2019 IL App (1st) 161096-U

SIXTH DIVISION
MARCH 29, 2019

No. 1-16-1096

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 13 CR 733
	)	
FERNANDO OLIVEROS,	)	Honorable
	)	Neera Lall Walsh,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: We vacate the defendant's conviction and respective sentence on the count of predatory criminal sexual assault of a child for contact between his mouth and the child's anus. We affirm the defendant's seven convictions of aggravated child pornography possession. The defendant did not receive ineffective assistance of counsel when his defense counsel did not renew his motion to suppress evidence during the trial.

¶ 2 Following a bench trial in the circuit court of Cook County, the defendant-appellant, Fernando Oliveros, was convicted of 27 counts of sex-related offenses against his girlfriend's minor daughter, J.S. The defendant was sentenced to an aggregate term of 100 years' imprisonment. On appeal, the defendant contends that: (1) the State failed to prove him guilty of

predatory criminal sexual assault of a child for the specific count regarding contact between his mouth and J.S.'s anus (count 3); (2) that six of his seven convictions for possession of child pornography must be vacated; and (3) that he received ineffective assistance of counsel when his defense counsel failed to renew his motion to suppress evidence. For the following reasons, we vacate the defendant's conviction and respective sentence on the count of predatory criminal sexual assault of a child for contact between his mouth and the child's anus. We otherwise affirm the judgment of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 The defendant was charged with 27 counts of sex-related offenses against J.S. that occurred when she was between the ages of 4 and 11. The charges included predatory criminal sexual assault (counts 1-6), aggravated child pornography (counts 7-13), aggravated criminal sexual abuse (counts 14-20), and aggravated child pornography based upon possession (counts 21-27).

¶ 5 **Pre-Trial**

¶ 6 Prior to trial, the defendant filed a motion to suppress evidence from his cell phone. In his motion, the defendant argued that on October 4, 2012, J.S.'s mother, Araceli D. (Araceli), went to the Chicago police station "for advice" regarding "an alleged sexual assault of [J.S.]" and that a police officer told her to bring her daughter and the phone "that allegedly had the evidence of the assault to the [police] station." The defendant further alleged that Detective Manuel De La Torre then "unlawfully opened the phone" and used the serial number to obtain a search warrant. The defendant's motion argued that his phone "was obtained by the police in violation of the [Fourth] Amendment."

¶ 7 The State responded to the defendant's motion by claiming that on October 3, 2012[1], Araceli's 7 year-old son, F.O., told her that he saw the defendant use his phone to show pictures of naked women to J.S., who was 11 years old. Araceli then took the defendant's phone and saw a video on it of the defendant sexually penetrating J.S. On October 4, 2012, Araceli took J.S. and the phone to the police station to make a report. She gave the phone to a police officer, who inventoried it. The following day, Detective De La Torre obtained a search warrant to have the phone forensically examined. Some images were recovered, and the phone was sent to the FBI for further examination. Forensic examination revealed 205 videos of the defendant "penetrating [J.S.'s] vagina for 3 years (between the ages of 7 and 10) with his penis, his finger, his mouth. The videos also revealed him placing his penis in her mouth many, many times, ejaculating in her mouth and penetrating her anus and vagina with objects." The State argued that Araceli was a private citizen who discovered the child pornography on the defendant's phone and voluntarily presented it to the police. The police then used "minimal measures" to obtain the serial number, but never viewed the contents of the phone until they had the proper authority via a search warrant and forensic analysis.

¶ 8 At the hearing on the defendant's motion, defense counsel argued that the police directed Araceli to bring in the defendant's cell phone, making her a state actor and implicating the fourth amendment. The State countered that police do not need a search warrant when evidence is voluntarily produced by a private citizen. It also urged that all proper procedures were followed before the police viewed the contents of the phone.

[1] Parts of the record indicate that F.O. told Araceli about the defendant showing J.S. sexually explicit pictures on October 2, 2012, and other parts of the record indicate that he did so on October 3, 2012.

