IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

PAUL ELIAS,

Appellant,

v. Case No. 5D19-2370

STATE OF FLORIDA,

Appellee.

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Opinion filed December 31, 2020

Appeal from the Circuit Court
for Volusia County,
Dawn D. Nichols, Judge.

Michael Ufferman, of Michael Ufferman Law Firm, P.A., Tallahassee, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Carmen F. Corrente, Assistant Attorney General, Daytona Beach, for Appellee.

EDWARDS, J.

Appellant, Paul Elias, was convicted, following jury trial, of thirty counts of possession of sexual performance by a child in the form of thirty photographic or video image files[1] in violation of section 827.071, Florida Statutes (2017). We hold that

[1] Each count identified a specific image file by that image file's name.

Appellant is entitled to a judgment of acquittal as to seven counts regarding seven image files found only on certain compact discs. We find that the State failed to prove that Appellant viewed those seven images or otherwise knew that those images of child sexual performance were contained on the CDs.[2] We further hold that Appellant is entitled to a new trial on the remaining twenty-three counts because the State ignored binding authority forbidding police officers from offering prejudicial hearsay testimony conveying the substance of a tip identifying a defendant as the perpetrator of the subject crime. Appellant raised five issues seeking entry of a judgment of acquittal or a new trial, and we discuss each below.

Background Facts

Volusia County Sheriff's deputies received a tip that led them to believe that somebody located at Appellant's address was using a Flickr account[3] to upload images of very young children engaged in sexual performances. The deputies obtained and executed a search warrant at Appellant's home where they located a laptop computer owned by Appellant along with an old desktop computer and CDs that Appellant claimed to have inherited from his father. Deputies located a number of CDs that contained approximately thirty images[4] of pre-pubescent children engaged in sexual performances. Approximately twenty of those thirty images had been copied from the CDs and saved onto Appellant's laptop. There were different, but similar images located only on the

[2] Possession of those image files was charged in Counts 20, 21, 23, 25, 26, 27, and 30 of the information.

[3] Flickr is an online platform used to store and share photographic images.

[4] Testimony revealed there were duplicates of some images.

desktop deputies found in a closet in Appellant's bedroom. The seven remaining illegal images that Appellant was charged with possessing were found only on CDs and not on either computer.

Appellant was interviewed by deputies at his home in connection with execution of the search warrant. He confirmed that the laptop was his and that, for a period of time, he had used the email address and the screen name contained in the tip received by the Sherriff's office. However, Appellant denied, during his interview and thereafter, that he had known there were any such images of child sexual performance on any computer or CDs located at his house.

Initially, he denied having a Flickr account. While being questioned by the deputies, he recalled having a Flickr account that he used in the past to upload photographs of his son's football games. Appellant claimed that when his father passed away in 2012, his stepmother came to Appellant's house and dropped off his father's desktop computer and a box with various personal items, including CDs. According to Appellant and his wife, at some point in August 2017, in an effort to see if the CDs contained family pictures, Appellant inserted them into his laptop computer. He testified that all he ever saw were spinning icons indicating that a program was trying to run or open the images. He maintained that none of the images were ever visible on his laptop regardless of whether he tried to directly open an image or tried first to save the image so he could later open it. Appellant also tried to view some of the CDs on his late father's desktop computer, but he did not have any results there either. Appellant finally gave up trying to see the images and put the CDs and desktop away. Appellant's wife's testimony

was consistent with what her husband described. All thirty image files were admitted into evidence and published to the jury without objection.

Detective Keith Earney, who was present during the execution of the search warrant and who served as the State's forensic computer expert, was one of several sheriff's deputies called to testify on behalf of the State. Detective Earney testified that the images on the laptop were hidden from easy detection by having been saved and nested within a series of folders, up to fifteen or sixteen folders deep. Detective Earney testified that some of the images had been uploaded from the laptop to Flickr. He went on to explain that you must choose discrete image files if you want to upload images to a Flickr account. In other words, neither the computer nor the Flickr application could automatically upload images to Flickr without direct guidance and input from a person. Detective Earney's testimony about Flickr undercut a major theme of Appellant's defense in which he suggested that a program on his laptop had automatically downloaded images from the CDs and then uploaded them onto Flickr.

