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2019 IL App (3d) 150838-U

Order filed August 5, 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-Appellee,)	
v.)	Appeal No. 3-15-0838
SANTOS LOZA JR.,)	Circuit No. 10-CF-1794
Defendant-Appellant.)	Honorable Sarah-Marie F. Jones, Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Presiding Justice Schmidt concurred in the judgment.
Justice Carter concurred in part and dissented in part.

ORDER

¶ 1 *Held:* The defendant's conviction of first degree murder was reversed and remanded for a new trial because the trial court abused its discretion in admitting recordings of the defendant's interrogations when the defendant did not make any admissions and did not testify; and any probative value they contained was substantially outweighed by the danger of unfair prejudice.

¶ 2 The defendant, Santos Loza Jr., appeals from his conviction of first degree murder.

¶ 3 **FACTS**

¶ 4 The defendant was indicted on two counts of first degree murder, in violation of section 9-1(a)(1), (2) of the Criminal Code of 1961 (720 ILCS 5/9-1(a)(1), (2) (West 2008)), for the death of his girlfriend's eight-month-old son, K.B. The defendant's girlfriend, Sandra S., had asked the defendant to babysit during the evening and night of October 26, 2008, while Sandra worked.

¶ 5 Sandra testified that her father usually watched K.B. while she was at work, but she had asked the defendant to watch K.B. on October 26. That was the first time that the defendant had ever watched K.B., other than a brief time when Sandra returned some movies. Sandra was with K.B. after she returned home from work at night on October 25 and in the morning of October 26, and she did not notice any injuries on K.B.'s body. She described K.B. as a happy baby. Sandra took K.B. to the defendant's home in the afternoon of October 26, and she left to get to work by 5 p.m. K.B. was crying when she left, and the defendant was holding him. While she was at work, Sandra texted the defendant for updates on K.B., and the defendant responded that K.B. was fine. After work, Sandra stopped at her father's house and picked up her older son and then drove to the defendant's home, arriving at the defendant's house around 11 p.m. Sandra went upstairs to look in on K.B. She did not go into the room because she did not want to wake him up, but it sounded to her like K.B. was snoring. Sandra testified that she and the defendant went upstairs to go to bed, and the defendant took a blanket in to cover K.B. The next morning, Sandra testified that she went in to get K.B., and he was cold, stiff, and lifeless. She told the defendant to call 911.

¶ 6 The 911 call was played for the jury. On the call, Sandra can be heard weeping and yelling, and she made the statement "[y]ou killed my baby." During a police interview on October 30, 2008, Sandra told the officers that she made that statement because she thought that

K.B. had choked or suffocated to death on a blanket. At trial, Sandra testified that she made that statement because no one else besides the defendant was in the house.

¶ 7 K.B. was pronounced dead at the hospital at 5:10 a.m. on October 27, 2008. That same morning, the defendant was interrogated at the hospital, which was audio recorded. The defendant was again interrogated later that night, and that interrogation was both audio and video recorded. The defendant objected to the State's request to admit the recorded interrogations (recordings) into evidence and to play the recordings for the jury. The defendant asserted that the recordings were inadmissible under the common law and under Illinois Rule of Evidence 403 (eff. Jan. 1, 2011) because the probative value of the recordings was substantially outweighed by the risk of unfair prejudice and potential confusion of the issues. The defendant conceded that his statements were an exception to the hearsay rule, but contended that the statements made by the detectives were not admissible and misrepresented the evidence in the case. In the alternative, the defendant requested that the trial court give the jury a limiting instruction similar to the one that was given to the jury in the case of *People v. Bryant*, 391 Ill. App. 3d 228, 244 (2009) (the trial court *sua sponte* instructed the jury that the questions posed by the interviewers in the recorded police interrogations of defendants were not to be considered by the jury as evidence of what had occurred but as statements designed to elicit a response from the defendants as to what had occurred). The trial court allowed the recordings to be admitted into evidence and published to the jury over the defendant's objection and denied the defendant's request for a limiting instruction.

