2019 IL App (2d) 170177-U
No. 2-17-0177
Order filed May 6, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. BRIAN ALLEN LAMEYER, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Winnebago County. No. 11-CF-1022 Honorable John S. Lowry, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justice Hudson concurred in the judgment. Justice Schostok dissented.

ORDER

¶ 1 *Held*: The trial court erred in denying defendant's motion for a new trial, as his newly discovered evidence, which was indisputably new, material, and noncumulative, was also so conclusive that it would probably change the result.

¶ 2 Defendant, Brian Allen Lameyer, was convicted of child pornography based on a video of his girlfriend's 15-year-old daughter found on his phone (720 ILCS 5/11-20.1(a)(1)(vii) (West 2010)). He contends that newly discovered evidence— that a second, highly similar video found only on his girlfriend's phone was shown to another on the date of his arrest—warrants a new trial because it undermines his girlfriend's credibility and the State's contention that defendant's

phone was not likely used by anyone else. We agree with defendant that the new evidence undermines confidence in the verdict such that it would probably lead to a different result. Accordingly, we reverse and remand for a new trial.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged with child pornography, in that, between April 15, 2010, and April 15, 2011, he filmed K.J.B., a minor, in a lewd pose, displaying her breasts. Nearly five years later, a jury trial was held in March of 2016.

¶ 5 At trial, defendant's girlfriend, Kelly, testified that, in 2011, she lived with defendant, their eight-year-old daughter, and two of her children from a prior relationship. Those children were K.J.B., who was 15 at the time, and Kelly's son, K.B., who was 14.

¶ 6 Defendant, Kelly, K.J.B., and K.B. all had cell phones on Kelly's cellular plan. All four phones had cameras capable of taking pictures and recording video. Defendant's phone and Kelly's phone were identical and were purchased at the same time. Kelly described defendant as protective of his phone. He carried it with him most of the time. However, the entire household had access to it when he left it on its charger. The charger could be moved from room to room, including the living room and kitchen. Kelly also told a detective that the children used her and defendant's phones to play games, but only with permission and not very often. The house was a popular place for K.J.B.'s and K.B.'s teenage friends to hang out, and sometimes they were there when Kelly was not at home. They could come and go through the area of the laundry room. However, defendant never complained to Kelly that the children or their friends used his phone without his permission or put files on his phone. Defendant also was alone with the children at times and had access to the laundry room.

¶ 7 Before 2011, Kelly converted an enclosed porch on her home into a laundry room and bathroom. In the process, she boarded up a window that looked into the bathroom from the laundry room. Those boards had since warped, leaving cracks through which a person could look into the bathroom.

¶ 8 On the morning of April 15, 2011, defendant left the house to apply for a job. He left his phone behind on its charger on a couch in the living room, where Kelly had access to it. Kelly picked up the phone, browsed through its stored pictures and video, and found a video of K.J.B. in the bathroom. That video was labeled as People's exhibit No. 3 and played for the jury. In the video, it appeared that the camera was looking into the bathroom through a hole in the wall. The video focused on the shower curtain, which then was pulled back to reveal K.J.B. completely nude. K.J.B. stood there, looking at a point somewhere to the left of the camera. The camera then focused on K.J.B.'s breasts, with her face occasionally visible as the camera shook up and down. The video froze at 25 seconds and ended at 1:47. Kelly testified that she recognized the video as having been filmed through a crack in the boards covering the window and that K.J.B. appeared in it as she did in early 2011, when she was 15.

¶ 9 After viewing the video, Kelly took the phone to her parents' home and called the police. A detective took a written statement from her that afternoon, on April 15, 2011. Defendant's phone was seized from Kelly and it remained in the custody of the police thereafter. The police did not search Kelly's phone or the phones of any other household members, and Kelly did not volunteer her phone to the police. Nothing in the record indicates that Kelly ever disclosed to the police the presence of any similar videos of K.J.B. on her own phone.

¶ 10 Defendant did not present any evidence. In closing, defense counsel argued that the evidence that others had access to defendant's phone created reasonable doubt as to whether

defendant or someone else recorded the video. On March 15, 2016, the jury found defendant guilty.

¶ 11 New counsel appeared and filed a motion for a new trial, based in part on newly discovered evidence of a *second* video stored on Kelly's phone. Attached to the motion was an affidavit from defendant's friend, Shane Minihan, who averred that, sometime after defendant was arrested, he tried to visit defendant at Kelly's house, Kelly told Minihan that defendant had been arrested, and she used **a** phone to show him a video of K.J.B. stepping out of the shower. Kelly stated that it was the video that caused defendant to be arrested.

¶ 12 At a hearing on the motion, Minihan testified that, on April 15, 2011, the same day defendant was arrested, he was moving to Texas and tried to visit defendant at Kelly's house before he left. Kelly told Minihan that defendant had been arrested, and she used a phone to show him a video that she said defendant had taken of K.J.B.. The video that Kelly showed Minihan was about 13 to 14 seconds and depicted K.J.B. stepping out of the shower with a towel wrapped around her. Minihan recognized the bathroom and could tell that the video had been recorded from the laundry room with the camera pointed through a crack in the boarded-up window. Minihan said that "[K.J.B.] was decent with her clothes on or a towel wrapped around her." K.J.B.'s breasts were not shown. She was facing the camera. Minihan stated that she looked "coerced" in that she looked like she knew that she was being recorded. Minihan was unsure if the video stopped or if he discontinued watching. He said that he had seen enough and that "[i]t wasn't showing anything."