As noted earlier, the jury found Appellant guilty as charged on all thirty counts. The trial court adjudicated Appellant guilty on all thirty counts and sentenced him to a term of years for each count, with certain sentences being served concurrently and others being served consecutively. As a practical matter, Appellant was sentenced to serve thirty-five years in prison with credit for jail-time, and he had to register as a sex offender.

Motion for Judgment of Acquittal

Appellant raised several arguments below as to why the trial court should enter judgments of acquittal; however, his motion for a judgment of acquittal was denied. Appellate courts review the denial of a motion for judgment of acquittal de novo. *Pagan*

v. State, 830 So. 2d 792, 803 (Fla. 2002). "If, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt, sufficient evidence exists to sustain a conviction." *Id.* (citing *Banks v. State*, 732 So. 2d 1065 (Fla. 1999)).

A conviction for the crime of possession of child pornography requires the State to prove beyond a reasonable doubt that the defendant "knowingly possess . . . a photograph, motion picture, . . . representation, . . . or other presentation which, in whole or in part, he or she knows to include any sexual conduct by a child." § 827.071(5), Fla. Stat. (2017). The State offered sufficient evidence from which the jury could find that Appellant had seen the images described in twenty-three of the thirty counts by viewing them on either his laptop or the desktop, and thus could find that Appellant knew those images were of sexual conduct by a child. However, the images described and charged in Counts 20, 21, 23, 25, 26, 27, and 30 of the information were only located on CDs and were not found on either computer. The State failed to present any evidence proving that Appellant ever viewed those specific images or otherwise knew those seven images were of sexual conduct by children. Accordingly, as to those seven counts, there was insufficient evidence of Appellant's knowledge of what those images depicted. His conviction as to only those seven counts is quashed, and we remand for the trial court to enter a judgment of acquittal as to those counts.

Inadmissible Hearsay: Substance of Tip That Initiated Investigation

Over Appellant's hearsay objection, the State elicited testimony from Detective Gonzales that the sheriff's office had received a cybertip from the National Center for Missing and Exploited Children stating that an individual identified as "Paul L" had

uploaded several images suspected of being child pornography onto the Flickr platform. Detective Gonzales added that this cybertip included a phone number and email address that were associated with the suspect Flickr account. The State offered evidence tying Appellant to the email address, phone number, and Flickr account.

The trial court erred in overruling Appellant's objection. Florida courts have repeatedly held that it is reversible error for a police officer to testify that a tip identified a defendant on trial as the perpetrator. For example, in *Saintilus v. State*, 869 So. 2d 1280, 1281 (Fla. 4th DCA 2004), the Fourth District reversed a defendant's conviction because one police officer testified, over objection, that he received a nickname identifying a suspect through a tip, and another officer's testimony tied that nickname to the defendant. The court in *Saintilus* noted that:

> In spite of substantial authority condemning this attempt to adduce prejudicial hearsay, the state often persists in offering this kind of hearsay to explain the "state of mind" of the officer who heard the hearsay, or to explain a logical sequence of events during the investigation leading up to an arrest. This type of testimony occurs with the persistence of venial sin. The state's insistence on attempting to adduce this particular brand of hearsay requires trial judges to be constantly on their guard against it.

Id. at 1282. Apparently the State's attorney in our case took a page out of the *Saintilus* prosecutor's playbook, because she convinced the trial court to overrule Appellant's objection because "[the cybertip was] going to show the effect it had on Detective Gonzales as to how he began his investigation."

"[W]here the implication from in-court testimony is that a non-testifying witness has made an out-of-court statement indicating a defendant's guilt offered to prove the defendant's guilt, the testimony is not admissible." *Saintilus*, 869 So. 2d at 1282 (quoting *Schaffer v. State*, 769 So. 2d 496, 498 (Fla. 4th DCA 2000)). If there is some real need

"to show a logical sequence of events leading up to an arrest, the better practice is to allow the officer to state that he acted upon a 'tip' or 'information received,' without going into the details of the accusatory information." *Schafer*, 769 So. 2d at 499 (quoting *State v. Baird*, 572 So. 2d 904, 908 (Fla. 1990)). Indeed, Appellant's suggestion here to follow that better practice of allowing the deputy to say they were acting on a tip without disclosing the substance of the tip was rejected.

