2019 IL App (4th) 160742-U

NO. 4-16-0742

FILED
April 9, 2019
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.	)	Champaign County
KINZIE L. SCHWAB,	)	No. 16CF337
Defendant-Appellant.	)	
	)	Honorable
	)	Hugh Finson,
	)	Judge Presiding.

PRESIDING JUSTICE HOLDER WHITE delivered the judgment of the court. Justices Knecht and Cavanagh concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding (1) the trial court did not err by admitting motel registration records under the business-records exception to the hearsay rule and (2) trial counsel was not ineffective for failing to preserve this claim in the posttrial motion.

¶ 2 In March 2016, the State charged defendant, Kinzie L. Schwab, with criminal sexual assault (720 ILCS 5/11-1.20(a)(3) (West 2014)) (count I) and child pornography (720 ILCS 5/11-20.1(a)(1)(i) (West 2014)) (count II). The jury found defendant guilty on both counts. Subsequently, the trial court sentenced defendant to a term of 10 years' imprisonment on count I and a consecutive term of 15 years' imprisonment on count II.

¶ 3 Defendant appeals, arguing (1) the trial court erred by admitting motel registration records under the business-records exception to the hearsay rule because the State failed to lay a proper foundation for computer-stored evidence and (2) trial counsel was ineffective for failing

to preserve this claim in a posttrial motion. For the following reasons, we affirm the trial court's judgment.

¶ 4 I. BACKGROUND

¶ 5 In March 2016, the State charged defendant with criminal sexual assault (720 ILCS 5/11-1.20(a)(3) (West 2014)) and child pornography (720 ILCS 5/11-20.1(a)(1)(i) (West 2014)). The criminal sexual assault charge alleged defendant committed an act of sexual penetration with D.H. (born December 14, 1999), who was under the age of 18, by placing his penis in her vagina and defendant was a family member. The child pornography charge alleged defendant filmed D.H., whom defendant knew to be under the age of 18, while she was actually engaged in acts of sexual penetration with defendant.

¶ 6 A. Jury Trial

¶ 7 In August 2016, the matter proceeded to a jury trial, where defendant was tried *in absentia*. We recount only the evidence necessary for the resolution of this appeal.

¶ 8 1. *D.H.*

¶ 9 D.H. testified she lived with her grandmother until she was eight years old, when she moved to Texas to live with her mother (Dawnyel Schwab), her stepfather (defendant), and her two half-sisters. Dawnyel encouraged D.H. and defendant to participate in father-daughter activities and D.H. eventually called defendant "dad." The family moved to Illinois when D.H. was in seventh grade.

¶ 10 D.H. received a computer for her eleventh birthday and began playing games and exploring social media. According to D.H., she posted photographs on a website called "photo bomb" and started to get comments related to defendant. D.H. formed a friendship with someone named Alex, and the two exchanged e-mails. D.H. testified, "as I started talking to the

group, or the people, it starts with Alex but it was more eventually, but they started saying things like, [‘]we know who [defendant] is. We’ve known him for a long time. We just wanted to use you to be able to get to him.[’] That kind of stuff. And they were, like, threatening me and my mother and my sisters, to do things and stuff like that.” According to D.H., she tried to tell her mother once, but she did not believe D.H.

¶ 11 The people on the Internet began telling D.H. to do sexual things with defendant, like kissing or flirting. They threatened to hurt D.H.’s family if she ever brought up their communications. D.H. began to suspect defendant was sending the messages because the sender knew immediately when D.H. was going outside or jumping on the trampoline instead of doing what they asked her to do. In sixth grade, D.H. received messages telling her to “go downstairs and hang out.” When D.H. went downstairs, defendant “came on to” her in the kitchen. D.H. testified he came up behind her, said, “you know, mom’s not home,” and touched her.

¶ 12 D.H. continued to receive messages from 2011 through 2015, and defendant continued to attempt to get physical with D.H. during that time. D.H. testified the messages were “hopeful” and stated “if you just do this, if you just do this, then we’ll stop bothering you, we won’t hurt your mom, we’ll leave your sisters alone.” D.H. was overwhelmed, wanted the messages to stop, and decided to go ahead with the requests.