¶ 9 The defendant called Araceli to testify at the hearing.[2] She testified that she and the defendant lived together between 2003 and 2012, and had a son together, F.O. Araceli also had three older children, including J.S., who lived with them. Araceli stated that on October 2, 2012, after F.O. alerted her that the defendant was showing J.S. pictures of naked women, J.S. told Araceli that the defendant took pictures and videos of him having sex with her. Although J.S. did not specifically mention the defendant's phone, Araceli assumed that the sexually explicit videos and pictures were on the defendant's phone. The following day, Araceli waited for the defendant to return home from work. She then took his phone out of his work briefcase. On the phone, she discovered several naked pictures of J.S. and numerous videos of the defendant penetrating J.S. Araceli subsequently took the phone to the police station to make a report. Araceli initially testified that she went to the police station by herself, and did not mention the phone to the police. After some confusing questions and answers that appeared to result from translation issues, Araceli testified that she first called 911 and "they told [her] [she] had to go the police station with [J.S.] and that's how [she] went." She went to the police station only once, taking the phone and J.S. with her. Araceli also denied that she later told Detective De La Torre that she originally went to the police station just to seek advice instead of filing a report.

¶ 10 The defendant next called Detective De La Torre, who testified that he interviewed Araceli on October 10, 2012. Although he agreed that he had written "went to CPD, asked for advice" in his notes, he denied that Araceli told him that she went to the police station on October 4, 2012 for advice or that the police told her to bring in the defendant's cell phone.

¶ 11 Following the hearing, the State moved for a directed finding and argued that defendant failed to establish any evidence in support of his argument that the police told Araceli to bring

[2] Araceli does not speak English and she testified through a Spanish translator. The record reflects that there were some apparent translation issues during her testimony.

the phone to the police station. The court noted that although there were some "language issues" which made Araceli's testimony "a little difficult at times to follow," it nonetheless found Araceli to be a credible witness. The court found that Araceli "was acting as a private party. She was not acting at the behest of the government at that point when she looked at [the videos on the phone]." The court then granted the State's motion for a directed finding and denied the defendant's motion to suppress.

¶ 12 **Trial**

¶ 13 A bench trial commenced on February 19, 2016. J.S., who was 14 years old at the time of trial, testified that she had lived with the defendant when she was between the ages of 4 and 11. J.S.'s earliest memory of the defendant sexually abusing her was of the defendant touching her chest area under her shirt when she was 4 years old. The defendant continued to touch her that way for the next several years. She testified that when she was around 7 years old, the defendant began touching her in more places, including putting his hand inside her vagina, which hurt. The defendant also frequently put his finger and objects, including a vibrating sex toy, into her anus. J.S. further testified that around the time she was 7 years old, the defendant began putting his penis inside her vagina and that it hurt. The defendant sometimes filmed himself putting his penis into J.S.'s vagina on his cell phone, and he would later show the recordings to her. She also testified that the defendant made her perform oral sex on him more than once a week beginning around the time she was 8 years old. The defendant showed her numerous videos he had filmed of her performing oral sex on him.

¶ 14 J.S. explained that her mother was never home when the defendant did these things to her. J.S. did not want to tell anyone because she "didn't know what to do or what was happening

exactly." The defendant also told her not to tell anyone, and she was afraid of him. On October 4, 2012, she went with her mother to the police station to make a report.

¶ 15 The State then played short excerpts of the sexually explicit videos recovered from the defendant's phone; J.S. confirmed that each video accurately depicted what the defendant had done to her between the ages of 4 and 11. In almost all of the videos, both the defendant's and J.S.'s faces can be seen. The videos show numerous instances of: the defendant's penis touching and penetrating J.S.'s vagina; the defendant's penis touching and penetrating J.S.'s mouth; the defendant's mouth touching and penetrating J.S.'s vagina; the defendant's fingers touching and penetrating J.S.'s vagina; the defendant's mouth touching and kissing J.S.'s buttocks; the defendant inserting a sex toy inside J.S.'s vagina and anus; and J.S. urinating in a toilet. J.S. explained that each of the videos was taken on a different day over the course of seven years, when she was between the ages of 4 and 11.