¶ 13 Minihan left for Texas that same day and did not return to Illinois until 2012 or 2013. He did not speak to defendant again until June 2016, when defendant called him from jail. Defendant told Minihan that he had heard rumors that other people had seen the video on Kelly's

phone. Minihan told defendant that he had seen it. When defendant asked why Minihan had not told him of it, Minihan said that he had forgotten. At a later hearing, the court reviewed a record of a June 30, 2016, telephone conversation between Minihan and defendant. The court noted that Minihan told defendant that, in the video that Kelly showed him, K.J.B. seemed to be looking at the hole in the wall. Nothing in the record suggests that the State knew of the *second* video at the time of trial.

¶ 14 The court denied the motion for a new trial. The court found that Minihan was credible and that his testimony was new, noncumulative, and relevant to the issues at trial. The court also found that defendant could not have discovered the evidence until three months after trial. However, the court found that Minihan's testimony was not so conclusive that it would probably have changed the outcome at trial. The court noted that the video that Minihan described could not have been the same video that was in question in the case. Instead it showed a nearly identical scene of the same subject from the same perspective. The court ruled that, because it was not the same video, it did not warrant a new trial. Defendant's motion to reconsider was denied, and he was sentenced to six years' incarceration. He appeals.

¶ 15 II. ANALYSIS

¶ 16 Defendant contends that the trial court erred in denying his motion for a new trial because he presented credible new evidence of actual innocence that undermined Kelly's testimony and the State's theory of the case.

¶ 17 Initially, the State suggests that we should affirm because defendant's motion for a new trial was untimely. See 725 ILCS 5/116-1(b) (West 2016) (requiring filing of a motion for a new trial within 30 days of the verdict). However, the State forfeited this argument by failing to raise it in the trial court. *People v. Raibley*, 338 Ill. App. 3d 692, 698 (2003). Further, the trial court

has discretion to hear an untimely motion for a new trial when it still has jurisdiction over the case. *People v. Gilmore*, 356 Ill. App. 3d 1023, 1036 (2005). Such was the case here.

¶ 18 "[I]n order to succeed on a claim of actual innocence, the defendant must present new, material, noncumulative evidence that is so conclusive it would probably change the result on retrial." *People v. Coleman*, 2013 IL 113307, ¶ 96. "[C]onclusive means the evidence, when considered along with the trial evidence, would probably lead to a different result." *Id.* "[W[e review the trial court's decision to deny relief following an evidentiary hearing for manifest error." *Id.* ¶ 98. "[A] decision is manifestly erroneous when the opposite conclusion is clearly evident." *Id.*

¶ 19 Here, the trial court found, and the State does not dispute, that the evidence was new, material, and noncumulative. Thus, the only issue is whether it was of such a conclusive character that it would probably lead to a different result.

¶ 20 When the evidence is new, material, and noncumulative, the trial court "must consider whether that evidence places the evidence presented at trial in a different light and undercuts the court's confidence in the factual correctness of the guilty verdict." *Id.* ¶ 97. "This is a comprehensive approach and involves credibility determinations that are uniquely appropriate for trial judges to make. But the trial court should not redecide the defendant's guilt in deciding whether to grant relief." *Id.* "This does not mean that [the defendant] is innocent, merely that all of the facts and surrounding circumstances *** should be scrutinized more closely to determine [the defendant's] guilt or innocence." *People v. Molstad*, 101 Ill. 2d 128, 136 (1984). "Indeed, the sufficiency of the State's evidence to convict beyond a reasonable doubt is not the determination that the trial court must make. If it were, the remedy would be an acquittal, not a new trial." *Coleman*, 2013 IL 113307, ¶ 97. "Probability, not certainty, is the key as the trial

court in effect predicts what another jury would likely do, considering all the evidence, both new and old, together." *Id.*

¶ 21 In reaching a determination, "[a] distinction is to be drawn between evidence which impeaches a witness in the sense that it affects the credibility of the witness, and evidence which is probative in that it presents a state of facts which differs from that to which the witness testified." *People v. Holtzman*, 1 Ill. 2d 562, 568 (1953); see also *People v. Smith*, 177 Ill. 2d 53, 82-83 (1997) (discussing *Holtzman*). "Newly discovered evidence, the effect of which is to discredit, contradict and impeach a witness, does not afford a basis for the granting of a new trial." *Holtzman*, 1 Ill. 2d at 568. "If, however, it contradicts a witness by showing facts, a new trial may be ordered when it appears that such new evidence has sufficient probative force or weight to produce a result different from that obtained at the trial which has been had." *Id.*

¶ 22 For example, in *Holtzman*, the defendant was charged with receiving stolen property, which consisted of seven shirts worth a total of $20 that were sold to the defendant. Following his conviction of receiving stolen property, affidavits were filed by two persons stating that the individual who originally sold the property said that he sold the shirts to the defendant two at a time. If such evidence had been produced at the trial, the defendant might have been guilty only of the lesser offense of receiving stolen property valued at less than $15. However, our supreme court noted that those facts, if true, were well known to the defendant at the time of the offense and that he had every opportunity to defend himself on the basis of the lesser included offense. Thus, the court held that the new evidence had the sole effect of impeaching a witness and was not sufficient to require it to grant the defendant a new trial.