¶ 13 In 2015, defendant broached the idea of engaging in sexual intercourse and suggested he and D.H. do “something more than what’s already being done.” Between April and June 2015, defendant and D.H. twice went to hotels in Champaign. D.H. identified photographs of the hotel rooms and specifically remembered the view out of one window because it was “the only thing [she] had to look at while it was happening.” D.H. testified defendant put his penis in her vagina on two occasions. On another occasion, defendant gave D.H. alcohol and she was

unsure if they had sexual intercourse. D.H. tried to tell her mother what happened but it did not help.

¶ 14 According to D.H., defendant was controlling and would not let her leave the house. D.H.'s mother passed away in February 2016, and D.H. began seeing a counselor. D.H. began "letting out hints" about what defendant did to her and eventually told her counselor and an investigator with the Urbana Police Department what happened. D.H. identified People's exhibit No. 1 as a computer disk containing a video of her and defendant having sexual intercourse in a hotel room. D.H. also identified People's exhibit Nos. 8(a) through 8(d), which were photographs depicting defendant's work area in their house and her mother's telephone. Once D.H. had sexual intercourse with defendant, she stopped receiving messages and defendant did not continue to pursue her.

¶ 15 2. *Mehul Patel*

¶ 16 Mehul Patel testified he worked at the front desk of a Super 8 Motel in Champaign. According to Mehul, the motel was part of the national hotel chain and, in the course of regular activities, the business kept records of people who checked in, checked out, and how they paid. Mehul testified it was a corporate policy that "whoever comes and goes there, stay in computer." Mehul agreed the records were entered close in time to the transactions and were accurate. Mehul testified that when a police officer asks if a person has stayed at the hotel, Mehul has to cooperate with the officer and give the officer access to the records. The State showed Mehul People's exhibit No. 4, and Mehul stated, "I—I—this paper print out, I—I did the print out when officers came, but I don't know who is the person or when, because there is three people are working so." Mehul identified the printout as an accurate copy of the business records maintained by his business. According to Mehul, he did not put information into the

record. Mehul testified, "Actually what happens when we have a system like (unintelligible) comes with the different—a different company, like Price Line, Experion, anything, that the—this end the reservation." When someone checks in, the person working the front desk checks the confirmation number against the computer records.

¶ 17 The State moved to admit People's exhibit No. 4, and defense counsel objected "as to foundation, for the accuracy of what's actually been in-putted into the system." The State argued that "what goes in simply goes to weight." The State pointed out the admission of the item once a business-records foundation had been laid was a different issue. The court agreed with the State and admitted People's exhibit No. 4 into evidence.

¶ 18 3. *Kantilal Patel*

¶ 19 Kantilal Patel testified he was a desk clerk and assistant manager at Motel 6 in Urbana. Kantilal testified the business kept records of people who check in and out of the hotel, as well as how they paid and where they stayed. According to Kantilal, the records are made close in time to the event occurring. When someone checks in or pays, a notation is made in the computer system. The desk clerk also scans the person's identification card. Kantilal testified the records were accurate and he was one of the people who could handle and process those records. Kantilal identified People's exhibit Nos. 5 and 6 as business records from his business related to defendant. Kantilal testified the exhibits were true and accurate copies of the business records kept in the regular course of his business. Kantilal testified he remembered checking in defendant and making the business records at that time.

¶ 20 The State moved to admit People's exhibit Nos. 5 and 6 into evidence. Defense counsel again objected and stated, "I think him saying it's a true and accurate record of what happened, what someone else entered is essentially commenting on what the reliability of what

someone else did. I—I think he can testify it's a record consistent with the regular course of business, but as to it's [*sic*] accuracy, I would object." The State maintained its position that the exhibits were admissible as business records and the contents of the records were subject to argument as to its weight. The court admitted People's exhibit Nos. 5 and 6.

¶ 21 4. *Tim McNaught*

¶ 22 Tim McNaught, an officer with the Urbana Police Department, testified he had special expertise in computer forensics and more than 400 hours of digital forensics training. McNaught was qualified as an expert in cellular telephone forensic examination. McNaught testified that on March 3, 2016, he assisted Investigator Matthew Bain with the execution of a search warrant at defendant's house. According to McNaught, he recovered an iPhone 4 from defendant's work area. During McNaught's investigation of the phone, he found a 35-minute video that he burned onto a disk and made available for Bain to view.