¶ 16 Next, Araceli testified on behalf of the State.[3] Araceli generally testified consistently with her pre-trial hearing testimony. However, when she described her 911 call, she stated that the 911 operator "said that I had to take my daughter and take the evidence and that's what I did."

¶ 17 After the State rested, the defendant filed a motion for a directed finding, which the trial court denied. The defendant then rested without testifying or presenting any evidence.

¶ 18 During closing arguments, the State argued that each of the predatory criminal sexual assault charges against the defendant, except for count 3, was proved by the videos played during J.S.'s testimony. The State conceded that there was no video proving count 3, predatory criminal sexual assault of a child for contact between the defendant's mouth and J.S.'s anus. However, in closing argument, the State claimed that even without video evidence, it still had proved count 3

[3] Araceli again testified through a Spanish translator.

through J.S.'s testimony. The State claimed that "if you're to believe that all the other counts took place, which there's no reason not to since there's concrete evidence of it, there's no reason to discredit the victim when she said his tongue went in her anus."

¶ 19 At the conclusion of trial, the trial court found that the State met its burden of proof on all 27 counts. The court stated: "And one of the most compelling bits of evidence besides * * * this young lady being brave enough to come forward and testify about all of these things that happened to her from a very young age was the fact that the defendant's videos showed the defendant's face. There is no dispute, there is no doubt in my mind * * * it is the defendant and the young lady in each and every one of these videos." The trial court then found the defendant guilty of all 27 counts.

¶ 20 **Sentencing**

¶ 21 During the sentencing hearing, J.S. testified that she now suffers from depression and panic attacks, and has tried to kill herself more than three times. The defendant spoke in allocution and raised a litany of complaints, including that his fourth amendment rights were violated. The trial court rejected the defendant's claims of violating his rights.

¶ 22 The trial court sentenced the defendant to terms of 10 years for each of the predatory criminal sexual assault charges (counts 1-6); terms of 10 years for each of the aggravated child pornography charges (counts 7-13); terms of 5 years for each of the aggravated criminal sexual abuse charges (counts 14-20); and terms of 5 years for each of the aggravated child pornography based upon possession charges (counts 21-27). The trial court ordered counts 1-6, 14, and 21-27 to be served consecutively and the remaining counts to be served concurrently, resulting in an aggregate term of 100 years' imprisonment. This appeal followed.

¶ 23 ANALYSIS

¶ 24 We note that we have jurisdiction to review the trial court's judgment, as the defendant filed a timely notice of appeal. Ill. S. Ct. R. 603 (eff. Feb. 6, 2013); R. 606 (eff. July 1, 2017).

¶ 25 The defendant presents the following three issues: (1) whether the State failed to prove him guilty beyond a reasonable doubt of count 3, predatory criminal sexual assault of a child for contact between his mouth and J.S.'s anus; (2) whether six of his seven convictions for aggravated possession of child pornography should be vacated; and (3) whether he received ineffective assistance of counsel. We take each issue in turn.

¶ 26 The defendant first argues that the State failed to prove him guilty beyond a reasonable doubt of count 3, predatory criminal sexual assault of a child for contact between his mouth and J.S.'s anus. The defendant points to the fact that there was no video evidence of his mouth touching J.S.'s anus. The defendant also argues that during closing arguments, the State falsely claimed that J.S. had testified that the defendant touched her anus with his mouth. He claims that without any testimonial or video evidence of that specific contact, his conviction and respective 10-year sentence for count 3 should be vacated. The State concedes in its brief before this court that J.S. never testified that the defendant touched her anus with his mouth. The State nonetheless urges that it proved count 3 through another video played at trial, which was used to prove aggravated criminal sexual abuse charges (counts 17 and 18). That video showed the defendant rubbing J.S.'s buttocks with his hands and touching J.S.'s buttocks with his lips. The State points out that in that video, the defendant can be seen rubbing his mouth between J.S.'s buttocks and remaining there for a minute, making it a reasonable inference that the defendant's mouth made contact with J.S.'s anus. Thus, the State argues that this video proved the defendant guilty beyond a reasonable doubt of count 3.

