all of the testimony upon which the indictment is based is incompetent. *Id.* Where inaccurate evidence is presented to a grand jury, the indictment should not be dismissed if additional evidence before the grand jury was sufficient to support the indictment. See *id.*; *People v. Young*, 220 Ill. App. 3d 488, 494 (1991). If there is ample evidence to support an indictment without an officer's misstatements, there is no due process violation. See *People v. DeCesare*, 190 Ill. App. 3d 934, 945 (1989).

¶ 23 "A defendant who seeks dismissal of an indictment bears a heavy burden of showing actual and substantial prejudice to him." *Young*, 220 Ill. App. 3d at 492. Discrepancies between an officer's testimony before a grand jury and evidence presented at trial does not result in prejudicial denial of a defendant's due process rights where the discrepancies are immaterial and did not affect whether the grand jury returned an indictment. See *People v. Holmes*, 397 Ill. App. 3d 737, 743 (2010); *People v. Mattis*, 367 Ill. App. 3d 432, 436-37 (2006).

¶ 24 An indictment may be dismissed if it is based on perjured testimony. See *DeCesare*, 190 Ill. App. 3d at 944. A witness's testimony constitutes perjury only if the witness knowingly makes a false statement. *People v. Pulgar*, 323 Ill. App. 3d 1001, 1010 (2001). Where a witness does not know at the time he testified that his testimony was incorrect, there is no perjury and no denial of due

process. See *People v. Shaw*, 133 Ill. App. 3d 391, 399 (1985).

¶ 25 Here, Officer Tuuk admitted at the hearing on the motion to dismiss the indictment that he was wrong when he testified before the grand jury that three computer disks and a computer file containing child pornography were found at defendant's residence. It appears that his testimony regarding these matters were mistakes and not knowingly false or perjured statements.

¶ 26 Any testimony by Tuuk regarding defendant's possession of computer disks or a computer file containing child pornography was immaterial since defendant was never prosecuted for possessing those items. Likewise, Tuuk's testimony before the grand jury that defendant was distributing child pornography was immaterial since defendant was not charged with distribution of child pornography. Finally, Tuuk's testimony that defendant possessed "a large collection of child pornography" was not necessarily false, as that description was subjective and reflected Tuuk's belief that 25 to 30 images constituted a "large collection."

¶ 27 The proper and correct testimony provided by Tuuk regarding the torn up pictures of child pornography was sufficient to support count I of the indictment, the only count the State pursued against defendant. Since there was ample accurate evidence before the grand jury to support count I, the trial court did not err in denying defendant's motion to dismiss the indictment.

¶ 28 II. ADMISSIBILITY OF TESTIMONY

¶ 29 Defendant argues that the trial court erred in allowing Sullivan to testify that files containing child pornography originated from his IP address after the court granted his motion to reopen proofs.

¶ 30 The admissibility of evidence is dependent upon a showing that it is legally relevant. *People v. Lewis*, 305 Ill. App. 3d 665, 674 (1999). Evidence is relevant if it has any tendency to make the existence of a material fact more or less probable than it would be without the evidence. *Id.*

¶ 31 The improper introduction of evidence is harmless when a defendant is neither prejudiced nor denied a fair trial based on its admission. *People v. Chromik*, 408 Ill. App. 3d 1028, 1042 (2011). A defendant is neither prejudiced nor denied a fair trial based on the erroneous admission of evidence where the properly admitted evidence against the defendant is sufficient to establish the defendant's guilt of the crime with which he is charged. See *People v. Johnson*, 406 Ill. App. 3d 805, 818 (2010).

¶ 32 Here, defendant filed a motion requesting the trial court to reopen proofs so that he could present testimony related to two issues: (1) the installation date of the hard drive of his computer, and (2) exculpatory evidence related to his character and prior military service. The trial court granted the motion.

¶ 33 As a result, defendant presented the testimony of Haqqani, who determined that defendant's hard drive was replaced on March 29, 2007. Thereafter, the State presented the testimony of Sullivan, who testified that files containing child pornography originated from defendant's IP address.