¶ 23 5. *Matthew Bain*

¶ 24 Matthew Bain, a juvenile investigator with the Urbana Police Department, testified that he received a report that D.H. had been sexually assaulted. Following his interview with D.H., Bain visited the LaQuinta Inn but the hotel did not have records past six months. Bain next visited a nearby Super 8 Motel and asked them to do a name search for defendant's name. Bain obtained People's exhibit No. 4, which indicated a person with defendant's name stayed there from May 24 to May 25.

¶ 25 Bain executed a search warrant at defendant's house where he asked defendant if he had a cellular telephone on his person. Defendant handed Bain his phone without asking any questions. It was not the same phone McNaught found the video on. Bain interviewed defendant and asked about D.H.'s allegations. Defendant denied D.H.'s allegations. When

confronted with the Super 8 Motel record, defendant claimed he was at the motel with Lindsay Hall. When asked why D.H. would make the allegations, defendant had no response. Bain informed defendant he had a video of defendant and D.H. having sexual intercourse and defendant failed to respond.

¶ 26 Bain identified People exhibit No. 1 as a copy of the video McNaught recovered from a cellular telephone found in defendant's house. According to Bain, it was a video of defendant and D.H. having sexual intercourse at Motel 6 in Urbana. Bain testified he viewed the video and searched on the Internet to see if he could find photographs of local hotel rooms that matched the room in the video. Bain identified the motel as the Motel 6 in Urbana. According to Bain, he went to the Motel 6 and asked if a person by defendant's name had checked in there. Bain identified People's exhibit Nos. 5 and 6 as a guest report from Motel 6 from June 17 and a clerk activity log from the same date. Bain testified that Kantilal Patel provided those business records.

¶ 27 The Motel 6 records showed defendant spent the night in room 229. Bain observed room 229 and took photographs of the room from several angles. Bain moved the microwave to confirm his theory that the phone was leaned against it to record the video of defendant and D.H. having sexual intercourse. The video was played, without audio, for the jury.

¶ 28 B. Verdict and Sentence

¶ 29 During deliberations, the jury requested "a screen shot of the girl in the video to verify identification of [D.H.]." The trial court responded by informing the jurors it was not possible to provide a screenshot and asked the jury to continue deliberations. The jury sent a second question that read, "Can we review the video through the part where the female and the

individual sits on the bed." The court determined it would not be appropriate to replay the video, denied the jury's request, and asked the jury to continue deliberations. The jury found defendant guilty of criminal sexual assault and child pornography. The trial court sentenced defendant to a term of 10 years' imprisonment on count I and a consecutive term of 15 years' imprisonment on count II.

¶ 30 This appeal followed.

¶ 31 II. ANALYSIS

¶ 32 On appeal, defendant argues (1) the trial court erred by admitting motel registration records under the business-records exception to the hearsay rule because the State failed to lay a proper foundation for computer-stored evidence and (2) trial counsel was ineffective for failing to preserve this claim in a posttrial motion. Defendant acknowledges that he failed to preserve this claim in his posttrial motion and asks this court to review his claim regarding the motel registration records under the plain-error doctrine.

¶ 33 Our review of the record shows defendant failed to preserve in a posttrial motion his argument that the court erred by admitting the motel registration records. Accordingly, we find defendant has forfeited review of this claim. *People v. Enoch,* 122 Ill. 2d 176, 186, 522 N.E.2d 1124, 1130 (1988). We next turn to the plain-error doctrine.

¶ 34 A. Plain Error

¶ 35 "[T]he plain-error doctrine allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of

the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 410-11 (2007). The first step in plain-error analysis is to determine whether error occurred. *Id.*

