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2019 IL App (3d) 180258-U

Order filed May 1, 2019

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2019

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellant,)	
v.)	Appeal No. 3-18-0258
)	Circuit No. 13-CF-1274
CHARLES BOCOCK,)	
Defendant-Appellee.)	Honorable Sarah-Marie F. Jones, Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justice McDade concurred in the judgment.
Presiding Justice Schmidt concurred in part and dissented in part.

ORDER

- ¶ 1 *Held:* The circuit court did not abuse its discretion when it granted the defendant's motions *in limine*.
- ¶ 2 The State appeals from the Will County circuit court's pretrial order granting two of the defendant's motions *in limine*.

¶ 3 I. BACKGROUND

¶ 4 The State charged the defendant, Charles Bocoock, with indecent solicitation of a child (720 ILCS 5/11-6(a) (West 2012)), traveling to meet a minor (*id.* § 11-26), and unlawful grooming (*id.* § 11-25). During the pretrial proceedings, the defendant filed several motions *in limine*, two of which are the subject of this appeal.

¶ 5 The defendant's first motion *in limine* sought to bar the admission of text messages and e-mails alleged to have been sent by the defendant under the alias Joshua Smith. The defendant contended that the State could not establish a foundation for the admission of the text messages and e-mails. According to the defendant, the State could not establish a rational basis for the trier of fact to conclude the defendant authored the communications.

¶ 6 The defendant's second motion *in limine* sought to bar the admission of audio-recorded telephone conversations between Joshua Smith and a female utilized by the police to portray the fictitious persona of "Kelsey," a 12-year old female the defendant believed he was meeting. The defendant contended that the State could not establish a proper foundation for the admission of the recordings.

¶ 7 The State failed to file a responsive pleading to the defendant's motions *in limine*. Instead, the State filed an offer of proof. The State conceded that it could not directly establish the foundations to the text messages, e-mails, and audio recordings given that the State could not retrieve the messages from any cell phone or computer found in the defendant's possession. However, the State contended that it could establish foundations for the evidence through circumstantial evidence. The State's written offer of proof provided the following information.

¶ 8 The State would call Robert Greco to testify that he made an advertisement on Craigslist asking for help making a car payment. Greco received an e-mail response from an individual named Joshua Smith. Greco informed the police as to the content of the communications with

Smith. Greco spoke to Detective Dino Dabezic and authorized Dabezic to use his e-mail account to correspond with Smith.

¶ 9 Additionally, Dabezic would testify that he continued to communicate with Smith via e-mail. Within the e-mail conversations, Dabezic provided Smith with an e-mail address of Kelsey Quigley, the 12-year-old fictitious persona created by Detective Rich Wistocki.

¶ 10 The State would also call Wistocki to testify that he continued to communicate with Smith under the fictitious persona of Kelsey. Wistocki provided Smith with a telephone number and the two exchanged text messages. Wistocki also recorded and listened to telephone conversations between Smith and the female utilized to portray Kelsey.

¶ 11 Attached to the State's offer of proof are printouts of the e-mail and text message conversations between Smith, Greco, Dabezic, and Wistocki. However, the State's offer of proof failed to allege that the printouts were true and accurate depictions of the conversations.

¶ 12 The State's offer of proof also stated that Wistocki would testify consistently with the contents of his police report. The report indicated that Wistocki and members of other law enforcement agencies set up an observation at a Dunkin' Donuts in Plainfield. Wistocki observed a vehicle approach the parking lot, and an individual exited the vehicle. The individual walked over to Detective Anthony Cimilluca (who was portraying Kelsey's uncle Greco). The individual introduced himself as Joshua Smith, and Cimilluca introduced himself as Greco. Inside the Dunkin' Donuts, Smith gave Cimilluca \$500 and asked to meet Kelsey. Cimilluca told Smith that she was waiting outside in a van. The pair exited Dunkin' Donuts and Smith was arrested. Upon his arrest, Smith was identified as the defendant.

¶ 13 According to the State's offer of proof, Wistocki recorded and listened to the conversation between Cimilluca and Smith at Dunkin' Donuts. When the defendant was arrested,

Wistocki recognized his voice as the person who had previously represented himself as Smith during recorded telephone conversations. The State's offer of proof included a copy of the recorded conversation at Dunkin' Donuts, but the recorded telephone conversations between Smith and Kelsey were not included and do not appear in the record on appeal. The State's offer of proof also failed to indicate that the audio recordings of the telephone conversations between Smith and Kelsey were true and accurate.

¶ 14 The State's offer of proof also stated that Cimilluca would testify to the content of his police report. When Cimilluca met the defendant, the defendant introduced himself as Smith. The defendant provided Cimilluca with an envelope containing \$500. Smith also told Cimilluca that he had an additional \$500 for Kelsey in his vehicle. Cimilluca asked the defendant what he wanted to do with Kelsey. The defendant told Cimilluca that he would not do anything that Kelsey did not want to do. Cimilluca told the defendant that he did not want him to have sexual intercourse with Kelsey. The defendant understood and repeated that he did not want to do anything that Kelsey did not want to do. The pair exited the Dunkin' Donuts and the defendant was arrested.