¶ 8 Approximately an hour of the second recording, the interview that was audio and video recorded, was played for the jury. The defendant was asked questions regarding his care of K.B., including repeated questions about whether he hurt K.B., all of which he denied. The detectives

also made a number of statements to the defendant that were not posed as questions. Examples of these statements are:

“A baby was murdered while in your care and control.”

“Somebody hurt this baby; they did it on purpose.”

“[Sandra] says that ***you did it and that she knows that you did it.”

“[Sandra said] he did it. You know, I kinda knew that. *** I knew what happened.

I don’t think it happened on purpose, but, you know, that’s what happened.”

“[A] baby died in your house tonight, with only two of you there. You have to know; how can you not know?”

“I’ve got somebody who maybe lost their temper in a split second and something happened to this baby.”

¶ 9 Linda Odom, who was a detective with the Joliet Police Department in 2008, testified that she conducted both interrogations and established the foundation for the admission of the recordings. Odom testified that the defendant told her that he took care of K.B. at his home from 4 p.m. until about 11 p.m. on October 26, 2008. The defendant told her that he never left the house, and he also said that no one came over to his house. The defendant said that K.B. was fine when he was dropped off by Sandra, the defendant never hit K.B., and K.B. did not fall. On cross-examination, the defense established that although Odom told the defendant that Sandra had told the police that the defendant committed the offense, Sandra had not actually made that statement to police. That was an interrogation technique used by the police. Odom testified that she told the defendant that Sandra had accused him in an attempt to provoke a response from the defendant. Odom acknowledged that, during the interrogation, she was trying to ask questions that would elicit some kind of response or admission from the defendant or that would elicit

some type of statement from the defendant about what had happened to K.B. Odom also acknowledged that she had made the statement to the defendant about possibly losing his temper and hurting K.B. because she thought that doing so might get the defendant to make some type of admission that he or Sandra had accidentally hurt K.B. Odom agreed that during an interrogation, a police officer might tell a person being interviewed a false fact in attempt to elicit a response from that person.

¶ 10 Dr. Valerie Arangelovich, a forensic pathologist, testified that the autopsy revealed that K.B. died of cranial cerebellar injuries caused by multiple blunt force trauma to his head. He also had numerous external bruises, rib fractures, a skull fracture, and cerebral edema. Dr. Arangelovich opined, to a reasonable degree of medical certainty, that the fatal injuries occurred four to eight hours before K.B.'s death.

¶ 11 Sandra's father, James S., testified that when Sandra and K.B. left his house around noon on October 26, 2008, K.B. was happy and giggling with his brother. James did not notice any injuries on K.B. and K.B. had not fallen or gotten hit with anything. James testified that he never observed Sandra hit, slap, or squeeze K.B.

¶ 12 The jury found the defendant guilty. The defendant filed a posttrial motion, challenging the admission of the recorded interrogations and the limitation of his cross-examination of Sandra. The trial court vacated the defendant's conviction, finding that it erred by limiting the defendant's cross-examination of Sandra. The trial court had limited the cross-examination of Sandra regarding her sexual relationship to the defendant up until February 2009 and had barred a card written by Sandra and an ultrasound photo after that date due to late disclosure by the defense to the State.

¶ 13 Prior to retrial, the defense filed a motion *in limine*, seeking to be allowed to use the Department of Children and Family Services (DCFS) records as evidence regarding the legal and physical custody of Sandra’s children. The trial court enjoined the defense from inquiring into the DCFS investigation. The defendant’s second trial was nearly identical to the first trial, except that Sandra’s father had passed away, so his prior testimony was read to the jury, and Sandra was cross-examined regarding her continuing relationship with the defendant.