¶ 36 Defendant contends the trial court erred by admitting the motel registration records under the business-records exception to the hearsay rule. Defendant contends this is a legal question and our review is *de novo*. The State contends this court should not disturb the trial court's decision to admit evidence under the business-records exception absent an abuse of discretion. We note, a reviewing court most often uses an abuse of discretion standard to review the decision to admit hearsay evidence under an exception to the rule against hearsay. *People v. Caffey*, 205 Ill. 2d 52, 89, 792 N.E.2d 1163, 1188 (2001) ("Reviewing courts generally use an abuse-of-discretion standard to review evidentiary rulings rather than review them *de novo*."). While a reviewing court will apply a *de novo* standard in the event the trial court's exercise of discretion is thwarted by a mistaken rule of law, such is not the case in this matter. *Id.* *Williams*, cited by defendant, required the supreme court to determine whether the use of a guilty plea to attempted murder, as evidence in a subsequent murder prosecution as a result of the victim's eventual death, constituted, as a matter of law, a direct consequence of the guilty plea. *People v. Williams*, 188 Ill. 2d 365, 369, 721 N.E.2d 539, 542 (1999). Here, there is no dispute about the general admissibility of business records, only a question as to whether the state provided the necessary foundation to admit the business records. Thus, we employ an abuse-of-discretion standard.

¶ 37 Hearsay is an out of court statement offered to prove the truth of the matter asserted. *Caffey*, 205 Ill. 2d at 88. Hearsay is generally inadmissible because of its lack of reliability unless it falls within an exception to the hearsay rule. *Id.* One exception to the rule against hearsay is the business-records exception, which allows for the admission of a writing or

record once the following foundation has been laid: "(1) the writing or record was made as a memorandum or record of the event; (2) it was made in the regular course of business; and (3) it was the regular course of the business to make such record at the time of such transaction or within a reasonable time thereafter." *People v. Virgin*, 302 Ill. App. 3d 438, 451, 707 N.E.2d 97, 105-06 (1998); see also Ill. R. Evid. 803(6) (eff. Jan. 1, 2011). "Anyone familiar with the business and its procedures may testify as to business records, and the original entrant need not be a witness." *People v. Morrow*, 256 Ill. App. 3d 392, 397, 628 N.E.2d 550, 554 (1993).

¶ 38 Additional foundation is required when a business record is contained on a computer. *People v. Nixon*, 2015 IL App (1st) 130132, ¶ 111, 36 N.E.3d 349. Illinois courts distinguish between computer-stored records and computer-generated records. *People v. Houston*, 288 Ill. App. 3d 90, 98, 679 N.E.2d 1244, 1249 (1997). "Tangible printouts of 'computer-stored' data are admissible under the business records exception to the hearsay rule if (1) the electronic computing equipment is recognized as standard, (2) the input is entered in the regular course of business reasonably close in time to the happening of the event recorded, and (3) the foundation testimony establishes that the sources of information, method[,] and time of preparation indicate its trustworthiness and justify its admission." *Id.* Computer-generated records are admissible under a lesser standard and require a showing that the recording device was accurate and operating properly when the data was generated. *Id.*

¶ 39 As an initial matter, we conclude the testimony established a sufficient foundation for People's exhibit Nos. 4, 5, and 6 to be admissible under the business-records exception to the rule against hearsay. As to exhibit No. 4, Mehul's testimony was sufficient to show the Super 8 Motel record was made to record defendant checking in to the motel, it was made in the regular course of business, and it was the regular course of the business to make such a record at the time

someone checked in. *Virgin*, 302 Ill. App. 3d at 451. Mehul testified it was corporate policy for the business to keep records of people who check in, check out, and how they pay. Mehul agreed the records were entered close in time to the transactions and were accurate. As to exhibit Nos. 5 and 6, Kantilal testified Motel 6 kept records of people who checked in and out of the hotel, as well as how they paid and where they stayed. According to Kantilal, the records are made close in time to when someone checks in or pays and a notation is made in the computer system. The desk clerk also scans the person's identification card. Kantilal testified the records were accurate. This testimony was also sufficient to establish the foundation for these documents as business records.

¶ 40 Although the testimony was sufficient to lay a foundation under the business-records exception, defendant argues the foundation was not sufficient to allow for the admission of this evidence because it did not meet the additional requirements for computer-stored records. Specifically, defendant asserts the records are computer-stored and the testimony was inadequate to establish that the computer equipment was recognized as standard because there was no testimony that the computers were standard and the desk clerks failed to mention the brands of the computers. The State asserts the record in exhibit No. 4 was computer-generated, not computer-stored. With respect to exhibit No. 4, Mehul testified, "Actually what happens when we have a system like (unintelligible) comes with the different—a different company, like Price Line, Experion, anything, that the—this end the reservation." He went on to state that the desk clerk merely checked a guest's confirmation number against the confirmation number in the record at the time the guest checks in. The State contends the information in the record was generated by the computer when a reservation is made at the hotel.