¶ 15 Ultimately, the circuit court granted the defendant's motions *in limine*. The court reasoned that "there is no connection between the cell phone number and the e-mail address. So I certainly understand the State can prove that by circumstantial evidence, but it was a close call for me on this one." The State filed a certificate of impairment pursuant to Illinois Supreme Court Rule 604(a)(1) (eff. July 1, 2017).

¶ 16

II. ANALYSIS

¶ 17 On appeal, the State contends the circuit court abused its discretion when it granted the defendant's motions *in limine*. A determination of the admissibility of evidence is in the sound

discretion of the circuit court and will not be reversed on appeal absent an abuse of discretion. *People v. Watkins*, 2015 IL App (3d) 120882, ¶ 35. Under this standard, “[t]he reviewing court owes some deference to the trial court’s ability to evaluate the impact of the evidence on the jury.” *People v. Donoho*, 204 Ill. 2d 159, 186 (2003). The threshold for finding an abuse of discretion, therefore, is a high one and will not be overcome unless it can be said that the circuit court’s ruling was arbitrary, fanciful, or unreasonable, or that no reasonable person would have taken the view adopted by the court. See *In re Leona W.*, 228 Ill. 2d 439, 460 (2008).

¶ 18 Here, the State argues that it presented sufficient circumstantial evidence to establish a foundation for the admission of the e-mail, text message, and audio-recorded telephone conversations. In other words, the State contends that it presented sufficient circumstantial evidence to link the defendant to the e-mails, text messages, and the telephone audio recordings.

¶ 19 The party seeking admission of an audiotape must establish an adequate foundation. *People v. Williams*, 109 Ill. 2d 327, 338 (1985). The party establishes sufficient foundation when “a witness to the conversation recorded on the tape *** testifies that the tape, as it exists in court, accurately portrays the conversation in question.” *Id.* The Illinois Rules of Evidence state that evidence is authenticated where a witness with knowledge testifies that “a matter is what it is claimed to be.” Ill. R. Evid. 901(b)(1) (eff. Jan. 1, 2011). Similarly, a proper foundation is laid for the admission of documentary evidence (e-mails and text messages) when the document has been identified and authenticated. *People v. Chromik*, 408 Ill. App. 3d 1028, 1046 (2011). To “authenticate a document, evidence must be presented to demonstrate that the document is what its proponent claims.” *Gardner v. Navistar International Transportation Corp.*, 213 Ill. App. 3d 242, 247-48, (1991).

¶ 20 In the instant case, we acknowledge that the parties focused their arguments on the circumstantial evidence linking the defendant to the e-mails, text messages, and the telephone audio recordings. However, we note that the State's offer of proof failed to demonstrate the essential prerequisite of establishing a foundation for the evidence in question. Specifically, the State failed to make any showing that the e-mails, text messages, and telephone audio recordings had not been altered and were accurate. Stated differently, the State failed to indicate that any of its witnesses would testify that these proofs truly and accurately portrayed the conversations they claimed to have had with Smith. Given this fundamental flaw, we cannot say that the circuit court abused its discretion when it granted the defendant's motions *in limine*. See *cf. People v. Ziamba*, 2018 IL App (2d) 170048, ¶¶ 51-53. We therefore need not speculate whether the State presented sufficient circumstantial evidence linking the defendant to the conversations the State failed to declare were true and accurate. See *People v. Ringland*, 2015 IL App (3d) 130523, ¶ 33 (a court of review can affirm on any basis supported by the record).

¶ 21 In reaching this conclusion, we reject the State's argument that its failure to demonstrate that the audio recordings of the telephone conversations between Smith and Kelsey were true and accurate would easily be cured on remand. The State contends that the court's ruling on the motions *in limine* is procedural and can be changed or reversed at any time prior to a final judgment. According to the State, it could cure this shortcoming because Wistocki would testify at trial that the recordings were true and accurate portrayals of the conversations between Smith and Kelsey. In support, the State cites *People v. Caballero*, 102 Ill. 2d 23 (1984).

¶ 22 In *Caballero*, the issue on appeal related to the breadth of evidence which a court of review may consider in determining if the circuit court erred in denying a motion to suppress. *Id.* at 34-36. Specifically, whether a court of review could consider evidence that was later presented

at trial when analyzing the circuit court’s ruling on a motion to suppress. While the *Caballero* court determined that a court of review could consider the evidence at trial, the instant case is distinguishable. Here, the State appeals the circuit court’s decision on the defendant’s motions *in limine*. There has not been a trial for this court to consider. Our review, therefore, is limited to what has been presented in the circuit court. The record shows that the State failed to satisfy the fundamental requirement of showing that the audio recording was true and accurate. In short, the State’s argument would require this court to speculate as to the possible testimony of Wistocki. This we will not do.