¶ 27 The State has the burden of proving *beyond a reasonable doubt* each element of an offense. *People v. Gray*, 2017 IL 120958, ¶ 35. When a defendant challenges the sufficiency of the evidence, the proper standard of review is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id*. A criminal conviction will not be reversed for insufficient evidence unless the evidence is so unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt as to the defendant's guilt. *Id*.

¶ 28 The conviction at issue in this case is count 3, predatory criminal sexual assault of a child for contact between the defendant's mouth and J.S.'s anus. A person commits predatory criminal sexual assault if the accused is over 17 years of age and commits an act of sexual penetration with a victim who is under 13 years of age. 720 ILCS 5/11–1.40(a)(1) (West 2014). "Sexual penetration" is defined 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." 720 ILCS 5/11-0.1 (West 2014).

¶ 29 For every other predatory criminal sexual assault count, the State played a video, accompanied by J.S.'s testimony, to prove that count. However, there was no testimonial or video evidence of the defendant's mouth making contact of any kind with J.S.'s anus. Stated another way, in the context of the trial, there was no clear evidence that this specific contact

occurred. Notwithstanding the clear proof of the many other acts committed by defendant, this specific count (count 3) was devoid of any evidence of proof.

¶ 30 We are not persuaded by the State's argument that it proved count 3 with a video showing the defendant rubbing J.S.'s buttocks with his hands and touching J.S.'s buttocks with his lips. At trial, the State argued that this video proved *only* counts 17 and 18. The State did not argue that it also proved count 3. Moreover, the State acknowledged during its closing arguments that there was no video evidence of count 3. Instead, the State expressly argued that J.S.'s testimony proved count 3. But the record reflects, and the State now concedes, that J.S. never testified to the elements necessary to prove count 3. Specifically, the defendant's mouth making contact with J.S.'s anus. Given the judicial admission of no video evidence to support count 3, the State is estopped from retroactively arguing a contrary position. See *People v. Major-Flisk*, 398 Ill. App. 3d 491, 500 (2010) (a party is estopped from taking a position on appeal that is inconsistent with a position the party took in the trial court). The State cannot retrospectively try to make the video it used to prove counts 17 and 18 now also fit to prove count 3 when it was never used for that purpose during the trial. We cannot allow the State to change the characterization of the evidence which it presented in the trial solely for purposes of its appellate argument.

¶ 31 As the State now admits that there is no video and J.S. did not testify to this specific act, there is no evidence supporting the conviction for count 3. Without any testimonial or video evidence that the defendant committed the act charged in count 3, we find that the State failed to prove the defendant guilty of that count beyond a reasonable doubt. Consequently, we vacate the defendant's conviction for count 3, predatory criminal sexual assault of a child for contact

between the defendant's mouth and J.S.'s anus. We also vacate the defendant's 10-year sentence for count 3.

¶ 32 The defendant next argues that six of his seven convictions for possession of child pornography must be vacated. Relying upon *People v. McSwain*, 2012 IL App (4th) 100619, the defendant claims that because he possessed all of the videos and pictures on one device (his cell phone) and because the phone indicated a single "Created Date" for all the videos and images, he should have only been convicted of one count, not multiple counts, for aggravated possession of child pornography.

¶ 33 The statute applicable to this case (the pre-2014 version of the child pornography statute)[4] provides that a person commits the offense of aggravated child pornography if:

> "with knowledge of the nature or content thereof, [he] possesses any film, videotape, photography or other similar visual reproduction or depiction of any child * * * whom the person knows or reasonably should know to be under the age of 18 * * *, engaged in any activity described in subparagraphs (i) through (vii) of paragraph (1) of this subsection." 702 ILCS 5/11-20.1(a)(6) (West 2012).