¶ 41 As to People's exhibit No. 4, we conclude the record was a computer-generated record, not a computer-stored record. Mehul's testimony established that the motel's record was automatically generated at the time someone made a reservation. We acknowledge defendant's contention that someone must input information into a third-party website, such as Priceline. But that fact alone does not turn the information into a computer-stored record. The computer generated a record of a reservation at the time the reservation was made, much like a computer generates a record of a telephone call at the time the call is made. See *People v. Holowko*, 109 Ill. 2d 187, 191, 486 N.E.2d 877, 879 (1985) (computer-generated data is generated instantaneously as the call is placed, without the assistance, observations, or reports from or by a human declarant). Mehul testified the computer was accurate and in working order. Accordingly, we cannot say the trial court abused its discretion in admitting People's exhibit No. 4, and we affirm the court's judgment.

¶ 42 The State concedes People's exhibit Nos. 5 and 6 were computer-stored records. Kantilal testified the process for making a record of information when a person checks in to Motel 6 was to scan the person's identification card and arrange the person's payment method. His testimony referenced the fact that the creation of these records was the same across other Motel 6 franchises and indicated the system was standard among Motel 6 franchises. Although the State did not specifically elicit testimony that the computer system was standard in the industry, Kantilal's testimony showed the system was widely used in Motel 6 franchises. "Further, the ultimate issue is whether the foundation sufficiently guarantees trustworthiness to justify introduction." *People v. Lombardi*, 305 Ill. App. 3d 33, 43, 711 N.E.2d 426, 434 (1999) (the State did not specifically elicit testimony that the computer system was standard but testimony that it was widely used was sufficient to show computing equipment was recognized

as standard). Based on Kantilal's testimony, we conclude the trial court did not abuse its discretion in admitting People's exhibit Nos. 5 and 6. Accordingly, we find no error occurred and affirm the court's judgment.

¶ 43 B. Ineffective Assistance of Counsel

¶ 44 A claim of ineffective assistance of counsel is governed by the familiar framework set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). "To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defendant." *People v. Domagala*, 2013 IL 113688, ¶ 36, 987 N.E.2d 767. The deficient-performance prong requires a defendant to show that counsel's performance was objectively unreasonable under prevailing professional norms. *People v. Veach*, 2017 IL 120649, ¶ 30, 89 N.E.3d 366. The prejudice prong requires a showing that, but for counsel's deficient performance, the outcome of the proceeding would have been different. *Id.* A defendant must satisfy both prongs to prevail on a claim of ineffective assistance of counsel. *Id.*

¶ 45 Defendant contends his counsel was ineffective for failing to preserve his claim regarding the motel registration records in a posttrial motion. Defendant asserts counsel had no strategic purpose for failing to preserve this issue. Defendant further asserts there is a reasonable probability that he would not have been convicted without the registration records. In support, defendant points to the two questions by the jury in which they asked for a screenshot from the video and to watch a portion of the video for a second time. We disagree.

¶ 46 Even if we assume counsel's performance was objectively unreasonable under prevailing professional norms, we conclude there is no reasonable probability defendant would have been acquitted without the registration records. Defendant's argument ignores the fact that

Kantilal testified he personally checked defendant into the Motel 6 and inputted the information contained within exhibit Nos. 5 and 6. Even without the registration records, the jury heard corroborating evidence that defendant stayed at the Motel 6 shown in the video. Moreover, Bain testified defendant admitted to staying at the Super 8 Motel but denied staying there with D.H. We further note the jury's questions focused on identifying D.H. in the video made at the Motel 6, not defendant. Given the foregoing, we conclude the motel registration records were not the basis for the jury's finding of guilt and there is no reasonable probability the outcome of the trial would have been different without the records being admitted into evidence. As such, defendant has failed to show he was prejudiced by counsel's allegedly ineffective performance. Therefore, we affirm the judgment of the circuit court.

¶ 47 III. CONCLUSION

¶ 48 For the reasons stated, 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).

¶ 49 Affirmed.