¶ 23 Finally, the State contends that the circuit court’s order was overbroad regarding the admissibility of the audio recordings of the telephone conversations between Smith and Kelsey.¹ The State notes that the defendant’s motion *in limine* requested the circuit court “to sustain his objection to the admission of—and *testimony* regarding—overhear recordings of phone calls between ‘Joshua Smith’ and ‘Kelsey,’ a fictitious persona of Det Dabezic.” (Emphasis added.) The State contends that Wistocki should still be able to testify as to the content of these recordings. The State, however, has forfeited the issue by failing to raise it in the circuit court. See Ill. S. Ct. R. 615(a). The doctrine of forfeiture applies to the State as well as to the defendant. *People v. McKown*, 236 Ill. 2d 278, 308 (2010). The State does not argue that this purported error constitutes plain error. Consequently, we will not address this unpreserved error.

¶ 24 III. CONCLUSION

¶ 25 The judgment of the circuit court of Will County is affirmed.

¶ 26 Affirmed.

¶ 27 JUSTICE SCHMIDT, concurring in part and dissenting in part:

¹As noted above (*supra* ¶ 13), the audio recordings of the telephone conversations between Smith and Kelsey are not part of the appellate record.

¶ 28 I concur with the majority order with respect to the trial court's order *in limine* barring the admission of text messages, e-mails and phone recordings but I do so solely on the State's failure to put on evidence that the audiotapes accurately portray the conversations in question, and that the e-mails and text messages offered are true and accurate copies of the e-mails and text messages actually exchanged. Otherwise, the record shows more than adequate circumstantial evidence to tie defendant to the e-mails, text messages, and phone recordings. All that was lacking is testimony that the e-mails, text messages and phone recordings were true and accurate representations of the conversations that took place through those three media. The fact that the police found no evidence of the text messages on defendant's computer is irrelevant. See *People v. Downin*, 357 Ill. App. 3d 193 (2005). I know of no case that requires the IP address of a computer alleged to have sent an e-mail, or evidence from that computer showing that the e-mail was sent, as a foundational requirement for authenticating an e-mail conversation between two parties.

¶ 29 With regard to the State's argument that the trial court's order which grants the defendant's motion *in limine* requesting this court "to sustain his objection to the admission of—and testimony regarding—overhear recordings of phone calls between 'Joshua Smith' and 'Kelsey,' a fictitious persona of Det Dabezic" (*supra* ¶ 23), there is no basis in the record to prevent either Detective Dabezic or Officer Wistocki (who was present during all three cell phone audio recordings) from testifying regarding the conversations. The majority argues that the State has forfeited that argument. *Id.* However, the State raised this argument in its initial brief. Defendant never argued that the State had forfeited that argument. A forfeiture argument can also be forfeited and in this case was. See *People v. McKown*, 236 Ill. 2d 278, 308 (2010); see also *People v. Williams*, 193 Ill. 2d 306, 347-48 (2000). Here, the majority raises a forfeiture

argument not raised by defendant. There is no basis in the law on the facts of this case to bar a witness from testifying to those facts of which he/she has personal knowledge.

¶ 30 Furthermore, a reading of the briefs makes it clear that both below and here on appeal, the defendant's arguments concentrated on admission of documentary evidence of the e-mails and text messages, as well as the audiotape of the phone calls. I saw no discussion or argument regarding testimony.

¶ 31 I also feel that this appeal may be an exercise in futility. A trial court's ruling on a motion *in limine* is procedural rather than substantive. *People v. Caballero*, 102 Ill. 2d 23, 36 (1984). The ruling is not a final judgment and "may be changed or reversed at any time prior to final judgment." *Id.* 35-36. Common sense tells me that come trial, the State will have witnesses to testify that the documents are what they say they are, and that the recording is a true and accurate copy of the conversations between "Joshua Smith" and "Kelsey."

¶ 32 In conclusion, I believe that to the extent the court relied on any basis other than the lack of the very basic foundation that the documents and recordings are what they are purported to be, the trial court erred. Applying the wrong law is an abuse of discretion. *101 E. Crossroads, LLC v. Weber*, 2015 IL App (3d) 140034, ¶ 22. However, we review the trial court's judgment, not its reasoning. When one looks at the evidence in this case, no reasonable person could conclude that the defendant did not send e-mails, text messages, and have the phone conversations regarding having sex with a 12-year-old girl. However, I must agree with the majority that for whatever reason, undoubtedly oversight or inexperience, the State failed to have someone testify that the audio recordings are a true and accurate representations of the phone conversations, and that the e-mail and text message exhibits are true and accurate copies of the e-mails and text messages exchanged.