¶ 34 The testimony provided by Sullivan was not relevant to either of the issues raised in defendant's motion to reopen proofs. It had nothing to do with the installation date of defendant's hard drive or defendant's character and military service. The State never filed a motion to reopen proofs to present such testimony. Thus, the court erred in allowing it.

¶ 35 Nevertheless, any error in the admission of the evidence was harmless. The only crime for which defendant was prosecuted was possessing torn-up pictures depicting child pornography. The evidence against defendant on that charge was overwhelming, as the State provided the torn-up pictures to the court and defendant admitted that they were his. Sullivan's testimony regarding

defendant's possession of digital child pornography was irrelevant since defendant was not prosecuted for that crime. Thus, Sullivan's testimony did not prejudice defendant nor deny him due process.

¶ 36 III. SUFFICIENCY OF THE EVIDENCE

¶ 37 Defendant argues that he was not proven guilty of child pornography beyond a reasonable doubt because he testified that he never looked at the images on the pieces of paper and had effectively discarded them on his computer desk. He also contends that there was insufficient evidence that the individuals depicted were children, particularly since the website from which they originated stated that "[a]ll models were at least 18 y.o."

¶ 38 To sustain a charge of child pornography, the State must prove (1) the defendant possessed a film, videotape, photograph or other similar visual reproduction or depiction by computer of a child, (2) the defendant knew or reasonably should have known that the child was under the age of 18, and (3) such child was "depicted or portrayed in any pose, posture or setting involving a lewd exhibition of the unclothed genitals, pubic area, buttocks, or, if such person is female, a fully or partially developed breast of the child or other person." 720 ILCS 5/11-20.1(a)(1)(vii) & 20.1(a)(6) (West 2008).

¶ 39 When reviewing the sufficiency of the evidence, the appropriate standard of review is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the offense were proven beyond a reasonable doubt. *People v. Pollock*, 202 Ill. 2d 189, 217 (2002).

¶ 40 A trial court is not required to accept a defendant's testimony that he had no knowledge that he possessed pornographic photographs of underage children. See *People v. Thomann*, 197 Ill. App.

3d 488, 499 (1990). In a bench trial, it is the function of the court to determine the credibility of the witnesses and the weight to be given their testimony. *Id.* It is not for this court to substitute its judgment for that of the trier of fact on questions involving the weight of the evidence or the credibility of the witnesses. *Id.*

¶ 41 The determination of the age of participants in photos or videotapes is to be made by the trier of fact as a necessary element of the offense of child pornography. *Thomann*, 197 Ill. App. 3d at 498. "[A] court does not need expert testimony to determine whether the participants are underage, but can rely on its own everyday observations and common experiences in making this determination." *Id.* at 499; *see also People v. Phillips*, 346 Ill. App. 3d 487, 497 (2004); *People v. Schubert*, 136 Ill. App. 3d 348, 354 (1985).

¶ 42 Here, the trial court found that defendant knowingly possessed and kept the torn-up pictures of child pornography. Although defendant testified that he accidentally printed the pictures, immediately tore them up without looking at them and then forgot about them, the court found this version of events unbelievable. Instead, the court believed that defendant looked at the pictures, knew what they were and purposefully kept them so that he could look at them again later. Since the trial court was in the best position to determine the credibility of defendant, we will not disturb this finding. *Thomann*, 197 Ill. App. 3d at 499.

¶ 43 Additionally, the State proved that the females portrayed in the pictures were under 18 years of age. The torn-up pictures were admitted into evidence and examined by the trial court. The judge could use his "everyday observations and common experiences" to determine that the females in the pictures were under 18, despite the disclaimer contained on the website. *See Phillips*, 346 Ill. App. 3d at 497; *Thomann*, 197 Ill. App.3d at 499; *Schubert*, 136 Ill. App. 3d at 354.

¶ 44 After reviewing the evidence in the light most favorable to the prosecution, the State proved that defendant was guilty of child pornography beyond a reasonable doubt.