¶ 14 On cross-examination at retrial, Sandra testified that she continued to see the defendant after K.B.’s death, and continued a sexual relationship with the defendant, on and off until January 2010. In January 2009, she agreed to assist in the investigation and wear a wire, but did not tell the detectives that she was still seeing the defendant. In July 2009, Sandra sent the defendant’s parents a card telling them that she was expecting the defendant’s baby. She miscarried that pregnancy. Later, she gave the defendant an ultrasound picture, where she wrote a due date of June 15, 2010, on the back. She believed the defendant could be the father of that child.

¶ 15 The State again admitted both interrogation recordings into evidence and played both of the recordings for the jury over the defendant’s objection. The defendant again requested a limiting instruction like the one that was given in the *Bryant* case, and the request was again denied. The defendant was found guilty. The defendant filed posttrial motions, challenging the use of the recordings and challenging the order enjoining him from cross-examining Sandra regarding the DCFS investigation. The trial court denied the motions and sentenced the defendant to 34 years in prison. The defendant appealed.

¶ 16 ANALYSIS

¶ 17 The defendant argues that the trial court should not have allowed the prosecution to publish the recordings because it allowed improper opinion testimony and provided a means for the prosecution to impeach the defendant's character even though he elected not to testify. The defendant contends that the admission of the recordings was more prejudicial than probative, thereby impairing the defendant's right to a fair trial. The State argues there was no abuse of discretion in admitting the recordings.

¶ 18 Relevancy is a threshold requirement for all evidence. *People v. Dabbs*, 239 Ill. 2d 277, 289 (2010). "Evidence is relevant if it tends to prove a fact in controversy or render a matter in issue more or less probable." *People v. Nelson*, 235 Ill. 2d 386, 432 (2009). Evidence that is relevant is admissible unless its probative value is substantially outweighed by the danger of unfair prejudice. Ill. Rs. Evid. 402, 403 (eff. Jan. 1, 2011). A determination of the admissibility of evidence rests within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. *People v. Pikes*, 2013 IL 115171, ¶ 12.

¶ 19 In general, a defendant's out-of-court statements are admissible against him at trial as long as his statements are voluntary. Ill. R. Evid. 801(d)(2) (eff. Oct. 15, 2015); *People v. Harper*, 2013 IL App (4th) 130146, ¶ 13. The defendant does not argue that his statements were not voluntary, but rather seeks to bar the statements made by the police officers during the interrogations, suggesting that the officers' statements were their opinions of the case that were improperly put before the jury. The State argues that the statements by the police were the result of proper interrogation techniques and did not amount to opinion testimony.

¶ 20 Based on the record, without addressing the defendant's argument that the statements by the police were improper opinion evidence, we find that the trial court abused its discretion when it allowed the recordings to be admitted into evidence and published to the jury during the

defendant's second trial. We find that any probative value was substantially outweighed by the danger of unfair prejudice. On the one hand, the recordings had little probative value to the State. The defendant did not make any type of incriminating statement in the recordings, other than to admit that he had watched K.B. for a period of time, and consistently denied throughout the recordings that he had harmed K.B. The defendant's demeanor during the interrogations, while arguably emotionless, did not have significant probative value to the State's case. The defendant remained calm throughout the interrogations and never lost his temper with the police officers.

¶ 21 On the other hand, the unfair prejudicial effect of the recordings to the defendant was substantial. The recordings exposed the jury to the officers repeatedly questioning the defendant, accusing the defendant of the crime, stating that Sandra had accused the defendant, and telling the defendant that the officers did not believe the defendant's claim of lack of knowledge. While the officers' conduct was appropriate for interrogation, it was not something to which the jury should be exposed, especially when there was a much less prejudicial option available to the State. The State could have merely had the police officers testify that they interviewed the defendant and that the defendant admitted that he had watched K.B. the previous day and stated that he did not know what had happened to K.B. In addition, the State could also have had the officers testify regarding their personal observations of the defendant's demeanor during the interrogations. By proceeding in that manner, the State still would have been able to present the evidence that it wanted to present but would have done so in a manner that was not unfairly prejudicial to the defendant. See Ill. R. Evid. 403 (eff. Jan. 1, 2011); *People v. Walker*, 211 Ill. 2d 317, 339 (2004) (indicating that the State has no entitlement to present evidence that is unfairly prejudicial to the defendant when equally probative nonprejudicial evidence is available that will serve the same purpose).

