

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).

2018 IL App (4th) 160876-U
No. 4-16-0876

FILED
March 12, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	McLean County
MICHAEL JOSEPH STAFFORD HUBBARD,)	No. 13CF1648
Defendant-Appellant.)	
)	Honorable
)	John Casey Costigan,
)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Steigmann and DeArmond concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed, concluding count XXV of the indictment stated an offense of predatory criminal sexual assault of a child for which defendant could be convicted as the principal perpetrator.

¶ 2 In September 2014, defendant, Michael Joseph Stafford Hubbard, pleaded guilty to one count of criminal sexual assault (720 ILCS 5/11-1.20(a)(4) (West 2012)), seven counts of predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2012)), and two counts of aggravated production of child pornography (720 ILCS 5/11-20.1B(a)(3) (West 2010)). In November 2014, the trial court sentenced defendant to consecutive terms of imprisonment for each offense, totaling 285 years' imprisonment. Defendant filed motions to reconsider his sentence and withdraw his guilty plea, which the court denied.

¶ 3 Defendant appeals, arguing this court should vacate his convictions and remand

the matter to allow the withdrawal of his guilty plea because the underlying plea agreement is unenforceable. Specifically, defendant asserts the underlying plea agreement is unenforceable where one of his convictions for predatory criminal sexual assault of a child is based on a charging instrument that fails to state an offense for which he could be found guilty either as the principal perpetrator or under a theory of accountability. We affirm.

¶ 4

I. BACKGROUND

¶ 5

As a result of conduct alleged to have occurred between August 1, 2012, and December 5, 2013, the State charged defendant by indictment with 10 counts of criminal sexual assault (720 ILCS 5/11-1.20(a)(4) (West 2012)), 13 counts of predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2012)), 15 counts of production of child pornography (720 ILCS 5/11-20.1(a)(3) (West 2012)), 3 counts of aggravated production of child pornography (720 ILCS 5/11-20.1B(a)(3) (West 2010)), and 13 counts of possession of child pornography (720 ILCS 5/11-20.1(a)(6) (West 2010)). Count XXV of the indictment specifically alleged defendant, in violation of section 11-1.40(a)(1) of the Criminal Code of 2012 (Criminal Code) (720 ILCS 5/11-1.40(a)(1) (West 2012)), committed the offense of predatory criminal sexual assault of a child in that “DEFENDANT, *** BEING OVER 17 YEARS OF AGE, KNOWINGLY COMMITTED AN ACT OF SEXUAL PENETRATION INVOLVING THE PENIS OF [J.R.] AND THE MOUTH OF A.S. AT A TIME WHEN J.R.[] WAS UNDER 13 YEARS OF AGE.”

¶ 6

In September 2014, defendant, in exchange for the dismissal of all other charges, pleaded guilty to one count of criminal sexual assault, seven counts of predatory criminal sexual assault (including count XXV), and two counts of aggravated production of child pornography.

The factual basis for the plea provided as follows. On December 9, 2013, J.R., a minor under the age of 12, reported, while staying the night on weekends at defendant's home, defendant, whose birthday was November 4, 1985, would sleep in the same bed as him, bathe with him, touch his privates, and take pictures of him naked and being touched. J.R.'s mother reported J.R. had visited defendant's home between 20 and 30 times and recalled another boy also staying the night. On December 10, 2013, A.S., a minor under the age of 17 but over the age of 13, reported defendant touched him inappropriately when visiting defendant's home. A.S. described specific instances of sexual conduct, which included defendant performing anal sex on A.S., defendant performing oral sex on A.S., and A.S. performing oral sex on defendant. A.S. reported defendant would videotape the sexual conduct and show him "nude videos" on a cell phone and a computer. A.S. stated defendant provided the boys with games and remote-control cars to be used only while at defendant's home. Defendant admitted having sexual contact with both A.S. and J.R. He admitted penetrating each boy anally multiple times, performing oral sex on each boy multiple times, having both boys perform oral sex on him multiple times, and taking video footage and pictures of the sexual conduct. Electronic devices found within defendant's home contained video footage of defendant performing oral sex on the boys, the boys performing oral sex on defendant, and defendant performing anal sex on J.R. Video footage also showed "defendant watching and directing sexual acts of penetration between the two boys on each other." The sexual conduct occurred between August 1, 2012, and December 5, 2013.

¶ 7 In November 2014, the trial court sentenced defendant to 15 years' imprisonment for the offense of criminal sexual assault, 30 years' imprisonment for each offense of predatory criminal sexual assault of a child, and 30 years' imprisonment for each offense of aggravated

production of child pornography. The court ordered the terms of imprisonment be served consecutively, with defendant serving at least 85% of each term. Defendant filed a motion to reconsider his sentence, which the court denied, and defendant appealed.