¶ 45 IV. CUMULATIVE ERRORS

¶ 46 Finally, defendant argues that numerous errors that occurred before and during his trial denied him due process. Those errors include two already addressed above: Officer Tuuk's incorrect testimony before the grand jury, and Officer Sullivan's testimony following defendant's motion to reopen proofs. The remaining errors alleged by defendant were not raised independently by defendant on appeal and include the prosecutor's reference to defendant creating a "collage" out of the torn up pictures, playing a video of child pornography that allegedly originated from defendant's computer, the State's late disclosure of information from the website where the pictures originated, the absence of a finding by the trial court that the pictures were child pornography, and the trial court's failure to seal evidence at the conclusion of the case.

¶ 47 Individual trial errors may have the cumulative effect of denying a defendant a fair trial. *People v. Desantiago*, 365 Ill. App. 3d 855, 871 (2006). However, the cumulative errors that warrant such an extreme result must themselves be extreme. *Id.* The errors must have resulted in prejudice to the defendant. See *People v. Bradley*, 220 Ill. App. 3d 890, 904-05 (1991). Cumulative errors occurring at trial do not require reversal, where errors considered either in their individual or cumulative effect were harmless beyond a reasonable doubt. See *People v. Williams*, 228 Ill. App. 3d 981, 989 (1992); *People v. Castillo*, 40 Ill. App. 3d 413, 426 (1976).

¶ 48 Where there is no reversible error on any individual issue, the issues cannot cumulatively warrant a new trial. *People v. Atherton*, 406 Ill. App. 3d 598, 620 (2010); *People v. Bauer*, 393 Ill. App. 3d 414, 430 (2009); *People v. Smallwood*, 224 Ill. App. 3d 393, 409 (1991). Where the errors

complained of either were not errors at all or were inconsequential to the defendant's conviction, the cumulative errors doctrine does not apply. See *Desantiago*, 365 Ill. App. 3d at 871; *Bradley*, 220 Ill. App. 3d at 904-05.

¶ 49 Here, we have reviewed the alleged errors raised by the defendant and find that they were not errors at all or were harmless and inconsequential to defendant's conviction. Thus, the cumulative errors doctrine does not apply. See *Desantiago*, 365 Ill. App. 3d at 871; *Bradley*, 220 Ill. App. 3d at 904-05.

¶ 50 CONCLUSION

¶ 51 The order of the circuit court of Will County is affirmed.

¶ 52 Affirmed.

¶ 53 JUSTICE McDADE, specially concurring.

¶ 54 The order of this court affirms the conviction of defendant, John Byer, for possession of child pornography. I concur in that decision.

¶ 55 I write separately on the issue of the motion to dismiss indictment to clarify the basis of my concurrence. Typically, challenges to the results of grand jury proceedings are appealed in one of two postures. In the first, the trial court has found a due process violation and has granted defendant's motion to dismiss the indictment and the State is appealing the dismissal. *People v. Oliver*, 368 Ill. App 3d 690 (2006), and *People v. Hunter*, 298 Ill. App. 3d 126 (1997), discussed in the briefs by both parties, are examples of this type of case.

¶ 56 In the second, the trial court has denied the motion to dismiss the indictment, the case has gone to trial, the defendant has been convicted, and he raises his complaints about the grand jury proceedings as part of a comprehensive challenge to his conviction. *People v. Hart*, 338 Ill. App.

3d 983 (2003), again discussed by the parties, is among numerous examples of this second type of case.

¶ 57 The instant case falls in the second category and the defendant's actual conviction renders any concerns with the grand jury proceedings essentially moot. "A defendant who seeks dismissal of an indictment bears a heavy burden of showing actual and substantial prejudice to him." *People v. Young*, 220 Ill. App. 3d 488, 492 (1991). Even assuming defendant can show that the misconduct affects the grand jury's deliberations, a finding of prejudice cannot be supported where defendant was subsequently found guilty of the charged offense. *People v. Holmes*, 397 Ill. App. 3d 737, 743 (2010); *People v. Mattis*, 367 Ill. App. 3d 432, 436-37 (2006).