¶ 22 Since the evidence in this case was not overwhelming as to whether the defendant was the person who had committed the offense, we cannot say that the error that occurred from the admission and publication of the recordings was harmless. See *People v. Pulliam*, 176 Ill. 2d 261, 275 (1997) (stating the general rule that an error in the admission of evidence is harmless if the properly admitted evidence is so overwhelming that no fairminded juror could reasonably have voted to find the defendant not guilty). We find, therefore, that the probative value of the recordings was substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury, and that the admission and publication of the recordings substantially affected defendant's right to a fair trial. See Ill. Rs. Evid. 103(a) (eff. Oct. 15, 2015); 403 (eff. Jan. 1, 2011). Thus, we reverse the defendant's conviction of first degree murder and remand for a new trial.

¶ 23 Because we have found that the trial court committed an abuse of discretion by admitting the recordings into evidence and by allowing the State to publish those recordings to the jury, we need not address the defendant's other assertions on this issue regarding the need for a limiting instruction or whether the officers' statements and questions in the recordings improperly put defendant's character at issue in violation of the defendant's constitutional rights.

¶ 24 The defendant also argues that the trial court violated his constitutional right to confront the witnesses against him by enjoining him from using DCFS records during Sandra's testimony. The defendant sought to use the DCFS records to test Sandra's interest, bias, and motive in testifying against him. The issue arose during the defendant's first trial, wherein the defense sought to bring in the DCFS caseworker who authored a risk assessment dated December 11, 2008. The trial court barred the evidence on procedural grounds; specifically, there were no DCFS caseworkers listed as witnesses who could perfect any impeachment of Sandra. The same

argument in favor of the admissibility of the DCFS records was made prior to the defendant's second trial, and the defense had filed a supplemental witness list that included the DCFS caseworker. The trial court again barred the evidence. Our review on this issue is hampered by the fact that complete DCFS records were not contained in the record on appeal. While we acknowledge that an incomplete record would generally be resolved against the defendant, since we are reversing on the prior issue, a better course of action in this case is to allow the parties and the trial court to revisit this issue in the trial court where there is full access to the DCFS records and witnesses and opportunity for argument. See *People v. Hampton*, 225 Ill. 2d 238, 245 (2007) ("Advisory opinions are to be avoided."); see also *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391 (1984) ("appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error").

¶ 25 We note that, although the evidence presented at the defendant's second jury trial was not overwhelming as to whether the defendant was the person who had committed the offense, it was sufficient to prove the defendant guilty beyond a reasonable doubt such that double jeopardy does not bar a retrial of the defendant in this case. See *People v. Lopez*, 229 Ill. 2d 322, 366-68 (2008).

¶ 26 CONCLUSION

¶ 27 The judgment of the circuit court of Will County is reversed and remanded for a new trial.

¶ 28 Reversed and remanded.

¶ 29 JUSTICE CARTER, concurring in part and dissenting in part.

¶ 30 I concur with the majority's decision to reverse defendant's conviction of first degree murder and remand the case for a new trial based upon the erroneous admission of the recordings of defendant's police interrogations.

¶ 31 I respectfully dissent, however, from paragraph 24 of the majority's decision wherein the majority elects not to address the issue of whether the trial court violated defendant's constitutional right to confront the witnesses against him by denying defendant's request to use certain DCFS records in his cross-examination of Sandra at his second jury trial. I would address the issue because it is likely to arise again at defendant's retrial upon remand and would find that the trial court did not err in denying defendant's request to use the DCFS records in cross-examining Sandra. I believe we have enough information from the record that we do have to decide this issue.