Statutory construction is a matter of law; we therefore review a trial court's application of a statute *de novo*. *People v. Brindley*, 2017 IL App (5th) 160189, ¶ 27.

[4] This statute was repealed and recodified into section 11-20.1 of the Criminal Code (720 ILCS 5/11-20.1) by P.A. 97-995 (eff. Jan. 13, 2013). The amended statute clarified that "[t]he possession of *each* individual film, videotape, photograph, or other similar visual reproduction or depiction by computer in violation of this Section constitutes *a single and separate violation*." [Emphasis added.] 720 ILCS 5/11-20.1(a)(5) (West 2018). The pre-2014 version of the statute is applicable to this case, however, as the defendant's acts in this case occurred before the statute's amendment in 2014. See *Perry v. Dep't of Financial & Professional Regulation*, 2018 IL 122349, ¶ 43 (substantive changes to statutes are prospective only).

¶ 34 The defendant directs us to *McSwain*, which held that, under the pre-2014 statute, the defendant's simultaneous possession of five images in one e-mail constituted a single offense. *McSwain*, 2012 IL App (4th) 100619, ¶ 64. This court found that the term "any" made the statute ambiguous as to whether a simultaneous possession of multiple child pornography images constituted a single or multiple offenses. *Id.* ¶¶ 58-59. And we recognized that ambiguous statutes are interpreted in favor of the defendant. *Id.* ¶ 52. This court emphasized the fact that all five images were in a single email and we determined that such simultaneous possession could not support multiple convictions under those facts. *Id.* ¶ 58.[5]

¶ 35 The defendant argues that this case is analogous to *McSwain*. He stresses that all the videos and images submitted into evidence by the State indicated a single "Created Date" of May 27, 2012, and so he claims that he should have only been convicted of one child pornography possession offense. We are not persuaded by this argument and find that *McSwain* is distinguishable from the facts of the instant case. This court in *McSwain* focused on the fact that the defendant possessed all five child pornography images in a *single email*, which necessarily meant that the five images were all possessed *at the same time*. By contrast, the 200+ videos and images in this case were clearly created over the course of seven years by the defendant himself. It necessarily follows that the defendant did not possess them all at the same time. Regardless of how the defendant's phone may have labeled the videos and images, it is evident by J.S.'s evolving age throughout the videos and images that they were not all created at the same time.

[5] This court in *McSwain* challenged the legislature to clarify the child pornography statute, stating: "if the General Assembly wants to authorize multiple convictions for child pornography based on simultaneous possession of images of the same minor displayed in a single e-mail, it knows how to do so." *McSwain*, 2012 IL App (4th) 100619, ¶ 64. Almost immediately after *McSwain* was published, the legislature amended the child pornography statute to clarify that "[t]he possession of *each* individual film, videotape, photograph, or other similar visual reproduction or depiction by computer in violation of this Section constitutes *a single and separate violation*." [Emphasis added.] 720 ILCS 5/11-20.1(a)(5) (West 2018).

Further, J.S. testified that the defendant recorded the sexually explicit videos and images of her over the span of seven years. We are guided by *People v. Sedelsky*, 2013 IL App (2d) 111042, in which this court followed *McSwain* and vacated one of the defendant's two child pornography possession charges under the pre-2014 statute where the same image was saved twice to the same medium and *at nearly the same point in time*. Notably though, we stated that our analysis would have been different if the State had presented facts that established that the defendant had *uploaded the image at substantially different times. Id.* ¶¶ 26-28.

¶ 36 There was no way the legislature could have anticipated the mechanism of how the defendant's phone would label the 200+ videos and images. It would be illogical to convict the defendant of only one count of child pornography under the facts and circumstances of this case simply because of the single "Created Date," which may have been unique to the defendant's phone. The State presented ample evidence that the defendant recorded and possessed the sexually explicit videos and images of J.S. on different dates over the course of seven years. Accordingly, we affirm the defendant's seven convictions of aggravated child pornography based upon possession.