¶ 58 Because the trial court found that the grand jury was presented with accurate information that defendant was in possession of a computer printout containing child pornography and because he was convicted of only that charge, our finding rejecting defendant's argument that the motion to dismiss the indictment was improperly denied is both compelled and correct.

¶ 59 I do, however, also wish to briefly address concerns I have about the irregularities before the grand jury and at the hearing on the defendant's motion to dismiss the indictment of which the defendant has complained. Although they are not pertinent to our decision, they are nevertheless disturbing and they create for me an appearance of impropriety in this case.

¶ 60 Officer Tuuk testified, under oath, before the grand jury. He averred, falsely, that the search of defendant's residence, pursuant to a warrant, resulted in the confiscation of three computer disks and a computer file, all containing child pornography. We conclude this testimony was "mistake[n]" rather than knowingly false. ¶ 25, *supra*.

¶ 61 Information can be unknown if it is unavailable or it can be unknown even if it is easily

available and one fails to check. I would suggest that the latter situation can, given the right facts, be tantamount to knowing falsity. This case has not required us to explore the *reasons* why the information presented to the grand jury was incorrect. We only know that it was false and that there was information in both the State's file and the police record reporting, *six months before the grand jury proceeding*, that no child pornography had been found on either the disks or the computer file. Indeed the State asserts that after the indictment was returned, the prosecutor acknowledged that he had the report with the correct information.

¶ 62 The prosecutor knew that he was presenting this case before the grand jury and should have verified his facts before soliciting testimony to secure the indictment he sought. Similarly, Officer Tuuk knew that he was going to be providing, under oath, factual support for the indictment the prosecutor wanted, and he had a similar obligation to familiarize himself with the file so that his testimony would be truthful. Instead, the false information was presented to the grand jury.

¶ 63 We have also found in our order that any falsity in Tuuk's testimony that defendant was "distributing" child pornography or that he possessed "a large collection of child pornography" is immaterial because he was never prosecuted for those offenses. ¶ 26, *supra*.

¶ 64 At one point in the proceedings, one of the jurors asked whether any attempts were being made to "get the distributors," and Tuuk replied that "the individual that is being indicted here was getting them off the internet and then distributing them out." The juror asked twice more, "he was distributing them?" The first time, Tuuk answered, "yes;" the second time, the prosecutor interrupted to indicate it was hard to track them down because a lot of them are out of the country. To which the juror responded, "is the guy still locked up?" This suggests to me that,

at least for this one juror, the allegation that defendant was "distributing" was very important.

¶ 65 Tuuk also testified that defendant was in possession of "a large collection of child pornography." In ¶ 26, *supra*, we find that to be his subjective opinion and immaterial because it was not pursued. However, the State, during the hearing on the motion to dismiss the indictment, characterized this material to the court as follows:

"You get a page, right? It will have several pictures on there.

These pages were torn up and put in the garbage. We just charge it as being a page, but it might be more than one. But you can't really tell because it's torn up."

This hardly seems to be anyone's description of "a large collection of child pornography." Again, the implication is that this is a person heavily involved in child pornography.

¶ 66 So the fundamental concerns I have are that: (1) it appears that the State, and its witness Officer Tuuk, failed to do the diligent preparation for the presentation of facts to the grand jury that is expected and required of officers of the court; (2) presented false and exaggerated information to the grand jury, arguably "gaming" it into entering the two-count indictment, and (3) presented the information on both counts to the trial court before, upon being pressed by the court on the factual basis for count 2, dismissing that count and proceeding only on the simple count it could factually support.

¶ 67 My purpose here is not to accuse the State of wrong-doing in this case. Rather, prompted by the facts before us, it is to remind prosecutors and their witnesses of the weighty responsibility they bear to actually seek justice, not merely to indict or to convict. To that end, if the true facts warrant an indictment, the grand jury should have the opportunity to make that

decision without consideration of false information or unwarranted exaggeration adduced by the State.