¶ 8 In August 2016, this court granted defendant's motion for summary remand for compliance with Illinois Supreme Court Rule 604(d) (Ill. S. Ct. R. 604(d)(eff. Feb. 6, 2013)). On remand, defendant filed both a motion to reconsider his sentence and a motion to withdraw his guilty plea. Following a November 2016 hearing, the trial court denied defendant's posttrial motions.

¶ 9 This appeal followed.

¶ 10 II. ANALYSIS

¶ 11 On appeal, defendant argues this court should vacate his convictions and remand the matter to allow the withdrawal of his guilty plea because the underlying plea agreement is unenforceable. Specifically, defendant asserts the underlying plea agreement is unenforceable where one of his convictions for predatory criminal sexual assault of a child is based on a charging instrument that fails to state an offense for which he could be found guilty either as the principal perpetrator or under a theory of accountability.

¶ 12 Defendant argues count XXV of the indictment fails to state an offense of predatory criminal sexual assault of a child for which he could be found guilty as the principal perpetrator. Specifically, defendant asserts he could not be found guilty of the offense as charged because the charging instrument only alleged J.R.'s sex organ made contact with the body of A.S. and lacked any allegation suggesting he committed an "act of conduct" with either J.R. or A.S. or caused the contact between the boys. In support of his argument, defendant, quoting

People v. Atherton, 406 Ill. App. 3d 598, 609, 940 N.E.2d 775, 786 (2010), contends, to sustain a conviction for predatory criminal sexual assault of a child, the State must prove “ ‘actual contact’ between the defendant’s sex organ and the sex organ or anus of the complainant.” Defendant also parenthetically cites *People v. Betance-Lopez*, 2015 IL App (2d) 130521, ¶ 41, 38 N.E.3d 36, for the proposition actual contact is required in prosecutions for predatory criminal sexual assault of a child.

¶ 13 Section 11-1.40(a)(1) of the Criminal Code (720 ILCS 5/11-1.40(a)(1) (West 2012)) provides: “A person commits predatory criminal sexual assault of a child if that person commits an act of sexual penetration, is 17 years of age or older, and *** the victim is under 13 years of age.” Section 11-0.1 of the Criminal Code (720 ILCS 5/11-0.1 (West 2012)) defines, in part, “[s]exual penetration” as “any contact, however slight, between the sex organ or anus of one person and an object or the sex organ, mouth, or anus of another person, or any intrusion, however slight, of any part of the body of one person or of any animal or object into the sex organ or anus of another person, including, but not limited to, cunnilingus, fellatio, or anal penetration.”

¶ 14 We agree with the proposition defendant cites from *Betance-Lopez*, 2015 IL App (2d) 130521, ¶ 41, indicating actual contact is required in prosecutions for predatory criminal sexual assault of a child. See 720 ILCS 5/11-0.1 (West 2012). In context, we also agree with the proposition defendant cites from *Atherton*, 406 Ill. App. 3d at 609, indicating, where a defendant, who is older than 17 years of age, is charged with committing predatory criminal sexual assault of a child by making contact with the sex organ or anus of a child under the age of 13 with his

sex organ, the State is required to show an actual contact between the defendant's sex organ and the sex organ or anus of the child.

¶ 15 We disagree, however, with defendant's characterization of count XXV of the indictment. Count XXV alleged defendant, in violation of section 11-1.40(a)(1) of the Criminal Code (720 ILCS 5/11-1.40(a)(1) (West 2012)), committed the offense of predatory criminal sexual assault of a child in that "DEFENDANT, *** BEING OVER 17 YEARS OF AGE, KNOWINGLY COMMITTED AN ACT OF SEXUAL PENETRATION INVOLVING THE PENIS OF [J.R.] AND THE MOUTH OF A.S. AT A TIME WHEN J.R.[] WAS UNDER 13 YEARS OF AGE." That is, count XXV alleged defendant knowingly committed an act of sexual penetration against J.R., a child under 13 years of age. Applying the definition of "sexual penetration," count XXV alleged defendant knowingly committed an act of contact between the sex organ or anus of one person (the penis of J.R.) and the mouth of another person (the mouth of A.S.). See 720 ILCS 5/11-1.40 (West 2012). In effect, the State charged defendant with using A.S. as an instrument to commit an act of sexual penetration against J.R. The factual basis indicating defendant directed sexual acts of penetration between J.R. and A.S. supports the offense as charged. We find count XXV of the indictment states an offense of predatory criminal sexual assault of a child for which defendant could be convicted as the principal perpetrator.

¶ 16 III. CONCLUSION

¶ 17 We affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2016).

¶ 18 Affirmed.