The State has not met its obligation of proving beyond a reasonable doubt "that there is no reasonable possibility that the error contributed to the conviction." *State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986). Accordingly, the error was not harmless. We reverse Appellant's conviction on the remaining twenty-three counts and remand for a new trial.

State's Discovery Violations

Appellant asserts that he was prejudiced by two discovery violations committed by the State, both of which concern the State's forensic computer expert, Detective Earney. First, in his pretrial deposition, Detective Earney testified that he had never used Flickr and did not know what steps were required to store or share images on the internet. However, at trial, Detective Earney testified that, in preparing for the trial of this case, he created his own Flickr account and became familiar with how it functioned in terms of uploading images. Furthermore, in his deposition, Detective Earney also testified that he had not personally viewed any of the images contained on any of the CDs associated with the case; however, between his deposition and trial, he had reviewed all the CDs as he revealed in his trial testimony.

It is undisputed that prior to trial, the State failed to disclose these changes in Detective Earney's statements, despite the continuing duty to disclose such information, which is codified in Florida Rule of Criminal Procedure 3.220(j). It is well settled that the "failure to disclose a significant change in a witness's testimony is as much a discovery violation as a complete failure to disclose a witness." *Scipio v. State*, 928 So. 2d 1138, 1141 (Fla. 2006) (internal citation omitted).

In our case, Detective Earney was transformed from a know-nothing into a know-it-all with regard to Flickr, and the transformation was specifically undertaken to enhance his testimony at trial, without disclosure to the Appellant. Appellant had taken the position that perhaps when he inserted the CDs in his laptop, some program saved the images even though he could not see them, and that later, again without Appellant viewing them, the images were uploaded using the Flickr app. Thus, Earney's surprise testimony was potentially very harmful to the defense. Whether that all amounted to the "type of dirty pool" that the rules regarding discovery were designed to prevent will not be answered in the majority opinion, because the issue was not properly preserved for appellate review.

First, Appellant made no contemporaneous objection to Detective Earney sharing his recently gained Flickr knowledge with the jury during the State's direct examination. Appellant first lodged his objection and requested a *Richardson*[5] hearing after the noon lunch break, prior to cross-examining Earney. The failure to timely object to evidence based upon a discovery violation waives preservation of that issue. *Simon v. State*, 615 So. 2d 236, 237 (Fla. 3d DCA 1993). Raising an objection after challenged testimony has already been presented is not sufficient to preserve an issue for appeal. *See Bright v.*

[5] *Richardson v. State*, 246 So. 2d 771 (Fla. 1971).

State, 90 So. 3d 249, 259 (Fla. 2012) (holding contemporaneous objection rule requires defendant to make objection when comments are being made and that motion for a mistrial after comments are made is not sufficient to preserve issue for appeal).

Although the trial court ruled that there had been no *Richardson* violation regarding Earney's recently gained Flickr expertise, it nevertheless recognized the potential prejudice to Appellant and offered to delay Appellant's cross-examination of Detective Earney until he had sufficient time to meet with his own expert to discuss the surprise testimony. However, Appellant went ahead with his cross-examination of Detective Earney without speaking to the defense expert. Accordingly, he passed on what may have been a very good way to mitigate any prejudice. Whether Detective Earney's previously undisclosed surprise testimony, that he reviewed the CDs following his deposition, constituted a discovery violation that unfairly prejudiced Appellant is less clear. However, because we are reversing for a new trial on other grounds, we need not analyze the claimed discovery violations further.

Discussion of Uncharged Crimes

Detective Earney briefly testified that there were two image files on Appellant's laptop in addition to the images identified in the thirty-count information, and that the titles of those two image files contained "child exploitive terms." Appellant timely objected and requested a mistrial because the detective was discussing uncharged, collateral crimes, namely the possession of at least two more illegal images of children engaged in sex. "Evidence that a defendant committed a collateral crime is inherently prejudicial because it creates the risk that a conviction will be based on the defendant's bad character or propensity to commit crimes, rather than on proof he committed the charged offense."

Jones v. State, 944 So. 2d 533, 536 (Fla. 5th DCA 2006). The trial court found that the detective's reference was so brief and ambiguous that it did not warrant granting a mistrial. Furthermore, the trial court instructed the detective not to mention any uncharged images; the detective confirmed he understood and would obey. Appellant continued to request a mistrial, but when that was denied, he agreed with the trial court that any corrective jury instruction, telling them to ignore those uncharged image files would have done more harm than good. Because we have granted a new trial on other grounds, we need not extensively analyze this claimed error. We are confident that during the retrial, the State and its witnesses will abide by the trial court's order to not discuss any uncharged images.