¶ 23 In contrast, in *People v. Cotell*, 298 Ill. 207, 214 (1921), affidavits supporting a request for a new trial attacked the credibility of an accomplice who testified against the defendant and

contradicted many of the statements made by the accomplice at trial. There, the accomplice was described by the court as an unreliable witness, and her testimony was the only evidence connecting the defendant to the crime. *Id.* Thus, the new evidence presented facts that went to the very foundation of the State's case. *Id.* at 217. Based on that distinction, the court distinguished the case from others where newly discovered evidence tended to deny the truth of the testimony of one of several witnesses to the same facts or where the State's case rested on the testimony of several witnesses and on facts and circumstances that were not disputed. *Id.*; see *People v. Woodall*, 131 Ill. App. 2d 662, 668 (1970) (citing *Cotell*, 298 Ill. at 217) ("where newly discovered evidence affects the credibility of the testimony of a material witness it would be a strong reason for granting a new trial."); see also, *People v. Tyler*, 2015 IL App (1st) 123470, ¶¶ 186, 189 (remanding postconviction petition for third-stage hearing where evidence of systematic pattern of abuse by detectives could undermine their credibility and was material in deciding defendant's guilt or innocence).

¶ 24 Here, the trial court appeared to deny the motion for a new trial solely because the video Minihan described seeing on Kelly's phone was not identical to that found on defendant's phone and introduced as People's exhibit 3. But that missed defendant's point that there were *two* separate but highly similar videos and that the video on Kelly's phone was seen there on the day of his arrest, suggesting that someone other than defendant made both videos. The video on Kelly's phone was strikingly similar to People's exhibit 3 in that it was taken from the same vantage point, of the same subject, portraying the same conduct by K.J.B., exiting from the shower. However, in the video on Kelly's phone, K.J.B. had a towel on and appeared to be aware that she was being filmed. This second video from Kelly's phone went beyond solely impeaching Kelly's credibility. Instead, the evidence implied a state of facts that differed from

the State's theory of the case. That a highly similar second video was on Kelly's phone on the same day that she purported to discover the video on defendant's phone supported defendant's theory of the case that Kelly or someone else filmed *both* videos. While one could theorize innocent explanations for Kelly to have a similar, and more innocent, video on her phone, one could also theorize nefarious explanations, such as the video on Kelly's phone being a dress rehearsal for the video later found on defendant's phone, leading to the inference that Kelly filmed both videos and creating reasonable doubt. Notably, although the State did not have the burden of proof, it had the opportunity to provide evidence, yet it chose not to present evidence at the hearing explaining the existence of the video on Kelly's phone. Thus, based on the facts presented, by showing that a similar video was on Kelly's phone on the day of defendant's arrest, the new evidence had sufficient probative force or weight to undermine confidence in the verdict and produce a different result. As a result, the trial court erred when it denied the motion for a new trial.

¶ 25 III. CONCLUSION

¶ 26 Accordingly, the judgment of the circuit court of Winnebago County is reversed, and the cause is remanded for a new trial.

¶ 27 Reversed and remanded.

¶ 28 JUSTICE SCHOSTOK, dissenting:

¶ 29 I respectfully dissent because there was no probability that the evidence provided by the defendant would lead to a different result. Although the trial court noted that Minihan's testimony was credible, the trial court found that Minihan's testimony would not have changed the outcome at trial. This determination was not manifestly erroneous as the opposite conclusion was not clearly evident. The evidence provided by the defendant was not Kelly's phone actually

depicting the alleged video. The evidence presented was an affidavit from Minihan stating that he saw the alleged video in 2011 and, yet, he did not inform the defendant of it until June 2016. The jury was already presented evidence that everyone in the household had access to each other's cell phone and defense counsel argued in closing that because others had access to the defendant's phone, there was reasonable doubt as to whether the defendant or someone else recorded the video. The jury was thus already presented with the possibility that others in the home, and not the defendant, had created the video. Nonetheless, the jury determined that the defendant had recorded the video. The majority notes that the State did not present evidence explaining the existence of the video on Kelly's phone. However, it was not the State's burden to discredit the defendant's alleged new evidence. Rather, it was the defendant's burden to provide evidence that was so conclusive that it would probably change the result on retrial. *People v. Evans*, 2017 IL App (1st) 143268, ¶ 32. As noted above, in light of all the evidence, Minihan's testimony was not so conclusive that it would probably change the result on retrial. For this reason, I cannot agree with the majority's decision.