¶ 37 Finally, the defendant argues that he received ineffective assistance of counsel when his defense counsel failed to renew his motion to suppress evidence at trial after Araceli testified that the 911 operator told her "to bring the evidence" to the police station. The defendant claims this made Araceli a state actor, acting at the behest of the government and implicating the fourth amendment. He therefore argues that had his defense counsel renewed his motion to suppress, the trial court would have reversed its earlier denial of that motion.

¶ 38 Claims of ineffective assistance of counsel are reviewed through a two-part test that was announced by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668

(1984), and adopted by our supreme court. *People v. Burrows*, 148 Ill. 2d 196, 232 (1992). To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate both that (1) counsel's performance was objectively unreasonable under prevailing professional norms and (2) the defendant was prejudiced thereby. *People v. Veach*, 2017 IL 120649, ¶ 30 (citing *People v. Domagala*, 2013 IL 113688, ¶ 36). Prejudice is a reasonable probability of a different result of the proceeding absent counsel's deficiency, and a reasonable probability is probability sufficient to undermine confidence in the outcome. *Id*. When a reviewing court addresses an ineffective assistance of counsel claim, it need not apply the two-part test in numerical order. *Burrows*, 148 Ill. 2d at 232. We review claims of ineffective assistance of counsel *de novo*. *People v. Demus*, 2016 IL App (1st) 140420, ¶ 21.

¶ 39 The defendant's ineffective assistance claim is based on an alleged violation of the fourth amendment, which guarantees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const., amend. IV. The fourth amendment applies only to government action. *People v. Sykes*, 2017 IL App (1st) 150023, ¶ 23. A search performed by a private person does not violate the fourth amendment unless that person is acting as an agent of the State. *Id.* Whether a private party should be deemed an agent or instrument of the State for the purposes of the fourth amendment necessarily turns on the degree of the government's participation in the private party's activities, a question that can only be resolved in light of all the circumstances. *People v. Gill*, 2018 IL App (3d) 150594, ¶ 80 (quoting *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 614 (1989)). In determining whether a private party should be considered an agent of the State, courts consider (1) whether the government knew of and acquiesced in the intrusive conduct, and (2) whether the party performing the search intended to assist law enforcement

efforts or to further her own ends. *Gill*, 2018 IL App (3d) 150594, ¶ 80 (quoting *United States v. Souza*, 223 F.3d 1197, 1201 (10th Cir. 2000).

¶ 40 Reviewing the entire record before us, including the pre-trial testimony, it is clear that Araceli was not acting as an agent of the State when she took the defendant's phone and brought it to the police. On the contrary, she was acting as a concerned parent. Araceli unquestionably took and searched the defendant's phone because of what J.S. had told her. She then brought the phone to the police to make a report based on what she discovered on the phone. The police subsequently performed all the proper procedures to search the defendant's phone. See *Sykes*, 2017 IL App (1st) 150023, ¶ 23 (The fourth amendment does not prohibit the government from using information discovered by a private search). It is of no consequence that the 911 operator may have told Araceli to "bring the evidence" to the police. Araceli consistently testified that she took and searched through the defendant's phone before she even contacted 911 or the police. And she clearly did so to ascertain the information which she then took to the police to protect her daughter. The defendant has not presented any evidence that the police directed Araceli to search and seize the defendant's phone. Nothing that the defendant points to is sufficient to render Araceli an agent of the State and implicate the fourth amendment. Even had the motion been renewed, we find there is no reasonable probability that the trial court would have changed its original conclusion.

¶ 41 Accordingly, there is no reasonable probability that a renewed motion to suppress would have succeeded. Thus, the defendant was not prejudiced by his defense counsel not renewing his motion to suppress. Therefore, we find that the defendant did not receive ineffective assistance of counsel.

¶ 42 CONCLUSION

¶ 43 For the foregoing reasons, we vacate the defendant's conviction of predatory criminal sexual assault of a child as to count 3, as well as his 10-year sentence for that conviction (count 3); we affirm the remainder of the circuit court of Cook County's judgment in all other respects.

¶ 44 Affirmed in part and vacated in part.