Obligation to Accept Proposed Stipulation

The charges specifically alleged that certain images knowingly possessed by Appellant depicted sexual performance involving children less than five years of age. The State intended to and did prove this by calling a medical doctor as an expert witness. During Detective Earney's testimony, the thirty charged images of child sexual performance had been admitted in evidence and published to the jury. To prove the children's ages, the State intended to project each of those thirty images in court during the doctor's testimony so that he could give his expert opinion on the age of each child in each image. Appellant objected to this on the grounds that it would be unfairly prejudicial and needlessly cumulative to show the jury those images again.

Appellant offered to stipulate to the children's ages if the State would agree not to republish the images during the doctor's testimony. The trial court suggested alternatives for the State to consider in proving the children's ages, but the State persisted in its plans

to have the jury see each image as the doctor testified. The State correctly argued that it had an obligation to prove beyond a reasonable doubt that some of the children were younger than five. The State asserted, correctly, that it was not obligated to accept the Appellant's proposed stipulation in lieu of presenting the doctor's testimony coupled with a simultaneous review of the images. The State is entitled to reject a defendant's offer to stipulate to an element of the crime and is entitled to present evidence on that element despite the proffered stipulation. *Arrington v. State*, 233 So. 2d 634, 636 (Fla. 1970).[6] "[A]n offer to stipulate remains merely an offer unless accepted by the prosecution." *Id.*

Appellant also claims that the trial court should have prevented the re-publication of the offensive images either as needlessly cumulative or being more unfairly prejudicial than probative under the balancing test of section 90.403, Florida Statutes (2017). As to the cumulative nature of the evidence, it was not a situation of introducing additional images; the thirty images were the only ones in evidence. Furthermore, under the facts of this case, the trial court did not abuse its discretion by allowing the images, which are at the core of the case, to be twice shown to the jury. As for the 90.403 analysis, that typically is used to determine whether evidence should be admitted in the first place, rather than dealing with the parties' and jury's right to utilize those items that are already admitted in evidence. Thus, as to this issue we affirm.

[6] We recognize that in certain circumstances the State and trial court are compelled to accept the defendant's proffer to stipulate to a defendant's previous DUI convictions or prior felony convictions when the defendant's status is an element of the crime. *See State v. Harbaugh*, 754 So. 2d 691, 694 (Fla. 2000) (holding that State and trial court should accept defendant's offer to stipulate to three prior DUI convictions); *Brown v. State*, 719 So. 2d 882, 889 (Fla. 1998) (holding trial court must accept defendant's offer to stipulate to past felony in felon in possession case).

Conclusion

As noted, we affirm as to certain issues, but reverse the judgment and sentence, and remand this matter to the trial court with instructions to enter judgment of acquittal as to Counts 20, 21, 23, 25, 26, 27, and 30, and to conduct a new trial on the remaining twenty-three counts.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR NEW TRIAL.

WALLIS, J., concurs.
COHEN, J., concurs specially, with opinion.

COHEN, J., concurring specially.

I concur in the Court's opinion and write only to emphasize the duty of the prosecutor to have disclosed what was a material change in Detective Earney's testimony. I agree with the majority opinion that the issue was not properly preserved for appeal. However, it is quite clear that the assistant state attorney was well aware that the detective, who was the State's forensic computer expert, conducted additional investigation subsequent to, and as a result of, questions asked at deposition. Despite knowing that this had occurred, the assistant state attorney took no action to comply with her legal obligation outlined in Florida Rule of Criminal Procedure 3.220(b), which imposes a continuing duty to disclose any new information or change in testimony that the State learns about before trial.

It is apparent that Detective Earney's change in testimony significantly impacted the defense, who had retained their own forensic expert. When the defense attempted to address Detective Earney's new testimony concerning the workings of Flickr during the testimony of their forensic expert, the prosecutor exacerbated the harm by highlighting on cross-examination that the defense expert had not disclosed that testimony at his pre-trial deposition.

In my view, this issue would have warranted reversal in and of itself, had it been preserved.